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.*	C.A. NO. 2:21-cv-02253-KHV-GEB

PLAINTIFF VOTER PARTICIPATION CENTER'S OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants fail to establish they are entitled to summary judgment on each of Plaintiff VPC's three claims that the Personalized Application Prohibition (I) abridges VPC's First Amendment freedom of speech; (II) abridges VPC's First Amendment freedom of association; and (III) is unconstitutionally overbroad.

The Court previously held after the preliminary injunction hearing on September 8, 2021, that Defendants failed to substantiate any legitimate state interests supporting Kansas House Bill 2332's Personalized Application Prohibition and the Court preliminarily enjoined the provision for violating First Amendment rights. Nearly a year later, Defendants have failed to develop any meaningfully different evidence than was before this Court last year.

On February 25, 2022, this Court entered a stipulated order for permanent injunction and declaratory judgment in Plaintiffs' favor on Counts I, II, and III, thereby permanently enjoining the enforcement of the Out-of-State Distributor Ban as violative of Plaintiffs' First Amendment rights. After months of discovery, the parties cross-moved for summary judgment. But Defendants are stuck in the past. Throughout their moving brief, Defendants attempt to rehash the same arguments this Court has already rejected. And they emphasize purported issues from voters' receipt and/or submission of multiple advance mail ballot applications, on which the Personalized Application Prohibition has no bearing. In numerous ways, Defendants fail to grapple with the factual record, the Court's prior ruling in Plaintiff's favor, and the live issues actually presented in this case.

First, rather than argue for their entitlement to judgment as a matter of law on undisputed *facts*, Defendants focus their brief on re-litigating the same legal issues this Court decided at the preliminary injunction phase. They argue that Plaintiff's personalization of applications is not speech, but this Court has already concluded that it is. Defendants attempt to distinguish cases

cited by the Court in reaching that opinion, but they offer no compelling reason—whether legal or factual—for this Court to depart from its prior ruling. The issue before this Court is now narrower, limited only to the Personalized Application Prohibition, but it is not different. As explained below, in Plaintiff's motion for summary judgment (ECF No. 154), and by this Court, VPC's personalization of advance mail voting applications is core political speech, expressive conduct, and associational activity. Just as at the preliminary injunction phase, Plaintiff's mailers with personalized applications are unified packages of core political speech. Plaintiff's personalization itself is speech that conveys a message to particular underrepresented voters: *you*—the carefully selected recipient of this mailer—can and should vote by mail, and here is how. And Plaintiff's distribution of personalized applications is also expressive conduct and protected associational activity. However one describes VPC's activity, it is protected under the First Amendment.

Second, the Personalized Application Prohibition should be reviewed under a strict scrutiny standard. Not only does the Personalized Application Prohibition abridge Plaintiff's activity that requires utmost First Amendment protection, but it is also impermissible content- and viewpoint-based discrimination and constitutionally overbroad. Contrary to Defendants' argument, the *Anderson-Burdick* standard applied to general ballot-access cases is not the appropriate framework through which to consider restrictions on speech among private parties advocating for greater participation in the political process.

Third, even under *Anderson-Burdick*, Defendants' arguments fail. Despite the undisputed fact that the Out-of-State Distributor Ban is no longer at issue, Defendants double down on their argument that voters receiving *duplicate* advance mail ballot applications harm Defendants' purported state interests. But duplicate applications are irrelevant to the Personalized Application Prohibition at issue here, which places no limitation on the *number* of advance mail ballot

applications a third-party entity like VPC may distribute to Kansas voters. Defendants paper over this conceptual gap by consistently conflating perceived issues from *duplicate* applications and *personalized* applications. No less than six times throughout their brief, Defendants use the joint phrase "inaccurate and duplicate" advance voting ballot applications, and in numerous other instances they cite the record concerning duplicate applications to purportedly support a proposition about their personalization. But these are two entirely distinct concepts, and only the latter has any bearing on the issues remaining in this case. Defendants attempt to lump the concepts together—without offering any cogent reason to do so—because the record is clear that no compelling state interests justify the Personalized Application Prohibition. At the least, Defendants fail to show the absence of genuine disputes of material facts specific to VPC's personalization of applications as required for summary judgment in favor of Defendants.

Defendants' arguments have already failed. Rather than muster new evidence to support their assertions, Defendants opt for repetition and conflation. The Court should again reject Defendants' contentions, which fail to establish that they are entitled to summary judgment on any of Plaintiff's three claims. Instead, the Court should grant summary judgment for Plaintiff.

PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS[1]

PLAINTIFF'S GENERAL OBJECTIONS IN RESPONDING TO DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiff objects to Defendants' submission of unsubstantiated facts that are not supported by a citation.

2. Plaintiff objects to any legal arguments and/or conclusions of law in Defendants' statements.

3. Evidence cited by Defendants in support or in contradiction of any particular fact or proposition should not be construed as the only evidence supporting or contradicting the fact or proposition in question, and Plaintiff specifically reserves the right to provide additional evidence as is necessary and appropriate.

4. The phrase "uncontroverted" shall not be construed as a concession by Plaintiff that a statement is material, complete, supports the proposition which is cited, admissible or otherwise relevant.

5. Plaintiff reserves its right to challenge the admissibility of any statement and cited materials in future proceedings, including at trial.

6. The phrase "uncontroverted" is used solely in the context of Defendants' motion for summary judgment and Plaintiff reserves all other objections including, but not limited to, its

[1] For ease of reference and in accordance with Rule 56.1(b)(1) of the Rules of Practice of the United States District Court for the District of Kansas, Plaintiff responded to each of Defendants' Statements of Uncontroverted Facts by transposing Defendants' enumerated paragraphs in Defendants' Memorandum of Law in Support of the Motion for Summary Judgment and supplied Plaintiff's response immediately below the aforesaid paragraph. *See* ECF No. 142 at 10. Plaintiff removed Defendants' headings from this Response because they are not part of separately numbered paragraphs which require a response. Plaintiff disputes Defendants' headings and further notes that they are largely argumentative as opposed to organizational.

right to object to or contest each of Defendants' assertions of fact at the appropriate time, including the right to challenge such assertions of fact at trial.

7. Plaintiff objects to Defendants statements of purported material facts to the extent such purported issues of material fact are incapable of admission as evidence and, therefore, not appropriately before the Court on Defendants' motion for summary judgment.

8. Plaintiff does not concede that the content of Defendants' statements concern material facts for this case.

9. Because Defendants' section headings are not statements of uncontroverted facts without a factual citation, no response is required.

10. In furnishing responses, Plaintiff does not agree or concede that the content of Defendants' statements concern material facts.

11. Plaintiff objects to the extent Defendants rely on unsworn expert reports in support of its purported statements of material fact as unsworn expert reports may not be considered as evidence in support of a motion for summary judgment. *Stonebarger v. Union Pac. R.R. Co.*, 76 F. Supp. 3d 1228, 1235 (D. Kan. 2015) ("This court has repeatedly emphasized that, when tested at summary judgment, the proponent of expert testimony may not simply present the unsworn report of the proposed expert.").

12. Plaintiff objects to the extent Defendants' purported statements of material fact are not relevant or material to the issues raised by their Motion for Summary Judgment as certain facts are not referenced in Defendants' brief in support of their Motion for Partial Summary Judgment or relate to matters for which Defendants do not seek summary judgment. *McCormick v. City of Lawrence*, 2008 U.S. Dist. LEXIS 32347, at *12-13 n.1 (D. Kan. Apr. 18, 2008) ("With respect to those aspects of defendant[]'s Statement of Uncontroverted Facts that are not included in the court's

Statement of Facts, the court sustains plaintiff's objections and excludes them from the summary judgment record largely because they are either not supported by the evidence of record cited by defendant and/or defendant [] has not shown them to be relevant to the particular claim at issue.").

RESPONSES

DEFENDANTS' UNCONTROVERTED FACT ¶ 1:

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

PLAINTIFF'S RESPONSE TO ¶ 1:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted. With respect to Defendants' use of "targeted groups of voters," Plaintiff Voter Participation Center ("Plaintiff" or "VPC") is a Washington, D.C.-based 501(c)(3) organization that was founded in 2003 with a mission of providing voter registration, early voting, vote by mail, and get out to vote resources to traditionally under-represented groups, including young voters, voters of color, and unmarried women. *See* Pretrial Order, ECF No. 140, Stipulations ("Pretrial Order Stipulated Facts" or "PTO-SF") ¶¶ 2(a)(vii)-(viii).

DEFENDANTS' UNCONTROVERTED FACT ¶ 2:

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

PLAINTIFF'S RESPONSE TO ¶ 2:

This statement is not cited in Defendants' brief and therefore this legislative history of HB 2332 is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 3:

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

PLAINTIFF'S RESPONSE TO ¶ 3:

This statement is not cited in Defendants' brief and therefore this legislative history of HB 2332 is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 4:

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

PLAINTIFF'S RESPONSE TO ¶ 4:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted. However, Paragraph xxii of the Pretrial Order Stipulated Facts states that the statute will be referred to as the "*Personalized* Application Prohibition." PTO-SF ¶ 2(a)(xxii) (emphasis added). Defendants refer to this statute as the *Pre-Filled* Application Prohibition throughout their Statement of Facts and memorandum of law in support of their motion for summary judgment.

DEFENDANTS' UNCONTROVERTED FACT ¶ 5:

5. K.S.A. 25-1122(k)(2) does not apply to persons who mail or cause to be mailed an application for an advance voting ballot with any portion completed to a registered voter where the portion of such application completed prior to mailing is completed at the request of the registered voter. In other words, when a registered voter asks a person to mail or cause to be mailed an advance voting ballot application to such registered voter, and that person does so, that person does not "solicit[] by mail a registered voter to file an application for an advance voting ballot" as set forth in K.S.A. 25-1122(k)(1). Stipulation (Dkt #73), at 2-3.

PLAINTIFF'S RESPONSE TO ¶ 5:

This statement is not cited in Defendants' brief and therefore is immaterial to Defendants' motion. To the extent a response is required: Uncontroverted. *See* PTO-SF ¶ 2(a)(xxiii).

DEFENDANTS' UNCONTROVERTED FACT ¶ 6:

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

PLAINTIFF'S RESPONSE TO ¶ 6:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 7:

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

PLAINTIFF'S RESPONSE TO ¶ 7:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 8:

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

PLAINTIFF'S RESPONSE TO ¶ 8:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 9:

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

PLAINTIFF'S RESPONSE TO ¶ 9:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 10:

10. Defendants, via a Stipulation with Plaintiffs that the Court entered on February 25, 2022, agreed to a permanent injunction against the enforcement of the Out-of-State Distributor

Ban as violative of Plaintiffs' First and Fourteenth Amendment rights. Those claims have thus been fully resolved and are no longer part of this litigation (other than Plaintiffs' request for their attorney fees as prevailing parties). PTO-SF ¶ xxvii. The only claims remaining in dispute pertain to the Pre-Filled Application Prohibition. PTO-SF ¶ xxviii.

PLAINTIFF'S RESPONSE TO ¶ 10:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 11:

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

PLAINTIFF'S RESPONSE TO ¶ 11:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 12:

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

PLAINTIFF'S RESPONSE TO ¶ 12:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted. However, Paragraph xxx of the Pretrial Order Stipulated Facts states that to vote by mail in Kansas elections, *generally*, a voter must complete an advance

voting ballot application and return it to the county election office in the county in which the voter is registered to vote. PTO-SF ¶ 2(a)xxx.

DEFENDANTS' UNCONTROVERTED FACT ¶ 13:

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

PLAINTIFF'S RESPONSE TO ¶ 13:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 14:

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

PLAINTIFF'S RESPONSE TO ¶ 14:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. Uncontroverted as to the first sentence. *See* PTO-SF ¶ 2(a)xxxiii. Controverted as to the second sentence. Paragraph xxxiii of the Pretrial Order Stipulated Facts cites Kansas law: "Ballots must be issued to advance voting voters within two business days of the receipt of the voter's application by the county election office starting on the

commencement of the 20-day period before the election. K.S.A. 25-1123(a)." *Id.* The cited source does not speak to what a county election office "will" or will not do; it merely quotes the law.

The cited source also does not support Defendants' characterization that applications submitted prior to the 20th day before the election "must be issued" on the 20th day before the election. To the extent Defendants use this statement as support for the inference that, for all voters who properly submitted an advance voting application prior to the 20th day before the election, the county election office did, in fact, transmit an advance ballot to those voters on the 20th day before the election, that inference cannot be drawn in Defendants' favor on summary judgment; to the extent Defendants do not seek to draw such inference, the purported fact is irrelevant to the matters presented by their motion.

DEFENDANTS' UNCONTROVERTED FACT ¶ 15:

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

PLAINTIFF'S RESPONSE TO ¶ 15:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted. Plaintiff states that the deposition testimony of Shawnee County Election Commissioner, Mr. Howell, demonstrates that this "general" rule is not always followed. Mr. Howell testified that if an advance mail ballot application is not cured with 48 hours, his office will "continue to work on it. If we can't get it out the door within 48 hours, then that means there is some other issue that needs to be dealt with. So we're going to continue trying to

figure out why we couldn't get it out." *See* Ex. 1 (Excerpts of the Deposition of Andrew Howell (Sept. 14, 2022) ("Howell Tr.")) at 187:7-8.[2]

DEFENDANTS' UNCONTROVERTED FACT ¶ 16:

16. If an advance voting ballot application is timely submitted to the county election office, an official in such office processes the application and, if the information entered onto the application (including the signature) matches the information contained in the State's voter registration database – the Electronic Voter Information System ("ELVIS") – the county will mail the voter an advance ballot packet. PTO-SF ¶ xxxi.

PLAINTIFF'S RESPONSE TO ¶ 16:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. It is uncontroverted that, "If an advance voting ballot application has been timely submitted to the county election office, an individual working in such office processes the application[.]" PTO-SF ¶ 2(a)xxxi. The cited source does not support Defendants' characterization that, "if the information entered onto the application (including the signature) matches the information contained in the State's voter registration database – the Electronic Voter Information System ("ELVIS") – the county will mail the voter an advance ballot packet." The cited source states, "if the county accepts the application, the county will mail the voter an advance ballot packet," but it does not speak to the county's standards or criteria for acceptance. PTO-SF ¶ 2(a)xxxi.

[2] Numbered Exhibits refer to the exhibits to the Declaration of Mark P. Johnson in Support of Plaintiff Voter Participation Center's Opposition to Defendants' Motion for Summary Judgment (Nov. 4, 2022), filed concurrently herewith. Lettered Exhibits refer to the exhibits to Defendants' Motion for Summary Judgment.

DEFENDANTS' UNCONTROVERTED FACT ¶ 17:

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

PLAINTIFF'S RESPONSE TO ¶ 17:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. Controverted because and to the extent the cited sources do not support Defendants' claim that "the county election office must attempt to contact the voter" if "any of the required information . . . does not match the information for that voter in ELVIS." The cited sources do not state or support Defendants' characterization that the county election office must contact the voter if the name, address, date of birth, political party, or registration status on the advance voting ballot application does not match the information for that voter on the voter registration list or ELVIS.

Paragraph xxxiv of the Pretrial Order Stipulated Facts states that the county election office must do so "[i]f a received advance voting ballot application does not contain sufficient information or if the information is illegible, or there is a signature mismatch or missing signature[.]" PTO-SF ¶ 2(a)xxxiv. Similarly, the cited regulation states, "If the application does not contain sufficient information or if the information is illegible, the county election officer shall contact the applicant to obtain the information before election day, if practicable." Kan. Admin.

Reg. 7-36-7(a). Kan. Admin. Regs. 7-36-7 and 7-36-9 and K.S.A. 25-1122(e) also pertain to signatures and driver's license or other identification numbers on an application.

It is uncontroverted that if it is not practicable to contact the applicant before the election or if the information, signature, or photocopy provided is incomplete or inconsistent with the voter registration list, the county election officer shall issue a provisional advance voting ballot. PTO-SF ¶ 2(a)xxxiv; Kan. Admin. Reg. 7-36-7(f).

DEFENDANTS' UNCONTROVERTED FACT ¶ 18:

18. 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 ¶ 25; Ex. B at 35:6-40:5; 48:6-51:7.

PLAINTIFF'S RESPONSE TO ¶ 18:

Controverted in part. Because Defendants' Uncontroverted Fact ¶ 18 is compound, containing two factual allegations therein, Plaintiff has bifurcated this paragraph into subparts (a) and (b). With respect to subpart (a) containing "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[,]" Plaintiff's response is that this fact is uncontroverted insofar as Exhibit A ¶ 25 speaks to the steps that staff in the Shawnee County Election Office take when the information on the application does not precisely match the information in ELVIS. See Ex. A at ¶ 25. *See* Ex. A at ¶ 25. The cited sources do not speak to the steps any county election office takes to process

applications when the information on the application *does* precisely match the information on ELVIS or whether all such applications can be processed without having to contact the voter.

With respect to subpart (b) containing "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[,]" Plaintiff's response is that this fact is uncontroverted that the inadvertent mismatches described by Defendants will be overlooked. *See* Ex. B at 38:8-22, 38:23-39:3. This fact is controverted to the extent that the cited sources do not support Defendants' characterization that these are the "only" mismatches that would be overlooked. For example, Douglas County Elections Director, Mr. Shew, testified that differing prefixes would be overlooked. *See id.* at 48:21–23.

DEFENDANTS' UNCONTROVERTED FACT ¶ 19:

19. County election officials will not send an advance ballot to a voter who submitted an application with an erroneous middle initial or suffix. Ex. B at 48:25-50:7.

PLAINTIFF'S RESPONSE TO ¶ 19:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. The cited source does not support Defendants' characterization. Mr. Shew testified that if he or someone in his office (*i.e.*, county election officials in Douglas County) received an advance ballot application where the suffix did not match, that application would enter the curative process; he did not testify his office would not ultimately send this voter an advance ballot. Ex. B at 49:2-7. Similarly, Mr. Shew testified that his office would "go look and see . . . if the middle initial doesn't match." *Id.* at 50:1-7.

In Defendants' citation for this fact, Mr. Shew did not testify as to how election officials in any of the other 104 counties in Kansas would handle applications with erroneous middle initials

or suffixes. To the extent Defendants use this statement as support for the inferences that if any election officials in counties other than Douglas County received an application with erroneous middle initials or suffixes, then the election officials will not send an advance ballot to the voter, or that the election officials would enter those applications into the curative process, those inferences cannot be drawn in Defendants' favor on summary judgment.

