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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

Court: Shawnee County District Court

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Case Title: League of Women Voters of Kansas, et al. vs. Scott Schwab - Kansas Secretary of State, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

LEAGUE OF WOMEN VOTERS OF KANSAS, et al.,

Plaintiffs

2021-CV-299

SCOTT SCHWAB, et al.,

Defendants

MEMORANDUM DECISION AND ORDER

Plaintiffs filed a petition challenging the legality of recently enacted Kansas election laws. Defendants Kansas Secretary of State Scott Schwab and Attorney General Derek Schmidt moved to dismiss the petition. Plaintiffs later filed an amended petition, and Defendants once again moved for dismissal. In the meantime, Plaintiffs sought a partial temporary injunction to prevent the implementation and enforcement of one provision of the challenged laws, Section 3(a)(2) and (3) of Kansas House Bill 2183 (2021) (hereinafter the "False Representation Provision" or "FRP"). Plaintiffs submitted their motion based solely on affidavits and documentary evidence attached to their briefs. The Court at this time will address only Plaintiffs' motion for partial temporary injunction. The Court will not address Defendants' motion to dismiss the amended petition here.

STATEMENT OF FACTS

1. Plaintiffs named in the original petition are four Kansas organizations interested in the issue of voter participation. The amended petition added as plaintiffs three individuals who allege they are negatively affected by the recently enacted election laws.
2. Plaintiffs state that they engage in certain voter registration and education activities, including assisting people in "navigating" the election process.
3. Kansas House Bill 2183 (2021) was adopted by the Kansas Legislature on April 8, 2021. Governor Laura Kelly vetoed the bill on April 23, 2021. The Kansas Legislature voted to override her veto on May 3, 2021. HB 2183 became law effective July 1, 2021.
4. HB 2183's New Section 3 is the focus of the instant motion. It says:

> "(a) False representation of an election official is knowingly engaging in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> (1) Representing oneself as an election official;
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official.
>
> (b) False representation of an election official is a severity level 7, nonperson felony.
>
> (c) As used in this section, 'election official' means the secretary of state, or any employee thereof, any county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office."

CONCLUSIONS OF LAW

Plaintiffs seek a partial temporary injunction preventing the implementation and enforcement of Section 3(a)(2) and (3) in HB 2183. A temporary injunction is extraordinary relief, and the burden is on the movant to demonstrate all of the factors required to obtain it. *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008).

> "A temporary injunction merely preserves the relative positions of the parties until a full decision on the merits can be made. Even so, in order to obtain such an injunction, a plaintiff must show the court: (1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019).

A. Likelihood of success on the merits.

Plaintiffs raise three constitutional challenges to the FRP, all grounded in Section 11 of the Kansas Constitution Bill of Rights: (1) it restricts core political speech without justification; (2) it is overbroad; and (3) it is vague. Section 11 provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." It is applicable to the states through the Fourteenth Amendment. Though not identically worded, Kansas courts consider the two provisions to be "coextensive." *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 33, 37, 20 P.3d 39 (2001); *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122, *cert. denied* 449 U.S. 983 (1980). To the extent Plaintiffs suggest that Section 11 affords greater protection than the First Amendment, the suggestion is rejected as inconsistent with existing Kansas precedent, which this Court is bound to follow. *Henderson v.*

Board of Montgomery County Com'rs, 57 Kan. App. 2d 818, 830, 461 P.3d 64 (2020).

The constitutionality of a statute is question of law for the Court. "A statute is presumed to be constitutional, and all doubts must be resolved in favor of constitutionality. If a court can find any reasonable way to construe a statute as constitutionally valid, it must do so. Before a statute may be struck down, the constitutional violation must be clear." (Internal citations omitted.) *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015). The Kansas Supreme Court has recently purported to scale back this presumption, but only in cases where it has declared a "fundamental interest" specially protected by the Kansas Constitution, such as in the case of abortion. See *Hodes*, 309 Kan. at 673-74. Because there is no such declaration by the Kansas Supreme Court in regard to Section 11, the general presumption of constitutionality applies to the challenged provision.

1. Political speech.

Plaintiffs first argue that the FRP is unconstitutional because it criminalizes certain voter registration and education activities protected by the state constitution. Analysis of the challenged provision begins with the framework used to consider Plaintiffs' argument. There are four choices on the current spectrum of First Amendment jurisprudence: 1) the strict scrutiny test; 2) the *Meyer-Buckley* "exacting scrutiny" test; 3) the *Anderson-Burdick* "flexible balancing" test; and 4) the rational basis test.

