

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' RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

RETRIEVED FROM DEPOSITARYDOCKET.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
SUMMARY OF EXHIBITS	vi
I. INTRODUCTION.....	1
II. DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNCONVERTED FACTS	3
III. DEFENDANTS' STATEMENT OF ADDITIONAL MATERIAL FACTS	31
IV. ARGUMENT	43
I. Sending a Voter a Partially Completed Advance Mail Ballot Application is Conduct, Not Speech.....	44
A. <i>The Partially Completed Advance Mail Ballot Applications that VPC Sends to Voters are Not Inherently Expressive</i>	44
B. <i>The Cases that the District Court Cited in its Preliminary Injunction / Motion to Dismiss Order are Inapposite</i>	52
C. <i>The Pre-Filled Application Prohibition is Rationally Related to the State's Legitimate Interests</i>	55
II. Even if the First Amendment is Implicated, the Pre-Filled Application Prohibition is Viewpoint- and Content-Neutral and not Subject to Heightened Scrutiny.....	57
A. <i>The Pre-Filled Application Prohibition Does Not Target Core Political Speech</i>	57
B. <i>Assuming the First Amendment is Implicated, the Proper Standard for Evaluating VPC's Claims is the Anderson-Burdick Test</i>	62
III. The Pre-Filled Application Prohibition Does Not Contravene VPC's Freedom of Association Rights	68
IV. VPC's Overbreadth Claim Has No Merit.....	70
A. <i>The Pre-Filled Application Prohibition is Not Overbroad as Applied to VPC's Activities</i>	72
B. <i>The Pre-Filled Application Prohibition is Not Facially Overbroad</i>	73

V. CONCLUSION	73
CERTIFICATE OF SERVICE	75

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>ACLU v. Santillanes</i> , 546 F.3d 1313 (10th Cir. 2008).....	63
<i>Am. Booksellers Ass’n, Inc.</i> , 484 U.S. 383 (1988).....	71
<i>American Ass’n of People with Disabilities v. Herrera</i> , 690 F. Supp.2d 1183 (D.N.M. 2010)....	55
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	62
<i>Armour v. City of Indianapolis, Ind.</i> , 566 U.S. 673 (2012)	52
<i>Brnovich v. Democratic Nat’l Comm.</i> , 141 S. Ct. 2321 (2021).....	21, 56, 66, 67, 68, 69
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	71
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985).....	72
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	62, 63, 64
<i>Burns v. Bd. of Cnty. Comm’rs</i> , 330 F.3d 1275 (10th Cir. 2003)	10
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	56, 60, 61, 67
<i>City of Austin v. Reagan Nat’l Advert. of Austin</i> , 142 S. Ct. 1464 (2022).....	58, 59
<i>Clark v. Cmty. for Creative Non-Violence</i> , 468 U.S. 288 (1984).....	44
<i>Clark v. Schmidt</i> , 493 F. Supp.3d 1018 (D. Kan. 2020)	73
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001)	46
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008)	66, 67
<i>Dallas v. Stanglin</i> , 490 U.S. 19 (1989).....	69
<i>DCCC v. Ziriaux</i> , 487 F. Supp.3d 1207 (N.D. Okla. 2020)	51
<i>Democracy N.C. v. N.C. State Bd. of Elections</i> , 476 F. Supp.3d (M.D.N.C. 2020)	54
<i>Democracy N.C. v. N.C. State Bd. of Elections</i> , __ F. Supp.3d __, 2022 WL 715973, at *6-8 (M.D.N.C. Mar. 10, 2022)	54
<i>Doe v. Reed</i> , 561 U.S. 186 (2010)	56, 60, 61
<i>DSCC v. Pate</i> , 950 N.W.2d 1 (Iowa 2020).....	56
<i>Faustin v. City & Cty. of Denver, Colo.</i> , 423 F.3d 1192 (10th Cir. 2005)	71, 72
<i>Feldman v. Ariz. Sec’y of State’s Office</i> , 843 F.3d 366 (9th Cir. 2016)	54
<i>Fish v. Schwab</i> , 957 F.3d 1105 (10th Cir. 2020).....	62
<i>Good v. Bd. of Cnty. Comm’rs</i> , 331 F. Supp.2d 1315 (D. Kan. 2004)	21

<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	56
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	65
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010)	48
<i>In re Motor Fuel Temperature Sales Pracs. Litig.</i> , 07-1840, 2012 WL 13050524 (D. Kan. Apr. 4, 2012)	8, 12, 16, 19, 22, 28, 29
<i>Knox v. Brnovich</i> , 907 F.3d 1167 (9th Cir. 2018).....	54
<i>League of Women Voters v. Browning</i> , 575 F. Supp.2d 12989 (S.D. Fla. 2008).....	51
<i>League of Women Voters v. Hargett</i> , 400 F. Supp.3d 706.....	48, 53
<i>Lichtenstein v. Hargett</i> , 489 F. Supp.3d 742 (M.D. Tenn. 2020)	51, 67, 68
<i>Lichtenstein v. Hargett</i> , __ F. Supp.3d __, 2021 WL 5826246, at *35 (M.D. Tenn. Dec. 7, 2021).....	49
<i>Marchioro v. Chaney</i> , 442 U.S. 191 (1979)	56
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995).....	64
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988)	50, 57, 60, 61
<i>Meyer and Buckley v. American Constitutional Law Foundation, Inc.</i> , 552 U.S. (1999)	60
<i>N.M. Youth Organized v. Herrera</i> , 611 F.3d 669 (10th Cir. 2010)	72
<i>Navajo Health Found.-Sage Mem. Hosp., Inc. v. Burwell</i> , 256 F. Supp.3d 1186 (D.N.M. 2015).....	52
<i>NetChoice, LLC v. Att’y Gen., Fla.</i> , 34 F.4th 1196 (11th Cir. 2022).....	47
<i>New Ga. Project v. Raffensperger</i> , 484 F. Supp.3d 1265 (N.D. Ga. 2020).....	53, 54
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	71
<i>Ohio Democratic Party v. Husted</i> , 834 F.3d 620 (6th Cir. 2016).....	63
<i>Priorities USA v. Nessel</i> , 462 F. Supp.3d 792 (E.D. Mich. 2020).....	52
<i>Priorities USA v. Nessel</i> , 487 F. Supp.3d 599 (E.D. Mich. 2020).....	52, 53
<i>Priorities USA v. Nessel</i> , No. 19-13341, 2022 WL 4272299 (E.D. Mich. Sept. 15, 2022)....	51, 53
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)	58
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	65
<i>Richardson v. Tex. Sec’y of State</i> , 978 F.3d 220 (5th Cir. 2020).....	67
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984)	69
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U.S. 47 (2006).....	44, 47, 48
<i>Save Palisade Fruitlands v. Todd</i> , 279 F.3d 1204 (10th Cir. 2002).....	55
<i>Sickles v. Campbell Cnty., Ky.</i> , 501 F.3d 726 (6th Cir. 2007).....	48

<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	56
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	44, 47
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997)	46, 59
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	47, 48
<i>United States v. Streett</i> , 434 F. Supp. 3d 1125 (D.N.M. 2020)	72
<i>United States v. Williams</i> , 553 U.S. 285 (2008)	71
<i>Univ. of Tex. v. Camenish</i> , 451 U.S. 390 (1981)	52
<i>Utah Republican Party v. Cox</i> , 892 F.3d 1066 (10th Cir. 2018)	62
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2004).....	71, 72, 73
<i>VoteAmerica v. Raffensperger</i> , __ F. Supp.3d __, 2022 WL 2357395 (N.D. Ga. June 30, 2022)	2, 50, 51, 64, 67, 69
<i>VoteAmerica v. Schwab</i> , 576 F. Supp.3d 862 (D. Kan. 2021).....	51
<i>Voting for Am. v. Steen</i> , 732 F.3d 382 (5th Cir. 2013)	44, 48, 49, 50, 51, 52, 53, 54, 61
<i>Voting for Am., Inc. v. Andrade</i> , 488 F. App'x 890 (5th Cir. 2012).....	69
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	65, 66
<i>West v. Derby Unified Sch. Dist. No. 260</i> , 206 F.3d 1358 (10th Cir. 2000).....	73

Statutes

52 U.S.C. § 20301	5
52 U.S.C. § 21083	3
K.S.A. 25-124	3
K.S.A.25-1121	3
K.S.A. 25-1122	1, 3, 4, 5, 6, 18, 29, 30, 31, 45, 52, 68, 73
K.S.A. 25-1123	5
K.S.A. 25-1124	6
K.S.A. 25-1131	3
K.S.A. 25-1214	5
K.S.A. 25-1220	5
K.S.A. 25-2431	27
K.S.A. 21-6602	29

Regulations

Kan. Admin. Reg. 7-36-7.....	6, 31
Kan. Admin. Reg. 7-36-9.....	6, 31

SUMMARY OF EXHIBITS

A.	Andrew Howell Affidavit
B.	[reserved]
C.	[reserved]
D.	[reserved]
E.	[reserved]
F.	Lionel Dripps Deposition Excerpts
G.	[reserved]
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.	[reserved]
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.	[reserved]
T.	[reserved]
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.	[reserved]
BB.	[reserved]
CC.	VPC's Resp. to Def. Schwab's First Req. for Produc. of Docs.
DD.	Letter from Scott Schillings to Meredith Karp (June 8, 2022)
EE.	Redacted Study on Pre-Filled Absentee Ballot Applications
FF.	Connie Schmidt Deposition Excerpts

GG.	Jamie Shew Deposition Excerpts
HH.	Bryan Caskey Deposition Excerpts
II.	[reserved]
JJ.	Tom Lopach Deposition Excerpts
KK.	Andrew Howell Deposition Excerpts
LL.	Debbie Cox Deposition Excerpts
MM.	Eitan Hersh Deposition Excerpts

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and
VOTER PARTICIPATION CENTER,

Plaintiffs,

vs.

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.

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

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants Scott Schwab, Derek Schmidt, and Stephen M. Howe, by and through counsel, respectfully submit this Response to Plaintiffs' Motion for Summary Judgment (Dkt. 144). In support of the same, Defendants state as follows:

I. – 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.

Without even bothering to cite the recent decision in *VoteAmerica v. Raffensperger*, __ F. Supp.3d __, 2022 WL 2357395 (N.D. Ga. June 30, 2022), where the court categorically rejected *these same Plaintiffs'* constitutional challenge to a virtually identical Georgia statute on the basis that a prohibition against third-parties pre-filling other persons' absentee ballot applications does not implicate the First Amendment, Plaintiffs now reiterate the same legal arguments they advanced at the preliminary injunction phase of the case. At the preliminary injunction stage, however, this 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 Pre-Filled Application Prohibition – the only statute still in dispute – is eminently reasonable and neither implicates nor violates any constitutional rights. While Defendants do not believe that the governing case law requires the State to produce *any* evidence in support of the Legislature's passage of this statute, the post-discovery record amply justifies the State's basis for adopting this common sense provision.

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. Kansas' Pre-Filled Application Prohibition is a perfectly reasonable prophylactic designed to mitigate such harms. Ironically, 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 State is entitled

to substantial deference in undertaking the measures that it did, and there is no basis whatsoever for granting Plaintiffs' summary judgment motion.

