No. 25-128896-S

IN THE SUPREME COURT 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

APPELLEES' CONDITIONAL CROSS-PETITION FOR REVIEW

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)

Bradley J. Schlozman (KS Bar #17621)
HINKLE LAW FIRM LLC
1617 N. Waterfront Parkway, Ste. 400
Wichita, KS 67206
Telephone: (316) 660-6296
Facsimile: (316) 264-1518
Email: bschlozman@hinklaw.com

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PRAYER FOR REVIEW

The Supreme Court should decline to review this case. In the event the Court grants Plaintiffs-Appellants' petition for review, however, Defendants-Appellees respectfully request that the Court also grant review of the Court of Appeals' determinations regarding (i) the legal standard invoked by the Court of Appeals for evaluating state constitutional challenges to the mode of voting in Kansas elections and (ii) the scope of freedom of association rights under the Kansas Constitution.

DATE OF THE DECISION OF THE COURT OF APPEALS

The Court of Appeals issued its decision on August 14, 2026. Plaintiffs-Appellants filed their petition for review on September 11, 2026. This conditional cross-appeal is timely filed within 30 days of Plaintiffs-Appellants' petition for review. See Sup. Ct. R. 8.03(c)(1).

CONDITIONAL ISSUES FOR REVIEW

I. The Court of Appeals erred by adopting *Anderson-Burdick* as the governing standard for challenges to the Legislature's constitutionally delegated authority over the mode of voting in Kansas elections.

II. The Court of Appeals' pronouncement that Section 3 of the Kansas Constitution protects a "broader array" of associational rights than the federal Constitution was unnecessary to its decision and should not govern future cases.

STATEMENT OF THE FACTS

The facts recited in the Court of Appeals' opinion are accurate.

ARGUMENT

ISSUE 1: The Court of Appeals Erred by Adopting *Anderson-Burdick* as the Governing Standard for Challenges to the Legislature's Constitutionally Delegated Authority Over the Mode of Voting in Kansas Elections.

The Court of Appeals correctly affirmed the district court's judgment dismissing Plaintiffs' state constitutional claims. But in doing so, it adopted a novel rule of Kansas constitutional law with implications extending far beyond fusion voting. The panel held that whenever a plaintiff alleges that an election law implicates speech or associational rights protected by the Kansas Constitution, courts must balance the asserted burden against the State's interest in regulating elections under Article 4, § 1. *United Kan., Inc. v. Schwab*, 2026 WL 2357663, at *6-7 (Kan. App. Aug. 14, 2026). Borrowing from the federal *Anderson-Burdick* framework, the panel further held that a "severe" burden triggers strict scrutiny, while lesser burdens receive correspondingly more deferential review. *Id.* at *7.

That holding warrants further review by the Supreme Court. The Kansas Constitution does not merely recognize a governmental "interest" in regulating the mechanics of elections. Article 4, § 1 expressly provides that "[a]ll elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide." Kan. Const. art. 4, § 1. As this Court recently explained, "[w]here popular elections are required . . . 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*). The panel's decision transforms that affirmative constitutional delegation into one side of a judicial balancing test.

That is not the approach *LWV II* requires. The Court there considered constitutional challenges to the Legislature's regulation of advance mail voting, specifically, the use of a signature verification requirement for mail ballots. Rather than beginning with generally applicable constitutional doctrine divorced from our Constitution's specific election provisions in Articles 4 and 5, the Court first asked what authority the Constitution itself commits to the Legislature. It emphasized that the Constitution's "specific provisions" concerning elections must inform the analysis and invoked the settled principle that a specific constitutional provision controls over a more general one. *LWV II* 318 Kan. at 797-98.

The Court recognized that legislation enacted pursuant to that delegated authority must comply with other constitutional guarantees. *Id.* at 805-06. But the reconciliation of those provisions produced a standard grounded in reasonableness, not a presumption that every alleged burden on a fundamental right potentially subjects the Legislature's chosen voting methodology to strict scrutiny. Thus, the Legislature's chosen procedures had to be capable of "reasonable uniformity" under objective standards and provide "reasonable notice" and a meaningful opportunity to cure. *Id.* at 807.

