

No. 25-128896-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

UNITED KANSAS, INC. et al.,

Plaintiffs-Appellants

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, et al.,

Defendants-Appellees

BRIEF OF APPELLEES

Appeal from the District Court of Saline County, Kansas
Honorable Jared Johnson, Chief District Judge
(Consolidated Cases -- Case Nos. SA-2024-000152 (lead) and RN-2024-000184)

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I. – INTRODUCTION

This lawsuit is, at its heart, an untenable plea for the judiciary to help Plaintiffs’ favored candidates secure the electoral successes that they have found consistently wanting at the ballot box. Plaintiffs seek to accomplish this goal by asking the Court to *mandate* the use of so-called “fusion voting,” a once common, now largely obscure, practice in which a single candidate is nominated by multiple parties in the same election and is then permitted to appear on the same ballot as the nominee of more than one party. The Kansas legislature, however, along with all but a handful of other states in the union, outlawed this mode of voting more than a century ago. Rather than taking their case to the people’s representatives in Topeka and advocating for a statutory amendment, Plaintiffs call on the Court to create – and resolve – a public policy dispute, bypass the legislative process, and overhaul long-established election procedures. This is emphatically not the role of the judiciary.

The legal theories Plaintiffs advance were squarely rejected by the U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). They likewise have been rejected by every state’s highest court (save New York) to evaluate such claims under their own state constitutions. The arguments fare no better in Kansas. Indeed, the selection of a specific methodology for conducting elections in this State is a matter that our Constitution expressly and exclusively assigns to the legislature. *See* Kan. Const. art. 4, § 1.

If Plaintiffs desire to change the basic ballot mechanism by which candidates are elected in Kansas, they are free to make their case to the legislature. But there is nothing *legally* infirm about the State’s current practices, and it is not the place of this Court to dictate a fundamentally new electoral process just because Plaintiffs believe that it might

yield candidates who more closely share their vision and values. It is hard to imagine anything more likely to diminish the public's confidence in the integrity of the electoral process or its respect for the judicial institution itself.

Plaintiffs' attempt to cast aside more than a century of consistent practice and nearly unanimous case law is predicated on a cobbling together of dissenting opinions, out-of-context quotations from inapposite decisions, and law review articles and commentaries from academics and advocacy organizations wishing to change the political order. These pleas are directed at the wrong branch of government. The issues here, on the other hand, are purely legal in nature and the district court properly dismissed Plaintiffs' causes of action for failure to state a claim upon which relief can be granted.

II. – STATEMENT OF ISSUES

- A. Does Kansas' prohibition against fusion voting violate Plaintiffs' freedom of association and freedom of speech rights under Sections 3 and 11 of the State Constitution's Bill of Rights?
- B. Are Kansas' interests in its fusion voting prohibition sufficient to overcome any minimal burden on Plaintiffs?

III. – BACKGROUND / STATEMENT OF RELEVANT FACTS

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

Kansas' laws prohibiting fusion voting represent the norm across the United States. Forty-three states prohibit fusion tickets either directly or indirectly. *See Timmons*, 520 U.S. at 357 (“[I]n this century, fusion has become the exception, not the rule.”).¹ Only four

¹ Sixteen states (including Kansas) directly prohibit fusion in at least some elections. *See* Del. Code Ann. tit. 15, § 4108; Ga. Code Ann. § 21-2-137; Ill. Comp. Stat. Ch. 10, § 5/7-12(9); Ind. Code § 3-10-1-15; K.S.A. 25-213(c); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25; Minn. Stat. § 204B.06; Mo. Rev. Stat. § 115.351; Neb. Rev.

states – New York, Connecticut, Vermont, and Oregon – permit and regularly use fusion candidacies.²

Fusion bans are deeply rooted in historical efforts to reform the electoral system. Until the late 1800s, there was “no official ballot” or “official list of candidates,” and all ballots cast in American elections were either write-in ballots or printed by political parties themselves with no state oversight. Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 Colum. L. Rev. 873, 876 (2000). That meant local party bosses effectively controlled which candidates appeared on party-printed ballots, which facilitated demanding bribes from candidates to be included on the ballot and printing counterfeit ballots of a rival party with substituted names to deceive voters into voting for their opponents. *Id.* at 883.

Stat. § 32-612(2); N.J. Stat. Ann. § 19:13-4; 25 Pa. Cons. Stat. Ann. § 2870(f); S.C. Code Ann. § 7-11-10(C); Tenn. Code Ann. § 2-5-101(f)(1); Tex. Elec. Code Ann. § 162.015; Wis. Stat. Ann. § 8.15(7). Seven states allow a candidate to accept only one nomination. *See* Iowa Code § 49.39; Mich. Comp. Laws § 168.692; Mont. Code Ann. § 13-10-303; N.D. Cent. Code § 16.1-12-06; S.D. Codified Laws § 12-6-3; Utah Code Ann. § 20A-9-201(2)(a)(ii); Va. Code § 24.2-511. Twenty states and the District of Columbia effectively prohibit fusion tickets by requiring that a candidate be registered in the party from which he seeks nomination. *See* Ala. Code §§ 17-16-21, 17-16-14; Alaska Stat. § 15.25.030(14); Ariz. Rev. Stat. Ann. § 16-311(A); Cal. Elec. Code § 8002.5(a); Colo. Rev. Stat. § 1-4-601(2); D.C. Code Ann. § 1-1001.08; Fla. Stat. § 99.021(1)(b); Haw. Rev. Stat. § 12-3(a)(7); Me. Rev. Stat. tit. 21-A, § 334; Md. Elec. Law § 5-203; Mass. Gen. L. ch. 53, § 48; Nev. Rev. Stat. § 293.177; N.H. Rev. Stat. Ann. § 655:14; N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18; N.C. Gen. Stat. § 163-106; Ohio Rev. Code Ann. § 3513.07; Okla. Stat. tit. 26, § 5-105; R.I. Gen. Laws § 17-14-1; W. Va. Code § 3-5-7; Wyo. Stat. § 22-5-204. Arkansas has election code procedures that make it practically impossible for a person to be nominated by multiple parties and appear on the ballot accordingly.

² *See* N.Y. Elec. Law §§ 6-120, 6-146, 9-112(4); Conn. Gen. Stat. §§ 9-242, 9-453(t); Vt. Stat. Ann. § 2474; Or. Rev. Stat. § 254.135. And only New York and Connecticut utilize the methodology Plaintiffs propose here in which a candidate’s name may appear multiple times on the same ballot under the banner of different political parties.

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

With the use of single omnibus ballots printed by the government, Kansas, along with many other states, also recognized the need for related reforms as well, including the basic structure of the ballot, registration rules, and provisions designed to ensure that ballots do not become overcrowded or confusing. See R. Alton Lee, *Anti-Fusion Laws in Populist Kansas*, Heritage of the Great Plains (Winter 2014); James Gray Pope, *Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States*, 50 Rutgers L. Rev. 473, 484 (1998). These restrictions included requiring a minimum number of signatures for nominating petitions, see 1901 Kan. Sess. Laws, Ch. 177, § 3, preventing the use of symbols or emblems by one political party that might be mistaken for those used by a different party, *id.* § 4, and restricting individuals from receiving two or more nominations for the same office, *id.* § 5.