DEFENDANTS' UNCONTROVERTED FACT ¶ 20:

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

PLAINTIFF'S RESPONSE TO ¶ 20:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 21:

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

PLAINTIFF'S RESPONSE TO ¶ 21:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 22:

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

PLAINTIFF'S RESPONSE TO ¶ 22:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 23:

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

PLAINTIFF'S RESPONSE TO ¶ 23:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 24:

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

PLAINTIFF'S RESPONSE TO ¶ 24:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part.[3] This statement is uncontroverted except to the extent that it suggests this data may be purchase or obtained at any time. The 30(b)(6) witness for the

[3] The citation to Mr. Shew's transcript cites a line that contains a question by counsel and no response from Mr. Shew. *See* Ex. B at 102:23. For the purposes of responding to this statement, Plaintiff assumes the correct citation is Ex. B at 102:23–103:24.

Office of the Secretary of State, Mr. Caskey, testified that during 2020, for the first time, the Secretary of State's office provided weekly updates to certain requesters of the people who had successfully submitted an advance mail ballot application and would be mailed a ballot. Ex. C at 121:20–124:21. Mr. Shew testified that this information was only available within 20 days of the election. Ex. 2 (Excerpts of the Deposition Transcript of Jameson Shew (Sept. 15, 2022) ("Shew Tr.")) at 103:10–24.

DEFENDANTS' UNCONTROVERTED FACT ¶ 25:

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

PLAINTIFF'S RESPONSE TO ¶ 25:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.[4]

DEFENDANTS' UNCONTROVERTED FACT ¶ 26:

26. Among the reasons that voter information in ELVIS may not match the information on a voter's pre-filled advance voting ballot application (completed by someone other than the voter) is that the data in ELVIS may have been updated (e.g., change of name, change of address,

[4] The cited source does not support Defendants' statement. For the purposes of responding to this statement, Plaintiff assumes that the correct citation is Ex. A ¶ 9.

death, or ineligibility due to criminal conviction) since the date the voter file was generated and used by a third-party to pre-fill an application (using the stale data). Ex. A ¶ 10.

PLAINTIFF'S RESPONSE TO ¶ 26:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. Plaintiff does not controvert this statement as it applies to changes of name or address. But, for changes related to eligibility—*e.g.* death or ineligibility due to criminal conviction—Mr. Caskey testified that those changes do not immediately cause the data not to match ELVIS, but rather for the data to match to an ineligible voter. *See* Ex. 3 (Excerpts of the Deposition of Bryan Caskey (May 24, 2022) ("Caskey Tr.")) at 83:3-91:9; 102:11-103:10.

DEFENDANTS' UNCONTROVERTED FACT ¶ 27:

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

PLAINTIFF'S RESPONSE TO ¶ 27:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 28:

28. VPC – acting through its 501(c)(4) sister organization, the Center for Voter Information ("CVI") – mailed advance voting ballot application packets to approximately 507,864

Kansas voters in connection with the 2020 General Election. Ex. E; Ex. F at 175:6-176:24, 177:24-178:15; Ex. G at 108:7-19, 123:17-124:6.

PLAINTIFF'S RESPONSE TO ¶ 28:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. This statement is controverted to the extent it suggests that all 507,864 voters were sent application packets by VPC. Mr. Dripps testified that Ex. E could reflect not only VPC's mailers, but "it could have also been VPC's sister organization, CVI." Ex. F. at 176:25-177:22. The statement is otherwise uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 29:

29. 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. G at 92:14-93:4; Ex. F at 164:7-13; Ex. H at 3.

PLAINTIFF'S RESPONSE TO ¶ 29:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 30:

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

PLAINTIFF'S RESPONSE TO ¶ 30:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 31:

31. VPC CEO Lopach testified that he does not know how often Catalist requests an updated voter file from the Secretary of State's Office. Ex. G at 104:2-105:13.

PLAINTIFF'S RESPONSE TO ¶ 31:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 32:

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

PLAINTIFF'S RESPONSE TO ¶ 32:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 33:

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

PLAINTIFF'S RESPONSE TO ¶ 33:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. This statement is uncontroverted except to the extent that Defendants seek to draw the inference that more than two election officials were easily able to identify VPC's personalized applications. Defendants' broad use of "election officials"

mischaracterizes the cited sources, which are limited to the experience and qualifications of the two individuals whose testimony and affidavits Defendants purport to rely on herein, Mr. Howell and Mr. Shew. See Ex. A ¶ 14; Ex. B at 18:10-21:22.

DEFENDANTS' UNCONTROVERTED FACT ¶ 34:

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

PLAINTIFF'S RESPONSE TO ¶ 34:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 35:

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

PTO-SF ¶ xl.

a. Wave A: data uploaded on 7/6/2020, expected in homes on 8/17/2020;

b. Wave B: data uploaded on 7/27/2020, expected in homes on 8/26/2020;

c. Wave C: data uploaded on 8/10/2020, expected in homes on 9/8/2020;

d. Wave D: data uploaded on 8/24/2020, expected in homes on 9/16/202; and

e. Wave E: data uploaded on 8/24/2020, expected in homes on 9/28/2020.

PLAINTIFF'S RESPONSE TO ¶ 35:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 36:

36. VPC only included *pre-filled* advance voting ballot applications (along with the other materials in the mailers) with Waves A, B, and E. Waves C and D included *blank* advance voting ballot applications. Ex. F at 163:6-164:16.

PLAINTIFF'S RESPONSE TO ¶ 36:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 37:

37. 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.

PLAINTIFF'S RESPONSE TO ¶ 37:

Controverted in part. This statement is not cited in Defendants' brief and therefore is immaterial. Because Defendants' Uncontroverted Fact ¶ 37 is compound, containing two factual allegations therein, Plaintiff has bifurcated this paragraph into subparts (a) and (b). With respect to subpart (a) containing "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)," Plaintiff's

response is that this fact is uncontroverted, subject to the initial objections and limitations raised therein.[5]

With respect to subpart (b) containing "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[,]" Plaintiff's response is that this fact is controverted in part. This statement is uncontroverted except to the extent that (i) the testimony cited to herein refers to "data vendors," and does not specifically say "Catalist," *see* Ex. F at 173:13-19; (ii) Defendants seek to have inferences drawn in their favor that VPC intentionally or routinely uses commercial data merged with the state voter file; and (iii) Defendants characterize Catalist's merging of the data to have occurred specifically in Kansas. Mr. Dripps testified that VPC's data vendors mistakenly "appended commercial data" when merging records for only two of the five waves of mail. *See id.* at 172:25–174:9. Mr. Dripps's testimony on this matter also refers to data used in states other than Kansas, and that he did not know whether or to what extent Catalist appended commercial data to the voter data in Kansas specifically. *Id.* at 169:10–170:25, 171:24 –174:1; *see also* Ex. 4 (Excerpts of the Deposition of Lionel Dripps (Aug. 30, 2022) ("Dripps Tr.")) at 79:2–80:1.

DEFENDANTS' UNCONTROVERTED FACT ¶ 38:

38. 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

[5] Plaintiff maintains its general objections in its responses to Defendants' Requests for Admission ("RFAs") and maintains its specific objections to RFA No. 8, including Plaintiff's denial of RFA No. 8 to the extent it indicates that Plaintiff will knowingly send partially filled out advance mail ballot applications to potential Kansas voters who have already submitted an application. Plaintiff does not incorporate any admission in its response to Defendants' RFA No. 8 beyond the admission that it "intends to continue sending partially filled out advance ballot applications to registered Kansas voters based upon publicly available information in the statewide voter registration file," and maintains that it otherwise denies RFA No. 8. *See* Ex. K at 10.

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.

PLAINTIFF'S RESPONSE TO ¶ 38:

Controverted in part. This statement is uncontroverted except to the extent that Defendants seemingly made a typographical error and switched the estimated percentages of the testimony. Mr. Dripps testified that approximately 5% of the records had a middle name or initial and roughly 3% of the records had a suffix that did not match the voter file. *See* Ex. F at 169:17-170:2.

DEFENDANTS' UNCONTROVERTED FACT ¶ 39:

39. 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.

PLAINTIFF'S RESPONSE TO ¶ 39:

Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 40:

40. 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.

PLAINTIFF'S RESPONSE TO ¶ 40:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. This statement is uncontroverted except to the extent that it suggests that all 507,864 voters were sent application packets by VPC. Mr. Dripps testified

that Ex. E (from which Plaintiff presumes Defendants are deriving "the approximately 507,864 voters to whom VPC had sent applications) could reflect not only VPC's mailers, but "it could have also been VPC's sister organization, CVI." Ex. F. at 176:25-177:22. CVI is not a plaintiff in this action.

DEFENDANTS' UNCONTROVERTED FACT ¶ 41:

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

DEFENDANTS' UNCONTROVERTED FACT ¶ 41:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. The statement is uncontroverted except to the extent that it (i) is vague to the extent it references to "numerous" purported errors and (ii) suggests that Mr. Block reliably identified any "errors/deficiencies" in VPC's information. Defendants do not cite specific findings or conclusions asserted by Mr. Block, including the nature or quantity of any purported errors or deficiencies in VPC's information. This statement is limited to Mr. Block's own assessment of Exhibit L. Plaintiff does not waive or acquiesce the materiality of this purported fact beyond this motion. Generally, Plaintiff's rebuttal expert, Dr. Eitan Hersh, testified that Mr. Block's methodology is "deeply flawed" and his claims are unsupported. *See generally* Ex. 5 (Expert Rebuttal Decl. and Rept. of Dr. Eitan D. Hersh ("Hersh Rpt.")).

Plaintiff reserves the right to dispute any such specific findings or conclusions, including but not limited to their admissibility or reliability based on Mr. Block's lack of expertise, unreliable methodology, and irrelevant testimony that would not assist the fact-finder in this case. *See*

generally Memorandum of Law in Support of Plaintiff Voter Participation Center's Motion To Exclude the Testimony and Report of Kenneth J. Block ("Pl.'s Mot. to Exclude"), ECF No. 153.

DEFENDANTS' UNCONTROVERTED FACT ¶ 42:

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

PLAINTIFF'S RESPONSE TO ¶ 42:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Uncontroverted. Plaintiff disputes that the cited source, Ex. M ¶¶ 34-35, supports Defendants' statement. However, this statement is supported by comparing Ex. H (when VPC received data from Catalist) with Paragraph xl of the Pretrial Order Stipulated Facts (when VPC uploaded its data for its 2020 mailer). *See* Ex. H at 3; PTO-SF ¶ 2(a)xl.

DEFENDANTS' UNCONTROVERTED FACT ¶ 43:

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

PLAINTIFF'S RESPONSE TO ¶ 43:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. The cited source does not support Defendants' characterization that VPC did not remove *any* cancelled voter registrations from their mailing list.

At most, Mr. Block reasoned that VPC "failed to properly remove voters from the VPC mailer file that Kansas election officials removed from the voter rolls after the date of the first VPC mailing." Ex. N ¶ 10. Mr. Block did not say VPC failed to remove *all* voters or *any* voters that fall into this category. Mr. Block did not review any material that could prove such a conclusion. Mr. Block analyzed a list of individuals who received mailers from VPC. *See* Ex. M ¶ 9 (describing what Mr. Block analyzed). But this list does not and cannot show the voters that *did not* receive mailers from VPC; the list cannot prove this negative. The validity of Mr. Block's analysis is further contested by the testimony of Plaintiff's expert Dr. Eitan Hersh. *See generally* Ex. 5 (Hersh Rpt.). Mr. Hersh testified that Mr. Block failed to "estimat[e] the accuracy of the VPC file relative to a benchmark such as the raw Kansas voter file contemporaneous to the period in which VPC was sending mail[.]" *Id.* ¶ 24. Instead, "Mr. Block uses a non-contemporaneous file and selectively cherry-picks instances where he alleges that the VPC file is inaccurate and where the state file is accurate." *Id.*

Moreover, Mr. Block is not an expert and his testimony should be excluded. *See generally* Pl.'s Mot. to Exclude. Because Mr. Block is not an expert, Plaintiff disputes Defendants' reliance on his testimony for the truth of the matter asserted.

Additionally, other evidence in this case demonstrates that VPC does remove voters whose registrations were, or should have been, cancelled. Mr. Lopach testified that VPC excludes voters from the Kansas voter registration file who passed away or changed addresses. *See* Ex. 6 (Excerpts of the Deposition of Thomas Lopach (May 18, 2022) ("Lopach Tr.")) 33:2-34:8.

DEFENDANTS' UNCONTROVERTED FACT ¶ 44:

44. 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 ¶ 9; Ex. O (date of voters' cancelled registration is found in Column E).

PLAINTIFF'S RESPONSE TO ¶ 44:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted in part. Plaintiff does not dispute that this statement reflects Mr. Block's testimony; except to the extent that the reasons for voter removal are not specifically enumerated in Exhibit O, apart from a few individuals whose obituary link is listed therein. Thus, ¶ 44's enumeration of reasons are not factually supported by the citation referenced therein. However, this paragraph of Mr. Block's testimony relies on work performed by election officials whose identities are unknown to Mr. Block and with whom he never communicated. *See* Ex. N ¶ 5 ("Kansas election officials provided data to me in a spreadsheet"); Ex. 7 (Excerpts of the Deposition of Kenneth J. Block (Sept. 13, 2022) ("Block Tr.")) at 50:14–24; 150:4–8; 157:22–158:8; 186:14–17; 206:9–11. Mr. Block did not oversee, supervise, or test the information indirectly provided to him, ask the officials over the phone what they did, or e-mail the officials and ask them to set forth the process they undertook. *Id.* 60:7–62:5, 187:6–188:18, 206:12–25. This unreliable evidence is inadmissible. *See generally* Pl.'s Mot. to Exclude. Moreover, the record is devoid of any foundation for the document on which Mr. Block relies. His own knowledge of its origin is based on the out-of-court oral statements of his counsel. *See* Ex. 7 (Block Tr.) 167:15–25, 205:22–206:23. This document is inadmissible, as is Mr. Block's reporting of its contents.

DEFENDANTS' UNCONTROVERTED FACT ¶ 45:

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

- 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 ¶ 9; Ex. O.

PLAINTIFF'S RESPONSE TO ¶ 45:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. Plaintiff does not dispute that this statement reflects Mr. Block's testimony. However, this paragraph of Mr. Block's testimony relies on work performed by election officials whose identities are unknown to Mr. Block and with whom he never communicated. *See* Ex. N ¶ 5 ("Kansas election officials provided data to me in a spreadsheet"); Ex. 7 (Block Tr.) at 50:14–24; 150:4–8; 157:22–158:8; 186:14–17; 206:9–11. Mr. Block did not oversee, supervise, or test the information indirectly provided to him, ask the officials over the phone what they did, or e-mail the officials and ask them to set forth the process they undertook. *Id.* 60:7–62:5, 187:6–188:18, 206:12–25. This unreliable evidence is inadmissible. *See generally* Pl.'s Mot. to Exclude. Moreover, the record is devoid of any foundation for the document on which Mr. Block relies. His own knowledge of its origin is based on the out-of-court oral statements of his counsel. *See* Ex. 7 (Block Tr.) 167:15–25, 205:22–208:14. This document is inadmissible, as is Mr. Block's reporting of its contents.

DEFENDANTS' UNCONTROVERTED FACT ¶ 46:

46. In the time between when VPC sent its mailers to the printer in connection with its first wave of mailings and its final wave of mailings for the 2020 General Election, hundreds of

additional Kansas voters had had their voter registration cancelled yet still received a mailing from VPC due to its failure to remove such no-longer-registered voters. Ex. N ¶¶ 10-13.

PLAINTIFF'S RESPONSE TO ¶ 46:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. Plaintiff does not dispute that this statement reflects Mr. Block's testimony, with the exception that Defendants' use of "hundreds" mischaracterizes Mr. Block's report given that specificity is attainable. Specifically, approximately 341 voters were removed from the voter rolls by the State of Kansas election officials. *See* Ex. N ¶¶ 10-13.

However, these paragraphs of Mr. Block's testimony rely on work performed by election officials whose identities are unknown to Mr. Block and with whom he never communicated. *See* Ex. N ¶ 5 ("Kansas election officials provided data to me in a spreadsheet"); Ex. 7 (Block Tr.) at 50:14–24; 150:4–8; 157:22–158:8; 186:14–17; 206:9–11. Mr. Block did not oversee, supervise, or test the information indirectly provided to him, ask the officials over the phone what they did, or e-mail the officials and ask them to set forth the process they undertook. *Id.* 60:7–62:5, 187:6–188:17, 206:12–25. This unreliable evidence is inadmissible. *See generally* Pl.'s Mot. to Exclude. Moreover, the record is devoid of any foundation for the document on which Mr. Block relies. *See* Ex. N ¶¶ 10-13 (reporting Mr. Block's reading of Ex. O). His own knowledge of its origin is based on the out-of-court oral statements of his counsel. *See* Ex. 7 (Block Tr.) 167:15–25, 205:22–208:14. This document is inadmissible, as is Mr. Block's reporting of its contents.

DEFENDANTS' UNCONTROVERTED FACT ¶ 47:

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

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

PLAINTIFF'S RESPONSE TO ¶ 47:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. The fact that two different voters showed the same voter registration number in VPC's files does *not* indicate that VPC sent a pre-filled application for Voter #1 to Voter #2. As Dr. Hersh explained, "[i]t is not clear to me what the consequences would be of these two individuals being accidentally listed with the same 'Voter ID' in the VPC records, if that is what happened, since the 'Voter ID' number is not populated on the mail application form." Ex. 5 (Hersh Rpt.) at 14.

Mr. Block's own exhibit—and his own, express notations in the "Note" column—demonstrate that Defendants' statement is false. *See* Ex. P. Two of the twenty-three "matched" pairs reflect the "Same exact record." *Id.* at 1. There is no "Voter #2"—both entries are for the same voter. Five more of the twenty-three "matched" pairs reflect two records "for two completely different people." *Id.* at 1-3. For another thirteen pairs, it is controverted that "these individuals were properly separated in Kansas' own voter file." On the contrary, Mr. Block's notations state that eleven Voter #2s in these pairs are "Not in voter file." *Id.* at 1-3. For three more of the twenty-three pairs, there is no one with Voter #2's name listed in the voter file. *See id.* at 1, 2.

Defendants' statement is demonstrably controverted by their own evidence.