The Court of Appeals characterized the constitutional question as a "potential conflict" between Plaintiffs' speech and associational rights and "the state's charge with determining the methodology of elections." *United Kan.*, 2026 WL 2357663, at *7. It then concluded that *Anderson-Burdick* "strikes the appropriate balance between the constitutional interests at stake." *Id.* But Article 4, § 1 is more than merely an "interest" belonging to the State. It is *the people's* affirmative decision to assign choices over voting methodology to the Legislature. The constitutional question thus cannot begin by placing that delegation on a scale opposite an

asserted Bill of Rights burden. The provisions must first be construed together in a manner that gives effect to both.

The panel's approach threatens to deprive Article 4, § 1 of much of its independent significance. Under the Court of Appeals' framing, any plaintiff who plausibly characterizes an election regulation as imposing a "severe" burden on speech or association may require the Legislature to demonstrate that its chosen mode of voting satisfies strict scrutiny. *United Kan.*, 2026 WL 2357663, at *7. Yet virtually every regulation governing ballot structure affects, in one way or another, how candidates, parties, and voters participate in elections. Candidate qualifications, ballot access rules, party designations, write-in restrictions, sore loser laws, nomination procedures, and rules governing what information may appear on the ballot all potentially impact political activity. If an asserted burden on that activity is enough to trigger strict scrutiny, Article 4, § 1's specific delegation of authority becomes contingent on a court's characterization of the magnitude of the burden.

That result is particularly difficult to reconcile with *LWV II*. This Court recognized there that election regulation necessarily implicates constitutional interests, yet it did not treat the Legislature's Article 4 authority as simply another governmental justification whose weight varies according to the court's assessment of the burden. Instead, the Court focused on the constitutional allocation of authority itself. That approach respects both sides of the constitutional equation. The Legislature cannot exercise its Article 4 authority in derogation of other constitutional guarantees, but neither may those general guarantees be interpreted in a manner that effectively erases the Constitution's express assignment of responsibility for determining the mode of voting.

The State made precisely this distinction below. It argued that *LWV II*'s reasonableness standard should govern because the challenged laws regulate the methodology by which Kansas elections are conducted. Appellees' Br. 8-13. The State then acknowledged that, if a general reasonableness standard did not govern, *Anderson-Burdick* provided an alternative framework under which the prohibition against fusion voting necessarily survived because it imposes, at most, modest and nondiscriminatory burdens. *Id.* at 10-11. The fact that Kansas' law survives either standard, however, does not make the choice between the two standards inconsequential. The Court of Appeals' opinion now establishes *Anderson-Burdick* as the governing rule for future challenges to Kansas election laws and expressly contemplates strict scrutiny of the Legislature's chosen voting methodology whenever a court deems the resulting burden sufficiently "severe."

That represents a substantial shift in the separation of powers. Despite Article 4, § 1's delegation of exclusive power to the Legislature on all matters relating to voting methodology, the Court of Appeals' rule would sanction the displacement of legislative judgment whenever a judge concludes that an asserted burden crosses an indeterminate threshold of severity. The result risks hobbling the Legislature in the exercise of authority explicitly committed to it by the Constitution while correspondingly aggrandizing the Judiciary's role in designing and supervising the State's electoral machinery.

Nor was adoption of the federal framework compelled by federal constitutional precedent. *Anderson-Burdick* developed as a means of reconciling rights protected by the First and Fourteenth Amendments with the states' inherent authority to regulate elections. But the Kansas Constitution contains an *express textual delegation* concerning the mode of voting.

While federal cases may offer useful guidance concerning the character of particular burdens – as *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), surely does here – those cases do not answer the antecedent question of what standard follows from the decision of our populace to entrust voting methodology exclusively to the Legislature.

Indeed, the Court of Appeals itself implicitly recognized the problem by adding a third tier to its formulation of *Anderson-Burdick*. It held that when a "ballot law imposes only slight burdens (or no burdens)," the law should be upheld if it bears "a reasonable relationship to the legislature's regulation of voting methodology under the Kansas Constitution and support[s] legitimate ends." *United Kan.*, 2026 WL 2357663, at *7. That qualification properly acknowledges Article 4, § 1 and *LWV II*. But it does so only at the bottom of the sliding scale. Nothing in Article 4 suggests that the Constitution's affirmative delegation to the Legislature disappears when a court characterizes an asserted burden as more substantial. Article 4 must inform the constitutional analysis at the outset, not merely supply a deferential standard after a court has already classified a burden as slight.

