OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

Advance Sheets
2d Series
Volume 62, No. 3

Opinions filed in May - June 2022

Cite as 62 Kan. App. 2d

JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER ..... Overland Park

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. ANTHONY J. POWELL ..... Wichita
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE ..... Valley Center
HON. LESLEY ANN ISHERWOOD ..... Hutchinson
HON. JACY J. HURST ..... Lawrence
HON. ANGELA D. COBLE[1] ..... Stockton

[1]Sworn in May 17, 2022

OFFICERS:

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Baker v. Norman	124,034	Shawnee	06/24/2022	Affirmed
Buberwa v. State	124,186	Sedgwick	06/10/2022	Affirmed
Campbell v. State	124,212	Sedgwick	06/10/2022	Affirmed
City of Wichita v. Obiero	124,088	Sedgwick	05/27/2022	Reversed; remanded with directions
Crum v. State	123,938	Sedgwick	06/03/2022	Affirmed
Dupree v. State	123,892	Sedgwick	06/10/2022	Affirmed
Estivo v. Kansas State Bd. of Healing Arts	123,436	Shawnee	06/17/2022	Reversed; remanded with directions
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In re J.H.	124,714	Saline	06/03/2022	Affirmed
In re Licensure of Shelly Ann Vandevord Day Care Home	123,827	Johnson	05/27/2022	Appeal dismissed
In re Marriage of Fox and Ozkan	123,643	Johnson	06/17/2022	Appeal dismissed
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Paulson v. State	123,537	Saline	06/17/2022	Affirmed
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Reardon v. Saavedra	124,482	Wyandotte	06/03/2022	Affirmed
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State v. Butler	123,958	Sedgwick	05/20/2022	Affirmed
State v. Carrillo	124,298	Wyandotte	06/24/2022	Appeal dismissed
State v. Castelli	123,403	Ford	05/27/2022	Affirmed

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State v. Freeman	124,111	Harvey	06/03/2022	Reversed; remanded with directions
State v. Gillis	124,181	Wyandotte	06/10/2022	Affirmed
State v. Greiner	122,954	Sedgwick	05/27/2022	Affirmed
State v. Haggard	124,356	Saline	05/27/2022	Appeal dismissed
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State v. Logan	123,151	Shawnee	05/20/2022	Affirmed
State v. Logue	123,432	Sumner	06/17/2022	Affirmed
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State v. Reynolds	121,504	Shawnee	06/17/2022	Affirmed in part; reversed in part; remanded with directions
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ADMINISTRATIVE LAW:

Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review. K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).
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Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result. *Gilliam v. Kansas State Fair Bd.* ……..…..…. 236

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Interpretation of Workers Compensation Statutes—Appellate Review. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination. *Turner v. Pleasant Acres* ……...…….. 122

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Grandparent Visitation Appeal—Court's Authority to Award Fees under Rule 7.07(b). In the appeal of a decision involving grandparent visitation, an appellate court has authority to award attorney fees under Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) because the district court had authority under K.S.A. 2020 Supp. 23-3304 to award attorney fees in the proceedings below. *Schwarz v. Schwarz* …… 103

CIVIL PROCEDURE:

Comparative Fault Procedure in Kansas—Policy of Judicial Economy. Kansas law requires defendants seeking to minimize their liability in comparative fault

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situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Doctrine of Comparative Fault—Parties to Occurrence to Have Determination of Fault in One Action. The doctrine of comparative fault requires all the parties to the occurrence to have their fault determined in one action.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Exception to One-Action Rule—Separate Actions by Plaintiffs Against Tortfeasors if No Determination of Comparative Fault. An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party. The requirement to join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

One-Action Rule—In Negligence Claim All Parties Must Be Joined in Original Action. When an injured party asserts a claim for negligence, all parties whose causal negligence contributed to the injury must be joined to the original action, with no distinction between tort claims and contract claims. This is called the one-action rule.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence. The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.
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Service of Process—Restricted Mail Different than Certified Mail Service. Service of process by restricted mail is different from service by certified mail.
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Due Process Protection--Parents Have Fundamental Right to Decisions Regarding Their Children. The Due Process Clause of the United States Constitution provides heightened protection against government interference with the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Schwarz v. Schwarz* …….. 103

Speedy Trial Assessment—Burden on Defendant to Show Actual Prejudice. To meet the burden to show actual prejudice, the defendant cannot rely on generalities or the passage of time but must show how the delay thwarts his or her ability to defend oneself. *State v. McDonald* ……..……. 59

— Consideration of Totality of Circumstances—Factors. The speedy trial assessment considers the totality of the circumstances with special emphasis on four factors: length of the delay, reason for the delay, defendant's assertion of his or her right, and prejudice to the defendant. *State v. McDonald* ……..……. 59

— Evaluation of Actual Prejudice—Three Factors. Courts consider three factors when evaluating actual prejudice: oppressive pretrial incarceration, the defendant's anxiety and concern, and most importantly, the impairment of one's defense. *State v. McDonald* ……. 59

— First Factor—Length of Delay between Charge and Arrest—Presumptively Prejudicial under These Facts. Under the facts of this case, the State's delay of over six years and three months between charging the defendant with child rape and arresting the defendant is presumptively prejudicial.
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— Fourth Factor—Actual and Presumed Prejudice from Excessive Delay. When assessing the fourth factor—prejudice—for a constitutional speedy trial analysis, we consider both actual prejudice and, in a proper case, presumed prejudice flowing from excessive delay. *State v. McDonald* ……. 59

— Presumed Prejudice if Excessive Delay. When the State has been negligent, prejudice can be presumed if the delay has been excessive. A delay of over six years attributable to the State is long enough to give rise to a presumption that the defendant's trial would be compromised, and the defendant would be prejudiced. *State v. McDonald* ……..……. 59

— Second Factor—Reason for Delay. When considering the second factor—the reason for the delay—the court assesses responsibility for the delay as between the State and the defendant. The State's inability to arrest a defendant because of the defendant's own evasive tactics is a valid reason for delay. But in that event, the State bears the burden to show that it took reasonably diligent efforts to pursue an evasive defendant. *State v. McDonald* ……. 59

— State May Mitigate Presumption of Prejudice. When a defendant relies on a presumption of prejudice to establish the fourth factor and identifies a delay of sufficient duration to be considered presumptively prejudicial, this presumption of prejudice can be mitigated by a showing that the defendant acquiesced in the delay

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and can be rebutted if the State affirmatively proves that the delay did not impair the defendant's ability to defend oneself. *State v. McDonald* …….. 59

Suit to Challenge Constitutionality of Law—Requirement of Standing to Be Satisfied for Justiciable Controversy to Exist. A plaintiff is not required to expose himself or herself to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced, but the requirement of standing still must be satisfied for a justiciable controversy to exist. *League of Women Voters of Kansas v. Schwab* …….. 310*

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Claim for Partial Indemnity or Contribution against Third-Party Defendant—Settlor Must Show Paid Damages on Behalf of Third-Party. To prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show that it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero.
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Indemnification Provision—Determination of Fault Required to Determine Contractual Liability. When a contract requires a promisor to indemnify another for the promisor's share of negligence, the underlying negligence tort controls the promisor's liability, and it becomes impossible to determine contractual liability without a determination of fault.
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Indemnification Provision Permitting Indemnity to Maximum Extent Allowed by Applicable Law Is Valid with Limits. When an indemnification provision permits indemnity "to the maximum extent allowed by applicable law," the provision is valid, but it limits the promisor's indemnification liability so that the promisor is not responsible for the promisee's negligence.
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Kansas Anti-Indemnity Statute—Indemnification Provision in Construction Contract Void and Unenforceable if Requires Promisor to Indemnify for Negligence or Intentional Acts. Under K.S.A. 2020 Supp. 16-121(b), the Kansas anti-indemnity statute, an indemnification provision in a construction contract is void and unenforceable if it requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions.
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COURTS:

No Constitutional Authority to Issue Advisory Opinions. Kansas courts lack the constitutional authority to issue advisory opinions.
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CRIMINAL LAW:

Booking Photo of Defendant at Trial—Relevancy Determination—In This Case Found to Be Material for Identity Purposes. A booking photo from the current case that illustrated defendant's appearance had changed considerably between the time of his arrest and the time of his trial was material, as required for relevancy determination, for identity purposes, because it explained the confusion by the child witnesses who had difficulty or no longer recognized the defendant due to the changes in his physical appearance. *State v. Vazquez* 86

Booking Photo of Defendant from Prior Case May Be Unduly Prejudicial. A booking photo for the current crime does not carry the same potential for an unduly prejudicial impact as a mugshot from a prior case where the latter may suggest the defendant has a history of criminality. *State v. Vazquez* 86

Booking Photo of Defendant Is Relevant—Admissible as Evidence at Trial. A criminal defendant's booking photo, taken at the time of arrest for the offenses for which he or she is currently on trial is relevant and generally admissible as evidence if it has a reasonable tendency to prove a material fact. *State v. Vazquez* 86

Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements. Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence. *State v. Hasbrouck* 50

— **Calculation of Criminal History Score under Inclusive Rule**. Under the "inclusive rule" for calculating a criminal history score, "prior convictions" includes multiple convictions on the same date in different cases. Because the convictions in each case are scored against the other case for criminal history purposes, a defendant will face a stiffer sentence if sentenced in multiple cases on the same date than if the defendant were sentenced for the same cases on different dates. *State v. Shipley* 272*

— **Cases Consolidated for Trial Not Prior Convictions**. Convictions in cases consolidated for trial do not qualify as "prior convictions" for criminal history purposes. K.S.A. 2020 Supp. 21-6810(a). *State v. Shipley* 272*

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— Classification of Out-of-State Conviction as Nonperson Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(iii), if the elements of the offense do not require proof of any of the circumstances listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) or (ii), then it must be classified as a nonperson crime.
State v. Hasbrouck 50

— Classification of Out-of-State Conviction as Person Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii), an out-of-state conviction is a person crime if the elements of that felony necessarily prove that a person was present during the commission of the crime. *State v. Hasbrouck* 50

— Classification of Person Crime under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)—Elements of Out-of-State Felony Offense—Eight Circumstances. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i), classification of a person crime is determined by looking at the elements of the out-of-state felony offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. *State v. Hasbrouck* 50

— **Multiple Complaints—Statutory Requirement of Formal Consolidation by Court**. A constructive consolidation argument is unsupported by the plain language of K.S.A. 2020 Supp. 21-6810(a). That statute requires formal consolidation by court order for multiple complaints to be "joined for trial."
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Sentencing for Out-of-State Felony Convictions under K.S.A. 2019 Supp. 21-6811(e)(3)(B). With the enactment of K.S.A. 2019 Supp. 21-6811(e)(3)(B), the Legislature replaced all the prior rules concerning how out-of-state criminal felony convictions are to be treated as person or nonperson crimes when a sentencing court is setting the offender's criminal history score. *State v. Hasbrouck* 50

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First Amendment Protections—Voter Outreach, Education and Registration Efforts. Voter outreach, education, and registration efforts receive protection under the First Amendment.
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Statutory Requirement of Prosecution of Individuals Who Knowingly Engage in Prohibited Conduct under Statute. In adopting K.S.A. 2021 Supp. 25-2438, the Legislature sought to subject only those individuals to prosecution who "knowingly" engaged in the conduct prohibited by the provision. *League of Women Voters of Kansas v. Schwab* 310*

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No Private Right of Action for Relocation Benefits under Eminent Domain Procedure Act. K.S.A. 2020 Supp. 26-518 is part of the Eminent Domain Procedure Act (EDPA). The EDPA does not provide third-party displaced persons a private right of action for relocation benefits under K.S.A. 2020 Supp. 26-518. Third-party displaced persons can pursue relocation benefits under the Kansas Relocation Act, K.S.A. 58-3501 et seq., or through another cause of action outside the EDPA.
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Eminent Domain Procedure Act Limits Amount of Compensation Owed under K.S.A. 26-513. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits judicial review to the amount of compensation owed under K.S.A. 26-513. It provides no mechanism for judicial review of a denial of relocation benefits under K.S.A. 2020 Supp. 26-518.
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Petition for Probate and Will Required to be Filed Within Six Months of Decedent's Death. A petition for probate of a will and the will itself must be filed with the district court within six months of the decedent's death.
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Probate Process Requires Timely Filing of Will. In order to probate a will, the district court must have the will. Timely filing of the will is a required step in the probate process. *In re Estate of Lessley* ……..…….. 75

Requirement of Filing of Petition for Probate of Will Within Six Months of Death of Testator. No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as provided by statute. *In re Estate of Lessley* ……..….. 75

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Material Fact Has Bearing on Decision in Case—Appellate Review. A material fact is one that has some real bearing on the decision in the case and presents a question of law over which an appellate court exercises unlimited review. *State v. Vazquez* 86

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Liability of Insurer for Judgment in Excess of Policy Limit—Requirement of Causal Connection. Kansas law is clear that for an insurer to be liable for a judgment in excess of the policy limit, there must be a causal connection between the insurer's conduct and the excess judgment. *Granados v. Wilson* 10

No Affirmative Duty of Insurer to Initiate Settlement Negotiations before Third Party Makes Claim. Although an insurer must exercise diligence and good faith in its efforts to settle a claim within the policy limits, an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages. *Granados v. Wilson* 10

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Establishment of Standing Requires Concrete Injury in Fact Element—Self-censorship May Satisfy Concrete Injury in Fact Element. Self-censorship in response to a law's passage may satisfy the concrete injury in fact element required to establish standing when (1) there is evidence that, in the past, the individual engaged in the type of conduct that is affected by the challenged government action; (2) affidavits or testimony are available that evidence a present desire, though no specific plans, to engage in such conduct; and (3) the individual can articulate a plausible claim that they presently have no intention to engage in such conduct because of a credible threat that to do so would subject them to adverse consequences. *League of Women Voters of Kansas v. Schwab* 310*

Standing—Pre-enforcement Inquiry—Requirement of Objectively Reasonable Perceived Threat of Prosecution. The perceived threat of prosecution must be one that is objectively reasonable. A subjective fear is not sufficient to satisfy the third prong of the pre-enforcement inquiry. *League of Women Voters of Kansas v. Schwab* 310*

— Requirement of Injury in Fact Cannot Be Merely Conjectural. The injury in fact requirement is not satisfied where the complained of injury is merely conjectural. *League of Women Voters of Kansas v. Schwab* 310*

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— Requirement of Justiciable Controversy or Case Dismissed. If a person does not have standing to challenge an action or request a particular type of relief, then a justiciable controversy does not exist and the case must be dismissed. *League of Women Voters of Kansas v. Schwab* ……..… 310*

Standing Inquiry for Pre-enforcement Questions—Requirements to Satisfy the Injury in Fact Component. In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and the party faces a credible, substantial threat of prosecution under the challenged provision. *League of Women Voters of Kansas v. Schwab* ……..…… 310*

Standing Requirement—Demonstrate Injury and Causal Connection Between Injury and Challenged Conduct. To demonstrate standing in Kansas, the traditional test is twofold: a person must demonstrate that he or she suffered a cognizable injury, also known as an injury in fact, and that there is a causal connection between the injury and the challenged conduct. *League of Women Voters of Kansas v. Schwab* ……..…… 310*

— Three-Prong for Association to Sue on Behalf of Its Members. An association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *League of Women Voters of Kansas v. Schwab* ……..… 310*

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Review of Presumptive Sentence by Appellate Court if Lack of Specific Finding as Required by Statute. An appellate court has jurisdiction to review a presumptive sentence under K.S.A. 2019 Supp. 38-2380(b)(5), when a trial judge imposes a sentence under K.S.A. 2019 Supp. 38-2369(a)(1)(B), that lacks a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……..…… 1

Sentencing of Juvenile Offender—Requirement of Specific Finding in Written Order by Trial Judge. Before a trial judge under K.S.A. 2019 Supp. 38-2369(a)(1)(B) directly commits a juvenile offender to a juvenile correctional facility, the trial judge must make a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……..…… 1

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PARENT AND CHILD:

Court's Jurisdiction Ends When Child Reaches Majority Age. A district court's jurisdiction over custody and parenting time ends once the child reaches the age of majority. *In re Marriage of Bush* …….. 284*

Request for Grandparent Visitation under Statute—Factors for Consideration by Court. When considering a request for grandparent visitation, in addition to considering under K.S.A. 2018 Supp. 23-3301(b), the best interests of the child and whether a substantial relationship exists between grandparent and child, the court must presume that a fit parent is acting in the child's best interests and must give special weight to a fit parent's proposed grandparent visitation plan. The court cannot adopt a grandparent's conflicting plan without first finding that the parent's proposed plan is unreasonable. The burden is on the grandparent to rebut the presumption that a fit parent's proposed visitation plan is reasonable. Reasonableness is assessed in light of the totality of the circumstances.
Schwarz v. Schwarz ……. 103

Statutory Authorization for Service of Notice of Hearing—Individual Not Required to Personally Sign for Delivery. K.S.A. 2020 Supp. 38-2267(b) authorizes service of the notice of a hearing concerning the termination of parental rights by return receipt delivery, which includes service by certified mail. The law does not restrict the delivery of the notice to the person served or otherwise require that individual to personally sign for its delivery. *In re A.P.* ……..……...……. 141

Statutory Grandparent Visitation Rights—Findings of Best Interests and Substantial Relationship. K.S.A. 2018 Supp. 23-3301(b) allows for grandparent visitation when "visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." *Schwarz v. Schwarz* ……...…….. 103

— No Statutory Exclusion of Visitation Rights Following Death of Parent. K.S.A. 2018 Supp. 23-3301(a), which permits a provision for grandparent visitation rights in a pending divorce action, does not preclude a separate and independent action for grandparent visitation rights following the death of a parent. *Schwarz v. Schwarz* ……...…….. 103

REAL PROPERTY:

Improvement to Real Property Is Valuable Addition to Property or Amelioration in Condition. An improvement is a valuable addition made to real property or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes. An improvement need not involve structural additions and need not necessarily be visible as long as it enhances the value of the property.
Claeys v. Claeys ……...……. 196

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Partition Proceedings—Broad Discretion of District Courts for Determining Division of Interests. Partition proceedings, which seek to fairly divide ownership interests in real property, are equitable in origin. District courts have broad discretion to determine how best to fairly divide those interests. When a cotenant has made improvements to the property, the court may adjust the division to apply a credit to that cotenant for his or her efforts, measured by the extent the improvement enhances the value of the land. *Claeys v. Claeys* ……...……...……. 196

STATUTES:

Construction—Determination of Legislative Intent—Appellate Review. The fundamental rule of statutory construction is to determine the Kansas Legislature's intent. If a statute is plain and unambiguous, appellate courts are not to speculate about the legislative intent behind the language used and must refrain from reading something into the statute that is not readily found in its words. *Turner v. Pleasant Acres* ……..…….. 122

TAXATION:

Equipment Rental Expenses Necessary to Perform Taxable Services Are Not Tax Exempt. Equipment rental expenses which are necessary to perform taxable services are materially different from hotel and meal expenses incurred by employees who perform the taxable services. As such, equipment rental expenses are not tax exempt under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012).
In re Tax Appeal of Capital Electric Line Builders, Inc. …..……. 251

No Exemption under Retailers' Sales Tax Act for Equipment Rental Expenses. The Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt equipment rental expenses incurred to perform taxable services from taxation.
In re Tax Appeal of Capital Electric Line Builders, Inc. ……...…. 251

Property Tax Exemptions Effective January 1 of Tax Year in Which Mineral Lease Produced at Exempt Levels. Since property tax exemptions are effective from the date of the first exempt use (K.S.A. 79-213[j]), and mineral leases are appraised as of January 1 each year (K.S.A. 79-301), a property tax exemption under K.S.A. 79-201t is effective January 1 of the tax year in which the mineral lease produced at exempt levels.
John O. Farmer, Inc. v. Board of Ellis County Comm'rs ……...… 262

Refund of Property Tax Paid on Mineral Lease When Lease Produced at Exempt Levels. A taxpayer is entitled to a refund of property taxes paid on a mineral lease for the tax year in which the mineral lease produced at exempt levels under K.S.A. 79-201t. K.S.A. 79-213(k).
John O. Farmer, Inc. v. Board of Ellis County Comm'rs ……...… 262

TORTS:

Comparative Implied Indemnity—Cause of Action by Tortfeasor for Recovery of Damages Proportional to Joint Tortfeasor's Fault. Comparative implied

