IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

James Clark, Roseanne Rosen, Kansas for Change, Inc., and Daniel DeGroot, *Plaintiffs*,	)	
v.	)	19-cv-2297
Scott Schwab, in his official capacity as the Secretary of State of Kansas; and Ronnie Metsker, in his official capacity as the Johnson County Election Commissioner *Defendants*.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs James Clark, Roseanne Rosen, Kansas for Change, and Daniel DeGroot seek a preliminary and permanent injunction to prevent enforcement of Kansas's oversized electioneering buffer zone and overbroad policies censoring speech within a 250-foot radius of an open polling location, without exceptions for speech that occurs on private property or in a traditional public forum.

First, Plaintiffs respectfully request this Court to enjoin the electioneering statute, K.S.A. 25-2430, which prohibits speech to influence or persuade a voter to support a particular candidate, party, or ballot question within 250 feet from a polling location. At two hundred and fifty feet— just short of the length of a football field— Kansas has one of the largest electioneering buffer

zones in the country. A 250-foot radius encompasses 18,241.4 square meters and is over six times larger than the surface area of the election buffer zone that the Supreme Court validated in *Burson v. Freeman*. This speech-free zone is geographically over-inclusive in relation to its legitimate application inside a voting place and the areas immediately surrounding a polling location entrance.

Speech restrictions within the buffer zone are also uniquely indefensible as applied to private property and traditionally public fora. Indeed, Kansas is the **only** state that does not exempt speech on private residential or commercial property from its electioneering statute. Due to the geographic expanse of a 250-foot radius, most Kansas buffer zones do in fact encompass private residences, businesses, and sidewalks. Plaintiffs James Clark, Kansas for Change, and Daniel DeGroot are currently prohibited from expressing any support for or against ballot questions within 250 feet of a polling location even on private property they are authorized to use and spaces traditionally open for public use.

While Defendants are permitted to impose speech restrictions to prevent voter intimidation, disruption, and fraud, they cannot suppress substantially more speech than necessary and must leave open ample alternative channels of communication— something the statute and the Defendants' policies do not do. Defendants' speech prohibitions on sidewalks, streets, and other areas traditionally open to assembly are subject to exacting scrutiny and must be appropriately tailored to achieve the state's compelling interests. Abating the mere possibility of voter annoyance is not a compelling interest. The electioneering statute therefore fails to pass constitutional muster on its face.

Plaintiffs also seek an injunction under their as-applied challenge to Defendant Ronnie Metsker's official policy of banning election protection efforts under the electioneering statute.

Metsker maintains that nonpartisan election protection speech could cause voters seeking assistance to engage in electioneering. In addition to maintaining a written policy stating this position, Defendant Metsker has banished nonpartisan election protection workers and their signage from polling places in the past. In doing so, he has directly cited the electioneering statute as the law empowering him to ban nonpartisan election protection speech and signs from the 250-foot buffer zone.

Finally, Plaintiffs seek to enjoin Defendant Schwab's policy of granting unfettered discretion to local election officials to censor any and all speech activities within the 250-foot radius buffer zone.

FACTUAL BACKGROUND

A. K.S.A. 25-2430-Kansas's Electioneering Statute

The Kansas Election Code makes electioneering a class C misdemeanor and defines Electioneering as:

> "***knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted***. Electioneering includes wearing, exhibiting or distributing labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election ***within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot by advance voting or within a radius of 250 feet from the entrance thereof***.

K.S.A. 25-2430(a)(emphasis added).

While the code exempts bumper stickers affixed to motor vehicles from the definition of electioneering, there is no exception for private property located within the 250 foot radius of a polling place or advance voting site. *See id.* ("Electioneering shall not include bumper stickers affixed to a motor vehicle that is used to transport voters to a polling place," but containing no other exceptions). State Elections Director Bryan Caskey has confirmed that no exemption exists

for private residences and businesses.[1] As a Class C misdemeanor, electioneering is punishable by up to one month in jail and a fine of up to $500 (K.S.A. §§ 21-6602, 21-6611), and can be enforced by the Secretary of State, the Kansas Attorney General or the District Attorney or County Attorney where the electioneering takes place. The Secretary of State maintains an official policy authorizing county election officers to enforce laws regarding voting procedures, including the duty to "prevent illegal activities such as electioneering" and coordinate with "local law enforcement officials."[2] Moreover, the Kansas Secretary of State has enforced this law as recently as recently as 2010.[3]

The 250-foot radius buffer zone restricts speech over a significant geographic area and encompasses 18,241.4 square meters of the public and private property surrounding every polling location in the state. The majority of electioneering buffer zones in Johnson County encompass the front yards, drive ways, and houses of private residences.[4] Fully two-thirds of the electioneering buffer zones in Douglas County encompass private residential property.[5] Because K.S.A. 25-2430 includes no exception for private property within electioneering buffer zones, hundreds of Kansas residents, organizations, and business owners—including Mr. Clark and Mr. DeGroot—are subject to arrest and prosecution if they campaign in the front yard of a friend or family member's private residence during early voting or on Election Day.

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[1] Hearing on HB 2566 Before the H. Comm. on Elections, 87th Leg., 2018 Sess. (Kan. Jan. 31, 2018) (statement of Bryan Caskey) ("this office would like to recommend an amendment to this bill that would exempt privately held property from the ban on electioneering"), *available at* http://kslegislature.org/li_2018/b2017_18/committees/ctte_s_ethics_elections_and_local_government_1/documents/testimony/20180131_01.pdf.

