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

UNITED KANSAS INC., *ET AL.*,

Plaintiffs – Appellants,

v.

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

Defendants – Appellees

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

AMICUS BRIEF OF CENTER FOR ELECTION CONFIDENCE, INC.

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SUMMARY OF ARGUMENT

Appellants attempt to paint their challenge to Kansas' 124-year-old anti-fusion voting law, K.S.A. 25-213, as new or novel. But similar anti-fusion voting laws have withstood countless state constitutional challenges across the country for at least as long as the Kansas statute has existed. Appellants' suit must also fail for similar reasons.

First, Appellants cannot succeed unless the free speech and association rights under the Kansas Constitution are *more protective* than those rights under the U.S. Constitution. But the Kansas Supreme Court has held multiple times that those rights are coextensive. And the U.S. Supreme Court has already determined that a nearly identical state anti-fusion voting law did not violate the First Amendment. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). Appellants are bound by that precedent and cannot succeed.

Second, Kansas does not recognize an unwieldy right of minor parties to commandeer a major party's candidate under the guise of free expression or association. This alleged right has no legal basis and would undermine the purpose of state ballots: to elect candidates, not to provide forums for political messages or a mechanism to prop up otherwise non-viable political parties. *Id.* at 363 (citation omitted).

Finally, Appellants' desired outcome would permit some parties to use the state ballot to thrust their political endorsements upon other parties and candidates, even against their consent. That outcome would conflict with the right of other political parties to associate with their nominees and to exclude those with whom they do not wish to associate. The balance between these conflicting rights and the state's interest in maintaining the integrity of its ballot and political stability are inherently political matters

best regulated by the *Legislature*. *Rucho v. Common Cause*, 588 U.S. 684, 703-07 (2019); *Rivera v. Schwab*, 315 Kan. 877, 895-99, 512 P.3d 168, 180-83 (2022). That is, the issue presents non-justiciable political questions of which party's interest should prevail and how best to protect the integrity of the state's ballot from unfair political gamesmanship. Accordingly, this Court, and all others confronted with this issue, lack judicially manageable standards (and therefore, lack jurisdiction) to adjudicate the right to speak and to associate via the ballot that Appellants posit. This Court should affirm.

ARGUMENT

I. The Protections Afforded by the U.S. and Kansas Constitutions for Speech and Association Are Coextensive.

Appellants seek to trample well-established Kansas precedent that interprets Sections 3 and 11 of the Kansas Bill of Rights (enumerating the right to peaceably assemble and the right to free speech, respectively) coextensively with the guarantees of the First Amendment of the U.S. Constitution. Appellants cannot win unless they do so: if the rights under the two Constitutions are coextensive, Appellants cannot escape *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which indisputably decides this lawsuit in the State's favor. Appellants' efforts fall short.

Kansas courts, including the State's highest court, have consistently interpreted the Kansas Constitution's free speech and association protections to be coextensive with those protections in the First Amendment of the U.S. Constitution. *See, e.g.*, *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 815, 549 P.3d 363 (2024) ("[W]e have previously recognized that the First Amendment and section 11 protections are generally considered

coextensive." (citing *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980), *cert denied* 449 U.S. 983 (1980))); *Prager v. State, Dept. of Rev.*, 271 Kan. 1, 37, 20 P.3d 39 (2001) ("The language of the Kansas Constitution may be worded more broadly than the United States Constitution, but we have treated both provisions as 'generally considered coextensive.'" (quoting *Russell*, 227 Kan. at 899); *id*. (citing *Boyer v. Bd. of Cnty. Comm'rs of Johnson Cnty.*, 922 F. Supp. 476, 483 n.5 (D. Kan. 1996), *aff'd* 108 F.3d 1388 (D. Kan. 1997) favorably for "refus[ing] to permit a claim for money damages under the KTCA for violation of free speech rights under the Kansas Constitution because a constitutional tort could not have been brought against a private person" and "reject[ing] Boyer's argument that the free speech language of the Kansas Constitution would permit her action because of its broader language"); *State v. Lawson*, 296 Kan. 1084, 1091, 297 P.3d 1164 (2013) ("But, at least for the past half-century, this court has generally adopted the United States Supreme Court's interpretation of corresponding federal constitutional provisions as the meaning of the Kansas Constitution, notwithstanding any textual, historical, or jurisprudential differences."); *Russell*, 227 Kan. at 899-900 ("The First Amendment to the United States Constitution [and] Section 11 of the Kansas Bill of Rights . . . are generally considered coextensive." (citing *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 72, 547 P.2d 760 (1976))); *State v. Phipps*, 63 Kan. App. 2d 698, 708, 539 P.3d 227 (Kan. Ct. App. 2023) (same); *Lingelbach v. Hy-Vee, Inc*., 84 P.3d 636 (Table), No. 88,995, 2004 WL 324120, at *4 (Kan. Ct. App. Feb. 20, 2004) (same). Federal courts interpreting Kansas law have followed suit. *See, e.g*., *Erickson v. City of Topeka, Kan*., 209 F. Supp. 2d 1131, 1137 (D. Kan. 2002); *Boyer*, 922 F. Supp. at 483; *Case v. Unified Sch. Dist. No. 233*, 908