DEFENDANTS' UNCONTROVERTED FACT ¶ 48:

48. Kansas election officials identified at least 15 voters to whom VPC sent advance voting ballot applications in connection with the 2020 General Election yet whose registration status had been cancelled in ELVIS *prior to April 10, 2020* (meaning that their names would not

have appeared on a list of voters by anyone requesting the statewide voter file as of that date). Ex. O.

PLAINTIFF'S RESPONSE TO ¶ 48:

This statement is not cited in Defendants' brief and therefore is immaterial. To the extent a response is required: Controverted. Assuming that the emphasized language "prior to April 10, 2020" does not include voters who were removed on April 10, 2020 itself, then there were only fourteen voters on VPC's mailing list supposedly cancelled prior to April 10, 2020.

The cited source is an exhibit prepared by unknown election officials with whom neither Mr. Block nor any witness in this case has communicated. *See* Ex. N ¶ 5 ("Kansas election officials provided data to me in a spreadsheet"); Ex. 7 (Block Tr.) at 50:14–24; 150:4–8; 157:22–158:8; 186:14–17; 206:9–11. Mr. Block did not oversee, supervise, or test the information indirectly provided to him, ask the officials over the phone what they did, or e-mail the officials and ask them to set forth the process they undertook. *Id.* at 60:7–62:5; 187:6–188:18, 206:12–25. This unreliable evidence is inadmissible. *See generally* Pl.'s Mot. to Exclude. Moreover, the record is devoid of any foundation for the cited source. Mr. Block's knowledge of its origin is based on the out-of-court oral statements of his counsel. *See* Ex. 7 (Block Tr.) 167:15–25, 219:19–220:2. This document is inadmissible.

DEFENDANTS' UNCONTROVERTED FACT ¶ 49:

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

PLAINTIFF'S RESPONSE TO ¶ 49:

Controverted. The cited source does not support Defendants' characterization that VPC's voter registration data was "often inaccurate." Paragraph 39 of Mr. Block's report does not speak to the frequency of "VPC's sending advance ballot applications to voters who had been removed from the rolls." *See* Ex. M ¶ 39. Nor does Paragraph 39 describe what election officials did "to figure out what is going on if that application was mailed." *See id.*

Additionally, as Dr. Hersh explained, "Mr. Block provides no evidence that VPC practices 'impaired the ability of … election officials to do their jobs.'" Ex. 5 (Hersh Rpt.) at ¶ 39. Dr. Hersh explained that Mr. Block identified only *nine* instances where voters sent election officials applications that VPC had mailed to individuals whose voter registrations had been cancelled. *See id.* All nine were sent to voters in Shawnee County who had passed away. *See* Ex. M ¶ 28. Only two of these nine applications had been personalized by VPC. *See* Ex. 8 (Ex. VIII to Block Report); Ex. 7 (Block Tr.) 238:20–239:14, 248:14–249:10; 278:12–279:3. And *none* of those applications actually requested an advance mail ballot. *See* Ex. 8 (Ex. VIII to Block Report). To the extent the two returned personalized applications "imposed an extra burden on county election officials," it was *not* to "identify the deficiencies submitted by voters and then communicate with voters to correct the mismatched information." These voters were deceased. And Mr. Howell, Shawnee County Election Commissioner, testified that his "office would never send a mail ballot to someone who was marked deceased in ELVIS." Ex. 1 (Howell Tr.) at 203:20–23.

As Dr. Hersh further explained, Mr. Block made no attempt to measure the burden of VPC's efforts on election officials. *See* Ex. 5 (Hersh Rpt.) ¶¶ 40–41. In fact, Dr. Hersh opined that "it seems likely that the VPC methods *reduced* the burden on election officials." *Id.* ¶ 41 (emphasis in original).

Exhibit VII to Mr. Block's report (attached to the Johnson Decl. at Ex. 8), a compilation of applications and one of the document relied on by the cited source for ¶ 49, is itself inadmissible because it lacks a foundation. This compilation was provided to Mr. Block by Defendants' counsel. *See* Ex. M ¶ 28. Mr. Block does not know the where Defendants' counsel obtained those nine applications. Ex. 7 (Block Tr.) at 238:20–239:2. They were not produced by Defendants. And Mr. Howell did not recognize Exhibit VII to Mr. Block's report and testified that he did not give Mr. Block any documents. Ex. 1 (Howell Tr.) at 205:25–206:3, 207:13–21. The cited source is also based on a fifteen-minute phone call between Mr. Howell and Mr. Block. *See* Ex. 7 (Block Tr.) 283:5–8; 279:4–13. Mr. Block admitted that he did not analyze what Mr. Howell told him; rather, he was "just relaying the information that Mr. Howell told [him] over the phone." *Id.* at 245:21–24. This hearsay testimony is inadmissible.

DEFENDANTS' UNCONTROVERTED FACT ¶ 50:

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

PLAINTIFF'S RESPONSE TO ¶ 50:

Controverted in part. Plaintiff does not dispute that Mr. Howell's affidavit supports Defendants' statement. However, Mr. Howell could not testify to "how much time his staff spent curing applications that contained prefilled information during the 2020 general election." Ex. 1 (Howell Tr.) at 253:24–254:11. Mr. Howell admitted his office "doesn't spend time determining" whether an application in the cure process was "prefilled or not. It's really of question of was it

accurate, were there duplicates, was there some other issue . . . ." *Id.* Mr. Howell's deposition testimony that he does not keep track of whether applications were personalized undercuts paragraphs 11 and 35 of his affidavit in which he states that his office received a "substantial" or "large number" of applications personalized by VPC that did not match ELVIS. *Compare id. with* Ex. A. ¶¶ 11, 35.

Defendants' Exhibit Q contains a collection of fifty-one (non-Bates stamped)[6] advance mail ballot applications. Plaintiff does not dispute that Defendants' Exhibit Q contains fifty-one examples of advanced mail ballot applications that appear to be personalized by VPC where the applicant crossed out some of the personalized information on the application. However, Plaintiff disputes this purported fact insofar as Defendants seek to draw the inference that these crossed-out applications created an additional burden on Shawnee County election officials. Of these fifty-one applications, only *twelve* appear to have entered the cure process, Ex. Q at pp. 1–9, (4 applications), 37–39 (2 applications), 48-53 (6 applications); and another *two* do not request a mail ballot, but rather indicate that the voter does not wish to vote by mail, *id.* at pp. 35, 36. The remaining thirty-seven applications appear to have been personalized by VPC, but the voter

[6] Exhibit Q appears to be a compilation of 51 advance mail ballot applications submitted to the Shawnee County Election Office and accompanying correspondence. This compilation appears to have been drawn from Shawnee County's production of nearly 10,000 pages of applications for advance mail ballots (which were not limited to applications provided to voters by VPC). Plaintiff notes that Shawnee County did not produce these applications with Bates stamps, but instead in over 300 named .pdf documents.

Defendants do not provide any information in this statement regarding who produced the documents, whether the documents were introduced as deposition exhibits, or information like the file name and page numbers at which these documents were produced, such that the documents are not locatable by VPC amongst the documents produced in this litigation without significant burden. As such, Defendants do not provide an adequate foundation for Exhibit Q for the Court, or VPC, to assess the documents.

With that said, Plaintiff accepts only for the purposes of its response to this statement that the 51 advance mail ballot applications were personalized by VPC.

crossed out some personalized information and wrote-in their information. During his deposition, Mr. Howell was shown an application personalized by VPC, including a suffix. Ex. 9 (Howell Tr., Ex. 7 at 55) (excerpted). The voter submitted the application to Shawnee County with the suffix crossed out. *Id.* Looking at this exhibit, Mr. Howell admitted that if a voter crosses out a piece of pre-filled information, as long as the information that is not scratched out is correct and matches the system, the application would be accepted. Ex. 1 (Howell Tr.) at 184:16–185:11.

Plaintiff further disputes that all fifty-one applications in Defendants' Exhibit Q contain examples of personalized information filled in by VPC that is "erroneous." For example, some voters crossed out and replaced the first name and middle initial. *See e.g.*, Ex. Q at 15, 16, 17. It is possible that VPC intended to send these applications to different recipients at the same address, and that the crossed-out information did in fact match the intended recipient's information in ELVIS.

Plaintiff further disputes that Exhibit Q's 51 applications support Defendants' characterization that the Shawnee County Election Office received a "large number" applications personalized by VPC with information that does not match the voter file; especially given Shawnee County produced over 300 documents containing nearly 10,000 pages of applications for advance mail ballots to Plaintiff in this matter, and Shawnee County received approximately 23,000 advance mail ballot applications in 2020 alone, *see* Ex. 1 (Howell Tr.) at 231:12–234:16.

DEFENDANTS' UNCONTROVERTED FACT ¶ 51:

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

PLAINTIFF'S RESPONSE TO ¶ 51:

Controverted. This statement is based on inadmissible hearsay testimony. Paragraph 12 of Mr. Howell's affidavit states, "We also received numerous calls from voters in 2020 who reported that multiple pre-populated applications had been sent to deceased individuals who had once lived at the address to which the application was sent." Ex. A ¶ 12. Mr. Howell's affidavit reports the out-of-court statements of voters. Defendants seek to introduce Mr. Howell's affidavit to prove the truth of the matter asserted by the voters' out-of-court statements: that "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." Plaintiff disputes this forbidden hearsay inference.

Plaintiff disputes that the cited sources support Defendants' characterization that the Shawnee County Election Office received "numerous" applications that had been personalized by VPC and sent to deceased voters. Paragraph 12 of Mr. Howell's affidavit does not state that he received numerous calls about personalized applications *from VPC*. Ex. A. ¶ 12. Mr. Howell's affidavit states that voters sent applications to his office to alert them of the voter's death, but Mr. Howell does not quantify how many applications were sent back to his office. *Id.* Moreover, Mr. Howell admitted at his deposition that he received "at least" "a couple" prefilled ballot applications that notes the voter is deceased. Ex. 1 (Howell Tr.) at 199:6–13. Plaintiff disputes Defendants' statement insofar as Defendants' seek to draw the inference that Mr. Howell's receipt of "a couple" of applications personalized to a deceased voter supports their statement that Shawnee County received "numerous" applications of this nature.

Plaintiff disputes that Defendants' Exhibit R supports their characterization that the Shawnee County Election Office received "numerous" applications that had been personalized by

VPC and sent to deceased voters whose registration had been cancelled before the application was printed. Defendants' Exhibit R contains eleven (non-Bates stamped)[7] advanced ballot applications sent by VPC. *See* Ex. R. Only ten of these applications were personalized by VPC. *See id.* at 13–14 (blank application sent by VPC). Two of these applications do not indicate the recipient is deceased. *See id.* at 1 (no notations), 2 (notation that "Moved out of state," but no notation that recipient is deceased). The remaining eight applications are personalized by VPC and contain hand-written annotations or notes that the recipient has passed away, but only four indicate the recipient's registration was cancelled on May 11, 2020, prior to when VPC uploaded data for its first mailing on July 6, 2020, *see id.* at 5-6, 7-8, 17-18; three indicate the recipient's application was cancelled between VPC's first data upload and when its first wave of mailers landed in homes on August 17, 2020, *see id.* at 3-4 (July 23), 11-12 (August 8), 19-22 (July 24); and one was

[7] Exhibit R appears to be a compilation of 11 advance mail ballot applications submitted to the Shawnee County Election Office and accompanying correspondence. This compilation appears to have been drawn from Shawnee County's production of nearly 10,000 pages of applications for advance mail ballots (which were not limited to applications provided to voters by VPC). Plaintiff notes that Shawnee County did not produce these applications with Bates stamps, but instead in over 300 named .pdf documents.

Defendants do not provide any information in this statement regarding who produced the documents, whether the documents were introduced as deposition exhibits, or information like the file name and page numbers at which these documents were produced, such that the documents are not locatable by VPC amongst the documents produced in this litigation without significant burden. As such, Defendants do not provide an adequate foundation for Exhibit R for the Court, or VPC, to assess the documents.

With that said, Plaintiff accepts only for the purposes of its response to this statement that the 11 advance mail ballot applications were sent by VPC, 10 of which were personalized by VPC.

The record does not contain an adequate foundation for Defendants' Exhibit R for the same reasons the record does not contain an adequate foundation for Defendants' Exhibit Q. For the purposes of responding to this statement, Plaintiff assumes Exhibit Q is a compilation of documents produced to Plaintiff by Shawnee County.

cancelled between VPC's third data upload on August 10, 2022 and when its third wave landed in homes on September 8, 2022, *see id.* at 15-16 (Sept. 1).[8]

Plaintiff disputes that the only arguably relevant 8 applications in Defendants' Exhibit R—out of the 10,000 pages of applications Shawnee County produced and the 23,000 applications Shawnee County received in 2020—support Defendants' statement that Shawnee County received "numerous advance voting ballot applications that had been pre-filled by VPC and sent to individuals who were deceased." Plaintiff further disputes that the 4 applications sent to voters whose registrations had been cancelled prior to VPC's first data upload—or even the 7 cancelled prior to VPC's fifth data upload—supports Defendants' statement that Shawnee County received "numerous" applications personalized by VPC and sent to deceased voters "whose voter registration in ELVIS had been cancelled prior to the time such applications had been printed."

DEFENDANTS' UNCONTROVERTED FACT ¶ 52:

52. As a result of these inaccurately pre-filled advance voting ballot applications, the Shawnee County Election Office was "overwhelmed" with telephone calls, letters, e-mails, and in-office visits from voters who were confused, angry, and frustrated at what they had received from VPC. Ex. A ¶¶ 12, 37, 40, 44; Ex. S at 117:24-125:2; Mr. Howell himself spoke with hundreds of these angry, frustrated, and confused voters. Ex. S at 121:11-122:12.

[8] VPC sent five "waves" of advance voting ballot application mailers to Kansas voters in advance of the 2020 General Election.. The dates were as follows:

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

PTO-SF ¶ xl.

PLAINTIFF'S RESPONSE TO ¶ 52:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. Plaintiff disputes this statement insofar as the phrase "what they had received from VPC" is vague and ambiguous. The only claims in dispute in this case concern the Personalized Application Prohibition, PTO-SF ¶ xxvii, which provides that no portion of an advance voting ballot application mailed to solicit a voter to file such an application may be completed prior to mailing, *id.* ¶ xxii. Defendants' cited sources support that voters were confused, angry, or frustrated about "what they had received from VPC," but those emotions were not directed toward *personalized* information.

Where the cited sources mention voters' reactions to inaccurate information, they consistently lump the issue of inaccurately personalized information to another, irrelevant issue, such as duplicate applications or confusion about the source of the information, *see, e.g.*, Ex. A ¶ 37 (these "inaccurate and duplicate applications"), or the reaction is not linked to personalization at all, *see, e.g.*, *id.* ¶ 44 (stating "voters thought they were *required* to return the application" sent by CVI, without linking voters' belief to the fact that the application was personalized). For example, Paragraph 40 of Mr. Howell's affidavit states that he "learned that many voters thought (erroneously) that the CVI-pre-filled applications had come from the Shawnee County Election Office." Ex. A ¶ 40. The paragraph explains that these voters expressed aggression or disbelief that *their county election office was incompetent* or *the county* would not have updated their information after being notified. This paragraph does not support the inference that voters would have had the same reaction had they realized a third party had personalized the applications.

The cited portions of Mr. Howell's deposition transcript do not support Defendants' statement that the Shawnee County Election Office was "overwhelmed" by communications from voters that were confused, angry, or frustrated about receiving *personalized* advance mail ballot applications in VPC's mailers. Mr. Howell was asked repeatedly about concerns over incorrect information in advance mail ballot applications, and he consistently responded about concerns over duplicates. *See* Ex. S at 117:24–123:9.[9] When asked about duplicates, Mr. Howell clarified that he "personally handled more than 100 phone calls and probably had 25 or 30 walk-ins" "over duplicate advance mail ballot applications." *Id.* 123:24–125:2. Plaintiff disputes this statement insofar as Defendants seek to draw the inference that the Shawnee County Election Office was "overwhelmed" by voter outreach *about personalized information*, or that. Mr. Howell answered hundreds of calls *about personalized information.*

Mr. Howell's deposition testimony further controverts this statement. Mr. Howell admitted that he "do[es]n't think that the prefilled information, in and of itself, was what all the concern was" with respect to the issues voter had during the 2020 election and the frustration they felt when they received applications from third parties. Ex. 1 (Howell Tr.) at 245:10–19. He further admitted

[9] When asked about "incorrect address information," he answered about "4,000 duplicates itself was a major time constraint and I personally took hundreds of calls from people upset for various reasons and various forms of issues with it," and staff time spent "on those duplicate applications." *Id.* 117:24 – 118:13. When asked about "the inaccuracy of the information in an application," he answered that "the entire experience of dealing with all the duplicates, *whether correct or incorrect*, was overwhelming in and of itself." *Id.* 119:6–14 (emphasis added). When asked about "incorrect name information," he answered by "point[ing] to, again, the 4217 dups, alone were overwhelming enough," and "the duplicates certainly were the biggest single – single group that caused a lot of issues for us" *Id.* at 119:16–120:5. When asked about "confusion or concern over prefilled information" and to clarify whether testimony about hundreds of calls was about "incorrect prefilled information, " he answered about "hundreds" of calls and clarifying that he could not quantify if those calls "were incorrect versus duplicate" *Id.* at 121:11–123:9. When asked about "the accuracy of prefilled advance mail ballot applications," he answered about duplicates, such as written comments that "hey, this is the third time I've seen this." *Id.* at 122:19–123:9.

that he did not know if he "receiv[ed] any phone calls from a voter that they were confused because an application contained prefilled information" because they did not "sa[y] it exactly that way. I think the concern is, like I said multiple times, when people get multiple copies after they've already sent an application in . . . ." *Id.* at 248:20–249:18.