Kansas’ ban on fusion voting has thus existed since 1901 and has been part of the framework of the State’s electoral process ever since. Until this case, the prohibition went unchallenged for nearly 125 years, a fact that further counsels in favor of judicial restraint

in evaluating Plaintiffs’ attack. *See Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020) (“‘Long settled and established practice’ may have ‘great weight’ in a proper interpretation of constitutional provisions” about the operation of government) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

B. Courts Have Uniformly Upheld Fusion Voting Prohibitions

As the district court recognized, (R. II, 224-25), in the roughly 135 years since the early enactments against fusion voting first took hold, courts have *uniformly* upheld these restrictions, reasoning that voters are free to vote for any candidate they wish and that these laws advance valid state interests in ballot integrity and management, reducing voter confusion, and preventing abuses. *See In re Malinowski*, 332 A.3d 755, 764-69 (N.J. Super. App. Div. 2025); *Working Families Party v. Commonwealth*, 209 A.3d 270, 284-86 (Pa. 2019); *Ray v. State Election Bd.*, 422 N.E.2d 714, 719 (Ind. Ct. App. 1981); *State v. Dunbar*, 230 P. 33, 38 (Idaho 1924); *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 957-61 (Mo. 1914); *State ex rel. Metcalf v. Wileman*, 143 P. 565, 566-67 (Mont. 1914); *Gardner v. Ray*, 157 S.W. 1147, 1151-53 (Ky. 1913); *People ex rel. Schnackenberg v. Czarnecki*, 100 N.E. 283, 286-87 (Ill. 1912); *State ex rel. Curyea v. Wells*, 138 N.W. 165, 166-67 (Neb. 1912); *Hayes v. Ross*, 127 P. 340, 342 (Utah 1912); *State v. Superior Ct. of King Cnty.*, 111 P. 233, 235-38 (Wash. 1910); *State ex rel. Fisk v. Porter*, 100 N.W. 1080, 1081 (N.D. 1904); *State ex rel. Runge v. Anderson*, 76 N.W. 482 (Wisc. 1898); *State ex rel. Bateman v. Bode*, 45 N.E. 195 (Ohio 1896); *Todd v. Bd. of Election Comm’rs*, 64 N.W. 496 (Mich. 1895).

The only exceptions are a 1910 decision from New York, *Matter of Callahan*, 93 N.E. 262 (N.Y. 1910) – one of just two states where fusion voting is still allowed with

cross-nominated candidates appearing on separate ballot lines – and a 1902 California Supreme Court opinion that has been thoroughly repudiated and constitutionally abrogated. (R. II, 27-28) (citing history of *Murphy v. Curry*, 70 P. 461 (Cal. 1902)).³ To the best of Defendants’ knowledge, no court has *ever* accepted Plaintiffs’ theory that strict scrutiny should be applied to constitutional challenges to these laws.

C. Plaintiffs’ Recitation of the Facts

This case turning on purely legal issues and having been decided at the motion to dismiss stage, the *relevant* factual background is undisputed. Defendants generally take no issue with Plaintiffs’ Statement of Facts or the summary of allegations articulated by the district court in its Memorandum Decision and Order. (R. II, 226-28). Defendants do point out, however, that any legal conclusions in Plaintiffs’ Petition (and their Statement of Facts on appeal) are immaterial and must not be accepted as true. *Duckworth v. City of Kansas City*, 243 Kan. 386, 391, 758 P.2d 201 (1988). Nor is the Court required to accept as true any “conclusory allegations” about “the legal effects of events.” *Weil & Assocs. v. Urban Renewal Agency of Wichita*, 206 Kan. 405, 413, 479 P.2d 875 (1971).

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

IV. – ARGUMENT

A. Kansas’ Prohibition Against Fusion Voting Fully Comports with Plaintiffs’ Rights to Freedom of Association and Speech Under the State Constitution

Kansas’ prohibition against fusion voting is fully consistent with Plaintiffs’ freedom of association and speech rights under Sections 3 and 11 of the Kansas Constitution’s Bill of Rights. Notwithstanding an on-point decision from the U.S. Supreme Court rejecting their legal theories, Plaintiffs insist that the State Constitution affords much broader rights than its federal counterpart. (Pls.’ Br. at 12-19). Plaintiffs thus contend that their attack on the law should be subjected to strict scrutiny because of the supposedly severe burden the fusion voting ban imposes on their state constitutional rights. These arguments fail as a matter of law.

1. A Highly Deferential Standard Must Be Applied

The district court correctly held that Kansas’ Constitution confers broad discretion upon the legislature to regulate the structure and administration of elections, which necessarily warrants considerable deference. (R. II, 231-232). Indeed, Article 4, § 1 of our Constitution assigns sole authority to the legislature over decisions regarding the specific voting methodology to be used in any state election. *See id.* (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added). (R. II, 231). The Kansas Supreme Court recently reinforced that point when it noted, “Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government

in concrete constitutional commands.”). *League of Women Voters v. Schwab*, 318 Kan. 777, 797, 549 P.3d 363 (2024) (“*LWV II*”). That express delegation of power, the district court concluded, “confers upon lawmakers the power to select *any reasonable* mode of voting for state elections.” (R. II, 231). Such principle follows naturally from the Supreme Court’s adoption of the standard governing another constitutionally delegated electoral power to the legislature – the right to impose “proper proofs” pursuant to Article 5, § 4 – an authority deemed to encompass “any *reasonable* provision for ascertaining who is entitled to vote.” *LWV II*, 318 Kan. at 380; (R. II., 231-232). The most logical standard to apply to Plaintiffs’ freedom of association claim, therefore, is one of simple reasonableness, as Defendants urged below. (R. I, 127-128; R. II, 22-25).

Plaintiffs attempt to minimize the importance of Article 4, § 1 by suggesting the Supreme Court in *LWV II* declined to apply a reasonableness standard to the due process and equal protection claims at issue there. (Pls.’ Br. at 37-39). Not true. Demonstrating fidelity to the principle that proper constitutional interpretation requires reading each provision “in the context of the Constitution as a whole,” not as isolated protections and guarantees, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325-26 (2015), the Court clearly incorporated the reasonableness standard applicable to claims under Articles 4 and 5 into the flexible tests it adopted for evaluating equal protection and due process challenges to the State’s signature verification requirements. That is why the Court held that “[t]o comply with equal protection in the context of providing ‘proper proofs’ of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with *reasonable uniformity* upon objective standards.” *LWV II*, 318 Kan. at

383 (emphasis added); *id.* at 384 (correct legal inquiry is whether the “signature requirement (and its implementing regulations and policies) . . . achieve *reasonable uniformity* on objective standards, and does it provide *reasonable notice* of defects and an opportunity to cure?” (emphasis added). It is similarly why the Court held that “[t]o comply with due process guarantees, any proper proofs devised by the Legislature must include *reasonable notice* to the voter and an opportunity to be heard at a meaningful time and in a meaningful manner by providing an opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies.” *Id.* (emphasis added).

Plaintiffs also miss the mark when they argue that remand in *LWV II* would have been unnecessary if the Supreme Court had intended to apply a reasonableness standard to the constitutional claims at issue there. The Court made clear that it was weaving a general reasonableness approach into the constitutional claims’ tapestry. But it remanded the case because it had adopted a new standard and, despite the substantial flexibility of that test, it felt the plaintiffs should have the chance to argue that the challenged signature verification law and its implementing regulations (the latter of which had never been examined by the lower courts since the regulations were not adopted until after the claims were dismissed) did not meet the newly articulated criteria. *Id.* at 384. The opinion cannot plausibly be read as endorsing a strict scrutiny level of analysis whenever a plaintiff wages a separate line of attack under the Bill of Rights against a law over which the Kansas Constitution confers broad and exclusive discretion upon the legislature to determine the contours.

This is all the more true given that no suspect class is involved and the challenged law applies even-handedly to all political parties and individuals (a point that Plaintiffs no

longer even contest, having abandoned their equal protection claim on appeal). Moreover, Article 4, § 1 was adopted by the People via referendum in November 1974, more than 115 years after the Bill of Rights was enshrined in the Constitution. It makes no sense to suggest that the vast authority delegated to the legislature by this provision is essentially toothless because the judiciary can simply sweep in and subject any voting methodology adopted by legislators to strict scrutiny whenever a plaintiff claims a particular mode of voting violates the Bill of Rights. *Cf. LWV II*, 318 Kan. at 378 (embracing “statutory interpretive principle that a specific provision controls over the more general one”).

Even if this Court were to find a general reasonableness standard inapplicable, *at worst*, a balancing test along the lines of the *Anderson-Burdick* standard utilized by the federal judiciary would govern. Under this standard, courts “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the state as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). “[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the challenged law is exposed to far less searching review that is closer to rational basis and “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Burdick*, 504 U.S. at 434.