F. Supp. 864, 876 (D. Kan. 1995). To counsel's knowledge, no court, and certainly not the Kansas Supreme Court, has extended Kansas' protections beyond federal guarantees, and this Court should not do so here.

Courts have reached this conclusion consistently even while acknowledging, as Appellants highlight here, that the text of the Kansas and U.S. Constitutions differ for various constitutional provisions. *See, e.g.*, *Russell*, 227 Kan. at 899-900 (so holding for Section 11 and the U.S. Constitution); *Lawson*, 296 Kan. at 1091; *Prager*, 271 Kan. at 37; *State v. McKinney*, 59 Kan. App. 2d 345, 356-57, 481 P.3d 806 (Kan. Ct. App. 2021). As such, Appellants' chief argument that the Court should depart from this interpretation because the Kansas Constitution's text is allegedly broader than the U.S. Constitution's has already been heard and rejected by the Kansas Supreme Court multiple times.

This Court, for its part, is "duty bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position." *Phipps*, 63 Kan. App. 2d at 708 (citing *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017)). "The Supreme Court has given no such indication" that it is departing from *Russell*'s well-established holding. *Lingelbach*, 2004 WL 324120, at *4. Thus, this Court should continue to interpret the Kansas constitutional provisions at issue in tandem with the First Amendment.

Even if Kansas authority were insufficient to defeat Appellants' argument, other states with similar anti-fusion laws and free speech protections have reached the same conclusions. For example, the New Jersey Superior Court determined just this year that a challenge to New Jersey's anti-fusion voting law under the New Jersey Constitution could

not stand, in part because the rights to free speech and assembly guaranteed by the New Jersey Constitution must be guided by federal interpretations of the First Amendment. *In re Malinowski*, 332 A.3d 755, 765-66 (N.J. Super Ct. 2025). The New Jersey Superior Court reached that conclusion even though the text and history of the New Jersey Constitution differ from the text and history of the First Amendment. *Id*. at 764-67. The language of the Kansas constitutional provisions tracks closely with New Jersey. *Compare* N.J. CONST. art. I, ¶ 18 ("[P]eople have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives."), *with* KAN. CONST. BILL OF RIGHTS § 3 ("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."); *compare* N.J. CONST. art. I, ¶ 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."), *with* KAN. CONST. BILL OF RIGHTS § 11 ("The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights . . . ."). This Court should reach the same result as the New Jersey Superior Court.

Because the Kansas Constitution must be interpreted in line with the Federal Constitution, the Court must look to U.S. Supreme Court precedent interpreting the First Amendment. This Court, of course, recognizes it is "duty bound to follow controlling United States Supreme Court precedent." *Phipps*, 63 Kan. App. 2d at 708 (citing *Lawson*, 296 Kan. at Syl. ¶ 1); *see also Lawson*, 296 Kan. at Syl. ¶ 1 ("The United States Supreme

Court's interpretation of the United States Constitution is controlling upon and must be followed by state courts."). As such, the district court was correct to look to and apply *Timmons*, a Supreme Court case that, as discussed more fully in Section II, *infra*, upheld a nearly identical ban on fusion voting against a First Amendment challenge. Just as the First Amendment did not bar a state anti-fusion voting law there, the Kansas Constitution's coextensive provisions do not bar the Kansas anti-fusion voting law here.