The cited sources are replete with inadmissible hearsay, including voter "report[s] that multiple pre-populated applications had been sent do deceased individuals," Ex. A ¶ 12, calls "complaining about *CVI*'s pre-filled applications," *id.* ¶ 37 (emphasis added), calls that "voters thought (erroneously) that the CVI-prefilled applications had come from the Shawnee County Election Office," *id.* ¶ 40, calls that voters "insisted that they did not actually intend to request and vote an advance ballot," *id.* ¶ 44, and "voters told us that they thought they were *required* to return the application," *id.*. These sources cannot be used to draw the inference that the matter asserted in these out-of-court statements is true; namely that: pre-populated applications were sent to deceased individuals, voters thought CVI-prefilled applications had come from Shawnee County, voters had not intended to request and vote an advance ballot, or voters thought they were required to return CVI-prefilled applications. To the extent Defendants use these sources to draw the inference that voters were confused, angry, or frustrated, even if Mr. Howell's perception of their demeanor were admissible under a hearsay exception, the *reason* for the voters' emotions would remain inadmissible. *See infra* fn. 25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 53:

53. Voters communicating with Mr. Howell regarding inaccurately pre-filled advance voting ballot applications often believed (erroneously) that the applications had been sent to them by the Shawnee County Election Office, and they expressed anger and frustration at the purported incompetency of the office. Many of these voters voiced their incredulity that the office would

send an application to the wrong address or use the wrong name in pre-filling the application when they had previously communicated such changes to the election office. Ex. A ¶¶ 38, 40-42.

PLAINTIFF'S RESPONSE TO ¶ 53:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is unsupported by admissible evidence. What voters said about why they were confused, frustrated, or angry, *see* Ex. A ¶ 38; what they said about their beliefs about the sender of the personalized applications, why they thought the Shawnee County Election Office was incompetent or harboring a political agenda, or was using the wrong name on personalized applications, *id.* ¶ 40; what they said about their thoughts about who was responsible for sending "prefilled and duplicate applications" or their beliefs that they were required to return them, *id.* ¶ 41; and what they said about the competency and credibility of the Shawnee County Election Office, *id.* ¶ 42, is all inadmissible hearsay. To the extent Defendants use these sources to draw the inference that voters were confused, angry, or frustrated, even if Mr. Howell's perception of their demeanor were admissible under a hearsay exception, the *reason* for the voters' emotions would remain inadmissible. *See infra* fn. 25.

This statement is also unsupported to the extent Defendants characterize voters' reactions to the fact that they received inaccurately personalized applications. Plaintiff does not dispute that Mr. Howell's affidavit states that some voters expressed confusion, frustration, and anger about having received CVI-prefilled applications that contained inaccurate information. Ex. A ¶ 38. Defendants mischaracterize the remainder of the cited sources, which pertain to voter reactions to receiving unsolicited or duplicate information, or voter confusion arising from the perceived

sender of the application (their county election office, not a third party) rather than the *content* of the application.

DEFENDANTS' UNCONTROVERTED FACT ¶ 54:

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

PLAINTIFF'S RESPONSE TO ¶ 54:

Controverted in part. The fact that Ms. Cox sent an ad to three newspapers to remind voters that pre-filled applications had not come from the county election office is uncontroverted. The text of the ad is uncontroverted. The reason for Ms. Cox's taking this action is controverted. The cited sources do not support Defendants' characterization that Ms. Cox took this action because she had heard from 20-30 voters per day *about the inaccurate and duplicate advance voting ballot applications from VPC*. Paragraph 37 of Ms. Cox's affidavit is vague to the extent it refers to "overall voter confusion," but states that she published ads to clarify the source of the advanced mail ballot applications. Ex. U ¶ 37. Ms. Cox's deposition testimony resolves any ambiguity, and clearly states that voters called because they wanted to know "where did they get this information." Ex. T at 131:19–132:12. Neither source references concern about inaccurate or duplicate applications.

Insofar as Defendants seek to draw the inference that Ms. Cox took out ads because she heard from voters confused, angry, or frustrated about *inaccurately personalized information* on advance mail ballot applications mailed by VPC, this statement is unsupported.

DEFENDANTS' UNCONTROVERTED FACT ¶ 55:

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

PLAINTIFF'S RESPONSE TO ¶ 55:

Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 56:

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

PLAINTIFF'S RESPONSE TO ¶ 56:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. Plaintiff does not dispute the general statement that Shawnee County election Office sent out letters to voters who submitted advance voting ballot applications containing information that did not match the data in ELVIS. However, the cited sources do not support Defendants' statement.[10] Mr. Howell's cited testimony references "a copy of every letter

[10] Defendants' Exhibit A is Mr. Howell's affidavit, numbered with paragraphs. For the purposes of responding to this statement, Plaintiff assumes that the correct citation is to Defendants' Exhibit S, excerpts of Mr. Howell's deposition transcript, which contains numbered lines.

that we sent out to every voter," but nowhere indicates that these letters were sent to voters who submitted advance voting ballot applications containing information that did not match the data in ELVIS. *See* Ex. S at 120:6–121:4.

The examples of the letters in Defendants' Exhibit W do not support this statement. At his deposition, Mr. Howell was shown a similar form letter, with the same logo at the top and the same general layout. *See* Ex. 1 (Howell Tr.) at 181:9–183:21; *compare* Ex. 10 (Howell Tr., Ex. 8) *with* Ex. W at 1–3, 6, 9–10. Mr. Howell testified that Ex. 10 (Howell Tr., Ex. 8) "looks like a form letter that we've used in the past, and I'm not aware whether this is a current one that we use now or not," and noted that the date field of these letters updates automatically. Ex. 1 (Howell Tr.) at 181:22–182:16. When asked about the form letters that address different issues, Mr. Howell further testified that he is "actually not that familiar with all the form letters that I sent you because some of those, like I said, are ones that we do not use currently," and that "it would be wrong to assume that, if these form letters have dates" in the body of the letter for 2022, then the letters have or will be used in 2022. *Id.* 182:21–183:20.

This statement is vague and ambiguous about which of these specific form letters were sent to voters, when, or how often. Several of these form letters do not address advance mail ballot applications that do not match ELVIS. *See* Ex. W at 3 (voter registration), 4 (data of birth for Help America Vote Act compliance), 5 (ineligibility due to felony status, not mismatched information), 6 (same). The one non-form letter does not address mismatched information between an application and ELVIS. *See id.* at 7-8 (addressing a voter question about CVI). Moreover, several of these letters appear to be outdates, as they have a different letterhead with a former employee listed. *See id.* at 4, 7 (listing Mark A. Stock). These form letters lack an adequate foundation and,

given that Defendants cite no evidence of these letters *actually* being sent to voters, their existence as blank "form" letters is irrelevant to any disputed issue in this case.

DEFENDANTS' UNCONTROVERTED FACT ¶ 57:

57. Kansas Elections Director Bryan Caskey also received many calls from county election officials who complained that their offices were receiving pre-filled advance voting ballot applications in which the information on the form did not match the data in ELVIS. Ex. C at 150:13-152:15. In response to these calls, Mr. Caskey regularly discussed the problem with county election officials during his weekly telephone conferences with them. He also spoke personally with election officials in at least 60 of the State's 105 counties on the subject. Ex. C at 212:20-213:11, 237:11-240:5.

PLAINTIFF'S RESPONSE TO ¶ 57:

Controverted in part. Plaintiff does not dispute that Mr. Caskey testified that received calls from county election officials who *said* that they were experiencing problems. Ex. C. at 151:14–152:3. Mr. Caskey testified that he received complaints from county election officials about applications that were "prefilled out," with information that did not match the voter file. *Id.* Insofar as Defendants seek to draw an inference from Mr. Caskey's testimony that these county election officials did in fact receive applications personalized with mismatched information, it is an inference about the truth of the matter asserted by an out-of-court declarant and is hearsay.

Plaintiff does not dispute that Mr. Caskey testified that county election officials from 60 out of 105 counties called him about their voters contacting them about prefilled applications. *Id.* at 212:20–213:11. Insofar as Defendants seek to draw an inferences from Mr. Caskey's testimony that these 60 county election officials did in fact have voters contacting them about personalized information, it is hearsay within hearsay: Defendants cannot rely on the voter's out-of-court

statement to her county election official about any issue with personalized information on an application for the truth of the matter asserted—that here was in fact any issue with personalized information on an application; nor can Defendants rely on the county election officials' out-of-court statements to Mr. Caskey that voters were complaining for the truth of the matter asserted—that the voters were in fact complaining.

Plaintiff does not dispute that Mr. Caskey testified that he spoke to election officials about the number of advance ballot applications, the quality of those applications, complaints from voters, and frustration with duplicates and time constraints. *See id.* at 237:11–240:5. However, the cited source does not support Defendants' characterization that Mr. Caskey had these conversations "in response to" calls about *inaccuracies* with personalized applications; he had these calls "concerning voters in their counties receiving advance ballot applications that were prefilled," without reference to error. *See id.* at 212:20–213:4. Additionally, Defendants may not rely on Mr. Caskey's testimony about what county election officials told him (*e.g.*, that voters were in fact "verifying"—presumably, submitting—"multiple applications") or what county election officials told him they had perceived (*e.g.*, that voters were angry, confused, and frustrated) or what the voters told their county election officials (*e.g.*, they were frustrated with the process) for the truth of the matter asserted. *See id.* at 237:11–240:5.

DEFENDANTS' UNCONTROVERTED FACT ¶ 58:

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

PLAINTIFF'S RESPONSE TO ¶ 58:

Controverted in part. It is uncontroverted that Mr. Caskey testified that he spoke to voters who expressed their anger, confusion and frustration. This statement is controverted to the extent Defendants seek an inference that because Mr. Caskey received phone calls from voters saying that they received more than one application or asking why the State gave away their information, it is true that these voters in fact received more than one application or that the State in fact gave away their information because it is an inference about the truth of the matter asserted by an out-of-court declarant and is hearsay.

DEFENDANTS' UNCONTROVERTED FACT ¶ 59:

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

PLAINTIFF'S RESPONSE TO ¶ 59:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent it quotes Exhibit Z. However, Plaintiff states that the letter from the Kansas Secretary of State's Office is dated for February 18, 2021. *See* Ex. Z, Kan. Sec. of State Letter, dated Feb. 18, 2021. This statement is immaterial because the Personalized Application Prohibition places no limit on the number of unsolicited applications a third party may mail a voter. *See* PTO-SF ¶¶ xxii, xxvii.

DEFENDANTS' UNCONTROVERTED FACT ¶ 60:

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

PLAINTIFF'S RESPONSE TO ¶ 60:

Controverted in part. It is uncontroverted that the cited sources contain these statements as to Mr. Howell and Ms. Cox. This estimation is therefore limited to those parties and their estimation of experienced election officials in their offices. Mr. Howell further testified that if an advance mail ballot application is personalized with information that matches the information that is in ELVIS, it does not create an additional burden on his office to process the application. *See* Ex. 1 (Howell Tr.) at 252:11–23.

DEFENDANTS' UNCONTROVERTED FACT ¶ 61:

61. If the information on a voter's advance voting ballot application does not match the information in ELVIS, or if the application is missing information, the election office will attempt to contact the voter (via telephone, U.S. mail, and/or e-mail) to determine the reason for the discrepancy or to obtain the missing information. This contact can require multiple attempts. The office generally makes at least three attempts to reach the voter, assuming it is practicable. Ex. A ¶ 25; Ex. U ¶ 24.

PLAINTIFF'S RESPONSE TO ¶ 61:

Controverted in part. It is uncontroverted that the cited sources contain these statements as to Mr. Howell and Ms. Cox. This statement is therefore limited to the experience of the affiants on whom Defendants rely—Mr. Howell and Ms. Cox—and the practices of Shawnee and Ford County, respectively.

DEFENDANTS' UNCONTROVERTED FACT ¶ 62:

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

PLAINTIFF'S RESPONSE TO ¶ 62:

Controverted in part. It is uncontroverted that the cited sources contain these statements as to Mr. Howell and Ms. Cox. This statement is therefore limited to the practices of Shawnee and Ford County, respectively. This statement is controverted by Mr. Howell's admission that he could not estimate "the average amount of time it takes to cure an advance mail ballot application that is missing information" because "[t]here are just too many factors, every election is different, and I don't – I really don't think there is an average." Ex. 1 (Howell Tr.) at 168:22–169:10. Mr. Howell's deposition testimony directly contradicts his ability to estimate his statement in paragraph 26 of his affidavit. *See* Ex. A at ¶ 26. Plaintiff also states that Mr. Howell testified that the amount of time his staff spends curing applications "really isn't, to [him], a question of was it prefilled or not. It's really a question of was it accurate, were there duplicates, was there some other issue . . . ." Ex. 1 (Howell Tr.) at 253:24–254:11. Insofar as Defendants seek to draw an

inference that personalized applications take longer to process, that inference is controverted by Mr. Howell's deposition testimony.

DEFENDANTS' UNCONTROVERTED FACT ¶ 63:

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

PLAINTIFF'S RESPONSE TO ¶ 63:

Controverted in part. It is uncontroverted that the cited sources contain these statements as to Mr. Howell and Ms. Cox. This statement is therefore limited to the experience of Mr. Howell and Ms. Cox and therefore is limited to the practices of Shawnee and Ford County, respectively.

DEFENDANTS' UNCONTROVERTED FACT ¶ 64:

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

PLAINTIFF'S RESPONSE TO ¶ 64:

Controverted in part. Plaintiff does not dispute that Mr. Howell's affidavit contains this statement. Ex. A ¶ 28. However, this statement is limited to Mr. Howell's experience. Additionally, Mr. Howell testified that after election day, his office conducts further follow-up for provisional voters who need to provide additional information "even clear up right up until canvas." *See* Ex. 1 (Howell Tr.) at 192:15–193:17. The cure process continues for an additional 13 days, during which the Shawnee County election officials will "try to reach out to them to cure

the original problem." *Id.* at 195:3–14. This 13-day period is many times longer than the usual two-day timeframe in which county election officials must process advance mail ballot applications. *See* PTO-SF ¶ xxxiii. Mr. Howell's deposition testimony is at odds with paragraph 28 of his affirmation.

DEFENDANTS' UNCONTROVERTED FACT ¶ 65:

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

> **I got a form that has someone else's information on it-why did that happen?**
>
> Thank you for reaching out. VPC is aware of this issue and is actively working to make sure it doesn't happen again. This issue was limited in scope and only affected a very small percentage of individuals. In the meantime, we are happy to send you a new vote-by-mail application with the correct information, or I can tell you the link you can use to print it from your state's SoS website and then fill it out and mail back in the envelope we sent you.
>
> **How did it happen? How are you making sure it won't happen again?**
>
> The mistake was due to a printer error and they have taken responsibility for their mistake and have already added additional quality control measures, like installing an additional camera to monitor printing, and retraining printer staff, to prevent this type of situation in the future.

PLAINTIFF'S RESPONSE TO ¶ 65:

Controverted in part. The quotation of the FAQs from Exhibit X is uncontroverted. However, the cited source does not support Defendants' characterization of the intended purposes of the FAQs. Defendants' Exhibit X itself demonstrates that the FAQs are used for voters who are interested in receiving an advance mail ballot application from VPC, not only individuals who have problems with VPC's mailers. *See* Ex. X at 1 ("can you send me one?").

DEFENDANTS' UNCONTROVERTED FACT ¶ 66:

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

PLAINTIFF'S RESPONSE TO ¶ 66:

Controverted in part. The cited sources do not support Defendants' characterization that these emails reflect "complaints" about "inaccurate" absentee ballot applications. Moreover, this characterization is vague. Evidence of inaccuracies on components of VPC's mailers are irrelevant to the issue at hand—personalization of portions of the application itself. The vast majority of Defendants' cited sources do not reflect inaccuracies with the personalized portions of the absentee ballot applications VPC sent to voters in states other than Kansas during the 2020 election cycle. Ex. Y at 1–3 (noting a potential issue with zip codes on the return address of VPC's envelopes), 4-5 (describing how VPC left a field *blank—i.e.*, the absence of personalization of this field), 6-8 (noting an issue with the city pre-addressed on VPC's prepaid return envelopes), 9 (same), 10-11 (same), 12-13 (same), 14-16 (same), 17-18 (same),[11] 19-25 (same), 26 (same), 34-37 (discussing

[11] Plaintiff produced this document as a complete, three-page email chain bearing Bates numbers VPC000396 – VPC000398. Defendants unnecessarily excerpted this document. *See* Ex. 11. Plaintiff also produced the document containing VPC000408 as a complete, four-page email chain bearing bates numbers VPC000407 – VPC000410. Defendants unnecessarily excerpted this document. *See* Ex. 12. Plaintiff produced the document containing VPC000429 – VPC000431 as a complete, five-page email chain bearing bates numbers VPC000429 – VPC000433. Defendants unnecessarily excerpted this document as well. *See* Ex. 13.

suggested changes to instructions and information in mailers), 38-40 (same); 41-42 (noting past errors with VPC's *voter registration* mailing list). Evidence of issues unaffected by the Personalized Application Prohibition are irrelevant and therefore immaterial.

DEFENDANTS' UNCONTROVERTED FACT ¶ 67:

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

PLAINTIFF'S RESPONSE TO ¶ 67:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein. To the extent a response is required: Uncontroverted.

DEFENDANTS' UNCONTROVERTED FACT ¶ 68:

68. 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. G at 123:17-124:20.

PLAINTIFF'S RESPONSE TO ¶ 68:

Controverted. This statement is controverted to the extent it suggests that all 507,864 voters in Exhibit E (from which this statement is derived) were sent application packets by VPC. This statement is further controverted to the extent it suggests that all 112,597 voters in Exhibit E used a VPC-provided envelope to mail their application back. Mr. Dripps testified that Exhibit E

could reflect not only VPC's mailers, but "it could have also been VPC's sister organization, CVI." Ex. F. at 177: 9–22. *See* Ex. 14 Declaration of Thomas Lopach in Support of Plaintiff Voter Participation Center's Motion to Dismiss (Oct. 13, 2022) ("Lopach Decl.")) ¶ 26 (stating approximately 69,000 voters responded to advance mail ballot applications sent by VPC). As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

DEFENDANTS' UNCONTROVERTED FACT ¶ 69:

69. 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. G at 124:16-125:18.

PLAINTIFF'S RESPONSE TO ¶ 69:

Controverted. This statement is controverted to the extent it suggests that all 112,597 voters in Exhibit E (from which this statement is derived) used a VPC-provided envelope to mail their application back. This statement is further controverted to the extent it suggests that all 127,336 applications in Exhibit E were sent using a VPC-provided envelope. Mr. Dripps testified that Exhibit E could reflect not only VPC's mailers, but "it could have also been VPC's sister organization, CVI." Ex. F. at 177: 9–22. *See also* Ex. 14 (Lopach Decl.) ¶ 26 (stating approximately 69,000 voters responded to advance mail ballot applications sent by VPC). Moreover, Plaintiff states that the numbers included in ¶ 69 are from the 2020 General Election. *See* Ex. G at 110:4-8. Finally, this statement is cited as support for Defendants' motion for

summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

DEFENDANTS' UNCONTROVERTED FACT ¶ 70:

70. 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. G at 128:3-25.