[2] *See* KANSAS ELECTION STANDARDS MANUAL (2014), attached as Exhibit A, at II-41.

[3] *Fish v. Kobach*, No. 2:16-cv-02105-JAR (D. Kan. filed Feb. 18, 2016), ECF No. 269-32 ("Known Reported Incidents of Election Crimes, 1997 - 2012"), at 1, 4.

[4] *See* Johnson County 2018 Polling Location Maps, attached as Exhibit B, at 195 (summary page identifying each of the polling locations whose buffer zone maps on the pages prior reveal private property within the 250-foot radius).

[5] *See* Douglas County 2018 Polling Location Maps, attached as Exhibit C, at 60 (summary page identifying each of the polling locations whose buffer zone maps on the pages prior reveal private property within the 250-foot radius).

Mr. Clark lives in Lawrence, Kansas and has campaigned as a candidate for public office multiple times over the last three decades. He was elected and served as the Franklin County Attorney from 1976 to 1981 and ran for a seat in the Kansas Senate and the Lawrence Board of Education in 2000 and 2011, respectively. He campaigned on Election Day on private and public property within the electioneering buffer zone for each of these races.[6] Mr. Clark has also engaged in Election Day campaigning for other candidates within 250 feet of a polling location in more recent years. However, he did not become aware that the electioneering statute prohibited his campaign activity until the August 2018 primary when an election judge misapplied the statute to his nonpartisan poll observer activity.[7] He would like to continue to campaign to support certain candidates on private and public property near polling locations but is currently chilled from formulating any specific plans.[8]

Similarly, Kansas for Change and its volunteer Daniel DeGroot both are reticent to engage in political speech even on public sidewalks near a polling place because of their past enforcement experiences and their awareness that speech even on private property or public sidewalks has been criminalized by K.S.A. 25-2430.[9]

Electioneering buffer zones also foreclose speech in spaces that are typically open to public assembly and speech. Over 80% of the electioneering buffer zones in Douglas County encompass areas that include public streets and sidewalks.[10] Approximately 70% of electioneering buffer zones in Johnson County encompass public streets, sidewalks, and public parks.[11]

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[6] Declaration of James Clark, attached as Exhibit D, ¶13.
[7] Ex. D, ¶¶ 10, 13.
[8] Ex. D, ¶13.
[9] Declaration of Daniel DeGroot, attached as Exhibit. E, ¶¶6-7; Declaration of Kansas For Change, attached as Exhibit F, ¶ 8.
[10] *See* Ex. C, at 60.
[11] *See* Ex. B, at 195.

Because the electioneering statute includes no exception for public spaces within 250-feet of a polling place entrance, a candidate would be in violation of the statute if she held a rally in a public park across the street from a polling location. Mr. Clark, who has engaged in partisan speech on sidewalks and other public spaces outside of polling locations in Douglas County in the past is hesitant to continue doing so out of fear of being prosecuted for electioneering.[12]

B. Johnson County Restrictions on Nonpartisan Speech Under K.S.A. 25-2430

The Johnson County Elections Office maintains a practice of prohibiting speech unrelated to candidates, parties, or ballot questions that take place within 250 feet of a polling place under K.S.A. 25-2430.

During the August 2018 primary election, Johnson County Election Commissioner Ronnie Metsker ordered election judges to remove dozens of nonpartisan election protection volunteers, including Plaintiff Roseanne Rosen, from the parking lots of polling locations because he believed their efforts to assist voters constituted "electioneering."[13] During the August 2018 primary election, Defendant Metsker also removed nearly one hundred signs promoting nonpartisan election protection programs because he believed the signs constituted electioneering.[14]

On August 8, 2018, Ms. Rosen volunteered to be a nonpartisan election protection worker at her polling place located at Crossroads Church RCA at 10551 South Quivira Road Shawnee Mission, KS 66215.[15] She sat in a lawn chair outside of her car in the parking lot approximately 150 feet from the entrance of the polling location and holding up an 8 x 11 handheld sign that read "ELECTION PROTECTION VOLUNTEER 1-866-OUR-VOTE."[16] The sign also had a graphic

[12] Ex. D, ¶¶ 12-13.
[13] *See* Declaration of Rosanne Rosen, attached as Exhibit G, ¶ 11.
[14] *See* 866 OUR Vote Yard Sign, attached as Exhibit H.
[15] Ex. G, ¶ 7.
[16] *See* 866 OUR Vote Handheld Sign, attached as Exhibit I.

of the Statute of Liberty. Ms. Rosen's sign did not identify a party, candidate, or ballot issue nor did any of her clothes or her vehicle. She did not approach any voters or verbally offer assistance.

Approximately 30 minutes after Ms. Rosen began her voter assistance work, a poll worker came out and asked her what she was doing. Ms. Rosen explained that she was providing nonpartisan assistance to voters. The poll worker told her that she was "electioneering" and that he had received orders from the Election Commissioner's office to move her 250 feet away from the polling location entrance.[17] The poll worker measured 250 feet from the location entrance, which was at the very end of the parking lot. The worker then instructed Ms. Rosen that the end of the parking lot was the closest she was permitted to be.