II. – Defendants' Response to Plaintiffs' Statement of Uncontroverted Facts

1. Defendant Kansas Secretary of State Scott Schwab does business in and is an elected official in the state of Kansas. *See* Stipulations, Pretrial Order, Dkt. No. 140 (Sept. 30, 2022) ("Stipulated Facts"), at § 2(a)(i).

RESPONSE: Uncontroverted.

2. Defendant Schwab is the Chief Election Officer for the State of Kansas. *See id.* at §2(a)(ii).

RESPONSE: Uncontroverted.

3. As the Chief Election Official for the State of Kansas, Defendant Schwab is responsible for overseeing all Kansas elections and administering the State's election laws and regulations. Defendant Schwab also issues guidance and instruction to county election officers on a range of election procedures and requirements. *See id.* at §2(a)(iii) (citing K.S.A. 25-124).

RESPONSE: Uncontroverted.

4. Kansas law permits Defendant Schwab to adopt rules and regulations related to advance voting, including the general form of advance voting ballots and applications for advance mail voting. K.S.A. 25-1131, 25-1121(a)-(b), 25-1122d(c); *see also* HB 2332, Session of 2021 (Kan.), §§ 3(k)(2), (m).

RESPONSE: Uncontroverted.

5. Defendant Schwab, as Kansas's Secretary of State, is responsible for maintaining an online voter registration database. 52 U.S.C. § 21083(a)(1)(A).

RESPONSE: It is uncontroverted that the Secretary of State’s Office maintains a statewide voter registration database. However, the office does not modify, add, or delete any records in the database as that task is performed by county election offices. Ex. HH at 40:5-42:17.

6. The Kansas state voter registration database is known as the Election Voter Information System (“ELVIS”). *See* Stipulated Facts at § 2(a)(xi).

RESPONSE: Uncontroverted.

7. Election officials in Kansas’s 105 counties are responsible for maintaining the voter files for voters within their respective counties and ELVIS reflects the voter data maintained by those county officials. *See id.* at §2(a)(xii).

RESPONSE: Uncontroverted.

8. When a voter registration application is received by the respective county election office, they input that voter’s registration information into the state’s central database by hand and thereby create a voter record in ELVIS. *See id.* at § 2(a)(xiii).

RESPONSE: Uncontroverted.

9. ELVIS is a dynamic system that reflects in real-time changes that are made to individual voter files. County election officials input information on voters, including the voters’ registration and advance mail ballot information. *See id.* § 2(a)(xiv).

RESPONSE: Uncontroverted.

10. To vote by mail in Kansas 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. *See id.* at § 2(a)(xxx).

RESPONSE: It is uncontroverted that this paragraph is “generally” true; however, it is incomplete. Voters who are on the permanent advance voting list (K.S.A. 25-1122(h)) and voters who vote by mail pursuant to the Uniformed and Overseas Citizens Absentee

Voting Act (K.S.A. 25-1214 *et seq.*) are not required to file an advance voting ballot application every time the voter wishes to vote by mail.

11. If an advance voting ballot application has been timely submitted to the county election office, an individual working in such office processes the application and, if the county accepts the application, the county will mail the voter an advance ballot packet. *See id.* at § 2(a)(xxxi).

RESPONSE: Uncontroverted.

12. 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).

RESPONSE: Uncontroverted.

13. 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), 25-1220.

RESPONSE: Uncontroverted.

14. Ballots must be issued to advance voting voters within two business days of the receipt of the voter's application by the election office or the commencement of the 20-day period. K.S.A. 25-1123(a).

RESPONSE: Controverted in part. When an election official receives a *properly completed* advance voting ballot application that matches the information in the ELVIS database (i.e., the application has been fully submitted in accordance with K.S.A. 25-1122), a ballot must be mailed to the voter within two business days of the commencement of the 20-day period. If the voter submits an *inaccurate or incomplete application*, however,

adherence to the two-day policy is not always possible. The county election office will attempt to contact the voter and “cure” the application and still meet that deadline. Ex. KK at 188:13-189:22. But it is not always possible.

15. If an advance mail ballot application does not contain sufficient information, does not match the voter file, or if the information is illegible, the election office confirms the validity of the application before accepting it. K.A.R. § 7-36-7 and 7-36-9; K.S.A. §§ 25-1122(e), 25-1124; Declaration of Mark Johnson in Support of Plaintiff Voter Participation Center’s Motion to Dismiss (Oct. 14, 2022) (“Johnson Decl.”),¹ Ex. 1, (Deposition of Connie Schmidt (Sept. 16, 2022) (“Schmidt Tr.”)) 91:8-17, 93:9-13, 110:24-111:16; *id.* at Ex. 2, (Deposition of Deborah Jean Cox (Sept. 9, 2022) (“Cox Tr.”)) 52:14-53:6, 56:22-57:11, 72:6-16; *id.* at Ex. 3, (Deposition of Jameson Shew (Sept. 15, 2022) (“Shew Tr.”)) 51:12-13; *id.* at Ex. 4, (Deposition of Andrew Howell (Sept. 14, 2022) (“Howell Tr.”)) 66:13-25, 77:12-78:17, 132:17-133:21, 138:5-11, 147:8-148:23; *id.* at Ex. 5, (30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) (“KS SOS Tr.”)), Ex. 9 (Kansas Election Standards on Election Administration) at KS000167VA.

RESPONSE: Uncontroverted.

16. In such cases, county election office must attempt to contact the voter to obtain the correct information and cure the application. Johnson Decl., Ex. 1, (Schmidt Tr.) 130:14-131:22; *id.* at Ex. 2, (Cox Tr.) 69:12-21; *id.* at Ex. 3, (Shew Tr.) 40:6-14.

RESPONSE: Uncontroverted.

17. 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. K.A.R. § 7-36-7(f); Stipulated Facts at § 2(a)(xxxiv).

RESPONSE: Uncontroverted.

18. 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. See Stipulated Facts at § 2(a)(xxxv).

RESPONSE: Uncontroverted.

19. Plaintiff Voter Participation Center is a 501(c)(3) nonprofit, nonpartisan organization founded in 2003. See Stipulated Facts at § 2(a)(vii); Johnson Decl., Ex. 6 (Deposition of Thomas Lopach (May 18, 2022) (“Lopach Tr.”)) 57:25-58:1, 58:24-59:4; Declaration of Thomas Lopach in Support of Plaintiff Voter Participation Center’s Motion to Dismiss (Oct. 13, 2022) (“Lopach Decl.”) ¶ 2.

RESPONSE: Controverted in part, but immaterial. VPC’s activities in Kansas in the 2020 General Election cast doubt on whether it is a non-partisan organization. See Ex. M at 5-6.

20. Plaintiff VPC’s core mission is to promote voting among traditionally underserved groups, including young voters, voters of color, and unmarried women at rates commensurate with voters in other groups. See Stipulated Facts at § 2(a)(viii); Johnson Decl., Ex. 7 (Deposition of Lionel Dripps (Aug. 30, 2022) (“Dripps Tr.”)) 111:25-112:9; id. at Ex. 6, (Lopach Tr.) 153:12-16, 96:14-17, 204:3-6; id. at Ex. 8 (September 8, 2021 Hearing on Plaintiffs’ Motion for Preliminary Injunction (“9/8/2021 PI Tr.”)) 50:9-20 (Thomas Lopach testimony); Lopach Decl. ¶ 7-11, 28.

RESPONSE: Uncontroverted but immaterial.

21. VPC primarily encourages these voters to register and to participate in the electoral process through direct mailings. See Stipulated Facts at §2(a)(ix); Johnson Decl., Ex. 6 (Lopach Tr.) 146:24-147:15; Lopach Decl. ¶¶ 7, 13.

RESPONSE: Uncontroverted but immaterial. The only issue in this case is whether pre-filling an advance voting ballot application constitutes speech or expressive conduct and communicates a message that is constitutionally protected. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 07-1840, 2012 WL 13050524, at *2 (D. Kan. Apr. 4, 2012).

22. Distributing advance ballot applications is a common part of civic engagement communications among partisan and nonpartisan actors alike. *See, e.g.*, Johnson Decl., Ex. 3 (Shew Tr.) 22:23-24:6; *id.* at Ex. 8 (9/8/2021 PI Tr.) 70:18-25 (Bryan Caskey testimony).

RESPONSE: Controverted to the extent Plaintiffs claim that “distributing ballot applications is a common part of civic engagement communications.” Nothing VPC cites supports that statement. In any event, the only issue in this case is whether pre-filling an advance voting ballot application constitutes speech or expressive conduct or communicates a message that is constitutionally protected. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 07-1840, 2012 WL 13050524, at *2 (D. Kan. Apr. 4, 2012). And that’s a legal issue.

23. VPC encourages registered Kansas [sic] to participate in this manner by mailing voters a package communication that advocates for mail voting and provides a personalized advance mail ballot application. *See* Stipulated Facts at §2(a)(x); Johnson Decl., Ex. 7 (Dripps Tr.) 124:14-125:2; Lopach Decl. ¶¶ 12, 17-18, 21, 23-24.

RESPONSE: It is uncontroverted that VPC sends mailers to Kansas voters that include information advocating for mail voting and that at least some of those mailers include a personalized advance voting ballot application. However, whether pre-filling an advance voting ballot application represents speech or expressive conduct that communicates any type of message is a legal conclusion, not a fact that would be admissible in evidence, and thus is not to be considered for summary judgment. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 2012 WL 13050524, at *2.

24. VPC considers providing young voters, voters of color, and unmarried women—who may have fewer resources for, and less access to, printing and postage—with the necessary personalized applications is key to effectively advocating its message. Johnson Decl., Ex. 6 (Lopach Tr.) 185:25-186:3; *id.* at Ex. 8 (9/8/2021 PI Tr.) 59:23-60:20; Lopach Decl. ¶¶ 10, 21, 23, 28.

RESPONSE: Controverted. While VPC may “consider” the pre-filling of advance voting ballot applications as “key” to the effectiveness of its message, there is no competent evidence in the record to support VPC’s assertion that sending an unsolicited, *pre-filled* application is more effective at advocating its message than sending a blank application. VPC did not designate any expert or submit competent and admissible evidence that pre-filled applications have higher rates of return than blank applications.

Defendants explicitly requested during discovery any studies that VPC believed supported its belief that pre-filled advance voting ballot applications were more effective than blank applications. Ex. CC, #4, 15. Initially, VPC produced one “study” that does not address pre-filled vs. blank applications. Ex. JJ at 16:6-17:13. At his deposition, Mr. Lopach then identified a purported “study” conducted in 2006 by Dr. Mann with VPC’s predecessor organization, Ex. JJ at 17:15-20:13, and a second purported “study” by Dr. Green which, when finally disclosed, was merely an expert report in another case, dated March 21, 2022. Ex. JJ at 27:3-27:18. Following the deposition, Defendants requested a copy of the 2006 study referenced by Mr. Lopach given that it was not previously produced due to the timeframe of the requested documents. Ex. DD. In response, VPC produced a 111-page document, all but four pages of which was redacted. Ex. EE. The document stated that VPC’s predecessor conducted a study in 2006 that “tested both the messages of its mailings and different combinations of mail and phone calls.” Ex. EE at 92. The only unredacted

portion of the alleged study that was produced was a two-sentence conclusion stating that a “pre-populated form produces a higher response rate than a blank form.” Ex. EE at 96. The study is inadmissible hearsay and, without some expert witness to testify about it, VPC cannot rely on it in support of its motion.