II. Ballots Are Not a Forum for Political Messages Under the Kansas Constitution.

Even if the Kansas Constitution affords broader protection than the First Amendment (it does not), speech protection do not extend to the acts in which Appellants wish to engage: piggybacking on another party's candidate to send a message or to prop up the party's future ballot position. Kansas has afforded minor parties (like Appellant United Kansas) relatively easy access to ballot positions in line with the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). Parties that submit petitions signed by over 2% of qualified electors voting in the last gubernatorial election receive recognition. K.S.A. 25-302a. And parties maintain ballot access if at least one nominated candidate receives over 1% of the total statewide vote. K.S.A. 25-302b. This burden on minor parties like Appellant United Kansas is reasonable, but it creates a perverse incentive for them to "nominate" a major party candidate to piggyback on the electoral strength of a major party's candidate. *Timmons*, 520 U.S. at 365-66. Appellant United Kansas concedes that it does not nominate candidates with any independent viability. Rather it exists to "nominate" only major party candidates, based not on Appellant's own electoral strength, "to send a 'message with [its supporters'] vote,' namely that 'whether the candidate is on the Democratic or Republican

side, they'll know how a big share of their votes came from voters . . . fed up with partisan politics.'" Opening Brief of Appellants at 24 (citing 5 ROA 9-10, ¶ 33 (Long)).

However, the state's ballot is not a forum to send political messages to candidates to influence their political stances or to prop up non-viable parties who stand no chance to win on their own. As the U.S. Supreme Court has already determined, "[b]allots serve primarily to elect candidates, not as forums for political expression," *Timmons*, 520 U.S. at 363 (citation omitted); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127-28 (2011); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 n.7 (2008), and not as forums for associational interests, *Clingman v. Beaver*, 544 U.S. 581, 589 (2005) ("If the concept of freedom of association is extended to a voter's every desire at the ballot box, it ceases to be of any analytic use." (quotation omitted)); *Timmons*, 520 U.S. at 362-63 ("We are unpersuaded, however, by the party's contention that it has a 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."). Rather, the primary (and adequate) forum for parties to endorse their candidates, even if listed as another party's candidate on the ballot, is through the *election campaign*. *Timmons*, 520 U.S. at 363. And voters retain their right to vote for that candidate even if listed as another party's candidate. *Id*. Neither candidates, political parties, nor voters have a freestanding right to dictate state regulations of ballots under the guise of association or speech rights. *Clingman*, 544 U.S. at 589; *Timmons*, 520 U.S. at 362-63. Appellants' attempt to misuse state ballots (as opposed to campaign speech outside the polling place) to accomplish political objectives by leeching onto another party's candidates is not a free speech right.

Appellants' theory relies on Sections 3 and 11 of the Kansas Bill of Rights, but neither provision provides the alleged rights of minor parties to leech onto a major party's candidates on an election ballot. In fact, the Kansas Supreme Court recently held that a Kansas constitutional free speech challenge to a state ballot collection requirement failed because "the proscribed activity—the delivery of ballots—is not speech or expressive conduct." *League of Women Voters*, 318 Kan. at 808. In so holding, the Kansas Supreme Court relied on the U.S. Supreme Court's analogous interpretation of the First Amendment: "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," and "not all conduct is 'expressive' for purposes of the First Amendment." *Id*. at 808-09 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968) and *Texas v. Johnson*, 491 U.S. 397, 405 (1989)).[1] Otherwise, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (citation omitted).

Furthermore, the "universal and long-established tradition of prohibiting certain conduct" here—*i.e.* fusion voting—"creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within

[1] Appellants rely entirely on a cherry-picked line from *League of Women Voters*, which stated "the advance ballot is the core political speech of the voter, not the League, and [o]ne does not speak in this context by handling another person's speech." 318 Kan. at 810 (quotation omitted). But Appellants take this quote entirely out of context and with no analysis. There, the Court was responding to and rejecting an argument that ballot harvesters were engaging in expressive conduct or speech merely by picking up other people's ballots and delivering them elsewhere; it neither considered nor held that casting a ballot constitutes speech.