PLAINTIFF'S RESPONSE TO ¶ 70:

Controverted. This statement is controverted to the extent it suggests that all 112,597 voters in Exhibit E (from which this statement is derived) used a VPC-provided envelope to mail their application back. Mr. Dripps testified that Exhibit E could reflect not only VPC's mailers, but "it could have also been VPC's sister organization, CVI." Ex. F. at 177: 9–22. *See also* Ex. 14 (Lopach Decl.) ¶ 26 (stating approximately 69,000 voters responded to advance mail ballot applications sent by VPC). Moreover, Plaintiff states that the numbers included in ¶ 70 are from the 2020 General Election. *See* Ex. 6 (Lopach Tr.) at 110:4-8. Finally, this statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

DEFENDANTS' UNCONTROVERTED FACT ¶ 71:

71. In the 2020 General Election, the Shawnee County Election Office received and processed 23,156 advance voting ballot applications. That is, it sent regular or provisional advance

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

PLAINTIFF'S RESPONSE TO ¶ 71:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 15 of the Affidavit of Andrew Howell contains the statement set forth in ¶ 71. However, this statement is controverted to the extent Paragraph 15 of Mr. Howell's affidavit is contradicted by his testimony during the Preliminary Injunction Hearing held on September 9, 2021. *See* Ex. 15 (September 8, 2021 Hearing on Plaintiffs' Motion for Preliminary Injunction ("9/8/2021 PI Tr.")) at 92:18-19 (testifying that his office received 2,955 duplicate applications in 2020); *id.* at 96:8-14 (testifying that his office received 24,699 applications that were not duplicates). Moreover, the context is incomplete. This statement does not pertain to the number of duplicate applications the Shawnee County Election Office received that were sent to voters by VPC. It further omits that the number of advance mail ballot applications the Shawnee County Election Office received during the 2020 general election increased by approximately 270 percent as compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and "processed" 23,156 plus an additional 4,217, totaling 27,373 applications received) with *id.* ¶ 17 (stating the Shawnee County

Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). Finally, it omits that Mr. Howell testified during the Preliminary Injunction Hearing held on September 9, 2021 that the pandemic in 2020 was an unprecedented situation for him and his office. *See* Ex. 15 (9/8/2021 PI Tr.) at 104:21-25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 72:

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

PLAINTIFF'S RESPONSE TO ¶ 72:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 18 of the Affidavit of Andrew Howell contains the statement set forth in ¶ 72. However, the statement is controverted to the extent Paragraph 18 of Mr. Howell's affidavit is contradicted by his testimony during the Preliminary Injunction Hearing held on September 9, 2021. *See* Ex. 15 (9/8/2021 PI Tr.) at 92:23-93:2 ("2,703 of them were duplicates, 198 had three applications, 40 of them had four applications turned in, nine people had five applications turned in, four voters had six applications turned in, and one voter had seven applications turned into our office."). Moreover, the context is incomplete. This statement does not pertain to the number of duplicate applications the Shawnee County Election Office received that were sent to voters by VPC. It further omits that the number of advance mail ballot applications the Shawnee County Election Office received

during the 2020 general election increased by approximately 270 percent as compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and "processed" 23,156 plus an additional 4,217, totaling 27,373 applications received) with *id.* ¶ 17 (stating the Shawnee County Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). Finally, it omits that Mr. Howell testified during the Preliminary Injunction Hearing held on September 9, 2021 that the pandemic in 2020 was an unprecedented situation for him and his office. *See* Ex. 15 (9/8/2021 PI Tr.) at 104:21-25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 73:

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

PLAINTIFF'S RESPONSE TO ¶ 73:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 17 of the Affidavit of Andrew Howell contains the statement set forth in ¶ 73. This statement is uncontroverted to the extent the context is incomplete. This statement omits that VPC also sent advance mail ballot applications to Kansas voters in 2018. *See* Ex. 14 (Lopach Decl.) ¶ 26. It further omits that the number of advance mail ballot applications the Shawnee County Election Office received during the 2020 general election increased by approximately 270 percent as

compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and "processed" 23,156 plus an additional 4,217, totaling 27,373 applications received) with *id.* ¶ 17 (stating the Shawnee County Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). Finally, it omits that Mr. Howell testified during the Preliminary Injunction Hearing held on September 9, 2021 that the pandemic in 2020 was an unprecedented situation for him and his office. *See* Ex. 15 (9/8/2021 PI Tr.) at 104:21-25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 74:

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

PLAINTIFF'S RESPONSE TO ¶ 74:

This statement constitutes impermissible hearsay and is not admissible. Defendants cannot rely on these out-of-court statements to prove the truth of the matter asserted; namely, that the voters were in fact confused and they did in fact think they were required to complete additional advance mail ballot applications. Even if these statements were admissible to demonstrate the fact that the voters were confused under a hearsay exception, in no event could Defendants rely on the voters' statements to prove why they were confused. *See infra* fn. 25.

To the extent a response is required: Controverted. Plaintiff disputes that the cited material supports the vague and subjective characterization that "many voters told county election officials

that they were confused by the pre-filled advance voting ballot applications." At most, the cited material indicates some unquantified number of voters called Mr. Howell and individuals in the Ford County Clerk's office to ask if they were required to submit a pre-filled advance mail ballot application they had received from a third party—though not necessarily VPC—if they had already submitted an application, and Mr. Howell was told by an unquantified number of voters that they thought his office was sending the applications. *See* Ex. A ¶ 41 (stating that many voters told Mr. Howell that they thought his office was responsible for sending the applications and the voters believed they were required to return every application they received); Ex. S at 269:14-270:1 (testifying that Mr. Howell had conversations with voters where the voters said they thought they were receiving applications from his office that they had to return); Ex. U ¶ 19 (stating that voters called Ms. Cox's office to ask whether they were required to submit an application that "they had received from some third-party" if they had already submitted an application). Rather, Mr. Howell testified that, in his opinion, the pre-filling of applications was not the cause of voter confusion. *See* Ex. 1 (Howell Tr.) at 245:13-19 (Q. "Is it your opinion that -- that voters became even more confused and frustrated when the applications contained prefilled information?" A. "I don't think that the prefilled information, in and of itself, was what all of the concern was.").

DEFENDANTS' UNCONTROVERTED FACT ¶ 75:

75. In the 2020 General Election, the Ford County Election Office received and processed 3,040 advance voting ballot applications. That is, it sent regular or provisional advance ballots to 3,040 voters after having received advance voting ballot applications from these voters. In addition, it received 274 duplicate applications (i.e., applications from voters who had already submitted an application and to whom the office had already mailed a regular or provisional

advance ballot). Nearly 9% of the advance voting ballot applications that the office received, therefore, were duplicates. Ex. U ¶ 16.

PLAINTIFF'S RESPONSE TO ¶ 75:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 16 of the Affidavit of Debbie Cox contains the statement set forth in ¶ 75. This statement is controverted to the extent the context is incomplete. This statement does not pertain to the number of duplicate applications the Ford County Election Office received that were sent to voters by VPC. In fact, Ford County itself sent all voters advance ballot applications. *See* Ex. 16 (Excerpts of the Deposition Transcript of Deborah Jean Cox (Sept. 9, 2022) ("Cox Tr.")) at at 103:20-23. It further omits that Ms. Cox testified that her office "had a lot more voters voting by mail [in 2020 than 2016 and 2018], considerably more." *See id.* at 98:25-99:4.

DEFENDANTS' UNCONTROVERTED FACT ¶ 76:

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

PLAINTIFF'S RESPONSE TO ¶ 76:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 18 of the Affidavit of Debbie Cox contains the statement set forth in ¶ 76. The statement is controverted to the extent the context is incomplete. This statement omits that both Ford County and VPC also sent advance mail ballot applications to Kansas voters in 2018. *See* Ex. 14 (Lopach Decl.) ¶ 26; Ex. 16 (Cox Tr.) at 103:20-23. It further omits that Ms. Cox testified that her office "had a lot more voters voting by mail [in 2020 than 2016 and 2018], considerably more." *See* Ex. 16 (Cox Tr.) at 98:25-99:4.

DEFENDANTS' UNCONTROVERTED FACT ¶ 77:

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

PLAINTIFF'S RESPONSE TO ¶ 77:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. Plaintiff does not dispute that "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." Plaintiff disputes that the cited material supports the vague and subjective characterization that "the majority of duplicate applications are believed to have been pre-filled by VPC." At most, the cited material indicates Mr. Howell and Ms. Cox believe the majority of duplicate applications their offices received had been partially

pre-filled by CVI. Nevertheless, neither Mr. Howell nor Ms. Cox present any foundation for such belief, such that it should not be credited.

DEFENDANTS' UNCONTROVERTED FACT ¶ 78:

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

PLAINTIFF'S RESPONSE TO ¶ 78:

This statement constitutes impermissible hearsay not admissible. Moreover, this statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent the cited material contains the quoted language. This statement is controverted to the extent it does not pertain to the number of duplicate pre-filled advance mail ballot applications submitted by voters that were sent to voters by VPC.

DEFENDANTS' UNCONTROVERTED FACT ¶ 79:

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

PLAINTIFF'S RESPONSE TO ¶ 79:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein. To the extent a response is required: Uncontroverted; however, Plaintiff states that this purported factual assessment is based on the experience of the . This statement is therefore limited to the experience of the affiants on whom Defendants rely—Mr. Howell and Ms. Cox—and the practices of Shawnee and Ford County, respectively.

DEFENDANTS' UNCONTROVERTED FACT ¶ 80:

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

PLAINTIFF'S RESPONSE TO ¶ 80:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration. To the extent a response is required: Controverted in part. It is uncontroverted that the cited sources contain these statements as to Mr. Howell and Ms. Cox. This statement is therefore limited to the experience of Mr. Howell and Ms. Cox, and therefore is limited to the practices of Shawnee and Ford County, respectively.

DEFENDANTS' UNCONTROVERTED FACT ¶ 81:

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

PLAINTIFF'S RESPONSE TO ¶ 81:

Controverted in part. The record as to the "2-day deadline imposed by State law" is as follows. 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). 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. 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).

Plaintiff does not dispute that Paragraph 33 of the Affidavit of Andrew Howell contains the statement set forth in ¶ 81, although the context is incomplete. This statement does not pertain to the number of "inaccurate or duplicate" applications the Shawnee County Election Office received that were sent to voters by VPC. It further omits that the number of advance mail ballot applications the Shawnee County Election Office received during the 2020 general election

increased by approximately 270 percent as compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and 'processed' 23,156 plus an additional 4,217, totaling 27,373 applications received) with *id.* ¶ 17 (stating the Shawnee County Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). Finally, it omits that Mr. Howell testified during the Preliminary Injunction Hearing held on September 9, 2021 that the pandemic in 2020 was an unprecedented situation for him and his office. *See* Ex. 15 (9/8/2021 PI Tr.) at 104:21-25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 82:

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

PLAINTIFF'S RESPONSE TO ¶ 82:

This statement constitutes impermissible hearsay not admissible. Moreover, this statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

To the extent a response is required: Controverted in part. This statement is uncontroverted to the extent the cited material contains the quoted language. This statement is controverted to the extent it does not pertain to the number of applications submitted by voters that were sent to voters by VPC.

DEFENDANTS' UNCONTROVERTED FACT ¶ 83:

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

PLAINTIFF'S RESPONSE TO ¶ 83:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent Paragraph 47 of the Affidavit of Andrew Howell contains the statement set forth in ¶ 83. This statement is controverted to the extent the context is incomplete. This statement does not pertain to the number of voters who ultimately decided to vote in person after submitting applications to the Shawnee County Election Office that were sent to voters by VPC. It further omits that the number of advance mail ballot applications the Shawnee County Election Office received during the 2020 general election increased by approximately 270 percent as compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and 'processed' 23,156 plus an additional 4,217, totaling 27,373 applications received) with *id.* ¶ 17 (stating the Shawnee County Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). Finally, it omits that Mr. Howell testified during the Preliminary Injunction Hearing held on September 9, 2021 that the

pandemic in 2020 was an unprecedented situation for him and his office. *See* Ex. 15 (9/8/2021 PI Tr.) at 104:21-25.

DEFENDANTS' UNCONTROVERTED FACT ¶ 84:

84. 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. G at 98:17-99:20.

PLAINTIFF'S RESPONSE TO ¶ 84:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent that lines 98:17 through 99:20 of Mr. Lopach's deposition contains the statement set forth in ¶ 84. This statement is controverted to the extent the context is incomplete. Just after Mr. Lopach makes the aforementioned statement, he clarifies that he is unable to speak to differences "outside of the study we did in 2006 or other studies presented by academics or practitioners who have done similar work." Ex. G at 98:17-99:8. This referenced study evaluated the 2006 election cycle and indicated that pre-filled "vote-by-mail applications had a higher rate of return than blank vote-by-mail applications." Ex. 6 (Lopach Tr.) at 18:24-19:6. This study would constitute VPC's evaluation of the effectiveness. *See id.* at 20:7-13. Columbia University faculty have also evaluated this question and determined that pre-filled applications are "more successful at engaging voters" compared to blank applications. Ex. G at 27:10-15.

DEFENDANTS' UNCONTROVERTED FACT ¶ 85:

85. 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. G at 99:22-100:10.

PLAINTIFF'S RESPONSE TO ¶ 85:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent lines 99:22 through 100:10 of Mr. Lopach's deposition contains the statement set forth in ¶ 85. This statement is controverted to the extent the context is incomplete. The question arises from a clarification question as to how the recipient views the message, if any, from a partially-completed ballot as opposed to a not-partially-completed ballot application. *See* Ex. G at 99:9-99:20. Mr. Lopach testified that he could not testify to this inquiry. *See id.* Based on the question, Mr. Lopach testified that he would not know a recipient's political views. *See id.* at 99:22-100:10. The recipient's views from the application is separate from Mr. Lopach's understanding of effectuating VPC's mission to engage populations in democracy. *See* Ex. 6 (Lopach Tr.) at 151:10-16.

DEFENDANTS' UNCONTROVERTED FACT ¶ 86:

86. 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. G at 189:18-191:14.

PLAINTIFF'S RESPONSE TO ¶ 86:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent lines 189:18 through 191:14 of Mr. Lopach's deposition contain the statement set forth in ¶ 86. This statement is controverted to the extent the context is incomplete. Mr. Lopach's testimony cited therein included his belief that "our strongest encouragement of the use of advance mail voting is when we include a prefilled message to the voter[]" and that it limits the success of engagement with voters. Ex. G at 189:18-191:14.

DEFENDANTS' UNCONTROVERTED FACT ¶ 87:

87. 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. G at 183:9-187:19.

PLAINTIFF'S RESPONSE TO ¶ 87:

This statement is cited as support for Defendants' motion for summary judgment, but does not reach an ultimate question in this case. As such, this statement is immaterial and irrelevant for the Court's consideration, as will be elaborated herein.

Controverted in part. This statement is uncontroverted to the extent lines 183:9 through 187:19 of Mr. Lopach's deposition contain the statement set forth in ¶ 87. This statement is controverted to the extent the context is incomplete. The most successful method of voter

engagement to convey a message and empower voters to participate in democracy is through a prefilled form. Ex. 6 (Lopach Tr.) at 187:21-188:4.

PLAINTIFF VPC'S STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS

I. VPC's Program and Speech

1. Plaintiff VPC's core mission is to promote voting among traditionally under-represented 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); Ex. 4 (Dripps Tr.) 111:25-112:9; Ex. 6 (Lopach Tr.) 153:12-16, 96:14-17, 204:3-6; Ex. 15 (9/8/2021 PI Tr.) 50:9-20 (Thomas Lopach testimony), Ex. 14 Lopach Decl. ¶ 7-11, 28.

2. VPC believes that our country's democracy is better off when more eligible voters can participate and vote for the candidates of their choice and encouraging and assisting voters to participate in elections through mail voting is one of the best ways to ensure a robust democracy. Ex. 14 (Lopach Decl.) at ¶ 8, 10.

3. VPC advocates mail voting to expand engagement among its target voters who do not have the ability and availability to vote in person or the resources and know-how to navigate the mail voting application process. Ex. 14 (Lopach Decl.) at ¶ 10.

4. VPC primarily encourages its target voters to register and to participate in the electoral process through direct mailings. *See* Stipulated Facts at §2(a)(ix); Ex. 6 (Lopach Tr.) 146:24-147:15; Ex. 14 (Lopach Decl.) ¶¶ 7, 13.

5. VPC's core message is that advance mail voting is safe, secure, accessible, and beneficial. Ex. 14 (Lopach Decl.) at ¶ 9.

6. VPC encourages registered Kansas to participate in this manner by mailing its target voters a package communication that advocates for mail voting and provides a personalized

advance mail ballot application. *See* Stipulated Facts at §2(a)(x); Ex. 4 (Dripps Tr.) 124:14-125:2; Ex. 14 (Lopach Decl.) ¶¶ 12, 17-18, 21, 23-24.

7. 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. Ex. 6 (Lopach Tr.) 91:4-92:18; Ex. 14 (Lopach Decl.) ¶¶ 37-40.

8. The process for personalizing applications adds additional steps and cost to the application mailing process. Ex. 14 (Lopach Decl.) ¶ 21; Ex. 2 (Shew Tr.) 24:7-14.

9. In 2020, 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. Ex. 14 (Lopach Decl.) at Ex. A (2020 VPC mailer).

10. 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." Ex. 14 (Lopach Decl.) at Ex. A at VPC000002. The step-by-step guide was printed on the reverse side of the enclosed personalized advance ballot application. *Id.* at VPC000004.

11. The 2022 mailers contain the same basic components as VPC's prior mailer communications, including personalized advance mail ballot applications. Ex. 14 (Lopach Decl.) ¶ 17; *id.* at Ex. B at VPC000743-746 (2022 VPC mailer).

12. 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. Ex. 14 (Lopach Decl.) at ¶ 52; Ex. 6 (Lopach Tr.) 30:3-10.

13. 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. Ex. 14 (Lopach Decl.) ¶¶ 11, 17-18, 22, 28-29; Ex. 15 (9/8/2021 PI Tr.) 47:7-13.

