No. 25-128,896-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

UNITED KANSAS, INC., *et al.*,

Plaintiffs-Appellants,

v.

SCOTT SCHWAB, *et al.*,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REVIEW

Appeal from the District Court of Saline County, Kansas
Honorable Jared B. Johnson, Judge
District Court Case Nos. SA-2024-CV-152, RN-2024-CV-0184

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Introduction

The Kansas anti-fusion laws deprive Plaintiffs of essential associational and expressive freedoms guaranteed by Sections 3 and 11 of the Kansas Bill of Rights. The laws deny Plaintiffs the right to nominate for office their standard-bearers of choice, simply because they have also been nominated by another party. As a result, they obstruct Plaintiffs' efforts, during the height of a political campaign, to spread their party's message to Kansas voters hungering for greater electoral choice. And they deny Plaintiffs and their supporters the opportunity to publicly express collective support for both their party and preferred candidates—as all other Kansans are permitted to do—when casting their ballots.

Thus, the Court of Appeals' decision affirming dismissal of Plaintiffs' claims presents weighty constitutional questions of great public importance never before addressed by this Court. As shown in the petition, Plaintiffs are entitled to review of that decision as a matter of statutory right. And even if the law did not provide a right of review, exercise of the Court's discretionary power of review would remain equally imperative.

This Court's review is necessary not simply because the Court of Appeals' decision brims with error, though most certainly it does. The court rejected strict scrutiny, contrary to this Court's precedent; dismissed the severity of Plaintiffs' constitutional injuries; and casually affirmed hypothetical state interests as justifications for stripping Plaintiffs of basic freedoms. If allowed to stand, the decision below would set a precedent diluting the protection of fundamental political rights extended to all Kansas citizens. And just as gravely, it would do so at a moment in our Nation's history when the vigorous exercise of those freedoms could not be more essential to the health of our political institutions.

Defendants' contrary arguments rest on mischaracterizations of both precedent and Plaintiffs' claims. This Court, therefore, should grant review, reverse, and remand this case to the District Court, to prevent the Court of Appeals' misguided analysis from embedding within Kansas' foundational law, and to ensure the respect for rights of free association and expression that our Constitution, and the endurance of our democratic order, require.

Argument

I. Plaintiffs are entitled to review as a matter of right

Plaintiffs are entitled to review of the decision below because in its wake at least three critical questions implicating freedoms guaranteed by the Kansas Bill of Rights arise for the first time in this Court. K.S.A. 60-2101(b); *see also* Kan. Sup. Ct. R. 8.03(g)(1); Pet. 5; *see id.* 7-8. In response, Defendants maintain that novel constitutional questions do not arise "for the first time" so as to occasion a right to review where they were initially placed before the District Court and thereafter addressed by the Court of Appeals. Resp. 3-5. But quite the opposite, the cases Defendants cite hold only that issues presented in a petition for review that were *not* raised below, but could have been, do not qualify as first-time issues under the right of review so as to excuse a litigant's failure to preserve them in the lower courts. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 800-04, 466 P.3d 1207 (2020); *In re Tax Appeal of Alsop Sand Co.*, 265 Kan. 510, 521, 962 P.2d 435 (1998).

Defendants err, too, when they suggest that under Plaintiffs' reading of § 2101(b), "virtually any new appellate analysis of an existing constitutional claim" would compel review in this Court. Resp. 4. The right to review is narrowly circumscribed to cases (such as this one) presenting novel constitutional issues never before addressed by this Court. It

is Defendants' reading, instead, that flouts the statute's aims. Defendants would render it a nullity by limiting the right of review to inconceivable situations where the Court of Appeals' decision, itself, somehow spawns a constitutional question that did not exist in the case beforehand. Defendants give no reason to believe the Legislature had only such unfathomable circumstances in mind. *See Hays v. Ruther*, 298 Kan. 402, 406, 313 P.3d 782 (2013) (observing that courts presume the Legislature does not enact useless, meaningless, or absurdly drafted laws).

Plaintiffs' petition for review presents constitutional questions of great consequence for all Kansans that arrive from the Court of Appeals for the first time in this Court. The plain terms of § 2101(b) entitle Plaintiffs to air these issues before this bench.

