ELECTRONICALLY FILED
2024 Sep 03 PM 3:03
CLERK OF THE SALINE COUNTY DISTRICT COURT
CASE NUMBER: SA-2024-CV-000152
PII COMPLIANT

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

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

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

Pursuant to K.S.A. Chapter 60

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

United Kansas Inc., Lori Blake, Rep. Jason Probst, Sally Cauble, Jack Curtis, Brent Lewis, Elizabeth Long, Scott Morgan, and Adeline Ollenberger (collectively, the "Plaintiffs") hereby file a Motion for Summary Judgment and Opposition to the Motions to Dismiss filed by Secretary of State Scott Schwab, Saline County Clerk Jamie Doss, and Reno County Clerk Donna Patton (collectively, the "Defendants"). Plaintiffs respectfully request that this Court GRANT Plaintiffs'

Motion for Summary Judgment and DENY Defendants' Motions to Dismiss because:

1. Each of the Plaintiffs has established standing to pursue their claims.
2. Defendants' application of K.S.A. 25-306e and 25-613 violates Sections 2, 3, and 11 of the Kansas Constitution's Bill of Rights.
3. In the absence of any disputed material facts, Plaintiffs are entitled to judgment as a matter of law.
4. Defendants' legal theories for dismissal are contrary to settled precedent, defy reality and common sense, and seek to replace the actual facts of this case with speculation and conjecture.
5. In assessing the motions to dismiss, the Court should disregard all of Defendants' assertions and adverse inferences that fall outside of or contradict the allegations in the Petitions.

Plaintiffs hereby provide the following memorandum and statement of undisputed material facts in support of their Motion for Summary Judgment and brief in opposition to Defendants' Motions to Dismiss.

TABLE OF CONTENTS

MEMORANDUM AND STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

The United Kansas Party ("United Kansas" or "UKP") nominated State Representative Jason Probst as its candidate in the 102nd District and Ms. Lori Blake in the 69th District of the Kansas House of Representatives. Each candidate welcomes the Party's support, and United Kansas voters are eager to cast ballots for them, to work together to elect them, and to advance the Party's goals of political compromise and moderation. Rep. Probst and Ms. Blake are each running as a Democratic Party nominee as well, and each won their unopposed primary. However, the State is now forcibly revoking their United Kansas nominations and excluding them from the ballot. This case presents a simple question: Does this state action comply with basic guarantees set forth in the Kansas Bill of Rights? Text, case law, history, and common sense all point to the same answer: no, such restrictions are unconstitutional.

When Kansas ratified its Constitution, candidates for public office routinely earned nominations from two parties, and electoral ballots reflected as much. This practice had been been a defining feature of the antislavery movement's rise from political obscurity to national dominance, and it persisted for decades after ratification. In the 1890s, the Kansas Supreme Court confirmed that "each political party has a perfect right to select its candidates as it pleases, and have their names printed under its party heading," as "there is nothing in the law, nor in reason, preventing two or more political parties . . . from selecting the same individuals." *Simpson v. Osborn*, 52 Kan. 328, 34 P. 747, 749 (1893).

Yet, in 1901, the legislature ignored this admonition and adopted the State's first laws to prevent candidates from earning two nominations. The clear purpose at the time was (and certainly the effect was) to limit political expression and participation by stopping the two opposition parties

at the time from "fusing" their support together behind the same candidates—a tactic they had used successfully in preceding elections. The "Anti-Fusion Laws" are now codified at K.S.A. 25-306e and 25-613.

The fact that these restrictions "ha[ve] remained in the statute books for a long period of time in no sense imparts legality," as "[a]ge does not invest a statute with constitutional validity." *State v. Hill*, 189 Kan. 403, 410, 369 P.2d 365 (1962). Rather, application of these restrictions today violates Plaintiffs' rights to free speech, association, and equal protection. The Secretary has rescinded Rep. Probst's and Ms. Blake's United Kansas nominations: he forbade them to keep both of their duly-earned nominations, with the threat that, if they declined to designate for themselves which nomination to keep, he would make the selection for them. This abrogation of the United Kansas nomination two months before Election Day prevents the Party, its supporters, and its candidates from engaging in critical political speech, and severs the most important associational link uniting them all.

County Clerks Patton and Doss will then exclude the United Kansas nominations from the general election ballots in the 69th and 102nd House Districts. This exclusion further silences political speech "at the most crucial stage in the electoral process." *Anderson v. Martin*, 375 U.S. 399, 402 (1964). Kansas courts recognize that the "ballot is the core political speech of the voter." *League of Women Voters of Kan. v. Schwab*, ___ Kan. ___, 549 P.3d 363, 385 (2024) ("*LWV II*"). Yet United Kansas voters are compelled to use their ballot to express support for *another* party in order to vote for their *own* nominees. Absence from the ballot frustrates the Party's associational purpose of building "political power in the community" during "the crucial juncture at which the appeal to common principles may be translated into concerted action." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). Because these burdens are onerous, do not advance

compelling state interests, and lack any degree of tailoring, the abrogation and exclusion of the United Kansas nominations flout rights embodied in Sections 2, 3, and 11 of the Kansas Bill of Rights, and are unconstitutional.

For their part, Defendants propose a host of novel jurisdictional theories that defy Kansas precedent—and that would, if accepted, all but eliminate judicial review over state regulation of the electoral process and insulate the statutes at issue from constitutional scrutiny. On the merits, Defendants rely principally on non-binding decisions of other courts in a case exclusively about Kansas law, neglecting to mention that the preponderance of relevant, well-reasoned persuasive authority rejects the Defendants' constricted view of permissible political participation. Defendants lay particular emphasis on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), a ruling this court is not bound to follow; which employed a widely discredited analytical framework; and which is based on a different set of legal claims, arising from a distinctive history, and originating from material facts markedly different to the case before the Court today. Defendants want this Court to abdicate its decision-making; Plaintiffs simply ask this Court to do what it must: analyze the facts and law before it, using the Kansas Constitution as its north star.

* * *

The material facts in this case are straightforward. Application of Kansas law to the facts entitles Plaintiffs to judgment as a matter of law on the state constitutional questions presented. Plaintiffs therefore move for summary judgment, and respectfully request the denial of Defendants' motions to dismiss and entry of judgment in Plaintiffs' favor.

HISTORICAL BACKGROUND

A. Candidates in Kansas Routinely Earned Two Nominations in the Past

The nomination of a single candidate by two parties representing two groups of voters was unremarkable for much of U.S. history. In the 1840s and 1850s, anti-slavery politicians often

sought a Democratic or Whig nomination in addition to the nomination from the Free Soil Party or another abolitionist minor party. This allowed anti-slavery voters to work together to elect allied officials and elevate their cause—without having to support major parties beholden to, or unwilling to challenge, slave-holder interests.[1] Similar tactics featured prominently in the presidential elections of 1860 and 1864.[2]

The same was true in the first gubernatorial election after Kansas achieved statehood in 1861.[3] In Kansas and elsewhere, candidates continued to receive nominations from two parties, and by the 1890s, this practice was widespread. Many laborers, farmers, and other working class voters had become disillusioned with both the Democratic and Republican Parties for neglecting economic, monetary, and labor reforms they cared about. The Populist Party gave voice to these concerns and emerged as a powerful force.[4]

In the South, Republicans and Populists nominated many of the same candidates in the hopes of together challenging Democratic dominance; this collaboration succeeded in North

---

[1] *See* Reinhard O. Johnson, *The Liberty Party, 1840-1848: Antislavery Third-Party Politics in the United States*, 126-28 (2009); Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of Civil War*, 868-72 (1999); Tyler Anbinder, *Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s*, 57-62, 206-45 (1992); Frederick J. Blue, *The Free Soilers: Third Party Politics 1848-54*, 136-37 (1973); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, 125-29, 155-66, 193-201, 237-50 (1970; reprint 1995); Richard H. Sewell, *John P. Hale and the Politics of Abolition*, 52-67, 76-85, 156-60 (1965). For a general overview of these dynamics, see Corey Brooks & Beau Tremitiere, *Fusing to Combat Slavery: Third-Party Politics in the Pre-Civil War North*, St. John's L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4831091.

[2] Jack Furniss, *Devolved Democracy: Federalism and the Party Politics of the Late Antebellum North*, 9 J. Civil War Era 560-62 (Dec. 2019); Louis Martin Sears, *New York and the Fusion Movement of 1860*, 16 J. Ill. St. Hist. Soc'y (Jul. 1923).

[3] *See* Clarence J. Hein & Charles A. Sullivant, *Kansas Votes: Gubernatorial Elections*, *1859-1956*, 4 (1958), https://babel.hathitrust.org/cgi/pt?id=mdp.39015081958004&seq=1.

[4] Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 Am. Hist. Rev. 287, 292 (1980).

Carolina in the mid-1890s, a rare interruption of Jim Crow rule in the former Confederacy during the century following Reconstruction.[5] The dynamic was inverted in Kansas, where Republicans had dominated since statehood.[6] By cross-nominating the same candidates, in the late 1800s Populists and Democrats twice won the governorship and won control of the legislature.[7] Their elected officials advanced issues from the Populist platform that had received scant attention from either major party in the preceding sessions: "railroad regulation, usury and interest regulation, labor legislation, tax reform, stockyard regulation," and "unemployment relief," among others.[8]

B. The Kansas Legislature Enacted Anti-Fusion Laws to Limit Political Participation and Stifle Competition

By the turn of the 20th century, however, Republicans had regained unified control of state government,[9] and one of their top priorities was to foreclose future opportunities for cross-partisan collaboration that might again threaten their political dominance. The governor's 1901 address to the legislature insisted that "[f]usion of principles is impossible" and "should not be tolerated."[10] Shortly thereafter, the legislature adopted the state's first anti-fusion laws, requiring that "[n]o person shall accept more than one nomination for the same office," Ch. 177, sec. 5 1901 Kan. Sess.

---

[5] Helen G. Edmonds, *The Negro and Fusion Politics in North Carolina, 1894-1901*, 3 (1979).
[6] Robert G. Fogg, *The Greenback Movement in Kansas 1874-1884*, 5 (July 1954), https://soar.wichita.edu/handle/10057/25008.
[7] Hein & Sullivant, *supra*, at 28-33; D. Scott Barton, *Party Switching and Kansas Populism*, 52 The Historian 453 (May 1990), https://www.jstor.org/stable/24448020; Peter H. Argersinger, *Road to a Republican Waterloo: The Farmers' Alliance and the Election of 1890 in Kansas*, 33 Kan. Hist. Q. 443 (Winter 1967), https://www.kancoll.org/khq/1967/67_4_argersinger.htm.
[8] Peter H. Argersinger, *Populists in Power: Public Policy and Legislative Behavior*, 18 J. Interdisc. Hist. 83 (Summer 1987), https:doi.org/10.2307/204729.
[9] John D. Hicks, *The Populist Revolt: A History of the Farmers' Alliance and the People's Party*, 394-95 (1931), https://digital.library.cornell.edu/catalog/chla2846621; Ryan A. Stephans, *Greenbackers & Populists: The Failures and Successes of Agrarian Reform Movements in Douglas County, Kansas, 1874-1904*, 68-69 (May 16, 2011) https://esirc.emporia.edu/bitstream/handle/123456789/675/Ryan%20Stephans.pdf?sequence=4.
[10] *Kansas Senate Journal*, 24-25 (1901); R. Alton Lee, *Anti-Fusion Election Laws in Populist Kansas*, 46 Heritage of the Great Plains 4, 18 (Winter 2014), https://esirc.emporia.edu/bitstream/handle/123456789/3386/R.%20Alton%20Lee.pdf.

Laws 316, and that "[t]he name of each candidate shall be printed on the ballot once and no more." Ch. 177, sec. 6 1901 Kan. Sess. Laws 318.

These restrictions mirrored the wave of anti-fusion laws adopted around the country at this time by Republican *and* Democratic majorities fearful of a unified opposition. In Kansas, as elsewhere, it is indisputable that these laws were adopted to restrict participation by and influence of minor parties and their voters, and to frustrate the cross-cutting political alliances that arose when parties were free to nominate their preferred candidates.[11] A state legislator in Michigan captured the motivating sentiment: "We don't propose to let the Democrats make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation."[12]

Just as the sponsors of the anti-fusion laws had hoped, minor parties in Kansas—barred from nominating competitive candidates—became electorally irrelevant, offering voters few opportunities to associate outside of the two major parties or to meaningfully express their preference for a new direction. Since the first anti-fusion laws were adopted, *no* independent or minor party candidate has won a statewide or federal election in Kansas.[13] Major party candidates have won 99.8% of all state legislative races since 1912.[14]

---

[11] Argersinger, *A Place on the Ballot, supra* at 306.
[12] *Id.* at 296 (quoting Detroit Free Press, Jan. 5, 1893, p. 1).
[13] Hein & Sullivant, *supra*; June Cabe & Charles Sullivant, *Kansas Votes: National Elections, 1859-1956* (1957), https://archive.org/details/kansasvotesnatio00cabe/page/n5/mode/2up; *Election Statistics, 1899-2010*, Kan. Gov't Info. Online Library, https://catalog.library.ks.gov/eg/opac/record/107623 (last visited Aug. 31, 2024); Kan. Sec'y of State, *Election Results*, https://sos.ks.gov/elections/election-results.html (last visited Aug. 31, 2024).
[14] *Election Statistics, 1899-2010*, *supra*; *Election Results*, *supra*. For an overview of minor party activity before and after adoption of the Anti-Fusion Laws in Kansas, see Joel Rogers, *Kansas and Fusion Voting: Democratic Participation and Responsive Representation in the Sunflower State*, New Am. (Aug. 21, 2024), https://www.newamerica.org/political-reform/reports/kansas-and-fusion-voting/.

Despite the broad adoption of anti-fusion restrictions at the turn of the 20th century, candidates can have two nominations on the ballot in certain elections in at least seven states today: California, Connecticut, Mississippi, New Hampshire, New York, Oregon, and Vermont.[15]

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Plaintiffs

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).

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.

---

[15] *See Fusion Voting*, Ballotpedia, https://perma.cc/J32M-9S66; Jordan Willow Evans, *New Hampshire Libertarian Candidates Win Democratic Primary Races*, Independent Political Report (Sept. 16, 2022), https://perma.cc/5ADG-LPVK; Richard Winger, *American Independent Party Formally Nominates Donald Trump and Michael Pence*, Ballot Access News (Aug. 13, 2016), https://perma.cc/M359-4DMK.

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.

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.

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).

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).

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).

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).

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).

B. UKP Seeks to Restore Compromise and Moderation in Kansas Politics by Nominating Competitive, Moderate Candidates

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).

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.

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.

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.

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.

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).

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.

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.

C. Ms. Blake and Rep. Probst Eagerly Accept UKP's Nomination and Seek to Run as the Nominees of Both the Democratic Party and UKP

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.