The strict scrutiny test has been applied to laws that proscribe core political speech. For example, the strict scrutiny test was applied to a city ordinance that prohibited non-residents from circulating initiative, referendum, or recall petitions inside city limits. *Chandler v. City of Arvada, Colo.*, 292 F.3d 1236 (10th Cir. 2002). Strict scrutiny requires any prohibition on protected speech to be narrowly tailored to support a compelling state interest. A compelling state interest includes

"policing the integrity" of the political process. *Id.* at 1241.

But it is an "erroneous assumption" that strict scrutiny applies to any law touching upon the First Amendment rights in the election context. *Burdick v. Takushi*, 504 U.S. 428, 432 (1992).

> "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (Internal quotations and citations omitted.) *Id.* at 433.

For this reason, the United States Supreme Court has more often applied some form of a balancing test to laws that restrain or reduce core political speech to some degree. There are two such balancing tests. The more demanding of the two is the *Meyer-Buckley* "exacting scrutiny" test. This refers to *Meyer v. Grant,* 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182 (1999). In *Meyer,* the court invalidated the state's prohibition on the use of paid petition circulators. 486 U.S. at 428. In *Buckley*, the court invalidated three additional restrictions on petition circulators, including that circulators be registered voters, wear an identification badge with name, and be listed in a report with the names and addresses of all paid circulators and the amount paid to each. 525 U.S. at 186. The so-called "exacting scrutiny" test arising from these cases requires a law to be "substantially related to important government interests" that cannot be addressed by "less problematic measures." 525 U.S. at 202, 204.

The *Meyer-Buckley* test has been applied in other jurisdictions in scenarios not analogous here. See *League of Women Voters v. Hargett,* 400 F.Supp.3d 706, 725 (M.D. Tenn. 2019). In

Hargett, a federal district court in Tennessee applied "exacting scrutiny" to strike laws requiring among other things: 1) prior registration with the state for those who plan to collect 100 or more voter registration applications during a voter registration drive; 2) a 10-day turn-in period for voter registration applications collected, with criminal penalties for failure to do so; 3) civil penalties for submitting incomplete applications on behalf of others; and 4) mandatory disclaimers on communications regarding voter registration status. *Id.* at 711-13. Not wanting to "slice and dice" the numerous provisions at issue, *Id.* at 720, the *Hargett* court decided that it would apply *Meyer-Buckley* because taking all of the provisions together, "the regulation of First Amendment-protected activity is not some downstream or incidental effect" of the law as a whole. *Id.* at 720-24.

In the context of challenges to election laws, the most oft-applied test in the Tenth Circuit is the *Anderson-Burdick* "flexible balancing" test. See, e.g., *Fish v. Schwab,* 957 F.3d 1105 (10th Cir. 2020); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270 (10th Cir. 2019); *Utah Republican Party v. Cox,* 892 F.3d 1066 (10th Cir. 2018). This test is derived from *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); and *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). In *Anderson*, the court invalidated a state's early filing deadline for independent candidates to appear on the ballot. 460 U.S. at 806. In *Takushi*, the court upheld a state's prohibition on write-in voting. 504 U.S. at 441-42. The resulting "flexible balancing" test is generally explained as follows:

> "a court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." (Internal citations and quotations omitted.) *Cox*, 892 F.3d at 1077.

Further:

> "If a regulation is found to impose severe burdens on a party's associational rights, it must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." (Internal citations and quotations omitted.) *Id.*

The fourth and final test is the rational basis test. Where plaintiffs fail to demonstrate an actual burden on a constitutional right, a straightforward rational basis standard should be applied. *Hargett,* 400 F.Supp.3d at 722, citing *McDonald v. Bd. of Election Com'rs,* 394 U.S. 802, 807–09 (1969). The rational basis test requires only that the law "bear some rational relationship to a legitimate state interest." *Hodes,* 309 Kan. at 611.

With these frameworks in mind, the analysis turns to the plain language of the statute, "giving common words their ordinary meaning." *Carman v. Harris,* 313 Kan. 315, 318, 485 P.3d 644 (2021). HB 2183 Section 3(a) defines false representation of an election official as "knowingly engaging" in certain conduct "while not holding a position as an election official," to include: (1) "[r]epresenting oneself as an election official"; (2) "engaging in conduct that gives the appearance of being an election official"; or (3) "engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official." Plaintiffs for purposes of this motion do not challenge Section 3(a)(1), nor do they complain about the definition of "election official" in Section 3(c).

A culpable mental state is an essential element of every crime. K.S.A. 21-5202(a). K.S.A. 21-5202(i) defines "knowingly" in the context of criminal culpability as follows: "A person acts knowingly, or with knowledge, with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such

person's conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." Put more succinctly, "knowingly" means that a person was "reasonably certain that X action would lead to X result." *State v. Chavez,* 2016 WL 5867484, *18 (Kan.App. 2016) (unpublished), citing *State v. Hobbs,* 301 Kan. 203, 211, 340 P.3d 1179 (2015).