Moreover, the burden of a nondiscriminatory law is analyzed *categorically* under *Anderson-Burdick*, without consideration of “the peculiar circumstances of individual voters.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 206 (2008) (Scalia, J., concurring); *cf. id.* at 190 (plurality opinion) (noting that *Burdick* held that reasonable, nondiscriminatory election law imposed only a minimal burden despite preventing “a significant number of voters from participating in Hawaii elections in a meaningful manner”) (cleaned up); *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) (“One less-convenient feature does not an unconstitutional system make.”); *Memphis A. Philip Randolph Instit. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) (same).

The district court held that it need not stake out a position as to whether a general reasonableness test or *Anderson-Burdick* balancing should be invoked. (R. II, 233). It concluded that the tests substantially overlap and that the standard outlined in *LWV II* “carries similarities to the *Anderson-Burdick* framework.” (R. II, 233). The court thus held that “the factors utilized by the *Anderson-Burdick* analysis are the appropriate standard of review in this case and consistent with the reasonableness test from *LWV II*.” (R. II, 234). That is true enough when – as here – the law inflicts no severe burden on Plaintiffs and is nothing more than a reasonable and nondiscriminatory restriction rooted in legitimate state interests. Particularly in the election law context, states are entitled to a wide berth in fashioning their regulatory framework, and Kansas’ fusion ban nowhere runs afoul of those limits.

2. Strict Scrutiny Would Invite Separation of Powers Problems

In adopting the reasonableness test described above, the Court in *LWV II* recognized the need for legislative latitude and rejected a strict scrutiny standard. This makes eminent

sense: application of strict scrutiny to claims attacking the mode of voting selected by the legislature would render Article 4, § 1 a dead letter. It would also introduce a separation of powers issue by effectively stripping the legislature of a core power afforded to it by the Constitution. *See Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986) (describing broad power delegated to legislature to adopt such reasonable regulations and restrictions for the exercise of the elective franchise as it may be deemed necessary) (citing *Taylor v. Bleakley*, 55 Kan. 1, Syl. ¶ 1, 39 P. 1045 (1895)).

To be sure, legislative policy-based judgments, even in this sphere, must comport with other constitutional provisions. *See LWV II*, 318 Kan. at 382 (“In designing a process of providing proper proofs, the Legislature still must comply with other constitutional guarantees such as those of equal protection and due process.”); *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015) (“As a general rule, the legislature may enact legislation to facilitate or assist in the operation of a constitutional provision, but such legislation must be in harmony with and not in derogation of the constitution.”). But as Defendants noted below (R. II, 25), when the factors consistently applied to assess a potential separation of powers concern are taken into account – (1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time, *Solomon*, 303 Kan. at 526 – it is clear that substantial deference must be afforded to the legislature. The specific process by which our elections are conducted is an

issue textually committed to the legislative branch. The process is also one which is inherently policy-laden, with judgments to be made that are beyond the expertise and outside the proper role of the judiciary.

Plaintiffs allege that they created their political party to “reduce partisanship and promote consensus and compromise.” (Pls.’ Br. at 7). To have to come up with their own candidates, they complain, would “pull[] votes away from the more moderate of the two major-party candidates and help[] to elect the more extreme option.” (*Id.*). Of course, if it is true that more polarizing candidates are being elected (and that is an assessment in the eye of the beholder), it is because the electorate itself is more polarized. What Plaintiffs are proposing, therefore, is to have the Court subvert the will of the people. From a legal perspective, however, the salient point is that putting the Court in the position of determining whether a particular voting methodology is better than another, or more likely to result in what some factions believe will be a superior outcome or candidate, not only usurps the authority of the legislature and presents a non-justiciable question, but it also deprives the citizenry of a power allocation that it specifically approved at the ballot box, a matter that is fundamental to our system of checks and balances.

3. The Text of Section 3 of the Kansas Constitution’s Bill of Rights Does Not Support Plaintiffs’ Legal Standard on their Freedom of Association Claim

In their freedom of association cause of action, Plaintiffs suggest that the difference in wording between Section 3 of the Kansas Constitution’s Bill of Rights and the First Amendment to the U.S. Constitution must yield a broader reading under the former than the latter. (Pls.’ Br. at 15-17). But other than asserting general platitudes that the Kansas

and Federal Constitutions need not be interpreted in lock-step, Plaintiffs offer no persuasive reason *why* the particular provisions at issue here compel heightened scrutiny to the State’s ban on fusion voting.

Section 3 dictates: “The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances.” Plaintiffs contend this language gives Kansans “greater protection of opportunities for collective action in public affairs” than does the U.S. Constitution. (Pls. Br. at 17). Plaintiffs cite no case law to support this proposition, and Defendants are unaware of any. Tellingly, many states have language virtually identical to Section 3’s affirmative “right to . . . consult for the common good” in their own constitutions, and *not one* has interpreted its freedom of association protections to invalidate a prohibition against fusion voting in the approximately 135 years since those bans first began taking effect. Just the opposite in fact. At least eleven state supreme courts (along with New Jersey’s intermediate court of appeals, earlier this year) have rejected freedom of association constitutional challenges to fusion voting bans based on those identical state constitutional provisions. *See, e.g.*, Idaho Const., art. I, § 10; Ill. Const., art. I, § 5; Ky. Const., Bill of Rights, §1 “Sixth”; Mich. Const., art. I, § 3; Mo. Const., art. I, § 9; Neb. Const., art. I, § 19; N.J. Const., art. I, ¶ 18; N.D. Const., art. I, § 5; Ohio Const., art. I, § 3; Pa. Const., art. I, § 20; Wash. Const., art. I, § 4; Wisc. Const., art. I, § 4; *see also* Part III.B, *supra*.

Beckoning to history, Plaintiffs highlight that fusion voting was common in the first few decades after Kansas joined the Union, whereas political parties were largely unknown

at the time the First Amendment was ratified. (Pls. Br. at 18-19). This proves nothing. For one thing, if the Court is to focus on snapshots in time, it would have been unfathomable to the State's Founding Fathers when they adopted the Wyandotte Constitution that anyone other than white males could vote. *See* Kan. Const., art. V, § 1 (1859) ("Every white male person, of twenty-one years and upward, . . . who shall have resided in Kansas six months next preceding any election . . . shall be deemed a qualified elector."); *see also id.* art. VIII, § 1 ("The militia shall be composed of all able-bodied white male citizens."). In fact, racially segregated schools were entrenched and even approved by our Supreme Court. *See Graham v. Bd. of Educ. of City of Topeka*, 153 Kan. 840, 114 P.2d 313 (1941).

In addition, the U.S. Supreme Court has made clear that states are free to "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons*, 520 U.S. at 367; *Clingman v. Beaver*, 544 U.S. 581, 596-97 (2005) (State "has an interest in tempering the destabilizing effects of precisely this sort of party splintering and excessive factionalism."). As the district court here noted, "the fact that fusion voting was prevalent or common" during the early decades of our State's entry into the Union is "irrelevant." (R. II, 242).

The evolution to the Australian ballot system and the national trend of banning fusion voting provides historical context for the evolution of our political system, but it does not advance [Plaintiffs'] theories. The United States Supreme Court has held that states are free to "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons*, 520 U.S. at 367. The Kansas Supreme Court has also held that "the mode, form, and rules governing . . . elections are constitutionally delegated" to the Legislature. *See LWV II*, 318 Kan. at 797. (R. II, 242).

Whether or not there are scenarios in which Section 3 of the Kansas Constitution’s Bill of Rights could be construed to offer broader safeguards than the First Amendment, this case is not the vehicle for assessing those limits. Indeed, Kansas’ fusion voting ban imposes no severe constraints on Plaintiffs’ associational rights. *See Timmons*, 520 U.S. at 363 (any burdens on associational rights flowing from prohibition against fusion voting are not severe). Nothing about the challenged law severely impedes anyone – including minor political parties and their supporters – from using their collective power to influence the government. A political party has no “absolute[] entitle[ment] to have its nominee appear on the ballot as that party’s candidate,” and there is no significant burden on the party’s associational rights when its preferred individual does not appear thereon. *Id.* at 359. Any burden on a party’s inability to have its first-choice candidate appear as its nominee on the ballot is a function of the *candidate’s* choice to accept a different party’s nomination. *Id.* And the party remains “free to try to convince” its preferred candidate to relinquish some other party’s nomination and accept its nomination instead. *Id.* at 360.

