

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and
VOTER PARTICIPATION CENTER,

Plaintiffs,

vs.

Case No. 2:21-cv-02253-KHV-GEB

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

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS I-III

Defendants respectfully move for summary judgment with regard to Counts I-III of the Plaintiffs' Complaint, as they relate to Plaintiffs' constitutional challenge to Section 3(k)(2) of HB 2332 (codified at K.S.A. 25-1122(k)(2)). A separately-filed memorandum in support accompanies this motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2022, I electronically filed the foregoing Defendants' Motion for Summary Judgment Regarding Counts I-III with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By /s/ Bradley J. Schlozman

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS I-III**

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- A. Andrew Howell Affidavit
- B. Jamie Shew Deposition
- C. Bryan Caskey Deposition
- D. Kansas Secretary of State's Office – Voter Registration Data Request Form
- E. VPC's advance voting ballot application mailing statistics for 2020 General Election
- F. Lionel Dripps Deposition
- G. Tom Lopach Deposition
- H. Pls.' Resp. to Interrog. No. 16 in Defs.' Second Set of Interrogs.
- I. Sample of VPC's cover letter, pre-filled advance voting ballot application, and envelope sent to Kansas voters in 2020 General Election
- J. Sample VPC pre-filled advance voting ballot application
- K. Pls.' Response to Defs.' RFA No. 8
- L. Kansas Voters to whom VPC sent advance voting ballot application in 2020 General Election
- M. Ken Block's Initial Declaration
- N. Ken Block's Supplemental Declaration
- O. Ex. XI to Ken Block's Supplemental Declaration
- P. Ex. V to Ken Block's Initial Declaration
- Q. Examples of CVI-pre-filled deficient advance voting ballot applications received from Shawnee County voters
- R. Advance voting ballot applications sent by VPC to deceased voters in Shawnee County
- S. Andrew Howell Deposition
- T. Debbie Cox Deposition
- U. Debbie Cox Affidavit
- V. Text of notice placed in Ford County newspapers by Debbie Cox regarding CVI's mailing of advance voting ballot applications to voters
- W. Examples of correspondence between Shawnee County Election Office and voters submitting deficient advance voting ballot applications in 2020 General Election
- X. VPC Call Center FAQs
- Y. Emails between VPC's Counsel and Other States' Election Officials
- Z. Written Testimony from Kansas Secretary of State's Office to Kansas Legislature
- AA. Pls.' Resp. to Interrog. No. 8 in Def. Schwab's First Set of Interrogs.
- BB. Pls.' Resp. to Interrog. No. 4 in Def. Schwab's First Set of Interrogs.

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MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS I-III**

Defendants respectfully move for summary judgment with regard to Counts I-III of the Plaintiffs' Complaint, as they relate to Plaintiffs' constitutional challenge to Section 3(k)(2) of HB 2332 (codified at K.S.A. 25-1122(k)(2)).¹ In support of such motion, Defendants state as follows:

INTRODUCTION

The only remaining issue in this case is whether a third-party has a right under the First Amendment to fill out *someone else's* advance voting ballot application. In other words, does K.S.A. 25-1122(k)(2) constitute an impermissible restriction on speech or association under the First Amendment? Defendants submit that a third party's pre-population of a voter's advance ballot application is neither expressive conduct nor speech warranting constitutional protection, and it has no impact as well on the third-party's freedom of association rights.

¹ All other claims in this matter have either been dismissed or resolved via a Stipulated Order. *See* Dkt #73.

At the preliminary injunction stage of these proceedings, the Court concentrated the bulk of its analysis on a provision prohibiting only out-of-state entities from sending advance voting ballot applications to Kansas voters. Defendants accepted the Court's determination that the provision was unconstitutional and agreed to a permanent injunction against it. But the law now before the Court, which simply restricts third-parties from pre-filling anyone else's advance voting ballot application, is eminently reasonable and does not encroach on any constitutional rights.

Plaintiffs highlight that Kansas has experienced no recent, systematic election fraud. True enough, but Plaintiffs' argument ignores the applicable legal standard and the State's legitimate interests in adopting this legislation. The Legislature acted on what it deemed to be a serious concern with pre-filled advance voting ballot applications. As was evident in Kansas in 2020, and has been clear throughout the country for years, the activities of Plaintiff Voter Participation Center ("VPC") tend to precipitate anger, confusion, and frustration in the electorate; negatively impact the orderly and efficient administration of elections; and contribute to the diminution of public confidence in both the competency of election officials and the integrity of the electoral process. In fact, VPC itself was so concerned with erroneous data in the pre-filled advance voting ballot applications it was sending to voters during the 2020 General Election that it decided on its own to stop pre-populating applications for its target market for a period of time.

The election integrity measure being challenged here is a perfectly reasonable prophylactic designed to mitigate such harms. These same Plaintiffs challenged a virtually identical statute in Georgia, and the court there categorically rejected the claims. *See VoteAmerica v. Raffensperger*, __ F. Supp.3d __, 2022 WL 2357395 (N.D. Ga. June 30, 2022). Governing case law dictates that this Court likewise turn aside Plaintiffs' claims and afford substantial deference to Kansas' law. The State is not required to conduct its elections in an environment filled with chaos.

STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiff VPC is a 501(c)(3) organization that, *inter alia*, provides early voting and vote-by-mail resources and information – including pre-filled advance voting ballot applications – to certain targeted groups of voters, primarily young voters, voters of color, and unmarried women. Pretrial Order (Dkt #140) Stipulated Facts (“PTO-SF”), ¶¶ vii-viii.

2. The Kansas Legislature introduced House Bill (H.B.) 2332 in February 2021 to address various election-related matters, including the solicitation by mail of advance voting ballot applications. PTO-SF, ¶¶ xvii-xviii.

3. The Legislature passed the legislation, as amended, by votes of 83-38 in the House and 27-11 in the Senate, but Governor Kelly vetoed the bill on April 23, 2021. On May 3, the Legislature overrode the governor’s veto (voting 86-37 in the House and 28-12 in the Senate). PTO-SF, ¶¶ xix-xxi.

4. Section 3(k)(2) of H.B. 2332 (codified at K.S.A. 25-1122(k)(2)) prohibits “[a]ny person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing” from completing (i.e., pre-filling) any portion of such application prior to mailing such application to the registered voter. This statute will be referred to as the “Pre-Filled Application Prohibition.” PTO-SF, ¶ xxii.

5. K.S.A. 25-1122(k)(2) does not apply to persons who mail or cause to be mailed an application for an advance voting ballot with any portion completed to a registered voter where the portion of such application completed prior to mailing is completed at the request of the registered voter. In other words, when a registered voter asks a person to mail or cause to be mailed an advance voting ballot application to such registered voter, and that person does so, that

person does not “solicit[] by mail a registered voter to file an application for an advance voting ballot” as set forth in K.S.A. 25-1122(k)(1). Stipulation (Dkt #73), at 2-3.

6. Section 3(*l*)(1) of HB 2332 (codified at K.S.A. 25-1122(*l*)(1)) provides that “[n]o person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state.” This statute will be referred to as the “Out-of-State Distributor Ban.” PTO-SF, ¶ xxiv.

7. At passage, both Sections 3(k)(2) and 3(*l*)(1) of HB 2332 were scheduled to go into effect on January 1, 2022. PTO-SF, ¶ xxv.

8. On June 2, 2021, Plaintiffs commenced this lawsuit, alleging that the enforcement of K.S.A. 25-1122(k)(2) and 25-1122(*l*)(1) violated their First and Fourteenth Amendment rights and breached the Constitution’s Dormant Commerce Clause. With regard to the First and Fourteenth Amendment claims, Plaintiffs alleged that the statutes violated their freedom of speech (Count I) and freedom of association (Count II) and were unconstitutionally overbroad (Count III). Compl. (Dkt #1) at 22-33.

9. In a Memorandum & Order on November 19, 2021 (and a *nunc pro tunc* Order on December 15, 2021), the Court preliminarily enjoined enforcement of Sections 3(k)(2) and 3(*l*)(1) of HB 2332. Dkt #s 50, 61.

10. Defendants, via a Stipulation with Plaintiffs that the Court entered on February 25, 2022, agreed to a permanent injunction against the enforcement of the Out-of-State Distributor Ban as violative of Plaintiffs’ First and Fourteenth Amendment rights. Those claims have thus been fully resolved and are no longer part of this litigation (other than Plaintiffs’ request for their attorney fees as prevailing parties). PTO-SF, ¶ xxvii. The only claims remaining in dispute pertain to the Pre-Filled Application Prohibition. PTO-SF, ¶ xxviii.

11. The Pre-Filled Application Prohibition does not cover Plaintiff VoteAmerica's conduct because VoteAmerica only mails pre-populated advance voting ballot applications to voters who have specifically requested them via its interactive website. As a result, VoteAmerica has not participated in any discovery in this case. PTO-SF, ¶ xxix.

Kansas' Voter Registration Database and the Process for Voting an Advance Ballot

12. To vote by mail in Kansas elections, a voter must complete an advance voting ballot application and return it to the county election office in the county in which the voter is registered to vote. PTO-SF, ¶ xxx.

13. Under Kansas law, an advance voting ballot application can be filed with the county between 90 days prior to the General Election and the Tuesday of the week preceding such General Election. K.S.A. 25-1122(f)(2). PTO-SF, ¶ xxxii.