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indemnity, or as it is more accurately termed postsettlement contribution, describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor's fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Comparative Implied Indemnity or Claim of Contribution against Joint Tortfeasor as Third Party—Must Assert Timely Claim. For a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2020 Supp. 60-258a(c) and assert a timely claim against the joint tortfeasor.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Determination of Percentage of Fault in One Lawsuit--Submission to Jury of Causal Fault or Negligence of All Parties to Occurrence. The causal fault or negligence of all parties to the occurrence, including the negligence of the injured plaintiff and any third parties, should be submitted to the jury and the percentage of fault of each determined in one lawsuit.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

TRIAL:

Booking Photo of Defendant—Preventative Measures Required to Minimize Prejudicial Effect. The district court should take preventive measures to minimize any potentially prejudicial effect the photograph might have. *State v. Vazquez* 86

Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause. When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
State v. Myers 149

— Conviction of Multiple Charges—Compliance with Equal Protection Clause. For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.
State v. Myers 149

TRUSTS:

Beneficiary of Trust May Void Transaction if Conflict of Trustee's Fiduciary and Personal Interest—Exception. Generally, a trust beneficiary may void a transaction involving trust property which is

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affected by a conflict between the trustee's fiduciary and personal interest, without further proof. But an exception to that rule applies when the terms of the trust expressly or impliedly authorize the transaction. K.S.A. 2021 Supp. 58a-802(b)(1). *Culliss v. Culliss* 293*

Court Has Discretion to Award Reasonable Attorney Fees to Any Party. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, has broad discretion to award reasonable attorney fees to any party, to be paid by another party or from the trust that is the subject of the controversy. K.S.A. 58a-1004. *Culliss v. Culliss* 293*

WORKERS COMPENSATION:

Decisions of Workers Compensation Appeals Board--Appellate Review under KJRA. Appellate courts review decisions from the Kansas Workers Compensation Appeals Board under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. In doing so, appellate courts must review the record to determine whether the decision of the Board is supported by evidence that is substantial when viewed in light of the record as a whole. It is not the role of the appellate courts to reweigh the evidence or to make credibility determinations. *Turner v. Pleasant Acres* 122

Dual Purpose of K.S.A. 44-504. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries.
Turner v. Pleasant Acres 122

Employer's Subrogation Rights—Legislative Determination. The nature and extent of an employer's subrogation rights under the Kansas Workers Compensation Act are matters for legislative determination.
Turner v. Pleasant Acres 122

Injured Worker's Recovery under K.S.A. 44-504(b)—Subrogation Rights of Employer against Duplicative Recovery. Under K.S.A. 44-504(b), if an injured worker receives a judgment, settlement, or other recovery in a claim asserted against any person or entity—other than the employer or a co-employee—who caused the injury for which compensation is payable under the Kansas Workers Compensation Act, the employer is subrogated to the extent of the compensation and medical benefits provided and has a lien against any duplicative recovery. The subrogation lien does not include any amount paid by a third party for loss of consortium or loss of services to an injured worker's spouse.
Turner v. Pleasant Acres 122

No Distinction between Types of Recovery in K.S.A. 44-504(b). K.S.A. 44-504(b) does not distinguish between the types of recovery to which the workers compensation subrogation lien attaches.
Turner v. Pleasant Acres 122

(510 P.3d 1194)

Nos. 123,773
123,774

STATE OF KANSAS, *Appellee*, v. STEVEN J. SHIPLEY, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Calculation of Criminal History Score under Inclusive Rule*. Under the "inclusive rule" for calculating a criminal history score, "prior convictions" includes multiple convictions on the same date in different cases. Because the convictions in each case are scored against the other case for criminal history purposes, a defendant will face a stiffer sentence if sentenced in multiple cases on the same date than if the defendant were sentenced for the same cases on different dates.

2. SAME—*Sentencing—Cases Consolidated for Trial Not Prior Convictions.* Convictions in cases consolidated for trial do not qualify as "prior convictions" for criminal history purposes. K.S.A. 2020 Supp. 21-6810(a).

3. SAME—*Sentencing—Multiple Complaints—Statutory Requirement of Formal Consolidation by Court.* A constructive consolidation argument is unsupported by the plain language of K.S.A. 2020 Supp. 21-6810(a). That statute requires formal consolidation by court order for multiple complaints to be "joined for trial."

Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge. Opinion filed May 27, 2022. Affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Taylor A. Hines, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., HILL and ISHERWOOD, JJ.

GARDNER, J.: The State charged Steven J. Shipley with crimes in two separate cases: 12 CR 1572 and 12 CR 1589. Shipley later pleaded guilty to one count each of aggravated robbery, aggravated battery, and aggravated burglary in 12 CR 1572, and three counts of aggravated robbery in 12 CR 1589. The plea agreement noted that the State and Shipley both understood his criminal history score would be an A based on his new convictions in the two cases. Neither party asked the district court to consolidate the complaints for trial, nor did the district court ever order the cases consolidated.

The district court adopted the plea agreement, found Shipley's criminal history score to be A, granted his departure request, and sentenced him on the same day in both cases to a reduced controlling sentence of 209 months. Shipley did not appeal. But in 2017, Shipley moved to correct an illegal sentence, arguing the district court had improperly relied on the convictions in each case to find a criminal history score of A in the other case. The district court succinctly denied his motion.

Shipley now appeals, arguing that the district court erred because his cases were "constructively consolidated" for trial so his criminal history should have been a G. But unpersuaded by the constructive consolidation argument, we find the district court did not err in relying on the convictions in each complaint to calculate a criminal history score in the other. Shipley also raises an Equal Protection issue for the first time on appeal. But because Shipley failed to raise this fact-based issue to the district court, it is unpreserved, and we do not reach its merits.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2012, the State charged Shipley in case number 12 CR 1572 with one count of aggravated robbery, a severity level 3 person felony, two counts of aggravated battery, a severity level 4 person felony, and one count of aggravated burglary, a severity level 5 person felony. In December 2012, the State charged Shipley in case number 12 CR 1589 with four counts of aggravated robbery, a severity level 3 person felony, and one count of aggravated burglary, a severity level 5 person felony. The two cases stemmed from separate acts over eight days—Shipley approached persons working on a car, pulled a gun on them, and demanded that they give him their belongings.

In August 2013, Shipley entered into a plea agreement with the State which resolved both cases. In it, Shipley agreed to plead guilty to one count each of aggravated robbery, aggravated battery, and aggravated burglary in 12 CR 1572, and to three counts of aggravated robbery in 12 CR 1589. The State agreed to dismiss the remaining counts and to recommend a downward durational departure sentence. The plea agreement showed both parties expected Shipley's criminal history score to be A in both cases.

The district court sentenced Shipley in both cases on the same day in September 2013. In case number 12 CR 1572, using the three convictions in 12 CR 1589 as prior convictions, the district court found Shipley's criminal history score was A and that the resulting sentencing grid range for the

offense was 221-233-247 months. The district court granted Shipley's downward durational departure motion and imposed a 209-month base sentence for aggravated robbery. It imposed concurrent sentences for the two remaining convictions in 1572, leading to a controlling 209-month sentence.

Similarly, in 12 CR 1589, using the three convictions in 12 CR 1572 as prior convictions, the district court found Shipley's criminal history score was A and granted his motion for downward durational departure. The district court sentenced Shipley to 209 months for aggravated robbery and imposed concurrent sentences for the two remaining convictions, creating a controlling 209-month sentence. The district court ran the sentences in 12 CR 1572 and 12 CR 1589 concurrently for a total controlling prison sentence of 209 months and awarded Shipley 308 days of jail credit. Shipley did not appeal.

In October 2015, Shipley filed a pro se motion to correct an illegal sentence in both cases, arguing the district court should have found his criminal history score to be G instead of A. The district court summarily dismissed that motion and Shipley did not appeal.

But again, in January 2017, Shipley filed a pro se motion with the district court to correct an illegal sentence in both cases, arguing his criminal history score should have been G because there was a reasonable basis to conclude that both cases were in fact consolidated for trial and sentencing. Essentially, Shipley argued the cases had been effectively consolidated so his criminal history score for each case should not have included any conviction from the other case.

In February 2017, the district court summarily denied Shipley's motion. The district court relied on K.S.A. 2012 Supp. 21-6810(a) to find that convictions other than those brought in the same information or joined for trial will count as prior convictions for a defendant's criminal history score.

Shipley appeals.

DID THE DISTRICT COURT ERR BY RELYING ON THE CRIMINAL CONVICTIONS IN EACH CASE IN DETERMINING DEFENDANT'S CRIMINAL HISTORY SCORE?

Before we address Shipley's argument that his two cases effectively were consolidated, and thus do not qualify as "prior convictions" for criminal history purposes, we must address a procedural matter—whether Shipley's claim is properly before us.

Does a Preclusion Doctrine Bar Shipley's Motion?

In 2015, Shipley moved the district court to correct an illegal sentence in both cases, arguing the district court should have found his criminal history score was G instead of A. The district court summarily dismissed that motion on its merits and Shipley did not appeal. Shipley now raises that same issue again.

This procedural posture would generally cause us to find that the matter has been decided and cannot be revisited. But emerging caselaw does not apply traditional preclusion doctrines to K.S.A. 2020 Supp. 22-3504 motions, such as this one. See, e.g., *State v. Hayes*, 312 Kan. 865, 867, 481 P.3d 1205 (2021) ("[T]he plain language of K.S.A. 22-3504, which allows correction of an illegal sentence 'at any time,' operates as a legislative override of traditional principles of waiver, abandonment, and res judicata."). Under Kansas Supreme Court precedent cited in *Hayes*, "serial motions to correct an illegal sentence can be filed and the failure to raise an issue in the first such motion is not a bar to appellate review." 312 Kan. at 867. Shipley raised the issue that his criminal history score should have been G instead of A in his 2015 motion but did not raise the constructive consolidation argument. Given the uncertainty of the law in this area, and in an abundance of caution, we choose to reach the merits of the 2017 motion, as the district court did.

Is Shipley's Motion Barred Because His Sentence Resulted from a Plea Agreement?

Under the plea agreement, Shipley pleaded guilty to the various crimes in exchange for the State's promise to dismiss the remaining charges and recommend a departure. K.S.A. 2020 Supp. 21-6820(c) provides that an appellate court shall not review a sentence for a felony committed after July 1, 1993, that results from a plea agreement between the State and the defendant which the district court approved on the record. See *State v. Quested*, 302 Kan. 262, 264, 352 P.3d 553 (2015) (no jurisdiction to review sentences agreed to and approved by the sentencing court).

But a court may correct an illegal sentence at any time while the defendant is serving the sentence. K.S.A. 2020 Supp. 22-3504(a). A sentence is illegal under K.S.A. 2020 Supp. 22-3504

when: (1) it is imposed by a court without jurisdiction; (2) it does not conform to the applicable statutory provisions, either in character or the term of punishment; or (3) it is ambiguous about the time and manner in which it is to be served. *State v. Hambright*, 310 Kan. 408, 411, 447 P.3d 972 (2019). And a change in the law after the district court pronounces sentence and after the conclusion of any direct appeal does not render that sentence illegal. K.S.A. 2020 Supp. 22-3504(c).

Broadly read, Shipley's motion alleges that his sentence does not conform to K.S.A. 2012 Supp. 21-6810, the statute that defines prior convictions and states which convictions the district court may use to calculate a defendant's criminal history score under the Kansas Sentencing Guidelines Act (KSGA). Under that statute,

> "[a] prior conviction is any conviction, other than another count in the current case, which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 . . . which occurred prior to sentencing in the current case." K.S.A. 2012 Supp. 21-6810(a).

Shipley does not contend that his convictions were "brought in the same information or complaint." K.S.A. 2012 Supp. 21-6810(a). Rather, he contends that his counts were "joined for trial with other counts in the current case pursuant to K.S.A. 22-3203." That statute permits a district court to join multiple complaints for trial: "The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment." K.S.A. 22-3203. And K.S.A. 22-3202(1) provides that the State may charge two or more crimes against a defendant in the same case if the charges are of the same or similar character or based on the same act or transaction. Shipley had no trial because he pleaded, but his cases were set for trial on the same day, he pleaded to both cases by a joint plea agreement on the same day, and he was sentenced in both cases on the same day. He thus contends that his cases were constructively consolidated—joined for trial—yet the district court sentenced him contrary to K.S.A. 2012 Supp. 21-6810(a)'s provision not to include as "prior convictions" convictions in the same case. Because Shipley's motion

contends that his sentence does not conform to the applicable statutory provisions, we consider it to have been properly brought under K.S.A. 2020 Supp. 22-3504.

Did Shipley's Sentence Violate Applicable Statutory Provisions?

We thus reach the merits of Shipley's motion. The district court must count all prior convictions in determining a defendant's criminal history score unless the convictions constitute an element of the present crime, enhance the severity level, or elevate the classification from a misdemeanor to a felony. K.S.A. 2020 Supp. 21-6810(d)(10); *State v. Kelly*, 298 Kan. 965, 976, 318 P.3d 987 (2014). Similarly, all prior convictions count separately, whether sentenced concurrently or consecutively. K.S.A. 2020 Supp. 21-6810(c). The district court must include all valid convictions in a defendant's criminal history if they occurred before sentencing, regardless of the date of the convictions. K.S.A. 2020 Supp. 21-6810(a); see *State v. Bussart*, 29 Kan. App. 2d 996, 998-99, 35 P.3d 281 (2001).

"Under Kansas law, any conviction that a defendant has before sentencing is counted in determining that defendant's criminal history score, unless that conviction is another count in the same case. This means that if a defendant pleads guilty to two crimes on the same day in two separate cases, the conviction in each case counts against the other case as a prior conviction. This is because both convictions have occurred before sentencing in each case. As we stated, any conviction that a defendant has before sentencing is counted in determining that defendant's criminal history score." *State v. McKinzy*, No. 121,464, 2021 WL 4496098, at *1 (Kan. App. 2021) (unpublished opinion).

Under the "inclusive rule" for calculating a criminal history score, "prior convictions" includes multiple convictions on the same date in different cases. *State v. Roderick*, 259 Kan. 107, 116, 911 P.2d 159 (1996). In *Roderick*, the Kansas Supreme Court recognized the sentencing disparity that Shipley complains of here:

"The inclusive rule avoids the problem of having to arbitrarily determine the order in which sentencing should occur for several crimes pled to on the same date. If each crime is counted against the other, the order in which each crime is counted does not matter. The same presumptive sentence will result, regardless of the order in which the crimes are considered. However, as Roderick's counsel points out in his supplemental brief, the inclusive rule nonetheless may create different sentencing results. If one defendant pleads to three crimes in separate

cases on different dates and is sentenced separately for each crime, the total presumptive sentencing range will be less than for a defendant who pleads to the same three crimes in separate cases on the same date.

"Under the inclusive rule, a defendant will face the possibility of a stiffer sentence if pleading to separate crimes in separate cases on the same date, rather than on separate dates. On the other hand, if the inclusive rule is not applied, the reverse occurs: A defendant convicted separately for three crimes will be exposed to a stiffer sentence than one who pleads to the same three crimes at the same time. Neither the State's nor Roderick's interpretation will eliminate the potential for disparate sentencing results." 259 Kan. at 115-16.

Despite the sentencing disparity, *Roderick* upheld the statute, acknowledging that under the inclusive rule a defendant will face a stiffer sentence if sentenced in multiple cases on the same date than if that defendant were sentenced for the same cases on different dates or if the defendant were sentenced in a consolidated case for the same crimes. 259 Kan. at 115-16.

Shipley claims that his two cases effectively were consolidated, so they do not qualify as "prior convictions" for criminal history purposes. See K.S.A. 2020 Supp. 21-6810(a) (excluding from the definition of a "prior conviction" a conviction for another count joined for trial in current case under K.S.A. 22-3203).

Shipley argues that the district court *could* have consolidated the cases under K.S.A. 22-3202, though it did not formally do so, because the charges involved similar offenses and used similar modus operandi and occurred within about a week of each other in the same county. Shipley concedes that the district court did not formally consolidate the cases but argues that "the record shows de facto consolidation for trial." Shipley also concedes that Kansas caselaw disfavors his position but claims his circumstances are different because he "showed more than just that he pleaded guilty to these offenses on the same day and was sentenced on the same day."

We are not persuaded. First, Shipley cites no legal support for his proposition that because the cases were scheduled for trial on the same day in the same court, his later guilty plea to various charges in two complaints amounts to a constructive consolidation. Failure to support a point with pertinent authority or failure to show why a point is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief the issue. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020).

Second, although Shipley insists the cases *could* have been joined under K.S.A. 22-3202 and K.S.A. 22-3203, the fact remains that they were not joined. Although Shipley entered pleas on the same day and the plea agreement deals with both cases, the district court never ordered the cases joined for trial. And because the cases were never "joined for trial," as is required here to prevent his convictions from being "prior convictions" under K.S.A. 2020 Supp. 21-6810(a), the district court was duty bound to use the convictions in each case to calculate the criminal history score in the other. See *Roderick*, 259 Kan. at 115-16 (holding that the district court should count multiple convictions entered on same date in different cases in determining a defendant's criminal history score). Our cases have consistently so held. See *State v. Helko*, No. 112,961, 2016 WL 1296081, at *1 (Kan. App. 2016) (unpublished opinion) (finding convictions in one case qualified as "prior conviction[s]" for criminal history scoring purposes even though defendant was convicted in that case and in another case on the same day and sentenced for both cases at one hearing); *State v. Freimark*, No. 108,839, 2013 WL 5976056, at *2 (Kan. App. 2013) (unpublished opinion) ("when a defendant is convicted of crimes in two separate cases on the same day and sentenced in both cases at one hearing, the convictions in each case are scored against the other case for criminal history purposes"); *State v. Loggins*, No. 90,171, 2004 WL 1086970, at *6 (Kan. App. 2004) (unpublished opinion) ("The fact the court set the cases for sentencing on the same date, likewise, did not prevent them from being prior convictions for purposes of Loggins' criminal history.").

We reject Shipley's constructive consolidation argument as unsupported by the plain language of K.S.A. 2020 Supp. 21-6810(a) ("A prior conviction is any conviction, other than another count in the current case, which was … joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 . . . which occurred prior to sentencing in the current case."). Had the Legislature intended to exclude from "prior convictions" a defendant's convictions in a separate case that *could have been joined* for trial, it would have said so.

Interpreting the statute to require formal consolidation for multiple complaints to be considered "joined for trial" under K.S.A. 2020 Supp. 21-6810, our court has routinely rejected arguments that cases not formally joined for trial had a "consolidation effect" or were "constructively consolidated." See *State v. Jarrell*, 34 Kan. App. 2d 480, 483-84, 122 P.3d 389 (2005) (finding defendant's consolidation argument unpersuasive though record shows district court considered sentencing proceeding a "consolidated" one); *State v. Allen*, No. 113,142, 2016 WL 852887, at *1-3 (Kan. App. 2016) (unpublished opinion) (finding two cases remained legally separate and distinct even though they were disposed of in combined plea and sentencing hearings); *Loggins*, 2004 WL 1086970, at *5-6 (rejecting argument that district court's setting both cases for trial on same day and for sentencing on same day had a "consolidation effect.").

We do the same. A district court rarely consolidates criminal cases sua sponte. Rather, consolidation usually results from a party's motion. And such motions are not pro forma but are the product of the parties' considered judgment and strategy that varies from case to case. Among counsel's many considerations are judicial economy, the effect of consolidation on a defendant's sentence, and the potential prejudice to a defendant by bolstering or another effect of combining multiple counts. And an order of consolidation does not happen unless the parties have deliberated about the matter, the parties have had a chance to be heard on it, and the district court has exercised its discretion to consolidate the cases. Much certainty, deliberation, and due process is to be gained by a formal order of consolidation. All of that would be lost were constructive consolidation enough. We hold that cases are not "joined for trial" under K.S.A. 2020 Supp. 21-6810(a) unless consolidation is ordered by the court.

But no such order was made here. Although both complaints were resolved by a joint plea agreement, Shipley pleaded guilty to two separate complaints, and the record does not reflect that either party moved to consolidate them, or that they were ordered joined for trial. Under these circumstances, no consolidation occurred even though Shipley entered a joint plea agreement and was sentenced in both cases on the same day.

As a result, the district court properly counted Shipley's convictions in each case to calculate his criminal history score in his other case. K.S.A. 2020 Supp. 21-6810(a) Shipley's sentence does not violate the sentencing statute and is thus not illegal. K.S.A. 2020 Supp. 22-3504(c)(1). We affirm the district court's denial of Shipley's motion to correct his illegal sentence.