Mr. Lopach also lacks the requisite personal knowledge to rely upon Dr. Mann’s study. Indeed, Mr. Lopach testified that he did not know “the size of the sample or anything else” about the study. Ex. JJ at 19:2-19:9. Mr. Lopach likewise testified that he is “not aware of any studies examining how the recipient of a vote-by-mail mailing that is pre-filled compared to one that is not pre-filled [or] how the recipient reacts or responds to that mailing.” Ex. JJ at 27:19-28:13. To now imply that such studies exist in his Declaration amounts to a sham affidavit. *See Burns v. Bd. of Cnty. Comm’rs*, 330 F.3d 1275, 1281-82 (10th Cir. 2003).

25. Doing so provides the voter simple access to an advance mail ballot application that is personalized with required information from the voter file. Lopach Decl. ¶ 21.

RESPONSE: Controverted but immaterial. VPC V.P. Lionel Dripps testified that VPC does *not* solely use information from the Kansas voter file to pre-fill applications; rather, its vendor (Catalist) merges commercially available data with information from the State’s voter file. Ex. F at 173:14-174:1.

26. VPC believes that distributing personalized advance mail ballot applications as a part of its advance mail voting mailer conveys its viewpoint that voting by mail is convenient and a good option for the recipient to participate in democracy. Johnson Decl., Ex. 6 (Lopach Tr.) 149:11-13, 150:13-19, 151:14-16, 183:9-184:1, 185:21-186:3, 188:1-4; *id.* at Ex. 7 (Dripps Tr.) 192:5-13; *id.* at Ex. 8 (9/8/2021 PI Tr.) 44:24-45:7, 49:17-24 (Thomas Lopach testimony); Lopach Decl. ¶¶ 9, 23-24, 66.

RESPONSE: Uncontroverted that this is VPC’s “belief,” but VPC’s subjective beliefs are immaterial in establishing this assertion as fact. VPC conceded that it does not know if voters receive any message from a pre-filled advanced ballot application. Ex. JJ at 98:17-100:10; 151:18-152:2. Indeed, Mr. Lopach testified that he could not “speak to how an individual or group of people would respond to prefilled vote-by-mail application versus a blank vote-by-mail application outside of the study we did in 2006 or other studies presented by academics or practitioners who have done similar work.” (none of which were produced in his case). Ex. JJ at 99:2-99:7. Mr. Lopach lacks the personal knowledge to support his claim that a pre-filled application “conveys” VPC’s viewpoint to a voter.

27. VPC is a data-driven operation. It tracks recipient responses to its communications and conducts randomized control trials to evaluate the effectiveness of its mailings. Johnson Decl., Ex. 7 (Dripps Tr.) 77:24-79:17, 116:3-18; *id.* at Ex. 6 (Lopach Tr.) 14:15-20:13, 33:2-35:3, 112:13-24, 116:17-117:12, 155:1-157:15, 165:1-166:9, 170:7-174:9.

RESPONSE: It is uncontroverted that VPC “tracks recipient responses to its communications” to the extent it is claiming that it tracks when the recipients of its mailings use its pre-paid, pre-addressed envelopes to send advance voting ballot applications to county election offices. But Defendants controvert that VPC knows whether or how a voter perceives any purported messages from pre-filling advance voting ballot applications. *See* Response to SOF ¶ 26 above.

28. VPC engages experts in voting behavior and quantitative research, who support VPC’s belief that personalizing applications is effective at conveying the organization’s pro-advance mail voting message. Lopach Decl. ¶ 16; Johnson Decl., Ex. 6 (Lopach Tr.) 13:15-16:10; *id.* at Ex. 7 (Dripps Tr.) 159:20-160:16.

RESPONSE: Controverted. VPC is improperly trying to admit expert testimony, apparently by Christopher B. Mann, via lay witness Lopach, to support its claim. VPC did not designate or disclose any expert (i) “in voting behavior and quantitative research” or (ii) who could address the issue of whether “personalizing applications is effective at conveying the organization’s pro-advance mail voting message.” Moreover, any studies that VPC officials may have relied upon to assess the efficacy of its program are inadmissible hearsay. In any event, whether pre-filling advance voting ballot applications is expressive conduct that conveys a “message” is a legal question, not a question of fact, and thus cannot be relied upon for summary judgment. *In re Motor Fuel Temperature Sales Pracs. Litig.*, 2012 WL 1305024, at *2.

29. VPC also personalizes its applications with pre-filled information to make the application processing easier for election officials. Lopach Decl. ¶ 60.

RESPONSE: Controverted. It is uncontroverted that VPC pre-fills advance mail ballot applications, but it is controverted that doing so makes it “easier for election officials” to process.

Mr. Lopach is not qualified to testify as to what is “easier for election officials to process[.]” He has never worked in an election office so this statement is entirely speculative and without foundation. Ex. JJ at 125:20-126:8. In fact, he admitted that he has to defer to county election officials regarding what is entailed in processing applications. *Id.*

The evidence also shows that pre-filled applications are often *not* easier for election officials to process. Shawnee County’s Election Office, for example, received numerous pre-filled advance voting ballot applications from voters with information that did not match the State’s voter file and/or applications from (or on behalf of) individuals who had died or whose registrations had otherwise been cancelled. Ex. A at ¶¶ 11-12, 35; Ex. Q (examples of

inaccurate applications); Ex. R (examples of applications of previously canceled voters). These inaccurate pre-filled applications “overwhelmed” the Shawnee County Election Office 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. KK at 117:24-125:2. Shawnee County Election Commissioner Andrew Howell personally spoke with hundreds of angry, frustrated, and confused voters about their pre-filled applications. Ex. KK at 121:11-122:12.

Other election officials experienced similar calls from confused, angry, and frustrated voters. Ex. LL at 130:6-132:5; Ex. U at ¶ 37; Ex. HH at 150:13-152:15, 209:15-210:9, 212:20-213:1, 237:11-245:20. Indeed, the problems caused by VPC’s pre-filled applications are not unique to Kansas as other states have had similar issues. Ex. Y (e-mails between VPC outside counsel Jennifer Carrier and other state election officials).

30. Kansas county election officials indicated their support for the benefits of prefilling for a mailer communication’s effectiveness. Johnson Decl., Ex. 1 (Schmidt Tr.) 85:6-14 (noting that handwriting can be harder to read than typeface), 108:15-18; *id.* at Ex. 2 (Cox Tr.) 149:20-150:14. Douglas County Elections Director Jamie Shew testified that if not for budgetary constraints, his office would prefer to personalize the applications sent to voters with their prefilled information. *Id.* at Ex. 3 (Shew Tr.) 24:15-20.

RESPONSE: The first sentence is controverted in part. The second sentence is uncontroverted.

The citation to Ms. Schmidt’s deposition transcript simply states the “obvious” that “[s]ometimes handwriting can be hard to read.” Ex. FF at 85:6-14. Ms. Schmidt later added that “hard to read” handwriting does not generally “increase the amount of time for the application processing” due to other information on an application. Ex. FF at 85:15-85:20.

Ms. Cox's deposition transcript merely notes that hand-written applications contain inaccuracies at times related to Hispanic last names. Ex. LL at 149:2-150:14. And Shawnee County Election Commissioner Andrew Howell *rejected* any perceived benefit from a typed as opposed to handwritten advance ballot application. Ex. KK at 270:22-271:12.

The statement also fails to account for the abundance of evidence that election officials were burdened by pre-filled advance mail ballot applications. Ex. A at ¶¶ 11-12, 35, 37, 40, 44; Ex. Q (examples of inaccurate applications); Ex. R (examples of applications of previously canceled voters); Ex. KK at 117:24-125:2; Ex. LL at 130:6-132:5; Ex. U at ¶ 37; Ex. HH at 150:13-152:15, 209:15-210:9, 212:20-213:1, 237:11-245:20; Ex T, Cox Tr. at 89:7-89:20, 139:9-140:3).

31. In 2020, Johnson County sent applications for the primary and general elections to all voters in the county, opting to expend additional resources to personalize the applications and in fact prefilled more information than VPC's communications by also adding the voter's date of birth. *See id.* at Ex. 1 (Schmidt Tr.) 222:10-227:7, 234:23-236:20, 284:2-8; *id.* at Ex. 9 (Schmidt Tr. Ex. 32) (Apr. 16, 2020 emails); *id.* at Ex. 10 (Schmidt Tr. Ex. 35) (2020 prefilled Johnson County advance mail ballot application mailer); *id.* at Ex. 11 (Schmidt Tr. Ex. 38) (same).

RESPONSE: Uncontroverted, but immaterial.

32. Staff in the Johnson County Elections Office decided to "pre-fill as much of the [voter's] information from their registrant record as possible," *id.* at Ex. 12 (Schmidt Tr. Ex. 31) at 3 (Apr. 2, 2020 emails), believing that doing so "makes it easier for the voter and reduces mistakes that we then have to work harder to fix on the back end," *id.* at Ex. 9 (Schmidt Tr. Ex. 32) at 1 (Apr. 16, 2020 emails).

RESPONSE: Uncontroverted, but immaterial.

33. VPC's mailer communications sent to Kansas voters also included a letter encouraging the voter to request and cast an advance ballot with instructions on how to do so, or if they choose, to opt out of future VPC communications; a step-by-step guide and other assistance for how voters may submit the included application; and a postage-paid envelope addressed to the voter's county election office. Lopach Decl., Ex. A (2020 VPC mailer) at VPC000001-005.

RESPONSE: Uncontroverted.

34. The letter's opening paragraph specifically refers to "the enclosed advance voting application already filled out with [the voter's] name and address" and mentions the personalization in the closing "P.S." message: "We have already filled in your name and address on the enclosed form. Please take a minute to complete the form, sign and date it, and place the form in the pre-addressed, postage-paid envelope." *See id.* at VPC000002. The step-by-step guide was printed on the reverse side of the enclosed personalized advance ballot application. *Id.* at VPC000004.

RESPONSE: Uncontroverted.

35. To personalize the applications it sends, VPC uses statewide voter registration files obtained via its data vendors and fills-in parts of the advance mail ballot applications with the voter's information as it appears in the state records. Johnson Decl., Ex. 6 (Lopach Tr.) 91:4-92:18; Lopach Decl. ¶¶ 37-40. VPC culls its lists to ensure that the information is accurate and current and that it is running its program as efficiently as possible. *See* Lopach Decl. ¶¶ 18, 39; Johnson Decl., Ex. 6 (Lopach Tr.) 33:2-35:3, 92:13-25, 93:20-96:8; *id.* at Ex. 7 (Dripps Tr.) 123:13-21, 147:16-20.