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.

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.

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.

D. Because of the Anti-Fusion Laws, UKP's Nominations Are Abrogated and Excluded from the November Ballot

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.

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.

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.

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).

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).

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.

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.

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.

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.

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]."

E. Each of the Plaintiffs is Injured as a Direct Result of Defendants' Application of the Anti-Fusion Laws

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.

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.

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.

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.

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.

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.

LEGAL STANDARDS

Kansas courts are courts of general jurisdiction. The presumption is that "Kansas courts may hear whatever claims a plaintiff pursues. And instead of requiring a plaintiff to demonstrate that a claim belongs in a Kansas court, a lawsuit filed in Kansas may proceed as long as the facts included in the petition and the reasonable inferences that can be drawn from those facts state *any* claim upon which relief can be granted." *Rogers v. Wells Fargo Bank, N.A.*, ___ Kan. App. 2d ___, 551 P.3d 142, 149 (2024) (emphasis original) (internal quotation marks and citation omitted). The petition "does not need to affirmatively demonstrate that [the plaintiff] may pursue their claims"; it need only include a "short and plain statement of the claim showing [the plaintiff] [is] entitled to relief," "giv[ing] the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Id.* at 146.

On a defendant's motion, a court may dismiss a petition "when [it] raises no legally cognizable claims," but in ruling on such a motion the court "must assume all the factual allegations in the petition—along with any reasonable inferences [therefrom]—are true." *Id.* at 146-47. "Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure of the petition to state a claim." *Nelson Energy Programs, Inc. v. Oil & Gas Tech. Fund, Inc.*, 36 Kan. App. 2d 462, 472, 143 P.3d 50, 557 (2006). Rather, a court "must resolve *every* factual dispute in the plaintiff's favor." *Rogers*, 551 P.3d at 147 (emphasis added); *accord Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001) (on a motion to dismiss, "every doubt" must be resolved in favor of the plaintiff).

"[T]he court must decide [a motion to dismiss] based only on the well-pled facts and allegations" as "drawn from the petition" and any documents attached to it. *Williams v. C-U-Out*

Bail Bonds, LLC, 310 Kan. 775, 784, 450 P.3d 338 (2019); *Rogers*, 551 P.3d at 151; *accord Cohen v. Battaglia*, 296 Kan. 542, 549, 293 P.3d 752 (2013). "While a court may take judicial notice of the outcome of another proceeding . . . , there is no authority for a trial court to take judicial notice of factual conclusions reached in another court in another case." *Jones v. Bordman*, 243 Kan. 444, 459, 759 P.2d 953 (1988). "Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff *does not* have a claim." *C-U-Out*, 310 Kan. at 784 (emphasis added). Accordingly, "Kansas appellate courts have repeatedly cautioned . . . that dismissal [for failure to state a claim] is the exception, not the rule." *Rogers*, 551 P.3d at 147.

Similarly, when a defendant moves to dismiss for lack of standing, the court must "accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom." *Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008). "If those facts and inferences demonstrate . . . standing to sue," the motion must be denied. *Id.* In evaluating standing on a motion to dismiss, the Court must "resolve any factual disputes in [Plaintiffs'] favor," and Plaintiffs "need[ ] only make a prima facie showing of [subject-matter] jurisdiction." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

Summary judgment is proper when "there is no genuine issue as to any material fact, and . . . the moving party is entitled to judgment as matter of law." *Bank IV Wichita v. Arn*, 250 Kan. 490, 497-98, 827 P.2d 758 (1992). "A disputed question of fact which is immaterial to the issue[s] does not preclude summary judgment," and "[s]ummary judgment is proper where the only question or questions presented are questions of law." *Id.* at 498.

ARGUMENT

I. Plaintiffs Have Standing

Each Plaintiff has a "sufficient personal stake in the outcome of th[is] controversy to invoke

jurisdiction and to justify the court exercising its remedial powers on the party's behalf." *Kan. Bldg. Indus. Workers Compens. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015). The two requirements for standing are clearly satisfied here: every Plaintiff has a "cognizable injury," and "there is a causal connection between the injury and the challenged conduct." *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014) (quoting *Cochran v. State*, 291 Kan. 898, 908-09, 249 P.3d 434 (2011)). Defendants' arguments to the contrary are without merit—and if their novel legal theories were accepted, application of the Anti-Fusion Laws would be immune from constitutional review not just in this case, but any future litigation as well.

A. Each Plaintiff Has a Cognizable Injury

The abrogation and exclusion of the UKP nominations from the ballot clearly injure each of the Plaintiffs. Not only is UKP fully excluded from the ballot in the 69th and 102nd House Districts, but the formal nominations of Rep. Probst and Ms. Blake—which the Secretary's website recognized as valid for months—are nullified. Curtis Decl. ¶ 20; Cauble Decl. ¶ 6. Rep. Probst and Ms. Blake eagerly welcome their UKP nominations—but both lose their status as UKP's official nominees, and the ballot omits their hard-earned nominations. Probst Decl. ¶¶ 6, 18; Blake Decl. ¶¶ 7, 19. Loss of the UKP nominations clearly harms the "election prospects" of each candidate. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 & n.4 (5th Cir. 2006); Probst Decl. ¶ 18; Blake Decl. ¶ 19. UKP faces a "threatened loss of [political] power" because its candidates are less likely to win and the Party's share of credit for victory would be obfuscated. *Benkiser*, 459 F.3d at 587 & n.4.

UKP voters are barred from voting for their preferred candidates on their party's ballot line. Thus, they are barred from formally associating with Rep. Probst and Ms. Blake, and from voting for and associating with their party and their nominees on their ballots. Instead, UKP voters

such as Ms. Long and Ms. Ollenberger are forced to support a party not of their choosing, the Democratic Party, in order to vote for the UKP nominees, just as campaigning or otherwise encouraging support for Rep. Probst or Ms. Blake necessarily requires them and other UKP supporters to urge fellow Kansans to vote on the Democratic line too. Curtis Decl. ¶ 22; Cauble Decl. ¶ 7; Lewis Decl. ¶ 9; Long Decl. ¶ 9; Morgan Decl. ¶ 10; Ollenberger Decl. ¶ 7.

This is in stark contrast to the injury-free political participation enjoyed by others in Kansas: state-recognized parties appear on the ballot in districts where they've nominated candidates for public office; their nominees appear on the ballot alongside their nominating party; and their voters can freely associate with, campaign for, and cast their ballot in support of their party and their nominees—without any compelled expression of support for an alternative party. Plaintiffs are unaware of a single instance when such injuries caused by anti-fusion restrictions were insufficient to confer standing. Indeed, courts routinely find standing in election disputes when the asserted injuries are much less "concrete" than those here.[16]

Defendants do not seriously dispute that these injuries are cognizable, but insist that this case should be dismissed because the injuries are "speculative." Mot. at 9-10.[17] Yet, the injuries

[16] *E.g., Green Party of Tenn. v. Hargett*, 767 F.3d 533, 542-45 (6th Cir. 2014) (minor parties have standing to challenge elections laws because they affect the parties' "ability to associate and campaign for political office," even in the absence of any foreseeable conflict); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009) (voters have standing to challenge voter ID law even if they were "able to overcome the challenged barrier"); *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 83-87 (D.C. Cir. 2005) (candidates have standing to challenge campaign finance rules that could potentially give opponents electoral advantage); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (minor party had standing because granting other parties ballot access "increased competition," even though the plaintiff "was not denied access to the ballot in any way"); *Schulz v. Williams*, 44 F.3d 48, 50, 52-53 (2d Cir. 1994) (voters and party officials have standing in dispute over election laws); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (party official has standing to challenge postal rate giving potential competitive advantage to another party's candidate).

[17] The Secretary filed nearly-identical motions to dismiss in each case before they were consolidated on August 23, 2024. Duplicative reference to both motions is therefore unnecessary.

are "actual"—they have, in fact, occurred. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013). Rep. Probst was the only candidate to file for the August 6 Democratic primary in the 102nd House District, which he won. The same is true for Ms. Blake in the 69th District.[18] On August 28, the Board of Canvassers certified their primary victories. The Secretary then issued his ultimatum: Rep. Probst and Ms. Blake must select just one nomination each, with the failure to do so meaning the Secretary would make the selection himself. Rep. Probst and Ms. Blake notified the Secretary that despite their enthusiasm for UKP and desire to remain its nominee, each would, with great reluctance, relinquish the UKP nomination in order to keep the ballot line of the more established party, the Democratic Party, with a larger current number of registered voters. Probst Decl. ¶¶ 13-17 & Exh. C; Blake Decl. ¶¶ 14-18 & Exh. C. Accordingly, the County Clerks will list Rep. Probst's and Ms. Blake's Democratic Party nominations on the general election ballot—and omit UKP—under K.S.A. 25-613.

There is nothing "speculative" or "imaginary" about these real-world injuries. Mot. at 10. Nor does it matter that Rep. Probst and Ms. Blake each won their Democratic primaries, and the Secretary enforced the Anti-Fusion Laws to rescind the UKP nominations, after Plaintiffs filed these actions in mid-July. *See* Mot. at 10 (urging the Court to assess standing "at the time the litigation is commenced"). It is black-letter law that standing may be satisfied by a "threatened injury," so long as it is "impending" and "probable." *Sierra Club*, 298 Kan. at 33; *see also League of Women Voters of Kan. v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022 (2023) ("*LWV I*").

At the time of filing the Petitions, Plaintiffs' injuries clearly met that standard. At that time,

---

All references herein to "Mot." shall refer to the Secretary's Motion to Dismiss in the original Saline County matter, Case No. SA-2024-CV-000184.

[18] Each won unanimously. *See* Kan. Sec'y of State, *2024 Primary Election Official Vote Totals*, https://sos.ks.gov/elections/24elec/2024-Primary-Official-Vote-Totals.pdf (last visited Aug. 30, 2024).

Rep. Probst and Ms. Blake were unopposed and were all but guaranteed to win their primaries a few weeks later. Prior to filing, the Secretary had promised in writing (in June) that he would promptly enforce the Anti-Fusion Laws upon the ministerial certification of those victories. Rep. Probst and Ms. Blake knew at the time of filing that the Secretary would rescind their UKP nominations because they had already decided that, once the Secretary coerced them into making a selection, each would keep their Democratic line. Probst Decl. ¶¶ 4-6, 12-16; Blake Decl. ¶¶ 5-7, 13-17. There were no open questions or contingencies: it was just a matter of time before the injuries materialized.

Courts routinely find standing in election disputes where the threatened injury is much less certain than presented here. *See, e.g.*, *Hughs v. Dikeman*, 631 S.W.3d 362, 372 (Tex. App. 2020) (candidates have standing even though none had yet secured their party's nomination "at the time their suit was filed"); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (political parties have standing in election dispute even though they "have not identified specific voters" that will be harmed or the time, location, and exact nature of such injuries); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500-01 (10th Cir. 1995) (candidate has standing even before he "declare[d] his candidacy for state office").

In response, Defendants offer nothing but (since debunked) speculation that both candidates "could withdraw [their Democratic Party] candidacy, otherwise be replaced on the ballot, or find [their] nomination challenged for unknown reasons that render [them] ineligible to appear on the ballot." Mot. at 10. Mere conjecture that, at the last moment and for unknown reasons, Rep. Probst and Ms. Blake would be precluded from receiving or suddenly abandon a nomination in no way rebuts Plaintiffs' clear showing that these injuries were imminent at the time of filing. *See LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011) (candidate established an

"imminent injury" based upon public statement to run in election "nineteen months" in the future, rejecting concerns "that since [he] had never before held office and at the time of the complaint had taken few steps to establish his candidacy . . . the risk he would change his mind was unacceptably high"). Threatened injuries could *never* be established if it were sufficient for a defendant to simply posit that, somehow, an act of God would intervene in the meantime. As noted, voluminous precedent forecloses any such rule. In any event, Defendants' entire timing argument is best understood as challenging the "ripeness" of Plaintiffs' claims—and it is settled law that a court must account for post-filing factual developments when assessing ripeness. *See Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 139-40 (1974).

Two other points warrant brief mention. Defendants now insist that Plaintiffs have brought their claims too early—yet the Secretary previously complained that the claims were "dilatory," chastising Plaintiffs for waiting until the "virtual eve of the election before dropping this lawsuit." *Defendant Scott Schwab's Response to Plaintiffs' Motion to Expedite Proceedings* at 2, No. SA-2024-CV-000152 (July 24, 2024). It is unclear how anyone could ever pursue injunctive relief preventing the unconstitutional application of the Anti-Fusion Laws in a given election if, on one hand, a claim cannot be filed prior to certification (in late August), while on the other hand, the practicalities in finalizing ballots by the mid-September federal law deadline apparently require that a claim be filed months in advance. *See id.* at 5-6; *see also LaRoque*, 650 F.3d at 788-89 (standing analysis in election context warrants consideration of whether an unduly narrow "imminence" requirement would put "courts and candidates" in an "untenable position").

Defendants also insist—without any authority—that Ms. Cauble, Mr. Curtis, Mr. Lewis, and Mr. Morgan lack standing because they do not reside in either the 69th or 102nd House District. However, "[a]ny interference with the freedom of a party is simultaneously an

interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). This principle is particularly true here, given the clear burdens on the expressive and associational rights of these UKP members, who will be forced to urge fellow Kansans to support another political party, not of their choosing, in order to promote the candidacy of the UKP nominee. Curtis Decl. ¶ 22; Cauble Decl. ¶ 7; Ollenberger Decl. ¶ 7; Long Decl. ¶ 9; Lewis Decl. ¶¶ 8-9; Morgan Decl. ¶¶ 9-10. Members such as Mr. Curtis and Ms. Cauble, the UKP Chair and Vice Chair, actively involved in the operation of a political party, are clearly injured by state restrictions that "chang[e] [their] decisions about campaign financing, messages to stress, and candidates to recruit." *Miller v. Brown*, 462 F.3d 312, 317-18 (4th Cir. 2006) (party officer has standing to challenge state restrictions on party nominations); Curtis Decl. ¶ 22; Cauble Decl. ¶ 7. If accepted, Defendants' novel theory would insulate from judicial scrutiny (and therefore authorize the State to impose) any conceivable limit on a voter's ability to advocate and campaign for his party and its nominees outside of his home district—including limits on a party's statewide officers. This cannot be.

B. Plaintiffs' Injuries Are Causally Connected to Defendants' Application of the Anti-Fusion Laws

Plaintiffs have also satisfied the second element of standing: "the injury" is "fairly traceable to the challenged action of the defendant[s]." *Kan. Bldg.*, 302 Kan. at 681 (quoting *Gannon*, 298 Kan. at 1130) (cleaned up). The "fairly traceable standard is lower than that of proximate cause" and "does not set a high bar for plaintiffs." *Id.* at 681-82. Plaintiffs have clearly carried their burden here: but for Defendants' application of the Anti-Fusion Laws, Rep. Probst and Ms. Blake would each retain their UKP nominations for the remainder of the electoral campaign and on the ballot, and none of the Plaintiffs would be injured.

