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

On Appeal from the District Court of Saline County,
Decision Dated March 3, 2025
Honorable Jared B. Johnson, Judge, District Court
Case Nos. SA-2024-CV-000152; RN-2024-CV-000184

AMICUS CURIAE BRIEF OF PUBLIC INTEREST LEGAL FOUNDATION, INC. AND THE AMERICAN CONSTITUTIONAL RIGHTS UNION

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IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

The Public Interest Legal Foundation, Inc. ("Foundation") is a non-partisan, public interest 501(c)(3) organization whose mission is to protect the fundamental right of citizens to vote and preserving election integrity across the country. For over a decade, the Foundation has sought to advance the public's interest in having elections free from unconstitutional burdens and discrimination. At the state level, this is best done by ensuring that state laws enacted by each state's legislative branch are constitutional. It is also done by monitoring judicial actions that intrude into the delegated responsibilities of the legislative branch. The separation of powers is foundational to election systems that are fair and free from undue partisan manipulation.

The American Constitutional Rights Union (ACRU) is a non-partisan, non-profit 501(c)(3) organization that supports the constitutional structure of election administration and promotes compliance with federal and state election laws. The ACRU seeks to advance civil rights because it believes civil rights are fundamental liberties available to all. As part of its mission, it seeks to defend constitutionally protected civil rights, with a strong emphasis on preserving free and fair elections. A central tenet of its mission is to honor the constitutional authority vested in states to regulate the "times, places and manner" of elections, ensuring that all citizen votes are protected and free from unconstitutional burdens.

This case is of interest to the Foundation as it is concerned with protecting the sanctity and integrity of American elections and preserving the proper constitutional

balance of state control over elections. This appeal concerns challenges to the State of Kansas's requirement that candidates for elected office accept the nomination of only one political party. Kan. Stat. Ann. § 25-306e. The District Court properly applied the *Anderson-Burdick* test in upholding this requirement. This case also implicates the right of the Kansas State Legislature to set reasonable restrictions regarding ballot procedures.

SUMMARY OF THE ARGUMENT

The Constitution of the State of Kansas vests the legislature with the authority to provide and regulate the means by which elections are held, either by ballot or device. Kan. Const. art. 4, § 1. The State's prohibition against fusion voting flows from this explicitly delegated authority. Transforming the ballot into an uncontrolled forum for political speech undermines the legislature's authority to create reasonable ballot procedures. Any burdens on speech or associational rights under the Kansas Constitution are justified by the State's profound interest in properly regulating the ballot to ensure stability and integrity in elections. Other states have addressed this same issue under their state constitutions and upheld fusion voting bans along similar lines to what the district court held in Kansas. Lastly, fusion voting is promoted as a moderate solution to political polarization, but in reality, it operates as a gateway to greater polarization.

ARGUMENT

I. Ballots are the State-Administered Means of Electing Candidates, Not Forums for Speech.

In 1997, the Supreme Court upheld Minnesota's anti-fusion law, stating, "[b]allots serve primarily to elect candidates, not as fora for political expression." *Timmons v. Twin*

Cities Area New Party, 520 U.S. 351, 363 (1997). Even if the free speech protections of the Kansas Constitution are construed more broadly than those of the First Amendment, this principle is still applicable.

Prior to the late-nineteenth century, fusion voting and other expressive content were more common on ballots. *Id*. at 356 ("Fusion was a regular feature of Gilded Age American politics."). At that time, political parties, not the state, printed and distributed ballots. *Id*. In the years following the election of 1888, many states switched to the Australian ballot system. *Id*. There are four defining features of this ballot system that is still in place today: (1) The ballots are printed and distributed at the expense of the public, (2) they contain candidates duly nominated by law, (3) they are distributed by election officers only at the polling place, and (4) there are secrecy provisions to protect each person's cast ballot from being associated with them. L.E. Fredman, *The Australian Ballot: The Story of an American Reform* 46 (Michigan State University Press, 1st ed. 1968). Widespread bans on fusion voting followed the adoption of the Australian ballot, many of which remain in place. *Timmons*, 520 U.S. at 356-357.