DOES K.S.A. 2012 SUPP. 21-6810 VIOLATE THE EQUAL PROTECTION CLAUSE?

Shipley next argues, for the first time on appeal, that K.S.A. 2012 Supp. 21-6810 violates the Equal Protection Clause. The State counters that this court should not consider the merits of this unpreserved claim. Thus, once again, we must decide whether to reach the merits of Shipley's claim.

Generally, a defendant must raise a specific constitutional challenge to a statute before the district court to preserve the issue for appeal. *State v. Robinson*, 306 Kan. 1012, 1025, 399 P.3d 194 (2017). Shipley concedes that he is raising this constitutional argument for the first time on appeal. But he asserts these two exceptions to that general rule: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Shipley adds two other reasons: (1) the precedent he relies on for the Equal Protection claim was decided after the district court summarily denied his claim; and (2) the Equal Protection claim is merely another authority supporting an argument he did make to the district court that it erred by including each case in the other's criminal history score.

But even though Shipley argues exceptions, we need not review his new claim.

"The decision to review an unpreserved claim under an exception is a prudential one. *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017); *State v. Frye*, 294 Kan. 364, 369, 277 P.3d 1091 (2012). Even if an exception would support a decision to review a new claim, we have no obligation to do so. *Parry*, 305 Kan. at 1192.

"We decline to utilize any potentially applicable exception to review Gray's new claim. Gray had the opportunity to present his arguments to the district court

and failed to do so. This failure deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review. We therefore decline to address Gray's new arguments on appeal." *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

Here, as in *Gray*, this panel would have benefitted from a full factual development and the district court's analysis of this important equal protection argument that Shipley failed to raise.

A peek at the merits shows why. Shipley contends the statute treats two indistinguishable classes differently, without good reason: those whose cases were consolidated for trial; and those whose cases could have been consolidated for trial "as a matter of law" but were not. Although Shipley does not state whether he is arguing a facial or an as-applied challenge to the constitutionality of the statute, his brief shows that he is making an as-applied challenge to K.S.A. 2012 Supp. 21-6810. First, Shipley contends that "the resulting application of the statute violates the Equal Protection Clause." And second, rather than rely solely on the language of the statute, Shipley asserts that his cases could have been consolidated "as a matter of law." But to reach that conclusion, Shipley relies on factual assertions regarding multiple charges in his two cases—that they involved similar offenses, used similar modus operandi, occurred within about a week of each other, and occurred in the same county. Third, a determination under K.S.A. 22-3202(1), which provides that the State may charge two or more crimes against a defendant in the same case if the charges are of the same or similar character or based on the same act or transaction, is fact-based. Thus the fact-based nature of Shipley's claim is readily apparent. See *State v. Smith-Parker*, 301 Kan. 132, 157, 340 P.3d 485 (2014) (finding Kansas cases that have held consolidation or joinder to be appropriate on this basis "have generally had multiple commonalities, not merely the same classification of one of the crimes charged"); *State v. Dixon*, 60 Kan. App. 2d 100, 132, 492 P.3d 455 ("the State is correct that determining whether consolidation of charges for trial is warranted is a factual inquiry"), *rev. denied* 314 Kan. 856 (2021). As its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge necessarily requires findings of fact. *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019). Such is the case here.

Because Shipley failed to raise this constitutional claim to the district court, we decline to reach it now.

Affirmed.

No. 124,454

In the Matter of the Marriage of STACEY A. LEWIS (f/k/a Bush), *Appellee*, and GREGORY L. BUSH, *Appellant*.

SYLLABUS BY THE COURT

PARENT AND CHILD—*Court's Jurisdiction Ends When Child Reaches Majority Age*. A district court's jurisdiction over custody and parenting time ends once the child reaches the age of majority.

Appeal from Johnson District Court; JACQUELYN E. ROKUSEK, judge. Opinion filed June 10, 2022. Affirmed in part and dismissed in part.

Gregory L. Bush, appellant pro se.

Erin B. Bajackson, of Albano, Richart, Welch & Bajackson, LLC, of Independence, Missouri, for appellee.

Before ATCHESON, P.J., POWELL and WARNER, JJ.

POWELL, J.: Stacey A. Lewis (f/k/a Bush) and Gregory L. Bush divorced in 2012. They share one child, a daughter born in 2004. In May 2020, a physical altercation occurred between the child and Bush's wife, prompting Lewis to file a motion to modify parenting time and child support. Several months later, Lewis filed a motion to extend child support beyond the child reaching the age of majority as the child remained in high school. After a trial on these two motions, the district court found a material change in circumstances had occurred and entered new orders as to parenting time and child support.

However, while this case has been on appeal, the child reached the age of majority in April 2022. As a result, we lost jurisdiction to enter any orders concerning custody and parenting time. Moreover, because Bush, as the appellant, has failed to supply us with the necessary record—specifically the transcript of the trial—to permit appellate review, we must reject his appeal of the district court's child support orders. Finally, we decline to address his allegations of bias against the district judge who heard the case because the required affidavit supporting such allegations was

never filed, thus preventing our evaluation of its contents. Accordingly, we affirm in part and dismiss in part.

FACTUAL AND PROCEDURAL BACKGROUND

Lewis and Bush married in 2006. One child was born of their relationship, a daughter born in April 2004. Lewis and Bush divorced in 2012 in Johnson County, Kansas.

Under their divorce decree, Lewis and Bush were awarded joint legal and physical custody of their daughter with Lewis' residence designated as her primary residential address. Bush was awarded parenting time "in a two (2) week rotation, from Wednesday at 6:00 p.m. in Week 1, and Thursday at 6:00 p.m. until Sunday at 8:00 p.m. in Week 2. Additional parenting time was awarded on alternating holidays and for vacation periods." Bush was ordered to pay $683 of child support monthly.

While never memorialized in a subsequent parenting plan, because of the child's age, Lewis and Bush let her come and go between homes as she chose, rather than follow the court-ordered parenting plan. Bush alleges that the child spent approximately 80% (or more) of her time at his home, although there is nothing in the record to support this claim.

In May 2020, "an inappropriate physical altercation occurred between stepmother and [the child]." The stepmother (Bush's current wife) testified that "during an argument when the child was cussing at her, that [the stepmother] lightly placed her fingertips on the back of [the child's] neck and gently directed the child's head where she wanted the child to look." The child's testimony regarding the event was taken in camera, so a record of her side of events is not available. However, the district court did not find the stepmother's description of events to be credible and deemed the physical altercation between the two as "inappropriate." Additionally, on Father's Day 2020, the stepmother and child got into a verbal altercation regarding the child support that Bush pays, which involved the stepmother yelling at the child about the purpose of child support. The child recorded this altercation, and it was played before the district court. However, that recording is not in the record on appeal.

The physical altercation led to the child choosing not to spend time at her father's house, and this hesitancy to spend time at her father's house increased after the verbal altercation in June. In fact, at the time of trial, the child and her father had had virtually no contact in a year. After the altercations the child "suffered from panic attacks as well as chronic heartburn and digestive issues due to the stress from the strained relationship" with her father.

In late June 2020, these events prompted Lewis to file a motion to modify parenting time and child support. In that motion she alleged the child's relationship with her stepmother had "become increasingly volatile, and as a result, the current court-ordered schedule is no longer in the child's best interests." Lewis also alleged the child's stepmother "regularly smokes marijuana in the presence of the minor child" and the child "consistently arrives late to school when staying with [her father] on school nights." Additionally, the parents' incomes had changed more than 10% since the filing of the first order, and the child had begun participating in a competitive volleyball club, for which the fees were approximately $1,850 per year.

While this motion was pending, in March 2021, Lewis filed a motion to extend child support pursuant to K.S.A. 2020 Supp. 23-3001(b)(3). In the motion, Lewis indicated that the child would turn 18 years old in her junior year of high school because she repeated second grade. The child was on track to graduate in May 2023; therefore, Lewis requested child support be extended through May 31, 2023.

On May 19 and June 18, 2021, the district court conducted a trial on these two motions. The record on appeal contains no transcript of the trial. After considering the evidence presented, the district court amended the parenting plan, increased Bush's child support obligation, and extended that obligation until the child graduated from high school. Specifically, the district court limited Bush's parenting time to (1) two evenings per week from 5 p.m. to 10 p.m., unless the parties agreed otherwise so long as the child expressed an interest to participate in the same; and (2) alternating weekends on Saturday and Sunday from 10 a.m. until 6 p.m., so long as the child expressed an interest to participate in the same. Bush's child support obligation was increased to $1,120 per month and extended to May 31, 2023, after which the child would no

longer be a high school student. Bush was also ordered to pay the majority of the child's volleyball club fees. Family therapy between the child and Bush was also ordered.

Bush timely appeals.

ANALYSIS

It is important to note that Bush has appealed pro se and submitted his own brief without the benefit of counsel. Parsing through Bush's brief, it appears Bush first argues that there was no material change in circumstances permitting the district court to modify the parenting time agreement. Specifically, Bush argues his statement that he would withhold funding the child's volleyball costs if she did not come over after the altercations between Bush's wife and the child did not supply "just cause" to modify his parenting time. Bush also argues that allowing his daughter to choose when she spends time with him "completely strip[s]" him of "any parenting ability."

Additionally, Bush argues the district court erred in its new child support calculation. And for the first time on appeal, Bush alleges the district judge had a conflict of interest because the judge also has a daughter who plays in the same competitive volleyball league as Bush's daughter.

I. DO WE HAVE JURISDICTION TO REVIEW THE DISTRICT COURT'S PARENTING TIME ORDER ONCE THE CHILD HAS REACHED THE AGE OF MAJORITY?

Before we can address the merits of Bush's claims on appeal, we must consider our jurisdiction to pass judgment on the district court's parenting time order because the child reached the age of majority in April 2022, after the district court's ruling but while this case has been on appeal. Although neither party addresses this issue in their briefs, it is our duty to question jurisdiction on our own. When the record discloses a lack of jurisdiction, an appellate court must dismiss the appeal. *Wiechman v. Huddleston*, 304 Kan. 80, 84-85, 370 P.3d 1194 (2016). Whether jurisdiction exists is a question of law subject to our unlimited review. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019).

Generally, a district court retains jurisdiction in a divorce proceeding "over child custody issues until the child reaches the age of majority or emancipation." 25A Am. Jur. 2d, Divorce and Separation § 810. In Kansas, the age of majority is 18 years old. K.S.A. 38-101.

It appears that no binding authority in Kansas has dealt squarely with this issue. It seems assumed that a court's jurisdiction over parenting time ends once the child reaches the age of majority. Digging deep into opinions throughout the history of the Kansas Supreme Court and Court of Appeals reveals tacit conclusions and indirect statements in a handful of opinions that affirm the general statement that a court's jurisdiction over child custody and parenting time issues ends when the child reaches the age of majority.

In the late 1800s this commonsense notion is first articulated. In *Kendall v. Kendall*, 5 Kan. App. 688, Syl. ¶ 1, 48 P. 940 (1897), the panel held: "The jurisdiction of district courts over the guardianship, custody, support, and education of *minor* children in divorce cases is a continuing jurisdiction." (Emphasis added.) Over 50 years later, the Kansas Supreme Court echoed a similar sensible understanding. In *Selanders v. Anderson*, 178 Kan. 664, 667, 291 P.2d 425 (1955), the Supreme Court held that the district court that "granted custody of the *minor* children" to their father continued to exercise "jurisdiction over the children so far as their guardianship, custody, support, and education were concerned." (Emphasis added.) Similar mentions of a district court's jurisdiction of a parenting time award (then referred to as "custody") extending over minor children are found other cases. See *Nixon v. Nixon*, 226 Kan. 218, 220, 596 P.2d 1238 (1979) (analyzing the Uniform Child Custody Jurisdiction Act and holding: "[I]t is clear that the Wyandotte District Court had jurisdiction to entertain the original action for divorce, to award custody of the *minor* children, and to make provision for their support. Its jurisdiction to modify its custody and support orders is a continuing one so long as the children are *minors*." [Emphases added.]); *Goetz v. Goetz*, 181 Kan. 128, 134, 309 P.2d 655 (1957) ("[W]hen a petition for divorce is filed and a part of the relief sought is the custody and control of *minor* children, jurisdiction of the district court attaches immediately

over the divorce action and the future welfare of the *minor* children during the pendency of the action and until final disposition thereof." [Emphases added.]); *Leach v. Leach*, 179 Kan. 557, 559, 296 P.2d 1078 (1956) ("[I]n a divorce action the district court, by statute G.S. 1955 Supp. 60-1510, has full jurisdiction of the *minor* children of a marriage and is directed to make provision for their custody, support and education. This is a continuing duty." [Emphasis added.]).

Under the revised Kansas Family Law Code, K.S.A. 2020 Supp. 23-3001 et seq., there is no linkage of parenting time and child support; just because a parent is paying child support does not mean that such parent is entitled to parenting time. K.S.A. 2020 Supp. 23-3001(b). So, here, even though Bush's child support obligation extends past the age of majority and into the child's 19th year of life (because she was held back a year in school), there is no provision extending the district court's jurisdiction over parenting time even if Bush's child support obligation is extended. See K.S.A. 2020 Supp. 23-3001(b)(3).

Another panel of our court considered a factually similar issue to the one at hand in *In re Marriage of Wente*, No. 87,299, 2002 WL 35657646 (Kan. App. 2002) (unpublished opinion). In that case, the child turned 18 years old while the appeal of the father's denial of his request for residential custody was pending. The father's child support had been extended past her 18th birthday because she was still attending high school, which was then permitted under K.S.A. 2000 Supp. 60-1610(a)(1), now K.S.A. 2020 Supp. 23-3001(b)(2). The panel held that the child was "no longer a minor child and may choose her own residence. See K.S.A. 38-101." *Wente*, 2002 WL 35657646, at *3.

We agree with *Wente* and hold that while Bush's obligation to pay child support for his daughter continues after she has reached the age of majority, as permitted under K.S.A. 2020 Supp. 23-3001(b)(3), the district court's jurisdiction over parenting time and custody ended when the child reached the age of majority. Because the district court lost jurisdiction to enter any child custody and parenting time orders once the child reached the age of majority, any question concerning the propriety of its parenting time order in this case has become moot.

As a general rule, "Kansas appellate courts do not decide moot questions or render advisory opinions." *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020). The mootness doctrine is one of court policy, under which the court is to determine real controversies about the legal rights of persons and properties that are actually involved in the case properly before it and to adjudicate those rights in a way that is operative, final, and conclusive. 311 Kan. at 590.

Because the child has reached the age of majority, she now has the right to choose her own residence and how often she sees Bush. Because the district court lacks the power to enter any parenting time orders, any opinion we would issue directing the district court to modify its parenting time order would be ineffectual and therefore moot. Accordingly, we dismiss Bush's appeal of the district court's parenting time order.

II. DID THE DISTRICT COURT ERR IN ITS MODIFICATION OF BUSH'S CHILD SUPPORT OBLIGATION?

Next, Bush argues that the district court erred in its modification of Bush's child support obligation because it used Lewis' tax return information to calculate her income rather than her bank statements.

This issue is impossible to review because the transcript of the trial is not included in the record on appeal. Without the transcript, we are unable to engage in a meaningful review of the district court's child support order. While there are exhibits included in the record on appeal, there is no context for those exhibits, nor is it possible to know if all of the included exhibits were admitted and considered by the district court.

"An adequate factual record is required to conduct meaningful appellate review of an issue. A party challenging the ruling of the district court is responsible for developing an adequate record for appeal." *State v. Carr*, 314 Kan. 744, Syl. ¶ 19, 502 P.3d 511 (2022); see *Kelly v. VinZant*, 287 Kan. 509, 526, 197 P.3d 803 (2008) ("An appellant has the burden to designate a record sufficient to establish the claimed error; without such a record, the claim of error fails. [Citation omitted.]"); Kansas Supreme Court Rule 3.03(a) (2022 Kan. S. Ct. R. at 22) (appellant's duty to request any transcripts necessary for appeal); see also K.S.A. 60-

2104 (content and preparation of record on appeal governed by Kansas Supreme Court rules).

Bush alleges that he could not afford a transcript, but he does not point us to a location in the record on appeal where he even made a request for a transcript. The Appellate Clerk's System indicates that no transcript was requested. The absence of a transcript of the trial requires us to speculate about the district court's child support rulings, something we cannot do. See *Akesogenx Corp. v. Zavala*, 55 Kan. App. 2d 22, 42, 407 P.3d 246 (2017). Thus, we must reject Bush's challenge to the district court's child support orders.

III. DID THE DISTRICT JUDGE HAVE A CONFLICT OF INTEREST?

Last, and for the first time on appeal, Bush argues the district court had a conflict of interest "[t]hroughout the court proceedings." Specifically, he alleges the district judge who heard the case had a conflict of interest because she has a daughter around the same age as Bush's daughter who also plays in the same volleyball club.

"'We exercise unlimited review over judicial misconduct claims, and review them in light of the particular facts and circumstances surrounding the allegation.' [Citation omitted.]" *State v. Boothby*, 310 Kan. 619, 624, 448 P.3d 416 (2019). The party alleging judicial misconduct has the burden of establishing that the misconduct occurred and that it prejudiced the party's substantial rights. *State v. Miller*, 308 Kan. 1119, 1154, 427 P.3d 907 (2018).

A litigant may argue that a judge's recusal is required in accordance with (1) the statutory factors set forth in K.S.A. 20-311d(c); (2) the standards of the Kansas Code of Judicial Conduct, Supreme Court Rule 601B, Canon 2, Rule 2.2 (2022 Kan. S. Ct. R. at 495); and (3) the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Moyer*, 306 Kan. 342, 370, 410 P.3d 71 (2017).

A party or a party's attorney may move for a change of judge based on the belief "that the judge to whom an action is assigned cannot afford that party a fair trial in the action." K.S.A. 20-311d(a). "Under K.S.A. 20-311d, a party must first file a motion for change of judge; if that motion is denied, then the party must

immediately file a legally sufficient affidavit alleging grounds set forth in the statute." *State v. Sawyer*, 297 Kan. 902, 908, 305 P.3d 608 (2013). Moreover, our Supreme Court has refused to consider bias claims on appeal when the claimant has failed to follow the proper statutory procedure, concluding that a claimant's failure to file an affidavit barred it from evaluating the judicial bias claim. *Moyer*, 306 Kan. at 371-72.

Here, there is nothing in the record to show that Bush followed the statutory procedure by filing an affidavit setting forth his allegations of judicial bias. Because he has not done so, "we cannot 'decide the legal sufficiency of the affidavit.'" 306 Kan. at 372. Thus, we decline to consider Bush's judicial bias claims.

Affirmed in part and dismissed in part.

No. 123,782

GARY A. CULLISS, *Appellant*, v. BRIAN R. CULLISS, as Trustee of the JULIA A. CULLISS TRUST, *Appellee*.

1. TRUSTS—*Beneficiary of Trust May Void Transaction if Conflict of Trustee's Fiduciary and Personal Interest—Exception.* Generally, a trust beneficiary may void a transaction involving trust property which is affected by a conflict between the trustee's fiduciary and personal interest, without further proof. But an exception to that rule applies when the terms of the trust expressly or impliedly authorize the transaction. K.S.A. 2021 Supp. 58a-802(b)(1).

2 SAME—*Court Has Discretion to Award Reasonable Attorney Fees to Any Party*. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, has broad discretion to award reasonable attorney fees to any party, to be paid by another party or from the trust that is the subject of the controversy. K.S.A. 58a-1004.

Appeal from Johnson District Court; MICHAEL P. JOYCE, judge. Opinion filed June 17, 2022. Affirmed.

Michael R. Ong, of Ong Law Firm, P.A., of Overland Park, for appellant.

Jeffrey R. King and *Caleb F. Kampsen*, of Sage Law, LLP, of Overland Park, for appellee.

Before GARDNER, P.J., HILL and ISHERWOOD, JJ.

GARDNER, J.: Trust beneficiary, Gary Culliss, appeals the district court's denial of his motion for partial summary judgment on issues related to the distribution of real property of his mother's estate. Gary argues that his brother, Brian Culliss (trustee and co-beneficiary), breached his fiduciary duties as trustee by conveying ownership of certain real property to himself while paying Gary cash equal to the property's value. Gary claims he was entitled to sole or joint ownership of the property and the district court erred by finding the trust waived Brian's duty of loyalty. Gary also challenges the district court's valuation of the properties and its

order that he pay attorney fees. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Overview of the Testamentary Instruments

Julia Culliss executed a trust and will in March 2009; she died in June 2018. She appointed her oldest son, Brian, to act as trustee and executor. She named Brian and his brother, Gary, the beneficiaries of her estate.