Defendants seek to shift the blame onto Rep. Probst and Ms. Blake, insisting that Plaintiffs

lack standing because their injuries instead arise from the *candidates'* actions. Mot. at 11-12. This is factually and legally incorrect. After certification of their Democratic primary victories, the Secretary sent each, as promised, a formal communication initiating the enforcement of the Anti-Fusion Laws, notifying them that he would rescind and exclude from the ballot one of their nominations: if the candidate did not make their own selection as to which nomination to keep within a week, the Secretary would make the selection himself. Each candidate has filed their response selecting the Democratic nomination. Blake Decl. ¶ 18 & Exh. C; Probst Decl. ¶ 17 & Exh. C. Only that nomination will appear on the ballot—the UKP nomination will be excluded. Curtis Decl. ¶¶ 12-15 & Exh. B; *see* K.S.A. 25-306e, 25-613. Plaintiffs are therefore injured because the Secretary coerced the candidates to forfeit their UKP nominations. Probst Decl. ¶ 18; Blake Decl. ¶ 19.

The fact that Rep. Probst and Ms. Blake reluctantly complied with the Secretary's coercive demands does not break the causal link between Defendants and the injuries. Rather, when a defendant's conduct is "at least in part responsible for frustrating [a plaintiff's] attempt to fully assert his [constitutional] rights . . . the causation element . . . is satisfied." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013). Even when there is "an intervening cause of the plaintiff's injury," this requirement is met as long as the injury is "fairly traceable to the acts of the defendant." *Kan. Bldg.*, 302 Kan. at 682 (internal quotation marks omitted). Put another way, "the defendant's actions" need not be "the very last step in the chain of causation." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). Indeed, "an indirect causal relationship will suffice [to sustain standing], so long as there is a fairly traceable connection." *Toll Bros., Inc. v. Twp. of Readington*, 555 F. 3d 131, 142 (3d Cir. 2009) (citations omitted) (internal quotation marks omitted); *see also Focus on the Fam. v. Pinellas Suncoast Transit*, 344 F.3d 1263, 1273-74 (11th

Cir. 2003); *Miller*, 462 F.3d at 318.

Defendants' novel theory would perpetually insulate the Anti-Fusion Laws from judicial review unless candidates put themselves at the whim of the Secretary to potentially rescind their more favored nomination. Because settled precedent plainly forecloses Defendants' theory here, the causal requirement is satisfied, and each Plaintiff has established standing.

II. State Regulation of the Electoral Process Must Comply with the Kansas Bill of Rights

Defendants next contend that Article IV, Section 1 of the Kansas Constitution precludes Plaintiffs' claims, by exclusively assigning to the legislature all decisions regarding "voting methodology" for state elections. Mot. at 13 (citing Kan. Const., art. 4, § 1 ("All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.")). On that basis, Defendants maintain that the Judiciary lacks authority to assess whether their application of the Anti-Fusion Laws comports with the Kansas Bill of Rights. *Id.* at 13-15. They cite no case law supporting this striking proposition; and to the contrary, their position defies 140 years of settled precedent.

The Kansas Supreme Court held as long ago as the 1880s that the rights guaranteed by the Kansas Bill of Rights are judicially enforceable. The Court then announced, without exception, that the provisions of the Bill of Rights

> limit the power of the legislature, and *no act* of that body can be sustained which conflicts with them. Indeed, all of them may be considered, generally speaking, as conditions and limitations upon legislative action; and *no law* can be sustained which trenches upon the rights guarant[e]ed by them, or which conflicts with any limitation expressed in them.

Atchison St. Ry. Co. v. Mo. Pac. Ry. Co., 31 Kan. 660, 3 P. 284, 286 (1884) (emphasis added). The Kansas Supreme Court has reaffirmed this foundational principle time and again. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 633-35, 440 P.3d 461 (2019) (surveying prior case

law); *see also LWV II*, 549 P.3d at 387-88 (Rosen, J., concurring in part and dissenting in part) ("This court has long held that the declarations . . . in the Bill of Rights are judicially enforceable[.]"). Plaintiffs are aware of no decision holding that electoral laws enacted pursuant to Article IV or V of the Constitution may be adopted without regard to the Bill of Rights' protections, or that either provision withdraws from the courts their inherent power to enforce those protections against offensive state conduct.

Defendants nonetheless purport to find support for this position in *LWV II*, construing the case as holding that "Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections," without limitation by the Bill of Rights. Mot. at 13-14 (emphasis original). But *LWV II* demonstrates precisely the opposite.

At issue in *LWV II* was whether certain ballot signature-verification requirements violated the rights to vote, equal protection, and due process under the Kansas Constitution. 549 P.3d at 376-82. Although the Kansas Supreme Court concluded that the right to vote is not an unenumerated right protected by the Bill of Rights, *id.* at 376, 379, the Court held that voting is an enumerated right "provide[d] the strongest possible constitutional protection" by Article V of the Kansas Constitution, *id.* at 380. Laws regulating the manner in which the right to vote is exercised are unconstitutional, the Court explained, if they "unreasonably burden the right to suffrage" by imposing "new, extra-constitutional qualification[s] on the right to be an elector" beyond those set forth in the text of Article V. *Id.* at 380-81.

The Court assuredly did not hold, however, that compliance with Article V insulated the signature-verification requirement from further constitutional scrutiny. Rather, upon concluding that the law was consistent with "the legislature's duty and prerogative" under Article V "to provide [for] proper proofs" of a voter's qualifications, the Court stated plainly:

> Our analysis, however, cannot end here. Simply because a law does not violate article 5 does not mean that any regime of proper proofs is permissible . . . . [T]he Legislature still must comply with other constitutional guarantees such as those of equal protection and due process.

Id. at 382. Whereupon the Court found that the plaintiffs "ha[d] made a colorable claim . . . that the signature requirement is not sufficiently uniform or objective" to meet the equal-protection and due-process guarantees of Sections 2 and 18 of the Bill of Rights. *Id*. at 383-84.[19]

Here, Plaintiffs do not advance a claim under Article V—so the standard for an Article V claim articulated in *LWV II* is irrelevant. What is relevant is the Kansas Supreme Court's clear affirmation that election laws, even if enacted in conformance with Articles IV and V, are in no way exempt from the separate limitations imposed by the Bill of Rights. Judicial scrutiny under those legal standards remains necessary, as it would be for any other challenged state action.

The additional authorities relied on by Defendants do not say otherwise. They cite *LWV II* and *State v. Butts*, 31 Kan. 537, 2 P. 618, 622 (1884), for the proposition that "unless th[e] power" to select the mode of voting "is abused the courts may not interfere." Mot. at 13. But as just shown, *LWV II*, which relied extensively on *Butts* for its Article V analysis, 549 P.3d at 380-81, confirms that the power to enact electoral laws is indeed "abused" when exercised in derogation of the Bill of Rights. Defendants also quote—in part—the statement made in *Taylor v. Bleakley*, 55 Kan. 1, 13, 39 P. 1045, 1050 (1895) (and later cited in *Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986), and *Lemons v. Noller*, 144 Kan. 813, 829, 63 P.2d 177, 187 (1936)), that Article IV

[19] As Defendants observe, the Court also remarked that its analysis locating the right to vote in Article V was consistent with the interpretive principle that a "specific provision controls over a more general one," noting that in contrast to Article V, Section 2 of the Bill of Rights does not expressly address the subject of voting. *LWV II*, 549 P.3d at 378-79; Mot. at 14. That remark is also of no assistance to Defendants, because once the Court invoked this interpretive principle, it immediately clarified that the principle did not apply to the analysis of the plaintiffs' "equal protection claims—which do arise under [S]ection 2—[and would be] addressed at a later point" in the Court's opinion. *LWV II*, 549 P.3d at 379.

empowers the Legislature "to adopt [any] reasonable regulations and restrictions for the exercise of the elective franchise[.]" Mot. at 13-14. In so doing, though, Defendants omit the critical qualifier, found within the same quoted sentence, that the Legislature must exercise this authority "within the terms of the [C]onstitution." *Taylor*, 55 Kan. at 13, 39 P. at 1050; *see also Sawyer*, 240 Kan. at 412-13; *Lemons*, 144 Kan. at 829, 63 P.2d at 187. Those terms include the rights enshrined in the Bill of Rights.

Thus, to sustain application of the Anti-Fusion Laws it is not sufficient simply to inquire whether they comply with the terms of Article IV. They must also respect the limits imposed on all legislative enactments by the Kansas Bill of Rights. As Plaintiffs demonstrate below, in this instance they do not. This Court accordingly is empowered, and obligated, to declare their repugnance to the State Constitution and enjoin their enforcement.

III. The Abrogation and Exclusion of UKP's Nominations Are Unconstitutional

Defendants' enforcement of the Anti-Fusion Laws is incompatible with the rights to free speech, association, and equal protection guaranteed under Sections 2, 3, and 11 of the Kansas Constitution's Bill of Rights. Their motions to dismiss should therefore be denied because Plaintiffs have in fact stated a claim for relief. And in the absence of disputed material facts, Plaintiffs' motion for summary judgment should be granted because they are entitled to judgment as a matter of law.

Historical context is instructive in this case, but not in the way Defendants suggest. First, they are wrong that anti-fusion restrictions possess some sort of legitimacy because they were adopted more than a century ago. As the Kansas Supreme Court has made clear, the fact that laws "ha[ve] remained in the statute books for a long period of time in no sense imparts legality." *Hill*, 189 Kan. at 410. Second, the relevant history makes clear that for decades before and after

ratification of the Kansas Bill of Rights, candidates routinely earned two nominations, and the ballots reflected as much. *Supra* at 3-7. The ability of a party and its members to nominate, associate with, and express support for a candidate when he also earned another party's nomination was an intrinsic feature of the political process, no less so than the ability to write political missives in the local paper or host rallies for favored causes. *Id.* Any assessment of the meaning and scope of the Sections 2, 3, and 11 must account for this context.

In 1893, the Kansas Supreme Court captured the point clearly: "[E]ach political party has a perfect right to select its candidates as it pleases, and have their names printed under its party heading; . . . there is nothing in the law, nor in reason, preventing two or more political parties . . . from selecting the same individuals for one or more of the offices to be filled." *Simpson*, 34 P. at 749. Indeed, sister courts that closely reviewed anti-fusion restrictions have found them to be impermissible under their respective state constitutions. *E.g.*, *Murphy v. Curry*, 70 P. 461 (Cal. 1902); *In re City Clerk of Paterson*, 88 A. 694 (N.J. Sup. Ct. 1913); *In re Callahan*, 93 N.E. 262 (N.Y. 1910); *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911); *Devane v. Touhey*, 304 N.E.2d 229 (N.Y. 1973). The Third and Eighth Circuits likewise concluded that anti-fusion restrictions run afoul of the U.S. Constitution. *See Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305 (3d Cir. 1999); *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996); *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996).

Nevertheless, these decisions are not binding in this case arising exclusively under the Kansas Constitution. Defendants disregard this body of precedent and instead urge the Court to simply import the majority opinion from *Timmons*.

Yet, the dissents by Justices Souter, Stevens, and Ginsburg catalog the myriad logical and doctrinal errors committed by the majority. *See Timmons*, 520 U.S. at 370-82 (Stevens, Ginsburg, and Souter, JJ., dissenting); *id.* at 382-84 (Souter, J., dissenting).[20] And the U.S. Supreme Court has itself abandoned that mistaken course in the intervening decades. *E.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (government restrictions on party nominations violate associational freedom); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (government restrictions on political advocacy violate freedom of speech). Blind pursuit of this errant path is not just unwise—it would run headlong into *Simpson* and other Kansas precedent casting grave doubt on the constitutionality of Defendants' actions here under state law.

* * *

This case boils down to two simple truths: application of the Anti-Fusion Laws burden Plaintiffs as they try to participate in the political process, and the State's asserted justifications are fanciful, defy nearly two centuries of experience, and presuppose that the State can legitimately exclude disfavored forms of political activity. Strict scrutiny is required under Kansas precedent, but the constitutional burden is too severe, the plausible justifications too weak, and the restrictions too sweeping to survive any level of scrutiny. Under the undisputed material facts presented in this case, the abrogation and exclusion of the UKP nomination from the ballot are unconstitutional.

A. Abrogation and Exclusion of UKP's Nominations Violate the Freedom of Speech

The Kansas Constitution guarantees that "all persons may freely speak, write or publish

[20] Several cases cited by Defendants follow this pattern: persuasive dissents expose the majority's flawed reasoning. *E.g.*, *Swamp v. Kennedy*, 950 F.2d 383, 388-89 (7th Cir. 1991) (Ripple, Posner, and Easterbrook, JJ., dissenting from denial of rehearing en banc); *Working Families Party v. Commonwealth*, 209 A.3d 270, 286-88 (Pa. 2019) (Todd and Donahue, JJ., concurring in part and dissenting in part); *id.* at 288-307 (Wecht and Donahue, JJ., dissenting); *State ex. rel. Runge v. Anderson*, 76 N.W. 482, 487 (Wis. 1898) (Winslow, J., dissenting).

their sentiments on all subjects." Kan. Const. Bill of Rights, § 11. The Kansas Supreme Court has long recognized that "[f]reedom of speech" is "among the most fundamental personal rights and liberties of the people" guaranteed under the "state Constitution[]." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). Our entire republican system is premised upon "the open and free exchange of ideas and engagement in the political process." *LWV I*, 317 Kan. at 820.

Yet, the abrogation and exclusion of the UKP nominations unquestionably restrict core speech, both during the campaign and then again "at the most crucial stage in the electoral process"—on "the ballot." *Martin*, 375 U.S. at 402. Under settled precedent, once the Court determines that Defendants' actions infringe on Plaintiffs' freedom of speech, it must assess whether Defendants have shown that the burden on Plaintiffs' speech is justified by a sufficiently compelling interest. Whether the Court, in making that assessment, applies strict scrutiny, as precedent requires, or instead applies the balancing test erroneously proposed by Defendants, the same conclusion is warranted—the restrictions on Plaintiffs' speech are unconstitutional.