The Elections Clause of the Constitution guarantees the power of States to regulate the ballot in this way. *See* U.S. Const. art. I. § 4, cl. 1. In Kansas, this power of the legislature is affirmed by the state's constitution. Kan. Const. art. 4, § 1. Such regulation is necessary to maintain integrity and stability in the democratic process. *See Storer v. Brown*, 415 U.S. 724, 730 (1974). Striking down laws prohibiting fusion voting on free speech grounds undermines the constitutionally delegated power of the Kansas Legislature to regulate election procedures.

Transforming the ballot into a forum for the speech of political parties undermines the primary purposes of the ballot system that has existed in Kansas for well over a century and that is the norm in most other States as well. Since ballots are printed and distributed at the public expense by election officials at designated polling places, labeling the ballot as the speech of political parties in effect requires the public to pay for and promote that speech. *See* Kan. Stat. Ann. § 25-604(a) ("The county election officers shall have charge of the printing of the ballots for all elections, primary, special and general."); *see also* Kan. Stat. Ann. § 25-2201a ("Annually any county may make a tax levy on the taxable tangible property in the county in an amount not greater than the amount necessary to pay the direct expense of elections which the county is required to pay and for which the county is not reimbursed."). Furthermore, another feature of the ballot system is that the candidates are nominated by law. To require Kansas to allow multiple parties to nominate the same candidate and for that to be represented on the ballot minimizes the authority of the state to have regulations for nominations for the ballot.

Freedom of speech is certainly essential to free and open elections, but there is a point at which "the campaign ends and the electoral process begins." *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 131 (3d Cir. 2022) (upholding New Jersey's requirement that those referring to individuals or incorporated associations in a primary ballot slogan receive consent to name them in the slogan against a free speech challenge). The democratic process depends on free speech and open debate in campaigns, but when the campaign is over, it then depends on "States fulfilling their solemn duty to regulate

elections to ensure fairness and honesty" at the ballot box. *Id*. The line separating political speech from "the mechanics of the electoral process" may be difficult to discern at times. *Id*. at 132. Declaring the ballot itself a forum for political parties to continue their campaign speech, however, ignores the line entirely.

This is not to deny that there are any speech interests near the ballot box. As the Kansas Supreme Court recently noted, the ballot is "the core political speech of *the voter*." *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 810, 549 P.3d 363 (2024) (emphasis added). Recognizing that the ballot is the speech by which a voter expresses their choice of political leaders is different than it being a forum for the expression of political parties. The ballot is not "a billboard for political advertising." *Timmons*, 520 U.S. at 365. Political parties have the entire campaign to speak. At the ballot box, it becomes the voters' turn, administered by the state.

Political speech in campaigns is fundamentally different in nature than the content of a ballot. For example, when one pursues political change through a petition, an attempt at persuasion is usually necessary to secure the attention and support of the electorate, rendering the process a form of "interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Other forms of campaigning, such as public speaking or debating, door-to-door canvassing, advertising, or writing opinion pieces, similarly involve engaging with the electorate and fostering public deliberation on the issues. These forms of political speech occur "outside of the polling place and over a long period of time leading up to Election Day," whereas any material that appears on the ballot "is confined to the

ballot itself at the moment a vote is cast." *Mazo*, 54 F.4th at 145. Furthermore, lacking the interpersonal and interactive aspect of other political speech, the ballot is a "one-way communication confined to the electoral mechanic of the ballot." *Id*.

There are several examples in American jurisprudence of courts upholding state-imposed limits on how candidates identify or express themselves on the ballot. States can often deny candidates from including their degree designations, such as "Dr." or "PhD" or "M.D.," as a part of their name on the ballot. Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 699 (2016); *see also Toigo v. Columbia Cnty. Bd. of Elections*, 273 N.Y.S.2d 781, 783-84 (N.Y. Sup. Ct. 1966) ("It would be neither fair nor practical to permit the insertion of such titles or degrees with candidates' names, much less the myriad appellations and items of descriptive matter that might logically follow and which election fever and ingenuity would undoubtedly generate."); *State ex rel. Rainey v. Crowe*, 382 S.W.2d 38, 46 (Mo. Ct. App. 1964) ("[T]here is nothing in the law that permits either the candidate or the Board of Election Commissioners to use the ballot for campaign propaganda and statements of qualifications of candidates.").