According to its terms, Julia's trust was "to provide for the management of [her] property during [her] lifetime and at [her] death to reduce taxes and transfer cost of [her] property and provide for the management of the property and its orderly disposition to the proper persons at the proper times." The trust directs the trustee to distribute Julia's "tangible personal property to [Julia's] surviving issue *per stirpes*." If a disagreement occurs regarding the distribution of Julia's tangible personal property, the trust gives the trustee "the discretion to either divide the property . . . as equitably as possible, taking into account their personal preferences, and/or sell such assets and add the proceeds to the remainder." The trustee must then divide the remainder equally between the beneficiaries.

The trust provision at the center of this appeal is this "cash and in-kind distributions" provision:

> "Except where there are directed dispositions of specific assets, Trustee may make any distribution in cash or in kind (including non-*pro rata* in kind distributions) or a combination thereof. Distributions are to be valued at the recognized market value at the date of distribution. If there is no generally recognized market value, Trustee may conclusively make a determination of such value. Trustee shall have power to make allocations of assets without regard to the income tax basis of specific property."

Julia included the same language in her will directing her executor (Brian) regarding the disposition of assets, and incorporated the provisions of the trust into her will, giving "all of [her] estate" to Brian, as the trustee, "to dispose of under the terms of the Trust."

Dispute over the Lake Properties

The parties agree that, at the time of her death, Julia owned two adjacent properties in Gravois Mills, Missouri—the Lake

Properties. But Julia made no specific directions about those properties in her will or her trust. So when she died, the Lake Properties became part of "the remainder" of her estate.

Gary and Brian both wanted to own the Lake Properties. Gary agreed to joint ownership if necessary, but Brian did not. Brian created a proposed distribution plan as trustee, seeking sole ownership of the Lake Properties and offering to pay Gary an amount of cash equal to the value of the properties.

Gary petitioned for declaratory judgment, claiming that Brian's proposed distribution breached his fiduciary duties as trustee. In later briefs, Gary specified that Brian's proposal violated his duties as trustee under K.S.A. 58a-801 (the duty to administer the trust in good faith and in accordance with the Kansas Uniform Trust Code); K.S.A. 2021 Supp. 58a-802 (the duty of loyalty to the trust beneficiaries); K.S.A. 58a-803 (the duty to act impartially); and K.S.A. 58a-814 (limiting trustee discretion). Brian responded that the distribution plan followed the terms of the trust—specifically its non-pro rata clause—and his duties as trustee. Gary replied that the non-pro rata clause was just boilerplate language and that Julia intended the trust to be administered to equally benefit both brothers. Gary also argued that because the trust did not expressly waive Brian's duty to act as a prudent investor or his duty of loyalty to the trust beneficiaries, those duties prevented Brian from distributing the Lake Properties to himself.

At the hearing, the parties agreed to consider Gary's petition as a motion for partial summary judgment. After considering the parties' claims through that lens, the district court denied Gary's claim, finding that the trust gave Brian the authority to distribute the Lake Properties as he proposed and that doing so did not violate Brian's duties as trustee.

Valuation Proceedings

Gary also moved the court to determine the value of the Lake Properties, and the district court considered that issue at a separate hearing.

Brian had the Lake Properties appraised by a certified real estate appraiser, Michael McClain. McClain testified that he had appraised the properties three times and had valued the properties

together at $177,000 each time. McClain determined that the highest and best use of the properties was as a single parcel. He explained that although a person could legally separate the two lots, doing so would decrease the value of each lot. McClain explained that one of the two lots had a house on it, and Julia had bought the second lot to get better access to the lake. Both lots shared a single dock, but the first lot would need access to the second lot and its portion of the dock to get a boat on the water. And the second lot could have a dock only by encumbering the first lot, which could significantly affect the value of the second lot.

Gary testified about the positioning of the docks and the value the properties held separately. He stated that a purchaser could remove a portion of the existing dock and rearrange separate docks to allow each lot appropriate access to the lake. Gary thought the properties had separate water and sewer rights, which would allow independent development of the properties, and he believed the lots would be more valuable if sold separately.

Although Gary had obtained separate appraisals for each lot, his appraiser did not testify. Instead, Gary admitted exhibits of two appraisals valuing the Lake Properties separately. Those exhibits showed the value of the lot with the house as $175,000 and the other lot as $51,500. Based on these appraisals, Gary had offered to purchase the Lake Properties from the trust for $226,100 and he was still willing to purchase the properties at that price.

In closing, Brian explained that he had offered to stipulate to a value between his appraiser's value and the value Gary had offered or to get a new appraisal from a third party, but Gary had rejected those offers. Brian then argued that the trust authorized the trustee to overrule any disagreement about the value because its non-pro rata clause gave the trustee discretion to make distributions based on "the recognized market value" but if there was none the trustee could "conclusively . . . determin[e] . . . such value."

The district court accepted Brian's valuation, finding McClain's explanation about the highest and best use of the Lake Properties as a single parcel more compelling than the information from Gary's appraisals. The court also found that even though Gary had offered to purchase the Lake Properties at a higher value, Brian did not have to accept that value.

Attorney Fee Proceedings

At the close of the valuation hearing, the district court found that the parties had failed to provide the evidence necessary to determine attorney fees. After extensive briefing, the district court held another hearing. Gary argued that Brian should be held personally responsible for his attorney fees because he had pursued his own interests by his proposed distribution of the Lake Properties and had not acted on behalf of the trust.

But the district court disagreed and awarded Brian the attorney fees he had incurred throughout the litigation over the Lake Properties. And the court ordered Gary to reimburse the trust for those fees. And as to further fees, the district court stated:

"In addition, should the Court approve any further fees of the [trustee's] Firm for services [that] were incurred that relate to this judicial proceeding, Gary Culliss will be ordered to pay some or all of those fees within thirty days of the entry of that Order.

Amended Attorney Fees Proceedings

Brian moved to alter or amend the district court's attorney fees order, claiming the exhibit he had given the district court inaccurately showed his fees. He provided an updated version of the exhibit, listing his requested fees. The district court granted that motion and entered an amended order approving the additional amount. It found Brian's fees were fair and reasonable and ultimately approved both Brian's original request for $35,330.96 and his request for another $3,738. The court again ordered Gary to reimburse the trust for the total amount accrued during the litigation over the Lake Properties.

Gary timely appeals, challenging the district court's decision that Brian could own the Lake Properties, its valuation of the Lake Properties, and its award of attorney fees.

DID THE DISTRICT COURT ERR IN APPROVING THE TRUSTEE'S PROPOSED DISTRIBUTION OF THE LAKE PROPERTIES?

Gary first argues that the district court should have voided Brian's distribution of the Lake Properties to himself against Gary's wishes because doing so breached Brian's duty of loyalty

to trust beneficiaries. Gary also claims that the district court based its decision to allow this distribution on its erroneous finding that the trust agreement waived Brian's duty of loyalty, contrary to this court's decision in *Roenne v. Miller*, 58 Kan. App. 2d 836, 475 P.3d 708 (2020) (finding a trust cannot waive a trustee's duty of loyalty), *rev. denied* 312 Kan. 893 (2021).

Brian contends that Gary mischaracterizes K.S.A. 2021 Supp. 58a-802's duty of loyalty and the district court's holding. Brian concedes the duty of loyalty applied to him but contends the district court correctly found he did not violate that duty because he properly relied on a trust provision expressly authorizing his acts and fairly distributed the estate property.

Standard of Review and Basic Legal Principles

Because the district court decided this matter as a motion for partial summary judgment, we outline our appellate summary judgment standards:

> "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.'" *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

When, as here, the parties do not dispute the facts relevant to the legal issues raised, this court's review of an order granting or denying a motion for summary judgment is unlimited. *Becker v. The Bar Plan Mut. Ins. Co.*, 308 Kan. 1307, 1311-12, 429 P.3d 212 (2018). Similarly, this court exercises unlimited review over the district court's interpretation of statutes and trust terms. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019) (statutes); *Hemphill v. Shore*, 295 Kan. 1110, Syl. ¶ 2, 289 P.3d 1173 (2012) (trusts).

When interpreting a trust, a court's primary duty is to determine the settlor's intent by reading the trust as a whole. If that intent can be found out from the express terms of the trust, the court must carry out those terms unless they conflict with law or public policy. *Hamel v. Hamel*, 296 Kan. 1060, 1068, 299 P.3d 278 (2013). Courts have limited authority to intervene in matters properly left to a trustee's discretion through valid trust terms:

> "Where the instrument creating a trust gives the trustee discretion as to its execution, a court may not control its exercise merely upon a difference of opinion as to matters of policy, and is authorized to interfere only where the trustee acts in bad faith or its conduct is so arbitrary and unreasonable as to amount to practically the same thing." *Jennings v. Murdock*, 220 Kan. 182, Syl. ¶ 1, 553 P.2d 846 (1976).

Trustees' Duties and Discretion

The parties agree that this case involves a discretionary trust, in which Julia left Brian wide discretion as trustee to distribute the trust property. See *Simpson v. Kansas Dept. of SRS*, 21 Kan. App. 2d 680, 684, 906 P.2d 174 (1995) (defining discretionary trusts). The trust allowed Brian to distribute the portion of Julia's estate that she did not specifically direct to distribute otherwise—including the Lake Properties—in his "sole and absolute discretion." The trust also provided that "[e]xcept where there are directed dispositions of specific assets, Trustee may make any distribution in cash or in kind (including non-*pro rata* in kind distributions) or a combination thereof."

Gary claims that regardless of the degree of discretion the trust gave Brian, Brian's duty of loyalty as trustee prevented him from distributing the Lake Properties solely to himself. Gary argues that the distribution was voidable because it was affected by conflict between Brian's interests as trustee and a beneficiary. See K.S.A. 2021 Supp. 58a-802(b). Brian counters that his proposed distribution was not voidable simply because Gary did not prefer it, asserting that this statute does not give "a dissenting beneficiary *de facto* veto power over an otherwise authorized distribution."

In deciding this issue, we first look to the Kansas Uniform Trust Code (KUTC), which prescribes the statutory duties and powers of trustees. K.S.A. 2021 Supp. 58a-802 establishes the duty of loyalty:

"(a) A trustee shall administer the trust consistent with the terms of the trust and solely in the interests of the beneficiaries.

"(b) . . . [A] sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) The transaction was authorized by the terms of the trust."

Gary relies on the general rule in subsection (b) that a beneficiary may void a transaction involving trust property which is affected by a conflict between the trustee's fiduciary and personal interest. Brian relies on the exception to that rule, arguing that "[t]he transaction was authorized by the terms of the trust." K.S.A. 2021 Supp. 58a-802(b)(1).

The comment to subsection (b) of the statute explains that it establishes a "no further inquiry rule":

"Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the 'no further inquiry' rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See* Restatement (Second) of Trusts Section 170 cmt. b (1959)." Uniform Trust Code Comments, K.S.A. 58a-802.

See, e.g., Restatement (Third) of Trusts § 78, comments b-c (2007) (describing the no further inquiry rule as imposing an irrebuttable presumption of voidability to self-dealing transactions).

Our appellate courts have not often addressed this statute, but a panel of this court addressed the duty of loyalty under different facts in *Roenne.* There, beneficiaries of decedent's testamentary trust sued the trustee/beneficiary, alleging that the trustee had breached his fiduciary duties by taking *all* the trust assets for himself and his wife. The trial court found no breach of fiduciary duties because the trust stated that the trustee had "uncontrolled" or "exclusive" discretion over the trust. But this court reversed and remanded for further proceedings, holding that a trustee could not act as if there were no trust, and that the trustee had breached his

duties of loyalty, impartiality, and prudence to plaintiffs. 58 Kan. App. 2d at 850-54.

The panel in *Roenne* characterized the conflict as "a permissible grantor-created conflict of interest that should be respected," but warned "the trustee's conduct should 'be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality.' Restatement (Third) of Trusts § 79, comment b(1) (2007)." 58 Kan. App. 2d at 848.

> "The various cases that have dealt with these laws have all recognized that while the intent of the grantor is paramount, the law limits a trustee. Even where the grantor intended the trustee to have as much power as possible over the trust, the law restricts that power. See *In re Ralph E. Breeding Trust*, 21 Kan. App. 2d 351, 357-58, 899 P.2d 511 (1995). The trustee must act in good faith and in the interests of the beneficiaries. While a trust can eliminate strict prohibitions, such as that against self-dealing, it cannot eliminate the duty of loyalty. That limit preserves the fundamental fiduciary character of trust relationships recognized by law. *Schartz v. Barker*, No. 104,812, 2013 WL 189686, at *10 (Kan. App. 2013) (unpublished opinion) (quoting Restatement [Third] of Trusts § 78, comment c[2], p. 99 [2005])." 58 Kan. App. 2d at 847.

So even if a trust authorizes a conflict-of-interest transaction, the trustee must still act "in good faith in the interests of the beneficiaries." 58 Kan. App. 2d at 850. Thus, the "'uncontrolled discretion'" granted to the trustee in *Roenne* did "not relieve him from his fiduciary duties as a trustee to act impartially in the interests of all the beneficiaries, rather than just himself." 58 Kan. App. 2d at 850.

Although the district court's written order, filed before *Roenne*, suggested the trust could waive Brian's duty of loyalty, the district court did not rely on that finding alone in denying Gary's motion for partial summary judgment. Rather, the district court correctly determined that Brian acted within the authority provided through the trust and his duties as trustee, as we explain below. So even if the district court found the trust could waive Brian's duty of loyalty, that error was harmless.

Brian's Conflict of Interest

We agree that Brian's distribution of the Lake Properties to himself evidenced a conflict of interest between his interests as

trustee and his interests as a beneficiary. In short, Brian was wearing two hats and could not enter a transaction that prejudiced the beneficiaries. Because Gary was a beneficiary affected by the transaction, he could void the transaction without further proof, even if Brian gave Gary fair consideration for those properties, *unless* the trust authorized the transaction. K.S.A. 2021 Supp. 58a-802(b)(1).

Trust Created a Conflict of Interest

After recognizing that the trust gave Brian the authority to make "'any distribution in cash or in kind (including non-pro rata in kind distribution),'" the district court found that Julia intended to give Brian the ability to resolve this type of dispute:

"This language shows the grantor recognized that, after her death, a circumstance might arise where an asset might be subject to dispute about how it should be distributed. With this provision, the grantor gave the Trustee the discretion to not divide each asset evenly, but keep an asset, like this real estate, undivided and distributed to one beneficiary, so long as the other beneficiary received an 'in [cash] or in kind' distribution of the same value."

We agree.

True, no trust term expressly addressed the Lake Properties. But the trust term permitting non-pro rata in kind distribution authorized Brian's proposed distribution of them. Although the distribution was voidable because Brian's dual status as a trustee and a beneficiary created an inherent conflict of interest, our law allows conveyances despite conflicting interests if the transaction is authorized by the trust. K.S.A. 2021 Supp. 58a-802(b)(1). And a "'trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.'" *Mead v. Small, Trustee of Herlinda Small Revocable Living Trust*, No. 122,511, 2021 WL 2021199, at *7 (Kan. App. 2021) (unpublished opinion); see K.S.A. 58a-1006.

Although Julia did not expressly grant the trustee the power to act in a dual capacity, she created Brian's divided loyalty by knowingly placing him in a position in which his interest as trustee/beneficiary might conflict with the interest of the only other

beneficiary. Julia knew that her estate included the Lake Properties, and she was familiar with how her sons had used them. She knew that she had only two beneficiaries and she chose one of them to act as trustee. Yet Julia did not specifically direct that the Lake Properties be distributed to one of her sons, or that the properties be co-owned, or that any beneficiary could occupy or use those properties during some or all of the trust period. She thus intended for those properties to pass under the non pro rata clause in her trust, which permitted the trustee to "make any distribution in cash or in kind (including non-pro rata in kind distributions) or a combination thereof." As trustee, Brian did so.

When, as here, a settlor expressly or impliedly creates a conflict of interest by the terms of the trust, the beneficiary must generally prove more than divided loyalty.

"'Where a conflict of interest is approved or created by the testator, the fiduciary will not be held liable for his conduct unless the fiduciary has acted dishonestly or in bad faith, or has abused his discretion. Further, where the will approves the conflict of interest, the burden of proof remains on the party challenging the fiduciary's conduct as there is no presumption against the fiduciary despite the divided loyalty.'" Restatement (Third) of Trusts § 78, comment c(1) (2007) (quoting *Dick v. Peoples Mid-Illinois Corp.*, 242 Ill. App. 3d 297, 304, 609 N.E.2d 997 [1993]).

See *Tankersley v. Albright*, 374 F. Supp. 538, 543 (N.D. Ill. 1974) (finding conflicts of interest generally are prohibited but this proscription is subject to modification by settlor; mere existence of a conflict does not automatically require a prohibition of trustees' planned action where trust instrument creates conflict), *aff'd in part, rev'd in part* 514 F.2d 956 (7th Cir. 1975); *Clayton v. James B. Clow & Sons*, 212 F. Supp. 482, 505 (N.D. Ill. 1962) (finding that a fiduciary is not always precluded from self-dealing with trust property where settlor did not so intend, especially where testator knowingly placed his trustee in a position which he knew might conflict with interest of trust), *aff'd* 327 F.2d 382 (7th Cir. 1964); *In re Flagg's Estate*, 365 Pa. 82, 88-89, 73 A.2d 411(1950) (finding that existence of a conflict of interest did not ipso facto disqualify trustee from acting, and that bad faith, rather than a mere conflict of interest, was determinative factor where the will created the conflict).

Unlike the trustee in *Roenne*, Brian pointed to valid trust provisions he reasonably relied on to distribute the Lake Properties without breaching his duty of loyalty. Brian neither disregarded Gary's interests nor converted trust assets to only his personal use. Compare 58 Kan. App. 2d at 848-50. And unlike the trustee in *Roenne*, Brian considered Gary's interest in the Lake Properties and proposed a plan that created an equal financial distribution of the Lake Properties. Here, we have an implicitly approved trust-created conflict between a trustee who is also a beneficiary, so "there is, on the one hand, some inference of a preference for or confidence in the trustee-beneficiary but, on the other hand, a general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality."
Restatement (Third) of Trusts § 79, comment (b)(1) (2007).

For a court to force co-ownership of real property in this situation, when the trustee/beneficiary and the sole remaining beneficiary cannot agree to jointly own the property, would be as unworkable as a divorce court's order forcing the parties to share real property despite their professed incompatibility. The more reasonable solution is to award the property to one beneficiary and to make the other whole financially. But a court is poorly suited under these circumstances to determine which of two competing beneficiaries should own real property. Here, both the trustee/beneficiary and the other beneficiary claim to have the power to choose ownership. Yet it is the settlor, not the court or the beneficiaries, who decides that matter. As settlor, Julia decided that the trustee, Brian, could "make any distribution in cash or in kind (including non-*pro rata* in kind distributions) or a combination thereof." And a settlor's designation of the beneficiary-trustee may generally suggest a "tilt" in favor of the beneficiary-trustee in the balancing of divergent interests. See Restatement (Third) of Trusts § 78, comment c(2).

Having closely scrutinized Brian's conduct for abuse, we find Brian acted fairly and complied with the terms of the trust and his duties of loyalty and impartiality. Under the circumstances, Gary fails to show that Brian breached his fiduciary duties as trustee or that the district court committed reversible error in denying his motion for partial summary judgment.

DID THE DISTRICT COURT ERR BY APPROVING BRIAN'S VALUATION OF THE PROPERTIES?

Gary next challenges the value approved for the Lake Properties. He claims the district court had to accept his "bona fide offer" of $226,100 as the value of the properties over Brian's lower appraised value of $177,000.

We first consider Gary's argument that Brian's valuation wrongly deprived the trust of $49,100, violating his duty to act as a "prudent investor" under the Kansas Uniform Prudent Investor Act, and breaching his duties of loyalty and impartiality under that Act. See K.S.A. 58-24a02(a). But we agree with Brian that those provisions apply when trust assets are being invested or managed. See, e.g., K.S.A. 58-24a01 (requiring "a fiduciary who invests and manages trust assets" to comply with the prudent investor rule); K.S.A. 58-24a02(a) (requiring a fiduciary to "invest and manage trust assets as a prudent investor would"); K.S.A. 58-24a02(b) (regulating a fiduciary's "investment and management decisions" respecting individual assets). Gary fails to show that the Act applies here to a trustee's decision about which of two beneficiaries should own an estate's real property.

