

No. 23-3100

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

VOTEAMERICA and VOTER PARTICIPATION CENTER,

Plaintiffs-Appellees,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; KRIS KOBACH, in his official capacity as Kansas Attorney General; and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County,

Defendants-Appellants.

Appeal from the U.S. District Court for the District of Kansas
Honorable Kathryn H. Vratil, District Judge
District Court Case No. 2:21-CV-02253-KHV-GEB

**BRIEF OF AMICUS CURIAE HONEST ELECTIONS PROJECT
IN SUPPORT OF DEFENDANTS-APPELLANTS
AND REVERSAL**

Dated: August 1, 2023

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CORPORATE DISCLOSURE STATEMENT

Per Rule 16.1, Amicus Curiae Honest Elections Project states that it has no parent corporation or corporation that owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: August 1, 2023

/s/ Tyler Green
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STATEMENT OF INTEREST

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public interest litigation, HEP defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections.

No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

INTRODUCTION

Wearing black armbands expressed a protest of the Vietnam War. So did putting on military uniforms for dramatic presentation. Burning a flag expressed a protest of the federal government. And sitting in a “whites only” area expressed a protest of segregation. But what message does a mass-mailing of a State’s absentee-ballot application to voters express?

Not a discernable one. Rather, sending out hundreds of thousands of absentee-ballot applications is action trying to *get people to vote*, not to express some deep-felt message about voting. Plaintiffs will tell you that themselves. According to VoteAmerica’s mission statement, “VoteAmerica uses technology to simplify political engagement, *increase voter turnout*, and strengthen American democracy for all eligible voters.” VoteAmerica, *About VoteAmerica*, <https://perma.cc/UPC8-HE3L> (emphasis added). That’s why the employees at VoteAmerica are “busy working on voter turnout.” VoteAmerica, *The VoteAmerica Team*, <https://perma.cc/SJN5-E96Z>. The Voter Participation Center, too, helps people “register and cast ballots.” Voter Participation Center, *Who is VPC?*, <https://perma.cc/YFS9-2BUG>. Not all people, though. Its “mission is to provide voter registration, early voting, vote by mail, and get out the vote resources and information to traditionally underserved groups, including young voters, voters of color, and unmarried women.” *VoteAmerica v. Schwab*, Doc. 1, No. 2:21-cv-2253 (D. Kan. June 6, 2021).

All of this should generate skepticism that Plaintiffs' *efforts* to turn out voters are merely *expressions of their beliefs* about turning out voters. The district court showed no such skepticism. Instead, it questioned Kansas's interests in regulating its elections. It thus sided with Plaintiffs' novel arguments and agreed that Kansas's prohibition on mailing prefilled absentee-ballot applications violates the First Amendment.

The district court's ruling broke new ground. Federal courts have overwhelmingly rejected Plaintiffs' arguments that third-party voter turnout efforts are expressive conduct under the First Amendment. And no court has held that a prohibition on mailing prefilled absentee-ballot applications violates the First Amendment. Kansas's law is not unusual. Indeed, it is narrower than similar laws in many States. In South Dakota, for example, "[n]o person may *distribute* an absentee ballot application to a voter that is prefilled with the voter's name and registration address." S.D. Codified Laws §12-19-1.3 (emphasis added). Kansas just prohibits *mailing* prefilled applications. In Tennessee it is a felony for any person "who is not an employee of an election commission" to "give[] an application for an absentee ballot to any person." Tenn. Code §2-6-202(c)(3). These laws do not violate the First Amendment, and neither does Kansas's.

The court also erred by rejecting Kansas's legitimate interests in election regulation. Kansas has strong interests in protecting against voter fraud, avoiding voter confusion, administering its elections in an orderly manner, and enhancing public confidence in the integrity of elections. Supreme Court case law requires courts to defer

to these interests. But the district court picked them apart. It misconstrued the record and inappropriately required more evidence from the State. Those decisions flouted the Supreme Court's instructions that courts must give significant weight to States' interests when it comes to elections. And even if the law here burdened expressive conduct, each of the State's interests is sufficient to justify the comparatively light burden it imposes.

