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

UNITED KANSAS INC., ET. AL.,

Plaintiffs – Appellants,

v.

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

Defendants – Appellees

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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Despite defendants' reliance on *Timmons* and criticism of plaintiffs for supposedly looking past a "century of consistent practice and nearly unanimous case law," Defs.' Br. 2, defendants make little effort to defend *Timmons*'s reasoning. That choice is the Achilles' heel of defendants' position before this Court.

As plaintiffs explained in their opening brief, *Timmons*'s reasoning is flawed. *Timmons* improperly considered alternative forms of speech and association to cross-nominating candidates—such as campaigning for, endorsing, and then voting for candidates—when concluding that anti-fusion laws do not impose severe burdens on speech and association. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997). That reasoning from *Timmons* contravenes numerous other, better-reasoned free speech and association decisions rejecting the premise that the availability of other avenues of speech and association can excuse restrictions on speech—particularly when those alternatives lack the same degree of effectiveness. Pls.' Br. 20-22, 25-26.

In response, defendants primarily rely on the unsubstantiated assertion that plaintiffs' view is "[f]alse," Defs' Br. 22, and that plaintiffs' supporting precedents are distinguishable on their facts, Defs' Br. 25-27. Neither point should persuade. As a threshold matter, defendants' view that a court may consider the availability of other avenues of speech and association when calculating the burden of anti-fusion laws would give the government excessive power to pick and choose how citizens can engage in speech and association. What is more, defendants' attempts to distinguish plaintiffs' cases

explaining why the consideration of other avenues of speech remains improper on their mere facts cannot be squared with defendants' own (correct) observation elsewhere that "*[a]nyone* reasonably familiar with the work of the U.S. Supreme Court" should know "that the Court takes cases to address much broader themes," Defs' Br. 23 (emphasis added), than the facts of any particular case. Defendants cannot have it both ways.

Accordingly, as a matter of Kansas constitutional law, this Court should follow the view that alternative methods of speech and association do not excuse restrictions on speech and association. *E.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000). If this Court takes that view, then defendants' remaining position collapses. The district court erred by minimizing the burden imposed by anti-fusion laws simply because other, unrelated forms of political speech and association are available. In the alternative, it also erred by crediting other methods of speech and association that lack the same effectiveness and/or deliver a different message. *E.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (plurality) (opinion of Roberts, C.J.) ("*WRTL*"). Either way, the Kansas anti-fusion laws should be understood to impose a severe burden on plaintiffs' "right to select their nominees for public office." *Jones*, 530 U.S. at 576 (cleaned up).

Thus, strict scrutiny is called for *even under defendants' suggested Anderson-Burdick framework*, Defs.' Br. 10 (explicating framework), and there is no resulting risk of sliding down a slippery-slope by which every election law must be judged under strict scrutiny, as defendants warn. Defs.' Br. 21-22. Rather, the *Anderson-Burdick* framework itself only requires strict scrutiny when laws impose a severe burden on speech and

association.[1] Defendants (to their credit) do not appear to contest the point that their motion to dismiss should be denied if strict scrutiny applies, Pls.' Br. 28-35, and instead focus on their argument that anti-fusion laws can withstand lower levels of scrutiny, Defs.' Br. 28-40. That gives up the game.

As a result, this Court should conclude that anti-fusion laws impose a severe burden on speech and associational rights protected by the Kansas Constitution, apply strict scrutiny, and reverse and remand to the district court with instructions to deny the motion to dismiss. Further, plaintiffs respectfully request a ruling by **January 31, 2026** so that plaintiffs have sufficient time to seek—if appropriate—additional relief before the 2026 election season in order to prevent a recurrence of the same constitutional harms they suffered in 2024, particularly as those harms cannot be fully remedied at a later date.

ARGUMENT AND AUTHORITIES

I. The anti-fusion laws impose a severe burden on speech and association.

A. Defendants (and Timmons) erroneously consider the availability of other mechanisms of speech and association when determining the burden that Kansas's anti-fusion laws impose.