The consequences of the Court of Appeals' holding extend far beyond fusion voting or even laws governing the content of the ballot. Nearly every law governing the conduct and integrity of elections regulates, directly or indirectly, how voters, candidates, or political parties participate in the electoral process. Yet under the panel's framework, litigants challenging such laws have every incentive to characterize the resulting burdens as infringements of speech or association, thereby transforming authority specifically entrusted to the Legislature by Article 4, § 1 into a matter for judicial balancing. Constitutional structure should not turn on such a pleading exercise. Nor should the scope of this expressly delegated power depend upon an

individual judge's necessarily subjective assessment of whether a particular election law imposes a "slight," "less severe," or "severe" burden on political expression or association.

The practical effects would be profound. An election law that would otherwise receive the substantial deference commanded by Article 4, § 1 could become presumptively unconstitutional based on little more than a court's determination that its incidental effect on political expression or association is sufficiently substantial to warrant strict scrutiny. That framework invites constitutional challenges to the full range of laws governing the conduct of elections, creates opportunities for forum shopping, and injects substantial uncertainty into an area where clear and predictable rules are especially important. More fundamentally, it would alter the allocation of governmental authority established by the Kansas Constitution. Policy judgments that the Constitution specifically entrusts to the Legislature would increasingly be subject to searching judicial reassessment, diminishing the authority of one coordinate branch while substantially expanding that of another. That is not merely a change in the standard of review. It is a significant restructuring of the constitutional relationship between the Legislature and the Judiciary.

<u>ISSUE 2:</u> The Court of Appeals' Pronouncement that Section 3 of the Kansas Constitution Protects a "Broader Array" of Associational Rights than the Federal Constitution Was Unnecessary to its Decision and Should Not Govern Future Cases.

The Court of Appeals also unnecessarily announced a significant new rule of Kansas constitutional law by suggesting that Section 3 of the Kansas Bill of Rights protects "a broader array of assembly rights" than the federal Constitution. *United Kan.*, 2026 WL 2357663, at *10. Nothing in this case required the panel to decide that question. Indeed, the panel properly

rejected Plaintiffs' associational claim under principles drawn from *Timmons* and other federal precedent, concluding that Kansas' anti-fusion laws leave the United Kansas Party and its supporters free to endorse, support, and campaign for its preferred candidates, associate with others, and otherwise communicate its political message. *Id.* at *10-13. The panel therefore could have reached precisely the same judgment without deciding whether Section 3 protects some additional universe of associational rights beyond those protected by federal law.

The unnecessary nature of that pronouncement is particularly significant because the panel elevated it to paragraph 5 of its Syllabus. *Id.* at *1. Yet the panel never identified what additional associational rights Section 3 protects, where the boundaries of those additional protections lie, or how any purported difference between Kansas and federal law on this issue affected Plaintiffs' claims. It did not identify any associational activity protected by Section 3 but unprotected by the federal Constitution. Nor did it conclude that Plaintiffs engaged in any activity requiring the supposedly broader protection afforded by section 3. After declaring Section 3 broader than federal law, the panel never even relied on that proposition to resolve the case. Instead, it proceeded to resolve Plaintiffs' associational claim principally through the same federal precedent that governs such claims under the First Amendment.

The panel's conclusion is even more difficult to justify given the provenance of Section 3. The Kansas Constitution was modeled substantially on the Ohio Constitution, and Section 3's assembly guarantee closely tracks Article I, § 3 of the Ohio Constitution, which likewise provides that "[t]he people have the right to assemble together, in a peaceable manner, to consult for their common good." Yet the Ohio Supreme Court has *never* interpreted that language to confer broader associational rights than the federal Constitution. To the contrary,

that court has historically treated Ohio's assembly guarantee coextensively with federal law. See *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 462 (Ohio 2022) (Fischer, J., dissenting).[1] In other words, the very State whose constitutional language Kansas borrowed provides no support for the panel's conclusion that the affirmative phrasing of Section 3 demonstrates an intention to confer broader associational rights.