Moreover, the challenged Kansas law, just as was true of the Minnesota statute held to be valid in *Timmons*, “applies to major and minor parties alike,” and does not prevent any party from endorsing any individual even though such individual may appear as the candidate of another party. *Id.* at 360. To the contrary, the United Kansas Party “remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.” *Id.*

Nor does the fusion voting ban preclude minor parties from developing, organizing, or participating in the election process. *Id.* at 361. It is likewise silent on the party’s “internal structure, governance, and policymaking.” *Id.* at 363. The law “reduce[s] the universe of potential candidates who may appear on the ballot as the party’s nominee only by ruling out those few individuals who both have already agreed to be another party’s candidate and also, if forced to choose, [decided that they] prefer that other party.” *Id.* As the district court below noted, “Each candidate is ultimately the one faced with the decision regarding which party’s nomination to retain. Even after that decision is made, Kansas law does not interfere with UKP, its candidates, or voters from continuing to campaign on behalf of the party. The Kansas anti-fusion laws do not interfere with UKP’s freedom of association, they simply require the candidate to choose one party to list on the ballot.” (R. II, 245).

The Court in *Timmons* noted that while “[m]any features of our political system – *e.g.*, single-member districts, ‘first past the post’ elections, and the high costs of campaigning – make it difficult for third parties to succeed in American politics,” the “Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns.” *Id.* at 362. True, the Court was speaking about the U.S. Constitution. But in light of Article I, § 4 of the Kansas Constitution and its broad delegation of authority to the legislature to select the mode of voting for all elections, it is difficult to see how the same principle does not apply with even greater force to freedom of association challenges under Section 3 of the Kansas Bill of Rights.

4. The Text of Section 11 of the Kansas Constitution’s Bill of Rights Does Not Support Plaintiffs’ Legal Standard on their Freedom of Speech Claim

As for Plaintiffs’ freedom of speech claim, nothing about Section 11 of the Kansas Constitution’s Bill of Rights suggests that the State’s prohibition against fusion voting is in tension with that constitutional safeguard. The Kansas Supreme Court has construed our own State’s constitutional free speech protections under Section 11 as coextensive with the First Amendment. *League of Women Voters v. Schwab*, 317 Kan. 805, 815, 539 P.3d 1022 (2023) (“*LWV I*”) (citing *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980)). But as Defendants argued below, (R. I, 30-34; R. II, 26-38), and as the district court agreed, (R. II, 239-242), the fusion voting prohibition does not even implicate speech. And even if it does, the law is perfectly constitutional.

Plaintiffs suggest that the text of Section 11 – recognizing the right for “all persons [to] freely speak, write, or publish their sentiments on all subjects” – is more protective than the U.S. Constitution’s First Amendment. (Pls.’ Br. at 16-19). There is no case law to support this theory. So Plaintiffs reference the nearly identical language in Connecticut’s constitution, a state whose Supreme Court has held (in contexts having nothing to do with fusion voting) that the State Constitution bestows greater rights than the Federal Constitution. (*Id.* at 16).⁴

What Plaintiffs neglect to mention is that there is a litany of state supreme courts that have specifically blessed fusion voting bans against state constitutional challenges

⁴ In the district court, Plaintiffs also invoked New Jersey’s Constitution. (R. I, 309). Now that New Jersey’s intermediate appellate court rejected the argument that its State Constitution’s free speech safeguards protect fusion voting, *see In re Malinowski*, 332 A.3d at 764-69, Plaintiffs have conveniently dropped the reference to New Jersey in this appeal.

where the state constitutions' free speech safeguards are nearly identical to those in Kansas. *See, e.g.*, Ohio Const., art. I, § 11 (“Every citizen may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right.”);⁵ Mich. Const., art I, § 5 (“Every person shall be free to speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that freedom.”); Mo. Const., art. I, § 8 (“That all constitutional government is intended to promote the general welfare, and to secure and perpetuate the blessings of liberty to the people; and to this end, we the people of Missouri do declare that all men have a natural right to think and to express their thoughts freely.”); Ill. Const., art. I, § 4 (“The freedom of the press and the right of the people peaceably to assemble and to petition the government shall not be abridged.”); *see also* Part III.B, *supra*.

Moreover, as the U.S. Supreme Court held in *Timmons*, while a fusion voting ban may prevent a political party “from using the ballot to communicate to the public that it supports a particular candidate who is already another party’s candidate,” a party has no constitutionally-grounded speech “right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate.” *Timmons*, 520 U.S. at 362-63. The reason, the Court explained, is because “[b]allots serve primarily to elect candidates, not as forums for political expression.” *Id.* at 363; *see also Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002) (“A ballot is a ballot,

⁵ Ohio’s constitutional language – and its supreme court’s opinion upholding fusion voting bans against a state constitutional challenge, *Bateman*, 45 N.E. at 196-97 – is particularly instructive given that the Kansas Constitution was modeled after the Ohio Constitution. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 628-29, 440 P.3d 461 (2019).

not a bumper sticker.”); *Mazo v. N.J. Sec’y of State*, 54 F.4th 124, 145 (3d Cir. 2022) (the inclusion of a slogan or party name on the ballot is not speech by the candidate or party; it is merely “a one-way communication confined to the electoral mechanic of the ballot.”); *id.* at 144 (“For ballots to be effective tools for selecting candidates and conveying the will of voters, they must be short, clear, and free from confusing or fraudulent content. This necessarily limits the degree to which the ballot may – or should – be used as a means of political communication.”). In fact, expressly reaffirming its holding from *Timmons* that the ballot itself is not a forum for exercising speech, the Supreme Court held in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011), that the First Amendment does not confer upon voters “a right to use governmental mechanics to convey a message.”

And, as Defendants explained below (R. I, 146), even if the ballot did provide such a forum, it would be a non-public forum in which the State’s power to impose viewpoint-neutral time, place, and manner regulations is at its zenith. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 461 (2008) (Roberts, C.J., concurring) (“the State controls the content of the ballot, which we have never considered a public forum”); *Lower v. Bd. of Dirs. of Haskell Cnty. Cemetery Dist.*, 274 Kan. 735, 745-46, 56 P.3d 235 (2002) (“In nonpublic fora, the government may restrict access by content or speaker identity, so long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”); *Ramcharan-Maharajh v. Gilliland*, 48 Kan.App.2d 137, 143, 286 P.3d 216 (2012) (“The state’s important interest in regulating ballot access generally is sufficient by itself to justify reasonable, nondiscriminatory ballot-access restrictions.”) (citing *Timmons*, 520 U.S. at 364-65); *Burdick*, 504 U.S. at 433 (“[A]s

a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”). No speech is being suppressed here nor is there any viewpoint discrimination.

Plaintiffs next cite a sentence of grossly out-of-context dictum from the majority opinion in *LWV II* noting that the ballot is the “core political speech of the voter.” (Pls.’ Br. at 24) (quoting *LWV II*, 318 Kan. 810). But as the district court recognized in rejecting this theory, “the Court in *LWV II* was addressing a very different question than faced here or in *Timmons*.” (R. II, 240). The *LWV II* Court was merely highlighting the different positions for First Amendment purposes occupied by a voter casting a ballot and a third party collecting the voter’s ballot and returning it to the election office. The Kansas Supreme Court was certainly not intending to convey any disagreement with *Timmons* (and seemingly every other appellate tribunal to address the issue) that the ballot itself is not a forum of expression.

If the rule were otherwise, the State would be largely powerless to adopt a vast swath of regulations governing the ballot’s content, an unimaginable scenario that would introduce massive uncertainty into this area of law. A state, for example, likely could not restrict write-in votes. K.S.A. 25-213(c). Or maintain “sore loser” laws restricting losing candidates in a primary from reappearing on the general election ballot as an independent or as the nominee of some other party. K.S.A. 25-202(c), 25-305(b). Or limit extraneous messages, slogans, or qualifications on the ballot that a candidate or party might want to include. K.S.A. 25-213(b), 25-619. Or impose registration requirements. K.S.A. 25-2301 *et seq.* Or adopt many of the other array of rules that are critical to ensuring the fairness

and integrity of the ballot. It is inconceivable that the Kansas Supreme Court – with no analysis – *sub silentio* repudiated decades of U.S. Supreme Court precedent and became the only appellate court to hold that a voter engages in constitutionally protected expressive conduct simply by voting.