1. Defendants' Actions Clearly Infringe on Core Political Speech

"[F]ree speech . . . [is] the cornerstone of our free society and undoubtedly an essential, fundamental principle of American government[,] . . . indispensable to the discovery and spread of political truth." *LWV I*, 317 Kan. at 820 (internal quotation marks and citations omitted). And the "ballot is the core political speech of the voter," *LWV II*, 549 P.3d at 385. The plain text of Section 11, the history undergirding its provisions, pertinent case law, and the undisputed facts of this case make clear that Defendants' application of the Anti-Fusion Laws imposes a severe burden on Plaintiffs' speech rights.

a. The State Constitution Protects the Freedom of Speech

The full range of political speech and expressive conduct at issue here is protected under federal law. It is beyond dispute that "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 272 (1971)). And the U.S. Supreme Court has recognized that the government may not "require voters to espouse positions that they do not support" when they "express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). While the *Timmons* majority contested this principle, 520 U.S. at 363, the U.S. Supreme Court has since clarified that the "legal effect" of an "expressive activity" "in the electoral process" does not "deprive[ ] that activity of its expressive component, taking it outside the scope of the First Amendment." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010); *see also id.* at 231 (Thomas, J., dissenting) (agreeing with the majority on this point).

While not necessary to conclude that Defendants' actions violate Plaintiffs' Section 11 right of free speech, Kansas courts nonetheless have the "authority to interpret the Kansas Constitution independently" and "in a manner different from parallel provisions of the United States Constitution, which may result in our state Constitution providing greater or different protections." *State v. Albano*, 313 Kan. 638, 644-45 (2021). And the Kansas Supreme Court has in fact recognized that "the speech protections afforded by section 11 are, *at a minimum*, coextensive with the First Amendment." *LWV II*, 549 P.3d at 372 (emphasis added).

The text of Section 11—recognizing an affirmative right for "all persons [to] freely speak"—counsels against the limited construction sometimes applied to the First Amendment's negative protection that "Congress shall make no law . . . abridging the freedom of speech." *See Prager v. State Dept. of Revenue*, 271 Kan. 1, 37, 20 P.3d 39 (2001) (recognizing that the text of

Section 11 sweeps "more broadly" than the First Amendment); *see also State v. Linares*, 655 A.2d 737, 754 (Conn. 1995) (interpreting identical language in Connecticut Constitution as affording "greater expressive rights on the public than that afforded by the federal constitution"); *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 254 (N.J. 2014) (interpreting identical language in the New Jersey Constitution to "guarantee[ ] a broad affirmative right to free speech" that "affords greater protection than the First Amendment"). The historical context in which each provision was ratified illustrates why it would be especially inappropriate to impose the restrictive strain of federal case law, *see* Mot. at 31, in this area of Kansas jurisprudence. When the First Amendment was ratified in 1791, the concept of freedom of speech could not have accounted for the expressive value of a party nomination on the ballot—because neither parties nor nominations yet existed in the U.S., and many elections were conducted without ballots, either by voice vote or by raising hands. *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *Ray v. Blair*, 343 U.S. 214, 220 (1952).

Section 11 of the Kansas Bill of Rights is a different story. By the time it was ratified in 1861, political parties were, without question, the key pillars of our political system. *Supra* at 3-7. Elections were conducted almost exclusively through paper ballots, which at the time the parties themselves printed to prominently feature their nominees. *Id.* Candidates routinely earned nominations from two parties, and voters, especially those aligned with the anti-slavery parties, sent a clear message in casting their party's ballot. *Id.* At this time, it would have been unfathomable that the state could legitimately silence (i) a party's expression of support for its preferred candidate on the ballot, (ii) a candidate's embrace of his party's support on the ballot, or (iii) a voter's deliberate use of their ballot to advance a cause bigger than any individual candidate.

Rather, this expressive activity was inherent to the political process.[21] Parties, candidates, and voters continued to freely exercise this right for decades after ratification, including in the years following the State's 1893 adoption of the Australian ballot (that is, ballots printed and distributed by the State, and cast in secret by voters). *See Simpson*, 34 P. at 749.

Thus, a conclusion that Defendants' actions do not infringe on the array of Plaintiffs' expressive activity involved here, simply because it culminates in voters casting their ballots, would not only contravene binding precedent, but it would embrace a more constrained conception of free speech than prevailed at the time of and for decades following ratification. Excluding the UKP nominations from the ballot places a heavy burden on Plaintiffs' freedom of speech, as does its abrogation in the final months of the electoral campaign.[22]

b. Application of the Anti-Fusion Laws Clearly Infringes on Plaintiffs' Right to Engage in Political Speech

Application of K.S.A. 25-306e imposes a severe burden on Plaintiffs by stripping Ms. Blake and Rep. Probst of their status as the official nominees of United Kansas in the final weeks of the campaign—a status they held for the preceding three months. As a result UKP, its members, Ms. Blake, and Rep. Probst are barred during the campaign "from stating whether [either candidate] adheres 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 to appeal to the voting public that is afforded all other state-recognized parties, their candidates,

[21] More than half of the delegates at the Wyandotte Convention that adopted the Kansas Constitution originally hailed from Northern states where cross-nominations by anti-slavery minor parties had played a prominent role in recent elections. *See* William F. Zornow, *Kansas: A History of the Jayhawk State* 82 (1957).

[22] Defendants' discussion of whether speech can be regulated in a "polling place" is irrelevant. *See* Mot. at 31-32. As explained above, at issue here is the extent to which expressive conduct is constrained throughout the final months of the electoral campaign and in relation to the ballot.

and their supporters. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); *see generally* Blake Decl. ¶ 19; Probst Decl. ¶ 18; Curtis Decl. ¶¶ 21-22; Cauble Decl. ¶¶ 6-7; Ollenberger Decl. ¶ 7; Long Decl. ¶ 9; Morgan Decl. ¶ 10; Lewis Decl. ¶ 10.

Not only does this limitation "directly hamper[ ] the ability of a party," its candidates, and its members "to spread [the party's] message," it also "hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. Neither UKP, its members, Ms. Blake, nor Rep. Probst can truthfully identify the two candidates as UKP's formal nominees for the rest of "the election campaign," which "is a means of disseminating ideas as well as attaining office." *Id.* (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

Excluding UKP's nominations from the ballot also prevents its voters, individually and collectively, from signaling support for their preferred party. When a voter marks her ballot for a candidate, she expresses not just support for that candidate—but for his nominating party as well. In the aggregate, a party's vote share in an election is therefore the collective public expression of support from its adherents. This expressive principle has long been enshrined in the election code: K.S.A. 25-302b requires that a party lose ballot access unless it can demonstrate ongoing support in the electorate, as measured by one of the party's nominees receiving a sufficient share of votes cast whenever a statewide race is on the ballot. Excluding the UKP nomination from the ballot prevents its voters, individually and collectively, from engaging in this basic speech, as they cannot register support for their own party when marking the ballot for the party's chosen nominee. Instead, UKP voters are compelled to express support for a *different party* in order to vote for their own party's nominee. *See* Ollenberger Decl. ¶ 7; Long Decl. ¶ 9.

Likewise, "[c]andidates and political parties desire to communicate to voters by means of

the words used to identify and describe them on the ballot." Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 735 (2016). More than any other expressive aspect of "the election process," the "composition of the ballot" is "an absolutely critical point" because it is "the last thing the voter sees before he makes his choice." *Cook v. Gralike*, 531 U.S. 510, 531-32 (2001) (Rehnquist, C.J., and O'Connor, J., concurring). Excluding a nomination "directly hamper[s] the ability of a party to spread its message." *Eu*, 489 U.S. at 223-24. Indeed, "a party can give effect to [its members'] views only by selecting and supporting candidates . . . [who] are necessary to make the party's message known and effective." *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part). Removing UKP's nomination from the ballot therefore silences the Party's, its members', and its candidates' political speech.

Three judges on the U.S. Court of Appeals for the Seventh Circuit appointed by President Reagan aptly summarized the speech implications of anti-fusion restrictions:

> When a minor party nominates a candidate also nominated by a major party . . . it may — and often does — offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party. If a majority of the members of both major parties believe the same person is the best candidate, that alliance is of major significance in our political life. Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

Swamp, 950 F.2d at 388-89 (Ripple, Easterbrook, and Posner, JJ., dissenting from denial of rehearing en banc). Denying UKP and its voters this "opportunity . . . to be heard," *id*. at 389, severely burdens the freedom of speech guaranteed to them by Section 11.

c. Defendants' Arguments that Plaintiffs' Speech Is Unburdened

Are Unpersuasive

Defendants offer three arguments in support of their position that the abrogation and exclusion of UKP's nominations impose no burden of consequence on Plaintiffs' freedom of expression. None of these contentions has merit.

First, Defendants maintain that Plaintiffs' speech is unburdened because they can engage in "other form[s] of advocacy." Mot. at 30. This is nonsense. The ability to engage in other forms of expression does not somehow negate the constitutional injury inflicted by silencing the speech at issue. 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."[23] *Id.* This is, of course, not the law. *See McCutcheon*, 572 U.S. 185; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Second, Defendants ask this Court to ignore the Kansas Supreme Court's clear statement of law that the "ballot is the core political speech of the voter." *LWV II*, 549 P.3d at 385; *cf. VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1244 (D. Kan. 2023), *appeal docketed*, No. 23-3100 (10th Cir. argued Jan. 18, 2024) (recognizing that filling in voters' information on ballot applications is "inherently expressive conduct that the First Amendment embraces"); *see* Mot. at 33-34. Yet, "[t]his court is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position." *State v. Belone*, 51 Kan. App. 2d 179, 211, 343 P.3d 128 (2015). In the absence of any evidence that the Kansas Supreme Court has in any way called into question this principle, it is a binding rule of law in this Court—

[23] Defendants' theory seeks to eliminate the key feature that, under Kansas law today and two centuries of historical practice, distinguishes a political party from all other types of political organizations: the ability to *nominate* candidates for public office on the ballot under the party banner.

notwithstanding Defendants' breathless rhetoric. *E.g.*, Mot. at 34 (warning of an "unimaginable scenario" rife with "massive uncertainty" where courts would be "effectively powerless").

Notably, Plaintiffs here seek only to make the same expressive use of the ballot as other parties, voters, and candidates are entitled to do in Kansas—to signal, and express support for, the alliance between UKP and its chosen nominees. They are not seeking special treatment or any departure from how existing state law allows other parties, candidates, and voters to use the ballot to engage in political speech. Yet application of the Anti-Fusion Laws bars them from doing so, imposing "unconstitutional conditions" on Plaintiffs' political participation. *See State v. J.L.J.*, 318 Kan. 720, 735, 547 P.3d 501 (2024) ("[G]overnment may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."). To utilize the ballot access for which UKP has qualified, it must refrain from advocating for the Party's preferred standard-bearer and nominate someone else. In order to maintain ballot access, UKP must not only nominate a lesser choice—but necessarily introduce a third candidate into a statewide race whose presence will undermine the Party's fundamental goals of promoting moderation and defeating extremists. Curtis Decl. ¶ 7: Cauble Decl. ¶ 5; Blake Decl. ¶ 12. To cast votes for the UKP nominee, UKP voters must relinquish their ability to express support for their own party with their ballot (votes the party may need to retain its ballot access in the next election) and instead register support for an opposing party. The right to free speech is incompatible with these unconstitutional conditions. *E.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 214-21 (2013); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1258-63 (10th Cir. 2016).

Finally, Defendants erroneously assert that the restrictions on Plaintiffs' freedom of expression may be dismissed because ballots, being "cast in secret," are not "interactive" in nature.

Mot. at 31.[24] As an initial matter, this argument ignores the reality that stripping Ms. Blake and Rep. Probst of their UKP nominations places restraints on Plaintiffs' speech that take hold throughout the entire general election campaign, well before any ballots are marked, as described above. *Supra* at 36-39.

Moreover, as discussed above, *supra* at 37-39, as voting begins, ballots themselves convey an important message of political alliance between a party and its candidate at the critical moment of voters' decisionmaking, while afterward they send an equally important, collective message of voter support (or lack thereof) to the party, the candidate, and, indeed, the State itself. Kansas law allows a party to earn official recognition from the State, which entitles it to designate a candidate for the state legislature as the official, state-recognized nominee of the party and to place the party's name on the ballot in conjunction with the nominated candidate. The law likewise entitles a state legislative candidate who earns the nomination of a recognized party to be formally recognized as the party's nominee and to have her name placed on the ballot in conjunction with that party. The law therefore entitles voters associated with a recognized party to mark their ballot for their party's state legislative nominee in a manner that conveys support for their party. As noted above, the State itself uses this collective expression of voter support to determine whether a party merits continued ballot access. *See* K.S.A. 25-302b. Existing law thus structures ballot access,

[24] Defendants are also wrong that the use of a "secret ballot" removes the underlying speech from Section 11: that a voter is entitled to privacy while marking her ballot in no way strips the expressive activity of constitutional protection. Few principles are more "well-established" than the "right to speak with anonymity." *See Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (surveying U.S. Supreme Court authority on this topic). Moreover, that speech is publicly and powerfully expressed, collectively, when the votes are tallied and the numbers in which voters supported each political party appearing on the ballot become known. UKP members, like other voters, have an "intent to convey a particularized message" when they cast a ballot, "and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974).

nominations, and ballot design in a manner that permits parties, candidates, and voters to engage in meaningful expressive activity.

Casting one's ballot is, simply put, the quintessential way for a voter to express her will in the democratic process. *See Simpson*, 34 P. at 749 (recognizing as "eminently wise and beneficial" Australian ballot law that permitted multiple nominations and "enable[d] voters to express their real wishes by their ballots"). As such, it "is the core political speech of the voter." *LWV II*, 549 P.3d at 385. While it is true the "ballot serves the functional purpose of picking election winners and losers, . . . that functional purpose cannot be separated from its expressive speech elements." Muller, *supra*, at 745; *see Reed*, 561 U.S. at 195 (clarifying that the "legal effect" of an "expressive activity" does not "deprive[ ] that activity of its expressive component, taking it outside the scope of" constitutional protection); *see also id.* at 231 (Thomas, J., dissenting) (agreeing with the majority on this point). A critical channel of protected expression is therefore blocked when UKP's nominations are rescinded and erased from the ballot.

2. None of Defendants' Asserted Interests Can Justify These Onerous Burdens—Under Strict Scrutiny or a Balancing Test

a. Defendants Must Show That Their Actions Are Necessary to Advance Sufficiently Compelling Interests

Because the burdens on Plaintiffs' speech rights are severe, the Court must turn its attention next to whether these burdens are justified by sufficiently weighty state interests. The proper standard to apply in making that inquiry is strict scrutiny, because the Kansas Supreme Court has long recognized that "[f]reedom of speech" is "among the most fundamental personal rights and liberties of the people" guaranteed under the "state Constitution[ ]." *Unified Sch. Dist. No. 503*, 236 Kan. at 234. Accordingly, "[r]estrictions on free speech are valid only where necessary to protect compelling public interests and where no less restrictive alternatives are available." *Id.* at

227-28.

The U.S. Supreme Court has likewise held that "[l]aws that burden political speech are subject to strict scrutiny" under the First Amendment. *Citizens United*, 588 U.S. at 340 (internal quotation marks omitted). And the U.S. Supreme Court has in fact applied strict scrutiny in similar contexts, such as when holding that a state law restricting a party's ability to express support for candidates in the primary impermissibly burdened core political speech. *Eu*, 489 U.S. at 222.