Ms. Rosen attempted to continue her assistance for another ten or fifteen minutes but abandoned her efforts when she realized that she would not be able to interact with any voters. Ms. Rosen would like to provide voter protection assistance in Johnson County in future elections. However, she is afraid that she will be arrested for electioneering if she attempts to offer voters nonpartisan assistance.[18]

Prior to the November 2018 general election, Defendant Metsker explained that he intended to exclude all signs—including nonpartisan election protection signs—from the 250-foot buffer zone, citing the electioneering statute.[19] He also announced his intention to ban any nonpartisan election protection worker from entering the 250-foot radius due to his fear that a person receiving election protection assistance would engage in electioneering.[20]

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[17] Ex. G, ¶¶ 11-12.
[18] *Id.* ¶¶ 13-16.
[19] Letter from Ronnie Metsker to the American Civil Liberties Union Foundation of Kansas (Oct. 19, 2018), attached as Exhibit J.
[20] *Id.*

C. Restrictions on Nonpartisan Speech Under K.S.A. 25-2810

The Secretary of State, chief county election officer, deputy election officer, and supervising judge are authorized to supervise and direct control over a voting place by statute. *See* K.S.A. 25-2810(b). Defendant Schwab maintains an official policy authorizing election officers to impose speech and assembly restrictions under this statute, explaining that prohibitions on the distribution of literature within the 250-foot radius of a polling place entrance—among other prohibitions—are policies that are "consistent with the statutory responsibility of election boards."[21] This amounts to a policy of complete and unchecked control given to local election officials to restrict all manner of speech within the buffer zone.

In a 2018 opinion, the Kansas Attorney General interpreted the statute similarly, suggesting that the right to control a voting place empowers an election judge to restrict non-electioneering speech within the 250-foot radius even if it does not constitute disorderly election conduct or intimidation.[22] County Election officials across the state do in fact restrict speech within the 250 feet of polling location entrances at their own limitless discretion pursuant to their authority under K.S.A. 25-2810.

On information and belief, Riley County Clerk Rich Vargo maintains a practice of treating all speech within a 250-foot radius of a polling place as electioneering regardless of whether the signs promote a candidate, party, or ballot question. Ford County Clerk Debbie Cox excludes election protection volunteers and members of the press from covering elections pursuant to the Kansas Secretary of State's policy authorizing unfettered discretion to censor speech near a voting place.[23]

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[21] Ex. A, at II-42.
[22] KAN. ATT'Y GEN. OP. NO. 18-15 at 4 (Oct. 22, 2018), https://ag.ks.gov/docs/default-source/ag-opinions/2018/2018-015.pdf?sfvrsn=f3a9d11a_6
[23] Vincent Marshall, *Election Day 2018*, DODGE CITY GLOBE (Nov. 6, 2018), https://www.dodgeglobe.com/news/20181106/election-day-2018.

During the November 6, 2018 General Election, Cox banned members of the press from covering the election citing her "discretion as to what to allow." In past elections, Cox has also removed election protection signs erected within 250 feet of the polling location. Similarly, Wyandotte County Election Commissioner Bruce Newby maintains a practice of removing election protection signs erected within 250 feet of a polling location under Defendant Schwab's control policy.

Election judges wield their discretion under the policy to censor speech as well. Douglas County election judges have excluded nonpartisan election protection volunteers from engaging in passive speech within 250 feet of a polling location pursuant to Defendant Schwab's policy permitting unfettered discretion to censor speech near polling locations.[24] Certain Sedgwick County election judges have also invoked the Secretary of State's policy to restrict core First Amendment petitioning activities.[25]

In August 2018, Plaintiff James Clark volunteered as an election protection volunteer in Douglas County at the United Way polling place located at 2518 Ridge Court Lawrence, Kansas 66046. Mr. Clark parked his car across the street from the polling location in front of the residence located at 2519 Ridge Court, less than 50 feet from the entrance of the building. He brought his chair across the street and sat down under a tree at the entrance of the parking lot to the polling location. Mr. Clark had a folder with an 8x11 paper that said "ELECTION PROTECTION VOLUNTEER 1-866-OUR-VOTE."[26] He also wore a 3 x 4.5 sticker that said "Problem at the Polls? Talk to me. Election Protection Volunteer."[27]

[24] Ex. D, ¶ 10.
[25] Ex. E ¶ 4; Ex. F ¶¶ 4-5.
[26] *See Ex.* I.
[27] Election Protection Name Tag , attached as Exhibit K.

About 30 minutes into Mr. Clark's shift, an Election Judge approached him and said that he was not permitted to be there.[28] She showed him a full color locator map that identified the 250-foot buffer zone. When Mr. Clark informed the Election Judge that he was not electioneering, she responded that in her opinion his conduct was electioneering and he needed to leave. Mr. Clark asked if he would be in violation of any statute if he moved several feet across the street and sat outside of his car. The poll worker declined to provide an opinion on whether that would be legal. Unsure of whether he would be in violation of the law if he sat next to his car and aware no voters would be able to see him if he was 250 feet away from the polling location, Mr. Clark decided to leave. Mr. Clark would like to engage in election protection activities in future elections, including the 2020 primary and general election. However, he fears that an Election Judge might accuse him of an election crime.[29]

Defendant Schwab's policy of unlimited discretion has similarly chilled Mr. DeGroot and Kansas for Change's activity. On April 11, 2017, Kansas for Change volunteers collected petition signatures and had conversations with voters about marijuana decriminalization at the Gloria Dei Lutheran Church polling location in Wichita, Kansas. When Mr. DeGroot arrived, law enforcement officers were at the polling location because the election judge had determined that their petitioning activity would not be allowed at the polling location. The experience has made Mr. DeGroot hesitant to engage in petitioning activity on Election Day in the future. He is worried that even if he remains on public property and only speaks to voters as they are leaving the polling location, an election judge will use their authority under K.S.A. 25-2810 to have him arrested for an election misconduct crime.[30] Mr. DeGroot is not the only Kansas for Change volunteer who

