IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and
VOTER PARTICIPATION CENTER,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS' REPLY TO PLAINTIFF VOTER PARTICIPATION CENTER'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS I-III

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Defendants submit this Reply to Plaintiff Voter Participation Center's ("VPC") Opposition to Defendants' Motion for Summary Judgment Regarding Counts I-III (Dkt. 155). In support of this Reply brief, Defendants respectfully state as follows:

I. – INTRODUCTION

The thrust of VPC's Opposition to Defendants' summary judgment motion is that the Court should adhere to its ruling at the preliminary injunction phase of the case that VPC's pre-filling of third-parties' advance voting ballot applications amounts to expressive conduct – core political speech no less – and thus enjoys the highest level of protection under the First Amendment. Discovery, however, has exposed substantial facts amply justifying the Pre-Filled Application Prohibition. Additionally, Defendants believe that the Court applied an improper legal standard in its preliminary injunction order regarding VPC's constitutional attack on the statute, and we

urge the Court to revisit that ruling at summary judgment. While VPC continues to rely on a series of cases involving in-person voter registration activities, which are fundamentally distinct from the absentee/advance voting ballot applications at issue here, the case law addressing whether a third-party has a First Amendment right to pre-fill those applications and send them to individuals who did not request them or otherwise seek assistance tilts almost entirely in the direction of Defendants' legal position. Exclusively non-expressive conduct is involved in the activity now before the Court. And to the extent there is any speech at all, it is the speech of the voter, not VPC.

Even if the Court holds that pre-filling a third-party's advance voting ballot application is expressive conduct that implicates the First Amendment, the evidence marshalled in discovery underscores the problems that those pre-filled applications caused, not only in Kansas during the 2020 General Election, but also in other states across the country. VPC simply glosses over this evidence in its opposition brief. The omission is even more ironic given that VPC itself was concerned enough about the level of inaccuracies in the information it was using to pre-populate those applications that it stopped pre-filling them in its Kansas mailings and opted to send voters *blank* applications.

Moreover, no court – save this one at the preliminary injunction hearing – has found that the pre-filling of such applications constitutes *core political speech* triggering heightened scrutiny and narrow tailoring. VPC's frequently repeated assertion that pre-filled applications make its get-out-the-vote efforts more effective – a point for which they have produced no admissible evidence – does not change the requisite standard of review. While VPC seeks to bring its pre-filling of applications under the rubric of the First Amendment by characterizing such activity as "intertwined" with the other materials in its mailers to voters, the two activities are distinct and easily disaggregated. None of the messaging sought to be conveyed by VPC is lost in the process.

Impeding the State's ability to regulate in this area of election administration is foreclosed by governing precedent and will unreasonably hamstring legislators and election officials from fulfilling an essential role in ensuring the integrity and public confidence in our elections. For all these reasons, Defendants urge the Court to grant summary judgment to Defendants on Counts I-III.

II. – REPLY TO VPC'S RESPONSE TO STATEMENT OF UNCONTROVERTED FACTS

A. Reply to VPC's Response to Defendants' Statement of Uncontroverted Facts

As a preliminary matter, VPC's twelve "General Objections" to Defendants' Statement of Uncontroverted Facts, Br. at 4-6, is improper and should be rejected. If VPC has objections to any specific pieces of evidence or statements of fact, the proper response is to controvert those specific issues and cite to the record. *See* Local Rule 56.1,

VPC does not controvert SOF ¶¶ 1-13, 20-23, 25, 29-32, 34-36, 39, 42, 55, and 67. Defendants will confine their discussion to the specific statements of fact that VPC does controvert.

Reply to SOF ¶ 14

VPC controverts only the second sentence of SOF ¶ 14. VPCs' objection does not affect summary judgment. The second sentence of SOF ¶ 14 merely states that election officials send mail ballots to voters who properly submitted advance ballot applications beginning 20 days prior to the General Election. VPC does not controvert this factual statement and, regardless, the exact date on which such ballots are sent to voters is not material for purposes of summary judgment.