When the strict scrutiny framework is triggered under Kansas law, "the government's action is presumed unconstitutional." *Hodes*, 309 Kan. at 669.[25] The burden shifts to the state "to establish the requisite compelling interest and narrow tailoring of the law." *Id.* A compelling state interest is one "that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Id.* at 670 (internal quotation marks omitted). Here, the State cannot meet its heavy burden: the interests proposed by Defendants are legally insufficient; actually undermined by the Anti-Fusion Laws; insubstantial or speculative; or could easily be advanced through less restrictive means. Several of the purported interests even contradict one another.

Although precedent compels the application of strict scrutiny, Defendants, who cite no Kansas authority in support of their position, erroneously maintain that the so-called *Anderson-*

[25] Defendants argue that *Matter of A.B.*, 313 Kan. 135 (2021), implicitly overruled this presumption articulated time and again by Kansas courts, most recently in *Hodes*. Mot. at 16 n.4. They are wrong. *Matter of A.B.* makes no reference to *Hodes*, or for that matter to "strict scrutiny," and it is highly unlikely that the Kansas Supreme Court intended to reverse itself on an important legal standard less than two years after reaffirming that rule—without any reference to the preceding case. *See State v. Sherman*, 305 Kan. 88, 107-08, 378 P.3d 1060 (2016) (affirming state's strong commitment to stare decisis); *Kastner v. Blue Cross & Blue Shield of Kan., Inc.*, 21 Kan. App. 2d 16, 29-30 (1995) (applying rule of law "recently affirmed" by Kansas Supreme Court). Rather, *Matter of A.B.* merely recites the constitutional-avoidance rule of statutory construction, 313 Kan. at 138, which is irrelevant here as there is no dispute as to the meaning or scope of the Anti-Fusion Laws.

Burdick standard applies. Mot. at 29. Nevertheless, the ultimate outcome here does not turn on the standard of review: enforcement of the Anti-Fusion Laws here is an unconstitutional abridgement of the freedom of speech, even under Defendants' preferred test.

Under the *Anderson-Burdick* standard, a court first "consider[s] the character and magnitude of the asserted [constitutional] injury"; second "identif[ies] and evaluate[s] the precise interests put forward by the State as justifications for the burdens imposed by its rule"; and third "determine[s] the legitimacy and strength" of the State's interests and "consider[s] the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).[26] "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance,'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)), functionally the equivalent of strict scrutiny.

Here, the burden is punishing: UKP and its members are barred from conveying the message of support for Ms. Blake and Rep. Probst unique to a recognized party's formal nomination during the final months of the campaign. Then, "at the most crucial stage in the electoral process—the instant before the vote is cast," UKP and its members are again barred from expressing support for their nominees, and they are barred from expressing their support from and for the Party. *Martin*, 375 U.S. at 402. UKP voters are, unlike Democratic Party voters, barred from voting for Rep. Probst and Ms. Blake in a manner that conveys support for their party and raises public awareness around its platform. Instead, they are compelled to falsely express support for a different party in order to support their own nominees. *See Rumsfeld v. F. for Acad. &*

[26] Kansas courts have wisely declined to import federal balancing tests into state law in other contexts, recognizing that strict scrutiny fulfills the judiciary's "obligation to protect . . . rights that we . . . hold to be fundamental." *Hodes*, 309 Kan. at 669.

Institutional Rts., 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people what they must say.").

Thus, whether the analysis proceeds from here under the rubric of strict scrutiny, or the *Anderson-Burdick* balancing test, the path leads to the conclusion that the State's impositions on Plaintiffs' freedom of speech can only be justified if narrowly tailored to serve compelling interests. As shown below, the State has not carried its burden of demonstrating that any such interests necessitate these denials of Plaintiffs' fundamental freedoms.

b. None of the Defendants' Proposed Interests Are Compelling or Require the Abrogation and Exclusion of UKP's Nominations

Before exploring one-by-one the deficiencies in the state interests advanced by Defendants, the Court should recognize two global shortcomings that undermine their arguments on this issue from the outset.

First, a common denominator underlying the asserted interests is a fantastical parade of horribles—ballots overrun with party labels meant to confuse voters, and an anarchic political system destabilized by a host of new sham parties. Yet, thousands of elections have been held in which candidates could earn two nominations, both in Kansas previously and other states through the present day, yet Defendants do not identify any instances in which these concerns actually transpired.

Second, other Kansas statutes already address any such risks without taking a blunderbuss to expressive freedoms: meaningful signature requirements and vote thresholds to earn and retain formal recognition and ballot status weed out potential parties lacking a legitimate and durable basis of public support. K.S.A. 25-302a, 25-302b. These standards could be raised even higher. *See SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 275-76 (2d Cir. 2021) (noting ample discretion afforded states in setting such thresholds). Under existing Kansas law, only recognized parties can

place their nominating label on the ballot. This prevents the practice in other states which permit short descriptions to accompany independent nominations that can function as a *de facto* label on the ballot for an unrecognized group. *E.g.*, N.Y. Elec. Law 7-104. Kansas could also follow Oregon's lead and impose a reasonable limit on the number of nominations a candidate may accept. *See* Or. Rev. Stat. Ann. 254.135(3)(a) (setting limit of three nominations).[27]

Although these observations are sufficient alone to defeat Defendants' efforts to justify their infringements on Plaintiffs' freedom of speech, Plaintiffs now turn to the additional deficiencies specific to each of the proposed interests.

Preventing Voter Confusion: Defendants claim voters would be confused if a qualified candidate for public office is nominated by two state-recognized political parties and the ballot displays both nominations. Mot. at 28.[28] This argument was presented in *Timmons*—and none of the nine justices accepted it. The majority declined to even consider this "alleged paternalistic interest." 520 U.S. at 370 n.13. The dissent dismissed the "imaginative theoretical sources of voter confusion that could result from fusion candidacies" as a "meritless," "bare assertion" that "severely underestimate[d] the intelligence of the typical voter" and lacked any "plausible relationship to the [constitutional] burdens." *Id.* at 374-76 (Stevens, Ginsburg, and Souter, JJ., dissenting). The Kansas Supreme Court likewise rejected a similar argument more than a century ago. *See Simpson*, 34 P. at 749 ("The people, on election day, will vote only for the candidates of their choice, and are not likely to be seriously misled by any fraudulent or unauthorized nomination.").

[27] In the highly unlikely scenario that a *fourth* nomination was ever at issue, the law's narrow tailoring to this specific concern would place it on solid constitutional footing.

[28] If anything, the *exclusion* of the UK nomination from the November ballot would likely confuse UK voters, given that Rep. Probst was duly nominated by the Party and recognized as the Party's official nominee for several months on the Secretary's website.

Indeed, courts have long recognized that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798.[29] A decade after *Timmons*, the U.S. Supreme Court again swept aside this argument in one of the cases cited by Defendants, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *see* Mot. at 21. *Wash. State Grange* refused to credit the "sheer speculation" that "voters will be confused as to the meaning" of a party label on the ballot. *Id.* at 454. This was because such conjecture "depends upon the belief that voters can be 'misled' by party labels," while settled precedent "reflect[s] a greater faith in the ability of individual voters to inform themselves about campaign issues." *Id.* (quoting *Tashjian*, 479 U.S. at 220). The same is true here: "[t]here is simply no basis to presume that a well-informed electorate" will be confused by associating two party labels with the same candidate. *Id.* And as in *Wash. State Grange*, the simple addition of "prominent disclaimers" on the ballot "would eliminate any real threat of voter confusion." *Id.* at 456-57.[30]

Going back nearly two centuries, thousands of elections have been held in which two parties could nominate the same candidate on the ballot, yet Defendants cannot point to a single authority substantiating their purported concern.[31] Unless Defendants suppose that Kansans today are, for some reason, less capable than their forebears who encountered this reality routinely in the

[29] In no other context does the State assess, or is it permitted to police, the ideological alignment of parties and candidates. The suggestion that the State may do so here to avoid imagined confusion over "issues and positions," Mot. at 28, borders on the Orwellian.

[30] Since *Timmons*, at least two federal courts of appeal have likewise rejected arguments invoking the unsubstantiated specter of voter confusion, in the context of anti-fusion restrictions and otherwise. *See, e.g.*, *Reform Party*, 174 F.3d at 317; *No on E v. Chiu*, 85 F.4th 493, 506 (9th Cir. 2023), *petition for cert. filed*, No. 23-926 (U.S. filed Feb. 27, 2024).

[31] Instead, Defendants rest their entire "voter confusion" argument upon their unsupported assertions that "few voters outside a handful of states even have any familiarity with the concept" of a candidate receiving two nominations and that "most voters have never heard of [this concept] and would find [it] somewhat bewildering." Mot. at 28.

19th century or their contemporaries in other states where a candidate may still receive a second nomination on the ballot today—a supposition that Plaintiffs emphatically reject—their argument must fail. Defendants' "sheer speculation" cannot justify the real constitutional burdens imposed on Plaintiffs. *Wash. State Grange*, 552 U.S. at 454.

Keeping Sham Nominations Off the Ballot: Defendants next claim that ballots would "look like NASCAR vehicles, festooned with endorsements" from fraudulent parties seeking to give favored candidates an unfair advantage. Mot. at 24-25 & n.5. Three Justices in *Timmons* rightfully dismissed this kind of helter-skelter scenario as "farfetched" and "entirely hypothetical." 520 U.S. at 376 (Stevens, Ginbsurg, and Souter, JJ., dissenting). Again, despite nearly two centuries of elections in which candidates could earn a second nomination, Defendants offer nothing to show that this scenario—or any of the horrors they imagine—has ever actually happened. Even still, any genuine risk could be easily eliminated by adopting, as in Oregon, a reasonable limit on the number of nominations that a candidate may have on the ballot. Or. Rev. Stat. Ann. 254.135(3)(a).

It is also self-evident that "reasonable ballot access laws can prevent . . . sham parties" in the first instance. Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 Sup. Ct. Rev. 331, 339. And "even when a very low number of signatures . . . is required," "the experience of many States . . . demonstrates that no more than a handful of parties attempts to qualify for ballot positions." *Williams v. Rhodes*, 393 U.S. 23, 33 (1968) (holding that the "remote danger" of party proliferation could not "justify the immediate and crippling impact on the basic constitutional rights"). The stringency of Kansas's existing ballot access laws is evidenced by the fact that only UKP and two other new parties have met the Kansas threshold for ballot status in over a century. Defendants' insinuation that earning ballot status in Kansas is "relatively easy,"

Mot. at 25, suggests that, unlike Plaintiffs, they have not spent months knocking doors to convince tens of thousands of Kansas voters to join a new political movement. *See* Curtis Decl. ¶ 5; Morgan Decl. ¶ 4. Defendants' suggestion that "a fringe candidate" could nonetheless "rack up multiple nominations" in Kansas by gathering upwards of a hundred thousand signatures to get ballot access for several new parties is, in a word, absurd. Mot. at 25. Even still, the legislature could lawfully raise the thresholds even higher to zero out any such concerns. *See SAM Party of N.Y.*, 987 F.3d at 275-76.

Defendants' reliance on *Timmons* is, yet again, misplaced. That case centered on Minnesota's election laws, which, notwithstanding their ban on cross-nominations, allow groups other than recognized political parties, after submission of a filing fee or signature petition, to nominate candidates and feature the group's self-styled description on the ballot. *See* Minn. Stat. 204B.07(1). Thus, if a Minnesota candidate were permitted to receive several nominations, his supporters could, at least in theory, file a number of successive nominating petitions that "exploit" these laws to "associat[e] his . . . name with popular slogans or catchphrases." *Timmons*, 520 U.S. at 365. Yet, this ploy is impossible in Kansas, where the only labels that may appear on the ballot are those corresponding with recognized parties that have earned statewide ballot access. This asserted interest is therefore inadequate to justify the constitutional burdens placed on UKP, its voters, and its candidates.

Enforcing "Acceptable" Forms of Political Activity: Defendants also assert several interests in dictating the permissible nature and substance of, and participants in, the political process. Mot. at 26-28. These include, in essence, (i) increasing political polarization and discouraging compromise across ideological differences; (ii) subordinating the preferences of a minor party and its voters to the State's paternalistic view of what is in their best interest; (iii)

preventing a minor party from accruing a modest degree of political power; and (iv) insulating the political status quo from any potential change. *Id.*[32] None of these are legitimate—let alone compelling—interests that could justify the constitutional injuries at issue here.

Defendants' invocation of George Washington to justify these goals is more than a tad ironic, Mot. at 37, as using the machinery of the State to suppress disfavored political activity was hardly a Founding ideal. Rather, James Madison famously warned in Federalist No. 10 that state efforts to suppress political "factions" would "abolish liberty, which is essential to political life," and would therefore constitute a "remedy . . . worse than the disease." Federalist No. 10 (Madison). The idea that "the First Amendment . . . protect[s] a marketplace for the clash of different views and conflicting ideas . . . has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981). In his seminal *Whitney v. California* opinion, Justice Brandeis said it plainly: "Those who won our independence by revolution were not cowards. They did not fear political change." 274 US 357, 377 (1927) (Brandeis, J, concurring).

Fortunately, American jurisprudence has adhered to the Founding commitment to "the open and free exchange of ideas and engagement in the political process." *LWV I*, 317 Kan. at 820; *see also Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 772 (2018) ("[T]he people lose when the government is the one deciding which ideas should prevail."). The U.S. Supreme Court confirmed that "[a]ll political ideas cannot and should not be channeled"

[32] Defendants describe these interests as: "facilitat[ing] greater competition and voter choice"; avoiding "blur[ring] the distinction between parties"; preventing a minor party from "inflat[ing] its support" to maintain ballot status; "preventing a candidate from accepting nominations from multiple parties that may have competing, if not contradictory, platforms"; and promoting "the stability of [the] political system" by "insulat[ing] the two-party system from competition and influence." Mot. at 26-28 (cleaned up).

exclusively through "two major parties," that history teaches us that political activity by minority parties is often at "vanguard of democratic thought," and that excluding the voice of minority parties "would be a symptom of grave illness in our society." *Sweezy*, 354 U.S. at 250-51. In *Williams*, the U.S. Supreme Court explicitly rejected a proposed state interest in "promot[ing] a two-party system in order to encourage compromise and political stability" because giving "two particular parties—the Republicans and the Democrats . . . a complete monopoly" would eviscerate the "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and of the First Amendment freedoms." 393 U.S. at 31-32. The *Williams* Court further explained that "[t]here is . . . no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them," as "[n]ew parties struggling for their place must have the time and opportunity to organize . . . , just as the old parties have had in the past." *Id.* at 32. These and other rulings have channeled another Founder, John Adams, who feared that the "greatest political Evil" would be the exclusive and permanent "Division of the Republick into two great Parties." John Adams, Letter to Jonathan Jackson, Oct. 2, 1780.