Other limitations are imposed regarding the appearance of nicknames on the ballot. A Minnesota congressional candidate was forbidden from including the nickname "Prolife" with her name on the ballot because it was not actually a name by which she was commonly known, but rather it referred to her stance on a particular political issue. *Clifford v. Hoppe*, 357 N.W.2d 98, 102 (Minn. 1984). The ballot designation according to one's stance on a significant issue potentially gives the candidate using it an unfair advantage. *Id*. at 101.

If states can regulate the appearance of a candidate's name or designation on the ballot to ensure fairness and prevent manipulation, it follows that a state should be able to do the same with political party nominations. Just as the nickname "Prolife" could grant a candidate an unfair advantage because it associates her with a certain political stance, the listing of nominations from multiple minor parties could do the same. *See Timmons*, 520 U.S. at 365 ("[M]embers of a major party could decide that a powerful way of 'sending a message' via the ballot would be for various factions of that party to nominate the major party's candidate as the candidate for the newly-formed 'No New Taxes,' 'Conserve Our Environment,' and 'Stop Crime Now' parties."). Like the professional designation of "Dr." indicating a candidate's credentials, the nomination of multiple minor parties on the ballot could be used to persuade the public of a candidate's credentials on a particular issue. In that way, a candidate being nominated by a major party along with one or more minor parties with slogans for their names transforms the ballot into a tool for political propaganda. States are not obligated to permit such political appeals on the ballot. *See Lewis v. N.Y. State Bd. of Elections*, 678 N.Y.S.2d 809, 810 (N.Y. App. Div. 3d Dept. 1998) (holding that a candidate known by the nickname "Grandpa" due to his former television role was not entitled to be called "Grandpa" on the ballot).

Such gamesmanship on the ballot is exactly the sort of manipulation that states have a strong interest in preventing. *See Timmons*, 520 U.S. at 364. States also have an interest in "integrity, fairness, and efficiency" in the electoral process, which could be undermined by the confusion voters could face from a candidate being associated with multiple parties or appearing on the ballot more than once. *Id*. at 364-365.

If the Court accepts the premise that the ballot, like campaign speech, represents core political expression by parties and candidates, and therefore requires Kansas to allow fusion voting, a broader implication follows. The state would also be obligated to permit a range of other descriptive content on the ballot as a form of protected free speech. Certainly, the state legislature can choose to allow some descriptive content on the ballot if it so chooses. But declaring that the state constitution demands it is a radical notion that would limit the legislature's power to draw lines where they find it appropriate.

If the free speech protections of Section 11 of the Kansas Bill of Rights are read as being coextensive with those in the First Amendment, the *Timmons* analysis could simply be incorporated into state law. However, even if Kansas's free speech rights are understood as more expansive than those recognized nationally, they still do not cover fusion voting. *See* Kan. Const. B. of R. § 11. A broader reading of Kansas's free speech law does not alter the free speech analysis, because, for the reasons established above, the ballot is not a place for the campaign speech of political parties in the first place.

II. If the *Anderson-Burdick* Test is Applied, Fusion Voting Bans Survive

Even if the court were to depart from assessing the fusion voting ban under the more appropriate rational basis test, it still survives even using the *Anderson-Burdick* balancing test. For sure, subjecting every election regulation to strict scrutiny inhibits the ability of the States to efficiently run elections. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The *Anderson-Burdick* test offers a more flexible and realistic approach than First

Amendment scrutiny analysis. *Mazo*, 54 F.4th at 137. It involves weighing "the character and magnitude of the asserted injury" against the asserted State interests and then considering whether those interests justify the burden imposed by the law. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Tashijan v. Republican Party*, 479 U.S. 208, 213-214 (1986)).

The Supreme Court applied this test in upholding an anti-fusion law against a First and Fourteenth Amendment challenge in *Timmons*, 520 U.S. at 358. Even if Kansas's protections for free speech and association are read more broadly than the First Amendment's, the *Anderson-Burdick* test would still result in the survival of Kansas's fusion voting ban.