Gary also generally argues that the district court should have deferred to his valuation over Brian's because it was higher. But he provides no legal support for this argument. Further, the trust permitted Brian, as trustee, to set a value for the Lake Properties if no generally accepted market value existed. Because the appraisers disagreed as to value and as to the highest and best use of the Lake Properties, that clause applied here.

Still, the value of real property is a finding of fact for the district court to make. See *In re Estate of Hjersted*, 285 Kan. 559, 569, 175 P.3d 810 (2008). We thus review the district court's order approving Brian's valuation of the Lake Properties for substantial competent evidence. See *In re Estate of Lentz*, No. 118,307, 2021 WL 3573844, at *7 (Kan. App.) (unpublished opinion) (listing cases considering value a question of fact and applying this standard of review), *rev. denied* 314 Kan. 854 (2021).

"Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *In re Estate of Farr*, 274 Kan. 51, 58, 49 P.3d 415 (2002).

When determining this matter, "an appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. We also accept as true all inferences to be drawn from the evidence which support or tend to support the findings of the district court." *Hjersted*, 285 Kan. at 571. If the evidence, when considered in the light most favorable to the prevailing party, supports the district court's judgment, this court will not disturb that judgment on appeal. *In re Estate of Engels*, 10 Kan. App. 2d 103, 110, 692 P.2d 400 (1984).

Our review of the record shows substantial competent evidence supporting the district court's valuation. At the valuation hearing, McClain explained why he believed the highest and best use of the properties was as a single parcel whose fair market value was $177,000. Although Gary provided competing appraisal reports, the district court had good reason to find that they did not sufficiently address the impact that separating the properties might have on their value. The transaction was fair to the beneficiaries and the trust, as it was for a fair and adequate consideration. We find no reason to set aside the district court's findings.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY AWARDING AND ALLOCATING ATTORNEY FEES AGAINST GARY?

The district court awarded Brian $42,069.96 in attorney fees to be paid by the trust. The court assigned $35,330.96 of that amount to the litigation over the Lake Properties and ordered Gary to reimburse the trust that amount. The parties agreed that $3,001 of that amount should be paid as administrative expenses, but Gary challenges the district court's order for him to pay the remaining amount.

Gary maintains that Brian's decision not to distribute the Lake Properties jointly as tenants in common unnecessarily caused this litigation. Gary asserts that no reasonable person would have

awarded Brian the costs accrued by his decision to pursue his individual goals, and that the district court should not have ordered Gary to reimburse the trust unless it was to punish egregious conduct, such as bad faith or fraud—conduct not shown here.

In trust adjudication, a district court may award attorney fees to any party. "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."
K.S.A. 58a-1004. The district court has wide discretion to determine the amount and recipient of attorney fees. *Westar Energy, Inc. v. Wittig*, 44 Kan. App. 2d 182, 203, 235 P.3d 515 (2010). "In the context of the abuse of discretion challenge mounted here, we assess whether no reasonable person would adopt the position taken by the district court." *Cresto v. Cresto*, 302 Kan. 820, 848, 358 P.3d 831 (2015) (citing *In re Estate of Somers*, 277 Kan. 761, 773, 89 P.3d 898 [(2004)]). An award of attorney fees will be found reasonable if the litigation proved beneficial to the trust estate. See *Moore v. Adkins*, 2 Kan. App. 2d 139, 151, 576 P.2d 245 (1978). And legal proceedings benefit a trust estate if questions are resolved so the estate can be properly administered. *In re Trusteeship of the Will of Daniels*, 247 Kan. 349, 357, 799 P.2d 479 (1990). That is a pretty broad standard.

Gary challenges both the amount awarded and the order that he reimburse the trust for the fees caused by litigation over the Lake Properties. But he does not challenge the legal services provided or the reasonableness of the legal services itemized or the fees charged. Because our law gives the district court discretion to award costs and expenses and to charge them against "another party or from the trust that is the subject of the controversy," Gary must show the district court abused its discretion in both regards. K.S.A. 58a-1004; see *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017) (party asserting abuse of discretion bears burden of proof). Gary fails to meet that burden.

True, Brian's distribution proposal, while consistent with the trust terms and arguably fair, went against Gary's preference to own or share ownership of the Lake Properties. Only because

Brian was trustee could he prevail over his brother's contrary desires about ownership of the Lake Properties. But Brian distributed the Lake Properties as authorized by the trust terms and within his duties as trustee. And because the brothers disagreed on how to handle the Lake Properties and could not resolve their differences short of litigation, litigation was necessary to proper administration of the estate.

We recognize that, as experts on the reasonableness of attorney fees, we could disagree with the district court's assessment of fees and fix a different award:

> "While great deference is given a trial court in these matters, this court has stated that 'appellate courts, as well as trial courts, are experts as to the reasonableness of attorneys' fees and may, in the interest of justice, fix counsel fees when in disagreement with views of the trial judge.' [Citations omitted.]" *Somers*, 277 Kan. at 773.

But Gary does not challenge the reasonableness of the legal services or the fees charged.

Although we may not have assessed all the Lake Properties litigation fees against Gary, we decline to alter the district court's award. The district court considered the facts and the necessary factors for deciding attorney fees. See Kansas Rule of Professional Conduct 1.5 (2022 Kan. S. Ct. R. at 333). And this court generally affirms decisions made within the district court's discretion even when reasonable minds could differ, as here. The applicable standard requires a showing that "no reasonable person would reach the district court's decision" about attorney fees. *Consolver v. Hotze*, 306 Kan. 561, 571, 395 P.3d 405 (2017). Gary fails to make that showing. Because Gary started the Lake Properties litigation and lost on all his claims, we cannot say that no reasonable person would have ruled as the district court did.

DID THE DISTRICT COURT IMPROPERLY AWARD FUTURE ATTORNEY FEES?

Lastly, Gary claims the district court erroneously imposed future attorney fees.

Gary relies on this language:

> "In addition, should the Court approve any further fees of the [trustee's] Firm for services [that] were incurred that relate to this judicial proceeding, Gary Culliss

will be ordered to pay some or all of those fees within thirty days of the entry of that Order."

We do not view this language as a premature award of attorney fees for services to be performed in the future. Rather, by this language the district court simply expressed its intent to apply the same reasoning and result in the event the court approved more trustee's fees for services the trustee's firm had incurred by defending the lawsuit Gary filed on May 17, 2019. Thus, when Brian moved to alter and amend the fee order, the district court applied this rationale, approving additional fees of the trustee's firm for such services, and ordering Gary to pay them.

IS BRIAN ENTITLED TO ATTORNEY FEES ON APPEAL?

In his brief, Brian requests his attorney fees on appeal. But Brian filed no motion or affidavit requesting such fees, as is required. See Kansas Supreme Court Rule 7.07 (2022 Kan. S. Ct. R. at 51). We thus deny this request for lack of compliance with our rules. See *In re Estate of Mouchague*, 56 Kan. App. 2d 983, 994, 442 P.3d 125 (2019) (denying motion for attorney fees based on failure to comply with motion and affidavit requirements in Rule 7.07 and KRPC 1.5.

Affirmed.

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Appellants*, v. SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and DEREK SCHMIDT, in His Official Capacity as Kansas Attoney General,*Appellees*.

SYLLABUS BY THE COURT

1. JURISDICTION—*Standing Requirement—Three-Prong for Association to Sue on Behalf of Its Members.* An association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members.

2. SAME—*Standing Requirement—Demonstrate Injury and Causal Connection Between Injury and Challenged Conduct*. To demonstrate standing in Kansas, the traditional test is twofold: a person must demonstrate that he or she suffered a cognizable injury, also known as an injury in fact, and that there is a causal connection between the injury and the challenged conduct.

3. SAME—Standing—*Requirement of Injury in Fact Cannot Be Merely Conjectural*. The injury in fact requirement is not satisfied where the complained of injury is merely conjectural.

4. CONSTITUTIONAL LAW—*Suit to Challenge Constitutionality of Law—Requirement of Standing to Be Satisfied for Justiciable Controversy to Exist*. A plaintiff is not required to expose himself or herself to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced, but the requirement of standing still must be satisfied for a justiciable controversy to exist.

5. JURISDICTION—*Standing Inquiry for Pre-enforcement Questions—Requirements to Satisfy the Injury in Fact Component*. In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and the party faces a credible, substantial threat of prosecution under the challenged provision.

6. SAME—*Standing—Pre-enforcement Inquiry—Requirement of Objectively Reasonable Perceived Threat of Prosecution*. The perceived threat of prosecution must be one that is objectively reasonable. A subjective fear is not sufficient to satisfy the third prong of the pre-enforcement inquiry.

7. ELECTIONS—*First Amendment Protections—Voter Outreach, Education and Registration Efforts.* Voter outreach, education, and registration efforts receive protection under the First Amendment.

8. SAME—*Statutory Requirement of Prosecution of Individuals Who Knowingly Engage in Prohibited Conduct under Statute*. In adopting K.S.A. 2021 Supp. 25-2438, the Legislature sought to subject only those individuals to prosecution who "knowingly" engaged in the conduct prohibited by the provision.

9. JURISDICTION—*Establishment of Standing Requires Concrete Injury in Fact Element—Self-censorship May Satisfy Concrete Injury in Fact Element.* Self-censorship in response to a law's passage may satisfy the concrete injury in fact element required to establish standing when (1) there is evidence that, in the past, the individual engaged in the type of conduct that is affected by the challenged government action; (2) affidavits or testimony are available that evidence a present desire, though no specific plans, to engage in such conduct; and (3) the individual can articulate a plausible claim that they presently have no intention to engage in such conduct because of a credible threat that to do so would subject them to adverse consequences.

10. SAME—*Standing—Requirement of Justiciable Controversy or Case Dismissed*. If a person does not have standing to challenge an action or request a particular type of relief, then a justiciable controversy does not exist and the case must be dismissed.

11. COURTS—*No Constitutional Authority to Issue Advisory Opinions*. Kansas courts lack the constitutional authority to issue advisory opinions.

Appeal from Shawnee District Court; TERESA WATSON, judge. Opinion filed June 17, 2022. Appeal dismissed.

Henry J. Brewster, *Elisabeth C. Frost*, *Tyler L. Bishop*, and *Spencer M. McCandless*, pro hac vice, of Elias Law Group LLP, of Washington, D.C., *Pedro Irigonegaray*, *Nicole Revenaugh*, *Jason Zavadil*, and *J. Bo Turney*, of Irigonegaray, Turney, & Revenaugh LLP, of Topeka, and *David Anstaett*, pro hac vice, of Perkins Cole LLP, of Madison, Wisconsin, for appellants.

Bradley J. Schlozman and *Scott R. Schillings*, of Hinkle Law Firm LLC, of Wichita, and *Brant M. Laue*, solicitor general, and *Derek Schmidt*, attorney general, for appellees.

Before GARDNER, P.J., HILL and ISHERWOOD, JJ.

ISHERWOOD, J.: The League of Women Voters of Kansas (the "League"), Loud Light, Kansas Appleseed Center for Law and Justice, Inc. ("Kansas Appleseed"), and Topeka Independent Living Resource Center (the "Center") (collectively the "appellants") challenge two sections of a relatively new Kansas crime, K.S.A. 2021 Supp. 25-2438, which makes it a severity level 7, nonperson felony to knowingly misrepresent oneself as an election official. Appellants contend the broad language of the statute results in the criminalization of their voter education, engagement, and registration activities. As support for their contention, they assert that occasionally during past voter-assistance activities, an observer believed they were election officials despite clearly identifying themselves as volunteers with their respective organizations. The appellees disagree and contend the appellants' concern is unfounded because the statute demands that the misrepresentation at issue be the product of knowing conduct before an individual is subject to prosecution. Following a conscientious and exacting review of the issues presented, in conjunction with the evidence and arguments offered in support thereof, we find that the appellants failed to satisfy their burden to demonstrate an actual injury in fact as required to have standing to litigate their claims. In the absence of standing there is no justiciable controversy. Accordingly, the appellants' case must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The League, Loud Light, Kansas Appleseed, and the Center are non-partisan, non-profit organizations that perform voter outreach, education, and registration in an effort to encourage greater civic engagement. During the 2020 election cycle, the League registered over 2,000 Kansas voters. In that same time period, Loud Light produced a widely shared educational video about Kansas' advance voting process, used its social media platforms to combat misinformation about the process, and contacted voters whose ballots were challenged by county election officers but whom the county was unable to reach. It also played an integral role in registering over 9,000 voters during that cycle. The mission of Kansas Appleseed is to educate and engage voters in traditionally underrepresented populations in Southwest and Southeast Kansas.

The Center works closely with disabled Kansans and strives to increase voter registration and participation among that population to ensure they are equipped to make their voices heard through the voting process.

Although consistently, and without reservation, the appellants make their respective affiliations known when conducting activities in the community, on occasion an attendee at their events has mistaken one of their volunteers for a county election official. When such incidents occur, the volunteers quickly clarify which organization they represent and that they are not election officials.

During the 2021 Kansas legislative session, the Legislature passed Senate Substitute for House Bill 2183, which contained various new laws bearing on election matters. Governor Kelly concluded such laws were not warranted and vetoed the bill. The Kansas Legislature overrode the veto, however, and the law went into effect on July 1, 2021. L. 2021, ch. 96, § 3.

In relevant part, the bill made it a severity level 7, nonperson felony to falsely represent oneself as an election official. False representation of an election official is knowingly (when one is not 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." K.S.A. 2021 Supp. 25-2438.

In the wake of the law's passage, the appellants cancelled or curtailed various scheduled events. They feared that if their volunteers continued to engage in their respective organization's standard activities it would subject them to prosecution under the new statute.

In June 2021, the appellants moved for a temporary injunction on the grounds that K.S.A. 2021 Supp. 25-2438(a)(2) and (a)(3) violated their rights under section 11 of the Kansas Constitution Bill of Rights. The appellees responded, in part, that the appellants lacked standing to advance their challenge because they failed to identify any statements made or efforts undertaken that demonstrated individuals who engaged in the type of voter outreach programs conducted by the appellants ran afoul of the provision.

The appellees explained that the impetus for the law was an incident that occurred during the previous election cycle. Specifically, the distribution of letters that purported to be from an official agency and contained confusing or inaccurate information pertaining to critical electoral matters, as well as multiple advance ballot applications, and directions to what appeared to be legitimate websites where voters could complete information to receive advance ballots. The appellees asserted that only those individuals who knowingly engage in activities designed to give the false appearance they are election officials, or would cause a person to so believe, were at risk of prosecution under the statute. Thus, according to the appellees, the statute did not prohibit the appellants from engaging in their typical voter registration and advocacy efforts.

On July 27, 2021, the Douglas County District Attorney publicly announced she would not prosecute cases under the new law. In her opinion, the law was too vague, overbroad, and criminalized essential efforts to engage Kansans in the democratic process.

The Kansas Attorney General issued a statement in response to assure Kansans that violators of the law would still be prosecuted:

"'Thousands of Kansans will go to the polls tomorrow in the municipal primary elections. Citizens throughout our state deserve assurance that state election-integrity laws will be enforced and election crimes, like all other crimes, will be prosecuted when warranted by the evidence. On July 27, the Douglas County District Attorney announced that office will not prosecute certain categories of election crimes, but state law also authorizes prosecution by the attorney general. The law of the State of Kansas is in effect statewide, including in Douglas County, so any law enforcement agencies that obtain evidence of election crimes may present the results of an investigation to our office for review, and we will make a prosecution decision based on the facts and law applicable to any individual case.'"

The district court conducted a hearing on the appellants' motion. Following a review of the parties' extensive filings, evidentiary affidavits, and oral arguments, it declined to order an injunction. The court bypassed the standing question and concluded that the relief requested could not be granted because the appellants failed to demonstrate a substantial likelihood of eventually prevailing on the merits of their claim.

The appellants now bring the matter before us to resolve.

ANALYSIS

Laws that demand transparency in the identities of those voices disseminating voting and election information carry the potential to impose impermissible burdens on the exercise of free speech under the First Amendment. The appellants consist of four separate groups that actively promote civic engagement by conducting various voter outreach and education events throughout the State—League of Women Voters, Kansas Appleseed, Loud Light, and the Center. Operating under the belief the aforementioned impermissible burdens were realized here with the Kansas Legislature's passage of K.S.A. 2021 Supp. 25-2438, which prohibits the false representation of oneself as an election official, the appellants unsuccessfully moved the district court to temporarily enjoin enforcement of the second and third subsections of that provision.

A three-prong test must be satisfied for an association to sue on behalf of its members: (1) the members must have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013) (quoting *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, Syl. ¶ 2, 996 P.2d 821 [2000]). With the exception of standing, as will be fleshed out in the forthcoming analysis, we have no qualms with the organizations advancing this challenge on behalf of their members.

Our first obligation is to determine whether we have jurisdiction over this matter. The starting point for that inquiry is Article 3, § 1 of the Kansas Constitution which grants the "judicial power'" of the State to the courts. Judicial power is characterized as the authority to hear, consider, and determine controversies between litigants. *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Because Article 3 does not specifically include any "case" or "controversy" language, that requirement emanates from the separation of powers doctrine embodied in the Kansas constitutional framework. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008). That doctrine recognizes that

of the three departments or branches of government, "[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws *in actual controversies*." (Emphasis added.) *Van Sickle v. Shanahan*, 212 Kan. 426, 440, 511 P.2d 223 (1973). While Kansas, not federal, law determines the existence of a case or controversy, i.e., justiciability, "this court is not prohibited from considering federal law when analyzing justiciability." *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). The presence of concrete adverseness is critical. An abstract controversy is not sufficient to satisfy the constitutional standard because courts do not give advisory opinions. See *Sebelius*, 285 Kan. at 896-98. Thus, the district court's jurisdiction to impose appellants' requested injunction depended upon the existence of a true controversy between the parties. *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105 (2009). To warrant injunctive relief it must clearly appear that some act has been done or is threatened. *Unified School District No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984).

We analyze four factors to assess whether an actual controversy exists. First, the complaining party must have standing. Standing is also a component of subject matter jurisdiction. *Gannon*, 298 Kan. at 1122. It requires the court to decide whether a party has alleged a sufficient personal stake in the outcome of the controversy to invoke jurisdiction and to justify the court exercising its remedial powers on the party's behalf. *Cochran v. Kansas Dept. of Agriculture*, 291 Kan. 898, 903, 249 P.3d 434 (2011). A personal stake exists when the party has a right to make a legal claim or seek judicial enforcement of a duty or right. Second, we must determine whether the issue we are asked to resolve is moot. Third, that issue must be ripe, in that it has taken fixed and final shape rather than remaining nebulous and contingent. Finally, we consider whether a political question is at issue. See *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc*., 292 Kan. 285, 324, 255 P.3d 1186 (2011) (discussing and defining standing); *Sebelius*, 285 Kan. at 896 (listing the four requirements).

That first step, standing, like other jurisdictional issues, is a question of law subject to unlimited review. *Sierra Club*, 298 Kan. at 29. The traditional test for standing in Kansas requires a litigant to show that he or she suffered a cognizable injury, also known as an injury in fact, and that there is a causal connection between the injury and the challenged conduct. *Gannon*, 298 Kan. at 1123; *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 406, 197 P.3d 370 (2008). Additionally, our Supreme Court has occasionally cited and applied the federal rule's standing elements that "a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Ternes v. Galichia*, 297 Kan. 918, 921, 305 P.3d 617 (2013) (citing *Horne v. Flores*, 557 U.S. 433, 445, 129 S. Ct. 2579, 174 L. Ed. 2d 406 [2009]); see also *Gannon*, 298 Kan. at 1123. We will follow their lead and incorporate those factors into our standing analysis. Finally, injuries that are merely conjectural or hypothetical fall short of the hurdle. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283-84 (10th Cir. 2004); see also *Labette County Medical Center v. Kansas Department of Health and Environment*, No. 116,416, 2017 WL 3203383, at *9 (Kan. App. 2017) (unpublished opinion). Each element of the inquiry must be proved just as any other matter and with the degree of evidence required at the successive stages of the litigation. *KNEA v. State*, 305 Kan. 739, 746, 387 P.3d 795 (2017). Even so, the "'[f]irst and foremost'" of standing's three elements is "injury in fact." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 [1998]).