[28] Ex. D, ¶ 10.
[29] *Id.* ¶ 12.
[30] Ex. E, ¶ 7.

has been chilled by the Secretary of State's policy of unfettered discretion. A number of KFC's volunteers fear arrest or prosecution for conducting non-electioneering informational campaigns and signature drives at a polling place,[31] and Sedgwick County judges' exercise of discretion has interfered with the organization's ability to carry out its core mission of advocating for more just marijuana policies.[32]

ARGUMENT

A preliminary injunction is necessary to remedy the irreparable injuries inflicted, past, present, and future, on Plaintiffs by the electioneering statute's unconstitutionally overbroad reach as well as Defendant Metsker and Defendant Schwab's other speech-restrictive election buffer zone policies. To obtain a preliminary injunction, the moving party must ordinarily demonstrate: "(1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the moving party's favor; and (4) the preliminary injunction is in the public interest. *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (citations and internal quotation marks omitted). In the First Amendment context, the likelihood of success on the merits will often be the determinative factor because of the seminal importance of the interests at stake." *Id.* at 1126. On the other hand, "[t]he Tenth Circuit has modified the preliminary injunction test when the moving party demonstrates that the second, third, and fourth factors tip strongly in its favor. In such situations, the moving party may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* at 1128 n.5 (citations and internal quotation marks omitted).

[31] Ex. F, ¶¶ 5-6.
[32] *Id.* ¶ 6.

Plaintiffs satisfy both tests, given that all four factors weigh decisively in their favor. They are entitled to the more lenient standard, given the importance of the First Amendment rights at stake, both to themselves and the general public, as well as the balance of the equities. Because Plaintiffs are likely to succeed in demonstrating that K.S.A. 25-2430, Defendant Metsker's application of the statute to Election Protection workers, *and* the state's policy of unfettered discretion under K.S.A. 25-2810 are unconstitutional both on their face and as applied, the Court should issue a preliminary injunction restraining Defendants from enforcing the electioneering statute and the unconstitutional policies thereunder. If the Court declines to issue a preliminary injunction restraining enforcement of the electioneering statute and policies with respect to all Election Day speakers, however, it should at the very least issue a preliminary injunction restraining Defendant from enforcing these provisions against Plaintiffs.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIMS.

A. K.S.A. 25-2430 is Facially Overbroad.

A statute is impermissibly overbroad under the Free Speech clause of the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008); *Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005) (restrictive statute not overbroad "because when judged in relation to its plainly legitimate sweep it does not reach a substantial amount of constitutionally protected conduct"). The government bears the burden of demonstrating that the permissible applications of the statute are not outnumbered by the impermissible ones. *United States v. Stevens*, 559 U.S. 460, 482 (2010). States have consistently failed to justify election buffer zones larger than 150 feet when confronted with a facial

overbreadth challenge. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1052 (6th Cir. 2015) (finding Kentucky's 300-foot electioneering buffer zone was facially overbroad because it prohibited speech over area greater than necessary and contained no exemption for speech on private property); *Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir. 1988) (finding Washington's statute creating a 300-foot buffer zone overbroad "because it applies to activities not implicating the interest" in maintaining peace, decorum, and order at the polls); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513-15 (11th Cir. 1985) (invalidating Florida's 300-foot election buffer zone prohibiting solicitation of signatures as overbroad because it restricted such a broad range of protected conduct including signature collection in private residences and private business); *National Broadcasting Co. v. Cleland*, 697 F. Supp. 1204, (N.D. Ga. 1988)(striking down Georgia's 250-foot exit polling buffer zone as overbroad in relation to expressed purpose). Kansas's electioneering buffer zone is similarly overbroad in that it bans core political speech over too much geography and prohibits substantially more instances of protected speech than required to serve any voter protection or election integrity-related objective. Further, the statute lacks an availing narrowing construction to limit the applications of the statute's sweeping censorship.

The purpose of Kansas's electioneering statute is to prevent interference with voters as they are entering a polling location.[33] However, because the statute prohibits core political speech over such a large geographical area, a substantial number of instances exist in which the law cannot be applied constitutionally. The statute prohibits speech that would *not* intimidate or impede voters en route to their voting place. In many instances, it prohibits speech that voters would not see or

[33] Written Testimony on HB 2256 Before the S. Comm. on Elections, 87th Leg., 2018 Sess. (Kan. Jan. 24, 2018) (statement of Rep. Keith Esau) ("the purpose of the electioneering statute is to prevent people from being approached as they go from their cars to the entrance of the polling location"), *available at* http://kslegislature.org/li_2018/b2017_18/committees/ctte_s_ethics_elections_and_local_government_1/documents/testimony/20180131_02.pdf.

hear as they walked from their cars into their polling location. For instance, at many polling locations, the statute would prohibit a candidate or a supporter of the candidate from displaying a campaign sign half a block away from a polling place.[34] It is difficult to imagine how passive speech could interfere with or intimidate a voter from such a great distance. The statute would also prohibit a conversation between *voters* where one was urging the other to support their candidate on a public sidewalk on their way to vote at polling location. Even if the discussion was particularly boisterous, it would not create more of a disturbance than a loud verbal exchange on a different topic. [35] The statute would ban campaign materials posted outside of a city councilmember's office at a city hall polling location.[36] K.S.A. 25-2430 would also prohibit a campaign worker from handbilling for a candidate in a public park adjacent to the polling location.[37] It would also prevent the Young Republican's Club from running a partisan get out the vote effort in the building next to a college campus polling location.[38] These situations are not based on hypothetical polling locations or one-off examples from an isolated voting site. Instead, K.S.A. 25-2430's restrictions are so geographically broad that they actually prohibit this conduct in dozens of polling locations across Kansas.