RESPONSE: Controverted. VPC Executive V.P. Lionel Dripps specifically testified that VPC does *not* pre-populate advance voting ballot applications simply with information drawn from the State voter file. Ex. F at 171:24-172:17. Rather, VPC's vendor supplements

the State file with commercially available data. Ex. F at 173:13-174:1. Moreover, the commercial data used to “supplement” the information from the State voter file included faulty data. *Id.* Thus, the pre-filled applications VPC sent to voters in connection with the 2020 General Election often did *not* match “the voter’s information as it appears in the state records.” Because VPC, in pre-filling applications for use in the 2020 General Election, also used voter data that its vendor had obtained from the State *at least* 4-6 months before those applications were mailed to voters, the information on the pre-filled application often had changed and did not match the data by the time VPC sent its mailer to the voter. Ex. M at ¶¶ 34-35.

36. VPC now contracts with two data vendors so that it can use data from whichever vendor has the most up-to-date data at the moment a program’s mailing list is being created in a given state. Johnson Decl., Ex. 6 (Lopach Tr.) 100:12-101:13; *id.* at Ex. 7 (Dripps Tr.) 123:13-21, 147:16-20; Lopach Decl. ¶ 39.

RESPONSE: Uncontroverted.

37. VPC carefully designs this package of materials to convey to the recipient VPC’s message that this particular Kansan should participate in the democratic process by mail voting, that voting by mail is easy, and that VPC’s audience can act on this encouragement by returning the supplied advance mail ballot application that VPC has personalized. Lopach Decl. ¶¶ 11, 17-18, 22, 28-29; Johnson Decl., Ex. 8 (9/8/2021 PI Tr.) 47:7-13.

RESPONSE: Uncontroverted but immaterial. The only issue in this case is whether pre-filling an advance voting ballot application constitutes speech or expressive conduct and communicates a message that is constitutionally protected. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 07-1840, 2012 WL 13050524, at *2 (D. Kan. Apr. 4, 2012).

38. In 2018, VPC sent approximately 90,000 advance mail ballot application mailers to Kansas voters in a single wave of mailers. Lopach Decl. ¶ 35.

RESPONSE: Uncontroverted but immaterial.

39. Approximately 5,000 Kansans applied for an advance mail ballot in 2018 using a personalized application from VPC. Lopach Decl. ¶ 26.

RESPONSE: Uncontroverted but immaterial.

40. In 2020, VPC anticipated that the pandemic would result in many voters voting by mail for the first time. Johnson Decl., Ex. 7 (Dripps Tr.) 136:4-16; Lopach Decl. ¶ 33.

RESPONSE: Uncontroverted but immaterial.

41. VPC therefore increased the amount that it communicated with Kansas voters about advance mail voting in 2020 to five waves of mailers and sending nearly 1.2 million advance mail ballot application mailers to Kansas voters. Lopach Decl. ¶¶ 34-35.

RESPONSE: Uncontroverted.

42. An estimated 69,000 Kansas voters submitted an advance mail voting application provided by VPC to their county election official in the 2020 general election. Lopach Decl. ¶ 26. Other individuals ignored VPC's communications (Johnson Decl., Ex. 13 (Lopach Tr. Ex. 4) at VPC000133), and some requested to not receive future communications. Id. at Ex. 14 (Lopach Tr. Ex. 3) at VPC000135 (VPC's 2018 and 2020 unsubscribe lists).

RESPONSE: Uncontroverted but immaterial.

43. For the 2022 election, VPC sent one wave of advance mail voting mailers sent approximately 4 weeks apart. Id. at Ex. 7 (Dripps Tr.) 135:12-20; Lopach Decl. ¶¶ 47, 52.

RESPONSE: Uncontroverted but ambiguous. Defendants does not controvert that at least one of VPC's waves of mailings was sent approximately 4 weeks apart from others.

44. The 2022 mailers contain the same basic components as VPC's prior mailer communications, including personalized advance mail ballot applications. Lopach Decl. ¶ 17; *id.* at Ex. B at VPC000743-746 (2022 VPC mailer).

RESPONSE: Uncontroverted but immaterial. The mailers that VPC sent in the most recent 2022 election – more than a year after the Kansas Legislature enacted K.S.A. 25-1122(k)(2), at least in part in response to VPC's activities in Kansas in 2020 – are irrelevant to this lawsuit.

45. VPC also sent a follow-up letter in September 2022 to remind voters that they have previously received a personalized advance mail ballot application and further encouraging the voter to return the application and vote by advance mail ballot. *Id.* at ¶ 52; Johnson Decl., Ex. 6 (Lopach Tr.) 30:3-10.

RESPONSE: Uncontroverted but immaterial. The mailers that VPC sent in the most recent 2022 election – more than a year after the Kansas Legislature enacted K.S.A. 25-1122(k)(2), at least in part in response to VPC's activities in Kansas in 2020 – are irrelevant to this lawsuit.

46. Each year, VPC notifies the Kansas Director of Elections of its upcoming advance mail voting program and seeks feedback on the forms and instructions regarding advance mail voting that VPC plans to distribute. *See* Johnson Decl., Ex. 15 (KS SOS Tr. Ex. 15) KS001922VA—2068VA (Apr. 19, 2018 email); Johnson Decl., Ex. 16 (KS SOS Tr. Ex. 16) VPC000048—50 (June 22, 2020 to July 1, 2020 email thread); Johnson Decl., Ex. 18 (Dripps Tr. Ex. 8) VPC000706-09 (July 28, 2022 emails); *id.* at Ex. 19 (Dripps Tr. Ex. 9) VPC000712-16 (Aug. 25, 2022 emails).

RESPONSE: Uncontroverted but immaterial.

47. In the 2020 election cycle, the Kansas Director of Elections confirmed to VPC in writing that its advance mail voting application form and instructions complied with Kansas law and with the forms that the Secretary of State's office uses. Johnson Decl., Ex. 16 (KS SOS Tr. Ex. 16) VPC000048—50 (June 22, 2020 to July 1, 2020 email thread).

RESPONSE: Uncontroverted, but immaterial.

48. VPC understands that the Personalized Application Prohibition would prevent it from its most effective means of conveying its pro-mail voting message, and as such would make VPC reconsider its resource allocation decision to convey its communications in Kansas if it cannot speak in this manner. Lopach Decl. ¶¶ 55-66; *see also id.* ¶ 18 (“[p]ersonalizing the applications with prefilled information drawn from states’ voter registration files best ensures that VPC’s message and assistance are both effective and accurate”); Johnson Decl., Ex. 6 (Lopach Tr.) 150:14-19, 151:14-16, 185:21-186:3, 188:1-4; *id.* at Ex. 8 (PI Hearing Tr.) 44:24-45:7, 49:17-24, 60:11-20 (Thomas Lopach testimony).

RESPONSE: Controverted. While VPC may believe that pre-filling the advance voting ballot applications it sends to voters is the most effective means of conveying whatever message it wants to convey in its mailers, there is no competent evidence in the record to support it. See Response to SOF ¶ 24. Moreover, whether a third-party’s pre-filling of another person’s advance voting ballot application even involves expressive conduct is a legal question, not a factual question, and is inappropriate for inclusion in a summary judgment motion’s statement of facts. See *In re Motor Fuel Temperature Sales Pracs. Litig.*, 2012 WL 1305024, at *2.

49. The 2020 General Election in Kansas had record turnout (1,375,125 total votes cast, a 70.9% turnout rate) and had more votes cast than the 2018 General election (1,039,085 total

votes cast, a 56.4% turnout rate) and the 2016 General Election (1,225,667 total votes cast, a 67.4% turnout rate). See Stipulated Facts at §2(a)(xxxvi).

RESPONSE: Uncontroverted.

50. Conducting a high-turnout presidential election race held in the middle of a worldwide pandemic introduced many challenges for those tasked with administering it. See Johnson Decl., Ex. 1 (Schmidt Tr.) 155:7–156:20; *id.* at Ex. 2 (Cox Tr.) 98:25-100:13; *id.* at Ex. 4 (Howell Tr.) 49:2-25; *id.* at Ex. 3 (Shew Tr.) 85:5-24.

RESPONSE: Uncontroverted but immaterial.

51. It also presented new hurdles for voters who wanted to participate without jeopardizing the health of themselves or their loved ones. *Id.* at Ex. 1 (Schmidt Tr.) 149:4-150:6.

RESPONSE: Controverted but immaterial. The cited exhibit does not support the statement in ¶ 51, and it is speculation as to what voters in 2020 thought as they cast their ballots and selected the method for doing so.

52. As a result, there was a mass shift in the way voters voted in 2020, with a steep increase in advance mail voting, 459,229 Kansans voted by mail in the 2020 General Election as compared to 152,267 votes cast by mail during the 2018 General Election and 173,457 votes cast by mail in the 2016 General Election. See Stipulated Facts at § 2(a)(xxxvi); see also Johnson Decl., Ex. 17 (KS SOS Tr.) 274:19-22; *id.* at Ex. 1 (Schmidt Tr.) 74:21-24, 138:21-139:6, 149:4-150:6; *id.* at Ex. 2 (Cox Tr.) 98:25-100:13; *id.* at Ex. 4 (Howell Tr.) 240:9-241:10; compare *id.* at Ex. 3 (Shew Tr.) 84:3-12, 85:5-24.

RESPONSE: It is uncontroverted that the figures in ¶ 52 are correct. Whether that was a “massive shift” as a “result” of Covid-19 is speculation and not material to summary judgment anyway. In fact, Douglas County Election Clerk Jamie Shew indicated that the

increase in voting-by-mail “wasn’t as big of a change” for Douglas County. Ex. GG at 84:3-84:12.

53. As the use of mail voting increased during the 2020 General Election, a national debate unfolded about the efficacy and security of mail voting as public figures both in Kansas and nationwide discouraged voters from voting by mail. *See, e.g., id.* at Ex. 20 (Bryan Lowry & Sarah Ritter, *Despite Trump’s attacks, Kansas voters request 2020 mail ballots at historic rate*, The Kansas City Star (May 29, 2020), <https://www.kansascity.com/news/politics-government/article243052656.html>).

RESPONSE: Controverted and immaterial. The national debate over the efficacy and security of mail-in-voting commenced long before 2020. *See, e.g., Baker-Carter Comm’n Report, cited in Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2347 (2021). In any event, this paragraph is irrelevant to the issues in this summary judgment motion. It is also hearsay to the extent a newspaper article is being relied upon to prove the truth of the matter asserted. *See Good v. Bd. of Cnty. Comm’rs*, 331 F. Supp.2d 1315, 1327 (D. Kan. 2004).

54. Given both the novel challenges of the 2020 election and the public debate concerning voters’ confidence in mail voting, many organizations, campaigns, and elections offices, including Plaintiff VPC as well as Kansas election officials, sought to encourage voters to vote by mail. Compare, Lopach Decl. at Ex. A (2020 VPC mailer) and Johnson Decl., Ex. 21 (Schmidt Tr. Ex. 17) (May 18, 2020 emails); *see also* Johnson Decl., Ex. 1 (Schmidt Tr.) 287:4-14.