Plaintiffs first argue that the FRP is unconstitutional because it criminalizes certain voter registration and education activities protected by Section 11. Defendants counter that the FRP does not infringe on Plaintiffs' free speech rights at all because neither Section 11 nor the First Amendment protect knowing false representations through conduct as described in Section 3(a)(2) and (3). While some types of false or misleading speech are protected by the First Amendment, falsely representing that one is speaking on behalf of the government or impersonating a government officer is not protected conduct. *U.S. v. Alvarez,* 567 U.S. 709, 721 (2012). Statutes criminalizing such activities "protect the integrity of Government processes, quite apart from merely restricting false speech." *Id.*

Plaintiffs assert that the FRP "prevents Plaintiffs from engaging in all voter registration, education, and engagement activities" because "Plaintiffs would consistently run the risk that their activities might overlap with the types of activities that election officials also perform, making them appear as if they are election officials, or causing them to be mistaken (however innocently) for election officials." Further, Plaintiffs argue that the FRP "shift[s] the law's focus away from the impersonator's intent and plac[es] it entirely in the subjective perceptions of others."

Plaintiffs downplay the word "knowingly" in Section 3 almost to the point of ignoring it. Section 3(a) defines the various types of false representation of an election official as "knowingly engaging" in certain conduct. "Knowingly" means that the actor must be aware of his or her conduct or circumstances and aware that the conduct is reasonably certain to cause the prohibited result. The statute requires a culpable state of mind on the part of the actor; there is no violation based solely on the subjective perception of a bystander. Indeed, to be convicted of a crime as defined in Section 3(a)(2) or (3) requires that the *actor* - not the bystander - be reasonably certain that what he or she is doing gives the appearance of or causes another person to believe that he or she is - specifically - the secretary of state, a county election official, a county clerk, or an employee of any of those.

The scenarios described by Plaintiffs in their affidavits do not help them. A representative of each organizational Plaintiff stated that its members always identify themselves as members of their respective organizations and not as election officials. See, e.g., Lightcap Affidavit, ¶25 ("At each in-person and virtual event, the Kansas League members have always represented themselves as such, and not local elections officials."); Hammet Affidavit ¶23 (in direct calls to voters offering assistance with provisional ballots, "we always identified ourselves as affiliated with Loud Light and not any governmental organization"); Smith Affidavit ¶18 ("we always correctly identify ourselves as affiliated with Kansas Appleseed, and not any governmental office or body"); Hyten Affidavit ¶26 ("to my knowledge, if anyone at the Center has been mistaken for an election official, we have moved swiftly to correct that misunderstanding. Nor am I aware of anyone at the Center or elsewhere intentionally misrepresenting themselves as an election official."). In light of their own evidence, it is difficult to credit Plaintiffs' fear of prosecution for knowingly engaging in false

representation through certain conduct when Plaintiffs insist that their members always correctly identify themselves as affiliates of their own organizations and not as government officials.

A plain reading of Section 3(a)(2) and (3) reveals no violation of Plaintiffs' free speech rights under Section 11. This dictates the application of the rational basis standard, asking whether the FRP bears a rational relationship to a legitimate state interest. But even assuming that Plaintiffs' free speech rights are somehow implicated by the FRP, any burden on protected speech or conduct would be slight at best. If any test other than rational basis could be applied, it would be the *Anderson-Burdick* "flexible balancing" test. This is also known as a "sliding scale" approach, where the scrutiny applied "will wax and wane with the severity of the burden imposed," and "lighter burdens will be approved more easily." *Fish,* 957 F.3d at 1124. This test provides that in the case of lesser burdens, the government's important regulatory interests justify reasonable, nondiscriminatory restrictions.

The state's interest in election laws is clear and well recognized. The United States Supreme Court has emphasized that the state has an interest in deterring election fraud. *John Doe No. 1 v. Reed,* 561 U.S. 186, 217 (2010). The state has an interest in maintaining "public confidence in the integrity of the electoral process." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 197 (2008). "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997). These interests qualify as legitimate and important at the very least. Indeed, the Tenth Circuit has recognized a compelling state interest in the integrity of the election process. *Chandler,* 292 F.3d at 1241.

The FRP passes both the rational basis and the "flexible balancing" tests. The prohibitions on knowing false representation through conduct in Section 3(a)(2) and (3) are rationally related to the legitimate state interests of deterring fraud, protecting the integrity and fairness of elections, and maintaining public confidence in the election process. The FRP is also a reasonable, non-discriminatory provision justified by these same important, even compelling, government interests. Indeed, if it were necessary the FRP could pass more stringent scrutiny. In sum, the FRP does not violate the free speech clause of Section 11 of the Kansas Constitution Bill of Rights.