While the parties disagree as to whether *Timmons* should be followed as persuasive authority, both sides appear to agree on one thing: *Timmons* considers the availability of other methods of engaging in political speech and association when determining the burden

[1] To be sure, plaintiffs still maintain that strict scrutiny is appropriate given the text and history of the Kansas Constitution. Pls.' Br. 14-27. However, if the Kansas anti-fusion laws impose a severe burden on speech and association, this Court need not resolve the issue of whether the *Anderson-Burdick* standard or a heightened standard applies because the result (strict scrutiny) would be the same.

that anti-fusion laws place on minor parties. *See* 520 U.S. at 362–63; Defs.' Br. 22. Indeed, the supposed fact that Minnesota's anti-fusion laws "[did] not restrict the ability of the [political parties] and its members to endorse, support, or vote for anyone they like" was *the* key logical building block for the U.S. Supreme Court's "conclu[sion] that the burdens Minnesota impose[d]" on constitutional rights with its anti-fusion ban "though not trivial—[were] not severe." *Timmons*, 520 U.S. at 363. (Defendants' other main post-*Timmons* fusion cases, Def. Br. 5—*In re Malinowski*, 332 A.3d 755, 763-64 (N.J. App. Div. 2025) & *Working Families Party v. Commonwealth*, 209 A.3d 270, 285-86 (Pa. 2019))—rely on the same inference.)

In turn then, a key question for this Court in determining whether Kansas's anti-fusion law constitutes either (i) a severe or (ii) a less-than-severe burden on speech and associational rights is whether it is appropriate for a court to consider alternative methods of speech and association *when determining the standard of review*. Defendants erroneously assert that consideration of alternate modes of speech is proper, as did the district court below. To accord the fundamental rights of speech and association the dignity that the Kansas Constitution requires, this Court should hold otherwise.

While defendants accuse plaintiffs of "cast[ing] aside . . . case law," Defs.' Br. 2, on this critical point, the defendants are out-of-step with the principle that "unconstitutional restriction[s] upon" constitutional rights cannot be excused "simply because" the restrictions leave other constitutionally protected "activit[ies] unimpaired." *Jones*, 530

U.S. at 581.[2] That is why, for example, legislatures are not allowed to prohibit flag burning on the grounds that one may still protest the flag with words, *Texas v. Johnson*, 491 U.S. 397, 416 (1989), courts are not allowed to prohibit the peaceful wearing of a "F*** the Draft" jacket on the grounds that there are more appropriate alternatives to express frustration with U.S. foreign policy, *Cohen v. California*, 403 U.S. 15, 25-27 (1971), and the government is not allowed to ban leaflets on the grounds that one can publish books, *Reno v. ACLU*, 521 U.S. 844, 880 (1997). Instead, the "general rule" in speech and association law is to grant autonomy to those engaged in speech and associational activities so that they—and not the state—may tailor and control their messages and associations. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573-74 (1995).

B. Under the proper analysis, the Kansas anti-fusion laws should be understood to severely burden plaintiffs' speech and associational rights.

If the Court takes that same approach here and examines the burden that the Kansas anti-fusion laws place on plaintiffs' speech and association without consideration of other

[2] Under standard First Amendment analysis, other methods of speech and association only become relevant *once* the level of constitutional scrutiny has been chosen, and courts are examining whether a law survives that level of scrutiny as a *valid* time, place, and manner restriction. Only then does a court inquire into whether there are "ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In other words, while other methods of engaging in speech and association may be relevant in some instances to the question of whether a restriction *survives* constitutional scrutiny, they should not be relevant to the question of *what* the proper level of scrutiny is. Rather, a law must "must rise and fall on" its "own merits" because the government does not get to "silence" citizens' speech and association "simply because" citizens "have other opportunities for speech." *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014).

methods of speech and association, then it must conclude that anti-fusion laws impose a severe burden on plaintiffs. Pls.' Br. 22-27. Without alternative methods of speech and association as a crutch, then defendants are left only with their contention that bans on cross-nominations do not (or only barely) implicate speech and associational rights. Defs.' Br. 13-17 (association); Defs.' Br. 18-27 (speech).