Special care is required when it comes to state election laws. The Constitution vests States with broad authority over both federal and state elections. And the standards employed in election cases often invite value judgments that are best suited for the legislature, not federal judges. The district court overstepped those bounds when it invalidated Kansas's law. This Court should correct the error and reverse the judgment of the district court.

ARGUMENT

I. Federal courts have overwhelmingly rejected Plaintiffs' arguments.

The weight of authority confirms that mailing prefilled absentee-ballot applications is not protected speech under the First Amendment. Indeed, these same Plaintiffs recently lost on these same arguments in Georgia. *See VoteAmerica v. Raffensperger*, 609 F. Supp. 3d 1341, 1352-66 (N.D. Ga. 2022). Like the Kansas law they challenge here, the law Plaintiffs challenged in Georgia made it a misdemeanor to mail a prefilled absentee-ballot application to a registered voter. Ga. Code §§21-2-381(a)(1)(C)(ii), 21-2-598, 21-2-562(a). Mirroring their claims here, Plaintiffs alleged that the Georgia prohibition violated their First Amendment speech and association rights.

VoteAmerica v. Raffensperger, 609 F. Supp. 3d at 1349-51. Indeed, plaintiffs filed a notice of supplemental authority in the Georgia case touting its similarity to this case. *See VoteAmerica v. Raffensperger*, Doc. 173, No. 1:21-cv-1390 (N.D. Ga. 2022). There's one critical difference: the court in Georgia got it right, and the district court here got it wrong.

The Northern District of Georgia court did not share the court's confidence here that Plaintiffs' conduct is inherently expressive. Here, the district court found it "overwhelmingly apparent to someone who receives plaintiff's application that plaintiff is expressing a pro-advance mail voting message." *VoteAmerica v. Schwab*, No. 2:21-cv-2253, 2023 WL 3251009, at *9 (D. Kan. May 4, 2023). The court deemed that finding "common sense" without providing a further explanation, record citation, or factual support. *Id.* "[V]ague assertions of common sense are not, in fact, evidence." *Adams v. Georgia Gulf Lake Charles, LLC*, 249 So. 3d 1066, 1080 (La. Ct. App. 2018), *writ denied*, 255 So. 3d 1053. And what the court here thought was common sense was firmly rejected by the Northern District of Georgia, which found that "Plaintiffs' conduct in distributing applications is clearly distinguishable" from what the Supreme Court has said is expressive activity. *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d at 1357.

Plaintiffs' conduct does not receive First Amendment protection merely because it advances their values. The Supreme Court has long rejected "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." *United States v. O'Brien*, 391

U.S. 367, 376 (1968). Rather, the First Amendment protects only activity that is “inherently expressive.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 64 (2006). Conduct is “inherently expressive” when the expressive actor “inten[ds] to convey a particularized message” and “the likelihood [is] great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To satisfy that standard, expressive conduct must be “sufficiently imbued with elements of communication.” *Id.* at 406. For example: wearing coordinated black armbands to protest a war, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); wearing military uniforms for a dramatic presentation, *Schacht v. United States*, 398 U.S. 58 (1970); or publicly burning an American flag at a presidential inauguration, *Johnson*, 491 U.S. at 404.