14. 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. Ex. 6 (Lopach Tr.) 149:11-13, 150:13-19, 151:14-16, 183:9-184:1, 185:21-186:3, 188:1-4; Ex. 4 (Dripps Tr.) 192:5-13; Ex. 15 (9/8/2021 PI Tr.) 44:24-45:7, 49:17-24 (Thomas Lopach testimony); Ex. 14 (Lopach Decl.) ¶¶ 9, 23-24, 66.

15. VPC believes that personalizing its applications increases voter engagement, which in turn allows VPC to build a broad associational base with potential voters in Kansas. Ex. 6 (Lopach Tr.) 167:22-168:15; Ex. 14 (Lopach Decl.) ¶¶ 21-22, 24, 28-30.

16. VPC considers providing young voters, voters of color, and unmarried women—who may have less access to printing and postage—with the necessary personalized applications key to effectively advocating its message. Ex. 6 (Lopach Tr.) 185:25-186:3; Ex. 15 (9/8/2021 PI Tr.) 59:23-60:20; Ex. 14 (Lopach Decl.) ¶¶ 10, 21, 23, 24.

17. Doing so provides the voter simple access to an advance mail ballot application that is personalized with required information from the voter file. Ex. 14 (Lopach Decl.) ¶ 18, 21.

18. 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. Ex. 14 (Lopach Decl.) ¶ 26.

19. VPC is a data driven operation. VPC uses data to identify its target voters, tracks recipient responses to its communications and conducts randomized control trials to evaluate the effectiveness of its mailings. Ex. 4 (Dripps Tr.) 77:24-79:17, 116:3-18; Ex. 6 (Lopach Tr.) 14:15-20:13, 116:17-117:12, 154:25-157:15, 165:1-166:9, 170:7-174:9.

20. 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. Ex. 14 (Lopach Decl.) ¶ 16; Ex. 6 (Lopach Tr.) 13:15-16:10; Ex. 4 (Dripps Tr.) 159:20-160:16.

21. VPC (then named "Women's Voices. Women Vote") conducted a study that evaluated the 2006 election cycle (the "2006 Study"), including VPC's evaluation of the effectiveness of personalizing advance mail voting applications. Ex. 6 (Lopach Tr.) at 17:15–18:7, 20:7–13.

22. Mr. Lopach testified that the 2006 Study found that pre-filled "vote-by-mail applications had a higher rate of return than blank vote-by-mail applications." Ex. 6 (Lopach Tr.) at 18:24-19:6.

23. The 2006 Study concluded that "a pre-populated form produced a higher response rate than a blank form." Ex. 17 (2006 Study, VPC000756) (excerpted) at VPC000851. Specifically, pre-populated forms had a response rate over 11% higher than un-populated forms. *See id.* at VPC000852.

II. The Burden of the Personalized Application Prohibition on VPC's Program and Speech

24. The Personalized Application Prohibition bans any person who solicits by mail a registered voter to file an advance mail ballot application and includes such an application in the mailing from completing of any portion an application prior to mailing the application to a registered voter, such as a voter's name and address. PTO-SF ¶ xxii; H.B. 2332 § 3(k)(2) (codified at K.S.A. 25-1122(k)(2)).

25. The Personalized Application Prohibition is not limited to only the inaccurate or fraudulent completion of any portion of an application. H.B. 2332 § 3(k)(2) (codified at K.S.A. 25-1122(k)(2)).

26. The Personalized Application Prohibition does not allow a person soliciting a registered voter to file an advance mail ballot application to mail that voter an application that has been completed with information from the Kansas voter rolls prior to mailing. *See id.*

27. The Personalized Application Prohibition does not limit the number of advance mail ballot applications that may be mailed to a registered voter. *See id.*

28. The Personalized Application Prohibition does not require the sender of advance mail ballot applications to identify itself on such mailings. *See id.*

29. 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).

30. VPC understands that the Personalized Application Prohibition would prevent it from its most effective means of conveying its pro-mail voting message. Ex. 14 (Lopach Decl.) ¶ 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"),

¶¶ 55-66; Ex. 6 (Lopach Tr.) 150:13-19, 151:14-16, 185:21-186:3, 188:1-4; Ex. 15 (PI Hearing Tr.) 44:24-45:7, 49:17-24, 60:11-20 (Thomas Lopach testimony).

31. VPC understands that the Personalized Application Prohibition would limit its associational activity with voters. Ex. 6 (Lopach Tr.) 190:10-12.

III. VPC's Personalization of Applications Does Not Burden the State

32. VPC Executive Vice President Lionel Dripps testified that VPC detected an error in the data it received from its data vendor whereby, nationally, roughly 5% of records had a middle name or initial and roughly 3% had a suffix that did not appear to match the voter file. Ex. 4 (Dripps Tr.) 167:24-168:9, 169:17-170:2.

33. Mr. Dripps testified that he did not know whether these errors appeared in the Kansas data in line with the national numbers. Ex. 4 (Dripps Tr.) at 169:10-16, 170:11-25.

34. Plaintiff's expert witness Dr. Eitan Hersh, who analyzed the expert reports of Defendants' proffered expert witness Kenneth Block, concluded that even assuming that all issues raised by Mr. Block represent actually erroneous or obsolete registrants contacted by VPC's mailers, the alleged issues raised by Mr. Block relate to just under 3% of the records in the VPC database. *See* Ex. 5 (Hersh Rept.) ¶ 27.

35. Mr. Block testified that he did not endeavor to compare the total number of purportedly erroneous records in his declaration and exhibits to the total records on VPC's mailing list. *See* Ex. 7 (Block Tr.) 272:18-23.

36. Mr. Block testified that he did not know "what the error rates are in VPC's data." Ex. 7 (Block Tr.) 267:18-268:7.

37. Mr. Block testified that he does not know how many advance mail ballot applications that were submitted by voters and pre-filled by VPC were ultimately rejected by Kanas election officials. Ex. 7 (Block Tr.) 272:9-17.

38. Mr. Block testified that he does not know, and is not offering an opinion as to, whether applications sent in on VPC mailers created more or less work for election officials than applications sent in by other individuals or organizations. Ex. 7 (Block Tr.) 268:14-24.

39. Mr. Howell testified that the personalization of applications did not cause voters to become more confused and frustrated. *See* Ex. 1 (Howell Tr.) 245:13-19 (Q. "Is it your opinion that -- that voters became even more confused and frustrated when the applications contained prefilled information?" A. "I don't think that the prefilled information, in and of itself, was what all of the concern was.").

40. Mr. Howell testified that that if a voter crossed out a prefilled suffix, and the remaining information on the application was correct, it would probably be accepted. *See* Ex. 1 (Howell Tr.) 184:16–185:11; Ex. 9 (Ex. 7 to Howell Dep.) at 55.

41. Ms. Schmidt testified that an application with a missing middle initial would still be processed so long as the remaining information on the application was correct. *See* Ex. 18 (Excerpts of the Deposition of Connie Schmidt (Sept. 16, 2022) ("Schmidt Tr.")) at 103:25-104:14.

42. Mr. Shew testified that he did not recall the Douglas County Elections Office receiving significantly more duplicate applications in 2020 compared to previous years and that, to the extent there was an increase, such an increase could be attributable to greater voter participation in the presidential election. *See* Ex. 2 (Shew Tr.) 74:3-19.

43. Ms. Cox testified that the Ford County Clerk's office had "a lot more mail ballot voting than we had in the past" because of the "COVID-19 pandemic." *See* Ex. 16 (Cox. Tr.) 102:3-8.

44. Ms. Cox further testified, "I did mail out [advance mail ballot] applications because of the COVID -- which I don't normally do a mass mailing. I did mail out to every registered voter

[advance mail ballot] applications for the primary and the general." *See* Ex. 16 (Cox. Tr.) 102:9-12.

45. Ms. Schmidt testified that the Johnson County Election Office did not detect any instances of voter fraud in 2020. *See* Ex. 18 (Schmidt Tr.) 212:25-213:22.

46. Ms. Cox testified that the Ford County Clerk's Office ran the 2020 elections successfully and that post-election audits detected no evidence of voter fraud. *See* Ex. 16 (Cox. Tr.) 105:5-106:9.

LEGAL STANDARD

Summary judgment should be granted only where the moving party shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant has the initial burden of demonstrating that there is no genuine issue of material fact which "might affect the outcome of the suit under governing law." *Furr v. Ridgewood Surgery & Endoscopy Ctr., LLC*, 192 F. Supp. 3d 1230, 1235 (D. Kan. 2016) (Vratil, J.) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Once the movant meets its initial burden, the nonmovant need only identify evidence of an issue of material fact which is "significantly probative and would enable a trier of fact to find in the nonmovant's favor." *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (quoting *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992)). In considering whether there are genuine disputes of material fact, courts must "view[] the record in the light most favorable to the nonmoving party." *Furr*, 192 F. Supp. 3d at 1246 (citing *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991)).

ARGUMENT

I. THE PERSONALIZED APPLICATION PROHIBITION RESTRICTS PLAINTIFF'S SPEECH, EXPRESSIVE CONDUCT, AND ASSOCIATION

In granting Plaintiffs' motion for a preliminary injunction and denying Defendants' motion to dismiss, the Court correctly rejected Defendants' argument that the Personalized Application Prohibition "exclusively regulates conduct, not speech." *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 886 (D. Kan. 2021). Despite discovery establishing the facts alleged in the Complaint and presented during the preliminary injunction evidentiary hearing, Defendants now advance this same argument and ask the Court to reverse its prior holding. The Court should once again reject this request. For the reasons below, and as further set forth in Plaintiff's motion for summary

judgment (ECF No. 154), the personalized applications are intertwined with VPC's overall communication, personalizing is itself Plaintiff's added speech, distributing personalized applications is expressive conduct, and Plaintiff's personalized mailers are associational activity.

A. Personalizing Advance Mail Ballot Applications and Distributing Them to VPC's Target Voters Is Protected First Amendment Activity

1. Distributing Personalized Applications Is Core Political Speech

As this Court already held, VPC's distribution of personalized advance mail ballot applications is "communication among private parties who are advocating for particular change—more voting by mail, especially in under-represented populations." *VoteAmerica*, 576 F. Supp. 3d at 888.[12] This holding respects the Supreme Court's admonition that the First Amendment embraces a wide range of speech involving the political process and courts must "be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999) (citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). Accordingly, the coverage of what counts as protected speech here is defined in broad terms, such as "the expression of a desire for political change," "communication of information," and "dissemination and propagation of views and ideas" about the electoral process. *Meyer*, 486 U.S. at 421, 422 n.5 (citing *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

The Court's prior holding is now further supported by the facts developed in discovery. It is undisputed that VPC's core mission is to promote voting among traditionally under-represented groups. *See* Plaintiff VPC's Statement of Additional Uncontroverted Facts ("SOAF") ¶ 1; *see also*

[12] Defendants' repeated yet conclusory assertion that the Court's prior decision "largely focused on [the] Out-of-State Distributor Ban" ignores the parts of the Court's opinion that specifically address the Personalized Application Prohibition and fails to appreciate that the Court's joint analysis applied to both challenged provisions. Defs.' Mot. for Summ. Judgment Br., ECF No. 151 ("Mot.") at 28.

Defendants' Statement of Uncontroverted Facts ("SOF") ¶ 1. Specifically, VPC advocates for mail voting (and the ease and trustworthiness of mail voting) to increase engagement in these populations beyond just those voters who have the ability and availability to vote in person or the resources and know-how to navigate the mail voting application process without assistance. *See* SOAF at ¶¶ 3, 5. To persuade voters to apply to vote by advance mail ballot, Plaintiff creates and disseminates preprinted advance mail ballot applications, personalized with information drawn from state records, that are distributed in a package with postage-paid return envelopes and letters that provide necessary information, instruction, and resources. *See* SOAF ¶¶ 4, 6, 7, 9, 10, 13.

Defendants argue that VPC improperly construes all of the pieces of its mailing—the personalized application, together with the cover letter, instructions, and the prepaid return envelope—as constituting one message, and attempt to isolate the personalized application and minimize First Amendment protections. But Defendants ignore that the distribution of personalized applications is "characteristically intertwined" with VPC's pro-mail-voting communication. *Schaumburg*, 444 U.S. at 632.[13] The entire point of VPC's mailer is to convey a message that voting by mail is easy and provide direct assistance and the seamless means for how voters can engage in this manner. *See* SOAF ¶¶ 4, 5, 6, 13, 14, 16, 17. All other parts of VPC's communication are designed to reinforce the core component of its message: providing a personalized application. *See* SOAF ¶¶ 7, 9, 10, 13. Defendants' explicit efforts to "disaggregate[]" the "application . . . from the cover letter" (Mot. at 25), is in direct conflict with

[13] Defendant's claim that the cover letter would be "wholly unaffected by the Pre-Filled Application Prohibition" (Mot. at 23), is belied by the record. VPC's cover letter explicitly says, for example: "I have sent you the enclosed advanced ballot by mail application already filled out with your name and address." *See* SOAF ¶ 10. The purpose of VPC's cover letter, and other instructional materials, is to inform and persuade the recipient voter that opting to vote by mail is easily done *with the attached personalized application*.

the Supreme Court's "refus[al] to separate the component parts of" a communication "from the fully protected whole." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *see also League of Women Voters of Tenn. v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (rejecting "slicing and dicing" the plaintiffs' speech).[14] This Court likewise recognized that VPC's mailer communications—including the personalized application—should be viewed in total. *VoteAmerica*, 576 F. Supp. 3d at 874-75 (distinguishing *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742 (M.D. Tenn. 2020), a case involving the distribution of blank applications, in part because VPC's "application packets include speech that communicates a pro-mail voting message").

But even in isolation, VPC's personalization of the advance mail voting applications is also protected by the First Amendment because VPC's prefilling is written speech. The personalized applications include words chosen by VPC—specific names from the voter rolls and the associated addresses—written on a page. *See* SOAF ¶¶ 6, 7, 9. It amounts to "the creation and dissemination of information," specifically the identifying information reflected in the voter file, for voters to have on their application and use to easily submit it. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (finding that even "prescriber-identifying information" sold by pharmacies is informational

[14] Defendants' citation to *Sickles v. Campbell County, Kentucky*, 501 F.3d 726 (6th Cir. 2007), has no bearing on the analysis of whether the personalized ballot application can be disaggregated from the rest of VPC's mailers for purposes of determining whether the Personalized Application Prohibition infringes First Amendment interests. The holding in *Sickles* is narrow: the government withholding money sent to inmates does not violate the senders' free speech rights even though there is some possibility that money may be used by the inmate to make phone calls. *Id.* at 734. The connection between sending personalized advance mail voting applications along with a letter encouraging the submission of that application and instructions for how to do so is not nearly so tenuous.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), is similarly off point. There, the language to which Defendants cite pertains to the Court rejecting a pre-enforcement overbreadth challenge to a statute criminalizing knowingly providing material support to terrorist organizations where the plaintiffs failed to articulate beyond the most general terms the form of their intended advocacy for the organizations. *Id.* at 25. VPC's articulation of the speech that it engages in, by contrast, is precise: distributing mailers that include personalized advance mail ballot applications.

speech); *accord Animal Legal Defense Fund v. Schmidt*, 434 F. Supp. 3d 974, 999 (D. Kan. 2020) (Vratil, J.), *aff'd sub nom. Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021).[15]

Defendants' reliance on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), to argue that there is "no conceivable 'speech'" on an application VPC personalizes because it is "simply a state-created form" is misplaced. *See* Mot. at 24. The challenged law in *Timmons* prohibited candidates from appearing on a ballot as affiliated with more than one political party. 520 U.S. at 353-54. As a result, a minor political party could not be listed next to its preferred candidate if the candidate was running on the ticket of another political party. *Id.* The minor political party argued this inhibited its ability to communicate its endorsements on the ballot. *Id.* The Court rejected this argument because the party did not have the right to compel the state to design its ballot so that the party could "send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate." *Id.* at 563. The lesson from *Timmons* is therefore much narrower: parties have no speech right to compel what appears next to candidates' names on a ballot. Plaintiff's activity here bears no resemblance to *Timmons*, and the case does not support Defendants' broad rule that using "a state-created form" can never be communicative.

Instead, *Meyer* and *Buckley* foreclose that argument. Citizen petitions are state-created forms that advocates use to express their speech. And there is no dispute that distributing citizen petitions is expressive. *Meyer*, 486 U.S. at 421; *Buckley*, 525 U.S. at 192. Thus, even though the personalized ballot applications originate as a state-created form and have an administrative effect in the electoral process, that does not "somehow deprive[] that activity of its expressive

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[15] *See also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (internal citations omitted)); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (credit report is "speech").

component, taking it outside the scope of the First Amendment." *Doe v. Reed*, 561 US. 186, 195 (2010); *see also id.* ("Petition signing remains expressive even when it has legal effect in the electoral process.").

Defendants further contend that personalizing applications cannot be speech because VPC can only write pre-determined information on the personalized communications (Mot. at 24), but this is contrary to the factual record. It is indisputable that VPC in fact *does* have discretion, and uses that discretion, regarding the information entered into the fields of the application: whose information gets inserted. *See* SOAF ¶¶ 6, 7. Selecting which voters will receive the application and personalizing with that voter's information is expression—it communicates VPC's belief that the particular voter whom VPC carefully selected and sent its mailer should apply for an advance mail ballot and participate in the democratic process. *See* SOAF ¶¶ 13, 14.

2. Distributing Personalized Advance Mail Ballot Applications Is Expressive Conduct

Distributing personalized applications is also expressive conduct. As the Court recognized, VPC's mailing of its application packets "communicates a pro-mail voting message" that "is inherently expressive conduct that the First Amendment embraces." *VoteAmerica*, 576 F. Supp. 3d at 875. "Conduct that is intended and reasonably perceived to convey *a message* falls within the free speech guarantee of the First Amendment." *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987) (emphasis added). VPC's distribution of personalized advance mail voting applications conveys a message to its specified voter recipients: participation in democracy is good, doing so through mail voting is convenient and beneficial, and the identified voter should use the enclosed and already personalized application to start the process. *See* SOAF ¶¶ 13, 14.

Defendants attempt to render VPC's expression non-communicative by arguing that personalizing the application does not offer "a separate message," as compared to conveying a

generic application, and that recipients do not "discern[] any particular message" from the personalized application. Mot. at 24-25. This misstates both law and fact. For conduct to be expressive, the speaker need not isolate a particular message apart from other types of expression because "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish–Am., Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 569 (1995) (citation omitted). And Plaintiff is not required to provide evidence that a specific voter subjectively discerned a particular message, as Defendants contend. Mot. at 25. Rather, the standard is objective and broader: "whether the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022) (citation omitted).