14. Other than voters entitled to receive ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 *et seq.*, counties cannot transmit advance ballots to voters prior to the 20th day before the election for which an application has been received. K.S.A. 25-1123(a) and 25-1220. Thus, for all voters who properly submitted an advance voting ballot application prior to the 20th day before the election, the county election office will transmit an advance ballot to those voters on the 20th day before the election. PTO-SF, ¶ xxxiii.

15. With respect to advance voting ballot applications that are received by the county election office on or after the 20th day before the election, the county generally must process them within two business days of their receipt. K.S.A. 25-1123(a). PTO-SF, ¶ xxxiii.

16. If an advance voting ballot application is timely submitted to the county election office, an official in such office processes the application and, if the information entered onto the application (including the signature) matches the information contained in the State's voter

registration database – the Electronic Voter Information System (“ELVIS”) – the county will mail the voter an advance ballot packet. PTO-SF, ¶ xxxi.

17. If any of the required information on an advance voting ballot application does not match the information for that voter in ELVIS (e.g., name, address, driver’s license number, non-driver’s identification number, date of birth, political party in primary election, active registration status, signature, etc.), the county election office must attempt to contact the voter to obtain the correct information. Kan. Admin. Reg. 7-36-7 and 7-36-9; K.S.A. 25-1122(e). If the voter cannot be contacted, or it would be impracticable to make contact before the election, the voter will be mailed a provisional ballot. Kan. Admin. Reg. 7-36-7(f). PTO-SF, ¶ xxxiv.

18.

REDACTED

19.

REDACTED

20. Once an advance voting ballot application has been received and processed by the county election office, the fact and date of such processing is recorded in ELVIS. The office also documents in ELVIS the date on which it transmits the regular or provisional ballot to the voter. PTO-SF, ¶ xxxv.

21. County election offices also document in ELVIS whether (and when) a voter has returned an advance ballot that was transmitted to the voter. Ex. A at ¶ 23; Ex. C at 48:17-49:18.

22. ELVIS is a dynamic system that is updated in real-time, meaning that once a county election office adds, deletes, or modifies a voter registration record, the system records that change immediately. Ex. A at ¶ 10; Ex. C at 42:14-43:8.

23. A list of all registered voters in Kansas can be purchased from the Secretary of State's office for a \$200 fee. Ex. C at 114:25-116:16; Ex. D. That list comes from ELVIS and represents a snapshot in time of the State's voter file as it appears on the date that the voter registration list is generated. Ex. C at 114:25-115:7.

24. Any individual or organization similarly may obtain a list of all registered voters in Kansas who have submitted an advance voting ballot application that has been processed by a county election office (as of the date of the request). This data can be purchased (or, in some counties, obtained for free) from either the Secretary of State's Office or a county election office. Ex. C at 118:13-119:17, 121:3-124:21; Ex. B at 102:23.

25. Because ELVIS is a dynamic system, even if a third-party utilizes voter registration information obtained from ELVIS to partially pre-fill advance voting ballot applications, some information on the pre-populated application may not match the State's voter file database when a voter receives the pre-filled application if there is a lag time between the date the third-party acquires the ELVIS data and the date it mails out the pre-filled application to the voter. Ex. A at ¶ 10.

26. Among the reasons that voter information in ELVIS may not match the information on a voter's pre-filled advance voting ballot application (completed by someone other than the voter) is that the data in ELVIS may have been updated (e.g., change of name, change of address, death, or ineligibility due to criminal conviction) since the date the voter file was generated and used by a third-party to pre-fill an application (using the stale data). Ex. A at ¶ 10.

VPC's Advance Voting Ballot Application Mailings in Kansas in 2020 General Election

27. The 2020 General Election in Kansas had record turnout (1,375,125 total votes cast, a 70.9% turnout rate) and a steep increase in advance mail voting (459,229 voted by mail). This compared to 1,039,085 total votes cast in the 2018 General Election, which represented a 56.4% turnout rate with 152,267 votes cast by mail. It also compared to 1,225,667 total votes cast in the 2016 General Election, which was a 67.4% turnout rate, with 173,457 votes having been cast by mail. See <https://sos.ks.gov/elections/elections-statistics.html>. PTO-SF, ¶ xxxvi.

28. REDACTED

29. REDACTED

30. VPC received Kansas active voter registration lists from Catalist on January 31, April 10, and September 15 of 2020. PTO-SF, ¶ xxxix.

31. REDACTED

32. VPC's advance ballot application mailers contained a cover letter, a Kansas advance voting ballot application, and a pre-paid, pre-addressed envelope that voters could use to send a completed application to the appropriate county election office. PTO-SF, ¶ xxxviii. A sample of VPC's cover letter, pre-filled advance voting ballot application, and pre-addressed envelope can be found at Exhibit I.

33. Due to the unique nature of VPC's pre-filled applications, election officials were easily able to identify them. Ex. A at ¶ 14; Ex. B at 18:10-21:22;

34. The advance voting ballot applications that were partially pre-filled or otherwise provided by VPC to Kansas voters in connection with the 2020 General Election (a) used a unique all-caps font (to the extent they were partially pre-filled), (b) contained a unique message – “It's as Easy as 1-2-3” on the back of the applications, (c) contained yellow highlighting on certain parts of the application, and (d) contained a code on the bottom margin of the application. A sample is available at Ex. J.

35. VPC sent five “waves” of mailers to Kansas voters for the 2020 General Election. The dates were as follows:

- a. Wave A: data uploaded on 7/6/2020, expected in homes on 8/17/2020;
- b. Wave B: data uploaded on 7/27/2020, expected in homes on 8/26/2020;
- c. Wave C: data uploaded on 8/10/2020, expected in homes on 9/8/2020;
- d. Wave D: data uploaded on 8/24/2020, expected in homes on 9/16/202; and
- e. Wave E: data uploaded on 8/24/2020, expected in homes on 9/28/2020.

PTO-SF, ¶ xl.

36. REDACTED

Problems with Inaccurate Advance Voting Ballot Applications in 2020 General Election

37. REDACTED

REDACTED

38. REDACTED

39. REDACTED

40. REDACTED

41. Defendants' expert witness, Ken Block, analyzed Ex. L and identified numerous errors/deficiencies in the information that VPC was using to pre-populate the advance voting ballot applications sent to Kansas voters. Ex. M.

42. Because of the 4-6 week lead time between the date that VPC sent its data to its printer for pre-filling advance voting ballot applications and the date such applications arrived in voters' mailboxes, and based on the dates that VPC received updated Kansas voter files from Catalist, *at best*, VPC was using the Kansas voter file from April 10, 2020, to pre-populate the applications sent to Kansas voters in connection with the 2020 General Election. Ex. M at ¶¶ 34-35.

43. VPC did not remove from the database it used to pre-fill advance voting ballot applications any Kansas voters whose voter registrations had been cancelled prior to mailing those individuals pre-filled advance voting ballot applications during the 2020 General Election. Ex. N at ¶ 10.

44. REDACTED

45. In its mailings to Kansas voters for the 2020 General Election, VPC sent out:

REDACTED

REDACTED

46. In the time between when VPC sent its mailers to the printer in connection with its first wave of mailings and its final wave of mailings for the 2020 General Election, hundreds of additional Kansas voters had had their voter registration cancelled yet still received a mailing from VPC due to its failure to remove such no-longer-registered voters. Ex. N at ¶¶ 10-13.

47. Mr. Block identified 23 pairs of matched records in which two different voters showed the same voter registration number, indicating that VPC had sent a pre-filled application

for Voter #1 to Voter #2. These individuals were properly separated in Kansas' own voter file to which VPC (and any other member of the public) had access. Ex. M at ¶¶ 23-24; Ex. P.

48. Kansas election officials identified at least 15 voters to whom VPC sent advance voting ballot applications in connection with the 2020 General Election yet whose registration status had been cancelled in ELVIS *prior to April 10, 2020* (meaning that their names would not have appeared on a list of voters by anyone requesting the statewide voter file as of that date). Ex. O.

49. VPC's use of stale (and thus often inaccurate) voter registration data to pre-fill the advance voting ballot applications it sent to Kansas voters imposed an extra burden on county election officials, who had to identify the deficiencies submitted by voters and then communicate with voters to correct the mismatched information. Ex. M at ¶ 39.

50. The Shawnee County Election Office received a large number of advance voting ballot applications from voters that had been pre-filled by VPC and contained information that did not match the voters' information in ELVIS. The mismatched information included erroneous addresses, last names, suffixes, and/or middle initials. Ex. A at ¶¶ 11, 35. Examples can be found at Ex. Q (copies of inaccurate applications).

51. The Shawnee County Election Office also received numerous advance voting ballot applications that had been pre-filled by VPC and sent to individuals who were deceased and whose voter registration in ELVIS had been cancelled prior to the time such applications had been printed. Ex. A at ¶ 12; Examples can be found at Ex. R.

52. As a result of these inaccurately pre-filled advance voting ballot applications, the Shawnee County Election Office was "overwhelmed" with telephone calls, letters, e-mails, and in-office visits from voters who were confused, angry, and frustrated at what they had received

from VPC. Ex. A at ¶¶ 12, 37, 40, 44; Ex. S at 117:24-125:2; Mr. Howell himself spoke with hundreds of these angry, frustrated, and confused voters. Ex. S at 121:11-122:12.