This case could yield an analysis of the various nuances of K.S.A. 2021 Supp. 25-2438 in order to determine whether it unlawfully constrained appellants' First Amendment rights. But the posture of this appeal forecloses that path. Although the appellees raised the issue of standing before the district court, that court sidestepped the issue and, in so doing, "put the merits cart before the standing horse." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006). We decline to commit the

same misstep. An appellate court can generally determine the standing issue because it presents a question of law. See *Baker*, 313 Kan. at 673. Keenly aware of what is potentially at stake, we analyze and meticulously filter the appellants' claims through the standing rubric outlined above. *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be meticulously scrutinized"). We ultimately conclude the appellants lack standing to challenge the statute due to their failure to successfully establish the existence of a cognizable, actual injury.

The dissent intimates that our conclusion here today is the product of a flawed mindset which mandates a plaintiff first be "arrested, charged, tried, convicted, and sentenced to prison before they dare challenge this law." 62 Kan. App. 2d at 332 (Hill, J., dissenting). That is neither our interpretation of the law nor our expectation. Rather, we fully recognize that a plaintiff seeking relief is not required to have endured such measures as a prerequisite to challenging the law or have suffered the full harm expected to satisfy their obligation to establish the injury in fact component. Thus, when the government threatens action, we acknowledge the potential for a pre-enforcement challenge. See *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128-29, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."); see also *Baker v. City of Overland Park*, No. 101,371, 2009 WL 3083843, at *4 (Kan. App. 2009) (unpublished opinion). The appellants' case falls in this category. In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 [1979]). Such allegations of future injury may suffice as an injury in fact if the threatened injury

is "'certainly impending'" or there is a substantial risk that the harm will occur. *Sierra Club*, 298 Kan. at 33-34; see also *Clapper v. Amnesty International USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). The dissent misconstrues our analysis of each of these factors as an inexplicable exercise of interpreting the law to resolve the standing question, so we do not have to interpret the law to resolve the merits of the claim. But standing does not simply manifest with a litigant's self-designation of their claim as a pre-enforcement challenge. Rather, that avenue presents its own series of hurdles that must first be cleared before their burden to establish standing is satisfied.

To begin that analysis, we again recognize that appellants are non-partisan, nonprofit organizations whose primary mission is to encourage eligible Kansans to participate in the democratic process. To accomplish that goal, they perform various voter outreach, education, and registration activities across different regions of the state. According to the appellants, although they do not misrepresent themselves, on occasion a few visitors at their events, "[a]mong the literally thousands of Kansans whom [appellants] regularly interact with," have mistaken them for election officials. They make clear in their brief to us "that—despite their best efforts to communicate that they are *not* elections officials—some people with whom they interact (or who observe their activities) assume they are acting in an official capacity," "even when [appellants] do not intend to cause that error (or even work to guard against it)."

The statute that provides the foundation for their claim is K.S.A. 2021 Supp. 25-2438, a relatively new provision which makes commission of the following act(s) a severity level 7, nonperson felony:

> "(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."

The appellants contend that they "canceled and curtailed voter engagement and registration activities across the state, *out of fear* that their actions *could be misconstrued* and result in criminal liability" under subsections (a)(2) and (a)(3). (Emphasis added.) We will address each of the three general pre-enforcement questions in turn.

DO THE APPELLANTS ENGAGE IN A COURSE OF CONDUCT THAT IS AFFECTED WITH A CONSTITUTIONAL INTEREST?

The appellants conduct various events throughout the State which, at their most fundamental level, are simply designed to promote civic engagement. Through educational activities and voter registration drives they seek to impress upon eligible Kansans the importance of active participation in the democratic process. In large measure, the parties do not dispute that the appellants' conduct falls squarely within the ambit of the First Amendment. Their position in this regard aligns with conclusions reached by several federal courts when called on to analyze similar issues. See *League of Women Voters of Florida, Inc. v. Lee*, ___ F. Supp. 3d ___, 2022 WL 969538 (N.D. Fla. 2022); *VoteAmerica v. Schwab*, __ F. Supp. 3d __, 2021 WL 5918918, at *7 (D. Kan. 2021) (public endeavors which assist people with voter registration are intended to convey a message that voting is important and implicate the First Amendment); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (statutes regulating various aspects of voter registration involved direct regulation of communication and were thereby subject to scrutiny under the First Amendment); *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012) ("[E]ncouraging others to register to vote" is "pure speech," and, because that speech is political in nature, it is a "core First Amendment activity."); *Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1217 (D.N.M. 2010) ("The First Amendment

protects not only the Plaintiffs' right to engage in incidental speech with prospective voters, but also their right to do so while engaging in the act of registration."). There is no discernible reason to depart from that line of thinking in this case.

IS THE CONDUCT THE APPELLANTS ARE ENGAGING IN PROSCRIBED BY K.S.A. 2021 SUPP. 25-2438(a)(2) OR (a)(3)?

To some degree, this step of the pre-enforcement standing analysis is intertwined with the final factor, which is whether the appellants face a credible threat of prosecution if they persist in their advocacy efforts. Even so, for purposes of clarity in addressing each point in the inquiry, we will seek to keep each step of the test isolated and distinct.

We begin with a look at the acts captured by the statute. K.S.A. 2021 Supp. 25-2438 makes it unlawful to knowingly engage in conduct which (1) directly communicates that one is an election official, or (2) gives the appearance that one is an election official, or (3) would cause another to believe that one is such an official, knowing the same to not be true. In adopting this provision, the Kansas Legislature sought to combat future permutations of deceptive practices it knew occurred during the most recent election cycle. Specifically, across the country, organizations distributed mailings and ballots made to appear as though the correspondence originated from official state agencies.

"The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Barr v. American Association of Political Consultants, Inc*., 591 U.S. __, 140 S. Ct. 2335, 2358, 207 L. Ed. 2d 784 (2020) (Breyer, J., concurring in part and dissenting in part) (quoting *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 100 L. Ed. 2d 425 [1988]). It is our understanding that the appellants' conduct does not involve deceptive practices but is properly characterized as reasonable efforts to foster discourse and facilitate the exchange of ideas.

That is, the appellants classify their outreach activities as simply nonpartisan manifestations of their desire to motivate others to embrace their opportunity to play an active role in building stronger communities. So they are driven solely by their aspiration

to encourage more robust and informed civic engagement. Thus, the activities at issue lack the nefarious or deceptive qualities K.S.A. 2021 Supp. 25-2438 is designed to combat, placing the appellants beyond its reach. When there is nothing in the record before us or from the arguments presented which suggests that the appellants intend to, desire to, or anticipate engaging in the type of conduct prohibited by the statute, we must find this factor does not favor the appellants.

DOES THE APPELLANTS' CONDUCT SUBJECT THEM TO A SUBSTANTIAL, CREDIBLE THREAT OF PROSECUTION UNDER K.S.A. 2021 SUPP. 25-2438(a)(2) OR (a)(3)?

The third step of the pre-enforcement standing analysis requires us to assess whether the appellants' advocacy efforts were inhibited by an objectively justified fear of real consequences as evidenced by a credible threat of prosecution or other consequences arising out of enforcement of the statute. *Susan B. Anthony List*, 573 U.S. at 159. "The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the . . . provision' against the plaintiff." *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 901 (10th Cir. 2016) (quoting *Babbitt*, 442 U.S. at 302).

Again, the appellants' argument consists of a claim that they "canceled and curtailed voter engagement and registration activities across the state, out of fear that their actions could be misconstrued and result in criminal liability" under subsections (a)(2) and (a)(3). This is, in some measure, where the dissent loses its way. It seeks to provide a foundation for its claim that the required injury in fact exists because "to [the appellants], the threat of prosecution is real." 62 Kan. App. 2d at 334 (Hill, J., dissenting). But a plaintiff's subjective and irrational fear of prosecution is not enough to confer standing. See *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). Rather, a plaintiff succeeds in establishing injury in fact from the threat of prosecution or enforcement when the threat of enforcement is substantial. See *Susan B. Anthony List*, 573 U.S. at 164;

see also *Woodhull Freedom Foundation v. United States*, No. 18-1552 (RJL), 2022 WL 910600, at *4 (D.D.C. 2002) (pre-enforcement standing requires a prospective plaintiff to show that the threat of future enforcement of the statute was substantial). The nature of the threat contemplated by this factor is one that is "'well-founded'" and "not 'imaginary or wholly speculative.'" *Susan B. Anthony List*, 573 U.S. at 160. Put yet another way, the fear of prosecution must be "*objectively reasonable.*" (Emphasis added.) *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996); see also *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 51 F. Supp. 2d 107, 111 (D.R.I. 1999). Both the injury based on threat of prosecution and the injury based on self-censorship depend on "the existence of a credible threat that the challenged law will be enforced." *New Hampshire Right to Life Political Action Committee*, 99 F.3d at 14. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

The appellants harbor a fear that if their members continue to engage in their customary activities, with no deviation from the same, an attendee at one of their events may happen to misunderstand that member's role or affiliation and the member will then face felony charges as a result. Importantly, the appellants do not allege that they plan to mislead potential voters about their identities or otherwise misrepresent their affiliation. The appellees argue that based on the lack of such an intention to violate the provision, there is no credible threat the appellants will be in the crosshairs of prosecution. We are inclined to agree with the appellees.

The primary impediment to the appellants' ability to establish a substantial threat of prosecution is found with the mens rea assigned to the offense. Mens rea refers to an actor's moral culpability or "'evil mind.'" *State v. Jorrick*, 269 Kan. 72, 82, 4 P.3d 610 (2000). More specifically, it contemplates criminal intent or the specific mental element contained in the applicable criminal statute. 269 Kan. at 82. In drafting K.S.A. 2021 Supp. 25-2438, the Legislature sought to subject only those individuals to prosecution

who "knowingly" engaged in the conduct prohibited by the provision. K.S.A. 2021 Supp. 21-5202 clarifies what it means to act with that particular state of mind:

> "(a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed 'intentionally,' 'knowingly' or 'recklessly.'
>
> . . . .
>
> "(i) 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. All crimes defined in this code in which the mental culpability requirement is expressed as 'knowingly,' 'known,' or 'with knowledge' are general intent crimes."

"'[A]s to the results of one's conduct, the [Model Penal] Code provides that . . . . [O]ne acts "knowingly" if "he is aware that it is practically certain that his conduct will cause such a result." . . . One is said . . . to act "knowingly" as to the nature of his conduct if "he is aware that his conduct is of that nature." As to the attendant circumstances . . . . one acts "knowingly" when "he is aware . . . that such circumstances exist."'" *State v. Murrin*, 309 Kan. 385, 394, 435 P.3d 1126 (2019) (quoting *1 LaFave*, Substantive Criminal Law § 5.2[b] [3d ed. 2018]).

Black's Law Dictionary defines knowingly as

> "In such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was practically certain to result; deliberately. . . . Under the Model Penal Code . . . . a person who acts *knowingly* understands that the social harm will almost certainly be a consequence of the action
>
> . . . ." Black's Law Dictionary 1042 (11th ed. 2019).

Webster's New World College Dictionary defines knowing as "1. having knowledge or information 2. shrewd; clever 3. implying shrewd understanding or possession of a secret or inside information [a knowing look] 4. deliberate; intentional." Webster's New World College Dictionary 806 (5th ed. 2014).

We will review the appellants' actions against the backdrop of the above definitions to clarify where their quest to establish an injury in fact fell short. The conduct engaged in by the League of Women Voters includes "community activities [through which] the League engages in conversations with voters and potential voters to convey its message about the importance of voting and political participation," and "in many Counties, the League's work

constitutes the bulk of the voter registration and education activities . . . ." There is no appreciable difference in the endeavors undertaken by Loud Light, Kansas Appleseed, and the Center.

The definitions of knowingly mean that a prosecuting attorney conducting a charging assessment, or a jury weighing evidence adduced at trial, would need to find that the appellants were aware of the nature of the conduct of which the State complains. In other words, the appellants had to undertake their civic engagement activities knowing that they were reasonably certain to give the impression to event attendees, or "*would*," *not* could, cause an event attendee to believe the appellants were election officials. (Emphasis added.) See K.S.A. 2021 Supp. 25-2438.

The record before us lacks any evidence of such "knowledge" but teems with evidence to the contrary. In truth what it reveals is that the appellants collectively labor under a misconception that the language of the provision does not demand any deliberate conduct by their members before they can be at risk of prosecution. Rather, they believe an innocent advocate will be subject to criminal repercussions if, through no fault of their own, a single outreach participant or event attendee merely walks away from an encounter with the mistaken belief that the voice they heard was that of a county election official. From the appellants' arguments before the district court and the corresponding evidence they submitted in support of their position, through the briefs to our court, and the points highlighted during oral argument, they have consistently and erroneously viewed the provision through the wrong lens. That is, they focus solely on the listener, and turn a blind eye to the requirement for and analysis of the conduct of the actor that was the calculated impetus for the misidentification. For example, the Director of the Center submitted an affidavit during the district court proceedings, which is now part of the record before us, attesting to the perceived ties binding the hands of the organization as a result of the statute's passage. She stated therein that "a simple misconception by someone other than our advocates is *all* the statute requires to be liable for serious prison time and crippling fines." (Emphasis added.) Loud Light similarly contends that its "staff, volunteers, and fellows, *through no fault of their own*, will

be subject to criminal penalties" if they continue to engage in activities in furtherance of the organization's mission. (Emphasis added.)

These interpretations are fundamentally flawed and run contrary to the plain language of the statute, which strictly prohibits *knowing conduct* on the part of the speaker, which results in the misrepresentation of their identity. It is that culpable behavior the provision was implemented to combat. Despite the appellants' assertions to the contrary, mere confusion on the part of a listener, standing alone, is not enough to subject one of their advocates to prosecution, a prison sentence, and a substantial fine under the statute. The misidentification must be preceded by an act or acts undertaken by the advocate with an eye toward the manifestation of that specific result.

The evidence we reviewed reflects that, without exception, the appellants unequivocally deny any mea culpa in this matter. They are a coalition of like-minded individuals motivated by a singular cause—fairness and equity in the democratic process. Because of their advocacy efforts, thousands of Kansans who may otherwise be at risk of experiencing a sense of disenfranchisement based on their gender, race, disability, age, socioeconomic status, or level of education have been invited into the civic engagement discussion.

The appellants embrace their respective callings and proudly display their affiliations while working in the community. In one instance, the Wichita Metro Chapter of the Kansas League of Women Voters drove caravans of decorated vehicles through parts of the community known for its low voter turnout, waving banners promoting the website for the United States League of Women Voters alongside their voter registration messages. On another occasion, the Kansas League hosted a large booth at the Kansas State Fair staffed by multiple volunteers. While educating and registering potential voters, the group also shared the story of the League and the development of its Kansas Chapter. Finally in another example, when Loud Light undertook an effort to assist voters whose ballots were flagged for deficiencies, their volunteers placed direct calls to those voters and "always identified [themselves] as affiliated with Loud Light."

These organizations are extraordinarily proud of the work they do in our communities. Thus, the statement the Director of the Center made in her affidavit, "To be clear, nobody—not myself, nor anyone else I'm aware of—wants to be mistaken for an election official . . . ." is truly reflective of the appellants' collective mindset. The League takes steps "[a]t each in-person and virtual event [t]o always represent themselves" as members of the organization. Kansas Appleseed adheres to the same principle and "always correctly identify [themselves] as affiliated with Kansas Appleseed, and not any governmental office or body." In those isolated instances when misidentification occurred the appellants did not hesitate to promptly set the record straight.

The appellants have every right to feel a sense of pride. Voter outreach and education are crucial parts of our democracy. Every eligible Kansan should be afforded the opportunity to embrace the privilege of casting a vote to ensure their voices are heard. It is that display of pride that places the appellants beyond the statute's reach and insulates them from prosecution. Notably, because of the appellants' standard practice in clearly identifying their respective affiliations, of the "tens of thousands of Kansans" with whom they interacted in 2020 alone, only "some" inadvertently mistook volunteers for election officials. And again, when those mistakes occurred, the listener was quickly corrected. We are not so deeply entrenched in our position that we are blind to the fact such misperceptions happen on occasion. The reality that must be acknowledged, however, is that the record reflects such incidents are anomalous, rather than frequent, occurrences. The dissent's assertion that misidentifications "happen often" lacks a factual foundation. 62 Kan. App. 2d at 336 (Hill, J., dissenting).

In attempting to convince us their fear is substantiated, the appellants highlight a public exchange between a district attorney and the Kansas Attorney General. Shortly after the provision's passage the district attorney at issue publicly announced her dissatisfaction with the statute and vowed not to prosecute anyone under it. The Attorney General responded that Kansas law grants his office concurrent jurisdiction to prosecute election crimes and those crimes "like all other crimes, will be prosecuted when warranted by the evidence." Thus, "any law enforcement agencies that

obtain evidence of election crimes may present the results of an investigation to our office for review, and we will make a prosecution decision based on the facts and law applicable to any individual case." The appellants contend the statement from the Attorney General is a shot across the bow intended to put them on notice that if they persist in their activities, prosecution is likely to result. We are not persuaded that the statement carried the menacing undercurrent the appellants attempt to assign it. Rather, we view the utterance as a mere truism. Under K.S.A. 75-702, "The attorney general shall appear for the state, and prosecute and defend any and all actions and proceedings, [and] control the state's prosecution or defense." See *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 567, 502 P.3d 89 (2022); *Breedlove v. State*, 310 Kan. 56, 72, 445 P.3d 1101 (2019) (Stegall, J., concurring) (explaining that giving prosecutors "'the authority to decide what the law is . . . gives rise to doubts about whether such laws violate the doctrine of separation of powers'" and "'invite[s] arbitrary power'" into the criminal justice system); see also *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1228, 200 L. Ed. 2d 549 (2018) (Gorsuch, J., concurring) (overlooking the separation of powers between branches leaves "prosecutors free to 'condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it'").

The requirement for a cognizable or actual injury is not satisfied where there is no evidence that a credible, substantial threat of future prosecution exists. To be subject to prosecution, one must engage in the prohibited conduct. See *McCormick v. Board of County Commissioners of Shawnee County*, 272 Kan. 627, Syl. ¶ 10, 35 P.3d 815 (2001). Again, perhaps the affidavit from the Director of the Center sums it up best, wherein she stated: "To be clear, nobody—not myself, nor anyone else I'm aware of—*wants* to be mistaken for an election official . . . ." (Emphasis added.)

As reflected by the analysis above the appellants do not, nor have they ever, engaged in the conduct prohibited by K.S.A. 2021 Supp. 25-2438. Thus, their concern fails to rise above a mere subjective fear, and such is not sufficient to carry their burden. Again, those whose fears of prosecution are merely imaginary or speculative "are not to be accepted as appropriate plaintiffs." *Babbit*, 442 U.S. at 298; see also *Johnson v. Dist. of Columbia*, 71 F. Supp.

3d 155, 162 (D.D.C. 2014) (Johnson's fear stems from speculation and such hypothetical fears cannot support standing under Article III); *Baker v. City of Overland Park*, No. 101,371, 2009 WL 3083843, at *5 (Kan. App. 2009) (unpublished opinion).

The appellants also argue that the substantial harm required to establish standing is evidenced by the fact that in response to the law's passage, they chose to self-censor and hold their activities in abeyance for fear they would otherwise be exposed to criminal liability. The dissent echoes their argument. *Virginia v. American Booksellers Association Inc*., 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988), offers a sound analysis of a self-censorship matter, and the appellants' case is not on par with that example. At issue in that case was a statutory amendment which made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is harmful to juveniles. 484 U.S. at 386. The Plaintiffs, consisting of several booksellers' organizations and two general purpose bookstores, filed suit claiming the amendment was facially violative of the First Amendment because of the significant and unnecessary burden it imposed on the expressive rights of adults and because of the economically devastating and extremely restrictive measures it demanded booksellers to adopt in order to be in compliance. 484 U.S. at 388.

The United States District Court for the Eastern District of Virginia held a preliminary injunction hearing more reminiscent of a trial on the merits. That is, the court accepted several exhibits and received testimony from several witnesses on the Plaintiffs' behalf regarding how their businesses would be impacted by the statute and what measures must be adopted or implemented to avoid prosecution. In granting the Plaintiffs' motion for injunctive relief the court found the amendment placed "significant burdens" on the First Amendment rights of adults. 484 U.S. at 391. In support of its conclusion, it noted the provision affected much of the booksellers' inventory and the alternatives required of the sellers to achieve compliance were significantly burdensome. 484 U.S. at 391.