That cannot be right, particularly with respect to plaintiffs' associational rights. Plaintiffs' "ability . . . to select their own candidate unquestionably implicates an associational freedom" because "[t]he members of a recognized political party unquestionably have a constitutional right to select their nominees for public office." *Jones*, 530 U.S. at 575-76 (cleaned up). Kansas's prohibition of consensual cross-nominations–namely, a political association between a candidate who wants to be the representative of a political party and a political party that wants to nominate that candidate (so there's no "hijacking," Defs.' Br. 27, involved[3])–interferes with that freedom by interfering with plaintiffs' "ability to perform the 'basic function' of choosing their own leaders." *Jones*, 530 U.S. at 580 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). While defendants suggest that being saddled with a second-choice (rather than first-choice) candidate is not that big of a deal, Defs.' Br. 16, that contention is empirically false: forcing a party to settle for a nominee "other than [the one] the part[y] would choose if left to [its] own devices,"

[3] *See also Swamp v. Kennedy*, 950 F.2d 383, 388–89 (7th Cir. 1991) (Ripple, J., dissenting, joined by Posner and Easterbook, JJ.) ("When a minor party nominates a candidate also nominated by a major party, it does not necessarily leech onto the larger party for support. Rather, it may—and often does—offer the voters a very real and important choice and sends an important message to the candidate." (cleaned up)).

itself "interfere[s] with the" party's "decisions as to the best means to promote [its] message." *Jones*, 530 U.S. at 579, 582.

The same is true of speech rights. Defendants' view that no expressive conduct is involved here, Defs.' Br. 22, sweeps too broadly, Pls.' Br. 23-27. While not everything surrounding a ballot involves expressive conduct, *e.g.*, *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 808, 549 P.3d 363, 384 (2024) ("*LWV II*"), the party's choice of nominee for that ballot remains "the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support," *Jones*, 530 U.S. at 575 (cleaned up). So nomination, at least, is the type of "activity, combined with the factual context and environment in which it was undertaken" that constitutes the "form of protected expression." *Spence v. Washington*, 418 U.S. 405, 410 (1974).

Likewise, an individual voter's choice to vote for particular candidates and parties qualifies as expressive conduct too, as "voters can assert their preferences only through candidates or parties or both." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (cleaned up); *cf. Norman v. Reed*, 502 U.S. 279, 288 (1992) (noting voters' interest in "express[ing] their own political preferences"). Thus, anti-fusion laws prohibit voters from providing an entire category of "information [that] is of immense value to the electorate" and tells "the candidate . . . which platform the majority of the voters favor." *Swamp*, 950 F.2d at 389 (Ripple, J., dissenting, joined by Posner and Easterbook, JJ.). Notably in this regard, plaintiffs seek only to make the same expressive use of the ballot as other Kansas voters

and parties are entitled under Kansas law to do, that is, to express support for both their party and their preferred candidate. And, contrary to defendants' suggestion, Defs.' Br. 20, the mere fact that plaintiffs' electoral votes also have "legal effect" does not "somehow deprive[] that activity of its expressive component" and take it entirely "outside the scope" of constitutional protections. *Doe v. Reed*, 561 U.S. 186, 195 (2010); *see also id.* at 231 (Thomas, J., dissenting) ("The Court also rightly rejects the baseless argument that . . . expressive activity falls outside the scope of the First Amendment merely because it has legal effect in the electoral process.").