53. Voters communicating with Mr. Howell regarding inaccurately pre-filled advance voting ballot applications often believed (erroneously) that the applications had been sent to them by the Shawnee County Election Office, and they expressed anger and frustration at the purported incompetency of the office. Many of these voters voiced their incredulity that the office would send an application to the wrong address or use the wrong name in pre-filling the application when they had previously communicated such changes to the election office. Ex. A at ¶¶ 38, 40-42.

54. Ford County Election Clerk Deborah Cox heard from so many confused, frustrated, and angry voters (20-30 per day) about the inaccurate and duplicate advance voting ballot applications they were receiving from VPC (via CVI) in the lead-up to the 2020 General Election that she sent an ad to three Ford County newspapers in an effort to remind voters that most pre-filled applications had come from CVI and not the county election office. Ex. T at 130:6-132:5; Ex. U at ¶ 37. The text of the ad can be found at Ex. V.

55. Ms. Cox got the idea for the ad because a similar ad had been placed in the *Beloit Call* by Mitchell County Clerk Chris Treaster. Ex. T at 130:6-17.

56. The Shawnee County Election Office sent out letters to the voters who submitted advance voting ballot applications containing information that did not match the data in ELVIS. Ex. A at 120:6-121:4. Examples of these letters can be found at Ex. W.

57. Kansas Elections Director Bryan Caskey also received many calls from county election officials who complained that their offices were receiving pre-filled advance voting ballot applications in which the information on the form did not match the data in ELVIS. Ex. C at 150:13-152:15. In response to these calls, Mr. Caskey regularly discussed the problem with county

election officials during his weekly telephone conferences with them. He also spoke personally with election officials in at least 60 of the State's 105 counties on the subject. Ex. C at 212:20-213:11, 237:11-240:5.

58. Mr. Caskey also spoke with many voters who expressed their anger, confusion, and frustration over the pre-filled advance voting ballot applications that they were receiving from third-parties such as VPC. Ex. C at 209:15-210:9, 240:6-242:7.

59. The Kansas Secretary of State's Office submitted written testimony to both the House and Senate Committees on Federal and State Affairs in March 2021 regarding the State's experience with advance voting ballot applications mailed to voters by third-parties in the 2020 General Election. Among other things, the testimony advised the Legislature that, "[l]eading up to the 2020 general election, state and county election officials were inundated with calls from confused voters who submitted an advance by mail ballot application but continued to receive unsolicited advance ballot applications from third parties. This created a substantial workload increase for local election offices who had to process thousands of duplicate forms at a time when county election officials were preparing for a high turnout, statewide election, in the middle of a pandemic." Ex. Z.

60. On average, it takes an experienced election official three to five minutes to process an accurate, non-duplicate advance voting ballot application. Ex. A at ¶ 24; Ex. U at ¶ 23.

61. If the information on a voter's advance voting ballot application does not match the information in ELVIS, or if the application is missing information, the election office will attempt to contact the voter (via telephone, U.S. mail, and/or e-mail) to determine the reason for the discrepancy or to obtain the missing information. This contact can require multiple attempts. The

office generally makes at least three attempts to reach the voter, assuming it is practicable. Ex. A at ¶ 25; Ex. U at ¶ 24.

62. If the county election office is able to reach the voter, it attempts to work with him/her to correct any discrepancies or omissions. It may be necessary for the voter to submit a new advance voting ballot application or registration form. The cumulative time to contact the voter and process the application in these situations averages around 15 minutes of staff time. Ex. A at ¶ 26; Ex. U at ¶ 25.

63. If the election office is unable to reach the voter or it would be impracticable to do so, the office will prepare a provisional ballot, assuming it is able to discern that the applicant is a registered voter. The cumulative time to complete this whole process regularly takes thirty minutes or more of staff time. Ex. A at ¶ 26; Ex. U at ¶ 26.

64. If the election office must send a provisional ballot to a voter after being unable to reach him/her in order to address defects on his/her application, there is a greater likelihood that the voter will not correct those defects prior to the county canvassing boards and thus will either not return the provisional ballot or will not have the ballot counted. Ex. A at ¶ 28.

65. VPC provided in discovery a set of FAQs intended to be used as canned responses for a call center to respond to individuals who contacted VPC about problems with the advance voting ballot applications that such individuals received from VPC. Ex. X. Two of the responses stated as follows:

I got a form that has someone else's information on it- why did that happen?

Thank you for reaching out. VPC is aware of this issue and is actively working to make sure it doesn't happen again. This issue was limited in scope and only affected a very small percentage of individuals. In the meantime, we are happy to send you a new vote-by-mail application with the correct information, or I can tell you the link you can use to print it from your state's SoS website and then fill it out and mail back in the envelope we sent you.

How did it happen? How are you making sure it won't happen again?

The mistake was due to a printer error and they have taken responsibility for their mistake and have already added additional quality control measures, like installing an additional camera to monitor printing, and retraining printer staff, to prevent this type of situation in the future.

66. VPC received complaints from election officials in states other than Kansas about the inaccurate absentee ballot applications that VPC was sending to voters in those states during the 2020 election cycle. Ex. Y (e-mails between VPC outside counsel Jennifer Carrier and other state election officials). The written/e-mail complaints that VPC produced in discovery came from officials in Virginia (VPC000364-000366; 000376-000383; 000388-000392; 000397, 000406); Iowa (VPC000407-000408; 000429-000431; 000434-435); Wisconsin (VPC000436-000439); and North Carolina (VPC000485-000487; 000496-000497).

Duplicate Advance Voting Ballot Applications in 2020 General Election

67. The Kansas voters whom VPC targeted with mailings in the 2020 General Election received between one and five advance voting ballot applications from VPC. Ex. L; Ex. G at 206:9-207:14, 209:3-210:22.

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71. In the 2020 General Election, the Shawnee County Election Office received and processed 23,156 advance voting ballot applications. That is, it sent regular or provisional advance ballots to 23,156 voters after having received advance voting ballot applications from these voters. In addition, it received 4,217 duplicate applications (i.e., applications from voters who had already submitted an application and to whom the office had already mailed a regular or provisional advance ballot). More than 15.4% of the total advance voting ballot applications that the office received, therefore, were duplicates. Ex. A at ¶ 15.

72. Of the 4,217 duplicate applications the Shawnee County Election Office received for the 2020 General Election: 3,676 were sets of two (i.e., voters sent in two applications); 407 were sets of three (i.e., voters sent in three applications); 99 were sets of four; 27 were sets of five; 6 were sets of six; 1 was a set of seven, and 1 was a set of nine. Ex. A ¶ 18.

73. The Shawnee County Election Office received very few (no more than a dozen) duplicate applications in connection with either the 2016 General Election (during which it received 7,394 total applications) or the 2018 General Election (during which it received 9,272 total applications). Ex. A at ¶ 17.

74. Many voters told county election officials that they were confused by the pre-filled advance voting ballot applications that they had received during the 2020 General Election and believed (erroneously) that the applications had originated from the election office. These voters told election officials that they thought they were required to complete and mail back the pre-filled applications to the county election office even if they had already submitted another application. Ex. A at ¶ 41; Ex. S at 269:14-270:1; Ex. U at ¶ 19.

75. In the 2020 General Election, the Ford County Election Office received and processed 3,040 advance voting ballot applications. That is, it sent regular or provisional advance ballots to 3,040 voters after having received advance voting ballot applications from these voters. In addition, it received 274 duplicate applications (i.e., applications from voters who had already submitted an application and to whom the office had already mailed a regular or provisional advance ballot). Nearly 9% of the advance voting ballot applications that the office received, therefore, were duplicates. Ex. U at ¶ 16.

76. The Ford County Election Office received only a handful (no more than five) duplicate applications in connection with either the 2016 General Election or the 2018 General Election. Ex. U at ¶ 18.

77. Although Kansas election officials did not attempt to quantify how many duplicate advance voting ballot applications in the 2020 General Election involved VPC-pre-populated applications, the majority of duplicate applications are believed to have been pre-filled by VPC. Ex. A at ¶ 16; Ex. U at ¶ 17.

78. Kansas Elections Director Bryan Caskey also had “dozens if not hundreds of conversations” with county election officials regarding the “flood” of duplicate advance voting ballot applications that were being submitted by voters to such offices. Ex. C at 150:13-19.

Impact of Duplicate Advance Voting Ballot Applications on Election Administration

79. When a voter submits duplicate advance voting ballot applications to a county election office in connection with a single election, the office must conduct the same review and verifications of each application upon receipt. One step in this process is to determine if the voter had previously submitted another application and was previously sent a regular or provisional advance ballot. If there are any differences between the original application and the new/duplicate application (e.g., different name or mailing address), the office will attempt to contact the voter to determine the reason for the discrepancy. Ex. A at ¶ 29; Ex. U at ¶ 27.

80. After receiving a duplicate application, the county election office cannot assume that the initially submitted application was correct. Depending on the situation, the office may need to send a provisional ballot to the voter. For this reason, the review of a duplicate application usually takes more staff time than the review of the initially submitted application. If the office does not have to contact the voter, the review of the duplicate application generally takes 7-10 minutes. If the office does have to contact the voter, the review of the duplicate application can take from 15-30 minutes (and occasionally more) of total staff time. Ex. A at ¶ 30; Ex. U at ¶ 28.