RESPONSE: It is uncontroverted that VPC sent letters encouraging voters to vote by mail. It is also uncontroverted that the Johnson County Election Office encouraged mail voting. However, Johnson County did not want individuals to vote exclusively by mail. *See* Johnson Decl., Ex. 21 (Schmidt Tr. Ex. 17) at 3 (“I think we want to encourage people to vote

by mail but also let them know that it is safe to vote in person if they want to do that.”). The remainder of SOF ¶ 54, discussing the “novel challenge of the 2020 election and the public debate concerning voters’ confidence in mail voting” is speculation/argument, not fact, and is neither supported by the citations nor appropriate for inclusion in the statement of facts of a summary judgment motion. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 2012 WL 1305024, at *2.

55. Several Kansas counties sent mailers regarding the advance mail voting process, including advance mail ballot applications, to their registered voters. See, e.g., Johnson Decl., Ex. 1 (Schmidt Tr.) 82:25-83:2; *id.* at Ex. 2 (Cox Tr.) 102:9-15; *id.* at Ex. 3 (Shew Tr.) 21:23-22:2.

RESPONSE: Uncontroverted and immaterial.

56. The Johnson County election office opted to send advance mail ballot applications that were prepopulated with the voter’s data on the application form. *Id.* at Ex. 1 (Schmidt Tr.) 227:2-236:20, 240:12-243:12; 285:12-286:19; *see also id.* at Ex. 12 (Schmidt Tr. Ex. 31) (Apr. 3, 2020 emails); *id.* at Ex. 9 (Schmidt Tr. Ex. 32) (Apr. 16, 2020 emails); *id.* at Exs. 10 (Schmidt Tr. Ex. 35), 22 (Schmidt Tr. Ex. 36), 23 (Schmidt Tr. Ex. 37) and 11 (Schmidt Tr. Ex. 38) (redacted examples of Johnson County prefilled mailers from May 2020).

RESPONSE: Uncontroverted and immaterial.

57. Kansas election officials engaged in this and other outreach efforts especially because many Kansans were voting by advance mail ballot for the first time in 2020 and had questions about the process. *See, e.g., id.* at Ex. 1 (Schmidt Tr.) 241:2-4 (“Again, these are reminders because a lot of our voters, in 2020, during COVID, have never dealt with voting by mail before.”), 297:25-298:8; *id.* at Ex. 24 (Schmidt Tr. Ex. 43) (Johnson County FAQ and Facebook post); *id.* at Ex. 2 (Cox Tr.) 91:18-24, 107:9-15, 146:3-147:19.

RESPONSE: It is uncontroverted that numerous Kansans voted by mail for the first time in 2020 and that Kansas election officials engaged in outreach efforts to assist voters in that regard. However, it is controverted that the evidence cited by VPC supports its assertion that election officials engaged in outreach about the vote-by-mail process “*especially* because many Kansans were voting by advance mail ballot for the first time.” The “reminder” testimony that VPC references from Ms. Schmidt pertained to an exhibit from her deposition, Johnson Decl., Ex. 22 (Schmidt Tr. Ex. 36) at 2, which addressed the fact that voters must submit separate advance voting ballot applications for both the primary and the general election. Ex. FF at 239:14-241:4. The FAQ cited by VPC was issued because of voter confusion caused by VPC’s mailers. Ex. FF at 295:17-298:9; Johnson Decl., Ex. 24 (Schmidt Tr. Ex. 43). Similarly, the testimony of Ms. Cox cited by VPC addresses voter confusion caused by a third-party’s mailers, not caused by voters voting for the first time by mail. Ex. LL at 89:3-91:25, 107:9-15. Ms. Cox even placed an ad in the newspaper to address the voter confusion caused by third-party mailers. Ex. LL at 130:6-132:21; 146:3-147:13. Ms. Cox testified that various errors in the applications, including misspelled last names, wrong middle initials, and wrong birth dates, also were a cause of voter anger and confusion, not that voters were voting by mail for the first time. Ex. LL at 139:16-9-139:24.

58. When incomplete or inaccurate applications were submitted, county election officials attempted to help voters cure them regardless of whether the voter had used a blank form or a form pre-populated with personalized information and without incurring a particular burden from those that were prefilled. *Id.* at Ex. 1 (Schmidt Tr.) 84:18-85:20, 86:22-87:5, 134:6-22, 135:25-136:13, 294:2-13; *id.* at Ex. 2 (Cox Tr.) 67:9-68:1; 89:3-90:5; *id.* at Ex. 4 (Howell Tr.) 245:13-246:16, 252:11-23; *id.* at Ex. 17 (KS SOS Tr.) 250:18-252:6.

RESPONSE: It is uncontroverted that the election office attempted to help voters cure an application regardless of whether it is prefilled or not. However, the remainder is controverted. First, VPC's citations do not support the assertion that election officials did not "incur[] a particular burden from those [applications] that were prefilled." Second, the claim that election officials did not incur a particular burden from pre-filled applications is demonstrably false. Mr. Howell testified that incorrectly completed prefilled applications caused significant burdens on the Shawnee County Election Office, typically taking three to five times longer to process than accurately completed applications. Ex. KK at 252:24-253:23. Both the cure process and the extensive communications with angry and confused voters were extremely taxing on election officials. Ex. A at ¶¶ 12, 25-28, 37, 40, 44; Ex. U at ¶¶ 24-26, 37.

59. During the 2020 election cycle, many voters who had concerns about lost advance mail ballot applications or mail delays called their respective election office to inquire about the status of their application. *Id.* at Ex. 1 (Schmidt Tr.) 195:1-196:8, 293:13-18; *see also id.* at Ex. 2 (Cox Tr.) 73:25-74:5, 100:14-101:1.

RESPONSE: Uncontroverted, but immaterial.

60. Others chose to re-submit their application out of an abundance of caution. *Id.* at Ex. 1 (Schmidt Tr.) 120:12-24; *id.* at Ex. 2 (Cox Tr.) 100:14-101:1. In some cases this resulted in duplicative advance mail ballot applications being received in county election offices. *Id.* at Ex. 1 (Schmidt Tr.) 309:1-6 ("The bigger issue for us was apps coming from outside the State of Kansas to our voters, and multiple applications."), 288:3-12, 293:7-294:13, 308:8-11, 309:1-6; *Id.* at Ex. 17 (KS SOS Tr.) 150:13-19 (testifying to conversations about duplicate applications that election offices received in the 2020 election); *id.* at Ex. 2 (Cox Tr.) 91:13-17; 100:19-101:1; *id.* at Ex. 3 (Shew Tr.) 73:13-74:7.

RESPONSE: It is uncontroverted that tens of thousands of Kansas voters submitted multiple advance voting ballot applications in connection with the 2020 General Election. However, VPC's claim that applications were "re-submitted . . . out of an abundance of caution" with the mail is controverted. VPC's citations do not support that allegation. The evidence shows that voters were confused and submitted multiple applications because they received multiple advance ballot applications from third-party groups, particularly the Center for Voter Information (via VPC). Ex. FF at 293:24-295:9 (describing a group from "Springfield, Missouri" as the problem); Ex. LL at 144:2-144:22 (explaining that advance applications sent to voters by VPC "were the ones that [she] noticed [] would have multiple applications sent from the same person."); Ex. KK at 256:22-257:5 (noting that "the most time for staff to deal with inaccuracies and duplicates were the ones that came from the Center for Voter Information."). Indeed, many confused voters believed they *had* to send in these additional applications in order to be able to vote. Ex. KK at 255:21-256:4; Ex. A at ¶ 53.

61. Other voters' concerns of mail delays were grounded in experience. *See, e.g., id.* at Ex. 1 (Schmidt Tr.) 195:1-197:21, 201:7-12, 211:24-212:8, 293:13-294:1; *id.* at Ex. 25 (Schmidt Tr. Ex. 25) (July 22, 2020 Johnson County Election Office Facebook post); *id.* at Ex. 26 (Schmidt Tr. Ex. 26) (July 24, 2020 emails); *id.* at Ex. 27 (Schmidt Tr. Ex. 27) (Apr. 11, 2020 emails).

RESPONSE: Uncontroverted, but immaterial.

62. When voters called their election offices about advance mail ballot applications received in the mail, officials instructed voters that the application forms were legitimate and that the voters could complete and submit those applications if they chose to do so. *See, e.g., id.* at Ex. 1 (Schmidt Tr.) 297:25-298:8; *id.* at Ex. 24 (Schmidt Tr. Ex. 43) (Johnson County FAQ and Facebook post).

RESPONSE: Uncontroverted, but immaterial. Many voters who called about the pre-filled advance voting ballot applications they received from CVI were angry, frustrated, and confused. Election officials had to explain to the voters that such applications were not from the election office and did not have to be returned if the voter did not want to do so. Ex. LL, Cox Tr., 89:3-89:20, 139:16-140:3; Ex. FF at 294:8-295:1.

63. Voters who expressed a desire to not do so, election officials informed the voter that the applications could be discarded. *See id.* at Ex. 1 (Schmidt Tr.) 294:20-295:1; *id.* at Ex. 2 (Cox Tr.) 139:20-140:3.

RESPONSE: Uncontroverted.

64. The 2020 General Election nevertheless saw high turnout throughout Kansas and state and local Kansas election officials deemed it a successful election. *Id.* at Ex. 17 (KS SOS Tr.) 274:5-22, 282:8-9; *id.* at Ex. 1 (Schmidt Tr.) 167:10-168:11; *id.* at Ex. 28 (Schmidt Tr. Ex. 15) (Aug. 5, 2020 letter); *id.* at Ex. 29 (Schmidt Tr. Ex. 23) (Johnson County Board of Canvassers report); *id.* at Ex. 30, Press Release, Kansas Att’y Gen., *AG Derek Schmidt: Kansas asks U.S. Supreme Court to hear Texas election lawsuit* (Dec. 9, 2020), <https://ag.ks.gov/media-center/news-releases/2020/12/09/ag-derek-schmidt-kansas-asks-u.s.-supreme-court-to-hear-texas-election-lawsuit>, (quoting Defendant Schmidt that “Kansas ran its elections honestly and by the rules....”); *id.* at Ex. 31, Russel Falcon, *Zero evidence of voter fraud in any state, including Kansas officials report to NYT*, KSNT (Nov. 11, 2020), <https://www.ksnt.com/news/kansas/zero-evidence-of-voter-fraud-in-any-state-including-kansas-officials-report-to-nyt>, (quoting Defendant Schwab that “Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems. . . .”).

RESPONSE: Uncontroverted, but immaterial.

65. The advance mail voting process includes multiple safeguards against fraud, *id.* at Ex. 1 (Schmidt Tr.) 64:3-20, 124:9-25, 212:25-216:9; *id.* at Ex. 2 (Cox Tr.) 58:5-8; *id.* at Ex. 4 (Howell Tr.) 42:9-23, 113:4-19, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications. *See, e.g.*, K.S.A. § 25-2431.

RESPONSE: Uncontroverted, but immaterial.

66. The 2020 post-election audit produced no evidence that voter fraud was a concern in Kansas. Johnson Decl., Ex. 17 (KS SOS Tr.) 282:25-283:13; *id.* at Ex. 1 (Schmidt Tr. 212:25-213:22, 292:1-5; *id.* at Ex. 2 (Cox Tr.) 105:5-106:9; *id.* at Ex. 4 (Howell Tr.) 42:9-23.