constitutional guarantees are not readily erased from the Nation's consciousness." *Nev. Comm'n on Ethics*, 564 U.S. at 122-23 (quoting *Republican Party of Minn. v. White*, 536 U. S. 765, 785 (2002)). And "longstanding traditions in the States" provide "overwhelming evidence of constitutional acceptability." *Id*. at 124-25. Fusion voting bans today exist in almost every state across the country and have existed in many states like Kansas for over a hundred years. *Cf. id*. at 125 (noting that "virtually every State has enacted some type of recusal law" and upholding Nevada's recusal law in part due to this evidence (citation omitted)). And since their inceptions, American courts have routinely upheld fusion voting bans against state and federal constitutional challenges with few exceptions. *See, e.g.*, *In re Malinowski*, 332 A.3d at 765-66 (New Jersey); *Working Families Party v. Commonwealth*, 653 Pa. 41, 209 A.3d 270 (2019) (Pennsylvania); *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (Wisconsin); *Ray v. State Elec. Bd.*, 422 N.E.2d 714, 722 (Ind. Ct. App. 1981) (Indiana); *State v. Dunbar*, 39 Idaho 691, 230 P. 33, 38 (1924) (Idaho); *State ex rel. Dunn v. Coburn*, 260 Mo. 177, 168 S.W. 956, 957-61 (1914) (Missouri); *State v. Wileman*, 49 Mont. 436, 143 P. 565, 566-67 (1914) (Montana); *Gardner v. Ray*, 154 Ky. 509, 157 S.W. 1147, 1151-53 (1913) (Kentucky); *People ex rel. Schnackenberg v. Czarnecki*, 256 Ill. 320, 100 N.E. 283 (1912) (per curiam) (Illinois); *State v. Super. Ct. of King Cnty.*, 60 Wash. 370, 377, 111 P. 233, 237 (1910) (Washington); *State ex rel. Fisk v. Porter*, 13 N.D. 406, 100 N.W. 1080, 1081 (1904) (North Dakota); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898) (Wisconsin); *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 45 N.E. 195 (1896) (Ohio); *Todd v. Bd. of Elec. Comm'rs*, 104 Mich. 474, 64 N.W. 496 (1895) (Michigan). *But see Hopper v. Britt*, 203 N.Y. 144, 96 N.E. 371 (1911).

Given that the Kansas law was born in the same context as many of these other State laws that have faced similar constitutional challenges, the Court should adhere to this overwhelming precedent.

In sum, ballot regulations, like the one at issue here, do not infringe upon any rights to free speech or association because ballots are a mode to elect candidates, not a forum for speech or association.

III. Appellants' Desired Outcome Creates a Non-Justiciable Political Question.

Finally, the Court should not recognize a free speech or associational right for minor parties to commandeer or piggyback on major party nominees to send political messages to candidates about the source of their support or to prop up otherwise non-viable minor parties. Doing so would immediately present this Court with a political question regarding which parties' "speech" rights win out: a minor party's "right" to leech a major party's candidate or the major party's right not to associate with the minor party via a shared candidate. The balance of these political strategies and competing "rights" is an inherently political question about the use and misuse of the state's ballot. The regulation of such political questions is best decided by the Legislature and should be beyond the scope of judicial review.

Parties and candidates have a right to associate, or not, without state interference. An "important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quotation omitted). "The right to eschew association

for expressive purposes is likewise protected." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) ("[F]orced associations that burden protected speech are impermissible")). This right to exclude is at least as strong as the right to speak and associate in the first place. *Hurley*, 515 U.S. at 573-74 (noting the First Amendment applies "equally" to the rights to speak and exclude (citation omitted)). And if the Kansas Constitution extends broader protections for association than those the First Amendment affords, as Appellants argue, then the right to exclude to protect those associations must be at least as robust. Otherwise, the Kansas Constitution would impermissibly protect *less* speech than the First Amendment. *League of Women Voters*, 318 Kan. at 815.

Under Appellants' theory, the right to associate attaches when a political party merely lists a candidate's name. Under this reasoning, by listing a candidate, a party not only associates with the candidate but with all other parties who list that candidate. A minor party who lists a major party's candidate as its own may thereby inhibit the major party's right to eschew association with the minor party. If the Kansas Bill of Rights gives minor parties the right to leech onto major parties' candidates (and thereby major parties' names, candidates, and platforms), and to influence their platforms, by using the state's ballot as a forum for influence or even cudgel, major parties also have the right to eschew self-interested minor parties who attempt to leech onto major parties' candidates (and thereby their name, brand, and platform) on the ballot.