81. The Shawnee County Election Office typically assigns 6-7 staff members to handle the processing of advance voting ballot applications. Nearly double that number had to be assigned to the task for the 2020 General Election. The most significant time burden and strain on staff came from having to contact thousands of voters who had submitted inaccurate or duplicate applications. At one point, Mr. Howell had to assign almost 30 staff members just to review and process applications in order to ensure that the office could process applications within the 2-day deadline imposed by State law. Ex. A at ¶ 33.

82. Prior to Election Day in November 2020, the Shawnee County Election Office responded to many confused voters who had returned pre-filled advance voting ballot applications but who insisted that they did not actually intend to request and vote an advance ballot. The voters told election officials that they thought they were required to return the application. Election officials expended substantial time and resources responding to those voters. Ex. A at ¶ 47.

83. Approximately 718 voters in the 2020 General Election voted on Election Day in Shawnee County (usually by provisional ballot) after having submitted an advance voting ballot application and having received an advance ballot. In the 2016 General Election, just 141 voters voted on Election Day (usually by provisional ballot) after having mailed in an advance voting ballot application and having received an advance ballot. Ex. A at ¶ 47.

Alleged Effectiveness of Pre-Filling VPC's Advance Voting Ballot Applications

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86. REDACTED

87. REDACTED

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STANDARD OF REVIEW

Summary judgment under Rule 56(c) is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with any 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. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A factual dispute is “material” only if it “might affect the outcome of the suit under the governing law.” *Id.* at 248. A “genuine” factual dispute requires more than a mere scintilla of evidence in support of a party's position. *Id.* at 252.

The movant bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met that burden, the burden then shifts to the non-moving party to show that genuine issues remain for trial as to those dispositive matters for which the non-moving party carries the burden of proof. *SEC v. GenAudio, Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts supported by competent evidence. *Id.*; *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010).

Although the Court views the record in the light most favorable to the non-moving party, *Duda v. Elder*, 7 F.4th 899, 905 (10th Cir. 2021), it must grant summary judgment if the non-movant's evidence is merely colorable or is not significantly probative. *Liberty Lobby*, 477 U.S. at 250-51. Nor can the non-moving party rely on ignorance of facts, speculation or suspicion, hoping that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Only by showing a sufficient factual disagreement over an essential element to its claim can the non-movant survive a motion for summary judgment. *GenAudio, Inc.*, 32 F.4th at 920.

ARGUMENT

As narrowed, this case no longer involves activity protected by the First Amendment. The prohibited conduct that VPC challenges – the pre-population of third-parties’ advance voting ballot applications – is simply not expressive in nature. Kansas’ Pre-Filled Application Prohibition must be reviewed, therefore, under the most deferential rational basis standard. But even if the First Amendment is triggered, there is emphatically no core political speech involved, and the requisite balancing of interests tilts heavily (if not entirely) in the State’s direction.

I. Sending a Voter a Partially Completed Advance Mail Ballot Application is *Conduct*, Not *Speech*

VPC’s First Amendment challenges to the Pre-Filled Application Prohibition must fail because the statute restricts neither speech nor association. The only thing being limited is *non-expressive conduct*. The First Amendment is thus not implicated here. “[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies,” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and VPC falls far short of this mark.

A. The Partially Completed Advance Mail Ballot Applications that VPC Sends to Voters are Not Inherently Expressive

While the First Amendment safeguards both speech and certain types of conduct, “only conduct that is ‘inherently expressive’ is entitled to First Amendment protection.” *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (“FAIR”)). In assessing whether specific conduct has “sufficient ‘communicative elements’ to be embraced by the First Amendment, courts look to whether the conduct shows an ‘intent to convey a particular message’ and whether ‘the likelihood

was great that the message would be understood by those who viewed it.” *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

VPC contends that by personalizing the advance voting ballot applications it sends to potential Kansas voters it engages in core political speech aimed at informing and assisting voters in the electoral process. More specifically, VPC claims that, “[t]hrough its personalized mailers, [it] engages in persuasive speech meant to encourage voters to vote by mail; persuade them that doing so is easy, safe, secure, and accessible; educate them about their right to vote by mail; and assist them in exercising that right.” Ex. AA. Pre-filling these applications allegedly “expresses [its] position on the important and controversial political issue of voting by mail.” *Id.*

But the conduct at issue – pre-populating an advance voting ballot application with the name and address of the intended recipient and mailing it to the voter (who did not request it) – is entirely separate from the messages VPC seeks to convey about mail voting. The messages that VPC communicates to voters about the vote-by-mail process and the alleged utility thereof are delivered through the contents of *a cover letter that VPC sends with the application, not through the application itself*. That cover letter, and the message contained therein, a copy of which is found at Ex. I, is wholly unaffected by the Pre-Filled Application Prohibition. The pre-filling of the application itself, on the other hand, embodies *conduct*, not expression.

Nothing in the challenged statute impedes VPC from engaging in any of the messaging that it imparts through its cover letter. VPC is in no way prevented from publishing or mailing content that educates Kansans on how to vote by mail or the purported benefits of doing so. Nor is VPC restricted from advocating in favor of voting an absentee ballot through the mail. SOF ¶ 87. In the wake of Kansas’ agreement to a permanent injunction against the enforcement of K.S.A. 25-1122(I)(1), *see* Dkt #73, VPC is not even prohibited from including a blank advance mail ballot

application in its mailings. For that matter, neither VPC nor any other entity is precluded from assisting a voter in completing such an application or in mailing a partially completed application to a voter who has affirmatively requested one. *Id.* at 2-3.² In short, every avenue of expressive conduct remains available.

The only thing VPC cannot do is partially complete the advance voting ballot application it sends to voters who have not requested one from VPC (as is true of all the voters to whom it sends such pre-filled applications). But there is no conceivable “speech” on that application. It is simply a state-created form. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (recognizing that while a person or party may express beliefs or ideas through a ballot, “[b]allots serve primarily to elect candidates, not as forums for political expression.”). There is nothing that can be filled out on the form other than a voter’s county of residence, address, date of birth, phone number, date of application, and signature, all of which are unique to the individual voter. VPC has no discretion regarding the information entered into those fields if it wants the form to be accepted by election officials. There is no space on the face of the form for any sort of messaging, nor would any messaging be permitted on that part of the official application.

Moreover, even if sending a *blank* advance voting ballot application to a voter somehow was endowed with sufficient communicative elements to trigger the First Amendment – conduct which is not prohibited by Kansas law – it does not follow that a separate message would be conveyed by *pre-filling* the application by adding the voter’s name and address to the lines on the official state form. There is nothing “inherently expressive” about an individual’s name and

² As noted in the Stipulation, “where a registered voter asks a person to mail or cause to be mailed an advance voting ballot application to the registered voter, and that person does so, that person does not “solicit[] by mail a registered voter to file an application for an advance voting ballot” as set forth in section 3(k)(1) of HB 2332 [K.S.A. 25-1122(k)(1)].” Dkt #73 at 2-3. This is why Plaintiff VoteAmerica’s claims are no longer part of the case.

address in the context of an official ballot application, especially when the application is being completed by someone other than the voter. Furthermore, Plaintiffs have produced no evidence that any recipient of such a personalized application discerns any particular message from the pre-filling of their personal information by a third party. SOF ¶¶ 84-85.

The Supreme Court in *FAIR* expressly “rejected the view that conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” 547 U.S. at 65-66 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)). Instead, the Court has “extended First Amendment protection only to conduct that is inherently expressive.” *Id.* at 66. And where the expressive component of an individual’s “actions is not created by the conduct itself but by the speech that accompanies it,” that “explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under” the First Amendment. *Id.* Were the rule otherwise, “a regulated party could always transform conduct into ‘speech’ simply by talking about it.” *Id.*

VPC construes all of the materials contained in its mailing to voters – i.e., the cover letter, the transmittal envelope, the return envelope, and the pre-filled advance voting ballot application – as a message in whole. The First Amendment, however, “does not protect any conduct that at some point might have a *connection* to speech.” *Sickles v. Campbell Cnty., Ky.*, 501 F.3d 726, 734 (6th Cir. 2007) (emphasis added). The application must be disaggregated from the cover letter. A contrary ruling would not only depart from the Supreme Court’s directive in *FAIR*, but it would also allow a plaintiff to claim to have engaged in speech at the highest level of generality and then seek to sweep in virtually all conduct allegedly related to that speech as constitutionally protected. The First Amendment is not nearly so broad. *See Holder v. Humanitarian Law Project*, 561 U.S.

1, 25 (2010) (speech cannot be defined at the highest “level of generality” in assessing the reasonableness of government regulations on conduct).