The Northern District of Georgia properly ruled that mailing a prefilled absentee-ballot application is not inherently expressive. To be sure, because “[i]t is possible to find some kernel of expression in almost every activity a person undertakes,” some recipients of prefilled applications might understand that Plaintiffs are expressing a pro-mail voting message. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). But to succeed on their First Amendment challenge, Plaintiffs must show that “the likelihood was *great* that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404 (emphasis added). And most who receive the prefilled applications will hear other, very different messages, like “We think you are incapable of filling out simple forms,” or “You need a sophisticated organization to guide you because absentee voting

is not ‘accessible,’” or “We think you will vote for our favored candidates so we are targeting you.” Most recipients will view a prefilled absentee-ballot application like other mass-mailings and perceive no message at all. Besides dismissing these and other explanations as “def[ying] common sense,” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *9, the district court did not explain why the “likelihood was great” that the prefilled applications “would be understood by those who viewed [them]” as communicating Plaintiffs’ alleged message, *Johnson*, 491 U.S. at 404.

The letter accompanying the prefilled applications only confirms that the act of *mailing* the prefilled applications is not inherently expressive. To the extent Plaintiffs’ mailings have an “expressive component,” that expressive component “is not created by the conduct itself but by the speech that accompanies it.” *FAIR*, 547 U.S. at 66. “The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.” *Id.* To discern a message, the person receiving the prefilled application needs additional speech—Plaintiffs’ letter—a telltale sign that the mailing itself is “not inherently expressive.” *Id.*

Again, the Northern District of Georgia’s reasoning exposes the flaws in the district court’s conclusory assertions here. Relying on *FAIR*, the court in Georgia found “that combining speech (in the cover information) with the conduct of sending an application form ... is not sufficient to transform the act of sending the application forms into protected speech.” *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d at 1357. The district court here disagreed, reasoning that “[a]n organization with a neutral or negative

opinion toward advance mail voting would not expend its resources to personalize mail ballot applications for specific voters.” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *8. But (1) expending resources has no bearing on whether conduct is expressive, and (2) that some people could draw the conclusion that Plaintiffs have a positive view of mail voting does not make the conduct “inherently expressive.” *FAIR*, 547 U.S. at 66. All conduct by a person could be viewed to say something about the person’s beliefs. That does not make all conduct expressive, even when “the person engaging in the conduct intends thereby to express an idea.” *Id.* at 65-66 (citation omitted). “If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.” *Id.* at 66.

That explains why the district court’s ruling is an outlier. Indeed, just three years ago the Middle District of Tennessee found “not a single case ... in which the act of distributing absentee-ballot applications was treated as within the scope of the First Amendment.” *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 769 (M.D. Tenn. 2020). The court thus concluded that “the intended recipient would not in all likelihood” understand any message from “the mere act of being offered an absentee-ballot application.” *Id.* at 767. Even though the mailed ballot applications were accompanied by “voter engagement materials” like Plaintiffs’ letters here, the court ultimately dismissed the suit for failure to state a claim. *Lichtenstein v. Hargett*, No. 3:20-cv-736, 2021 WL 5826246, at *6 (M.D. Tenn. Dec. 7, 2021).

The last three years have produced no precedent that helps Plaintiffs. The closest cases the district court cited were two cases that didn't concern mailing out absentee-ballot applications. See *VoteAmerica v. Schwab*, 2023 WL 3251009, at *9 (citing *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), and *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020)). *League of Women Voters* dealt with a law that required third-party voter registration organizations that collect voter-registration applications to ensure that those applications are “promptly delivered to the division or the supervisor of elections.” Fla. Stat. §97.0575(3). The court preliminarily enjoined the law because the risk of fines chilled the plaintiffs’ ability to collect absentee-ballot applications at voter-registration drives. *League of Women Voters*, 447 F. Supp. 2d at 1332-34. Similarly, the Middle District of North Carolina preliminarily enjoined a law that permitted only the voter, the voter’s near relative or legal guardian, or a county-authorized third-party to return an absentee ballot request form. *Democracy N.C.*, 476 F. Supp. 3d at 222. Neither case concerned mass-mailing absentee ballot applications, let alone duplicate or prefilled applications.