As a matter of both law and Kansas history, the Kansas Constitution's protections for speech and association extend to cross-nominations. Defendants do not challenge plaintiffs' historical observation that it would be "inconceivable" that the drafters of the Kansas Constitution would "not see cross-nominations as core speech and associational activity," Pls.' Br. 19; instead, defendants (and the district court) dismiss that history as "irrelevant," Defs.' Br. 15. Far from it: as courts regularly "rel[y] on history to inform the meaning of constitutional text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022); *see also* Pls.' Br. 17-18. The only history that is irrelevant here is *defendants'* attempt to rely on the multiple decades-later enactments of the Kansas anti-fusion laws to lend those laws constitutional legitimacy, Defs.' Br. 4-5; those enactments come "simply too late" to shed on the original understanding of the Kansas Constitution, *Bruen*, 597 U.S. at 82 (Barrett, J., concurring), and "[a]ge does not" otherwise "invest a statute with constitutional validity," *State v. Hill*, 189 Kan. 403, 410, 369 P.2d 365, 370 (1962).

C. Even if alternative methods of speech and association are considered when determining the burden of the Kansas anti-fusion laws, the result should be the same because defendants' proposed alternatives are not reasonable substitutes for cross-nominations.

Even if this Court considers alternative methods of speaking and associating when assessing the burden of the Kansas anti-fusion laws (and it should not), that analysis must evaluate whether those alternatives are "reasonable" substitutes. *WRTL*, 551 U.S. at 477 n.9 (plurality) (opinion of Roberts, C.J.) (observing that judicial consideration of alternative mechanisms of speech is suspect); Pls.' Br. 25-26. In response to that argument, the defendants (beyond factual nitpicking with *WRTL*, Defs.' Br. 25-26) argue that it is "false" to say that endorsements, campaigning, and voting for candidates are not an adequate substitute to nominations, Defs.' Br. 22. That is wrong.

Defendants' response remains "too glib," *WRTL*, 551 U.S. at 477 n.9, as "evidence of some possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden," *Barr v. City of Sinton*, 295 S.W.3d 287, 302 (Tex. 2009) (examining freedom of religion claim); *see also Reno*, 521 U.S. at 879-80; *Courthouse News Serv. v. Corsones*, 131 F.4th 59, 74 (2d Cir. 2025). In particular, courts have "particular concern with laws that foreclose an entire medium of expression," *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), particularly where the prohibited acts of speech and association "have no practical substitute," *id.* at 57. That is the case here: the defendants' proposed substitutes for cross-nominations "often carr[y] a message quite distinct," *id.* at 56, from a nomination, Pls.' Br. 25-26, which remains "'the most effective way in which that party can communicate to the voters what the party represents,'" *Jones*,

530 U.S. at 575 (quoting *Timmons*, 520 U.S. at 372 (Stevens, J., dissenting)). Accordingly, the Kansas anti-fusion laws should be understood to impose a severe burden on the rights of speech and association protected by the Kansas Constitution even if this Court considers the other methods of speech and association in assessing the burden imposed by the Kansas anti-fusion laws.

* * *

Even under defendants' proposed *Anderson-Burdick* framework, regulations are "subject to strict scrutiny" when they impose a "severe restriction[]" on speech and association. Defs.' Br. 10 (cleaned up). And, as plaintiffs have previously explained, the Kansas anti-fusion laws cannot survive strict scrutiny—particularly at the motion-to-dismiss stage. Pls.' Br. 28-35. Defendants do not take the position that the Kansas anti-fusion laws are narrowly tailored (a requirement to survive strict scrutiny); instead, defendants contend that there "is no requirement that the Kansas law be narrowly tailored" because strict scrutiny does not apply. Defs.' Br. 33. That dooms their argument that anti-fusion laws survive strict scrutiny. The Court should hold that the district court erred by not applying strict scrutiny and reverse and remand with instructions to deny the motion to dismiss.