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Even if true – and VPC produced no competent evidence to support this argument during discovery – the argument would be irrelevant. As the Fifth Circuit noted in rejecting a similar argument in the context of voter registration forms, “[plaintiffs] essentially seek a First Amendment right not just to speak out or engage in ‘expressive conduct’ but also to succeed in their ultimate goal regardless of any other consideration.” *Steen*, 732 F.3d at 391 (quotation omitted). “Only two possibilities flow from this reasoning. . . . [Either] throwing voter registration forms in the trash would have to be constitutionally protected expressive conduct,” or “supporting voter registration is the canvasser’s speech, while actually completing the forms is the voter’s speech, and collecting and delivering the forms are merely conduct.” *Id.* at 391-92. In explaining why this theory cannot be squared with First Amendment case law, the Fifth Circuit observed:

One clear principle that can be derived from the long line of election-related speech cases is that the degree of protection afforded under the First Amendment does not vary in accordance with anyone’s regard for the content of the message at issue. Thus, the logic of the Appellees extends to parties who wish to see fewer citizens vote even if it is true that Appellees’ ultimate goal is to have more citizens vote. The prevailing cases also do not extend First Amendment protection to an “anything goes” philosophy that seeks to insulate any conduct that may relate in any way to speech or expression. Here, Appellees offer a novel interpretation of the First Amendment. They contend that expressive activity, the promotion of voter registration in this case, is contingent upon the “success” factor of *actually registering voters*. While the First Amendment protects the right to express political views, nowhere does it guarantee the right to ensure those views come to fruition. To maintain otherwise would mean that a group seeking to discourage voting and voter registration would have the “right” to achieve its expressive goals by throwing the registration cards away.

Id. at 392 n.5 (emphasis in original) (internal citation omitted). VPC’s novel theory would render virtually every feature of a state’s electoral regulatory scheme vulnerable to constitutional attack just because such law might stand in the way of an advocacy organization’s effort to maximize the success of its operations.

Unsurprisingly, the overwhelming majority of courts to examine the issue have concluded that the distribution of advance voting ballot applications is *not* protected speech. In fact, these same Plaintiffs challenged a virtually indistinguishable Georgia statute, adopted just months before the Kansas provision, on the same grounds asserted here. The court rejected those claims, holding that pre-filled absentee ballot application restrictions do not entail expressive conduct subject to First Amendment protection. *See VoteAmerica v. Raffensperger*, __ F. Supp.3d __, 2022 WL 2357395, at *7-9 (N.D. Ga. June 30, 2022). The court reasoned that “distributing forms prefilled with a prospective voter’s own personal information” does “not require the type of interactive debate and advocacy that the Supreme Court constituted core political speech in *Meyer* [*v. Grant*, 486 U.S. 414 (1988)].” *Raffensperger*, 2022 WL 2357395, at *7. The court further added:

[C]ombining speech (in the cover information) with the conduct of sending an application form, as Plaintiffs do here, is not sufficient to transform the act of sending the application forms into protected speech. Plaintiffs’ pro-absentee voting message is not necessarily intrinsic to the act of sending prospective voters an application form. . . . As in [*FAIR*], the expressive component of sending application packages in this case is not created by the conduct itself but by the included cover information encouraging the recipient to vote. The necessity of the cover message is ‘strong evidence’ that the conduct of sending an application form is not so inherently expressive as to qualify for First Amendment protection.

Id. at *9; *accord DCCC v. Ziriox*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020) (“[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do no communicate any particular message. Those actions are not expressive. . . .”); *League of Women Voters v. Browning*, 575 F. Supp.2d 1298, 1319 (S.D. Fla. 2008) (same).

The bottom line is that pre-filling advance voting ballot applications is *non-expressive conduct* that the State is free to regulate as part of a legitimate, non-discriminatory election process. As such, the Pre-Filled Application Prohibition is subject only to rational basis scrutiny. *Steen*, 732 F.3d at 392; *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (government classification that involves neither a “fundamental right” nor a “suspect” classification is constitutionally valid if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

B. The Cases that the District Court Cited in its Preliminary Injunction / Motion to Dismiss Order are Inapposite.

Defendants acknowledge that this Court reached a contrary conclusion in its order denying our motion to dismiss and granting Plaintiffs a preliminary injunction. However, “the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981). Nor are they binding at the summary judgment phase. *Navajo Health Found.-Sage Mem. Hosp., Inc. v. Burwell*, 256 F. Supp.3d 1186, 1224 (D.N.M. 2015). In any event, the Court’s analysis largely focused on K.S.A. 25-1122(l)(1)’s Out-of-State Distributor Ban, which is no longer at issue in this case. Analyzed separately, the notion that the act of a third-party in writing someone else’s name on an official state form is constitutionally-protected expressive conduct would stretch the First Amendment well beyond its limits. The three non-binding cases that the Court cited in support of its reasoning (Dkt #61 at 12) – to the extent they were even correctly decided – do not justify a similar conclusion in the far narrower context now presented by the Pre-Filled Application Prohibition.

In *League of Women Voters of Fla. v. Cobb*, 447 F. Supp.2d 1314 (S.D. Fla. 2006), the court addressed a First Amendment challenge to a statute imposing deadlines for the submission of voter registration applications and fines for late submissions by any organization other than a

political party. *Id.* at 1315. The court held that these laws implicated plaintiffs’ free speech and association rights because the “collection and submission of voter registration drives is intertwined with speech and association.” *Id.* at 1333-34. This decision was largely an outlier and runs against the overwhelming case law – including the only two circuits to have squarely addressed the issue – that sending or collecting forms is *not* expressive conduct. *See New Ga. Project v. Raffensperger*, 484 F. Supp.3d 1265, 1300-01 (N.D. Ga. 2020) (collecting cases, including *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018), *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 372 (9th Cir. 2016), and *Steen*, 732 F.3d at 391)), *aff’d* 976 F.3d 1278 (11th Cir. 2020). Moreover, as noted below, voter registration forms are fundamentally distinct from absentee ballot applications. In any event, in the wake of the parties’ Stipulation, neither VPC nor any other entity is restricted under Kansas law from sending advance mail ballot applications to voters, nor is VPC subject to any rules or regulations that are not equally applicable to all other private parties and organizations.

Similarly, in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp.3d 159 (M.D.N.C. 2020), plaintiffs mounted a First Amendment challenge to a North Carolina statute that restricted, *inter alia*, third-parties from assisting voters in completing and returning absentee ballots. *Id.* at 173. Conceding that most other judges had reached a different result, the court in *Democracy N.C.* nevertheless concluded that “assisting voters in filling out a request form for an absentee ballot is expressive conduct which implicates the First Amendment.” 476 F. Supp.3d at 224.³ But once

³ Notably, although the court determined at the preliminary injunction phase that assisting voters in filling out absentee ballot request forms implicates the First Amendment, it went on to hold that *Anderson-Burdick* balancing – not strict scrutiny – applies to such laws and that “the burdens on Plaintiffs’ First Amendments speech and association rights are justified by the State’s interest in preventing fraud.” *Democracy N.C.*, 476 F. Supp.3d at 224. Moreover, in ruling on defendants’ motion to dismiss, the court expressed misgivings with its prior ruling and explicitly noted that it was *not* ruling “that assisting voters in filling out a request form for an absentee ballot is expressive conduct which implicates the First Amendment as a matter of law.” ___ F. Supp.3d ___, 2022 WL 715973, at *6-8 (M.D.N.C. Mar. 10, 2022). The court opted instead to simply *assume* the First Amendment applied at the motion to dismiss stage and then address the matter definitively at summary judgment or trial. *Id.* at *8.

again, nothing in Kansas law prevents a third-party from assisting a voter in completing an advance mail ballot application. To the contrary, the parties' Stipulation makes clear that if a voter requests such assistance, the statute is not violated. Dkt #73 at 2-3. In fact, *in-person* interactions – whether involving an advance mail ballot application or otherwise – between third-parties and voters are wholly unregulated by the State's Pre-Filled Application Prohibition. Only the *unsolicited* (i.e., unrequested) pre-population of advance ballot applications sent to voters through the mail by third-party organizations is prohibited by the statute.

The final case cited by this Court was *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020). There, the plaintiffs sought an injunction against Michigan's absentee ballot law on the grounds that it contravened their First Amendment speech and association rights to assist voters with absentee ballot applications. In particular, plaintiffs alleged that the statute's requirement that, other than family or household members, only voters registered in Michigan can assist voters in submitting absentee ballot applications violates the First Amendment because it prohibits the plaintiffs "from engaging in core political expression." *Priorities USA v. Nessel*, 487 F. Supp.3d 599, 609 (E.D. Mich. 2020). Plaintiffs further claimed that the law's restriction on non-family or household members from soliciting a voter to return an absentee ballot application also violated the First Amendment. *Id.* Although the court opted for the minority view and held that Michigan's absentee ballot prohibitions regulated expressive conduct and was subject to heightened scrutiny, *id.* at 609-612, it ultimately denied plaintiffs injunctive relief, holding that "the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are sufficiently

related to the limitations and burdens set forth in [the statute] . . . that plaintiffs are unlikely to succe[ed] on their First Amendment challenge to the Absentee Ballot Law.” *Id.* at 615.⁴

Contrary to the position of the Plaintiffs (and, with respect, of the Court) at the preliminary injunction stage, this case is also highly similar to *Lichtenstein v. Hargett*, 489 F. Supp.3d 742 (M.D. Tenn. 2020), which involved a constitutional challenge to a Tennessee statute prohibiting anyone other than an election official from giving an absentee ballot application to another person. The district court there concluded that the restriction on distribution of absentee voter applications was not a ban on core political speech at all, *id.* at 773, as it did “not restrict anyone from interacting with anyone about anything.” *Id.* at 770. Of course, the avenues of communication available to VPC here are far broader than those available in *Lichtenstein*, which flatly prohibited the sending of *any* absentee ballot applications to voters. Kansas’ Pre-Filled Application Prohibition merely restricts the *unsolicited* mailing of pre-populated applications. This Court sought to distinguish *Lichtenstein* on the grounds that VPC’s “application packets include speech that communicates a pro-mail voting message.” Dkt #61 at 12. But there is no basis for this factual distinction. Indeed, as the *Lichtenstein* district court subsequently made clear in its order dismissing the case, the plaintiffs there – just like VPC – included a blank absentee ballot application with the other “voter engagement materials” they sent to voters. *Lichtenstein v. Hargett*, ___ F. Supp.3d ___, 2021 WL 5826246, at *6 (M.D. Tenn. Dec. 7, 2021).