But in an inevitable conflict, whose right wins? And is the state helpless to regulate the use of its ballot to interfere with consensual party associations? These issues are unanswerable, non-justiciable political questions. "[T]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations that are inextricable from the exercise of political discretion vested in the political branches of government." *Rivera*, 315 Kan. at 895 (citation omitted). "If resolving a controversy is outside the scope of the competence of the judiciary, it is said to be 'nonjusticiable'—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government." *Id*. at 896. Kansas courts take their cues from federal courts in deciding whether a political question exists: "To determine if a political question exists, we look for the presence of one or more of the six characteristics established by the United States Supreme Court in *Baker* [*v. Carr*, 369 U.S. 186, 217 (1962)]. We will dismiss a case as nonjusticiable because it is a political question only if at least one of these characteristics 'is inextricable from the case' before us." *Id*. at 902 (quoting *Baker*, 369 U.S. at 217); *Gannon v. State*, 298 Kan. 1107, 1137-38, 319 P.3d 1196 (2014) (per curiam).

Five of the six *Baker* factors independently counsel against the Court's intervention.

First, there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. The Kansas Constitution vests the Kansas Legislature with the authority to decide the manner of elections of state officers. KAN. CONST. art. 2, § 8; KAN. CONST. art. 4, § 1 ("All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.").

Second, there is "a lack of judicially discoverable and manageable standards for resolving" the conflict of rights. *Baker*, 369 U.S. at 217. Such standards must be "clear, manageable, and politically neutral." *Rucho*, 588 U.S. at 706. The inevitable dispute over which political parties' speech and association rights win has no clear standard, would require political apportionment, and would ultimately boil down to a question of fairness. *Id*. at 705; *Rivera*, 315 Kan. at 900-01, 903. "And as the *Rucho* Court explained, deciding among different proposed metrics of fairness poses questions that are political, not legal." *Rivera*, 315 Kan. at 903. Accordingly, since there is no clear standard for courts to adjudicate this question, the Court may not decide it. *Id.* at 903-05.

Third, it is impossible for the Court to decide which political party's rights should effectively trump another's on the ballot "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. This is inherently a political decision and thus falls outside the Court's authority.

Fourth, it is impossible for the Court to "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The Legislature has already determined that candidate names should not be printed more than once on election ballots. K.S.A. 25-213(c). If the Court were to wade into this debate, it would inevitably undermine a political decision of a coordinate branch of government that has been on the books for over a hundred years. The Kansas Supreme Court has expressed a heavy reticence to do so. *Gannon*, 298 Kan. at 1148; *Downtown Bar & Grill v. State*, 294 Kan. 188, 192, 273 P.3d 709 (2012) ("[U]nder the separation of powers

doctrine, this court presumes statutes are constitutional and resolves all doubts in favor of a statute's validity." (quotation omitted)).

Fifth, "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" counsels against intervention. *Baker*, 369 U.S. at 217. If the Court decided minor parties' right to associate is greater than major parties' right to exclude, the Court would have to depart from the Legislature's pronouncement in its anti-fusion law.

In sum, even if Appellants are correct that *Timmons* does not control, this Court lacks jurisdiction to adjudicate the question of whether, when, and how Appellants' associational rights defeat major political parties' associational rights and how the ballot is to be regulated to prevent misuse. No judicially intelligible standards exist to resolve this political dispute. Courts could only fall back on policy judgments in deciding when the rights of a willing "leecher" trump the rights of an unwilling "leechee." That is precisely why this issue is textually committed to the Legislature under the Kansas Constitution. KAN. CONST. art. 2, § 8; KAN. CONST. art. 4, § 1. Kansas courts lack jurisdiction to undermine the authority of a coordinate branch and adjudicate Appellants' claims.

Ultimately, Appellants' remedy is not in the courts. They must do the hard work of convincing Kansans to adopt fusion voting—something few voters anywhere in our nation's history have endorsed. Courts are not a shortcut to achieving political goals.

CONCLUSION

For the foregoing reasons, the Court should affirm.

August 27, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 27, 2025, the above and foregoing Amicus Curiae Brief of the Center for Election Confidence, Inc. was electronically filed with the Kansas Court of Appeals using the Court's electronic filing system, which will send notice to all counsel of record.

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