Indeed, the Republican Party owes its very existence to the antecedent Liberty Party, Free Soil Party, and other anti-slavery parties, which were able to earn political power and new adherents during the 1840s and early 1850s because states at the time rejected Defendants' proposed micromanagement of political debate and electoral competition. *Supra* at 3-7. But for this open political process and the ability of these minor parties to nominate viable candidates, the Republican Party may never have been formed—let alone replaced the ailing Whigs as a major party that elevated the anti-slavery cause to the forefront of the national agenda. *Id.*[33]

[33] It strains credulity that, a few short years later, the drafters and ratifiers of the Kansas Constitution believed they were empowering the State to insulate the two major parties in power at that moment from all meaningful competition *ad infinitum*.

In asserting these interests, Defendants rest upon a thin reed: a determination by the *Timmons* majority that Minnesota could substantially "insulate the two-party system from minor parties' . . . competition and influence." 520 U.S. at 367. Yet, the weight of authority confirms that "minor political parties are not the step-children of the American political process." *Patriot Party*, 95 F.3d at 261. Rather, "[c]ore [constitutional] principles protect their rights to organize and to compete for votes," leading courts to time and again "str[ike] down statutes or practices that unnecessarily burdened the ability of minor political parties to participate in the political process." *Id.* (citing *Williams*, *Anderson*, and *Norman*). Put otherwise, "[a] state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo." *Swamp*, 950 F.2d at 389 (Ripple, Easterbrook, and Posner, JJ., dissenting from denial of rehearing en banc).

Defendants further seek to justify these constitutional burdens because, in the State's view, they compel "minor parties [to] identify[ ] new standard-bearers who best represent that party," Mot. at 26, and ensure "each party [and candidate has] a distinct ideology" and "platform." *Id.* at 27. Yet, these are nothing more than "circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices." *Jones*, 530 U.S. at 582. "[T]hese supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association." *Id.* Several years *after Timmons*, the U.S. Supreme Court "recognized the inadmissibility of this sort of 'interest.'" *Id.* (rejecting proffered interests in having candidates "better represent the electorate" and "expanding candidate debate"). Rightly so: few ideas are more foreign to the American constitutional order than state regulation of acceptable political thought.

It makes no difference that Defendants refer to these interests euphemistically as promoting

"competition" or "voter choice." Mot. at 26. Regardless of whether such interests might "in the abstract" justify other, lesser burdens in other contexts, "*in the circumstances of this case*," they are clearly not "compelling." *Jones*, 530 U.S. at 584 (emphasis original). As in *Jones*, "it is obvious that the net effect of this scheme—indeed, its avowed purpose" when it was enacted—"is to reduce the scope of choice." *Id.* Prior to enactment of the Anti-Fusion Laws, minor parties nominated scores of candidates up and down the ballot, and many of their nominees in fact won. *Supra* at 3-7. In the century (and change) since, the major parties have won all but a few of the thousands of state legislative races, sweeping all federal and statewide contests. *Id.*

Nor is the mere addition of other candidates to the ballot a "highly significant" contribution to "greater choice" or "competition" when they have no chance of being remotely viable. *Jones*, 530 U.S. at 584.[34] But even still, the Anti-Fusion Laws do not accomplish this limited goal: in the 171 federal and state races on Kansas ballots for the 2020 general election, a mere *nine* included minor party nominations. *See* Kan. Sec'y of State, *2020 General Election Official Vote Totals*, https://sos.ks.gov/elections/20elec/2020_General_Official_Vote_Totals.pdf (last visited Aug. 30, 2024). This can hardly be explained by enthusiasm for the two major parties: nearly a third of Kansas voters are unaffiliated or registered with a minor party. Kan. Sec'y of State, *Election Statistics: Voter Registration*, *supra*. Widespread frustration with both major parties and yearning for more options is no secret. *See* Blake Decl. ¶¶ 9-10; Probst Decl. ¶¶ 7-9; Curtis Decl. ¶ 4; Cauble Decl. ¶ 4; Ollenberger Decl. ¶¶ 3-5; Long Decl. ¶¶ 4-5; Morgan Decl. ¶¶ 3-4; Lewis Decl. ¶¶ 4-

[34] Defendants assert interests in two concepts that are facially incompatible with each other: (i) "insulat[ing] the two-party system from competition and influence of minor parties" and (ii) "faciliat[ing] greater competition." Mot. at 26-27 (internal citations and quotation marks omitted). Thus, Defendants do not mean "competition" in any meaningful sense—but simply, the presence of additional candidates on the ballot who cannot pose an actual challenge to their major party opponents.

6.[35]

Indeed, to the extent the State is concerned about vote totals that "inflate [the] support" of a party beyond its "bona fide" resonance with the electorate, Mot. at 25-26, it should be deeply troubled by the status quo. Today, the major parties in Kansas together receive 100% of the vote in most races, which grossly exaggerates any plausible estimate of each side's true public support. *E.g.*, Kan. Sec'y of State, *2020 General Election Official Vote Totals*, *supra*; Kan. Sec'y of State, *Election Statistics: Voter Registration*, *supra*. This is because, when a minor party like UKP is barred from nominating its preferred candidates, voters like Ms. Cauble, Mr. Curtis, Ms. Long, Mr. Lewis, Mr. Morgan, and Ms. Ollenberger have no choice but to vote for their own nominee under a major party banner and "inflate its support." Mot. at 26. This will in fact be the case in the 69th and 102nd Districts this November. On the other hand, permitting UKP candidates to retain their UKP nominations would simply allow current UKP voters and new adherents to accurately register their ideological support.

* * *

In sum, regardless of whether the burdens Defendants have imposed on Plaintiffs' freedom of political expression are deemed severe or substantial, the State cannot identify any "corresponding interest sufficiently weighty to justify" them. *Norman*, 502 U.S. at 288-89; *see supra* at 45-54. Nor is there any "tailoring" whatsoever between the sweeping, categorical restriction of annulling UKP's nominations and the specific interests asserted. *Id.* Thus, under either strict scrutiny or a burden-interest balancing test, the abrogation and exclusion of UKP's nominations violates the freedom of speech guaranteed by Section 11 of the Kansas Constitution.

[35] *E.g.*, Eli Mckown-Dawson, *How Do Democrats and Republicans Feel About the Two Parties?*, YouGov (Apr. 18, 2024), https://perma.cc/SU3T-RL3J; Lydia Saad, *Neither Party Well-Liked, but GOP Holds Advantage on Issues,* Gallup (Oct. 3, 2023), https://perma.cc/LUH9-C4SL.

B. Abrogation and Exclusion of UKP's Nominations Violate Freedom of Association

The Kansas Constitution also ensures that "[t]he people have the right to assemble" and "consult for their common good." Kan. Const. Bill of Rights, § 3. Such language is widely understood to guarantee freedom of political association. Yet, the abrogation and exclusion of UKP's nomination prevent the 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. These restrictions frustrate efforts to develop and grow this new party, despite its common-sense platform and potential broad appeal. Strict scrutiny is required, and the absence of compelling state interests or narrow tailoring render this restriction unconstitutional. Even under Defendants' proposed standard of review, the same conclusion follows. The poorly reasoned majority opinion in *Timmons* does not counsel otherwise.

1. The Kansas Constitution Guarantees the Essential Right of Association

While the Kansas Supreme Court has never been squarely presented with the question, Justice Biles recently noted that the Kansas Constitution provides Kansans with "a protected right to associate themselves with others of like-mind, and to voice their political opinions at the ballot box." *See Rivera v. Schwab*, 315 Kan. 877, 949, 512 P.3d 168 (2022) (Biles, J., concurring in part and dissenting in part). Indeed, it is axiomatic that "the right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms." *Williams*, 393 U.S. at 30. "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

This includes "the constitutional right of citizens to create and develop new political parties," which allow "like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." *Norman*, 502

U.S. at 288. Limits on "the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group" are particularly troubling because "such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794. Because the right to "free association [is] fundamental and highly prized," it "need[s] breathing space to survive," meaning it must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963) (internal citation and quotation marks omitted).

Defendants do not dispute that Section 3 guarantees this basic liberty. *See* Mot. at 15.

2. This Restriction on Associational Freedom Cannot Survive Any Level of Scrutiny

"Freedom of association means not only" that a party can nominate *someone*, but that it has the "right to . . . select a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224 (internal quotation marks and citation omitted). Accordingly, "the right of a party to nominate a candidate of its choice is a vital aspect of the party's role in our political structure. The ability to choose the same person as another party is an important aspect of that right." *Swamp*, 950 F.3d at 388 (Ripple, Easterbrook, and Posner, JJ., dissenting from denial of rehearing en banc).

Here, abrogating and excluding the UKP nominations from the ballot are a direct affront to Plaintiffs' associational rights. Ms. Blake and Rep. Probst are UKP's intended standard bearers in the 69th and 102nd Districts, respectively. (And each, in fact, served in this role for three months after the UKP nominations were filed in May.) Depriving UKP of the "ability to perform the 'basic function' of choosing [its] own leaders" imposes a "severe and unnecessary" burden on its associational freedom. *Jones*, 530 U.S. at 580, 586.

Moreover, nominating a candidate on the ballot is the key "mechanism by which [the party] can introduce itself to the public, share its views, and attract like-minded voters and supporters." Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 Seton Hall L. Rev. 1111, 1141 (2011). And "a political party's interest in a candidate's success is not merely an ideological interest. Political victory accedes power to [a] winning party, enabling it to better direct the machinery of government toward the party's interests." *Benkiser*, 459 F.3d at 587. UKP's nomination is therefore an "attempt to broaden the base of public participation in and support for its activities," which "is conduct undeniably central to the exercise of the right of association." *Tashjian*, 479 U.S. at 214. The associational harm here is particularly strong because it manifests during the vote-casting itself, "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 216.

UKP members also suffer associational injury, as "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy*, 354 U.S. at 250. Their "right to form a party for the advancement of political goals means little" if their party's nominations are rescinded and omitted from the ballot. *Williams*, 393 U.S. at 31. Here, UKP members are forced to associate with a different party in order cast their ballot for their own party's nominee, eviscerating their freedom to "determine for themselves with whom they will associate . . . in furtherance of common political beliefs." *Tashjian*, 479 U.S. at 214. This forced association violates Plaintiffs' rights because, after all, the "[f]reedom of association . . . presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Democratic Party of the United States v. Wis. ex rel. La Follette*, 450 U.S. 107,

122-24 (1981).[36]

For the same reasons, Rep. Probst and Ms. Blake also suffer serious associational injury. They each share UKP's priorities, and want to work with UKP leaders and voters to advance their shared goals. They are proud to be UKP's standard bearers in their respective districts, but the invalidation of their nominations prevents them from formalizing this consensual, mutually beneficial association in the final two months of the campaign and on the ballot itself.

Once it is established that there is a severe burden on Plaintiffs' right to associate, the Court must determine if any state interest is sufficiently compelling to justify such a burden. In evaluating Plaintiffs' claim, the Court should recognize the well established rule that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Ala. ex rel Patterson*, 357 U.S. 449, 460-61 (1958). Heightened 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. *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016).[37] Without the "presumption of constitutionality," Defendants must prove that the

[36] As with Plaintiffs' speech claim, *see supra* at 40-41, the Anti-Fusion Laws impose "unconstitutional conditions" on the exercise of Plaintiffs' right to association. First, UKP's access to the ballot is conditioned on forgoing association, through nomination, with the candidate of its choice. Second, UKP members have their associational rights conditioned on voting for a political party they do not support—a direct consequence of the State's forced abrogation of the UKP nominations. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990) ("[C]onditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."). Third, to maintain one association they value highly—being an official standard bearer for the UKP—Ms. Blake and Rep. Probst would have to forsake another association they hold dear—their Democratic nomination. *See ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 721 (E.D. Tex. 2020) ("[W]here government action compelling or prohibiting some sort of association would be unconstitutional, so too is government action coercing the same."). A Hobson's choice is not a true right to association.

[37] *E.g.*, *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983); *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993); *Doe v. Doe*, 644 So. 2d 1199, 1209 (Miss. 1994); *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998); *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996); *Shumway v. Worthey*, 37 P.3d 361, 366 (Wyo. 2001); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007); *Mont. Democratic*

abrogation and exclusion of UKP's nomination "serve some compelling state interest and [are] narrowly tailored to further that interest." *Hodes*, 309 Kan. at 663, 673. As discussed above in the section discussing Defendants' proposed state interests, *supra* at 45-54, they cannot carry this burden.

The same result follows even if this Court were to instead apply a burden-interest balancing test, as Defendants propose.[38] *See* Mot. at 15; *Burdick*, 504 U.S. at 434. The constitutional burden is onerous, as Plaintiffs are barred from exercising the basic associational rights. None of "the precise interests put forward by the State" is legitimate, let alone "sufficiently weighty" to justify these heavy burdens. *Id.*; *Norman*, 502 U.S. at 288-89; *see supra* at 45-54. This is especially true given the poor tailoring and ample means of addressing these purported concerns without burdening associational freedom. Thus, under either strict scrutiny or a burden-interest balancing test, the abrogation and exclusion of the UKP nomination violate the freedom of association guaranteed by Section 3 of the Kansas Constitution.

3. *Timmons* Does Not Warrant a Different Outcome

Defendants dedicate most of their arguments to urging the Court to copy and paste the majority opinion from *Timmons*, where a divided U.S. Supreme Court held that Minnesota's anti-fusion laws did not violate the freedom of association guaranteed under the U.S. Constitution.

Party v. Jacobsen, 545 P.3d 1074, 1090 (Mont. 2024); *Marrujo v. N.M. State Highway Transp. Dep't.*, 887 P.2d 747, 751 (N.M. 1994); *see also* Emily Lau, *Explainer: State Constitutional Standards for Adjudicating Challenges to Restrictive Voting Laws*, State Democracy Research Initiative (Oct. 3, 2023), https://perma.cc/2ZXY-PA8B (noting that more than two dozen states apply heightened scrutiny to restrictive election laws).

[38] Defendants' elsewhere half-heartedly suggest that the Court should instead apply the *LWV II* "reasonableness" test to this freedom of association claim. Mot. at 20-21. As noted above, *supra* at 28-30, *LWV II* articulated a standard of review for right-to-vote claims arising under Article V; by its own terms, the decision explicitly stated that this standard of review had no effect on the scrutiny required by constitutional protections set forth in the Bill of Rights.

Following that approach would be a mistake. One key reason is self-evident: only the party's associational rights were at issue in *Timmons*, which did not evaluate the associational rights of candidates and voters that this case presents. *Timmons* therefore offers no guidance for evaluating the associational harms to Ms. Blake, Rep. Probst, Mr. Curtis, Ms. Cauble, Ms. Long, Mr. Lewis, Mr. Morgan, Ms. Ollenberger, and other UKP voters.