⁴ Interestingly, the plaintiffs did not appeal the denial of their motion for a preliminary injunction, but the defendants did appeal a separate part of the ruling in which the district court *granted* a preliminary injunction on plaintiffs’ claim that a state law prohibiting third-parties from paying for the transportation of voters to the polls unless the voter is physically unable to walk. The Sixth Circuit promptly reversed that holding. *See Priorities USA v. Nessel*, 978 F.3d 976, 984 (6th Cir. 2020) (noting that “a statute can be a prophylactic rule intended to prevent the potential for fraud where enforcement is otherwise difficult” and that Michigan’s law was properly “intended to prevent fraud and undue influence.”).

C. The Pre-Filled Application Prohibition is Rationally Related to the State's Legitimate Interests.

Because the First Amendment is not implicated, the Pre-Filled Application Prohibition is properly evaluated under rational basis review. *See Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210-13 (10th Cir. 2002) (where statute neither infringes on a federal fundamental right nor affects a suspect classification, it is subject to rational basis scrutiny). Under this extremely liberal standard, the statute “need only be rationally related to a legitimate government purpose.” *Id.* at 1210. The “statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (internal citation and alterations omitted). “A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification” because a “legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 320. Nor must the statute have been adopted with “mathematical nicety.” *Id.* at 321. Rather, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Id.* The Pre-Filled Application Prohibition easily satisfies this standard.

The State’s regulatory interests in the Pre-Filled Application Prohibition are the avoidance of voter confusion, facilitation of orderly and efficient election administration, enhancement of public confidence in the integrity of the electoral process, and deterrence of voter fraud. All are well-recognized and indisputably legitimate interests in the context of election administration. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021) (combatting fraud is “strong and entirely legitimate” reason for enacting voting laws); *Doe v. Reed*, 561 U.S. 186, 197-98 (2010) (“The State’s interest in preserving the integrity of the electoral process is undoubtedly

important . . . [and it] extends more generally to promoting transparency and accountability in the electoral process.”); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (State has “compelling interest in protecting voters from confusion and undue influence.”); *Marchioro v. Chaney*, 442 U.S. 191, 196 (1979) (“The State’s interest in ensuring that [its electoral] process is conducted in a fair and orderly fashion is unquestionably legitimate.”); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *DSCC v. Pate*, 950 N.W.2d 1, 5-7 (Iowa 2020) (rejecting constitutional challenge to statute that prohibited third-parties from pre-populating voters’ absentee ballots).

VPC seems to think it is doing a favor for Kansas voters and election officials alike by pre-populating advance voting ballot applications with information that does not necessarily match the data in ELVIS. The confusion, frustration, anger, and chaos in the 2020 General Election give lie to that suggestion. As Ms. Cox and Messrs. Howell and Caskey described from Kansas’ 2020 experience, and as VPC’s emails from Virginia, Iowa, Wisconsin, and North Carolina confirmed elsewhere, VPC’s actions precipitated significant consternation among voters who received both inaccurate and duplicate advance voting ballot applications, adversely impacted election officials’ ability to administer the election in an efficient manner, contributed to a decline in the public’s confidence in the fairness of election procedures, and tested the limits of procedural safeguards. SOF ¶¶ 49-83. The Pre-Filled Application Prohibition is clearly related to each of the aforementioned legitimate state interests. There can be no serious question, therefore, that Kansas had a rational basis for adopting this legislation.

II. Even if the First Amendment is Implicated, the Pre-Filled Application Prohibition is Viewpoint- and Content-Neutral and Not Subject to Heightened Scrutiny

A. *The Pre-Filled Application Prohibition Does Not Target Core Political Speech.*

If, notwithstanding the preceding analysis, the Court still concludes that the Pre-Filled Application Prohibition targets expressive conduct, there is certainly no “core political speech” at issue and thus no basis for imposing “exacting” or “strict” scrutiny in the claims challenging this statute.

In promulgating a heightened scrutiny standard, VPC relies upon *Meyer*, 486 U.S. at 414. Parroting language from that opinion, VPC claims that the Pre-Filled Application Prohibition restricts its core political speech by proscribing its “most effective method available – distribution of pre-filled advance mail ballot applications to potential Kansas voters – to communicate its message that voters should participate in the democratic process and, in particular, should do so through advance mail ballots.” Ex. BB. VPC further avers that the law represents a content-based restriction on its First Amendment rights, apparently theorizing that the statute’s “limitations apply to particular speech because of the topic discussed and it defines the category of covered communications by their content.” Dkt #1 at ¶ 90. For example, VPC suggests, “[t]he prohibition singles out personalized advance voting applications but has no such prohibition on other similar forms of speech,” such as “personalizing applications for . . . voter registration activities.” *Id.*

There are numerous flaws in VPC’s argument. First, VPC produced no evidence in support of its theories regarding (i) the messages that voters understand from its pre-filled advance voting ballot applications or (ii) the effectiveness of pre-filling those applications. REDACTED

Second, any restrictions imposed by the Pre-Filled Application Prohibition are viewpoint- and content-neutral. The Supreme Court recently clarified its jurisprudence as to what constitutes a “content-based” regulation of speech. *See City of Austin v. Reagan Nat’l Advert. of Austin*, 142 S. Ct. 1464 (2022). That case involved a regulation of signage, with different rules applying to signs located on the premises of the place being advertised versus signs located offsite. The Court first reiterated that a “regulation of speech is facially content based under the First Amendment if it ‘target[s] speech based on its communicative content’ – that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’” *Id.* at 1471 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). But the Court then criticized the overly broad interpretation that many lower courts have ascribed to *Reed*. The Court explained that if the government’s regulatory distinctions “require[] an examination of speech only in service of drawing neutral” lines, then the regulation “is agnostic as to content.” *City of Austin*, 142 S. Ct. at 1471. In other words, the mere fact that one must read something to determine the applicability of a regulation does *not* render it content-based. *Id.* To the contrary, “absent a content-based purpose or justification,” the challenged law will be deemed content neutral and strict scrutiny will not be warranted. *Id.*

Just as was true of the signs in *City of Austin*, the Pre-Filled Application Prohibition is agnostic as to content. *Nothing* in the law precludes VPC from communicating any information or viewpoint whatsoever about advance voting, voting by mail, or any other topic. VPC concedes this fact.

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Like the signs in *City of Austin*, pre-filling advance ballot applications also expresses no “idea or message.” *See id.* at 1474 (rejecting “view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.”). The applications at issue here, which are simply official state forms with no room for any extraneous communications, are designed solely to facilitate voters’ ability to procure advance ballots, not to spread political messages of any sort. Given the Supreme Court’s clear statement that “[b]allots serve primarily to elect candidates, not as forums for political expression,” *Timmons*, 520 U.S. at 363, there is no possible basis for suggesting that pre-filling a ballot *application* can serve a communicative purpose.

As for VPC’s argument that the Pre-Filled Application Prohibition represents a content-based restriction because the State does not likewise limit the pre-filling of voter registration forms, this overlooks critical distinctions between the two in their timing, effect, operation, and impact. The submission of a voter registration application is several steps removed from the act of casting a ballot. Initial voter registration applicants are also new to the State’s electoral infrastructure, with no immediately accessible election database in place to adjudge the accuracy of all the data in the submission. By contrast, voters seeking an advance voting ballot application are already registered to vote and have all their pertinent data in the State’s voter file. The application, in turn, must precisely match the State’s voter file data before an advance ballot will be issued. SOF ¶ 18. Moreover, advance voting ballot applications are much more directly connected to the act of voting. The risks of voter confusion and voter fraud are thus heightened, as is – most importantly – the potentially adverse impact on the efficiency and effectiveness of the election administration process. The differential treatment of the two has nothing at all to do with *content*; it is simply a

byproduct of the often dissimilar issues and potential problems raised in these two distinct parts of the electoral system.

The Supreme Court rejected a similar argument in *Burson*, which involved a constitutional challenge to a Tennessee statute prohibiting the solicitation of votes and the display of campaign materials within 100 feet of a polling place. Casting aside the plaintiff's claim that the statute was an unlawful content-based restriction on her free speech rights because it did not *also* limit other types of speech such as charitable and commercial solicitation or exit polling within that 100-foot zone, the Court held that "the failure to regulate all speech" does not render a statute "fatally underinclusive." 504 U.S. at 207. Rather, the Court explained, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Id.* Any other ruling would bring states to a standstill.