By contrast, the appellants here have done nothing more than merely allege a "subjective 'chill'" which is woefully inadequate to establish an injury under this mode of analysis. *Laird*, 408 U.S. at 13-14. If the only measure required to conjure the jurisdiction of the courts was a bare assertion that, as a result of government action, one merely felt discouraged from speaking, there would be little left of the standing threshold in First Amendment cases. See *Initiative and Referendum Institute*, 450 F.3d at 1089. The Tenth Circuit formulated a test in an effort to establish parameters when self-censorship is alleged, and prospective relief is sought:

"[P]laintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that [adverse consequences] will be enforced." 450 F.3d at 1090.

Filtering the appellants' case through those factors reveals it falls well shy of the mark. As evidenced by the immediately preceding analysis, the appellants, by their own admissions, have not in the past, nor do they intend in the future, to identify themselves as anyone other than advocates for their respective organizations. Additionally, as we concluded above, the appellants failed to sustain their burden to demonstrate their actions subject them to a credible threat of prosecution. Thus, they likewise cannot show that the injury in fact component of the standing analysis is satisfied by their perceived need for self-censorship.

Given the nature of the appellants' claims, the dissent posits that the better analytical tool was that which was articulated by this court in *City of Wichita v. Trotter*, 60 Kan. App. 2d 339, Syl. ¶ 6, 494 P.3d 178 (2021), *rev. granted* 315 Kan. 968 (2022):

"'To have standing to challenge a law as being so overbroad as to infringe upon rights protected by the First Amendment to the United States Constitution, a party need not establish that he or she was personally injured by the disputed law because the mere existence of the disputed law may cause persons not before the court to refrain from conduct protected by the First Amendment.'" 62 Kan. App. 2d at 338-39 (Hill, J., dissenting).

The elements of that test place the burden upon the plaintiff to prove that (1) the protected activity is a significant part of the law's

target, and (2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications. 60 Kan. App. 2d 339, Syl. ¶ 6. Thus, even if this test applied, which it does not, the appellants' advancement would be stymied by the same barrier. As meticulously illustrated above, their outreach and advocacy efforts simply do not fall within the type of conduct the statute is designed to combat.

We have been asked to decide an important question concerning the freedom of speech. But before we do so it is incumbent upon us to determine whether an actual controversy exists, and standing is a critical component in that equation. Following a scrupulous analysis, we are unable to conclude that the appellants satisfied their burden to establish the mandated controversy is present. As we stated at the outset of our opinion, the controversy requirement stems from the separation of powers doctrine. When the layers of the appellants' claim are peeled away, what remains is a plea for us to enjoin members of the executive branch of government from executing an act of the legislative branch that the appellants assert is unconstitutional. It is not our desire to fortify the courthouse doors against legitimate controversies, nor can we abandon binding restrictions purely because our intellectual urges tempt us to do so. There is simply no justification for such special solicitude here. "Pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). We firmly believe that to delve into the merits of the appellants' statutory challenge when the necessary requirements have not been met blurs the lines of the separation of powers and risks flirting dangerously close to judicial activism. We cannot abide such a transcension of our permissible boundaries.

Our Supreme Court has explained that if a person does not have standing to challenge an action or to request a particular type of relief, then "there is no justiciable case or controversy" and the suit must be dismissed. *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.*, 270 Kan. 489, 490, 14 P.3d 1154 (2000). "When a person who does not have standing to file suit nevertheless asks for relief, it is tantamount to a request for an advisory opinion. Advisory opinions are an executive, not a judicial, power." *Board*

of Sumner County Comm'rs v. Bremby, 286 Kan. 745, 750, 189 P.3d 494 (2008) (citing *Sebelius*, 285 Kan. at 885). To render a decision analyzing the nuances of the issues raised in the appellants' case would force us to issue an impermissible advisory opinion. Accordingly, this appeal is dismissed.

Appeal dismissed.

* * *

HILL, J., dissenting: We are asked to review a district court's ruling that a recently enacted election law did not violate the Kansas Constitution. Rather than grapple with the merits of the serious issues of statutory and constitutional interpretation raised in this appeal, my colleagues have chosen to sweep the matter off our bench by holding that the appellants lack standing to sue.

I offer my dissent.

By dismissing this case upon the grounds of standing, the practical effect of the majority's ruling is to tell these four groups—the appellants in this appeal—that one member from each group will have to be arrested, charged, tried, convicted, and sentenced to prison before they dare challenge this law.

Using phrases such as "subjective and irrational fear," "subjective chill," and "merely allege a subjective chill," the majority holds that there is no proof that the appellants have been harmed by this law. 62 Kan. App. 2d at 322-23, 330. I must disagree.

The majority's conclusion is clear and chilling: "We ultimately conclude the appellants lack standing to challenge the statute due to their failure to successfully establish the existence of a cognizable, actual injury." 62 Kan. App. 2d at 318. In other words, you four groups have not yet been injured, so you cannot sue.

Such a holding is not how our freedom of speech should be protected by our Kansas Constitution. With such a ruling as this, there will be no pre-enforcement challenges to Kansas laws under the Kansas Constitution. My friends are erecting unnecessary obstacles that prohibit fair and reasonable legal actions seeking to protect Kansas constitutional liberties. After reading the majority opinion, I cannot say when it would ever permit a pre-enforcement action to test the constitutionality of a new law.

We are the first appellate court to examine this new law. This lawsuit is a pre-enforcement action challenging this new felony. No person or group is prosecuted here. We know of no actual prosecution in Kansas for this crime, nor does this record disclose any such case. In this case, only a petition, a motion for a partial temporary injunction, and a motion to dismiss have been filed. This means that there is no factual history for us to rely on in making our decision. There are a handful of affidavits offered by the parties but there has been no testimony, no witnesses examined or cross-examined, and no factual record to rely on. Our plow breaks new ground.

This is a Kansas case. The appellants are Kansas citizens seeking to restrain Kansas officials from enforcing a Kansas law because, in their view that law, on its face, violates the Kansas Constitution. Our guidance should mainly be from the Kansas Supreme Court as the final arbiter of the Kansas Constitution. Binding precedent is found only in that court's rulings.

Both parties and the majority have cited many federal cases in support of their positions. Many deal with the First Amendment to the United States Constitution. None of those cases offer binding precedent on Kansas constitutional questions. If we find such authority persuasive, we should do so explicitly, giving our reasons why we are so persuaded. I note that the majority fails to explain why we should bring in federal standing requirements as found in federal court into this proceeding. They should do so—after all, the two systems are different in this regard.

This difference begins with the test for standing. Kansas courts use a two-part standing test. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015). In that case, the court highlighted the difference between the Kansas and federal tests for standing:

"[W]e have not explicitly abandoned our traditional state test in favor of the federal model. Moreover, as opposed to the United States Constitution, our State Constitution contains no case or controversy provision. The Kansas Constitution grants 'judicial power' exclusively to the courts. Kan. Const. art. 3, § 1. And Kansas courts have repeatedly recognized that 'judicial power' is the '"power to hear, consider and determine controversies between rival litigants."' Given the differences in the genesis of the two systems, we do not feel compelled to abandon our

traditional two-part analysis as the definitive test for standing in our state courts. [Citations omitted.]" 302 Kan. at 679-80.

This two-part test thus becomes manifest. To show standing, a party "'must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury, or an injury in fact, occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017); *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). The parties must have "'adverse legal interests that are immediate, real, and amenable to conclusive relief.'" *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 678.

All of this means that the appellants must show that they are injured and the injury stems from the statute they challenge to have standing. The appellants fear prosecution and state that the threat of a 17-month prison sentence and a fine of $100,000 has forced them to curtail their activities. To them, the threat of prosecution is real, based on their experiences of having people at prior voter registration events believe that they are election officials and not just volunteers seeking to promote democracy by assisting voters to register. There is the injury set out for all to see—these groups have curtailed their activities. Their free speech is now limited because of the threat of prosecution under this law. In my view, the injury and the cause of the injury are established.

But this two-part test is too simple for the majority. It tells us the question of standing "presents its own series of hurdles that must first be cleared before [the appellants'] burden to establish standing is satisfied." 62 Kan. App. 2d at 319. The majority then goes on and creates an inexact evidentiary burden that must be met before the appellants can proceed. Our task is not to set up hurdles for the parties. The statement in Syllabus ¶ 2 is sufficient for me.

The district court, convinced that the appellants have misinterpreted the law, denied them any injunctive relief, and did not address the standing issue. The majority glibly criticizes the district court and holds that it took a misstep and "'put the merits cart before the standing horse.'" 62 Kan. App. 2d at 317. I applaud the district court for having the courage to address the merits of this

controversy and not glibly rule that the appellants have no stake in this dispute. If there is a misstep here, it is by the majority.

We should address the important issue of whether this statute inhibits free speech and not avoid the question and leave it in doubt. The chilling effect on free speech by enacting legislation is just as harmful to free speech as a jail sentence for free speech. To prevent this chilling effect on protected free speech, pre-enforcement actions that test the constitutionality of statutes must be allowed—not avoided.

Without saying so, the majority appears to concede that these four groups' conduct falls within the ambit of the First Amendment to the United States Constitution. I will not hesitate to say so; the groups' activities involve the exercise of free speech. I would go further and say their conduct is under section 11 of the Kansas Constitution, since that is the question we should be addressing.

The majority holds that the activities of these four groups lack the "nefarious or deceptive qualities that K.S.A. 2021 Supp. 25-2438 is designed to combat." 62 Kan. App. 2d at 322. That holding portrays what the majority believes the statute is meant to combat: intentional conduct that results in someone believing the groups are election officials, when they are not election officials. But there is more to the statute than that.

This holding reveals the error of the majority. K.S.A. 2021 Supp. 25-2438(a)(2) and (a)(3) of this law focus on appearances, not on the intentions of the person performing the acts. But appearances demand an observer. The majority says the appellants are looking at this law through the wrong lens. Not so. When dealing with appearances, the point of view is crucial. After all, subsection (a)(3) of the law makes it a felony to "engag[e] in conduct that would cause another person to believe a person engaging in such conduct is an election official." These appellants are facing prosecution and imprisonment. They are using the correct lens to look at this law.

The majority avoids the tough question of whether this statute violates the Kansas Constitution by ruling that the appellants lack standing. To do so, the majority interprets the questioned law to find that the appellants lack standing to question its interpretation because their activities are not prohibited by the statute. In other

words, we will interpret the law so that we do not have to interpret the law. All of this is done with no evidence other than a few affidavits. That makes no sense to me.

The majority holds that "the appellants had to undertake their civic engagement activities knowing that they were reasonably certain to give the impression to event attendees, or '*would*,' *not* could, cause an event attendee to believe the appellants were election officials." 62 Kan. App. 2d at 325. The majority concludes this could never happen.

Evidently, the majority does not believe the appellants' affidavits which assert that such impressions happen often. That is why they fear prosecution. I see nothing in this record that shows the appellants are lying about this.

The term "knowing" is the peg that the majority rests its cap on. A page or two after giving the statutory definition of "knowing" and then offering some dictionary definitions to the opinion that helps muddle the concept, the majority rejects the appellants' concerns. The appellants argue that when viewed properly, if someone in the audience thinks they are election officials, then they are subject to prosecution. In the words of the majority, "These interpretations are fundamentally flawed and run contrary to the plain language of the statute, which strictly prohibits *knowing conduct* on the part of the speaker, which results in the misrepresentation of their identity." 62 Kan. App. 2d at 326.

A fair reading of these few affidavits reveals that the appellants know what they are doing at these meetings and they know that some people believe they are election officials. They fear prosecution under subsection (a)(2) of the statute that says, "gives the appearance of being an election official" and subsection (a)(3) of the statute that says, "cause another person to believe a person engaging in such conduct is an election official." At this stage of this litigation, given the limited record we have, I cannot say the appellants' fears are irrational or subjective. I take them at their word. I see no flaw in their interpretation of this law.

In my view, under Kansas law, this question of standing is simple. Do the appellants have a cognizable injury? Must they first be arrested and prosecuted for violating this law before they can challenge the constitutionality of the statutes? The United States

Supreme Court has counseled that in cases on constitutional rights, an actual arrest and charge is unnecessary.

"[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007). Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. We have held that a plaintiff satisfies the injury in fact requirement where he or she alleges "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 [1979]).

I find this reasoning persuasive. We are dealing with a question of a violation of the right to freely speak as found in section 11 of the Kansas Constitution Bill of Rights. The appellants intend to continue with their voter registration activities. The appellants need not expose themselves to actual arrest or prosecution to challenge a criminal statute that deters the exercise of their constitutional rights of free speech. We should not hold that the rules on standing to sue force the appellants to choose between refraining from core political speech or engaging in that speech and risking criminal prosecution.

What the majority fails to appreciate is that free speech can be limited by the passage of this law. The threat of prosecution can force someone to refrain from free speech—no case needs to be filed against them for their speech to be stifled. That is what has happened here. These four groups have curtailed their activities because of the threat of prosecution. I cannot agree that their fears are irrational based on this tiny record that we have. Perhaps there could be no successful prosecutions here, but if the activities have been curtailed anyway, there is no need to prosecute. The goal of curtailing free speech has been accomplished without filing a case.

I must comment on the dueling prosecutors' comments raised by the parties. I am not convinced that we should be concerned about

them. This is a facial challenge to this statute. It either passes constitutional muster or it does not when it comes to free speech.

A prosecutor's decision not to prosecute does not render a statute constitutional and enforceable.

And I am not convinced that the Attorney General's argument that he does not intend to prosecute the appellants means that they lack standing. After all, he speaks only for himself and not all of the prosecutors in Kansas. Additionally, he cannot bind all future attorneys general by his expressions of self-restraint in this litigation.

The Kansas Supreme Court has not adopted the Tenth Circuit's view that plaintiffs lack standing to sue where there is an explicit declaration by the prosecutor that the plaintiffs would not be prosecuted. In *Bronson v. Swensen*, 500 F.3d 1099, 1109 (10th Cir. 2007), the court ruled that there was no standing where plaintiffs were never charged or directly threatened with prosecution under the state polygamy statute, the plaintiffs admitted the law was not being enforced, and the attorney general's policy was to not focus law enforcement efforts on consensual polygamous relationships involving adults.

When the Douglas County District Attorney's press release contended that this law should not be followed, the Attorney General responded with a press release saying, in effect, that all election laws should be prosecuted. This sequence lends weight to the appellants' fears of prosecution. Timing of events often tells more than the event itself. But I realize that no evidence has been offered in this lawsuit but a few affidavits.

I am concerned with a facial challenge to a statute that is said to be overbroad and vague. It allegedly restricts the free speech guaranteed by the Kansas Constitution. The expression of one prosecutor does nothing to eliminate the possible vagueness or breadth of this law.

Two Kansas cases offer us guidance on the question of overbreadth. In a case construing the licensing ordinance of Wichita governing after-hours establishments, a panel of our court ruled:

"To have standing to challenge a law as being so overbroad as to infringe upon rights protected by the First Amendment to the United States Constitution, a party need not establish that he or she was personally injured by the disputed law because the mere existence of the disputed law may cause persons not before the court to refrain from conduct protected by the First Amendment. To establish that this law is unconstitution-

ally overbroad contrary to the First Amendment, a party must prove (1) that the protected activity is a significant part of the law's target and (2) that there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications. If a party argues that the law prohibits protected First Amendment conduct, not merely protected First Amendment speech, that party must further prove that the law's overbreadth is not only real, but substantial, in relation to the law's plainly legitimate sweep." *City of Wichita v. Trotter*, 60 Kan. App. 2d 339, Syl. ¶ 6, 494 P.3d 178 (2021), *rev. granted* 315 Kan. 968 (2022).

The same reasoning should be applied here in dealing with the Kansas Constitution's guarantee of free speech. The existence of this law may cause other persons not before this court to refrain from exercising their free speech rights.

And then, in a case involving a prosecution for human trafficking and promoting prostitution, the Kansas Supreme Court held:

"Generally, if there is no constitutional defect in the application of the statute to a litigant, the litigant does not have standing to argue that the statute would be unconstitutional if applied to third parties in hypothetical situations. This general rule does not apply, however, when a litigant brings an overbreadth challenge that seeks to protect First Amendment rights, even those of third parties. Instead, an exception has been recognized because the mere existence of the statute could cause a person not before the court to refrain from engaging in constitutionally protected speech or expression." *State v. Williams*, 299 Kan. 911, Syl. ¶ 1, 329 P.3d 400 (2014).

I view this to be binding authority. Therefore, the majority should recognize that this exception applies here. This case involves a claim that the statute is overbroad and the majority should recognize the "injury" component of the standing rules to accommodate the resolution of the overbreadth claims.

To sum up, this is a facial challenge to a statute that was recently enacted. The claims center on overbreadth and vagueness. We have no history of prosecution or restraint from prosecution. The defendants have disavowed prosecution as a position taken here but they speak only for themselves and not all of the officials who prosecute crimes in Kansas. The appellants have curtailed their activities because of this law. It is unreasonable to conclude that the appellants lack standing.

We must follow the directions given by the Kansas Supreme Court and use a two-part standing test to decide this issue. Is there a cognizable injury here? The answer is yes. The appellants have curtailed their voter registration activities because of their fear of prosecution. Is there

a causal connection between the injury and the law they seek to have declared unconstitutional? Yes. That law is why they would be prosecuted. Having satisfied both parts of the test, we should hold that these four groups have standing to sue and get to work on interpreting this statute to see if it passes constitutional standards.

No. 123,063

KANSAS FIRE AND SAFETY EQUIPMENT, a Kansas corporation, HAL G. RICHARDSON d/b/a BUENO FOOD BRAND, TOPEKA VINYL TOP, and MINUTEMAN SOLAR FILM, *Appellants/Cross-appellees*, v. CITY OF TOPEKA, KANSAS, *Appellee/Cross-appellant.*

SYLLABUS BY THE COURT

1. EMINENT DOMAIN—*No Private Right of Action for Relocation Benefits under Eminent Domain Procedure Act*. K.S.A. 2020 Supp. 26-518 is part of the Eminent Domain Procedure Act (EDPA). The EDPA does not provide third-party displaced persons a private right of action for relocation benefits under K.S.A. 2020 Supp. 26-518. Third-party displaced persons can pursue relocation benefits under the Kansas Relocation Act, K.S.A. 58-3501 et seq., or through another cause of action outside the EDPA.

2. SAME—*Eminent Domain Procedure Act Limits Amount of Compensation Owed under K.S.A. 26-513*. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits judicial review to the amount of compensation owed under K.S.A. 26-513. It provides no mechanism for judicial review of a denial of relocation benefits under K.S.A. 2020 Supp. 26-518.

Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed June 24, 2022. Reversed and remanded with directions.

John R. Hamilton, of Hamilton, Laughlin, Barker, Johnson & Jones, of Topeka, and *Jason B. Prier*, of The Prier Law Firm, L.L.C., of Lawrence, for appellants/cross-appellees.

Shelly Starr, chief of litigation, City of Topeka, for appellee/cross-appellant.

Before HILL, P.J., POWELL and CLINE, JJ.

CLINE, J.: Multiple month-to-month tenants sued the City of Topeka for relocation benefits under K.S.A. 2020 Supp. 26-518 after they were forced to move once the City of Topeka bought the property where they operated their businesses. The district court granted the City summary judgment after finding the tenants were not "displaced persons" under that statute, nor did the tenants establish the City in-

tended to condemn the property (two prerequisites for relocation benefits under K.S.A. 2020 Supp. 26-518). Our Supreme Court reversed that decision after finding material disputed facts prevented summary judgment.

On remand, the City sought summary judgment on the grounds that the court lacked subject matter jurisdiction to consider the tenants' claims because K.S.A. 2020 Supp. 26-518 does not provide the tenants a private right of action. It also repeated its factual arguments that the tenants did not qualify for relocation benefits. The district court agreed that it lacked subject matter jurisdiction and granted summary judgment on that basis.

We find the district court properly held it lacked subject matter jurisdiction over the tenants' claims. K.S.A. 2020 Supp. 26-518 is part of the Eminent Domain Procedure Act (EDPA), K.S.A. 26-501 et seq. Even if tenants are "displaced persons" under the Act, nothing in the EDPA permits a displaced person to file an independent action in the district court seeking relocation benefits under K.S.A. 2020 Supp. 26-518. However, we find a dismissal for lack of jurisdiction should be without prejudice, so we reverse and remand with instructions for the district court to vacate the order granting summary judgment for the City and instead enter an order of dismissal without prejudice for lack of jurisdiction.