RESPONSE: Controverted. First, the cited testimony is misstated. Mr. Caskey testified that the post-election audits did not “reveal any systematic fraud in Kansas elections in 2020.” The cited testimony of Ms. Schmidt did not even discuss post-election audits.

Second, post-election audits do not address possible voter fraud resulting from pre-filled advance mail ballot applications. A post-election audit merely verifies that “every ballot that was cast was accounted for and counted properly either by hand or by machine.” Ex. HH at 283:14-283:21; Ex. LL at 105:19-106:9 (explaining that a post-election audit occurs by hand-counting the votes cast in 1% of the precincts and verifying that number matches the machine count); Ex. KK at 40:24-41:15 (explaining that the audit occurs by verifying that a hand count of the votes match what was reported on election night and covers a minimal number of precincts). Fraud in applying for, obtaining, and casting a mail ballot would not be revealed by a post-election audit.

67. On February 10, 2021, the Kansas Legislature introduced HB 2332, which, among other things, sought to tightly restrict the distribution of advance ballot applications to potential Kansas voters. *See* Stipulated Facts at § 2(a)(xvii).

RESPONSE: It is uncontroverted that HB 2332 was introduced on Feb. 10, 2021. But the characterization that it “sought to tightly restrict the distribution of advance ballot applications to potential Kansas voters” is attorney argument, not a fact (let alone an uncontroverted fact), and thus not appropriate for inclusion in a summary judgment motion. *In re Motor Fuel Temperature Sales Pracs. Litig.*, 2012 WL 1305024, at *2.

68. On March 17, 2021, the Kansas Secretary of State’s Office submitted written testimony on HB 2332 that did not include any discussion of prefilled advance mail ballot applications. Stipulated Facts at § 2(b)(x); *see also* Johnson Decl., Ex. 32 (KS SOS Tr. Ex. 17); *id.* at Ex. 17 (KS SOS Tr.) 295:21-297:7.

RESPONSE: Controverted. The document, which speaks for itself, references the fact that “mailings [from third-parties] may not collect information required by federal or state law, resulting in incomplete mail ballot applications. For instance, state law requires a government issued identification number or a copy of a government issued ID with advance by mail ballot applications. In addition, a voter signature is required for those who wish to request an advance by mail ballot. If a voter does not provide that information, their application is incomplete.” The document also explicitly identifies “the Center for Voter Information based out of Springfield, Missouri” as one of the entities mailing pre-filled advance voting ballot applications to Kansas voters.

69. The Office’s official position was “neutral.” *Id.*

RESPONSE: Uncontroverted, but immaterial.

70. On May 3, 2021, the Legislature enacted HB 2332 over the Governor’s veto. *See* Stipulated Facts at § 2(a)(xxi); Johnson Decl., Ex. 33 (Schmidt Tr. Ex. 4) (Governor Kelly’s veto letter).

RESPONSE: Uncontroverted, but immaterial.

71. Plaintiffs challenged two of HB 2332’s provisions, but only one—the Personalized Application Prohibition—is still at issue in this lawsuit. See Stipulated Facts at § 2(a)(xxviii).

RESPONSE: Uncontroverted.

72. HB 2332’s Personalized Application Prohibition bans any person or organization from mailing registered Kansas voters a personalized advance mail voting application that is prefilled with any information, such as a voter’s name and address. See H.B. 2332 § 3(k)(2) (codified at K.S.A. § 25-1122(k)(2)) (“No portion of such [advance mail voting application] shall be completed prior to mailing such application to the registered voter.”).

RESPONSE: Uncontroverted.

73. This prohibition applies to “[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,” even if the prefilled information is derived from the State’s publicly available voter registration file. *Id.*

RESPONSE: Uncontroverted.

74. A violation of the Personalized Application Prohibition is a class C nonperson misdemeanor, which contains no scienter requirement and is punishable by up to one month in jail and/or fines. *Id.* § 3(k)(5); K.S.A. §§ 21-6602(a)(3), (b).

RESPONSE: Whether the pre-filled advance ballot prohibition contains a “scienter requirement” is a statutory construction argument being made in a statement of facts. It is a legal conclusion, not a factual claim, and is thus inappropriate for inclusion in the statement of facts. *In re Motor Fuel Temperature Sales Practices Litigation*, 2012 WL 1305024, at *2.

75. HB 2332 carves out limited and narrow exceptions to the Personalized Application Prohibition by permitting a subset of state and county election officials to mail prefilled advance mail voting applications. *Id.* § 3(k)(4).

RESPONSE: Uncontroverted that K.S.A. 25-1122(k)(4) provides exceptions for state and county election officials.

76. In defense of the Personalized Application Prohibition the State has asserted interests such as “[m]inimizing voter confusion” and disenfranchisement, “[p]reserving and enhancing voter confidence,” and reducing the rejection of inaccurate applications, inefficiencies in election administration, and potential for voter fraud. Johnson Decl., Ex. 34 (Defendant Schwab’s Responses and Objections to Plaintiff’s First Interrogatories) at 3-4.

RESPONSE: Uncontroverted.

77. These rationales for the Personalized Application Prohibition are not a part of the Legislative Record for HB 2332. See Kansas House Bill 2332 (2021), Legislative Record, http://kslegislature.org/li/b2021_22/measures/hb2332/ (last accessed Oct. 14, 2022).

RESPONSE: Controverted and immaterial. First, as a matter of law, the Legislature was not required to memorialize its interests in adopting the legislation as part of any formal record. Second, Plaintiffs only cite to the bill page of the Kansas Legislature’s website and thus have not shown that their citation is to the entire “Legislative Record.” Second, at least one proponent did cite voter confusion, inaccurate applications, and other information that would address these categories. Testimony of John M. Toplikar in Support of H.B. 2332 (http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_1/documents/testimony/20210218_18.pdf) (last visited Oct. 25, 2002). Third, the Kansas County Clerks & Election Officials testified that they “appreciate[d] Representative Toplikar’s intent under this bill and d[id] not disagree with what he [was] trying to accomplish.” Testimony of Rick Piepho,

Kansas County Clerks & Election Officials Elections Committee Chari, *available at* http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_1/documents/testimony/2021_0218_15.pdf (last visited Oct. 25, 2022). The Secretary’s testimony likewise highlighted these issues. Ex. Z, Secretary of State Testimony.

III. – Defendants’ Statement of Additional Material Facts

1. 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. (Defs.’ MSJ SOF ¶ 17)

2. All of the information on an advance voting ballot application must precisely match the information in ELVIS in order for the county election office to process the application without having to contact the voter to cure mismatches or discrepancies. Only the most clearly inadvertent mismatches (e.g., minor misspelling of street name, such as omitting the letter “e” in “George” in the street “George Williams Way,” or signing as “Jim” despite being registered as “James”) will be overlooked. Ex. A at ¶ 25; Ex. GG at 35:6-40:5; 48:6-51:7. (Defs.’ MSJ SOF ¶ 18)

3. VPC relied on a vendor, Catalist, LLC (“Catalist”), to provide the voter registration data for the Kansas voters whom VPC targeted with advance voting ballot application packets during the 2020 General Election. Ex. JJ at 92:14-93:4; Ex. F at 164:7-13; Ex. H at 3. (Defs.’ MSJ SOF ¶ 29)

4. VPC received Kansas active voter registration lists from Catalist on January 31, April 10, and September 15 of 2020. PTO-SF, ¶ xxxix. (Defs.' MSJ SOF ¶ 30)

5. 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. (Defs.' MSJ SOF ¶ 32)

6. 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 9/16/2020; and
- e. Wave E: data uploaded on 8/24/2020, expected in homes on 9/28/2020.

PTO-SF, ¶ xl. (Defs.' MSJ SOF ¶ 35)

7. Although the information that Catalist (and, by extension, VPC) used to pre-fill advance voting ballot applications for voters was "based upon publicly available information" in ELVIS, Pls.' Resp. to Req. for Admis. No. 8, (attached as Ex. K), Catalist also merged commercial data with the official State voter file in preparing the voter data it sent to VPC for use in pre-filling those applications. Ex. F at 171:24-174:1. (Defs.' MSJ SOF ¶ 37)

8. VPC Executive Vice President Lionel Dripps testified that VPC discovered, in the wake of Waves A and B, that approximately 3% of the pre-filled applications it had sent to voters throughout the United States contained an erroneous middle initial (i.e., an initial that did not match the data in the states' voter files), and approximately 5% of the pre-filled applications contained

an erroneous suffix (i.e., a suffix that did not match the data in the states' voters files). Ex. F at 167:24-170:9. (Defs.' MSJ SOF ¶ 38)

9. Concerned about the accuracy of the voter data that it had received from Catalist, VPC opted to send blank advance voting ballot applications to Kansas voters in connection with Waves C and D. Ex. F at 171:1-23. (Defs.' MSJ SOF ¶ 39)

10. In its discovery responses, Plaintiffs produced a subset of the Kansas voters to whom it sent advance voting ballot applications in the 2020 General Election. (The list contained 312,918 of the approximately 507,864 voters to whom VPC had sent applications). Ex. L. (Defs.' MSJ SOF ¶ 40)

11. 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. (Defs.' MSJ SOF ¶ 41)

12. 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. (Defs.' MSJ SOF ¶ 42)

13. 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. (Defs.' MSJ SOF ¶ 43)

14. In its first wave of mailings, which VPC sent to the printer on July 6, 2020, for delivery to voters on or about August 17, 2020, 385 Kansas voters to whom VPC sent pre-filled

advance voting ballot applications had had their voter registrations cancelled prior to that date (due to death, change of residence, criminal conviction, etc.), and in many cases long before that date. Ex. N at ¶ 9; Ex. O (date of voters' cancelled registration is found in Column E). (Defs.' MSJ SOF ¶ 44)

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

- 5 separate mailings to 176 of the 385 voters whose voter registrations had been cancelled (and thus been removed from the Kansas voter rolls) prior to the first VPC wave mailing;
- 4 separate mailings to 99 voters who had been removed from the Kansas voter rolls prior to the first VPC wave mailing;
- 3 separate mailings to 39 voters who had been removed from the Kansas voter rolls prior to the first VPC wave mailing; and
- 2 separate mailings to 11 voters who had been removed from the Kansas voter rolls prior to the first VPC wave mailing

Ex. N at ¶ 9; Ex. O. (Defs.' MSJ SOF ¶ 45)

16. 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. (Defs.' MSJ SOF ¶ 46)

17. 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. (Defs.' MSJ SOF ¶ 47)

18. 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. (Defs.’ MSJ SOF ¶ 48)

19. 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. (Defs.’ MSJ SOF ¶ 49)

20. 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). (Defs.’ MSJ SOF ¶ 50)

21. 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. (Defs.’ MSJ SOF ¶ 51)

22. 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. KK at 117:24-125:2; Mr. Howell himself spoke with hundreds of these angry, frustrated, and confused voters. Ex. KK at 121:11-122:12. (Defs.’ MSJ SOF ¶ 52)

23. 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. (Defs.' MSJ SOF ¶ 53)