VPC's legal theory improperly conflates the speech issues at play (and the accompanying jurisprudence) in the context of referendum petitions – as in both *Meyer* and *Buckley v. American Constitutional Law Foundation, Inc.*, 552 U.S. 182 (1999) – with the *absence* of such issues in the absentee ballot application process. When it comes to a referendum, an "individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'" *Doe*, 561 U.S. at 195 (citing *Meyer*, 486 U.S. at 421). "In either case, the expression of a political view implicates a First Amendment right." *Id.* That is why restrictions on who can interact with the public in procuring referendum signatures are seen as having "specifically regulated the process of advocacy itself, dictating who [can] speak (only unpaid circulators and registered voters) or how to go about speaking (with name badges and subsequent detailed reports)," thereby "reducing the total

quantum of speech, the number of voices who will convey [the plaintiffs'] message and the hours they can speak, and . . . the size of the audience they can reach.” *Steen*, 732 F.3d 390 (quoting *Meyer*, 486 U.S. at 422-23).

By contrast, Kansas’ Pre-Filled Application Prohibition does not restrict anyone from communicating with anyone else about anything. It does not even limit a third-party from mailing a blank advance voting ballot application to another voter. Nor does it limit a third-party from providing a pre-populated application to a voter who has specifically requested it. The only thing being constrained is the mailing of an unsolicited, pre-filled application. Under no reasonable interpretation can such a *de minimis* regulation be deemed to be a limitation on core political speech such that it warrants the kind of sanctified constitutional protection and exacting scrutiny that VPC demands.

Even if the Court finds that prohibiting the mailing of unsolicited, pre-filled advance ballot applications entails expressive conduct, the State would *still* be entitled to deference in the review of such law. As the Supreme Court explained in *Doe*, a case challenging the compelled disclosure of signatory information on referendum petitions, which is indisputably expressive conduct, the electoral context is highly relevant to the nature of its First Amendment review. 561 U.S. at 195. The Court noted: “We allow States significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude.” *Id.* at 195-96 (citation omitted); *see also id.* at 212-13 (Sotomayor, J., concurring) (“States enjoy considerable leeway to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access . . . [E]ach of these structural decisions inevitably affects – at least to some degree – the individual’s right to speak about political issues and to associate with others for political ends. ...

It is by no means necessary for a State to prove that such reasonable, nondiscriminatory restrictions are narrowly tailored to its interests.”); *cf. Burson*, 504 U.S. at 206-08 (rejecting First Amendment overbreadth challenge to a statute establishing a 100-foot buffer zone outside polling places on Election Day within which *no one* could display or distribute *any* campaign materials or solicit votes on the grounds that the restraint was a valid prophylactic measure designed to prevent difficult-to-detect voter intimidation and election fraud).

B. Assuming the First Amendment is Implicated, the Proper Standard for Evaluating VPC's Claims is the Anderson-Burdick Test.

Assuming the Court even finds that the First Amendment is implicated, the proper standard of review is the *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). When a State invokes its constitutional authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will “inevitably affect – at least to some degree – the individual’s right to vote and his right to associate with others for political ends.” *Anderson*, 460 U.S. at 788. These burdens “must necessarily accommodate a State’s legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party*, 892 F.3d at 1077. That is why a State’s “important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions” on election procedures. *Anderson*, 460 U.S. at 789.

There is “no ‘litmus-paper’ test that will separate valid from invalid restrictions.” *Id.* The Court instead applies a “more flexible standard.” *Burdick*, 504 U.S. at 434. Under this flexible approach, referred to as *Anderson/Burdick* balancing, a “court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into

consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Cox*, 892 F.3d at 1077 (quoting *Burdick*, 504 U.S. at 434)); *Fish v. Schwab*, 957 F.3d 1105, 1121-22 (10th Cir. 2020).

Although highly flexible, this balancing test does contain certain core guidelines. If a state imposes “severe restrictions on a plaintiff’s constitutional rights . . . , its regulations survive only if ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. 434. But “minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434). “Regulations falling somewhere in between – i.e., regulations that impose a more-than-minimal but less-than-severe burden – require a ‘flexible’ analysis, weighing the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.” *Id.* (quotation omitted). Lurking in the background at all times, however, is the fundamental principle that “states have wide latitude in determining how to manage their election procedures.” *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008).

As described above, the burden on Plaintiffs’ advocacy work is minimal. Yet the State’s interests in adopting the Pre-Filled Application Prohibition are substantial, outweighing any minor inconveniences that Plaintiffs may experience, particularly when subjected (as they must be) to a highly deferential rational basis review. *See Burdick*, 504 U.S. at 434.

The proliferation of pre-filled advance voting ballot applications in the 2020 General Election triggered substantial confusion, anger, and frustration among the electorate, diminished public confidence in the electoral process, had a significantly negative impact on the efficiency of election administration, and pushed the limits of the State’s anti-fraud safeguards. A big part of

the problem was that the third-party-pre-filled applications sent to voters often contained erroneous information. Not only were confused and angry voters inundating county election officials with complaints on the issue,⁵ REDACTED

It is hard to see how one can knock the State for seeking to mitigate an issue that VPC itself recognized as a serious dilemma.

In addition to sending out inaccurate advance voting ballot applications, VPC also caused large numbers of duplicate applications to be submitted. While the use of mail ballots was clearly higher in 2020 than in previous years, the staggering onslaught of duplicate applications submitted to county elections was exponentially higher than the growth in advance voting. In Shawnee and Ford Counties alone, thousands of confused voters told election officials that they thought the pre-

⁵ Ms. Cox and Messrs. Howell and Caskey referenced the hundreds of wholly unsolicited telephone calls and office visits that they received from voters expressing confusion, frustration, and anger about the inaccurate and duplicate pre-filled advance voting ballot applications they were receiving. The sentiments expressed by such voters are *not* inadmissible hearsay. They are not being offered to establish the truth of the matter asserted or to prove a fact remembered or believed. *See* Fed. R. Evid. 801(c). They are simply offered to demonstrate voters' state of mind after receiving such materials. Testimony about a third-party's confusion is either not hearsay at all or it falls within the hearsay exception under Rule 803(3). *See CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 589 (6th Cir. 2015) (witness' testimony about telephone call with declarant in which declarant expressed confusion about the status of order "was not offered for the truth of the matter asserted . . . but rather was probative of the declarant's confusion."); *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City*, 383 F.3d 110, 132-33 (3d Cir. 2004) (bank tellers' testimony about customers' out-of-court statements regarding customers' confusion was either not hearsay or fell within exception under Rule 803(3); *Univ. of Kan. v. Sinks*, 565 F. Supp.2d 1216, 1230-31 (D. Kan. 2008) (declarants' out-of-court statements about their confusion over similarity of trademarks fell within Rule 803(3) hearsay exception); *HealthOne of Denver, Inc. v. UnitedHealth Group, Inc.*, 872 F. Supp.2d 1154, 1168 (D. Colo. 2012) (same); *Troublé v. The Wet Seal, Inc.*, 179 F. Supp.2d 291, 298-99 (S.D.N.Y. 2001) (out-of-court statements by customers offered to show customer confusion was not hearsay because testimony was offered "to show the customers' state of mind – that they were confused – as opposed to the truth of what they said;" and Rule 803(3) provided alternative basis for statements' admissibility).

filled applications had come from the county election office and had to be returned, even if the voter had already submitted another application during the election cycle. SOF ¶ 74. One voter in Shawnee County submitted *seven* separate applications and another submitted *nine*, each of which, of course, had to be carefully reviewed by election officials. SOF ¶¶ 73, 79-80. The problems were simply unprecedented.

Meanwhile, county election officials were forced to expend huge amounts of time dealing with voter complaints, processing inaccurate and duplicate applications, undertaking the necessary cure processes to ensure that voters who submitted inaccurate and duplicate applications were given an opportunity to correct any errors and thus receive (and vote) an advance ballot. All of this was occurring at the same time that election officials were having to perform the myriad other tasks that go along with conducting a major federal election. The end result was chaos that greatly taxed the time and resources of already short-staffed and overworked county election offices. The trust and confidence that election officials had worked so hard to build up with their constituencies also began to erode, as voters – falsely believing the materials from VPC had come from the county – accused these officials of incompetency for sending out applications riddled with errors.

The problem was not limited to Kansas; VPC's activities wreaked havoc with election offices in many other states, evidenced by the written complaints that VPC received from officials in Virginia, Iowa, Wisconsin, and North Carolina. SOF ¶ 66. This is critical because a state is not restricted to demonstrating harms only within its own borders in justifying the kind of legislative enactments at issue here. *See Brnovich*, 141 S. Ct. at 2348 (upholding Arizona's ballot collection restrictions despite "Arizona ha[ving] the good fortune to avoid" fraud, and referencing fraud from proscribed activity in North Carolina); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-95 (2008) (upholding Indiana voter ID law even though "[t]he record contained no evidence of

any such fraud actually occurring in Indiana at any time in its history,” but noting that “flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history”); *Burson*, 504 U.S. at 208-09 (upholding dismissal of facial attack on Tennessee law prohibiting solicitation of voting and campaign materials within 100 feet of polling place despite the State producing no evidence of the necessity of that boundary, and noting that the Court “never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question”).