II. Reasonableness is not the right standard for judging all claims under the Kansas Bill of Rights in the elections context

Defendants, at times, argue for this Court to apply a reasonableness standard of scrutiny to the anti-fusion laws that would be even less demanding than the *Anderson-Burdick* framework. Defs.' Br. 7-10. But defendants' argument reads *LWV II* too broadly

and places too much emphasis on the *LWV II* court's references to reasonableness when discussing the remand of the constitutional due process and equal protection claims. Defs.' Br. 8-10. In particular, defendants improperly read the *LWV II* court's recitation of the substantive constitutional standard that applies to due process and equal protection claims, *see* 318 Kan. at 805-06, 549 P.3d at 383—*where reasonableness is incorporated into the underlying substantive constitutional right*[4]—as also stating the substantive standard of review that applies to *all other constitutional claims* regardless of whether they too also incorporate a reasonableness standard. But the court in *LWV II* gave no indication that it was ruling so broadly; to the contrary, it indicated that satisfying the reasonableness test for Article 5 claims did not obviate the need for the Legislature to "comply with other constitutional guarantees." *LWV II*, 318 Kan. at 805, 549 P.3d at 382. So the correct view of *LWV II* remains that the opinion sets out the standard for claims brought under Article 5 but does not purport to rewrite the constitutional standard for every other claim brought under the Kansas Bill of Rights. Pls.' Br. 37-38.

Nor is a reasonableness standard necessary to avoid a "separation of powers issue." Defs.' Br. 11-12. A constitutional grant of authority like Article 4, § 1 to a legislature does not "extinguish the State's responsibility to observe the limits established by" other constitutional provisions guaranteeing individual rights. *Tashjian v. Republican Party of*

[4] *See State v. Patton*, 287 Kan. 200, 219, 195 P.3d 753, 766 (2008) ("basic procedural due process" requires "timely and reasonable notice and an opportunity to be heard"); *In re Weisgerber*, 285 Kan. 98, 105, 169 P.3d 321, 327 (2007) (equal protection requires that a classification "must be reasonable, not arbitrary" (cleaned up)).

Conn., 479 U.S. 208, 217 (1986). Again, the Kansas Legislature "still must comply with other constitutional guarantees" when exercising its power to regulate elections, *LWV II*, 318 Kan. at 805, 549 P.3d at 382, as "[t]he power to regulate . . . elections does not justify, without more, the abridgment of . . . the freedom of political association." *Tashjian*, 479 U.S. at 217. As such, this Court should reject defendants' attempt to craft a novel, lower standard for speech and association claims and apply at least *Anderson-Burdick* scrutiny. Otherwise, the Court invites a paradox: the comparatively broader textual guarantees of speech and association in the Kansas Bill of Rights would be given a narrower interpretation than the textually narrower guarantees of speech and association in the United States Constitution. Pls.' Br. 14-19.

III. In the alternative, remand is warranted even under intermediate scrutiny.

Defendants raise four main objections to plaintiffs' alternative argument that a remand is required even if intermediate *Anderson-Burdick* scrutiny applies because the district court did not follow the proper standard of review on a motion to dismiss and improperly credited defendants' speculation to controvert the well-pleaded allegations of the petition. Pls.' Br. 36-42. None of those objections has merit.

First, defendants suggest that plaintiffs exhibit "confusion as to the appropriate temporal target" for constitutional analysis. Defs.' Br. 29. But there is no tension between (i) suggesting that the scope of Kansas constitutional rights is determined by reference to constitutional text and history as understood by the drafters, Pls.' Br. 15, and (ii) the view that constitutional scrutiny is meant to be judged under present circumstances, Pls.' Br. 40-

41. The scope of constitutional rights and the application of constitutional scrutiny are distinct concepts with distinct tests. The constitutional scope inquiry looks at whether a statutory enactment burdens constitutional rights (the scope of which are determined by reference to text and history). The constitutional scrutiny analysis considers whether the state can demonstrate a sufficient interest and appropriate tailoring to justify that burden on constitutional rights; a statute's "current burdens" on constitutional rights must be justified by "current needs." *Shelby Cnty. v. Holder*, 570 U.S. 529, 550 (2013). Defendants' false binary collapses.