Because core political speech is not implicated, the court should review the fusion voting ban with a rational basis test. It is proper to apply lesser scrutiny when the law in question primarily regulates the mechanics of the electoral process rather than core political speech. *Mazo*, 54 F.4th at 138. Again, the ballot is primarily an instrument for electing candidates and is not a medium for core political speech. To the extent that the court deems any associational rights at issue, the *Anderson-Burdick* test would be a more appropriate test than strict scrutiny. A rational basis, review, is of course the most appropriate level of scrutiny.

III. This Challenge is Similar to Claims that Have Failed in Other States.

Plaintiffs bringing similar claims have a long record of failure in other courts. After the precedent established by the Supreme Court in *Timmons*, minor parties are precluded from arguing that fusion voting is a right protected under the First and

Fourteenth Amendments of the United States Constitution. However, *Timmons* did not reach individual state constitutional claims. In recent years, before this case, there have been two other cases brought at the state level in other states making similar claims to what Plaintiffs make here: that state constitutions in those states have more extensive protections than the U.S. Constitution, and therefore, ought to protect fusion voting in that state. Plaintiffs there failed despite the expansive state constitutional protections.

The first of these cases is *Working Families Party v. Commonwealth*, 209 A.3d 270 (Pa. 2019). In an appeal to the Pennsylvania Supreme Court, the Working Families Party claimed that the state's anti-fusion law violated the free speech and association protections of the Pennsylvania Constitution. *Id*. at 284. Like what Plaintiffs argue here, the Working Families Party argued that the Pennsylvania Constitution's protections for free speech and association ought to be given a broader construction than the U.S. Constitution's protections. *Id*. The Court acknowledged that in some cases, Pennsylvania's free speech and association rights had been construed more broadly than in the First Amendment. *Id*.

Regardless, the Pennsylvania Supreme Court ultimately denied the Working Families Party's claim that the state's free speech and association rights should extend to fusion voting. *Id.* at 286. In addressing the state constitutional claims, the Court still applied the reasoning from *Timmons* as the lower court did before them. *Id*. at 285-86. In *Timmons*, the Supreme Court noted that the New Party, like all other parties in Minnesota, could access the ballot through their own candidate, provided they were not

already someone else's, and communicate their ideas through campaigning, endorsements, and voting. 520 U.S. at 359. Similarly, the Pennsylvania Supreme Court held that the Working Families Party could still participate in the political process in the same ways, and therefore, their free speech and associational protections are not violated by an anti-fusion law. *Working Families Party*, 209 A.3d at 286. Even the more extensive protections of Pennsylvania's Constitution did not extend to fusion voting. *Id*.

The other state case upheld fusion voting bans in New Jersey earlier this year. The Moderate Party brought similar claims under the New Jersey Constitution, but the New Jersey Superior Court held that the anti-fusion law is constitutional. *In re Malinowski*, 332 A.3d 755, 766 (N.J. Super. Ct. App. Div. 2025). There, the court used an *Anderson-Burdick* test to assess state constitutional election law claims as well as First and Fourteenth Amendment claims. *Id*. at 767. Even under that heightened test, the Court still found that the State's regulatory interests justify any burden created by the anti-fusion law. *Id*. at 768. Regarding the free speech and association state constitutional claims, the Court here also applied the reasoning from *Timmons* that minor parties are still free to endorse and support whomever they please. *Id*.

Kansas's anti-fusion law should withstand challenges under the Kansas Constitution for the same reasons that similar laws were upheld in other states. The fact that the Kansas Constitution's protections for free speech and association may be construed more broadly than the First Amendment in some cases does not change the analysis of the anti-fusion law. Pennsylvania and New Jersey have demonstrated that the reasoning used in *Timmons* is still applicable to fusion voting claims brought under more

extensive state constitutions and even using an *Anderson-Burdick* balancing test. The district court correctly reasoned from *Timmons* and other federal election law precedents and properly applied the *Anderson-Burdick* test in upholding Kansas's restriction on cross-nomination.