The State also has an interest in avoiding potential fraud. *See Brnovich*, 141 S. Ct. at 2340. The risk of voter fraud is particularly acute with mail-in voting. *See, e.g., Crawford*, 553 U.S. at 195-96; *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 239 (5th Cir. 2020); Comm’n on Fed. Elections Reform (“Baker-Carter Commission”), *Bldg Confidence in U.S. Elections* 46 (Sept. 2005) (“Absentee ballots remain the largest source of potential voter fraud.”). While Kansas appears to have avoided any systemic fraud in its recent elections, the surge of inaccurate and duplicate pre-filled advance voting ballot applications in 2020 taxed the ability of overburdened county election offices to timely and efficiently process such applications, which also necessarily increased the opportunity for mistakes to be made both in connection with advance voting ballot applications and election administration in general. The idea that election-related criminal laws currently on the books represent a baseline above which a legislature cannot go without justifying to a federal court why such greater sanction is necessary is at odds with the separation of powers among the coordinate branches.

The restrictions imposed by the Pre-Filled Application Prohibition are virtually identical to those in *Raffensperger*, where the court rejected the same constitutional claims asserted here. *See* 2022 WL 2357395, at *12-18. The statute now before this Court is also far less rigorous than

the outright bar on third-party distribution of absentee ballots at play in *Lichtenstein*. Yet that court, in upholding a more restrictive Tennessee law against constitutional claims similar to those here, recognized the State’s strong regulatory interests that apply with equal or greater force in Kansas:

Among other things, there is a rational basis to believe that by prohibiting everyone (other than election commission employees) from distributing absentee-ballot applications, the State can: (a) increase the integrity of the absentee ballot process by, among other things, better ensuring that an absentee-ballot application is being submitted by someone who truly wants to submit the application, that the applicant does not miss out on voting absentee (and perhaps, as a direct result, voting at all) due to misleading addressing or other information provided by a distributor, and that the applicant is not mistakenly provided by election officials with multiple absentee ballots; and (b) decrease the risk of voter confusion arising from, among other things, voters’ receipt of (i) applications mistakenly believed by some recipients to be from election officials, (ii) applications from multiple distributors, or (iii) incorrect addressing or other information from the distributor regarding absentee voting.

Lichtenstein, 489 F. Supp.3d at 783-84.

Not only is there no narrow tailoring requirement under the *Anderson-Burdick* framework, but as the Supreme Court recently explained, a State’s “entire system of voting” – not just the impact on a small segment of the electorate – must be examined “when assessing the burden imposed by a challenged provision.” *Brnovich*, 141 S. Ct. at 2340. Under those circumstances, VPC can establish no entitlement to relief.

III. The Pre-Filled Application Prohibition Does Not Contravene VPC’s Freedom of Association Rights

VPC additionally claims that the Pre-Filled Application Prohibition abridges its First Amendment freedom of association. Little, if anything, appears to be left of this cause of action in the wake of the parties’ Stipulation. *See* Dkt #73. REDACTED

At an abstract level, VPC contends that the challenged statute prevents the organization from “broadening the base of public participation in and support for [its] activities promoting democratic engagement through voting an advance mail ballot.” Dkt #1 at ¶ 97. More specifically, VPC alleges that the restrictions on pre-filling unsolicited advance ballot applications amount to “a direct regulation of the communications and political association between [VPC] and Kansans that seeks to increase participation in democracy and effect change.” *Id.* at ¶ 99. VPC goes on to say that the statute “eliminates the method by which [it] connect[s] with voters at the advance ballot application phase to gain a foothold with Kansans for further association and group engagement for political expression.” *Id.* This claim fails on both the facts and the law.

Freedom of association protects “joining in a common endeavor” or engaging in “collective effort on behalf of shared goals.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984). It does not protect connections between people who “are not members of any organized association,” are “strangers to one another,” and do not come together to “take positions on public questions.” *Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989).

Mailing pre-populated advance voting ballot applications to voters with whom VPC has no connection does not implicate the freedom of association. It is a unilateral act that can be ignored by the would-be associate. The recipients are not members of any organization or otherwise joined in a common endeavor or collective effort on behalf of shared goals, but are strangers who simply receive similar mass-mailers. Some complete the application in the hope of electing a particular candidate, some complete it in the hope of electing that candidate’s opponent, some complete it and never vote, and some ignore it altogether. Moreover, unlike a referendum or initiative petition that requires joint effort, “applications are individual, not associational, and may be successfully submitted without the aid of another.” *Voting for Am., Inc. v. Andrade*, 488 F. App’x 890, 898

n.13 (5th Cir. 2012). If these sorts of bare communications constituted First Amendment association, then most of modern civilization would be immune from regulation. The court in *Raffensperger* rejected this same cause of action asserted by these same Plaintiffs involving virtually the same statute. *Raffensperger*, 2022 WL 2357395, at *10. This Court should reach the identical result.

IV. VPC's Overbreadth Claim Has No Merit

VPC additionally claims that the Pre-Filled Application Prohibition is unconstitutionally overbroad. It raises both facial and as-applied attacks on the statute. Dkt #1 at ¶¶ 107-108. In particular, VPC claims that restrictions on personalizing unsolicited advance ballot applications amount to “a direct regulation of the communications and political association between [VPC] and Kansans that seeks to increase participation in democracy and effect change.” *Id.* at ¶ 99. VPC suggests that the statute “eliminates the method by which [it] connect[s] with voters at the advance ballot application phase to gain a foothold with Kansans for further association and group engagement for political expression.” *Id.* This claim does not survive scrutiny.

When making an overbreadth claim pursuant to the First Amendment, the challenger must show that the statute in question “punishes a substantial amount of protected speech, judged in relation to the statute’s plainly legitimate sweep.” *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2004); *see also United States v. Williams*, 553 U.S. 285, 292 (2008) (“In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”). In other words, the mere fact that *some* impermissible applications of a law may be conceivable does not render that law unconstitutionally overbroad; there must be a realistic danger that the law will *significantly* compromise recognized First Amendment protections. This is particularly true

where, as is the case here, *conduct* and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Court examines both the text of the law and the facts on the ground when undertaking this analysis. *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (citing *Hicks*, 539 U.S. at 122).

The overbreadth doctrine is “strong medicine” and thus must be applied “with hesitation, and then only as a last resort.” *New York v. Ferber*, 458 U.S. 747, 769 (1982). Thus, if a statute is readily susceptible to a narrowing construction that will remedy any constitutional infirmity, the statute will be upheld. *Va. v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988). To the extent a statute is not readily susceptible to a narrowing construction, if the unconstitutional language is severable from the remainder of the statute, “that which is constitutional may stand while that which is unconstitutional will be rejected.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quotations omitted). Moreover, even if a law touches on political speech protected by the First Amendment, declaring a statute invalid may not be appropriate in light of the State’s interests. “[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.” *Faustin*, 423 F.3d at 1199 (quoting *Hicks*, 539 U.S. at 119).

A. *The Pre-Filled Application Prohibition is Not Overbroad as Applied to VPC’s Activities*

When considering an as-applied overbreadth challenge, courts recognize that a statute in question may be constitutional in many of its applications but not as applied to the plaintiff and his/her applicable circumstances. *See N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010). “A successful as-applied challenge is, thus, a necessary, but not sufficient,

ingredient to a successful facial challenge.” *United States v. Streett*, 434 F. Supp. 3d 1125, 1171–72 (D.N.M. 2020).

VPC alleges that its ability to encourage Kansans to engage in the democratic process is burdened because it will not be able to include a pre-filled advance voting ballot application in its mailers.

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There is no bar whatsoever to VPC’s ability to send mailers expressing any message it wishes to convey about the importance of voting in general or voting by mail via an advance-ballot, how to vote in person or by mail, or where to access an advance mail voting application. VPC can even include a blank application in the mailing. There are thus an infinite number of ways for VPC to communicate its message. The only thing being restricted is not speech at all; it is *non-expressive conduct* – i.e., pre-filling the advance voting ballot applications that VPC sends to Kansans who did not request one.

This logistical prohibition was adopted by the Legislature to prevent confusion among voters, facilitate greater confidence in the electoral process and those who administer it, ensure a more efficient and orderly administration of elections, and minimize the potential for fraud. To suggest that the Pre-Filled Application Prohibition impermissibly regulates a substantial amount of Plaintiffs’ protected speech and associations rings hollow.

B. *The Pre-Filled Application Prohibition is Not Facially Overbroad*

“Facial challenges based on overbreadth are disfavored,” *Clark v. Schmidt*, 493 F. Supp.3d 1018, 1033 (D. Kan. 2020), and the Court must begin its analysis by presuming that the statute is

constitutional. *Id.* In this case, VPC’s inability to satisfy the standards necessary to establish an as-applied challenge is also fatal to its facial overbreadth challenge. As noted, the challenged statute allows for an unlimited array of expressive conduct and core political speech. There is no prohibition at all on communicating with voters about anything having to do with voting (or any other subject, for that matter). There is, in short, no impairment (let alone a substantial impairment) of any constitutionally-protected activity. “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).” *Hicks*, 539 U.S. at 124. Nor has VPC come close to demonstrating that K.S.A. 25-1122(k)(2) will have a chilling effect on the First Amendment rights of parties not before the court. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000) (requiring the plaintiff to show the existence of a “realistic danger” that will “significantly compromise recognized First Amendment protections of parties not before the court.”). In sum, VPC’s overbreadth claim has no merit.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court grant their motion for summary judgment with regard to Counts I-III of the Plaintiffs’ Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2022, I electronically filed the foregoing Defendants' Memorandum in Support of Motion for Summary Judgment Regarding Counts I-III with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By /s/ Bradley J. Schlozman

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