2. Overbreadth.

Plaintiffs next assert that the FRP is unconstitutionally overbroad. An overbroad statute criminalizes conduct that is constitutionally protected under some circumstances. *In re Comfort,* 284 Kan. 183, 201, 159 P.3d 1011 (2007). But because "almost every law is potentially applicable to constitutionally protected acts, [a] successful overbreadth challenge can thus be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications." *Smith v. Martens,* 279 Kan. 242, 253, 106 P.3d 28 (2005). An overbreadth challenge will only be successful if the challenged law "trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep." *State v. Whitesell,* 270 Kan. 259, 271, 13 P.3d 887 (2000).

Further, "[a] statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected, and as so construed the statute will thereafter be immune from attack on grounds of overbreadth." *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 547, 592 P.2d 891 (1979). This is consistent with the notion

that the "overbreadth doctrine should be employed sparingly and only as a last resort." *Martens*, 279 Kan. at 253.

Plaintiffs assert that the FRP is overbroad because "every time Plaintiffs engage in their protected voter education, registration, or engagement activities they encounter an unavoidable risk that they will violate the . . . prohibitions because there is always a chance an observer might mistake them for a state or county employee," and the effect of the FRP is to "ban practically every third-party voter registration, education, or engagement program in the state." This is simply not true. As explained above, the FRP does not infringe on Plaintiffs' free speech rights at all because neither Section 11 nor the First Amendment protect *knowing* false representations through conduct as described in Section 3(a)(2) and (3). As discussed above, protected activity is not the law's target at all; it is certainly not a substantial part of the law's target given its plainly legitimate sweep. The FRP is not unconstitutionally overbroad.

3. Vagueness.

Finally, Plaintiffs assert that the FRP is unconstitutionally vague.

> "We use a two-part test to determine whether a statute is unconstitutionally vague. First, we consider whether the statute conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice. Next, we consider whether the statute adequately guards against arbitrary and discriminatory enforcement. The second part of the test embodies the requirement that a legislature establish minimal guidelines to govern law enforcement. We are interested in whether the language of the provision conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute that either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. A statute is not invalid for vagueness or uncertainty where it uses words of commonly understood meaning. At its heart, the test for vagueness is a common-sense determination of fundamental fairness." *Comfort*, 284 Kan. at 199.

Plaintiffs say that because the FRP "focuses entirely on others' subjective perceptions, it is impossible for Plaintiffs to know when they might be violating it." First, the FRP does not focus entirely on subjective perceptions. The first sentence in Section 3 makes clear that false representation of an election official is knowingly engaging in any of the described conduct. This focuses on the culpable mental state of the actor, not the subjective impression of a bystander. Second, a person of common intelligence understands what is meant by knowingly doing something that gives the appearance of or causes another person to believe that he or she is the secretary of state, a county election official, a county clerk, or an employee of any of those. Likewise, the required element of acting "knowingly" establishes more than minimal guidelines to govern enforcement of the law. Enforcement simply cannot occur without indicia of knowing conduct.

Plaintiffs at various points in their motion reference K.S.A. 21-5917(a), another false representation statute. It says: "False impersonation is representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false." This statute was held not to be unconstitutionally vague simply because the idea of "representing oneself" was not defined. The court held it was sufficiently clear that the crime was to claim to be something one is not. *State v. Marino*, 23 Kan.App.2d 106, 110, 929 P.2d 173 (1996) (statute also held not to be overbroad). Likewise here, common sense dictates that the crime is to claim, through knowing conduct, to be something one is not – specifically, the secretary of state, a county election official, a county clerk, or an employee of any of those. The FRP is not unconstitutionally vague.

4. Conclusion.

For the reasons stated above, Plaintiffs have not demonstrated a substantial likelihood of eventually prevailing on the merits of their Section 11 challenge to the FRP. This is fatal to their request for a partial temporary injunction.

B. Plaintiffs' other issues.

Because the Court has concluded that Plaintiffs have not demonstrated a substantial likelihood of eventually prevailing on the merits of their Section 11 challenge to the FRP, there is no need to examine the other components necessary to a grant of temporary injunction.

C. Defendants' other issues.

In their response to Plaintiffs' motion for partial temporary injunction, Defendants assert that Plaintiffs lack standing because there is no justiciable case or controversy, and Plaintiffs cannot prove associational or organizational standing. Because the Court has denied Plaintiffs' motion for partial temporary injunction on another basis as set forth above, the Court will not address Defendants' standing arguments here.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for partial temporary injunction is denied.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to counsel of record.

/s Angela Cox
Administrative Assistant