II. This case also presents compelling grounds for discretionary review

A. Review is necessary to guarantee freedoms of political association and expression the rigorous judicial enforcement they require

1. Under this Court's precedents, strict scrutiny, the "most searching" of standards, "applies when a fundamental right is implicated." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461 (2019); Pet. 8-9. Just so here, given the unmistakable burdens that the fusion ban inflicts on Plaintiffs' rights under Sections 3 and 11. Pet. 9-10. Review by this Court, and remand, are necessary to give Plaintiffs "their full opportunity to prove up their claims" under the appropriate standard of review. *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 807, 549 P.3d 363 (2024) ("*LWV II*").

Contending otherwise, Defendants baldly assert that *LWV II* rejected a fundamental rights "mode of analysis," Resp. 5, but their argument mischaracterizes that decision.

LWV II did not disavow precedents such as *Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 124, 853 P.2d 669 (1993) and *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 227-28, 234, 689 P.2d 860 (1984), holding that infringements on fundamental liberties protected by the Bill of Rights trigger strict scrutiny. Rather, *LWV II* held that the right at issue there—voting—is not, to begin with, a fundamental right secured by Bill of Rights Sections 1 and 2. *Id.* at 793-98. The Court explained that under *State v. Butts*, 31 Kan. 537, 2 P. 618 (1884), voting is a political right guaranteed by Article 5 of the Kansas Constitution, and, as such, is "provide[d] the strongest possible constitutional protections," surpassing even strict scrutiny. *Id.* at 800-02, 808. Nothing in *LWV II* or *Butts* curtails the scrutiny required where violations of Sections 3 and 11 are at issue.

Defendants also mischaracterize Plaintiffs' position. Plaintiffs do not argue that "every regulation touching" on a fundamental right, no matter how trivially, demands strict scrutiny. Resp. 7; *id.* at 5, 6. They maintain, and showed, that the Court of Appeals should have applied strict scrutiny because, at the very least, the anti-fusion laws "acutely interfere" with and "serious[ly] burden" their rights under Sections 3 and 11. Pet. 9-10.[1]

2. Even under an *Anderson-Burdick* approach, the Court of Appeals should have recognized that the severe burdens on Plaintiffs' rights necessitate strict scrutiny.

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[1] Defendants also oppose remand based on a statement, in one of Plaintiffs' initial district court filings, that factual development was not needed to adjudicate the case. Resp. 12. The cited remarks were predicated on an expectation at the time that the District Court, following this Court's precedent, would apply heightened scrutiny to the anti-fusion laws that Defendants' assertions of conjectural state interests could not satisfy. Because neither court below did so, a remand is now necessary to adjudicate Plaintiffs' claims under the appropriate standard of review, including opportunities for factual development if the State, contrary to its strategy before, attempts to adduce meaningful evidence in support of the fusion ban's constitutionality.

Defendants maintain that Plaintiffs' burdens do not qualify as severe because, in their telling, Plaintiffs claim no more than an unrecognized right to use the ballot as a billboard for political messaging. Resp. 2, 8, 9-10. Again, Defendants misrepresent Plaintiffs' case.

As Plaintiffs explained in their petition, their injury lies principally in the fact that the State's abrogation of their nominations—denying them their chosen standard-bearers during the height of an election campaign—deprives them of the single most effective means of conveying their political message and garnering public support, long before ballots are cast. Pet. 9, 10. It is also true that in an election Plaintiffs seek to advance their political goals using the ballot, but not as some sort of political pulpit. They seek, as voters, to use the ballot as a vehicle for their "core political speech," *LWV II*, 318 Kan. at 810, in precisely the same fashion as other Kansans are permitted by State law to do, that is, to express support for both their chosen nominees and their party. Pet. 9-10, 11.

Defendants contend relatedly, and rhetorically, that Plaintiffs seek to dictate how the State identifies a party's nominee on the ballot. Resp. 2, 8, 9-10. But Plaintiffs' complaint in this action is not *how* their nominees are identified on the ballot; it is that their nominees are stripped of that status, and are not identified on the ballot as such, *at all*.