Second, defendants erroneously import the legislative facts doctrine, Defs.' Br. 36-37, 42; it has no application here. Under the legislative facts doctrine, "courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). But defendants neither point to legislative *findings* from the Kansas Legislature that should control nor highlight a binding decision from the Kansas Supreme Court setting out a factual determination that this Court must follow. To the contrary, defendants' brief concedes that *Timmons* "is not binding on this Court." Defs.' Br. 36. As a result, the better course here is to follow the approach of the *LWV II* court, wherein the court "accept[ed] all allegations in the petition as true"—even when they questioned the effects of the statutory scheme passed by the Kansas Legislature—and gave the plaintiffs "their full opportunity to prove up their claims as a matter of evidence in the district court." 318 Kan. at 807, 549 P.3d at 383-84. Plaintiffs are entitled to that fair presentation here.

Third, defendants argue that speculative concerns about electoral integrity suffice as a matter of law to establish the state's legitimate interest in regulating cross-nominations. Defs.' Br. 42-43. But defendants' embrace of pure speculation, Defs.' Br. 42-43, sweeps too broadly. Plaintiffs have *never* claimed that Kansas needs to provide an "elaborate, empirical verification" to survive intermediate scrutiny; indeed, plaintiffs' opening brief disclaims any such standard. Pls.' Br. 41. Rather, plaintiffs' point is that defendants' embrace of pure speculation to *always* pass intermediate scrutiny goes too far, as "mere conjecture" can also be too little "to carry a" constitutional "burden" *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 379 (2000), particularly given that—even under the line of Sixth Circuit cases upon which defendants rely, Defs.' Br. 41—*Anderson-Burdick* "can, in many if not most cases, be a fact-intensive inquiry," *Daunt v. Benson*, 999 F.3d 299, 313 (6th Cir. 2021).

At some point in this litigation, the Kansas courts may have to more fully weigh in on the types of speculation that do—and do not—establish a sufficient evidentiary basis to satisfy constitutional scrutiny. But this Court need not address that issue *now*, because at the motion to dismiss stage plaintiffs' version controls and may not be challenged by defendants (let alone controverted on the basis of speculation). Pls.' Br. 36-37, 41-42. Thus, even if this Court applies intermediate scrutiny to examine the Kansas anti-fusion laws, it should still reverse and remand and allow this case to proceed to the next stage. Accepting the allegations of the complaint as true, the state has not shown that its interests "make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Defendants have not

offered anything other than speculation based upon supposed long-ago malfeasance that Kansas's anti-fusion laws further Kansas's claimed interests. Nor has defendants shown that less burdensome alternatives would not accomplish the goals that the anti-fusion laws seek to accomplish. Pls.' Br. 41-42.

Lastly, plaintiffs' summary judgment motion does not belie the potential need for factual developments to avoid a premature decision in this case. Defs.' Br. 41. Plaintiffs' motion for summary judgment simply reflected plaintiffs' view that defendants have nothing but insufficient speculation to back up Kansas's claimed interests—a view supported by the fact that the defendants' main historical example in their opposition brief of supposed fusion voting hijinks by parties and candidates appears to come from *1941*. Defs.' Br. 31 n.7. But that motion does not mean that plaintiffs waived the ability to proceed to discovery followed by a trial if the State could somehow come up with an evidentiary basis to substantiate its stated view on cross-nominations.

CONCLUSION

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

Respectfully submitted,
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**Pro hac vice*

***Applications for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I certify that on the 11th day of August 2025, the foregoing was electronically filed with the Clerk of the Court by using the Court's e-Filing system which will send notification of electronic filing to counsel for all parties of record.

/s/ Rex A. Sharp
Rex A. Sharp