Plaintiffs maintain that the burden of the challenged law on their free speech rights must “be considered severe because there are no reasonable alternatives in terms of impact and effectiveness to party nominations for the plaintiffs to communicate to the voters what the party represents and, thereby, attract voter interest and support.” (Pls.’ Br. at 22). False. “[T]he party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party’s candidate.” *Timmons*, 520 U.S. at 363. True, the law prevents that candidate from also having the United Kansas Party next to his name on the general election ballot if he has opted to accept the nomination of some other party, but the burden on Plaintiffs’ rights has been legally judged not to be severe in such circumstances. *Id.*⁶

⁶ *Clingman*, although it involved a freedom of association claim, is also instructive. In upholding Oklahoma’s semi-closed primary system against a First Amendment attack, the Court there held that the fact that a voter who wishes to vote in the Libertarian Party primary must first disaffiliate with any other party is not a severe burden on the voter’s rights. 544 U.S. at 589; *see also id.* at 604 (O’Connor, J., concurring). As Justice O’Connor explained in her concurrence, while the voter might well have a “significant commitment to a major party” and desire to maintain that association, forcing him to forfeit the registration in order to vote in a different party’s primary is a burden that is neither “severe” nor “discriminatory.” *Id.* at 604.

Plaintiffs' position is also contrary to the teachings of *Burdick v. Takushi*, 504 U.S. 428 (1992). *Burdick* involved a challenge to Hawaii's prohibition against write-in voting. The plaintiff argued that the law "deprive[d] him of the opportunity to cast a meaningful ballot, condition[ed] his electoral participation upon the waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminate[d] against him based on the content of the message he seeks to convey through his vote." *Burdick*, 504 U.S. at 438. The Court was unpersuaded. It held that the "function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* (citations and internal alterations omitted); (R. II, 241).

Although Plaintiffs insist that *Burdick* has no application here because that case was purportedly about little more than a protest vote, (Pls.' Br. at 22-23), Plaintiffs read the decision far too narrowly. The significance of the opinion was not confined to the specific voter wishing to cast a protest vote in favor of Donald Duck. Anyone reasonably familiar with the work of the U.S. Supreme Court knows that the Court takes cases to address much broader themes. The point of the Court's holding was to reinforce what it had "repeatedly upheld," i.e., that in the election law space, "reasonable, politically neutral regulations that have the effect of channeling expressive activity" are fully consistent with the First Amendment. *Burdick*, 504 U.S. at 438. (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986)).

Plaintiffs lament that “anti-fusion laws thrust upon [them] a Hobson’s choice: run second-choice, hopeless protest candidates or be excluded from the ballot entirely.” (Pls.’ Br. at 23). Kansas’ fusion voting ban, however, does not preclude Plaintiffs from accessing the ballot or nominating any candidate they believe might prevail in a general election. The only restriction is that such candidate cannot have been nominated by some other party, and if he was, the candidate must not have declined Plaintiffs’ nomination. Nor does the law prevent Plaintiffs from expressing support – financial or otherwise – for their party and its preferred candidates at every stage of the race. The full range of activities available to communicate such support is open to them, including identifying their preferred candidate as the endorsed nominee of the party. The fact that such individual may have another party next to his/her name on the ballot on Election Day does not undermine those opportunities. As the district court noted. “A candidate’s affirmative and strategic choice to forego the minor party’s nomination does not translate into a free speech injury to the party, its candidate, the voters or anyone associated with the party.” (R. II, 242). None of the concerns Plaintiffs complain about are unique to them; they are unremarkable hurdles that every minor political party faces. And as has been stated numerous times, states are free to adopt “reasonable election regulations that may, in practice, favor the traditional two-party system.” *Timmons*, 520 U.S. at 367.

Further, nothing in the Federal or State Constitution establishes an individual’s right to a “fair shot” at success of winning. *See N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (rejecting candidate’s theory that New York’s delegate selection procedures violate his freedom of association rights by not affording him “a realistic chance

to secure the party’s nomination”); *Timmons*, 520 U.S. at 362 (While “[m]any features of our political system . . . make it difficult for third parties to succeed in American politics,” the Constitution “does not require” states to level the playing field by permitting fusion voting “any more than it requires them to move to proportional-representation elections or public financing of campaigns.”). It is not the role of the judiciary to micromanage this process. As the Court noted in *Lopez Torres*, “The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product.” 552 U.S. at 208.

In criticizing *Timmons*’ holding that a fusion voting prohibition does not have a severe burden on the associational or speech rights of minor parties, (Pls.’ Br. at 20-21), Plaintiffs cite to an irrelevant footnote in a passage from *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (“*WRTL*”), which was joined by only two justices. In that case, a plurality of the Supreme Court held that the Bipartisan Campaign Reform Act’s prohibition against using corporate funds to finance issue-advocacy advertisements violated the First Amendment. Responding to the dissent in a footnote, Chief Justice Roberts noted that a *complete ban* on corporate speech could not be justified simply by affording corporate entities the opportunity to establish a political action committee. *Id.* at 477 n.9.

WRTL has little relevancy to this case. The Court in *WRTL* was evaluating a federal law that imposed a categorical, content-based ban on political issue ads by corporate entities during designated blackout periods close to an election. *Id.* at 455-56. Kansas’ fusion voting prohibition, by contrast, merely involves a regulation of electoral ballot structure –

a procedural guardrail operating in a purely non-public forum. In other words, fusion voting is a ballot design and election administration issue, not a speech ban. Kansas is in no way prohibiting political speech, restricting political advocacy, or impeding the right of any individual or party to endorse candidates in any forum. Unlike in *WRTL*, where the government foreclosed a corporation's right to speak altogether in a key electoral window, the ban on fusion voting still allows minor parties to endorse, campaign, fundraise, issue press releases, hold rallies, and use voter guides to express their support for a major party candidate. They simply cannot use the ballot line as a second platform for that individual.

Plaintiffs also rely upon *California Democratic Party v. Jones*, 530 U.S. 567 (2000), but that case is likewise unhelpful to them here. That case involved a freedom of association challenge to California's "blanket primary" law in which all registered voters – including those not affiliated with any political party – had the right to vote for any candidate in a *primary election*, regardless of voters' political affiliation. *Id.* at 570. In other words, the law "force[d] political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party and, at worst, have expressly affiliated with a rival." *Id.* at 577. This meant a party's nominee could be chosen by adherents of the opposing party, notwithstanding the party's objection to that candidate. *Id.* at 578. The Supreme Court found this situation antithetical to the First Amendment and a severe burden on political parties because it could force parties to associate with candidates whose politics they did not share and thereby fundamentally change the party's message. *Id.* at 581-82. That holding is eminently logical.

But *Jones* presents the mirror-opposite of this case. The Court’s focus in *Jones* was on the *primary election* nomination process. The Supreme Court has made clear that states have less interest in regulating election laws designed “to mitigate *intraparty* factionalism during a *primary* campaign” given that a “primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them.” *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989) (emphasis added). Here, the United Kansas Party confronts no interference from outsiders as to its nominee selection. Plaintiffs alone are free to select any nominee of their choosing to appear on the ballot, as long as that individual has not already been selected by another party and has not declined Plaintiffs’ invitation to run on their ticket rather than the ticket of some other party. The problem is that Plaintiffs’ entire *modus operandi* is on hijacking another party’s candidate, a scenario that even *Jones* said a state has a valid interest in safeguarding against. *Jones*, 530 U.S. at 584. That is the exact situation the Court addressed in *Timmons* and *Jones* is fully consistent with that.