IV. Fusion Voting Allows Fringe Parties to Gain Disproportionate Influence.

Fusion voting is promoted as the moderate solution to America's political polarization. Quite wrong. Some of its proponents suggest that a multiplicity of political parties is the best way to save the democratic system. *See* Jeffrey Mongiello, Comment, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 Seton Hall L. Rev. 1111, 1125 (2011) ("New Jersey's current political climate – with its bitterly fought elections, negative campaigns, and generally vitriolic political discourse – is ready for a reincarnation of fusion voting."). This forecast wildly misses the mark. Political reality reveals that fusion voting has no impact on reducing political polarization, as if that were even a basis to strike down a state law in the first place. New York, for example, is one of a small number of states that permit fusion voting. Joseph Burns, *Fusion Voting and Its Impact on the Upcoming Election*, N.Y. L. J., (Oct. 23, 2024) https://www.law.com/newyorklawjournal/2024/10/23/fusion-voting-and-its-impact-on-the-upcoming-election/?slreturn=20250623102417. It borders on the absurd to suggest that New York experiences less political polarization or is more politically functional than Kansas or any other state purely on account of fusion voting. Amici submits that the contrary is true. Kansas has a far more tranquil political culture than New York.

Fusion voting seems designed to do the opposite of what advocates suggest. Rather than generating a bipartisan consensus that challenges the two-party system, fusion voting can embolden minor parties that embody the more polarizing values of the extreme right and extreme left. Fusion voting in New York gives third parties like the Working Families Party (which has chapters in other states, including Connecticut, another fusion voting state), the Liberal Party, and the Conservative Party influence that they would not otherwise have. These parties operating from the political fringes rather than the center can influence the Republicans and Democrats to move further to the fringes to keep the fusion alive. *See* Tom Watson, *Fusion voting supporters should study its history*, City & State N.Y., (Mar. 12, 2019) https://www.cityandstateny.com/opinion/2019/03/fusion-voting-supporters-should-study-its-history/177590/ (explaining that the Working Families Party acts as a progressive influence on the Democrats while the Conservative Party has drawn Republicans to the right).

As much as fusion voting supporters try to clean up the concept, New York provides evidence that the practice is not totally detached from the Gilded Age legacy of corrupt party politics. Despite having very little popular support, the attractive nature of a cross-nomination enables minor parties to pursue political patronage by nominating a major party candidate who ends up winning. *See* Joshua Spivak, *Race for New York governor shows why fusion tickets must be banned*, The Hill, (May 1, 2018) https://thehill.com/opinion/campaign/385716-race-for-new-york-governor-shows-why-fusion-tickets-must-be-banned/. The story of Ray Harding, longtime party boss for the

Liberal Party whose career ended in a criminal conviction, is an infamous example of the corruption that fusion voting can foster by giving excessive influence to unpopular parties. *Id*.

Even when a centrist party arises, fusion voting is also liable to abuse by that party. The Independence Party in New York tricked voters desiring to register as independent in the sense of being politically unaffiliated into unknowingly being registered members of their party, inflating the party's registration numbers. *Independence from deception: The end of the Independence Party feud*, N.Y. Daily News, (Dec. 10, 2022) https://www.nydailynews.com/2022/12/10/independence-from-deception-the-end-of-the-independence-party-fraud/. This gave the impression that the Independence Party had more support than it actually did, which politicians from the two major parties could also take advantage of through the fusion voting system by seeking an additional nomination from the Independence Party. *Id*. The party is no longer in operation in New York politics and parties are now banned from using the term "independence" in their name. *Id*.

States have an interest in preventing the mess that fusion voting has brought elsewhere. The Kansas Legislature has the power to limit the effects of "party-splintering and excessive factionalism." *Timmons*, 520 U.S. at 367. It is also acceptable that a minor party's ballot access be conditioned "upon a showing of a modicum of support among the potential voters for the office." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Under the guise of moderation, fusion voting empowers the fringes of the

political spectrum to become outsized players in state politics far beyond their actual support.

CONCLUSION

For the foregoing reasons, the Foundation and ACRU respectfully request that the Court affirm the Saline County District Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 6, 2025, the above and foregoing *Amicus Curiae* Brief of the Public Interest Legal Foundation and the American Constitutional Rights Union was electronically filed with the Court of Appeals of Kansas using the Court's electronic filing system, which will send notice to all counsel of record.

/s/ Joshua A. Ney