Yet even those two cases are outliers. Court after court has rejected similar attempts to characterize third parties’ efforts to encourage or facilitate voting as expressive conduct. See *New Ga. Proj. v. Raffensperger*, 484 F. Supp. 3d 1265 (N.D. Ga. 2020) (“[C]ollecting ballots does not qualify as expressive conduct.”); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting that “the conduct of collecting ballots would reasonably be understood by viewers as conveying ... a symbolic message of any

sort”); *Voting for Am. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (finding “nothing ‘inherently expressive’ about receiving a person’s completed application and being charged with getting that application to the proper place”); *Voting for Am. v. Andrade*, 488 F. App’x 890, 898 (5th Cir. 2012) (same); *Feldman v. Arizona Sec’y of State’s Off.*, 840 F.3d 1057, 1084 (9th Cir. 2016) (“[A] viewer would reasonably understand ballot collection to be a means of facilitating voting, not a means of communicating a message.”), *reversed on other grounds* 843 F.3d 366 (en banc); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (agreeing that “the collection and handling of voter registration applications is not inherently expressive activity”); *DCCC v. Ziriak*, 487 F. Supp. 3d 1207, 1234-35 (N.D. Okla. 2020) (“[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message....”).

Not all conduct expresses a specific message that most observers would easily recognize. That’s why the weight of authority confirms what is intuitive to most voters: when an organization sends a ballot application, it is trying to facilitate voting, not to express itself to the voter. It wants the voter to *vote*, not to understand some expressive message about why voting is safe and important.

II. The Court must defer to the State’s interests in regulating elections.

State election regulations are supported by state interests of the highest order. “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Here, Kansas

asserts interests in protecting against voter fraud, avoiding voter confusion, orderly election administration, and enhancing public confidence in the integrity of elections. *See* Appellants’ Br. at 40. These are “weighty reasons that warrant judicial respect.” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurral). But the district court did not give the State’s interests the respect they are due.

First, States have a strong interest in deterring voter fraud. Indeed, “[t]he State’s interest is particularly strong with respect to efforts to root out fraud.” *Doe v. Reed*, 561 U.S. 186, 197 (2010); *see also Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020). The district court, however, thought preventing voter fraud was only “a *potentially* compelling state interest.” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *16 (emphasis added). That was error. “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.” *Cranford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). “Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021).

The district court also erred by faulting the State for not providing evidence of voter fraud. The court repeatedly remarked that the State had “presented no evidence of voter fraud.” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *16-17. But States have

legitimate interests in guarding against and deterring fraud even when the “record contains no evidence of any such fraud.” *Cranford*, 553 U.S. at 194. Requiring evidence of fraud, as the district court did, “would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Kansas “Legislature was not obligated to wait” for that “to happen” before acting to deter fraud. *Brnovich*, 141 S. Ct. at 2348. The district court also said the State’s interest in preventing fraud had only “superficial appeal.” *VoteAmerica v. Schwab*, 2023 WL 3251009 at *16. Substituting its judgment for that of the State’s, the court thought that the “real issue” was that “the process of preventing duplicate ballots takes more time than the process of dealing with requests for initial ballots.” *Id.* That, too, was error. “Federal courts have no business disregarding those state interests” merely because they prefer a different rule or think the interest should be something else. *Democratic Nat’l Comm.*, 141 S. Ct. at 34.

The Court also erred in questioning the effectiveness of Kansas’s chosen method of preventing fraud. Anyone in Kansas can return the application to a local election office or put it in the mail. *See* Kan. Stat. §25-1122. As the Iowa Supreme Court recently observed about third parties returning ballots, “requiring *the applicant* to complete certain personal information on the absentee ballot application form helps ensure that the ballot (which virtually anyone ... can return) was requested by the voter.” *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 6 (Iowa 2020) (emphasis added). The Kansas law is similar, “upholding the concept that the voter should fill out the absentee

ballot application correctly as a means of assuring the application comes from the voter.” *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 210 (Iowa 2020). Of course, Kansas does not prohibit people from helping other voters fill out their absentee ballots, as some States do. But Kansas cannot be faulted for choosing a less restrictive measure that narrowly targets a specific practice that was causing problems: mass-mailing prefilled ballots. Kansas had ample reason to believe that its law will both prevent and deter voter fraud.