But even if a specific message conveyed and received were required, the uncontroverted facts here satisfy that standard. Defendants raise no genuine dispute of material fact to contest that Plaintiff personalizes the applications to express a specific pro-advance mail voting message to a specific voter recipient whose information VPC conveys on its communications. *See* SOAF ¶ 13. And Defendants raise no genuine dispute of material fact that tens of thousands of Kansans did in fact receive and act on VPC's specific message by completing and submitting an application that VPC sent. *See* SOAF ¶ 18. There can be no doubt that Kansans interpreted VPC's mailing of the personalized applications as imparting the pro-voting message observed by this Court.

Defendants' expressive conduct analysis again attempts to divide the cover letter from the application, arguing that the cover letter's speech renders VPC's distribution of personalized advance mail ballot applications non-expressive. Mot. at 25. But, unlike in *Rumsfeld v. Forum*

for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006), to which Defendants principally rely for this proposition, this is not a case where an observer of VPC's conduct, *i.e.*, a recipient of a personalized ballot application, would be unable to discern VPC's message without speech explaining it. It defies common sense that a civic organization who was indifferent to whether an individual should submit a vote by mail application would expend the additional resources to send that individual a personalized application to do so. Moreover, the expressive conduct analysis here *requires* looking to the context in which the personalized application is sent. *Spence v. Wash.*, 418 U.S. 405, 409-10 (1974) (courts must examine "the nature of [the speakers'] activity, combined with the factual context and environment in which it was undertaken"); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (expressive conduct is examined "in context"). Viewing the personalized application in its context—the ongoing election cycle during which the personalized application arrives, as well as the rest of VPC's mailer—only supports that VPC is distributing the personalized application to further express its pro-advance mail voting message.

3. Distributing Personalized Advance Mail Ballot Applications Is Protected Associational Activity

VPC's personalized application communications are protected associational activity. As set forth in Plaintiff's motion for summary judgment, VPC uses its personalized applications as outreach to build greater association with a specific group of selected voters and engages them in the political process with future communications. *See* SOAF ¶¶ 1, 15, 19. The Court previously recognized the implications of the Personalized Application Prohibition on Plaintiff's associational activity, and the facts confirm this holding. *VoteAmerica*, 576 F. Supp. 3d at 875.

Defendants' categorical argument that the Personalized Application Prohibition has "no impact" on Plaintiff's association relies on their assertion that VPC's mailer communication "is a unilateral act that can be ignored by the would-be associate." *See* Mot. at 1, 45. But the First

Amendment's protections of associational interests cannot be predicated on whether the association currently exists or is at its beginning. In *NAACP v. Button*, the plaintiff's efforts to solicit then-unassociated individuals to participate in litigation was protected as the means to *begin* an association. 371 U.S. 415, 429-32, 437 (1963). Analogous facts were at issue in *Healy v. James*, where the Court protected a disfavored student group's associational activity seeking the "use of campus bulletin boards and the school newspaper" that were necessary to reach "new students" and create further associations to "remain a viable entity in a campus community." 408 U.S. 169, 181 (1972). VPC's associational activity here is no different. Defendants' cramped reading of associational rights to only protect *existing* associations is at odds with these cases.

Defendants' conclusions about Plaintiff's associational activity are also belied by the evidence. The undisputed record shows that VPC identifies a specific group of voters to target for its associations and does in fact continue its association with those voters by, for example, tracking who responds to its personalized advance mail voting applications and following up by sending further get-out-the-vote communications. *See* SOAF ¶¶ 12, 18, 19. These circumstances are a far cry from *City of Dallas v. Stanglin*, where the Court denied associational protections because the plaintiffs were merely "patrons of the same business establishment" that admitted "anyone willing to pay the admission fee," they expressed no shared views or joint activity, and they engaged in no articulated associational outreach. 490 U.S. 19, 24-25 (1989).

B. Defendants Fail to Distinguish the Precedent on which the Court Relied in Granting Plaintiff's Motion for a Preliminary Injunction

Binding and persuasive precedent recognizing First Amendment protections in the same or analogous contexts confirms that VPC's distribution of personalized advance mail ballot applications constitutes protected First Amendment activity. Numerous courts have recognized that substantially similar activity advocating for and assisting voters with mail voting or voter

registration through distributing communications constitutes protected speech, expressive conduct, and association. *See, e.g.*, *League of Women Voters of Tenn.*, 400 F. Supp. 3d at 720; *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) ("*Nessel I*"); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1202, 1215-16 (D.N.M. 2010). Similarly, multiple binding decisions have recognized broad First Amendment protections for civic organizations' speech in the analogous step in the democratic process of distributing and persuading citizens to sign petitions. *See Meyer*, 486 U.S. at 422-23; *Buckley*, 525 U.S. at 186, 192; *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002); *Yes On Term Limits v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). The same broad protections apply to VPC and similar groups distributing and persuading Kansas citizens to vote by mail.

Defendants fail to accurately portray the governing caselaw. Defendants' assertion that "the overwhelming majority of courts to examine the issue have concluded that the distribution of advance voting ballot applications is *not* protected speech," Mot. at 27, is flatly wrong. Two of the three cases Defendants cite for this "overwhelming majority" relate to the *collection* of absentee ballot applications and voter registration applications, not distribution, and are therefore inapposite.[16] Later, Defendants once again argue that the "overwhelming case law," including two

[16] Moreover, in *League of Women Voters v. Browning*, the court assumed that even the collection and handling of voter registration applications was expressive for purposes of its analysis. 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008). Defendants' reliance on *Priorities USA v. Nessel*, 487 F. Supp. 3d 599 (E.D. Mich 2020) ("*Nessel II*") (Mot. at 30-31), is misplaced for similar reasons. In a subsequent decision, although the district court held that *collection and delivery* of absentee ballot applications was not expressive, it specifically found that "Plaintiffs may *provide* potential absentee voters with blank applications" and "[i]n turn, such conduct could be a 'vehicle' to discuss the 'importance of voting, as well as the merits of candidates and ballot measures.'" *Priorities USA v. Nessel*, 2:19-cv-13341, 2022 WL 4272299, at *5 (E.D. Mich. Sept. 15, 2022) ("*Nessel III*") (emphasis added).

circuits, have held that "sending or collecting forms is *not* expressive conduct." Mot. at 29. Not so. Once again, all the cases Defendants cite related solely to *collection activity*, not the distinct distribution and persuasion activities. In fact, *Voting for America v. Steen*, "accepted" that "'distributing' voter registration forms" and 'helping' voters to fill out their forms" are expressive. 732 F.3d 382, 389-90 (5th Cir. 2013); *see id.* (finding that collection of completed voter registration forms is not speech but that "[s]oliciting, urging, and persuading [a] citizen to vote are the canvasser's speech"); *see also Democracy N.C. v. N.C. Board of Elections*, 476 F. Supp. 3d at 224 (finding that collecting and delivering ballot applications is not expressive but assistance with applications is); Pls.' Preliminary Injunction Reply Br. at 8-11 (ECF No. 33) (describing expressive differences between distribution and collection of voting-related forms).

Defendants ignore all the contrary precedent in tallying the weight of the case law. *See, e.g.*, Pl.'s Mot. for Summ. Judgment Br., ECF No. 154 at 24.[17] Thus, the "overwhelming majority" Defendants cite hinges on *VoteAmerica v. Raffensperger*, a wrongly decided preliminary injunction decision that is directly contrary to this Court's prior ruling. No. 1:21-cv-01390-JPB, 2022 WL 2357395, at *7-10 (N.D. Ga. June 30, 2022). The result in *Raffensperger* hinged on the district court's preliminary conclusion that nothing in VPC's distribution of vote-by-mail applications is protected speech. *Id.* This Court has already rejected that premise.[18]

[17] Indeed, Defendants do little to say why the superficial distinctions it draws from the binding precedent in the petition circulator context are actually consequential, and they provide only minimal discussion of the key cases under *Meyer-Buckley*. *See, e.g.*, Mot. at 34.

[18] While Defendants model their arguments for summary judgment on the reasoning in *Raffensberger* that this Court has already rejected, the internal contradictions in the *Raffensperger* decision also limit its persuasiveness. For example, the court ruled that the vote-by-mail application was not a vehicle for expression while later contradictorily ruling that a required disclaimer on the application *did* amount to compelled speech. *Id.* at *12.

Defendants' other attempts to distinguish relevant caselaw are unavailing. For example, Defendants argue that the holding in *Democracy North Carolina*—assisting voters by filling out part or all of a voter's a request for an absentee ballot is expressive conduct (476 F. Supp. 3d at 175, 224)—is inapplicable here because the Personalized Application Prohibition does not prohibit third parties from assisting voters in completing an advance mail ballot application. Mot. at 29-30. But Defendants then concede, as they must, that the Prohibition in fact *does* bar third parties from assisting voters by personalizing the distributed application. *Id*. The holding in *Democracy North Carolina* squarely applies. Defendants likewise provide no convincing basis for distinguishing the free speech ruling in *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). Even if Defendants' argument that "voter registration forms are fundamentally distinct from absentee ballot applications" was correct, those distinctions go to state rationales for restrictions, not the expressive nature of the communications.

C. Defendants' Argument That the Personalized Application Prohibition Does Not Restrict First Amendment Activity Because Other Methods of Communication Remain Available to VPC Is Contrary to Settled Law

Ultimately, Defendants' argument that the Personalized Application Prohibition restricts non-expressive conduct—not First Amendment activity—boils down to Defendants' repeated insistence that VPC has other available methods to communicate its message. However, that VPC remains "free to employ other means to disseminate their ideas" does not take their speech through distributing personalized applications "outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.").

Defendants argue, relying again on *Voting for America v. Steen*, that what VPC actually seeks in distributing personalized advance mail ballot applications is not just to speak, but also to

succeed in its goal of getting voters to vote by mail. *See* Mot. at 26. As noted above, *Steen* does not concern the type of activity at issue here. 732 F.3d at 389-90. But more to the point is that, far from advocating for the success of their programs, VPC seeks to vindicate its "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424; *see also* SOAF ¶¶ 15, 19, 20. Defendants ignore this clear holding in *Meyer*.

Defendants misapprehend how the factual and legal circumstances of *Meyer* bear on this case. The *Meyer* plaintiffs were proponents of a ballot initiative petition concerning "whether the trucking industry should be deregulated in Colorado" who wished to gather the required signatures through paid circulators, which Colorado law banned. 486 U.S. at 421. The Supreme Court held this ban unconstitutional because restricting how plaintiffs could communicate their message—paying circulators—stripped plaintiffs of their most effective method for getting their message out and reduced the overall quantum of speech on the issue. *Id.* at 422-24. The question before the Supreme Court in *Meyer* was not whether paying circulators was itself speech, but whether by denying plaintiffs their most effective method of speaking, the ban violated the First Amendment. *Id.* Here, the challenged restriction is even more immediately related to preventing VPC from conveying its desired message, compared to *Meyer*. The Personalized Application Prohibition directly dictates the content of VPC's communications and eliminates VPC's core means of expressing its message through its activity: that voting by mail is convenient and beneficial, and to drive home that advocacy, here is the personalized application to so.

VPC's distribution of personalized applications is protected under the First Amendment. Not only is Plaintiff's pro-advance mail voting communication as a whole plainly speech, but the applications themselves, prepared and personalized by Plaintiff, are also speech, and the

distribution of those applications inherently conveys Plaintiff's message and furthers its associations. Plaintiff's communications concerning the fundamental political act of voting warrant at least as much protection as discussions about "whether the trucking industry should be deregulated in Colorado." *Meyer*, 486 U.S. at 421. Defendants' attempt to refute this with unsupported conclusory statements—and no genuine dispute of material fact—should be rejected.

II. THE PERSONALIZED APPLICATION PROHIBITION IS SUBJECT TO STRICT SCRUTINY

Defendants argue that the proper standard is rational basis review because the First Amendment is not implicated and that, even if the First Amendment were implicated, the Personalized Application Prohibition is viewpoint- and content-neutral and therefore not subject to heightened scrutiny. But discovery has confirmed what this Court previously found: the Personalized Application Prohibition "significantly inhibits communicati[on] with voters about proposed political change and eliminates voting advocacy by plaintiffs." *VoteAmerica*, 576 F. Supp. 3d at 888 (internal quotations omitted). As such, the Prohibition infringes on Plaintiff's protected First Amendment rights and is subject to strict scrutiny.

A. Strict Scrutiny Applies

There are four independent reasons why the Court should apply strict scrutiny: the Personalized Application Prohibition (1) abridges VPC's core political speech; (2) is content- and viewpoint-based; (3) limits VPC's associational activity; and (4) is unconstitutionally overbroad. Any one of Plaintiff's four grounds is sufficient to trigger strict scrutiny and this Court should reject Defendants' argument that a lower level of scrutiny applies.

1. The Prohibition Abridges Plaintiff's Core Political Speech

VPC's mailing of personalized advance mail ballot applications is core political speech. *See supra* Part I.A.1. VPC sends personalized advance mail ballot applications to encourage

specific individuals to vote by mail and participate in the democratic process. SOAF ¶¶ 6, 7. VPC's communications advocate for political change, both in the narrow sense that VPC engages with voters on the merits of the political question of whether voting by mail is a safe and effective (SOAF ¶¶ 13, 14), and in the broader sense, as VPC's advocacy for increased participation among under-represented groups is ultimately advocacy for an elected government that serves those people and their interests. *See* SOAF ¶ 2. VPC's speech "advoca[ting for] a politically controversial viewpoint" in favor of voters trusting and using advance mail voting is "the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). But the Personalized Application Prohibition "involves direct regulation of [this] communication among private parties who are advocating for particular change—more voting by mail, especially in under-represented populations." *VoteAmerica*, 576 F. Supp. 3d at 888. By banning this "interactive communication concerning political change" the Prohibition abridges Plaintiff's core political speech, and the First Amendment protection warranted is "at its zenith." *See Chandler*, 292 F.3d at 1241 (internal citations omitted).

The Personalized Application Prohibition directly blocks VPC's most effective means of advocacy because it bans VPC from personalizing its applications. SOAF ¶¶ 16, 24. While Defendants quibble with the actual effectiveness of this method of speech, *see* Mot. at 34,[19] they do not contest that "[t]he First Amendment protects [VPC's] right, 'not only to advocate their cause but also to select what they *believe* to be the most effective means for so doing.'" *Chandler*, 292 F.3d at 1244 (quoting *Meyer*, 486 U.S. at 424) (emphasis added). Thus, VPC's belief that

[19] Defendants erroneously claim that VPC has produced no evidence in support of its position that prefilling is effective. *See* Mot. at 25. Not so. Mr. Lopach testified that VPC conducted a study into the effect of personalizing information on vote-by-mail applications. SOAF at ¶ 21, 22, 23. The study's results were clear: "a pre-populated form produced a higher response rate than a blank form," increasing the response rate by over 11%. *Id.*

personalizing applications most effectively advocates its pro-advance mail ballot message is what is relevant, and on that point VPC has been consistent and clear. SOAF ¶¶ 20, 30.

Defendants assert that "this case no longer involves activity protected by the First Amendment," because VPC is able to send advance ballot applications. *See* Mot. at 22. But Defendants recitation of other means Plaintiff may employ to disseminate their ideas "does not take their speech . . . outside the bounds of First Amendment protection." *See Meyer*, 486 U.S. at 424. The Personalized Application Prohibition would "limit[] the quantum of [] speech" concerning advance mail voting by eliminating one form of VPC's expression of its message. *Yes On Term Limits*, 550 F.3d at 1028.

2. The Prohibition Is Content- and Viewpoint-Discriminatory

The Personalized Application Prohibition "eliminates voting advocacy by plaintiffs . . . based on the content of their message . . . ." *VoteAmerica*, 576. F. Supp. 3d at 888. The Prohibition quite literally defines the speech it regulates based on the category of document covered (SOAF ¶ 24), and bans the content VPC uses to convey its message: certain voters' names and addresses. SOF ¶ 4. The Prohibition does not, however, apply to other types of communication.[20]

Defendants attempt to analogize the Personalized Application Prohibition to the regulation at it issue in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, but the comparison is inapposite. In *City of Austin*, the Court reiterates its precedent that "[a] regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—

[20] Defendants attempt to rely on *Burson v. Freeman*, 504 U.S. 191 (1992), to assert that the Prohibition is not content-based discrimination even though it applies to certain speech based on its content. *See* Mot. at 37. However, the Court found the restriction at issue in *Burson* to be content-based and consequently applied strict scrutiny. 504 U.S. at 198. There, the Court—noting that it was a rare case that survived strict scrutiny—ultimately found the law in question to be narrowly tailored to a serve a compelling state interest of ensuring voters can cast their ballots free from intimidation and fraud. *Id.* at 210. This is not a similarly rare case. *See infra* Part III.

that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). The Court differentiated the relevant city code at issue in *City of Austin* from that in *Reed* because the former the "d[id] not single out any topic or subject matter for different treatment . . . [r]ather the City's provisions distinguish based on location . . . ." *Id.* at 1472-73.

Unlike the regulation in *City of Austin*, however, the Personalized Application Prohibition is not location-based or "agnostic as to content." *Id.* at 1471. To the contrary, the Personalized Application Prohibition singles out personalized information on advance mail ballot application and forbids such content. SOF ¶ 4. Defendants fail to meaningfully engage with the *City of Austin*'s analysis and instead resort to their refrain that personalizing advance ballot applications does not express a message. Once again, this argument fails.

Additionally, Defendants present no argument apart from their *ipse dixit* assertion that the Personalized Application Prohibition is viewpoint-neutral. To the contrary, however, it "inherently present[s] 'the potential for becoming a means of suppressing a particular point of view,'" because mailing a personalized application is only consistent with a pro-vote-by-mail message. *See City of Austin*, 142 S. Ct. at 1473 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). The process for personalizing applications adds additional steps and cost to the application mailing process (*see* SOAF ¶ 8), that only communications advocating for advance mal voting would undertake. Discriminatory content- and viewpoint-based speech restrictions, such as the Personalized Application Prohibition, are subject to strict scrutiny and are "presumptively unconstitutional." *Reed*, 576 U.S. at 163; *see also Buckley*, 525 U.S. at 186-87.