Further, associational freedom is clearly an area where "the Kansas Constitution protect[s] the rights of Kansans more robustly than would the United States Constitution." *Hodes*, 309 Kan. at 621. The text itself supports this conclusion: Section 3 of the Bill of Rights grants an affirmative right ("The people have the right . . ."), while the First Amendment limits government power ("Congress shall make no law . . ."). Both provisions acknowledge the right to "assemble," but Section 3 goes further by guaranteeing the "right . . . to consult for the common good," ensuring greater protection of opportunities for collective action in public affairs than provided under federal law.

The differences are not accidental: Section 3 was *not* modeled on the First Amendment, but rather the earliest state constitutions. State associational rights, like the one enshrined in the Kansas Constitution, were incorporated in direct response to pre-Revolutionary conflicts with the Crown about whether it could prevent the people from legitimately wielding collective power to influence colonial governance. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1663-94, 1703-08 (2021).[39] As noted, when Kansas ratified this language in the mid-19th century, the State constitutionalized this expansive conception of participatory

[39] The Wyandotte Convention used as its model the Ohio Constitution, which based its assembly provision on the Pennsylvania Constitution of 1776 and Massachusetts Constitution of 1780. *See Hodes*, 309 Kan. at 628; Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 125-26 (2022 2d ed.).

government in the modern context, when parties were the key institutions for collective political action. And importantly, parties in this era routinely chose to forge coalitions by cross-nominating the same candidate. *Supra* at 3-7.

Nevertheless, this Court need not conclude that associational freedom is more robust under the Kansas Bill of Rights to justify skepticism of the *Timmons* majority's reasoning. The majority acknowledged that the federal right to association encompasses the right of a party to nominate candidates for public office—but proceeded to make several logical errors that defied decades of clear precedent in its analysis. This Court could conclude that the Kansas freedom of association is "generally . . . coextensive" with its federal analogue, *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980), while still recognizing that key aspects of *Timmons* were poorly reasoned and inconsistent with long-standing doctrine, and therefore lack persuasive value.[40]

The majority's principal error was concluding that anti-fusion laws "do[ ] not severely burden [a minor political] party's associational rights" because the party can nominate a lesser choice or campaign for their preferred candidate and encourage voters to support him on another party's ballot line. *Timmons*, 520 U.S. at 359. In the majority's view, preventing a party from nominating its top candidate does not in any way implicate a party's "internal affairs and core associational activities." *Id.* at 360. This is untenable: picking the right standard bearer is the quintessential associational purpose of a political party. The most important act for a political party is the selection of its standard bearer to be the voice of the party during an election. *Kusper*, 414

[40] A sitting U.S. district court judge and several top election law scholars have discussed the analytical and practical flaws of the majority ruling. *See, e.g.*, Hon. Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 Idaho L. Rev. 108, 108-18 (2019); Hasen, 1997 Sup. Ct. Rev. at 331-32; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 673-74 (1998); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95, 121-25.

U.S. at 58 ("Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections.");[41] Curtis Decl. ¶ 8. This aspect of the *Timmons* holding clearly conflicts with numerous U.S. Supreme Court rulings on the scope and meaning of associational freedom. *See supra* at 56-59 (citing *Anderson*, *Eu*, *Gibson*, *Jones*, *Kusper*, *Norman*, *Roberts*, *Sweezy*, *Tashjian*, and *Williams*).

The *Timmons* majority also unpersuasively claimed that because the aggregate impact of Minnesota's anti-fusion restrictions was, in the majority's view, negligible, the law neither "precluded minor political parties from developing and organizing" nor "excluded a particular group of citizens, or a political party, from participation." *Timmons*, 520 U.S. at 361. The dissent called out the absurdity of this point, noting that the majority ignored that such laws "were passed by the parties in power in state legislatures [to] squelch the threat posed by the opposition's combined voting force," which "provide[s] some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association." *Id.* at 357 n.6 (internal citation omitted).[42] This trend was particularly pronounced in Kansas, where minor party activity has been negligible for more than a century—after substantial activity (and success) in the years preceding adoption of the anti-fusion restrictions in 1901. *Supra* at 3-7.

What is more, after downplaying the severity of the associational burden, the majority

[41] Cases affirming the principle are legion. *E.g.*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) ("A political party has a First Amendment right to . . . choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."); *Jones*, 530 U.S. at 575 (noting "the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences'") (quoting *Eu*, 489 U.S. at 224).
[42] *See* Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 Cornell L. Rev 109, 159 (1996) ("If the actual effect of a state law on minor parties' political activities is considered . . . , and minor parties cannot survive without fusion, it is difficult to understand what state law could be more 'burdensome.'").

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. *Timmons*, 520 U.S. at 364-65, 367-68. Plaintiffs explain above why this Court should decline Defendants' invitation to repeat the same errors with respect to the state interests advanced again here. *Supra* at 45-54.

C. Abrogation and Exclusion of UKP's Nominations Violate Equal Protection

Section 2 of the Kansas Bill of Rights guarantees equal protection of the laws, providing that "all free governments . . . are instituted for the[ ] equal protection and benefit" of the people. Kan Const. Bill of Rights, § 2; *see LWV II*, 549 P.3d at 376, 383. The "political rights" protected by Section 2 include the freedom of speech and association, as well as "the right and power to participate in the establishment or management of government, [and] to exercise the right of suffrage and to hold office." *State ex rel. Fatzer v. Urb. Renewal Agency of Kansas City*, 179 Kan. 435, 439-40, 296 P.2d 656 (1956).

Defendants' enforcement of the Anti-Fusion Laws violates this guarantee by imposing disproportionate and unjustifiable burdens on the rights of UKP, its voters, and its nominees to participate as equals in the political process. Equal protection jurisprudence requires this Court to "measure the totality of the burden" on Plaintiffs' rights "against the justifications that the State offers to support the law." *Patriot Party*, 95 F.3d at 269. Under Kansas law, the imposition of these burdens is subject to strict scrutiny given the fundamental interests at stake. But even a less demanding level of review compels the conclusion that the discriminatory impact is constitutionally intolerable.

1. This Unequal Burden Requires, and Cannot Survive, Strict Scrutiny

Under Kansas equal protection jurisprudence, "strict scrutiny . . . applies when fundamental rights are affected." *Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 124, 853 P.2d 669 (1993); *see also Farley v. Engelken*, 241 Kan. 663, 669-70, 740 P.2d 1058 (1987) ("[S]trict scrutiny . . . applies in cases involving . . . fundamental rights expressly or implicitly guaranteed by the Constitution," such as "voting."); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) (applying strict scrutiny to laws that "deprive [voters] of a fundamental political right"). Because Plaintiffs' fundamental rights are "affected" differently than other parties, candidates, and voters, "the presumption of constitutionality" is displaced, and the State must demonstrate that the unequal constitutional burden "is necessary to serve a compelling state interest." *Jurado*, 254 Kan. at 124.

First, Defendants' enforcement of the Anti-Fusion Laws imposes an unequal burden on Plaintiffs. As described in the preceding sections, Plaintiffs are denied the same opportunities to freely associate and engage in core political speech that other parties, candidates, and voters enjoy. Unlike Plaintiffs, neither the Democratic and Republican Parties nor their members lose the associational link with their standard-bearers in the final weeks of the campaign and on the ballot, nor must they support another party in order to vote for and elect their own nominees. Neither Rep. Probst's nor Ms. Blake's opponents (nor other candidates in other races) must break their associational link with a nominating party two months before Election Day.

Unlike Democrats and Republicans who can freely vote for their nominees under their respective ballot labels, UKP members are denied an "equal right" "to cast their votes effectively." *Dunn*, 405 U.S. at 336; *Ill. Bd. of Elections*, 440 U.S. at 184. They are "force[d] . . . to choose among three unsatisfactory alternatives": nominating and voting for a less-favored UKP nominee who cannot win and could potentially defeat the fundamental purpose of the party by tipping the election to the more extreme major party candidate; voting for the preferred UKP candidate

designated as the nominee of another party; or not voting at all. *Reform Party*, 174 F.3d at 314. Whatever they choose, the impact of votes cast by UKP supporters is necessarily diluted as compared to Democratic and Republican voters, who freely cast ballots for their own party and its first-choice candidates. *Tashjian*, 479 U.S. at 216 (recognizing the ballot as a critical tool for translating shared principles into "political power in the community"); *cf. In re Petition of House Bill No. 2620*, 225 Kan. 827, 833-34, 595 P.2d 334 (1979) (observing that Section 2 prohibits invidiously "minimiz[ing] or cancel[ing] out the voting strength of . . . political elements of the voting population").

In *Williams*, the U.S. Supreme Court struck down Ohio laws that similarly placed unequal burdens on minor parties and their candidates as they sought to participate in the political process. 393 U.S. at 24, 30-34. As in Kansas today,

> the Ohio laws . . . g[ave] the two old, established parties a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Id. at 31. Likewise, the Third Circuit struck down a Pennsylvania anti-fusion law on equal protection grounds because—like Defendants' enforcement of the Anti-Fusion Laws here—it prevented

> a minor party from nominating its best candidate and from forming a critical type of consensual political alliance that would help it to build support . . . . Thus, the challenged laws help to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence.

Patriot Party, 95 F.3d at 268-70.[43]

[43] After *Timmons*, the Third Circuit reheard this case en banc and affirmed its initial ruling because "[n]othing in the *Timmons* opinion itself weakens the equal protection analysis" and "no equal

The New York Court of Appeals likewise recognized the inherent offense of anti-fusion laws to the values of equal protection. As its key rationale for striking down a law "prevent[ing] political combinations and fusions," the Court invoked the principle that the state "must not discriminate in favor of one set of candidates against another set." *Callahan*, 93 N.E. at 263. Striking down another legislative attempt to "mak[e] it more difficult to vote fusion or coalition tickets," the Court held that "each voter [must] have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable." *Hopper*, 96 N.E. at 373, 375.

Several years ago, the Pennsylvania Supreme Court narrowly divided over the constitutionality of another anti-fusion law, with four justices rejecting an equal protection claim—without any analysis of the disproportionate burdens imposed on minor parties, their voters, and nominees. *Working Families Party*, 209 A.3d at 282-84. Three justices dissented, exploring in detail the real-world impact of the restrictions and concluding that they denied equal protection of the law by "entrench[ing] power in major parties to the exclusion of minor parties." *Id*. at 305 (Wecht, J., dissenting); *see id*. at 288-94, 299-304 (Wecht, J., dissenting). In their view, the "regulations . . . plainly impose[d] asymmetrical burdens on voters and parties based upon nothing more than numerosity and relative popularity—which in part are determined by a self-reinforcing system in which political power begets more political power to the manifest exclusion of marginal and minority political coalitions and dissenting perspectives." *Id*. at 305 (Wecht, J., dissenting). As in Kansas, minor party voters face a lose-lose dilemma:

> If forced to choose between voting his first-choice candidate without the desired affiliation or his second-choice candidate as the nominee of his preferred party, the voter must choose between voting for whom he believes to be the candidate who best embodies his political values or casting a ballot in furtherance of the success of the party with which he identifies. Should the voter choose to vote candidate

protection claim was asserted or considered by the Court in *Timmons*." *Reform Party*, 174 F.3d at 312-18. Then-Judge Alito joined the en banc panel's decision.

> rather than party, his vote adversely affects his favored party in its quest to improve its status under Pennsylvania law. When a party member votes for the nominee of another party, not only does he reduce the numerator by not furnishing a vote for his chosen party, he also increases the denominator by casting a vote that effectively supports another party for classification purposes, with the practical effect of reducing his party's likelihood of elevating its status in the next election.

Id. at 306 (Wecht, J., dissenting). As with the parties, candidates, and voters in *Working Families Party*, *Callahan*, *Hopper*, *Patriot Party*, *Reform Party*, and *Williams*, Plaintiffs here are clearly denied the equal opportunity to participate in the political process.

Second, these disparately burdened rights are fundamental. *Eu*, 489 U.S. at 222-23 (ban on primary endorsements by political parties "directly affects speech which is at the core of our electoral process and of the First Amendment freedoms") (internal quotation marks omitted); *Ill. Bd. of Elections*, 440 U.S. at 184 (ballot access restrictions burden the "fundamental rights . . . of individuals to associate for the advancement of political beliefs, and . . . of qualified voters, regardless of their political persuasion, to cast their votes effectively") (quoting *Williams*, 393 U.S. at 30); *see also LWV II*, 549 P.3d at 380 (the right of suffrage is entitled to "the strongest possible constitutional protection"); *id.* at 383 (citing, *inter alia, Dunn*, 405 U.S. at 336 ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections *on an equal basis with other citizens in the jurisdiction*.") (emphasis added)). These rights of free speech and association, and the "equal right to vote," *Dunn*, 405 U.S. at 336, collectively ensure an equal opportunity to participate meaningfully in the political process—the core essence of Section 2. *Fatzer*, 179 Kan. at 439-40.

Third, none of the justifications proffered by Defendants meet the rigorous standard of a "compelling interest," nor are the restrictions at issue here in any way narrowly tailored to advance them. Plaintiffs explain these points in detail above. *Supra* at 45-54. Defendants' asserted justifications cannot survive strict scrutiny, meaning their abrogation and exclusion of the Anti-

Fusion Laws violates the equal protection guarantee provided by Section 2 of the Kansas Bill of Rights.

2. Defendants' Counterarguments Disregard Reality, History, and Precedent

Defendants give short shrift to Plaintiffs' equal protection claim, contending (i) that the Anti-Fusion Laws "treat all political parties identically," Mot. at 34, and alternatively (ii) that the Laws should be upheld under the so-called *Anderson-Burdick* test, *id.* at 35-36. Neither argument has merit.

First, Defendants maintain that the Anti-Fusion Laws do not invite equal-protection scrutiny of any kind because "[a] major party can no more cross-nominate candidates on the general election ballot than a minor party," and thus the Laws "make[ ] [no] distinction between the two." Mot. at 34-35. That argument misrepresents the nature of the inequality at issue, and otherwise defies reality.

The facial distinction in the Anti-Fusion Laws is not between so-called major and minor parties: rather, the line drawn is between a party like UKP that nominates competitive candidates who also earn another party's nomination, and those that do not. UKP is a recognized Kansas political party that has already secured ballot access, and has validly nominated willing individuals as its candidates for the State House. Yet, the Anti-Fusion Laws distinguish between UKP and other similarly situated parties on the sole basis that UKP's chosen candidates also happen to be the nominee of another party for the same office. In all meaningful respects the two classes are alike, yet the grievous disparity in the treatment of them is indisputable. It is only a party like UKP that must sacrifice its essential right to nominate the candidate that best promotes its ideals. Only the members of a party like UKP are forced to choose between their party and their preferred candidates when they exercise their right to vote, and have the effectiveness of their votes diluted

regardless of the choice they make. And only the candidates of a party like UKP must sacrifice their freedom of association by having a duly-earned nomination revoked in the heart of the general election campaign.