As the district court noted (R. II, 240), Pennsylvania’s Supreme Court rejected the same free speech claim that Plaintiffs advance here. *See Working Fams. Party v. Commonwealth*, 209 A.3d 270 (Pa. 2019). The court found no basis for distinguishing the free speech rights of the party versus those of its supporters and voters. The plaintiffs there were the Working Families Party (which the Commonwealth classified as a “political body” because—like in Kansas—it could not use the primary process to nominate candidates due to its minimal vote haul in the prior election), the party’s preferred candidate/nominee, and two voters who desired to vote for the nominee as the candidate of the Working Families Party. *Id.* at 272-73. Because of the Commonwealth’s ban on fusion voting, the plaintiffs

claimed, *inter alia*, that their freedom of speech and association rights had been contravened under the Pennsylvania Constitution. Despite the fact that Pennsylvania’s Supreme Court has generally embraced broader freedom of speech and association rights under its own state constitution than the First Amendment, the court underscored that the context of the dispute – one involving *elections* – was critical to its evaluation of the claims. *Id.* at 285. And in the electoral sphere, the court found the reasoning of *Timmons* to be sufficiently powerful to carry the day. *Id.* at 285-86. After quoting *Timmons* at length, the court concluded:

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

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

B. Kansas’ Strong Interests in the Fusion Voting Prohibition Are Sufficient to Overcome Any Minimal Burden on Plaintiffs

Kansas has a multitude of powerful interests justifying its fusion voting prohibition and the district court correctly ruled that those “interests greatly outweigh any burden [the law] might have on political parties.” (R. II. 250-251). Given the absence of any severe burden of the challenged law on Plaintiffs’ freedom of association or free speech rights (the latter of which are not even implicated here), the State’s interests are judged from a deferential standard. “[T]he State’s asserted regulatory interests need only be ‘sufficiently weighty to justify the limitation’ imposed on the party’s rights.” *Timmons*, 520 U.S. at 364.

There is no narrow tailoring requirement. *Id.* at 363-64. “Nor do[es the Court] require elaborate, empirical verification of the weightiness of the State’s asserted justifications.” *Id.* The rationale for this lack of an evidentiary burden is that “[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.” *Id.* at 364 (quoting *Munro*, 479 U.S. at 195-96).

Plaintiffs’ entire attack on the State’s interests is predicated on an assumption that a strict scrutiny standard must be applied and that the State is entitled to little if any deference in the regulation of its electoral mechanics. (Pls.’ Br. at 28-35). There is no basis for that assumption. As discussed in Section III, either a general reasonableness or *Anderson-Burdick* balancing with wide latitude afforded to the State is the proper touchstone. Strict scrutiny has no role here and its application would be inconsistent with the precedent of both the Kansas Supreme Court in election law challenges and the federal judiciary in specific attacks on fusion voting bans.

Plaintiffs also exhibit confusion as to the appropriate temporal target. After arguing at one point that the Court should focus on the “historical record, remembering the polestar is the intention of the makers and adopters,” (Pls. Br. at 15) (quoting *Hodes & Nauser*, 309 Kan. 623), Plaintiffs later reverse course and urge that constitutional scrutiny be “judged ‘based on the present circumstances – not the circumstances when the restrictions were originally passed.’” (Pls.’ Br. at 40) (quoting *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014)). It is true that changes in the governing precedent (e.g., the

evolution of Supreme Court jurisprudence regarding the proper review standard over a particular issue) can modify the applicable level of judicial scrutiny, and perhaps changes in factual circumstances (e.g., new technology advancements) might occasionally yield a different outcome based on the same level of scrutiny. But the appropriate standard of scrutiny does not simply shift with the winds. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (refusing to elevate the level of scrutiny for laws affecting the mentally disabled, despite changing social attitudes, indicating that levels of scrutiny are doctrinal and not responsive to cultural shifts alone).

In any event, none of that is relevant here. In this case, the only changed circumstance is that Plaintiffs (along with a group of supporters from academia and political activist circles) have decided that Kansas' fusion voting ban – 125 years after the law took effect, without a single legal challenge – is now an obstacle to their efforts to unseat the current legislative incumbents whom they disfavor. That is no sound basis for deviating from the highly deferential legal review standard applicable to this case.

1. Avoiding Ballot Manipulation and Gamesmanship

Among the most significant interests Kansas has in its fusion voting prohibition is the need to prevent ballot manipulation. *See Timmons*, 520 U.S. at 364 (“States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.”); (R. II, 235-236). Political party cross-nominations on a general election ballot potentially “undermine the ballot’s purpose by transforming it from a means of choosing candidates to a billboard for political advertising,” *Id.* at 365. For example, “a candidate or party could easily exploit fusion as a way

of associating his or its name with popular slogans and catchphrases,” *id.*, such as the “Low Taxes Party,” “Pro-Life Party,” or “Middle of the Road Party.” The problem could be particularly acute in judicial elections, no small concern in this State.

Fusion voting also incentivizes mischief by candidates and parties alike. A major party, for instance, could create multiple minor parties – a relatively easy task given that it need only obtain the signatures of 2% of the total number of votes cast for gubernatorial candidates in the preceding general election, *see* K.S.A. 25-302a – and then have its preferred candidate appear multiple times on the same ballot. This would allow the major party to monopolize ballot real estate by working up multiple cross-nominations to promote its preferred message. *See People ex rel. McCormick v. Czarnecki*, 107 N.E. 625, 629 (Ill. 1915) (“If the relator can be the candidate of two parties, he can be the candidate of all six parties of the state; and if he has that right every other candidate has the same right[.]”). Similarly, a fringe candidate could attempt to rack up multiple nominations from minor parties by obtaining the bare minimum of signature petitions with little support from the general electorate, thereby suggesting to the electorate that he has much wider support than he really does, because he appears on the ballot so many times.⁷

Worse still, a minor political party could effectively circumvent the rules for attaining major political party status – which requires the receipt of at least 5% of the total votes cast for all candidates for governor in the preceding general election, *see* K.S.A. 25-202(b)

⁷ This is not merely a hypothetical. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under *nine* different party labels during his political career. In 1941 alone, he was cross-nominated by four separate parties. *See* Celia Curtis, Comment, *Cross-endorsement by Political Parties: A “Very Pretty Jungle”?*, 29 Pace L. Rev. 765, 791-92 (2009).

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

Plaintiffs complain that Defendants have not shown historical evidence that the kind of ballot manipulation described above has occurred in Kansas. (Pls.’ Br. at 30-31). But the law is clear that no such “elaborate, empirical verification of the weightiness of the State’s asserted justifications” is required in this area. *Timmons*, 520 U.S. at 364. As the Supreme Court noted in *Munro*, 479 U.S. at 195-96:

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the ‘evidence’ marshaled by a State to prove the predicate. Such a requirement would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential

deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Accord Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 686 (2021) (State can take measures to prevent harm to its electoral system “even if [it has] had the good fortune to avoid it.”). As for Plaintiffs’ legislative suggestions as to how they think a fusion voting ban law could be drafted more narrowly, (Pls.’ Br at 30-32), there is no requirement that the Kansas law be narrowly tailored. *See Timmons*, 520 U.S. 363-64 (because burden of anti-fusion voting law is not severe on minor party, State need not show that the ban is narrowly tailored to serve its compelling interests); *id.* at 365 (“Whether or not the putative ‘fusion’ candidates’ names appeared on one or four ballot lines, such maneuvering would undermine the ballot’s purpose by transforming it from a means of choosing candidates to a billboard for political advertising.”).

Plaintiffs additionally resort to policy arguments, citing a law review article opining on why fusion voting can be beneficial to the electorate. (Pls.’ Br. at 30-31). They further speculate in their Petition that, “with nearly 30% of Kansas voters registered as unaffiliated, much of the state’s electorate likely shares the core concerns and priorities that inspired the formation of this new party.” (Pls.’ Br. at 31, citing R. I, 7 ¶ 25). Whatever the merits of those contentions, they have no place here. If Plaintiffs think their proposed mode of voting would be a boon to the public, they can take their case to the legislature in Topeka. But it is not the Court’s role to involve itself in that debate.

2. Facilitating Greater Competition and Voter Choice

Anti-fusion laws additionally help facilitate greater competition and voter choice.