Second, States have a strong interest in preventing voter confusion. The Supreme Court has long acknowledged that States have “‘compelling’ interests in avoiding voter confusion, preserving the integrity of the election process, and maintaining a stable political system.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *see also Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1378 (10th Cir. 1982) (acknowledging the “state interest of avoiding ‘confusion, deception, and even frustration of the democratic process at the general election’”). When federal courts issue “orders affecting elections,” they necessarily interfere with State election rules, which can “result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And the Supreme Court has “*never* required a State to make a particularized showing of the existence of voter confusion.” *Munro*, 479 U.S. at 194 (emphasis added). Courts have thus upheld laws prohibiting third parties from mailing absentee ballot applications “in light of the state’s goals of avoiding voter

confusion.” *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d at 1365; *see also Lichtenstein*, 489 F. Supp. 3d at 780.

Rather than credit the State’s evidence of voter confusion, the district court discounted it. The court found that the State “presented minimal evidence of voter confusion and frustration” and did not establish “that the pre-filled applications caused the alleged confusion.” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *17. But “[i]t is well established that, in the election context, there is no need for an ‘elaborate, empirical verification of the weightiness of the State’s asserted justifications.’” *Fla. State Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251 (N.D. Fla. 2008) (quoting *Timmons*, 520 U.S. at 364). That is because “Legislatures 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.” *Timmons*, 520 U.S. at 364 (cleaned up). “To require States to prove actual voter confusion ... would invariably lead to endless court battles over the sufficiency of the ‘evidence’ marshaled by a State to prove the predicate,” which is precisely what the district court required here. *Munro*, 479 U.S. at 195. In any event, the record indicates that many applications mailed by Plaintiffs contained false information. *See* Appellants’ Br. at 41-43. The court erred by failing to credit that evidence and by demanding more evidence than the law requires.

Even the court’s interpretation of the evidence was flawed. The court found that “defendants presented no evidence on how criminalizing the mailing of personalized

mail ballot applications would prevent confusion as to the source of the pre-filled advance mail ballot.” *VoteAmerica v. Schwab*, 2023 WL 3251009, at *17. But “[i]t goes without saying that all criminal laws have some deterrent effect.” *United States v. Idaho*, 623 F. Supp. 3d 1096, 1112 (D. Idaho 2022). Indeed, Plaintiffs challenge the law here *because* it makes mailing prefilled applications a misdemeanor. *See* Kan. Stat. §25-1122(k). And if no one is mailing out prefilled applications, no person could be confused “as to the source” of the prefilled applications. Voters cannot be confused “as to the source” of something they never receive. Prohibiting the mailing of prefilled applications will necessarily decrease any confusion caused by the mailing of prefilled applications.

Third, Kansas has a strong interest in the orderly administration of elections. *See Cranford*, 553 U.S. at 196 (discussing States’ “interest in orderly administration and accurate recordkeeping,” which provided “a sufficient justification for carefully identifying all voters participating in the election process”); *see also Fish*, 957 F.3d at 1132-33. A State’s “interest in running an orderly, efficient election,” *Democratic Nat’l Comm.*, 141 S. Ct. at 31, preserves state resources, guards against confusion in voters and election administrators alike, and ultimately “increase[s] voter confidence in elections,” *Brnovich*, 141 S. Ct. at 2345.