Granted, as a practical matter, UKP is a minor party—as is true of many parties in Kansas and elsewhere that have historically sought to cross-nominate viable candidates. *Supra* at 3-7. But that only makes matters worse. When candidates are forced to choose between keeping the nomination of a long-standing major party or a newer minor party, the pre-existing, built-in advantages (numbers of registered voters, superior ballot placement, etc.) compel them to choose the former. Such is the case here. Probst Decl. ¶¶ 16-17 & Exh. C; Blake Decl. ¶¶ 17-18 & Exh. C. Any suggestion to the contrary is frivolous.

It is therefore irrelevant whether or not the Anti-Fusion Laws are, on their face, superficially neutral. The manifest and disproportionate burdens they impose—as a practical matter—on the fundamental rights of Plaintiffs belie any suggestion that the State accords "equal treatment across-the-board." Mot. at 35. Equal-protection analysis requires the Court to look beyond the words printed on a page to "consider the facts and circumstances behind the law," *Williams*, 393 U.S. at 30, and determine whether, in reality, the burdens imposed by a ballot-access scheme "restrict political participation equally" or "fall unequally." *Graveline v. Benson*, 992 F.3d 524, 535-36 (6th Cir. 2021) (internal quotation marks omitted); *see Bullock v. Carter*, 405 U.S. 134, 143-44, 149 (1972) (invalidating on equal-protection grounds a uniform primary filing fee that excluded candidates of modest means, after "examin[ing] in a realistic light the extent and nature of [its] impact"); *Lubin v. Panish*, 415 U.S. 709, 713-18 (1974) (similarly invalidating uniform filing fee with "exclusionary" impact on indigent candidates). The severe burdens that the Anti-Fusion Laws disparately impose on a party, like UKP, seeking to establish itself as a viable

contender for political support, cannot survive equal-protection review. *See Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 989 (S.D.N.Y. 1970), *summarily aff'd*, 400 U.S. 806 (1970) ("If when the Election Laws are viewed in their totality it [is] found that independent parties have been denied an equal opportunity to win the vote of the electorate or that the right to vote has been diluted or debased, then only a showing of a compelling state interest therefor can justify such restraints on First Amendment freedoms.").

Second, Defendants suggest that instead of strict scrutiny the Court should evaluate Plaintiffs' equal-protection challenge under *Anderson-Burdick*. Mot. at 35; *see supra* at 44 (explaining how a court applies this balancing test). As an initial matter, the Court should reject Defendants' invitation to analyze this equal protection claim under the *Anderson-Burdick* test. Binding precedent requires the use of strict scrutiny when, as here, an equal protection challenge implicates fundamental rights covered by Section 2. *Supra* at 64. Defendants note that federal courts of appeals use *Anderson-Burdick* to evaluate federal equal-protection challenges raised against state ballot-access restrictions. Mot. at 35. But "the Supreme Court has not yet applied [that] test to ballot-access challenges [based] on pure equal-protection grounds." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015).[44] And while Kansas courts, when evaluating a Section 2 claim, must be "guided by United States Supreme Court precedent interpreting . . . the equal-protection guarantees . . . of the federal Constitution," *LWV II*, 549 P.3d at 383, this Court is not constrained to follow the same path as lower federal courts. When, as here, the precedents of the Kansas Supreme Court direct otherwise, that route is foreclosed.

Even if the Court accepted the Defendants' invitation to apply an *Anderson-Burdick*

[44] Again, as noted in *Reform Party*, *Timmons* involved a federal free-association challenge to Minnesota's anti-fusion statutes; "no equal protection claim was asserted or considered by the [Supreme] Court" in *Timmons*. 174 F.3d at 312-18.

analysis, the outcome of the analysis would not change. Where the disparate burden imposed on the equal opportunity to participate in the political process is "severe, the [restriction] will be upheld only if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Graveline*, 992 F.3d at 534 (quoting *Burdick*, 504 U.S. at 434). If the statute is "minimally burdensome" and "nondiscriminatory," then it can be justified by "important regulatory interests." *Id.* at 535; *Green Party*, 791 F.3d at 693. And where the burden falls somewhere in between, courts apply an intermediate level of review that "weigh[s] the burden on the plaintiff[ ] against the state's asserted interest and chosen means of pursuing it." *Green Party*, 791 F.3d at 693; *see also Graveline*, 992 F.3d at 535. In all events, courts must be wary of "burdens that fall unequally on new or small political parties or independent candidates," and "focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of [participants] from the electoral process." *Graveline*, 992 F.3d at 535-36 (quoting *Anderson*, 460 U.S. at 793-94).

The burdens on rights essential to Plaintiffs' meaningful participation in the electoral process qualify as "severe," as courts applying the *Anderson-Burdick* test have interpreted the term. In *Green Party*, the court concluded that requirements for recognized minor parties to retain their ballot access were unjustifiably "severe," especially as compared to the less-demanding requirements placed on major parties. 791 F.3d at 694; *see Patriot Party*, 95 F.3d at 269. In *Graveline*, the court found that signature-petition requirements under which no unaffiliated candidate had ever succeeded in obtaining ballot access imposed a "severe burden" on the rights of independent candidates, noting that "the hallmark of a severe burden is exclusion or virtual exclusion from the ballot." 992 F.3d at 543-44. By these same standards, the burden on Plaintiffs here is undeniably "severe." Whereas these other schemes at least in theory left open a path, albeit a difficult one, to ballot access, Plaintiffs here face an insuperable barrier.

As in *Graveline,* the history here also confirms the onerous nature of the Anti-Fusion Laws' cumulative impact, relegating upstart parties like UKP and their voters to the ranks of a permanent electoral under-class. *See Patriot Party*, 95 F.3d at 269 ("[W]e must measure the totality of the burden that the laws place on the voting and associational rights of political parties and individual voters . . . ."). In more than a century since enactment of the Anti-Fusion Laws, no minor party has won a statewide or federal election in Kansas, with their candidates rarely surpassing single-digit support. *Supra* at 6-7 & nn.13-14. Since 1912, major party candidates have won 99.8% of state legislative elections. *Id.* By highlighting a total of *four* well-known candidates who won in *other* states without the backing of a major party *since 1970*, Defendants reinforce this point. Mot. at 24.

Even if the Court deemed the burdens here to be short of "severe," given the speculative nature of the state interests claimed to justify them—and the readily available, far less burdensome and non-discriminatory means for the State to address its concerns—the Anti-Fusion Laws could not withstand even an intermediate level of scrutiny. *See Anderson*, 460 U.S. at 792-94 (striking down Ohio filing requirements for independent candidates that limited "the availability of political opportunity," "discriminate[d] . . . against those voters whose political preferences lie outside the existing political parties," and "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group"); *Green Party*, 791 F.3d at 694. In short, regardless of the degree of scrutiny applied, these barriers to Plaintiffs' equal enjoyment of their rights "to participate in the establishment or management of government . . . to exercise the right of suffrage and to hold office," *Fatzer*, 179 Kan. at 439-40, are repugnant to the promise of Section 2, and must be set aside.

IV. The Court Must Disregard the Extra-Pleading Assertions and Adverse Inferences in Defendants' Motions to Dismiss

For the reasons stated above, the undisputed material facts establish that Plaintiffs have

standing and are entitled to judgment on the merits as a matter of law. Thus, Plaintiffs have conclusively rebutted the two grounds upon which Defendants seek dismissal—a lack of standing and a failure to state a claim. Put otherwise, by granting Plaintiffs' motion for summary judgment, the Court would necessarily deny Defendants' Motions.

However, to the extent that the Court does not grant in its entirely Plaintiffs' motion for summary judgment or otherwise finds it necessary to separately assess Defendants' Motions, it is crucial that their Motions are reviewed under the appropriate standards. Defendants fashion their Motions as seeking dismissal under K.S.A. 60-212(b), which requires that the Court and parties "only consider the plaintiff's petition and any documents attached to it," "drawing all reasonable inferences in [Plaintiffs'] favor." *Minjarez-Almeida v. Kan. Bd. of Regents*, 63 Kan. App. 2d 225, 233, 242, 527 P.3d 931 (2023); *see* Mot. at 7-8, 12-13.

But, in reality, Defendants are asking the Court to determine that Plaintiffs lose on the merits by (1) disputing facts properly pled in the Petitions; (2) demanding the Court accept the truth of material outside the Petitions; and (3) urging the Court to make inferences in Defendants' favor. Kansas law prohibits this approach, and requires instead that Defendants' Motions to dismiss (in contrast to Plaintiffs' motion for summary judgment) be decided solely on the basis of the Petitions, that all well-pled allegations therein and inferences reasonably drawn therefrom be taken as true, and that every factual dispute be resolved in Plaintiffs' favor. *Supra* at 18-19 (citing, *inter alia, C-U-Out*, 310 Kan. at 775; *Rogers*, 551 P.3d at 146-47, 149-51).

The Motions are littered, though, with statements from Defendants with no basis in the Petitions, that require inferences drawn *against* Plaintiffs, and that are, in fact, untrue. For example, Defendants seek to contort the historical record, seeking to mask the undisputedly anti-competitive origins of anti-fusion restrictions with the sensible motives to transition from party ballots to state-

printed ballots years earlier. Mot. at 2-5, 19. Defendants also assert that "few individuals in Kansas today are even familiar with the concept of fusion voting" and "most voters have never even heard of it and would find the concept of a candidate's name appearing on multiple lines of the ballot somewhat bewildering." *Id.* at 2, 28. They insist that "fusion voting incentivizes mischief by candidates and parties alike," "major parties are more impacted by the fusion ban than minor parties," and cross-nominations "tend[ ] to further polarize, rather than depolarize, electoral competition in state and local races." *Id.* at 23, 25. Additional examples abound.[45] This case is a textbook example of defendants seeking to dismiss a case at the pleading stage by attempting to introduce facts that go well beyond the four corners of a petition.

But this is not the only factual problem with the Motions: Defendants also invite the Court

[45] A non-exhaustive list includes: Mot. at 10 ("United Kansas might even convince Ms. Blake to use the United Kansas designation, rather than the Democratic Party, on the ballot."); *id.* at 12 ("[T]he reason that United Kansas would not appear next to his name on the ballot would be due to Ms. Blake's own decision to decline the nomination of the United Kansas Party."); *id.* at 25 ("[A] major political party could create multiple minor parties—a relatively easy task given that it need only obtain the signatures of 2% of the total number of votes cast for gubernatorial candidates in the preceding general election, and then have its preferred candidate appear many different times on the same ballot."); *id.* ("[A] fringe candidate could attempt to rack up multiple nominations from minor parties by obtaining the bare minimum of signature petitions with little support from the general electorate."); *id.* ("[A] minor political party could effectively circumvent the rules for attaining major political party status—which requires the receipt of at least 5% of the total votes cast for all candidates for governor in the preceding general election and thus be able to nominate their candidates in a primary election (versus having to convene a delegate or mass convention, which the party must fund itself), and avoid the loss of recognition rules."); *id.* at 26 ("Fusion voting disincentivizes minor parties from identifying new standard-bearers who best represent that party."); *id.* ("Allowing minority parties to simply select already-popular candidates of major parties 'decreases real competition.'"); *id.* at 28 ("Voters are also likely to be confused by what positions a party and candidate actually stand for, whether the cross-nominated candidate will be more faithful to the issues and positions of one party versus another."); *id.* at 32 ("The casting of a vote via a secret ballot does not send any sort of expressive message."); *id.* at 36 ("The only reason that United Kansas might not appear on the ballot in November is because it affirmatively chose to nominate a candidate who it believes will also be nominated by the Democratic Party, and that candidate in turn opted to have his name listed on the general election ballot as the nominee of the Democratic Party rather than United Kansas.").

to rely upon numerous inferences reached by other courts in other cases with different facts. Not only is it inappropriate on a motion to dismiss to rely upon facts outside of the Petition and to draw inferences against the Plaintiffs, but a court is never permitted to simply take notice of contested findings (even if they may be taken as "findings," rather than assumptions) from a separate proceeding. *Bordman*, 243 Kan. at 459. For example, Defendants ask this Court to credit conclusions that cross-nominations "decrease[ ] real competition," Mot. at 26 (quoting *Swamp*, 950 F.2d at 385), that the process of casting a ballot cannot "inspire any sort of meaningful conversation regarding political change," *id.* at 31 (quoting *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022), *cert. denied*, 144 S. Ct. 76 (2023)), and that minor "parties that put in the hard work to appeal to the broader electorate can . . . achieve success in the absence of fusion," *id.* at 23-24 (citing *Timmons*, 520 U.S. at 361 & n.9). Again, other examples abound.[46]

Thus, the Court must disregard these extraneous factual contentions and assertions in Defendants' Motions, and resolve their Motions based solely on the allegations contained in and documents affixed to the Petitions.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for summary judgment should be granted in its entirety, and Defendants' Motions to dismiss should be denied.

Respectfully submitted,

HARTENSTEIN POOR & FOSTER LLC

/s/ Scott Poor

[46] A non-exhaustive list includes: Mot. at 24 (asking the Court to credit prediction in *Timmons* that cross-nominations could "transform[ ]" the "general election ballot . . . [in]to a billboard for political advertising," especially in the context of "judicial elections"); *id.* at 26 (asking the Court to credit supposition in *Timmons* that a minor party could illegitimately "inflate its support by cross-nominating the major party's candidate"); *id.* at 27 (asking the Court to credit assumption in *Swamp* concurrence that "one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election").

SCOTT B. POOR (KS Bar No. 19759)
scottpoor@gmail.com
SARAH FOSTER (KS Bar No. 14470)
sarah@smfosterlaw.com
200 W Douglas Ave, Suite 600
Wichita, Kansas 67202
T: (316) 267 2315
F: (316) 262 5758

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

SHARP LAW LLP

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

UNITED TO PROTECT DEMOCRACY

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

HOLLAND & KNIGHT LLP

JOHN F. WOOD*
john.f.wood@hklaw.com
BRENDAN H. CONNORS*
brendan.connors@hklaw.com
800 17th St NW, Suite 1100
Washington, DC 20006
T: (202) 955 3000
F: (202) 955 5564

ZACHARY WATTERSON*
zachary.watterson@hklaw.com
560 Mission St, Suite 1900
San Francisco, California 94105
T: (415) 743 6900
F: (415) 743 6910

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

**Admitted pro hac vice*

REQUEST FOR IN-PERSON HEARING AND ORAL ARGUMENT

Plaintiffs request an in-person hearing and oral argument on Plaintiffs' Motion for Summary Judgment and Defendants' Motions to Dismiss before the Honorable Jared B. Johnson, District Court Judge of Saline County, at a time and date to be determined by the Court.