PROCEDURAL HISTORY

In 2019, the Kansas Supreme Court reversed the district court's summary judgment order and remanded this case to the district court to resolve disputed facts. *Nauheim v. City of Topeka*, 309 Kan. 145, 154, 432 P.3d 647 (2019). Our Supreme Court summarized the factual and procedural background, including the arguments and outcome at this court:

> "In 2011, the City authorized by ordinance a public works project to replace a structurally deficient drainage system on a tributary to Butcher Creek to alleviate potential flooding within the city limits. The authorizing language did not mention condemnation. After exchanging terms with the owner during 2013, the City bought real property where commercial tenants operated their businesses. During the negotiation, the City made clear it wanted the property vacant before obtaining title. The owner complied, and the transaction concluded without the City exercising its eminent domain power.

"Charles Nauheim and Hal G. Richardson, the former tenants, relocated their respective businesses to other property. They sued the City for relocation costs under K.S.A. 2017 Supp. 26-518, which states:

'Whenever federal funding is not involved, and real property is acquired by any condemning authority through negotiation *in advance of a condemnation action* or through a condemnation action, and which acquisition will result in the displacement of any person, the condemning authority shall:

'(a) Provide the *displaced person*, as defined in the federal uniform relocation assistance and real property acquisition policies act of 1970, fair and reasonable relocation payments and assistance to or for displaced persons.' (Emphases added.)

"The City argued the statute did not apply because it never intended to condemn the property had the negotiation failed. It also contended neither tenant was a 'displaced person' as statutorily defined. The City claimed the tenants relocated because of agreements with the property owner—also their landlord. All parties moved for summary judgment.

"The district court granted the City's motion. It held the tenants were not displaced persons as defined by law. It also found the uncontroverted facts proved the property acquisition was not made 'in advance of a condemnation action,' but occurred instead by the City exercising its corporate power. The tenants appealed." 309 Kan. at 147.

On appeal to this court, the panel ultimately reversed and remanded for the district court to resolve disputed material facts. *Nauheim v. City of Topeka*, 52 Kan. App. 2d 969, 970, 381 P.3d 508 (2016), *rev. granted* 306 Kan. 1319 (2017). The tenants petitioned our Supreme Court for review of the panel's finding that a displaced person must prove a condemning authority threatened condemnation or took affirmative action to condemn the property before acquisition. *Nauheim*, 309 Kan. at 149.

Employing canons of statutory interpretation, our Supreme Court disagreed with the panel's interpretation of K.S.A. 2017 Supp. 26-518. Our Supreme Court concluded the panel's interpretation "too narrowly construes what evidence might show entitlement to benefits" and held "[w]hether a negotiation is in advance of a condemnation action is a question of fact a claimant needs to prove by a preponderance of the evidence." 309 Kan. at 152.

Our Supreme Court reviewed the evidence and found that "despite incorrectly imposing a higher evidentiary burden than the tenants needed to prevail," the panel correctly remanded for the district court to resolve disputed facts under the summary judgment standard. 309 Kan. at 154. Our Supreme Court determined: "Further proceedings are necessary to explore whether the City's negotiations were in advance

of a condemnation action under K.S.A. 2017 Supp. 26-518." 309 Kan. at 154.

On remand, the City again moved for summary judgment on factual grounds, claiming K.S.A. 2020 Supp. 26-518 was inapplicable because the City had not intended to condemn the property. The City also argued the district court lacked jurisdiction to consider the claims because K.S.A. 2020 Supp. 26-518 provides no private right of action.

In response, the tenants argued that the same genuine issues of material fact which our Supreme Court had found prohibited summary judgment still existed. They also argued that this court, and our Supreme Court, implicitly found subject matter jurisdiction since neither dismissed the case for lack of jurisdiction in the first appeal.

Upon detailing the uncontroverted facts and procedural history, the district court granted summary judgment for the City, finding it lacked subject matter jurisdiction to consider the tenants' claims under K.S.A. 2020 Supp. 26-518. The district court reasoned that K.S.A. 2020 Supp. 26-518 does not create a private cause of action for relocation benefits because it is contained within the EDPA, which only provides "an appeal process from an unsatisfactory condemnation compensation appraisers' award." Instead, it acknowledged the City's argument that the procedure for tenants to pursue relocation benefits is found in the Kansas Relocation Act, K.S.A. 58-3501 et seq., or through another cause of action outside the EDPA.

The district court recognized the appellate courts unfortunately did not consider subject matter jurisdiction previously because the courts focused on the "narrow determination of whether [the tenants] qualified as 'displaced persons' under the law." The district court noted that despite the independent duty of the courts to determine whether subject matter jurisdiction exists, "[t]here is a chance, as with all human endeavors that the issue was overlooked initially by the parties, then the District Court, and was later not squarely considered as the respective appellate courts narrowly received an issue of first impression in Kansas."

ANALYSIS

On appeal, the tenants claim the district court erred because they contend K.S.A. 2020 Supp. 26-518 creates either an outright or implied private right of action under which they can dispute the City's refusal to pay relocation benefits. They also claim the district court should

have allowed them leave to amend their petition to assert a claim under K.S.A. 58-3509 or dismissed their case without prejudice rather than grant the City summary judgment. The City cross-appeals, claiming the district court incorrectly found factual issues prevented summary judgment. Since we affirm the court's summary judgment decision, we need not address the City's cross-appeal.

Since resolution of the tenants' first issue on appeal involves interpreting the EDPA to determine whether it provides subject matter jurisdiction over the tenants' claims, we review the district court's decision to dismiss those claims de novo. *Nauheim*, 309 Kan. at 149.

We review the tenants' claim that the district court should have allowed them leave to amend their petition or dismissed their case without prejudice under an abuse of discretion standard. *Luckett v. Kansas Employment Security Bd. of Review*, 56 Kan. App. 2d 1211, 1221, 445 P.3d 753 (2019).

We find the district court correctly interpreted K.S.A. 2020 Supp. 26-518 and appropriately granted the City summary judgment. We also find that even if the tenants had properly sought to amend their petition to add claims under K.S.A. 58-3509, such an amendment would have been futile since the deadline to pursue these claims had passed.

The district court correctly found it lacked subject matter jurisdiction.

Subject matter jurisdiction is the court's power to hear and decide a particular type of action. *In re Care & Treatment of Easterberg*, 309 Kan. 490, 492, 437 P.3d 964 (2019). "Jurisdiction over subject matter is the power to decide the general question involved, and not the exercise of that power." *Miller v. Glacier Development Co*., 293 Kan. 665, 669, 270 P.3d 1065 (2011). And subject matter jurisdiction is vested by statute; the parties cannot confer such jurisdiction upon a court by consent, waiver, or estoppel. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, Syl. ¶ 1, 204 P.3d 562 (2009).

Subject matter jurisdiction may be raised at any time, whether for the first time on appeal or even on the appellate court's own motion. *In re Care & Treatment of Emerson*, 306 Kan. 30, 33, 392

P.3d 82 (2017). And an appellate court has a duty to question jurisdiction on its own initiative. *Wiechman v. Huddleston*, 304 Kan. 80, 84, 370 P.3d 1194 (2016).

The EDPA provides tenants no private right of action for relocation benefits.

The EDPA, K.S.A. 26-501 et seq., "codifies" the Fifth Amendment to the United States Constitution's protection against taking private property without just compensation. *Miller v. Bartle*, 283 Kan. 108, 117, 150 P.3d 1282 (2007). An eminent domain proceeding instituted under the EDPA is an administrative proceeding for determining the fair market value of private property taken for public use. 283 Kan. at 113-14.

Under the EDPA, the condemning authority files a petition in district court for the appointment of three appraisers to view and value the property at issue. K.S.A. 2020 Supp. 26-504. If any of the property owners or the condemning authority disagree with the valuation of the property by the appraisers, they can appeal the appraisers' award to the district court for a trial de novo on the issue of compensation owed for the taking of the property. K.S.A. 2020 Supp. 26-508. The only issue the district court has jurisdiction to consider in such an appeal is the amount of compensation owed under K.S.A. 26-513. K.S.A. 2020 Supp. 26-508(a); *Bartle*, 283 Kan. at 114-15. Our Supreme Court has repeatedly held the EDPA does not provide "'a forum for litigation over the right to exercise eminent domain or to determine the extent of said right.'" 283 Kan. at 114. Such issues "'can only be litigated in an individual civil action, usually by suit for injunction.'" 283 Kan. at 114.

While the EDPA does provide that displaced persons—such as the tenants—are entitled to "[f]air and reasonable relocation payments and assistance," when "real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action" and federal funding is not involved, the EDPA provides no mechanism for independent judicial review of a denial of such payments. K.S.A. 2020 Supp. 26-518. It also provides no standing to third parties—only parties to the condemnation action who are dissatisfied with an appraiser award may appeal the award to the district court.

K.S.A. 2020 Supp. 26-508. And, again, the statute limits the appealable issue to the "compensation required by K.S.A. 26-513, and amendments thereto." K.S.A. 2020 Supp. 26-508(a); see *Bartle*, 283 Kan. at 115. Relocation benefits are not mentioned in K.S.A. 26-513.

The tenants attempt to distinguish *Bartle* by claiming, "[a]ll the cases that hold that outside issues may not be litigated in a condemnation proceeding or an appeal therefrom involved condemnation actions of appeals therefrom. Here, there was no condemnation action, and thus no appeal." Put another way, the tenants argue their relocation claims "were not made within a pending condemnation action or an appeal—they were filed as an original action." But the tenants miss *Bartle*'s point: the scope of judicial review under the EDPA is limited regardless of whether the claim is brought as part of an eminent domain proceeding or as an original action. The EDPA grants the tenants no independent right to bring a claim for relocation benefits; it only allows appeal of an appraisers' award within a condemnation proceeding.

Our Supreme Court acknowledged the limited scope of judicial review allowed by the EDPA in *Miller v. Glacier Development Co.*, 293 Kan. 665, 270 P.3d 1065 (2011). The court held "the issue of whether the plaintiff can pierce the corporate veil of an LLC to hold a member/manager personally liable for an excess payment to the LLC is one of those 'other issues' that exceeds the jurisdictional scope of an eminent domain appeal." 293 Kan. at 672. The court reiterated that "'[t]he procedure for exercising eminent domain as set forth in K.S.A. 26-501 to 26-518 and K.S.A. 2008 Supp. . . . [26]-501b . . . shall be followed in all eminent domain proceedings.'" 293 Kan. at 670. Having found the district court lacked jurisdiction to adjudge a party personally liable under the EDPA, the *Glacier Development Co.* court found the district court entered the judgment without subject matter jurisdiction and therefore the judgment was "simply void." 293 Kan. at 672.

While the tenants contend the district court's interpretation of the EDPA "would render the provisions of K.S.A. 26-518 meaningless," we disagree. Under the EDPA, if "real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action,

and which acquisition will result in the displacement of any person" then the displaced person is entitled to relocation benefits. K.S.A. 2020 Supp. 26-518. Thus, if condemnation proceedings were initiated for the property, then the tenants could have claimed relocation benefits under K.S.A. 2020 Supp. 26-518, either as parties to the proceeding or through their landlord property owner. See *City of Wichita v. Denton*, 296 Kan. 244, 253, 294 P.3d 207 (2013) (a tenant "is entitled to compensation if his leasehold estate is damaged by the exercise of eminent domain" unless their lease provides otherwise); see also K.S.A. 2020 Supp. 26-504 (the appointed appraisers are "to determine the damages and compensation to the interested parties resulting from the taking"). Indeed, the City admitted as much in its correspondence. In an e-mail submitted as evidence, a City employee stated: "Fyi. If we don't close on the . . . property because the tenants refuse to leave and we have to condemn, we'll have to pay relocation benefits to the tenants regardless of whether federal funding is involved. Keep this in mind as you go forward." A couple of hours later, the same employee responded to the e-mail thread, again stating: "[T]he tenants may never leave—knowing that they'll get relocation benefits if the City is forced to condemn."

And if the property is acquired "through negotiation in advance of a condemnation," and no condemnation proceeding is initiated, then the tenants could still request relocation benefits from the City. K.S.A. 2020 Supp. 26-518. The tenants' problem is that the EDPA does not permit judicial review of the condemning authority's decision on such requests; K.S.A. 2020 Supp. 26-518 is advisory only since the right to judicial review in K.S.A. 2020 Supp. 26-508(a) is limited to "the compensation required by K.S.A. 26-513, and amendments thereto." The Legislature could have included relocation benefits under K.S.A. 2020 Supp. 26-518 within that appeal right, but it did not. We have no authority to substitute our judgment for the Legislature's.

The Legislature did not create an implied private right of action for judicial review of claims under K.S.A. 2020 Supp. 26-518.

The tenants alternatively argue that, by requiring payment of relocation benefits, the Legislature created an implied right of ac-

tion to recover such benefits. But there is no implied right of judicial review of administrative actions in Kansas. As our Supreme Court explained in *Barnes v. Board of Cowley County Comm'rs*, 293 Kan. 11, 17, 259 P.3d 725 (2011):

> "Courts have no inherent appellate jurisdiction over official acts of administrative officials or boards, unless there is a statute providing for judicial review. Absent such a statutory provision, appellate review of administrative decisions is limited to claims of relief from illegal, fraudulent, or oppressive official conduct through the equitable remedies of quo warranto, mandamus, or injunction. The right to appeal an administrative decision is not vested or constitutional; it is statutory and may be limited or completely abolished by the legislature. [Citation omitted]."

Here, the Legislature limited the right to appeal administrative decisions under the EDPA. K.S.A. 2020 Supp. 26-508(a); *Bartle*, 283 Kan. at 115. And the tenants' claims for relocation benefits do not fall within those limitations.

"'Generally, the test of whether one injured by the violation of a statute may recover damages from the wrongdoer is whether the legislature intended to give such a right.'" *Pullen v. West*, 278 Kan. 183, 194, 92 P.3d 584 (2004). Although some statutes expressly impose personal liability on persons or entities, "'[m]ost statutes do not, however, explicitly confer on potential plaintiffs a civil remedy.'" *Jahnke v. Blue Cross & Blue Shield of Kansas*, 51 Kan. App. 2d 678, 688, 353 P.3d 455 (2015) (quoting *Shirley v. Glass*, 297 Kan. 888, 894, 308 P.3d 1 [2013]). This court has held that it "primarily look[s] to the form or language of the statute" to determine whether the Legislature intended to grant a private cause of action for a violation of a statute. *Jahnke*, 51 Kan. App. at 689.

The tenants' argument that, by requiring payment of relocation benefits, K.S.A. 2020 Supp. 26-518 creates an implied right of action to recover such benefits ignores the rest of the EDPA. But we must construe the various provisions of the EDPA in pari materia with the view of reconciling and bringing the provisions of that Act into workable harmony if possible. *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017). And when viewed as a whole, the EDPA allows for judicial review of very limited claims—excluding claims for relocation benefits under K.S.A. 2020 Supp. 26-518.

This is not to say the tenants were left without a remedy when the City denied their claims for relocation benefits. As noted in *Barnes*, the tenants could have pursued the equitable remedies of quo warranto, mandamus, or injunction. Or they could have pursued a statutory remedy under the Kansas Relocation Act (KRA), K.S.A. 58-3501 et seq. The KRA is the state counterpart of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. It addresses the payment of relocation benefits when a state or municipal government program or project "will result in the displacement of any person by acquisition of real property, or by the direct result of building code enforcement activities, rehabilitation or demolition programs." K.S.A. 58-3502. It separately addresses situations when federal financial assistance will be available to pay all or part of the project or program and when it will not. See K.S.A. 58-3502; K.S.A. 58-3508. In fact, as the tenants note, K.S.A. 58-3508 contains the same language as the EDPA permitting relocation assistance by condemning authorities. See K.S.A. 2020 Supp. 26-518. But the difference between the KRA and the EDPA is the KRA contains a statutory provision permitting appeals of the determination of relocation payments, while the EDPA does not. See K.S.A. 58-3509.

Under K.S.A. 58-3509(a), "[a]ny displaced person entitled to benefits under this article may appeal by written notice to the state, agency or political subdivision a determination of relocation payments." If such appeal is made, an independent hearing examiner is appointed who decides the claim. From there, "[a]ny party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision." K.S.A. 58-3509(a). As the City pointed out below, the KRA provides the avenue through which the tenants could have pursued relocation benefits.

The existence of the KRA is another reason why we find the Legislature did not create an implied right of action within K.S.A. 2020 Supp. 26-518. No implied right of action is necessary when a specific statutory one is already provided.

Because the tenants' claims under K.S.A. 2020 Supp. 26-518 are outside the scope of judicial review under the EDPA, the district court correctly found it lacked subject matter jurisdiction to

consider the claims. Although the district court found it lacked subject matter jurisdiction upon remand by our Supreme Court, subject matter jurisdiction may be raised at any time, including the first time on appeal or even on the appellate court's own motion. *In re Emerson*, 306 Kan. at 33. And an appellate court has a duty to question jurisdiction on its own initiative. *Wiechman*, 304 Kan. at 84. Under these standards, the district court properly granted summary judgment to the City. See 304 Kan. at 84.

The district court did not err in denying the tenants' oral motion to amend.

After the mandate from our Supreme Court, the tenants moved to amend their petition to add parties on May 24, 2019 (substituting Kansas Fire and Safety Equipment for Charles Nauheim). The deadline for any motions to amend pleadings or add parties in the action was June 15, 2019. The tenants attached a copy of their proposed amended petition to their motion. In the amended petition, the tenants included three claims, one for each of the three tenants who relocated their business. Two of the tenants sought payments of $40,000 and the third sought a payment of $20,364.

The tenants were allowed to file their amended petition, which the district court later noted also expanded their theory and amount of recovery sought. The tenants now sought "'in lieu of' payments under 49 CFR Part 24.305, which include consideration of earnings of a business over a two year period prior to being displaced, rather than the actual moving and relocation expenses sought in the original petition."

While the tenants claim on appeal that they should have been allowed to amend their petition again to assert a claim under the KRA instead of the EDPA, they never actually sought to amend their petition to make this change. Instead, the only time they mentioned the issue was during oral argument on the City's summary judgment motion, when they said that if the court found the claims should have been brought under K.S.A. 58-3508, "the only reasonable option for the Court would be to allow an amendment for it to be brought under Chapter 58 if the City believes that there's a private right of action under Chapter 58."

The oral argument occurred on March 31, 2020, and the district court issued its summary judgment order on June 26, 2020. If the tenants wished to amend their petition again to assert new claims, they could have moved to amend and attached their proposed amended petition, as they had done before. By failing to file such a motion, the tenants gave the district court no opportunity to rule on their request. We have no decision to review.

Even if we construe the district court's summary judgment order as implicitly denying the tenants' oral request to amend their petition to add a claim under the KRA, we find no error in that denial. Adding a claim under the KRA at that point would be futile since the deadline to bring such a claim had long passed.

The tenants' counsel contacted the City on October 18, 2013, requesting relocation benefits under K.S.A. 2013 Supp. 26-518. A few weeks later, the City responded by letter and denied the request, reasoning that the property would not be purchased through a condemnation action. The City attached an e-mail to that letter, in which it stated it did not believe K.S.A. 2013 Supp. 26-518 applied to the tenants' claim, and said the City "has been very reluctant to use condemnation." Under K.S.A. 58-3509, the tenants had 60 days after they received notice of the City's denial in which to pursue their claim for relocation benefits by serving the City with a written notice of appeal of the denial. They did not avail themselves of this remedy, and the deadline has now passed to do so.

Although tenants claim the defect in their pleading was "easily curable," they fail to explain how they could cure a stale claim. Our Kansas Supreme Court has recognized futility of a proposed amendment as a valid reason to deny a motion to amend a pleading. *Smith v. Philip Morris Companies*, 50 Kan. App. 2d 535, 587, 335 P.3d 644 (2014) (citing *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, 327, 913 P.2d 119 [1996]). Even if we find the district court implicitly denied the tenants' request to amend, we find no error in that denial.

Disposition of the case

The tenants argue that rather than grant summary judgment based on a lack of subject matter jurisdiction, the district court should have dismissed their claims without prejudice. They point

to K.S.A. 2020 Supp. 60-241(b)(1), which provides that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. The City does not directly respond to this argument, although it argues the court properly dismissed the matter.

While the district court properly found the tenants have no private right of action under the EDPA, we agree its dismissal of the claim for lack of jurisdiction should be without prejudice under K.S.A. 2020 Supp. 60-241. Thus, we remand and instruct the district court to vacate the order granting summary judgment for the City and dismissing the action with prejudice. The district court should instead enter an order of dismissal without prejudice for lack of jurisdiction.

As mentioned above, since we agree the district court properly granted summary judgment, the City's cross-appeal is moot.

Reversed and remanded with directions.