3. Finally, to support the Court of Appeals' abandonment of strict scrutiny in favor of its own languid approach, Defendants resort to incantation. They contend no less than six times that the burdens on Plaintiffs' rights should not be viewed as severe given alternative means of political association and expression available to them, Resp. 2, 7, 9, 10, 13—as if drumbeat repetition of that mistaken assertion could somehow make it so. Yet as Plaintiffs have explained, Defendants' contention fails on two accounts, as held in

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000). First, as a matter of political reality, the inferior alternatives proffered by Defendants are "simply no substitute" for a party's choice of standard-bearer, and second, as a matter of constitutional principle, unjustified restrictions on some expressive and associational activity cannot be condoned just because other such conduct remains unfettered. *Id.* at 580-81; *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *see* Pet. 12; Pls. App. Br. 14, 25.

Defendants offer no response except to remark that *Jones* does not establish a constitutional right to "compel a candidate" of one party "to appear on the ballot as the nominee" of another. Resp. 10. Yet again, Defendants resort to misrepresentation of Plaintiffs' position. Plaintiffs sought in this case only to cross-nominate consenting candidates who gladly accepted UKP's nominations and wished to keep them. 1 ROA 2, 10, ¶¶ 2, 35; 5 ROA 2, 9, ¶¶ 2, 33; 1 ROA 206-07, 209-10, ¶¶ 18-19, 21, 29-30. Moreover, Kansas law already separately prevents a party from "hijack[ing]" another party's candidate, Defs. App. Br. 27, by providing that an individual chosen to stand for office by a minor party shall not become that party's candidate unless he or she consents to accept the minor party's nomination. K.S.A. 25-302(c). Thus, Defendants' argument succeeds only in illustrating that the State has more refined tools available to protect its asserted interests than the bludgeon of revoking a nascent party's nominations.

B. The cursory review applied by the Court of Appeals would erode the protection of fundamental associative and expressive rights

Plaintiffs have also shown that this Court's review is needed because the court below, though purporting to apply the *Anderson-Burdick* balancing test, effectively applied

no more than rational-basis review to the anti-fusion laws, a standard that weighs *against* the protection of fundamental rights. Pet. 12-15.

First, as grounds for upholding those laws, the Court of Appeals accepted as "sufficiently important" two speculative and ill-defined concerns, one—unspecified "fraud" and "chaos" in late-19th century elections—having no apparent connection to fusion voting at all, and the other—potential voter confusion—disavowed even by *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 n.13 (1997). App. A26-27; Pet. 12-15. Defendants respond that the State is not obligated to submit empirical evidence to establish the weight of its interests, and that legislatures may act with "foresight" in addressing "potential deficiencies in the electoral process." Resp. 11. That ignores the historical fact (as alleged in Plaintiffs' petition) that the only such deficiency the Legislature foresaw in 1901 was the threat posed to the dominant party's position by its rivals' formation of inter-party coalitions. Pet. 13; 1 ROA 2-3, 14, ¶¶ 5, 49-50. In any event, the State may not rely, as the Court of Appeals did here, on "sheer speculation" to justify encroachments on voters' constitutionally protected rights of political association and expression. *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 454 (2008). The exercise of "foresight" requires a genuinely foreseeable peril, not "imaginative theoretical" threats. *See id.* at 455. *See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("mere conjecture" is never "adequate to carry a First Amendment burden").

Nor, as the State maintains, was it excusable of the court below to veto consideration of any less restrictive alternatives for addressing the State's supposed interests. Resp. 12; *see* App. A26, 27. Even if the fusion ban's abridgement of Plaintiffs' rights were less than

severe, *Anderson-Burdick* review still required the Court of Appeals to inquire whether the State's asserted interests make it necessary to impose those constraints, an assessment that necessitates evaluation of other less burdensome expedients at the State's disposal. *Norman v. Reed*, 502 U.S. 279, 290 (1992); *Wash. St. Grange*, 552 U.S. at 456-57; Pet. 14; *see supra* at 6 (discussing Kansas' nominee-consent requirement). Yet the Court of Appeals refused, categorically, to undertake that inquiry. App. A26, 27.

Reliance on speculative and conjectural interests to support a statute's validity, and disregard of available less burdensome means, are the hallmarks of rational-basis review, *see Hoesli v. Triplett, Inc.*, 303 Kan. 358, 369–70, 361 P.3d 504 (2015); *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 847–48, 851, 942 P.2d 591 (1997), not the heightened scrutiny our Constitution demands when fundamental rights protected by Sections 3 and 11 are at stake. This Court should not allow the Court of Appeals' perfunctory approach to set the standard for judicial enforcement of those essential guarantees in this or future cases.