The statute becomes even more unjustifiable when you consider it applies to private property. Activities on private property are much more likely to be at play with a 250-foot ban versus the 100-foot ban validated in *Burson*. 384 U.S. 214. In the case of Mr. Clark, the statute prevents him from standing in one of his friend's yards and displaying a campaign sign on Election Day. Mr. DeGroot is similarly restricted from discussing his position on ballot questions inside a

[34] *See*, *e.g.*, Ex. B, at 3; Ex. C, at. 3.
[35] Indeed, the discussion could be about the toothpaste they used that morning— that would not violate the statute. But if they were talking about the candidates they support? That would violate the statute.
[36] *See*, *e.g.*, Ex. C at 41, LeCompton City Hall; Ex. B at 194, Westwood City Hall
[37] *See*, *e.g.*, Ex. B at 16, 24, 30, 54, 136, 185; Ex. C at 19-20, 31.
[38] *See*, *e.g.*, Ex. C at 30.

business located within 250 feet of a polling location that has authorized his presence and campaign activity on Election Day. *See Russell*, 784 F.3d at 1054 ("it is requisite that a buffer-zone law exempts speech occurring on private property") (internal citations omitted); *see also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 775 (1994) (striking down a 36-foot protest buffer zone that applied to private property because "nothing in the record indicates that petitioners' activities on the [private] property have obstructed clinic access, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation").

Kansas officials have conceded that the geographic scope of the buffer zone impairs a substantial amount of speech beyond what is required to achieve the statute's objectives. When testifying in favor of amending K.S.A. 25-2430, Representative Esau explained that "they should be able to have a safe walk from their car (to the entrance of the polling location) but beyond that it doesn't matter."[39] He also noted that "100 (feet) is not a problem but 250 starts to get into other people's yards."[40] Election Director Bryan Caskey explained that, from the Secretary of State's perspective, the statute's objectives of limiting voter interference and harassment could be fulfilled with a 100-foot buffer zone and exemptions for private property.[41]

In short, the 250-foot barrier is overbroad in two respects. First, it burdens protected political speech substantially beyond the 100 feet surrounding the entrance of the polling location necessary to prevent vote interference and harassment. Further, it precludes a broad range of speech on private property, including within and on the premises of private residences and businesses,that would not impede, intimidate, or interfere with voters.

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[39] Testimony on HB 2256 Before the S. Comm. on Elections, 87th Leg., 2018 Sess. (Kan. Jan. 31, 2018) (statement of Rep. Keith Esau), at 9:42:26, *available at* http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20180131/1/2995.

[40] *Id.* at 9:41:58.

[41] *See supra* note 1.

B. K.S.A. 25-2430 is Unconstitutional As Applied to Plaintiffs.

Even if the court determines that K.S.A. 25-2430 is constitutional on its face, it is an impermissible content-based restriction as applied to Plaintiffs' past and desired future Election Day speech activities. First, the ban on electioneering on sidewalks outside of *Burson*'s 100-foot buffer zone is a content-based restriction in a traditional public forum that is not appropriately tailored to achieve the state's interest in preventing voter interference. Additionally, the ban on electioneering is unconstitutional as applied to campaign signs and other speech on private property. Finally, Defendant Metsker's policy and practice of restricting election protection speech under K.S.A. 25-2430 also creates an as applied challenge for Plaintiff Rosen and other nonpartisan election protection workers assisting voters on Election Day.

a. K.S.A. 25-2430 is Unconstitutional as Applied to Public Fora.

While the area immediately surrounding a polling booth on public property may lose its character as a traditional public forum on Election Day, 504 U.S. at 214-16 (Scalia J., concurring), the sidewalks and streets outside of the 100-foot radius validated in *Burson* retain their status as public fora. *See Russell*, 784 F.3d at 1052 . Accordingly, electioneering speech restrictions on sidewalks, streets, and public parks between 100 and 250 feet of a polling location are subject to modified strict scrutiny. *Id.* at 1052 (noting that the State carries the "burden to explain why a larger area where political speech is forbidden is appropriately tailored to achieve the compelling interest of preventing election fraud and voter intimidation"). Specifically, the state must demonstrate why "the strictures of the law are 'reasonable' and do not 'significantly impinge' on First Amendment rights." *Id.* at 1053, *citing Burson*, 504 U.S. at 209. Even if the court determines that public spaces beyond the 100-foot barrier loses their traditional public forum status, restrictions on electioneering would still be subject to strict scrutiny since they burden political

speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) ("The First Amendment affords the broadest protection to such political expression in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); *see also Citizens United v. FEC*, 558 U.S. 310 (2010) (reaffirming laws burdening political speech are subject to strict scrutiny).

Prohibiting Mr. Clark from displaying a campaign sign on the sidewalk across the street or 100 feet up the block from a polling location would not serve the state's goals of limiting voter intimidation or restricting interference. Voters would not have to cross paths with Mr. Clark as they walked from their car to the entrance of the polling location. Even if Mr. Clark were engaging in a different type of active speech or conduct such as hand-billing, he would not be impeding any voters. The voters would be insulated by distance and a bisecting street.[42] The same applies to Kansas for Change's contemplated election day demonstrations in parks and on sidewalks adjacent to Sedgwick County polling locations. Unless a voter happened to be walking from a location other than the polling location parking lot, they would be able to see Kansas for Change's rally without having to navigate any potential obstruction created by the organization's protest.