3. The Prohibition Infringes on Plaintiff's Associational Rights

As this Court previously acknowledged, if the Personalized Application Prohibition limits VPC's ability to associate for the purposes of assisting voters request an application for an advance ballot, then it violates their First Amendment rights to engage in free association. *See VoteAmerica*, 576 F. Supp. 3d at 876. Contrary to Defendants' assertions, Mr. Lopach testified to exactly that: the Personalized Application Prohibition "limits the success of [VPC's] engagement with voters." *See* SOAF ¶ 31. The Prohibition need not be an outright ban on VPC's associational activities for it to be actionable. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). VPC's freedom of association encompasses their right to choose *how* to associate with others, and courts "give deference to an association's view of what would impair its expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

The undisputed evidence establishes that the Personalized Application Prohibition limits VPC's ability to associate with underrepresented voters and encourage them to vote by mail. VPC personalizes its communications because it has carefully identified the *specific voters* with whom it wants to band together to increase electoral participation, tout the security and convenience advantages of mail voting, and provide inroads for future engagement on electoral issues. *See* SOAF ¶¶ 13, 20. This is akin to the protected activity in *NAACP v. Button*, where the Supreme Court held that the NAACP's First Amendment rights were violated by a law that prevented the organization from associating to persuade others to action and using those associations to build relationships and bring litigation, their chosen "means for achieving" its desired change. 371 U.S. at 429. Defendants have not presented any evidence to the contrary. There, as here, a restriction on plaintiff's ability "to engage in association for the advancement of beliefs and ideas" to "persuade [their audience] to action" warrants strict scrutiny. *See id.*, 371 U.S. at 430, 437-38; *Kusper*, 414 U.S. at 59 (citations omitted). Defendants do not argue otherwise.

4. The Prohibition is Unconstitutionally Overbroad

The Personalized Application Prohibition is unconstitutionally overbroad because it "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) (internal quotation omitted). Defendants counter this claim by, once again, asserting that personalizing an advance mail ballot application is not protected speech and that Plaintiff nevertheless has other means of communicating its message. *See* Mot. at 48. But Defendants' argument reflects a fundamental misunderstanding of the "comparison between the legitimate and illegitimate applications of the law" necessary to consider an overbreadth claim. *Harmon v. City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020) (citation omitted). Specifically, Defendants do not describe the legitimate sweep of the Prohibition, perhaps because the ban "lacks any plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010), and its enforcement "may chill the free speech rights of parties not before the court, especially when the statute imposes criminal sanctions." *VoteAmerica*, 576 F. Supp. 3d at 877. Rather, they note their purported state interests, but make no attempt to connect these interests to the application of the law. *See* Mot. at 48. Defendants' list of expressive conduct and speech that the Personalized Application Prohibition does *not* address, is entirely beyond the applications of the law—it reflects neither legitimate nor illegitimate applications. *See* Mot. at 48, 49.

Even if Defendants' stated interests were "legitimate," the Personalized Application Prohibition's legitimate sweep would be exceedingly narrow. Defendants dance around two potentially legitimate applications of the Prohibition: preventing inaccurately personalized applications and avoiding voter fraud. To the extent Defendants' purported interests are tied to personalization at all (as compared to a third party's mailing of duplicative applications to voters), they are limited to *inaccurately* pre-filled advance mail ballot applications. *See* SOF ¶¶ 52–54,

56–57, 61–64, 66 (noting inaccuracies or mismatches between the application and the Kansas voter rolls).[21] Yet the Prohibition proscribes all personalization, regardless of accuracy. *See* SOAF ¶¶ 24, 25.

As applied to Plaintiff, it is clear that the Personalized Application Prohibition reaches far more speech than necessary. Of the hundreds of thousands of personalized applications VPC mailed Kansas voters, the undisputed evidence shows that—at most—VPC experienced single-digit error rates with its mailers. *See* SOAF ¶ 32, 33. Given the lack of any evidenced errors with over 90% of VPC's personalization, the Personalized Application Prohibition plainly prohibits a significant amount of speech that does not implicate any of Defendants' stated interests.

On its face, the Personalized Application Prohibition punishes *all* personalization prior to mailing—not just inaccurate or fraudulent personalization. Moreover, the Prohibition carries criminal penalties that "may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).[22] The illegitimate applications of the Prohibition far outweigh any potentially legitimate ones that might further interests referenced by Defendants, both as applied to VPC and to other third parties facing the Prohibition's criminal penalties. As such, the Personalized Application Prohibition is unconstitutionally overbroad and inappropriate for summary judgment in favor of Defendants.

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[21] Defendants' argument for summary judgment on Count III is completely devoid of citations to the record in this case.

[22] Defendants rely on *Broadrick v. Oklahoma* to assert that what they characterize as VPC's "conduct" of sending personalized applications is held to some higher standard than other protected First Amendment speech. Mot. at 46-47. Firstly, the Prohibition implicates quintessential First Amendment communication, not non-expressive conduct. *See supra* Part I.A. And, as *Broadrick* itself makes clear, the overbreadth of a statute is "judged in relation to [its] plainly legitimate sweep," which here is unarticulated by Defendants and, to the extent it exists at all, is dwarfed by the statutes overbroad applications if allowed to take effect. 413 U.S. at 615.

Strict scrutiny applies for each of these reasons. As explained in VPC's moving brief (ECF 145), the Personalized Application Prohibition would not survive strict scrutiny. Thus, this Court should deny Defendants' motion for summary judgment.

B. *Anderson-Burdick* Does Not Apply

Defendants assert that even if the Prohibition does implicate First Amendment rights, the proper standard of review is the *Anderson-Burdick* test. But Defendants have not established as a matter of law that this test should apply, or that they would succeed under its standard.

As this Court previously noted, the Tenth Circuit applies this test when deciding the constitutionality of *content-neutral* regulation of the mechanics of the voting process. *See VoteAmerica*, 576 F. Supp. 3d at 887. That is not the scenario here, however, where the Personalized Application Prohibition is facially content- and viewpoint-based. *See supra* Part II.A.2. But even if it were content-neutral, the Prohibition is not a mere regulation of the voting process or the "mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. The Personalized Application Prohibition does not apply to voters at all vis-à-vis their own applications. Instead, it is aimed specifically at third parties who are engaged in voting-related advocacy: those "who solicit[] by mail a registered voter to file an application for an advance voting ballot." *See* SOAF ¶ 24. This case, brought by an entity that cannot vote, is a far cry from the type of ballot access limitation cases in which courts developed the *Anderson-Burdick* framework. *See Burdick v. Takushi*, 504 U.S. 428, 432-35 (1992) (discussing the burden on ballot access imposed by state's requirement that one of three mechanisms be used to appear on a primary ballot); *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983) (discussing the burden on ballot access imposed by state's early filing deadline). The limitation at issue here goes beyond time, place, and manner restrictions on election administration and their effect on ballot access. *VoteAmerica*, 576 F. Supp. 3d at 888. It is a limitation on political expression and consequently warrants strict scrutiny.

But even if this Court were to apply *Anderson-Burdick*'s balancing and sliding scale approach, strict scrutiny would still apply because the Personalized Application Prohibition "impacts speech in a way that is not minimal." *Id.* at 888. The Personalized Application Prohibition is an outright ban on a key component of VPC's communications that the specified recipient should request an advance mail ballot application. *See* SOAF ¶¶ 6, 13, 14. Notwithstanding Defendants' bald assertion that "the burden on Plaintiffs' advocacy work is minimal," the Prohibition's burden on VPC's core speech is *per se* severe. Mot. at 40; *see Buckley*, 525 U.S. at 207 (Thomas, J., concurring); *see also Yes On Term Limits, Inc.*, 550 F.3d at 1028-29. Under *Anderson-Burdick*, this injury must be weighed against the relative interests of the state. Here, little to no undisputed facts support Defendants' purported interests, and they are far outweighed by VPC's constitutional injuries.[23] Thus, Defendants' have not established *Anderson-Burdick* balancing would lead this court to apply a less searching examination "closer to rational basis." *See* Mot. at 40. And even were a lesser level of scrutiny applied by way of the *Anderson-Burdick* framework, Defendants would not be entitled to summary judgment as they have failed to demonstrate Kansas's interest in the Personalized Application Prohibition. *See infra* Part III.

C. Rational Basis Review Does Not Apply

VPC's personalization of advance mail ballot applications is plainly speech—words on a page that convey to a particular person that she has the right to vote by mail and she should exercise that right. *See supra* Part I.A; *see also* SOAF ¶¶ 6, 7, 13. As this Court has already held, contrary to Defendants' arguments, rational basis review does not apply. *See* Mot. at 22, 28; *VoteAmerica*,

[23] What scant evidence Defendants do offer in support of their purported interest—largely offered without citation to the record—appears to concern the increased amount of advance mail voting during the 2020 election and the number of duplicative applications received by elections offices. *See* Mot. at 40-41, n.5. Once the Court strips away that which is immaterial, devoid of support in the record, or legally unsound, there is nothing left of Defendants' argument.

576 F. Supp. 3d at 889 ("Plaintiffs have shown a sufficiently heavy burden on First Amendment rights to justify a significantly more demanding standard of review than the 'rational basis' standard . . . .").

In sum, Defendants have failed to establish as a matter of law that heightened scrutiny does not apply to Plaintiff's First Amendment claims and Defendants cannot support their *Anderson-Burdick* argument with material, undisputed facts. Thus, they are not entitled to summary judgment.

III. DEFENDANTS CANNOT SHOW THAT THE PROHIBITION SERVES ANY STATE INTEREST

Defendants cannot show that the Prohibition serves any state interest at all, falling far short of satisfying the standard for strict scrutiny or *any* heightened scrutiny.

Defendants claim that the Prohibition minimizes harm—including, *inter alia*, voter confusion, diminished efficiency of election administration, and potential voter fraud—allegedly caused by inaccurately personalized information on advance mail ballot applications. *See* Mot. at 32. But the record demonstrates that any harm that Defendants cite is *not* connected to inaccurately personalized information, but rather to voters and elections officials' receipt of multiple advance mail ballot applications, regardless of whether an application was personalized or not. *See* Mot. at 41-44; *see also supra* Pl.'s Resps. to Defs.' SOF at ¶¶ 49-83.

Implicitly recognizing that these are distinct issues, Defendants slyly attempt to conflate these issues by repeatedly deploying the phrase "inaccurate and duplicate applications." *See* Mot. at 13, 33, 41 n.5, 42, 43. The reason Defendants try to muddy the water is there is little undisputed evidence that inaccurately personalized applications negatively impacted Defendants' stated interests. In fact, Mr. Howell, Defendants' main witness, admitted that personalization was not a problem. *See* SOAF ¶ 39 (Q. "Is it your opinion that -- that voters became even more confused

and frustrated when the applications contained prefilled information?" A. "I don't think that the prefilled information, in and of itself, was what all of the concern was.").

Critically, Defendants marshal evidence that relies on the same conflating language, "inaccurate and duplicate applications," on several fronts. First, Defendants claim—without citation to the record—that certain Kansas elections officials referenced "hundreds" of calls and visits "from voters expressing confusion, frustration, and anger about the inaccurate and duplicate pre-filled advance mail ballot applications they were receiving" (Mot. at 41 n.5), and that because county election officials were busy processing "inaccurate and duplicate applications," there was "chaos." *Id.* at 42. [24] Even with respect to these hearsay statements from voters,[25] Defendants provide no specific citations to calls from voters complaining about the *inaccurate personalization* of their applications.

Second, Defendants argue that they have an interest in preventing voter fraud, even if no such fraud has occurred in Kansas. Defendants claim—again without citation to the record—that the surge of "inaccurate and duplicate applications" decreased the efficiency of county election officials, which in turn increased the opportunity for "mistakes to be made." Mot. at 50. But

[24] Moreover, Defendants rely primarily on 2 out of 105 county election officials—Mr. Howell and Ms. Cox—but their experiences do not necessarily represent that there was "chaos" across the state. *See, e.g.*, SOAF ¶ 42.

[25] Defendants argue these unspecified references are not inadmissible hearsay under Federal Rule of Evidence 803(3). Without specific records cites, Plaintiff cannot meaningfully assess whether any of these "references" are in fact hearsay. Even assuming *arguendo* that such "references" are admissible, only the portion of the statement that speaks to the declarant's state of mind would be admissible (*e.g.*, that a voter was confused), but the portion of the statement that speaks to *why* that voter was in such state of mind (*e.g.*, that the voter received a duplicate application) would be inadmissible as a statement of memory or belief. *See McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1143 (10th Cir. 2006); *United States v. Joe*, 8 F.3d 1488, 1492-93 (10th Cir. 1993). Without admissible evidence of why voters were supposedly upset, any hearsay admissible under Rule 803(3) would have marginal, if any, relevance to this action, and certainly would not be material.

Defendants make no attempt to tie the fact that applications are personalized to any risk of voter fraud. Following Defendants' logic, any activity that takes up an election official's time and attention can be criminalized on the basis of potential fraud. This argument is illogical and should be rejected.[26]

The only specific evidence that Defendants *do* cite concerning the alleged inaccuracy of personalized applications is Mr. Block's identification of "hundreds" of purported errors identified by their expert witness in a list of over 300,000 voters. *See* SOF ¶¶ 44-47. But even assuming that all issues raised by Mr. Block are genuine—and they are not—they relate to under 3% of all records on VPC's mailing list. *See* Pl.'s Mot. to Exclude; SOAF ¶ 34. Defendants also cite to data reflecting that VPC included erroneous middle initials or suffixes for 3% and 5% of its mailers, nationally. *See* SOF ¶¶ 38-39; *see also* SOAF ¶ 32. But Defendants do not present any evidence as to error rates in Kansas. In fact, Mr. Block admitted he did not know, and made no attempt to calculate, the error rate in VPC's mailing list. SOAF ¶¶ 35, 36. In any event, Defendants' own witnesses acknowledged that such errors are immaterial. For example, Mr. Block made no attempt to connect the purported errors he identified in the VPC's mailing list to any errors in applications actually received by election officials. *See* SOAF ¶ 37. Thus, he could not offer any opinion as to whether VPC mailers created more or less work for election officials. *See* SOAF ¶ 38. Additionally, Shawnee County Election Commissioner Andrew Howell admitted that if a voter crossed out a prefilled suffix, and the remaining information on the application was correct, it

[26] Indeed, Defendants' own witnesses testified that there was no evidence of fraud in the 2020 election cycle and that their offices ran the 2020 elections successfully. *See* SOAF ¶¶ 45, 46. Thus, uncontroverted evidence in the record militates *against* Defendants' arguments concerning potential voter fraud.

would be accepted. *See* SOAF ¶ 40; *accord* ¶ 41. Defendants therefore present sparing evidence that does not entitle them to summary judgment.[27]

Thus, the record reveals that Defendants' conflating language—"inaccurate and duplicate applications"—is a subterfuge; that is, the issues that Defendants and their witnesses complain of in fact concern duplicate applications and not inaccurate applications at all. But VPC's sending of duplicate applications is entirely irrelevant to this action. Even assuming *arguendo* that the State has a legitimate interest in reducing the number of duplicate applications sent and received, the Personalized Application Prohibition in no way limits the number of advance mail ballot applications a third party could send a voter. *See* SOF ¶ 4. Moreover, evidence in the record indicates that any increase in duplicate applications was caused by a number of factors in 2020, including the dramatic general increase in vote-by-mail amidst the COVID-19 pandemic. *See, e.g.*, SOAF ¶¶ 43, 44. Accordingly, whatever burden duplicate applications may cause the State, it is irrelevant—it has no tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. *See* FED. R. EVID. 401.

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[27] Defendants' legal arguments in support of summary judgment fare no better. Defendants cite to two inapposite cases to show that their purported state interests justify the Personalized Application Prohibition. Mot. at 44. In *Raffensperger*, the court denied the plaintiffs' motion for a preliminary injunction of certain ballot restrictions, stating that "[t]he record show[ed] that the government designed the Prefilling Provision to address the concerns and confusion that arise when voters receive prefilled applications with incorrect identification information." *VoteAmerica v. Raffensperger*, 2022 WL 2357395, at *14, *20 (N.D. Ga. June 30, 2022). Here, after months of discovery, and with the burden on Defendants to show they are entitled to summary judgment, no record of why the government designed the Personalized Application Prohibition exists. *Lichtenstein*, 489 F. Supp. 3d 742 (M.D. Tenn. 2020), is similarly off point. This Court has already distinguished *Lichtenstein* from the case at hand. *See VoteAmerica*, 576 F. Supp. 3d at 874-75 ("Plaintiffs correctly respond that *Lichtenstein* is not germane because their application packets include speech that communicates a pro-mail voting message."). In any event, only one of the four interests listed in *Lichtenstein* is even remotely similar to the interests asserted by Defendants—decreasing the risk of voter confusion arising from incorrect addressing information. And here, the law only addresses personalizing the *application itself* without addressing inaccurate information on the outer envelope.

Defendants also speculate that voters submitted multiple applications because they thought the prefilled applications had come from the county election office. Mot. at 41-42 (citing SOF ¶¶ 73-74, 79-80). But, like concerns about duplicate applications, a voter's confusion or frustration about whether VPC's mailers came from a third party or their county election official is irrelevant in this action. *See* Mot. at 42. The Personalized Application Prohibition does not contain any provisions that would affect how a third party identifies itself on its mailers.[28] The Personalized Application Prohibition is not "related" to state interests impacted by duplicate applications or confusion about the identity of the sender, because the Prohibition does nothing to prevent these issues.[29]

CONCLUSION

For the foregoing reasons, Defendants have failed to establish that they are entitled to summary judgment for any of Plaintiff's three claims.

[28] In fact, VPC already clearly identifies itself in mailers to Kansas voters in multiple ways. *See* SOF ¶ 9.

[29] Defendants' arguments to the contrary rely on conclusory statements (*see, e.g.*, Mot. at 33 ("The Pre-Filled Application Prohibition is clearly related to each of the aforementioned legitimate state interests.")), and generalities about the 2020 election cycle, which was an extraordinary election cycle in many aspects unrelated to personalized applications. *See, e.g., id.* (discussing the "confusion, frustration, anger and chaos in the 2020 General Election"). These assertions do not suffice to demonstrate that the Prohibition furthers any legitimate state interest.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 4th day of November 2022, I electronically filed the foregoing document 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.

/s/ Mark P. Johnson
Mark P. Johnson