(R. II. 236-237). Fusion voting disincentivizes minor parties from identifying new standard-bearers who best represent that party, and instead incentivizes them to nominate candidates who already have the backing of a major political party. “Allowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to choose their own candidates promotes competition.” *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991); *see also Timmons*, 520 U.S. at 368 n.13 (describing how California’s allowance of cross-nominations led to Earl Warren being the gubernatorial nominee of both major parties, thereby “stifl[ing] electoral competition and undermin[ing] the role of distinctive political parties.”). This case underscores the point. Plaintiffs acknowledge that the United Kansas Party was “founded with a clear understanding that ... only two candidates will be viable in a given election,” and that it will thus restrict itself to “recruit[ing] candidates who are also interested in and capable of securing the nomination of one of the two major parties.” (R. I, 8-9 ¶ 28); (*accord* R. I, 8-9 ¶ 30).

Plaintiffs respond with speculation that the public is unhappy with the current two-party system in Kansas because major party candidates have won 99.8% of all state legislative races since 1912. (Pls.’ Br. at 32). One, of course, hardly follows from the other. There is no indication how many of those legislative races included a third-party candidate. And historical election outcomes are not a reliable proxy for electoral dissatisfaction, especially absent evidence of discriminatory access or procedural obstruction. Plaintiffs’ reasoning commits a non-sequitur by assuming that just because two parties dominate, competition is blocked. Dominance does not prove dissatisfaction or systemic unfairness. Moreover, the idea that Kansas politics have become too polarized, as Plaintiffs suggest

(Pls.’ Br. at 34), is an argument not only born of “recency bias” – consider the years leading up to the Civil War, *see, e.g.*, Joanne Freeman, *The Field of Blood, Violence in Congress and the Road to the Civil War*, 75-111 (2018); William J. Hoffer, *North v South: A Legal History of the Caning of Charles Sumner*, 43 Rutgers L.J. 515 (2013) – but one for which any “truth” or consensus is ultimately elusive. In fact, some might argue that, with both houses of the Kansas Legislature having Republican super-majorities, the electorate is more united than ever. Regardless, this is clearly not an issue to explore in discovery.

Nor is there any denying that allowing a minor party to nominate the same candidate as a major party does *nothing* to increase competition. While prevailing as a third-party candidate in a general election can be a tough slog, history shows that it can be accomplished. Plaintiffs’ objections are once again properly directed at the legislature, not this Court. Nothing in the Kansas Constitution necessitates that the State “compromise the policy choices embodied in its ballot-access requirements to accommodate [Plaintiffs’] fusion strategy.” *Timmons*, 520 U.S. at 365.

3. Preserving Stability of the Political System

Kansas also has “a strong interest in the stability of [its] political system.” *Timmons*, 520 U.S. at 366; (R. II. 237). While that interest does not sanction measures that “completely insulate the two-party system” from “competition and influence” of minor parties, it does empower the State “to enact reasonable election regulations that may, in practice, favor the traditional two-party system” and “temper the destabilizing effects of party-splitting and excessive factionalism.” *Id.* at 367. Kansas makes it relatively easy for minor parties to access the ballot, *see* K.S.A. 25-302a, and all restrictions on fusion voting are applied

evenhandedly to all parties across the board. *See* K.S.A. 25-306e. Kansas has employed this voting methodology for nearly 125 years, and the State’s electorate is familiar with, has relied upon, and put their faith in the same during that time.

Plaintiffs respond that allegations in their Petition deny the validity of this interest by suggesting that anti-fusion laws “prevent collaborative political dynamics.” (Pls.’ Br. at 33). But the Supreme Court has held unequivocally that a prohibition on fusion voting does *not* unduly “insulate the two-party system from minor parties’ or independent candidates’ competition and influence.” *Timmons*, 520 U.S. at 367. Admittedly, that decision is not *binding* on this Court. Still, whether it is characterized as a legal question or a legislative fact, there is no reason why Plaintiffs should be permitted to litigate this state interest anew in every case.

Judge Easterbrook described the issue neatly in his opinion in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). The plaintiffs in that case sought to challenge – as a *factual matter* – whether voter ID actually promoted public confidence in the integrity of the electoral system, notwithstanding that the Supreme Court had held as much in its *Crawford* decision. *Id.* at 750-51. The Seventh Circuit rejected this effort:

To put this in legalese, whether a photo ID requirement promotes public confidence in the electoral system is a “legislative fact” – a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state. Judges call the latter propositions “adjudicative facts.” On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court.

* * *

Photo ID laws promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in

Wisconsin. This means that they are valid in every state – holding constant the burden each voter must bear to get a photo ID – or they are valid in no state. Functionally identical laws cannot be valid in Indiana and invalid in Wisconsin (or the reverse), depending on which political scientist testifies, and whether a district judge’s fundamental beliefs (his “priors,” a social scientist would say) are more in line with the majority on the Supreme Court or the dissent. (*Id.*)

Plaintiffs are deeply dissatisfied with Kansas’ fusion voting ban and believe that it interferes with their opportunity to prevail over certain candidates and/or certain major political parties. But that does not mean that the State’s interest in preserving the stability of its political system is not served by the current law. Fusion voting potentially encourages transactional politics, where minor parties use their ballot line as leverage to extract policy promises or political favors from major party candidates. It also weakens the incentive for ideological compromise within the two major parties by discouraging broad coalitions and instead encouraging minor parties to maintain their distinct identities without fielding their own competitive candidates. Indeed, as Defendants noted below (R. I., 137), if New York’s fusion voting experience is any indication, long-term, fusion tends to mostly help extremist groups at the political fringes. Whether such groups are seeking political patronage or just wish to serve the role of a spoiler and splinter one of the major parties, fusion voting can have a deleterious effect on a State’s political stability, and the State is well within its rights to prohibit it.⁸ Whether Plaintiffs agree or disagree with these policy-grounded points has

⁸ Plaintiffs cite *Williams v. Rhodes*, 393 U.S. 23 (1968), in support of their criticism of this state interest. (Pls.’ Br. at 33). *Williams* involved an Ohio law that required such a large number of signatures for a new political party to gain access to the ballot, that it made it virtually impossible for the party to qualify, particularly since the threshold was higher for new parties than for established parties. *Id.* at 24-26. That is nothing like this case. In fact, Plaintiffs do not even argue that they could not access the ballot in Kansas if they fielded a candidate who was not already appearing under the banner of some other party.

no relevance. The important takeaway is that the Kansas Constitution, just like its federal counterpart, clearly permits the “Legislature to decide that political stability is best served through a healthy two-party system.” *Timmons*, 520 U.S. at 367. And the State “need not remove all of the many hurdles third parties face in the American political arena.” *Id.*

4. Enhancing Voter Confidence and Accountability

Fusion voting also tends to blur the distinction between parties, which diminishes voter confidence and candidate accountability. “People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party.” *Swamp*, 950 F.2d at 387 (Fairchild, J., concurring). Voters, in turn, may well believe that a candidate who is the representative of one distinct party ideology is more likely to represent those interests fully than a candidate who is the nominal standard-bearer for multiple parties, and further think, with good reason, that “one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election.” *Id.* The Missouri Supreme Court was even more blunt, characterizing fusion voting as “fraudulent,” “deceitful,” “dishonest,” and “corrupt.” *Coburn*, 168 S.W. at 957-58.

Plaintiffs insist that this interest is unwarranted paternalism and that a state has no “legitimate role in trying to police candidate adherence to the party platforms.” (Pls.’ Br. at 34). But that is not what Kansas is doing with its fusion voting ban. It is simply promoting its two-party system, while still allowing for relatively easy access to the ballot for any third-party wishing to field its own candidate.