C. The Court of Appeals' adoption of *Timmons* as a role model for judicial review only heightens the urgency for this Court's intervention

Notwithstanding the foregoing, Defendants assert that review by this Court is unwarranted because Plaintiffs' claims are "indistinguishable" from those rejected in *Timmons.* Resp. 14-15. But that simply begs a question at the heart of this case—whether uncritically accepting *Timmons'* flawed legal analysis and mistaken premises suffices to vindicate rights of free speech and association that the Kansas Constitution independently guarantees to voters and parties seeking to participate in the democratic process. As shown here and in Plaintiffs' petition, it does not. Pet. 12, 13, 15.

Moreover, this case is distinguishable from *Timmons* in numerous respects as matters of time and place: the passage of three decades' time during which *Timmons'* confidence in the stability of a two-party duopoly has been exposed as woefully misplaced, *see* Pet. 6-8; differences between Minnesota's election laws in 1997, and those of Kansas today, rendering a fusion prohibition even less justifiable here than in *Timmons, see, e.g.,* Pls. App. Br. 31 & n.9; and the distinct historical pedigrees of Sections 3 and 11 manifesting an accepted understanding of inter-party coalitions, now banned by the anti-fusion laws, as core associational and expressive activity protected by the particular terms of those state constitutional guarantees, *see id.* 17-19; Pls. App. Reply 8.

Indeed, the Court of Appeals recognized that Section 3 and (likely) Section 11 were intended to extend greater protection to rights of association and expression than the First Amendment. App. A20-21; *see* Resp. 7. But even if Sections 3 and 11 were no more than co-extensive with the First Amendment, it does not follow that Kansas courts must turn the same blind eye as *Timmons* did to the crippling, real-world impact of anti-fusion laws on essential political rights when determining for themselves—as guardians of our State Constitution—whether such laws impermissibly infringe on those rights. The Court of Appeals' uncritical acceptance of *Timmons'* analysis as determinative of the rights at issue here demands further review.

D. The public importance of the questions presented also calls upon this Court to intervene

Finally, Defendants argue that fusion's "perceived political benefits" do not evoke a constitutional issue requiring this Court's intervention. Resp. 13. Yet what they refer to

dismissively as fusion's "perceived political benefit[]" is the important contribution that fusion, by increasing voter choice, could make toward healing the wounds that entrenching a major-party duopoly has helped to inflict on our democracy, restoring stability and vigor to our political institutions, and renewing people's faith in representative government. Pet. 7-8. Whatever the outcome of this case, it cannot be gainsaid that it presents issues of utmost importance to all Kansans concerned for the future of our democratic project.

Defendants suggest, again dismissively, that whether "certain advantages" of fusion voting may merit a role for fusion in our "electoral process" is a matter for legislative determination. Resp. 14. But as the U.S. Supreme Court alluded to long ago, legislators cannot be counted on to repeal "restric[tions]" on the "political process[ ]" that serve their own interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *see also* John Hart Ely, *Democracy and Distrust* 106 (1980) ("Courts must police inhibitions on … political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."). This Court has steadfastly refused to heed such calls to "abandon [its] duty to the people of Kansas" to "safeguard[ ] the basic rights reserved" to them by the State Constitution. *Gannon v. State*, 303 Kan. 682, 745-46, 368 P.3d 1024 (2016). It should decline the invitation on this occasion, as well.

Conclusion

For the reasons given herein and in Plaintiffs' Petition for Review, this Court should grant review, reverse the decision below, and remand to the District Court for adjudication of Plaintiffs' free speech and association claims under the scrutiny required to ensure protection of Plaintiffs' constitutionally guaranteed rights.

Respectfully submitted,

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**Pro hac vice*

***Applications for admission pro hac vice pending*

Certificate of Service

I certify that on the 29th day of October, 2026, the foregoing was electronically filed with the Clerk of the Court by using the Court's e-Filing system, which will send notification of electronic filing to counsel for all parties of record.

/s/ Rex A. Sharp
Rex A. Sharp