Further, it is unclear how passive speech such as a campaign sign located on public property between 100 and 250 feet outside of a polling location would interfere with or intimidate voters. The only justification that the state could logically proffer for banning electioneering speech in the public fora located further than 100 feet from Mr. Clark's United Way polling location is to spare voters from seeing campaign messages in the final moments before they vote. Such a purpose is patently insufficient to justify such a sweeping restriction on core political speech. *Anderson v. Spear*, 345 F.3d 651, 663 (6th Cir. 2004)(noting buffer zone restricting First Amendment rights

[42] *See* Ex. C, at 39, 53

on public property in order to prevent voters from having contact with all political speech before they vote "significantly impinges on protected speech, and fails the test established by *Burson*).

Restrictions on passive political speech in public fora between 100 and 250 feet outside of a polling location simply are not appropriately tailored to serve the state's interest in preventing intimidation or interference. Specifically, restrictions as applied to speech in traditional public fora located across the street from a polling location is the classic example of an unconstitutional application that the Supreme Court identified in *Burson*. 504 U.S. at 210 n.13.

b. K.S.A. 25-2430 is Unconstitutional as Applied to Private Property.

Individuals have an enhanced First Amendment right to engage in protected speech on private property. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("a special respect for individual liberty in the home has long been a part of our culture and law…and that principle has a special resonance when the government seeks to constrain a person's ability to *speak* there") *citing Spence v. Washington*, 418 U.S. 405 (1974). Accordingly, courts have consistently found the government's interest in regulating speech is insufficient to justify a restriction on an individual's speech rights in their residence. *Spence*, 418 U.S. at 411 (1974) (recognizing the state's diluted interest in speech regulation on private property, explaining "the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression"); *Madsen*, 512 U.S. at 771 (finding abortion clinic buffer zone unconstitutional as applied to private property). States have been almost universally unable to justify the application of restrictions on political speech to private property in the electioneering buffer zone context. *Russell*, 784 F.3d at 1053 (explaining that Kentucky's 300-foot buffer zone could plausibly satisfy strict scrutiny, but that "the First Amendment would still require that it exempt speech occurring on private property"); *see Anderson*, 356 F.3d at 662 (noting the

electioneering buffer zone would not be appropriately tailored if it encompassed private property and concluding that " it is laudable (and requisite) that the Kentucky statute exempts private property"); *Calchera v. Procarione*, 805 F. Supp. 716, 729 (E.D. Wis. 1992) (explaining that Wisconsin's interest in protecting voters from harassment did not justify the sweeping prohibitions on individual homeowners from expressing their political views on their own property).

Banning electioneering activities in private residences and businesses within a 250-foot radius of a polling location does not advance Kansas's objectives of limiting interference and intimidation. In particular, passive electioneering speech, such as campaign yard signs, would not interfere with, hinder, or distract an individual headed to vote. Active electioneering inside of a private residence or business would have an equally benign effect on voter comfort and access. Thus, the state's interests are not met as applied to electioneering activities on private property.

C. K.S.A. 25-2430 is Unconstitutional as Applied by Defendant Metsker to Non-Electioneering Speech.

Defendant Metsker has adopted a practice of expanding the scope of K.S.A. 25-2430 to exclude election protection related speech and all signs within the buffer zone due to the *possibility* that nonpartisan speech would elicit or prompt prohibited electioneering speech from voters seeking assistance. In particular, Defendant Metsker has banned nonpartisan election protection workers and "866-OUR VOTE" signs because "communicating verbally with voters within 250 feet of the voting entrance risks causing some form of electioneering by the person being interviewed." A ban on all speech within a 250-foot radius of the polling location is not appropriately tailored to Defendant's interest in prohibiting electioneering or the statute's broader purpose of limiting interference with voters en route to the polls. Moreover, to the extent Metsker

is only banning speech related to nonpartisan election protection efforts, the restriction is a discriminatory, viewpoint-based restriction.

When a Defendant justifies a measure "to prevent anticipated harms," the government "must demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994). Defendant Metsker must identify an actual concrete problem—"[m]ere speculation of harm does not constitute a compelling state interest." *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012) *citing Consol Edison Co. of New York Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 (1980). At a minimum, Defendant must produce some evidence that the anticipated harm is likely to occur. *Awad*, 670 F.3d at 1130 (upholding the trial court's issuance of preliminary injunction against anti-Sharia law statute noting that the Defendant "did not know of even a single instance" where an Oklahoma court had applied Sharia law or the law of any other nation or culture). Even if a defendant produces some evidentiary basis for the projected harm, it must demonstrate that a challenged restriction is appropriately tailored. In essence, the government must demonstrate that its restrictions "serve a substantial state interest in 'a direct and effective way.'" *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (explaining a regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose."), *quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980).

Defendant Metsker's fear that nonpartisan speech will beget electioneering speech is both unsubstantiated and absurd. Specifically, Defendant Metsker's claim that a voter calling 866-OUR-VOTE or speaking with an election protection worker within the 250-foot radius will respond to an offer of assistance by campaigning for their candidate, is imaginative at best. While a voter seeking assistance could conceivably use the opportunity to engage in electioneering, this

scenario is far from likely and no more probable than a voter choosing to electioneer if they stopped to tie their shoe. Indeed, there is no logical nexus between the presence of nonpartisan voter protection services and electioneering. Because Defendant Metsker's restriction is justified by a purely speculative and, frankly, unreasonable anticipated harm, it cannot survive strict scrutiny.