The panel in this case identified no Kansas authority or historical evidence stablishing that Kansas' framers borrowed Ohio's language while intending it to carry materially greater protection than either federal law or Ohio law. Nor did Plaintiffs ever supply the missing justification much less explains what those additional protections supposedly encompass. In fact, on the precise subject of fusion voting, the Ohio Supreme Court long ago rejected a state constitutional challenge to a law prohibiting a candidate's name from appearing more than once on the ballot. See *State ex rel. Bateman v. Bode*, 45 N.E. 195 (Ohio 1896). More than a century later, the U.S. Supreme Court reached the same constitutional result under the federal Constitution in *Timmons*. Thus, whatever differences might exist between the scope of the Ohio and federal constitutional protections in other contexts, their application to the associational interests implicated by anti-fusion laws has produced the same result. That symmetry further undermines any suggestion that the language our Kansas founders borrowed from Ohio itself supplies a basis for recognizing broader associational protection in this case.

[1] Although Appellees cite a dissenting opinion in that case, the majority did not hold otherwise. The majority opinion expressly declined to reach the state constitutional assembly and speech claims because it resolved the case under Ohio's specific redistricting provisions. See *Ohio Redistricting Comm'n*, 192 N.E.3d at 384.

Kansas law distinguishes between a holding necessary to a judgment and a judicial pronouncement that goes beyond what the case requires. Judicial dictum may concern a question directly considered by the court, but when the proposition is "not essential to the decision," it "is not binding as a decision." *Schmidt v. Trademark, Inc.*, 315 Kan. 196, 207, 506 P.3d 267 (2022). Similarly, this Court has explained that "[d]icta in a court opinion is not binding, even on the court itself," in part because a legal question should be considered in light of the parties' briefs and arguments "when the question is squarely presented for decision." *Law v. Law Co. Building Assocs.*, 295 Kan. 551, Syl. ¶ 1, 289 P.3d 1066 (2012).

That distinction is not academic. The panel's categorical statement already purports to establish, for future cases, that Section 3 provides broader constitutional protection than its federal counterpart without identifying either the boundaries of that additional protection or the historical basis for applying it to particular forms of association. A constitutional holding of that breadth should await a case in which the difference actually matters and the Court has the benefit of briefing directed to the precise right claimed. See *Law*, 295 Kan. 551, Syl. ¶ 1 (explaining that constitutional and other questions should be decided when "squarely presented for decision"). The Court should not permit an unnecessary pronouncement concerning the scope of the Kansas Bill of Rights to acquire precedential force simply because it appeared in a case whose outcome did not depend upon it.

These issues warrant conditional review even though the State prevailed in the judgment below. The Court of Appeals affirmed the constitutionality of Kansas's anti-fusion laws, but it did so through significant and potentially far-reaching rulings of Kansas constitutional law adverse to the State. Kansas Supreme Court Rule 8.03 expressly recognizes

a conditional cross-petition as a means for a prevailing respondent to seek review of adverse holdings in the Court of Appeals' decision. If the Court grants Plaintiffs' petition for review, it should also grant the State's conditional cross-petition and address those rulings rather than allow them to govern future challenges to Kansas election laws.

Respectfully submitted,

Dwight R. Carswell (KS Bar #25111)
Acting Solicitor General
Office of the KS Attorney General
120 SW 10th Avenue
Topeka, KS 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: Dwight.carswell@ag.ks.gov

/s/ Bradley J. Schlozman
Bradley J. Schlozman (KS Bar #17621)
HINKLE LAW FIRM LLC
1617 N. Waterfront Parkway, Ste. 400
Wichita, KS 67206
Tel: (316) 267-2000
Fax: (316) 660-6596
Email: bschlozman@hinklaw.com

Counsel to Secretary Scott Schwab

John M. Settle
Reno County Counselor
206 West First Avenue
Hutchinson, KS 67501
Tel: (620) 694-2535
john.settle@renocounty.gov

Counsel for Reno County

Michael Montoya
Saline County Counselor
256 South Santa Fe Ave.
Salina, KS 67401
Tel: (785) 827-5505
admin@montoyalaw.kscoxmail.com

Counsel for Saline County

CERTIFICATE OF SERVICE

I certify that on this 12th day of October 2026, 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.

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman (KS Bar #17621)