24. 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. LL at 130:6-132:5; Ex. U at ¶ 37. The text of the ad can be found at Ex. V. (Defs.' MSJ SOF ¶ 54)

25. 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. LL at 130:6-17. (Defs.' MSJ SOF ¶ 55)

26. 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. KK at 120:6-121:4. Examples of these letters can be found at Ex. W. (Defs.' MSJ SOF ¶ 56)

27. 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. HH 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. HH at 212:20-213:11, 237:11-240:5. (Defs.' MSJ SOF ¶ 57)

28. 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. HH at 209:15-210:9, 240:6-242:7. (Defs.’ MSJ SOF ¶ 58)

29. 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. (Defs.’ MSJ SOF ¶ 59)

30. 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. (Defs.’ MSJ SOF ¶ 60)

31. 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. (Defs.’ MSJ SOF ¶ 61)

32. 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. (Defs.' MSJ SOF ¶ 62)

33. 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. (Defs.' MSJ SOF ¶ 63)

34. 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. (Defs.' MSJ SOF ¶ 64)

35. 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. (Defs.' MSJ SOF ¶ 65)

36. 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). (Defs.' MSJ SOF ¶ 66)

37. 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. JJ at 206:9-207:14, 209:3-210:22. (Defs.' MSJ SOF ¶ 67)

38. Of the approximately 507,864 Kansas voters to whom VPC sent at least one (and as many as five) advance voting ballot applications in connection with the 2020 General Election, at least 112,597 of those individuals used a VPC-provided pre-paid/pre-addressed envelope to mail their completed application back to their respective county election offices. Ex. E; Ex. F at 177:24-179:20; Ex. JJ at 123:17-124:20. (Defs.' MSJ SOF ¶ 68)

39. The 112,597 Kansas voters who used a VPC-provided pre-paid/pre-addressed envelope to mail their completed applications back to their respective county election offices sent in 127,336 applications using the VPC-provided envelopes. In other words, approximately 14,739 duplicate applications were sent to county election offices by Kansas voters using a VPC-provided envelope. Ex. E; Ex. F at 178:16-182:3; Ex. JJ at 124:16-125:18. (Defs.' MSJ SOF ¶ 69)

40. Of the 112,597 Kansas voters who used a VPC-provided pre-paid/pre-addressed envelope to send in a completed advance voting ballot application to their county election office, only 111,199 voters ultimately received an advance ballot. In other words, 1,398 voters who returned an advance voting ballot application in a VPC-provided envelope never submitted a

successful application such that they could receive an advance ballot in connection with the 2020 General Election. Ex. E; Ex. F at 182:20-184:1; Ex. JJ at 128:3-25. (Defs.' MSJ SOF ¶ 70)

41. 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. (Defs.' MSJ SOF ¶ 71)

42. 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. (Defs.' MSJ SOF ¶ 72)

43. 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. (Defs.' MSJ SOF ¶ 73)

44. 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. KK at 269:14-270:1; Ex. U at ¶ 19. (Defs.' MSJ SOF ¶ 74)

45. 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. (Defs.’ MSJ SOF ¶ 75)

46. 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. (Defs.’ MSJ SOF ¶ 76)

47. 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. (Defs.’ MSJ SOF ¶ 77)

48. 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. HH at 150:13-19. (Defs.’ MSJ SOF ¶ 78)

49. 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. (Defs.' MSJ SOF ¶ 79)

50. 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. (Defs.' MSJ SOF ¶ 80)

51. 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. (Defs.' MSJ SOF ¶ 81)

52. 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. (Defs.' MSJ SOF ¶ 82)

53. 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. (Defs.’ MSJ SOF ¶ 83)

54. VPC’s Rule 30(b)(6) witness, Mr. Lopach, testified that he cannot “speak to how an individual or a group of people would respond to a pre-filled vote-by-mail application versus a blank vote-by-mail application.” Ex. JJ at 98:17-99:20. (Defs.’ MSJ SOF ¶ 84)

55. Mr. Lopach testified that he does not know if the recipient of a pre-filled advance voting ballot application “views a political message in whether or not their name is filled out on” the application. Ex. JJ at 99:22-100:10. (Defs.’ MSJ SOF ¶ 85)

56. Mr. Lopach testified that nothing in the Pre-Filled Application Prohibition prohibits VPC from banding together with other persons or organizations to engage potential voters and assist community members in encouraging advance mail voting. Ex. JJ at 189:18-191:14. (Defs.’ MSJ SOF ¶ 86)

57. Mr. Lopach testified that, other than the restriction on inserting a voter’s name and address on an advance voting ballot application, nothing in the Pre-Filled Application Prohibition restricts VPC from encouraging individuals to participate in the democratic process, instructing them how to obtain or vote an advance ballot, encouraging them to do so, or communicating any other message in the mailers sent to targeted voters. Ex. JJ at 183:9-187:19. (Defs.’ MSJ SOF ¶ 87)

IV. – Argument

As narrowed, Plaintiffs’ lawsuit 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 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 pre-filling the advance voting ballot applications it mails to potential Kansas voters it engages in core political speech aimed at informing and assisting voters in the electoral process. More specifically, VPC claims it is engaged in speech in three ways. First, it

argues that its pre-filled applications promote the benefits of mail voting in pursuit of political change and that the pre-filled nature of the application is “characteristically intertwined” with that message. Br. at 21. Second, VPC maintains that adding a voter’s name and address to an official state form is protected speech not only because it represents “words on a page,” but also because that data conveys VPC’s belief that the particular voter to whom the VPC mailer and application were sent should apply for an advance ballot and vote by mail. Br. at 22. Third, VPC avers that pre-filling the application amounts to expressive conduct based on the “political moment and the surrounding context of the mailer,” and that a “reasonable recipient would interpret some sort of message” upon receiving VPC’s mailer. Br. at 23.

None of these theories has merit. 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, *see* 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. In the wake of Kansas’ agreement to a permanent injunction against the enforcement of K.S.A. 25-1122(l)(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. 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.”). Furthermore, Kansas retains broad authority to regulate how a voter obtains a ballot. *See Cook v. Gralike*, 531 U.S. 510, 523 (2001) (“[T]he Elections Clause grants to the States ‘broad power’ to prescribe the procedural mechanisms for holding congressional elections.”) (citations omitted). The fact that Plaintiffs include the voter’s information on the form does not convey a message to a particular voter. Pls. Br. at 22. The information to be included on the form is 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. Defs.’ Statement of Add’l Facts (“DSOAF”) ¶¶ 1-2. There is no space in the fields 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

address in the context of an official ballot application, especially when the application is being completed by someone other than the voter. And even if there was any conceivable speech flowing from the insertion of a voter's biographical data on the application that the voter must submit to the county election office, it would be the speech of the *voter*, not the *third-party*.

Furthermore, despite Plaintiffs' claim that voters who receive pre-filled applications must discern "some sort of message" therefrom, Br. at 23 (citing *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022)), Plaintiffs have produced no evidence that *any* message is received by a prospective voter from the pre-filled application itself. See DSOAF ¶¶ 54-55. In fact, VPC's CEO (and 30(b)(6) witness), Mr. Lopach, admitted that it would be entirely speculative for VPC to believe that a voter discerned *any* message from a pre-filled application. *Id.* Of course, even if voters did discern "some sort of message," that would not be enough; the voter must understand the intended message. Plaintiffs' "some sort of message" theory is at odds with the Supreme Court's directive that, before conduct can "possess[] sufficient communicative elements" to qualify for First Amendment protections, there must be a showing of "[a]n intent to convey a *particularized* message" and a finding that "*the message* would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (emphasis added).

Additionally, 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 combined 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 single message and insists that the pre-filled application itself cannot be disaggregated from the other materials contained therein. Br. at 21. 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).

VPC responds that the Court cannot “slice and dice” the activities involved in its speech. Br. at 21. To support this theory, VPC cites *League of Women Voters v. Hargett*, 400 F. Supp.3d 706, 720 (M.D. Tenn. 2019), a case regulating individuals engaging in voter registration activities. But the language that VPC quotes from that case is from *the dissent* in *Steen*. *Id.* (quoting *Steen*, 732 F.3d at 401). The *Steen* majority, on the other hand, correctly found, consistent with Supreme Court precedent, that an apparently limitless variety of conduct cannot be labeled “speech” any time a person engaging in such conduct intends thereby to express an idea. *Id.* at 388-390.

VPC next argues that some sort of message must have been understood by the recipients of its mailers because more than 69,000 Kansans returned one or more VPC-pre-filled advance voting ballot applications to county election offices. Br. at 23. Once again, there is no evidence

in the record that voters understood any message from the pre-filled nature of the VPC application, and the fact that VPC sent applications to more than 500,000 Kansans in connection with the 2020 General Election casts doubt on this allegation. More importantly, the mailers that VPC sent to Kansas voters did not consist merely of advance voting ballot applications. Included with the pre-filled application was a cover letter discussing the virtues of mail voting, the process for obtaining and voting an advance ballot, and a pre-addressed, postage pre-paid envelope in which to return the completed application to the county election office. DSOAF ¶ 5. VPC has produced no admissible evidence to show that a voter discerns any message from the pre-filled application itself, separate and apart from the other materials and messaging in the mailer.

In any event, even if VPC's factual argument were true, it 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); *see also Lichtenstein v. Hargett*, ___ F. Supp.3d ___, 2021 WL 5826246, at *35 (M.D. Tenn. Dec. 7, 2021) (same for mailing absentee ballot applications). "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." *Steen*, 732 F.3d at 391-92. In explaining why this theory cannot be squared with First Amendment case law, the Court 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*, 2022 WL 2357395, at *7-9. 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)].” *VoteAmerica*, 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 Priorities USA v. Nessel*, No. 19-13341, 2022 WL 4272299, at *5-6 (E.D. Mich. Sept. 15, 2022); *DCCC v. Ziriak*, 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 not 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).

Lichtenstein v. Hargett, 489 F. Supp.3d 742 (M.D. Tenn. 2020) is also directly on point, contrary to the position of the Plaintiffs (and, with much respect, of the Court) at the preliminary injunction stage. *Lichtenstein* involved a constitutional challenge to a Tennessee law 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. At the preliminary injunction phase, this Court sought to distinguish *Lichtenstein* on the grounds that VPC’s “application packets include speech that communicates a pro-mail voting message.” *VoteAmerica v. Schwab*, 576 F. Supp.3d 862, 875 (D. Kan. 2021). But the *Lichtenstein* court subsequently made clear in its order dismissing the case that the plaintiffs there – just like VPC – included a blank absentee ballot application with the other “voter engagement materials” they sent to voters. *Lichtenstein*, 2021 WL 5826246, at *6. 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.

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 cases that Plaintiffs cite in their summary judgment motion do not justify a similar conclusion in the far narrower context now presented by the Pre-Filled Application Prohibition. In *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020), for example, 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 district court initially 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. Moreover, *just over a month ago, the district court reversed its prior rulings and granted judgment to the defendants on the pleadings, concluding that the law involved solely non-expressive conduct. Priorities USA*, 2022 WL 4272299, at *5.