Even if the harm were supported by some evidentiary basis, the restriction is not narrowly tailored. The purpose of the statute is to prohibit partisan, candidate, and ballot issue-based advocacy near polling locations. By banning speech beyond what is prohibited in K.S.A. 25-2430, Defendant Metsker is unconstitutionally prohibiting more speech than necessary to achieve the statute's stated goal.

Neutral, nonpartisan observers have played a critical role in ensuring the integrity of elections in the United States and democracies around the world. Poll observers enhance the transparency of elections, create accountability for politically appointed election officials, and help combat fraud.[43] Non-partisan observers have also served as a resource for voters facing intimidation and racially-motivated suppression.[44] Ms. Rosen's voter protection efforts during the August 2018 primary in fact advanced the compelling interest for which the state enacted the electioneering statute, i.e. preventing voter intimidation, limiting interference, and ensuring election integrity. Therefore, Defendant Metsker cannot uphold his ban of election protection efforts under K.S.A. 25-2430. Defendant Metsker's application of K.S.A. 25-2430 to Rosen's nonpartisan election protection efforts does not serve the state's compelling interests. Rosen's voter protection efforts entailed passive speech— specifically displaying a sign with a phone

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[43] *Women & Elections*, UNITED NATIONS (2005), at 75, *available at* https://www.un.org/womenwatch/osagi/wps/publication/Chapter7.htm.

[44] Katy Collin, *Everything You Need to Know About Election Observers-and why the U.S. needs them*, WASHINGTON POST (Oct. 28, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/28/everything-you-need-to-know-about-election-observers-and-why-the-u-s-needs-them/?utm_term=.49d0b311327b.

number. She only spoke to voters after they had cast their ballot and limited her discussion to issue, candidate, and partisan-neutral topics. Therefore, Defendant's ban on Rosen's nonpartisan, passive speech does not remotely further the government's interest in limiting interference, disturbance, and intimidation. Indeed, Ms. Rosen's voter protection efforts furthered those interests.

Similarly, Defendant Metsker's application of the electioneering statute to nonpartisan voter protection signs is not appropriately tailored to the state's interest in minimizing voter disturbance or interference. There is no basis for Defendant Metsker's assertion that the presence of politically neutral signs that provide a number to call if a voter needs assistance would disturb, distract, or interfere with voting. This is particularly so in Johnson County where polling locations display a number of other signs including a placard designating the start of the 250-foot radius,[45] signs with information for voters who need assistance, and "vote here" signs.

D. Defendant Schwab's Official Policy Conferring Unbridled Discretion on Election Officials to Exclude Protected Speech from Polling Locations is Facially Invalid Under the First Amendment.

Kansas election law establishes that local election officials have absolute control over polling locations and their policies and practices, subject only to the supervision of the Kansas Secretary of State. K.S.A. § 25-2810(a) ("Each election board shall have control of its voting place and election procedure under the sole supervision of the secretary of state, county election officer, deputy county election officers and the supervising judge"). The Secretary of State's Office has in turn clarified in its own guidance that K.S.A. § 25-2810 grants local election officials discretionary authority to adopt and enforce any number of polling place policies they deem appropriate—including restrictions on non-electioneering speech. *See* KANSAS ELECTION STANDARDS (2014), Chapter II, at 41-42 (approving, by way of example, the banning of cell phones and electronic

[45] *See Eg.* Photograph of "No Campaigning" Sign at Johnson County polling location, attached as Exhibit L.

devices, or the prohibition of non-partisan print materials within 250 feet of a polling location, because any such policies are "consistent with the statutory responsibility of election boards" under K.S.A. § 25-2810 and avoid "nuisances or distractions for voters").

Meanwhile the Kansas Attorney General has interpreted K.S.A. § 25-2810 even more expansively, suggesting that election officials are empowered to determine on an ad hoc basis whether to allow or reject non-electioneering speech because local officials have an unqualified right under the statute to control "order" at the polling location:

> However, even though the mere presence of a person offering non-partisan voter assistance, or signage advertising the same, generally would not constitute electioneering, disorderly election conduct, or intimidation of voters, that does not mean a person has the right to engage in those activities at a polling place […] the election board of each polling place is authorized to guide, manage, direct, and oversee the polling place to ensure that voting is conducted in an orderly manner.

ATTY. GEN. OP. NO. 2018-15, at 4 (*citing* K.S.A. § 25-2810(a)).

Notably, the Attorney General here indicates that even non-electioneering, non-disruptive, and non-intimidating speech can be barred by election officials. The government therefore explicitly acknowledges that the statute on its face confers blanket authority on local election officials to restrict any and all speech in the name of preserving control over a polling location. *See* ATTY. GEN. OP. NO. 2018-15, at 5 ("K.S.A. 2018 Supp. 25-2810(a) empowers the election board of each polling place to "control . . . its voting place and election procedure"). The result is a statutory scheme that provides no limitation whatsoever regarding when or on what basis an election official can exclude individuals from the 250-foot buffer zone surrounding a polling location.

Limitless government discretion to permit or reject speech always violates the First Amendment regardless of the forum at issue. Indeed, even in a nonpublic forum where reasonableness is the touchstone of government regulation, the government's unbridled discretion

to reject speech is facially invalid because it permits viewpoint-based discrimination. *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997) ("Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard. *This does not mean the government has unbridled control over speech*, however, for it is axiomatic that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citations omitted) (emphasis added).