5. Minimizing Voter Confusion

Then there is the voter confusion that fusion voting is likely to engender, something the State has a compelling and powerful interest in avoiding. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221-22 (1986) (States have “legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions”); *Norman v. Reed*, 502 U.S. 279, 290 (1992) (States have a legitimate interest in preventing “misrepresentation and electoral confusion”); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (“There is surely an important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process[.]”). This is a highly unusual mode of voting – more than forty states outlaw it – and few voters outside a handful of states even have any familiarity with the concept. It has been banned in Kansas for nearly 125 years. While *Timmons* did not rely on voter confusion as a basis for its holding, 520 U.S. at 370 n.13, basic common sense reflects that most would find the concept of a candidate’s name appearing on multiple lines of the ballot somewhat bewildering. The district court agreed. (R. II, 237). Nor would their perplexity be confined to how to cast a ballot or why the same candidate’s name appears multiple times. Voters would also likely 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 the positions of one party versus another. This blurs political responsibility and impairs transparency. Absent the kind of ban that Kansas has had for well more than a century, “it would be difficult for voters to distinguish between the parties.” *Swamp*, 950 F.2d at 386; *accord Anderson*, 76 N.W. at 486-87.

While not everyone agrees with the notion that fusion voting can be confusing, that is beside the point. Considering the deferential standard to which legislative determinations in this area must be afforded, it is not a matter for the Court to decide what is best. In any event, given that this voting methodology has been prohibited in all but a handful of states for more than a century, it blinks at reality to suggest that there would not be substantial confusion, and potential destabilization of the electoral process, if fusion voting is suddenly introduced via judicial fiat. Kansas has developed an extensive administrative infrastructure around its law, and voter expectations have been firmly rooted in place since the law's enactment, with no constitutional challenges to the ban ever having been asserted in this State. That reliance is entitled to respect.

C. The District Court Properly Dismissed the Case

Having conducted their entire journey on a strict scrutiny road – a path reserved for only the most burdensome constitutional infringements – Plaintiffs arrive at a destination totally unsupported by the terrain they traversed. They thus spend the final pages arguing that the district court erroneously dismissed this case even under the relaxed standard of review set forth in *Timmons*. (Pls.' Br. at 40-42). They claim that the “proffered interests credited by the district court” are “little more than mere speculation that the Kansas anti-fusion laws actually further the State's claimed interests.” (*Id.* at 41). Plaintiffs pay lip service to the holding from *Timmons* (and a vast array of antecedent and subsequent cases) that the State need neither provide evidence of its interests nor sustain harm to its electoral system before legislating in the electoral space. But they insist that discovery would serve some purpose here. Plaintiffs are mistaken. Their claims fail as a *matter of law*.

Under the *Anderson-Burdick* test, “minimally burdensome and nondiscriminatory” regulations are subject to a “less-searching examination closer to rational basis.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016). “[T]he State’s important regulatory interests are generally sufficient to justify the restrictions.” *Burdick*, 504 U.S. at 434. Moreover, “[w]hen rational-basis review applies, it is downright routine for courts to dismiss constitutional challenges at the pleading stage.” *Lichtenstein v. Hargett*, 83 F.4th 575, 601 (6th Cir. 2023). Indeed, courts “have not shied away from granting motions to dismiss under the *Anderson-Burdick* test even though it can require a fact-intensive balance of a law’s burdens on voting rights against the state’s precise justifications for the law.” *Id.* That should be all the more true when the review, as here, is especially deferential as part of a reasonableness test used by the Kansas Supreme Court.

There is simply no need for discovery or factual development in the district court. In fact, Plaintiffs’ own actions belie the position they are now advocating. Less than a week after filing their Petition, Plaintiffs moved to expedite the briefing in this case and asked the district court to direct that all dispositive motions be filed less than one month later. (R. I, 63-69; R. V, 54-60). Plaintiffs explicitly stated in their request that “[t]he material facts are simple and do not require discovery in order to adjudicate the straightforward legal questions at issue.” (R. I, 66 ¶ 11; R. V, 57 ¶ 11). True to their word, at the same time they filed their response to Defendants’ motion to dismiss, Plaintiffs filed their summary judgment motion without taking or requesting any discovery. (R. I, 192-351).

The issues in this case are entirely legal in nature. The extent of the burden (or lack thereof) of Kansas’ fusion voting ban on Plaintiffs’ associational and speech rights (to the

extent the latter are even implicated here, which Defendants believe – and the district court concluded, consistent with *Timmons* – they are not) is a *legal determination* that has been squarely addressed by *Timmons*. Even when all allegations in the Petition are credited as true, the burden on Plaintiffs’ rights is simply not severe as a *matter of law*. For the reasons articulated by Judge Easterbrook, *supra*, it likewise makes no sense to litigate the State’s interests anew every time a disgruntled voter or minor political party decides to take a fresh swipe at the law.

In the context of *Anderson-Burdick*, even “speculative concern[s]” may “suffice[] as a matter of law to establish a legitimate State interest.” *Stone v. Bd. of Election Comm’rs*, 750 F.3d 678, 685 (7th Cir. 2014). And here, no speculation is necessary. Many of the State’s interests are irrefutable, particularly its objectives in avoiding ballot manipulation and gamesmanship. Given that there is no narrow tailoring requirement, Plaintiffs have nothing of substance to counter these interests.

Plaintiffs cling to a divided Ninth Circuit decision to support their position. *See Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018). That case is clearly distinguishable from the instant action, not to mention (in Defendants’ view) wrongly decided. In that suit, a candidate was prohibited by California’s ballot rules from identifying his preference for the Socialist Party next to his name on the ballot because that is not a qualified party in the State. *Id.* at 441-42. California’s primary justification for the law was the avoidance of voter confusion, but the majority opined that the ballot restriction not only did not advance this interest, but actually undermined it. *Id.* at 446-47. The majority held that the refusal to allow a candidate to have a party label next to his name on the ballot (and instead require

that he be listed as having no party preference) “gives rise to mistrust and negative inferences.” *Id.* at 446. The majority concluded that, even if the burden is not severe, *Anderson-Burdick* “from time to time requires an assessment of whether alternative methods would advance the proffered governmental interests,” and “a state must sometimes be required to offer evidence that its regulation of the political process is a reasonable means of achieving the state’s desired ends.” *Id.* at 448 (quotations omitted).

The majority’s opinion includes myriad caveats – “from time to time,” “sometimes,” and a “state [cannot simply] justify *any* non-severe voting regulation with a merely speculative concern of voter confusion.” *Id.* at 448-49. The decision is hardly sweeping and seems to be more of a “ticket-good-for-this-day-only” type of opinion. The dissent, meanwhile, makes it clear that the majority flaunted the dictates of *Timmons* both as a matter of procedure and substance. *Id.* at 450-60 (Rawlinson, J., dissenting). Judge Rawlinson reasoned that the majority’s approach was really an application of strict scrutiny via sleight of hand. *Id.* at 460-61. And sure enough, just two years later, the Ninth Circuit retreated from *Soltysik* and affirmed the dismissal of an Arizona election regulation. *See Tedards v. Ducey*, 951 F.3d 1041 (9th Cir. 2020). Turning away the plaintiff’s insistence on a remand for discovery, the court explained that “a higher level of scrutiny applied to the discriminatory regulation in *Soltysik* than applies here,” but that no evidentiary hearing was necessary to address the State’s interests in the Arizona litigation. *Id.* at 1068.

V. – CONCLUSION

The burden on Plaintiffs’ associational and speech rights from Kansas’ fusion voting prohibition is mild at worst. Under the deferential legal standard that must be applied here,

particularly given the State’s powerful interests in the law – which substantially outweigh any non-severe burdens the law may impose on Plaintiffs – affirming the district court’s dismissal of this case is the only logical outcome.

While Defendants believe a categorical holding would be appropriate, this Court need not divine the outer limits of *Timmons* or determine the scope of circumstances where a burden on Plaintiffs’ associational or speech rights *might* require the State to make an evidentiary showing in order to justify the interests undergirding some electoral statute or regulation. It suffices to say for now that there is no basis for remanding this case to the district court. Kansas’ 125-year-old prohibition against fusion voting – unchallenged since it took effect in 1901 and joined by at least thirty-three other states – has no severe burden on Plaintiffs’ freedom of association or speech under the State Constitution. And the State has well-recognized and legitimate interests, firmly entrenched in the jurisprudence of the U.S. and Kansas Supreme Courts, to regulate in this area. The district court’s judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 29th day of July 2025, I electronically filed the foregoing Brief of Appellee with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record.

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