In *League of Women Voters*, the court confronted a statute that, *inter alia*, required private parties to (i) register with the State before engaging in most voter registration drives, (ii) deliver voter registration forms to authorities within ten days of a voter registration drive, (iii) avoid copying or retraining data collected on the voter registration form, and (iv) include disclaimers on any public communications with voters in connection with voter registration assistance. 400 F. Supp.3d at 711-13. The court held, and the defendants conceded, that the voter registration drives amounted to core First Amendment conduct. *Id.* at 720. Citing the *dissenting opinion* in *Steen*, 732 F.3d at 388 (Davis, J., dissenting), the court then reasoned that the discrete, logistical aspects of Tennessee’s voter registration law could not be separated from the expressive parts of the statute. *League of Women Voters*, 400 F. Supp.3d at 720. This wrongly decided opinion was 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). And as described in more detail below, voter registration forms and activity are fundamentally distinct from absentee ballot applications and the advocacy related thereto.

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 224.¹ In later ruling on the defendants’ motion to dismiss, the court expressed misgivings with its prior decision at the preliminary injunction phase of the case 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.” *Democracy N.C. v. N.C. State Bd. of Elections*, ___ 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.

In any event, 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-*

¹ 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.

person interactions 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.

Finally, *American Association of People with Disabilities v. Herrera*, 690 F. Supp.2d 1183 (D.N.M. 2010), involved a challenge to a New Mexico law that (i) required third-parties to register with the State before conducting voter registration drives, (ii) limited the number of registration forms that a third-party could accept from prospective voters in any such drive, and (iii) mandated that third-parties return any voter registration applications within 48 hours of receipt. *Id.* at 1188. The court concluded that these restrictions on voter registration activity implicated the plaintiffs' First Amendment rights, and it proceeded to apply *Anderson-Burdick* balancing. *Id.* at 1212-20. The court's denial of the defendants' motion to dismiss in that case, however, shines little to no light on this action. Not only is voter registration activity materially different than assistance with absentee ballot applications, but the sole conduct by Kansas' Pre-Filled Application Prohibition is the mailing of unsolicited, pre-filled applications. There are no restrictions at all in Kansas with respect to the type of in-person interactions that the court in *Herrera* found so important.

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 a “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. DSOAF, ¶¶ 19-53. 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, as Plaintiffs advocate. Br. at 24-29.

In arguing for a heightened scrutiny standard, VPC relies upon *Meyer*, 486 U.S. at 414. Parroting language from that opinion, VPC maintains that the Pre-Filled Application Prohibition restricts its core political speech by “proscribing [its] most effective means of conveying its pro-advance mail voting message and reducing the overall quantum of speech delivering that message.” Br. at 25. VPC further avers that the law represents “content- and viewpoint-based discrimination because it regulates only pro-advance mail voting communications.” *Id.*

There are numerous flaws in VPC's argument. First, VPC produced no evidence in support of its theories regarding (i) any alleged message that voters understand from its pre-filled advance voting ballot applications or (ii) the effectiveness of pre-filling those applications. In fact, VPC's CEO (Plaintiffs' Rule 30(b)(6) witness) testified that he did not even know if the recipient of a pre-filled application "views a political message in whether or not their name is filled out on" the application. DSOAF ¶ 55.

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. 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.*

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. Mr. Lopach admitted in his

deposition that the Pre-Filled Application Prohibition does not restrict VPC from encouraging individuals to participate in the democratic process, from instructing them how to obtain or vote an advance ballot, from encouraging them to vote early or by mail, or from communicating any other message in the mailers that it sends to targeted voters. DSOAF ¶ 57.

Like the signs in *City of Austin*, pre-filling advance ballot applications also expresses no “idea or message.” See *City of Austin*, 142 S. Ct. at 1474 (rejecting “view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.”). The applications at issue here, which are 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 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, Br. at 28, 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. DSOAF ¶ 2. 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 in 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-filled application to a voter who has requested it. The only thing being constrained is the mailing of unsolicited, pre-filled applications. 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

If the Court 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 v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018). 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).

In an effort to avoid *Anderson-Burdick* balancing and effectively isolate this Court on a jurisprudential island where virtually no court has gone before, VPC contends that the Pre-Filled Application Prohibition does not involve the mechanics of the electoral process, but instead entails the direct regulation of communication among private parties who are advocating for political change and more voting by mail. Br. at 32. VPC has mischaracterized the purpose and effect of this election integrity statute. The law merely regulates what information may be included on an advance voting ballot application when that application is mailed, unsolicited, to a voter from a third-party. This facilitates more efficient election administration, ensures that the information on the application is correct, and minimizes voters’ confusion and frustration as to why they received a prefilled – and occasionally inaccurately pre-filled – application from a third-party not affiliated with their county election office. This, in turn, enhances confidence in the electoral process and minimizes the possibility of voter fraud when an application is mailed to an address where a voter

no longer lives. In short, the law regulates what information may be included on an application to obtain a ballot, an essential part of the mechanics of the electoral process; it does *not* regulate speech. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995) (distinguishing between laws regulating election mechanics and pure speech); see also *Burdick*, 504 U.S. at 433 (law that “governs . . . the voting process itself” is a quintessential election law); *VoteAmerica*, 2022 WL 2357395, at *13 (law prohibiting pre-filling of absentee ballot applications is best “described as a regulation that governs the mechanics of an election process”).

Furthermore, 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. DSOAF ¶¶ 7-27. (Contrary to VPC’s misrepresentation of the record, Br. at 36-37, the problem was *not* confined to merely duplicate applications.) Not only were confused and angry voters inundating county election officials with complaints on the issue,² but VPC itself was concerned enough with the faulty data it had received from Catalist (and used to pre-populate the applications sent to targeted voters) that it decided on its own to stop pre-filling the applications and began sending out blank applications for a period of time. DSOAF ¶¶ 8-9. It is hard to see

² For a discussion of why these voters’ statements were not hearsay, see Defs.’ MSJ (Dkt. 151) at 41 n.5.

how one can legitimately criticize the State for seeking to mitigate an issue that VPC itself recognized as a serious dilemma.

VPC's farfetched advocacy of a "narrowly tailored" standard (Br. at 37-43) falls flat. To begin with, there is no core political speech (or any expressive conduct at all, for that matter) at play with the Pre-Filled Application Prohibition. But even if there were, narrow tailoring simply requires that the law "not unnecessarily circumscribe protected expression." *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002). If a "content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). In that instance, the test is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). The Prefilled Prohibition meets that test. Rather than completely prohibiting third parties from distributing advance voting ballot applications, or prohibiting third party assistance in pre-filling such applications, Kansas acted narrowly to address the specific problem it saw: third-party, unsolicited pre-filled applications.

While VPC seeks to declare the related problem of duplicate applications irrelevant and unconnected to the Pre-Filled Application Prohibition, the opposite is true. As Andrew Howell and Debbie Cox noted, many voters submitted duplicate applications to county election offices because, after receiving pre-filled applications, they believed that they were required to return them even if they had already submitted another one. DSOAF ¶ 44. And VPC 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-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. *Id.* 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. DSOAF ¶¶ 43, 49-50. The problems were simply unprecedented.

Meanwhile, county election officials were forced to expend large 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. DSOAF ¶ 36. 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 *VoteAmerica*, 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 also claims (Br. at 29-31) that the Pre-Filled Application Prohibition abridges its First Amendment freedom of association. Little appears to be left of this cause of action, however, in the wake of the parties’ Stipulation. *See* Dkt. 73. Mr. Lopach, in fact, conceded that K.S.A. 25-1122(k)(2) does not constrain VPC from banding together with other persons or organizations to engage potential voters and encourage the use of advance mail voting. DSOAF ¶ 56.

VPC argues that it has identified specific voters with whom it wants to band together and tout the ease and virtues of voting early via mail. Br. at 30. VPC further notes that it tracks which

targeted voters use its pre-paid envelopes to submit advance voting ballot applications to county election offices so that it can assess the effectiveness of the communication and somehow “build a relationship” with that voter. *Id.* But these theories fail 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 *VoteAmerica* rejected this same cause of action asserted by these same Plaintiffs involving virtually the same statute. *VoteAmerica*, 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. Br. at 33-34. VPC argues that the legitimate applications of the statute are hypothetical or rare, particularly because, in pre-populating the advance voting ballot applications it sends to voters, VPC “us[es] reliable data from specialized vendors hired to professionally manage and maintain voter information and culls its lists from with the goal of keeping the information accurate and current.” Br. at 33. This is rich.

First, the evidence produced in discovery revealed that, in pre-filling its applications, VPC used voter data that its vendor (Catalist) had obtained from the Secretary of State's Office *at least 4-6 months* before those applications were mailed to and received by voters. DSOAF ¶¶ 3-4, 6, 12. As Ken Block pointed out, this meant that VPC failed to remove many hundreds of voters whose registrations had been cancelled (as a result of change of residency, criminal conviction, death, etc.) prior to the mailings. *Id.* at ¶¶ 14-19. VPC's own rebuttal expert confirmed that VPC was well aware of the often stale data on its mailers, yet decided it was not worth the trouble to update the information to ensure that the pre-filled applications reflected only the latest and most accurate data possible. *See* Ex. MM at 147:20-148:18.

Second, VPC discovered, in the wake of its first two waves of mailings to voters for the 2020 General Election that approximately 3% of the pre-filled applications it had sent to voters contained an erroneous middle initial (i.e., an initial that did not match the data in the states' voter files), and approximately 5% of the pre-filled applications contained an erroneous suffix (i.e., a suffix that did not match the data in the states' voters files). DSOAF ¶ 8. Following this discovery, VPC was so concerned about the accuracy of the voter data that it had received from Catalist that it send blank advance voting ballot applications to Kansas voters in connection with its third and fourth waves of mailers. *Id.* at ¶ 9.

Third, the adverse impact that pre-filled applications had on both voters and county election officials was substantial. DSOAF ¶¶ 19-53. Even if, as VPC insists, there were occasions when a pre-filled application might have some beneficial effect, the Kansas Legislature was certainly well within its authority to address and mitigate the concerns expressed by voters and county election officials alike.

In any event, VPC's overbreadth cause of action falls flat on the law. 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. But its CEO, Mr. Lopach, acknowledged that, other than not being allowed to insert a voter’s name and address on the ballot application, nothing in the Kansas law restricts VPC from encouraging individuals to participate in the democratic process, instructing them how to obtain or vote an advance ballot, encouraging them to do so, or communicating any other message in the mailers sent to targeted voters. 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.

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.

V. – Conclusion

For all the reasons stated herein, Defendants request that the Court deny Plaintiffs’ motion for summary judgment.

Respectfully Submitted,

By /s/ Bradley J. Schlozman

Bradley J. Schlozman (KS Bar #17621)

Scott R. Schillings (KS Bar #16150)

HINKLE LAW FIRM LLC

1617 North Waterfront Parkway, Suite 400

Wichita, Kansas 67206

Telephone: (316) 267-2000

Facsimile: (316) 630-8466

Email: bschlozman@hinklaw.com

E-mail: sschillings@hinklaw.com

Attorneys for Defendants

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2022, I electronically filed the foregoing Defendants' Response to Plaintiffs' Motion for Summary Judgment 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

RETRIEVED FROM DEMOCRACYDOCKET.COM