Again, the district court downplayed Kansas’s administrative interests. Some election officials testified that prefilled applications caused problems and created inefficiencies, while others testified that “in some ways,” prefilled applications made things easier. *VoteAmerica v. Schwab*, 2023 WL 3251009, at *18. The court credited only

the testimony that cut against the State, but what matters is the *State's* interest in election administration. The court also thought the real administrative problem was duplicate applications, not prefilled applications. *Id.* But this disregarded the evidence demonstrating the obvious results of mass-mailing prefilled applications to voters who had already submitted applications. *See* Appellants' Br. at 43-47.

Fourth, States have a strong interest in preserving public confidence in elections. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. The district court grouped together the States' interests in preserving public confidence and preventing voter fraud. But "[w]hile that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197. Federal courts striking down laws enacted by Kansas's elected representatives undermines that confidence and results in "consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5. Public confidence in election administration is still recovering,¹ and courts must defer to States on how best to assure voters and encourage democratic participation. *See Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

¹ *E.g.*, Pew Research Center, *Two Years After Election Turmoil, GOP Voters Remain Skeptical on Elections, Vote Counts* (Oct. 31, 2022), <https://perma.cc/SKN5-JSRF>.

* * *

Under the Supreme Court’s precedents, these interests demand respect, but the district court questioned and minimized them at every turn. Courts often uphold laws challenged as burdensome because of the “weighty” interests of the State. *Democratic Nat’l Comm.*, 141 S. Ct. at 34; *e.g.*, *Crawford*, 553 U.S. at 197 (upholding Indiana’s photo identification requirement, which “impose[d] some burdens on voters,” because of Indiana’s interest in preventing voter fraud, even when Indiana had presented no evidence of fraud); *Feldman*, 840 F.3d at 1085 (concluding that “ballot collection is not expressive conduct implicating the First Amendment, but even if it were, Arizona has an important regulatory interest justifying the minimal burden that [the law] imposes”). This Court should give Kansas’s interests their due—especially because the district court did not.

III. Federalism requires respect for the State’s election rules.

The power to regulate elections is left first to the States, then to Congress. The Constitution provides that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, §4. Likewise, “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” to choose the President of the United States. U.S. Const. art. II, §1.

Regulation of state elections, of course, is left entirely to the States. U.S. Const. amend. X.

“[T]he States ‘have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.’” *Evans v. Cornman*, 398 U.S. 419, 422 (1970). The Kansas Supreme Court, too, recognizes the proper role of the state legislature in regulating elections. *See Sanmyer v. Chapman*, 729 P.2d 1220, 1224 (Kan. 1986) (“The legislature weighed the added potential for fraud and loss of secrecy under mail ballot elections against the compelling state interest in increased participation in the election process and concluded the risk worth taking. Its action was lawful.”).

Given this constitutional structure, federal courts should be especially careful when it comes to weighing States’ interests in elections. Judges have cautioned against the “judicial overreach” that creeps in when courts apply the *Anderson–Burdick* framework. *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring in the judgment). That test is liable to “rampant subjectivity” that often bulldozes “a state’s political choices.” *Id.*; *see also Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring in the judgment) (“When an election law burdens voting and associational interests, our cases are much harder to predict, and I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from them.”). “*Anderson–Burdick* is a dangerous tool” that “leaves much to a judge’s subjective determination.” *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler,

J., concurring in the judgment); *see also Cranford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment) (“[R]ecord-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty....”).

This Court will be the first federal appellate court to decide whether Plaintiffs’ novel claims override Kansas’s sovereignty over its elections. It should treat the issue, and the State’s interests, with the care and respect they are due.

CONCLUSION

This Court should reverse the judgment of the district court.

Dated: August 1, 2023

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This brief complies with Rule 32(a), (g) because it contains 4,631 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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/s/ Tyler Green

CERTIFICATE OF DIGITAL SUBMISSION

With respect to this brief, all required privacy redactions have been made; the hard copies submitted to the clerk are exact copies of the ECF submission; the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Word 2016, and according to the program is free of viruses.

Dated: August 1, 2023

/s/ Tyler Green

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I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: August 1, 2023

/s/ Tyler Green