Several other circuits have also expressly held that limitless government discretion is a *per se* violation of viewpoint neutrality in a nonpublic forum. *See*, *e.g.*, *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (invalidating discretionary speech regulation in a nonpublic forum for violating viewpoint neutrality); *Amidon v. Student Ass'n* , 508 F.3d 94, 103 (2d Cir. 2007) (noting the "appropriateness" of "incorporat[ing] the rule against unbridled discretion into the requirement of viewpoint neutrality"); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints"); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) ("[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement"); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (noting that even in a nonpublic forum "the regulation on speech [must be] reasonable and not an effort to suppress expression *merely because public officials oppose the speaker's view*") (emphasis added).

Discretion is only appropriately limited if there are "*precise* and *objective*" standards for approval or rejection of speech. *See, e.g., Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999). K.S.A. § 25-2810 has no such standards. It does not merely limit

election officials to rooting out electioneering, voter intimidation, or disruptive conduct. Instead, it allows officials to decide for themselves what activities can and cannot occur at the polling location or in its vicinity without any defined criteria to check that decision against. *Cf. Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1128 (D. Minn. 2011) (noting that election judges did not have unbridled discretion to regulate speech because they were limited to proscribing five specific categories of material that expressed political views), *rev'd on other grounds by* 708 F.3d 1051 (8th Cir. 2013); *ABC v. Blackwell*, 479 F. Supp. 2d 719, 742-743 (S.D. Ohio 2006) (finding that a directive to poll workers regarding exit polling within the buffer zone did not confer unbridled discretion to remove people because the policy adequately distinguished between loitering and legitimate exit polling). This lack of defined criteria leaves election officials free to limit speech at their whim and in accordance with their own viewpoints in violation of the First Amendment. *Summum*, 130 F.3d at 916.

Indeed, county election officials across the state have relied on K.S.A. § 25-2810(a) to prohibit all manner of constitutionally protected speech within 250 feet of a polling location. This includes barring non-partisan election protection workers,[46] removing non-partisan election protection signage from the buffer zone,[47] and prohibiting the press from covering election day at the polling location.[48] Compl. ¶¶ 34-38.[49] All of these activities are expressly not electioneering,

[46] *See* Ex. G, ¶11.
[47] Ex. H.
[48] *See supra* note 23.
[49] In addition to the unconstitutional discretion K.S.A. § 25-2810(a) confers on local election officials, county officials limiting non-partisan, non-disruptive election protection activities at polling locations is patently unreasonable given that the forum, even if it is considered nonpublic, is open precisely for the purpose of conducting an election and offering individuals the opportunity to cast their vote. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985) ("The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.")

nor are they disruptive or intimidating to voters, and therefore their prohibition is an exercise of unchecked authority enabled by the statute and proscribed by the Constitution.

II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Both K.S.A. 25-2430 and the Secretary of State's official policy of unfettered discretion under K.S.A. 25-2810 are currently imposing irreparable harm on Plaintiffs and similarly situated speakers throughout Kansas. The Supreme Court, the Tenth Circuit, and this Court have all held that a violation of constitutional rights, even temporarily, amounts to irreparable harm for purposes of the preliminary injunction analysis. *See, e.g.*, *Elrod*, 427 U.S. at 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Verlo*, 820 F.3d at 1127; *Abilene Retail #30, Inc. v. Six*, 641 F. Supp. 2d 1185, 1199 (D. Kan. 2009). The electioneering statute and the policies at issue in this case unquestionably intrude upon the First Amendment rights of Plaintiffs and others. Moreover, it is impossible to determine how much protected expression is currently being chilled by the overbreadth of the statute and policies. A preliminary injunction is necessary to relieve these significant constitutional harms.

III. The Balance of Harms Tips Sharply in Plaintiffs' Favor.

In contrast to the irreparable harm the restrictions are currently inflicting on Plaintiffs, the issuance of a preliminary injunction in this case poses little, if any, risk of irreparable harm to Defendant's legitimate interests. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (stating that the government "does not have an interest in enforcing a law that is likely constitutionally infirm"). Under such circumstances, the scales tip decisively in favor of a preliminary injunction. *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]hreatened injury to [constitutional rights] outweighs whatever damage the preliminary

injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." (citation omitted)).

Furthermore, a preliminary injunction in this case would largely maintain the status quo. Defendant Metsker has only been enforcing his brand of K.S.A. 25-2430 for a few months. If an injunction issues now, Plaintiffs will be spared an unconstitutional restriction on their political beliefs, associations, and expression.

IV. Granting a Preliminary Injunction Serves the Public Interest.

Finally, the public interest in this case supports the issuance of a preliminary injunction. The public interest is served by an injunction that protects constitutional rights. *See, e.g.*, *ACLU*, 194 F.3d at 1163; *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001); *Elam Constr., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997). Here, the public interest—in particular, defense of the First Amendment—will be furthered by a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to grant its motion for preliminary injunction enjoining Defendants from:

(1) Enforcing K.S.A. § 25-2430 against individuals engaging in electioneering on public property outside of the polling location between 100 and 250 feet of the entrance of a polling location;

(2) Enforcing K.S.A. § 25-2430 against individuals engaging in electioneering on private property outside of the polling location;

(3) Maintaining policy under K.S.A. § 25-2810 granting county election officials and election judges unfettered discretion to restrict speech with the electioneering buffer zone and enforcing K.S.A. § 25-2810 against protected speech that does not contribute to voter interference or intimidation within the electioneering buffer zone outside of the polling location.

Date: June 13, 2019

Respectfully submitted,

s/ Lauren Bonds

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, on this 13th day of June, 2019, which will send a notice of electronic filing to all attorneys of record.

/s/ Lauren Bonds
Lauren Bonds