Reply to SOF ¶ 15

VPCs' quotation of Shawnee County Election Commissioner Andrew Howell's deposition testimony does not contradict SOF ¶ 15. VPCs' Response merely discusses the "cure" process for incomplete or inaccurate advance voting ballot applications. In those situations, election officials,

rather than issuing a provisional ballot, may elect to continue attempting to cure any problems with the application beyond the normal two-day deadline for sending the voter an advance ballot (so that a normal/non-provisional ballot can be sent to the voter) if there is sufficient time to contact the voter. This does not controvert SOF ¶ 15. Furthermore, VPCs' additional facts reinforce the added effort election officials undergo when an advance mail ballot application is inaccurate or incomplete.

Reply to SOF ¶ 16

VPC only controverts SOF ¶ 16 because it claims that there is nothing in the cited source about the "standards" or "criteria" a county uses to process an advance voting ballot application. But VPC does not controvert that, in the Shawnee County Election Office, the information on an advance voting ballot application must match the ELVIS system and that only clearly inadvertent mismatches will be overlooked. *See* Pls. Resp. to SOF ¶ 18. There is thus no sound basis for controverting this SOF. In any event, VPC's objection is immaterial for purposes of summary judgment.

Reply to SOF ¶ 17

It is not clear why VPC is objecting to SOF ¶ 17. Mr. Howell noted in his affidavit that, after receiving an advance voting ballot application, his office verifies all such information on the application against the information in ELVIS. Ex. A at ¶ 23. Moreover, K.A.R. 7-36-7(a)-(c) describes the information that must match between the application and ELVIS. There is thus no basis for controverting this SOF. In any event, VPC's objection is immaterial for purposes of summary judgment.

Reply to SOF ¶ 18

With respect to VPC's objection in (a), it is not clear why VPC is objecting. Mr. Howell noted in his affidavit that, after receiving an advance voting ballot application, his office verifies all such information on the application against the information in ELVIS. Ex. A at ¶ 23. Moreover, K.A.R. 7-36-7(a)-(c) describes the information that must match between the application and ELVIS. There is thus no basis for controverting this SOF. And VPC's objection – to the extent there is one here – is immaterial for purposes of summary judgment.

With respect to VPC's objection in (b), VPC is not controverting SOF ¶ 18. Defendants were providing examples of what mistakes a county election office may overlook in processing an advance ballot applications. VPC merely provides an additional example of a clearly inadvertent mismatch mentioned by Mr. Shew. This does not controvert SOF ¶ 18 in a material way.

Reply to SOF ¶ 19

VPC has not controverted SOF ¶ 19. VPC has not cited anything in the record indicating that a county election official would send an advance voting ballot application to a voter who submitted an erroneous middle initial or suffix. By entering the curative process, the office is *not* sending the voter an advance ballot. And if the application deficiencies cannot be cured, the voter will be sent a *provisional* ballot.

Reply to SOF ¶ 24

VPCs' citations do not controvert SOF ¶ 24. Mr. Caskey testified that the individuals and groups requesting the identities of voters who had submitted an advance voting ballot application wanted weekly updates of that information, so that is what the Secretary of State's Office provided. Ex. C at 121:21-124:16. He did not testify that *only* a weekly update was available as VPC claims. Additionally, VPC misstates Mr. Shew's testimony. Mr. Shew did not testify that the relevant

information was only available 20 days before the election; rather, he testified that the Douglas County Election Office began its nightly uploads of certain information 20 days prior to the election. VPC Ex. 2 at 102:16-103:25. However, Mr. Shew also testified that while there is a daily update 20 days before the election, "at any time before that, anybody requesting the daily records that exist on that date could obtain it from ELVIS." Ex. NN at 106:18-107:11. Regardless, these discrepancies between what VPC claims these officials testified and what the officials actually testified are not material to the summary judgment motion.

Reply to SOF ¶ 26

VPC's response is not supported by its citations and does not controvert SOF ¶ 26. Mr. Caskey testified that county election officials remove ineligible voters from the voter registration lists when they become aware of death or criminal conviction. VPC Ex. 3 at 83:3-91:9; 102:11-103:10. SOF ¶ 26 merely states that the information on a pre-filled advance voting ballot application may not match the information in ELVIS when the data used to pre-fill the application was from a voter registration list generated prior to information about the voter being updated in ELVIS. SOF ¶ 26. The point of SOF ¶ 26 is that, because the data in ELVIS is constantly updated, pre-filling an application with stale information can cause inaccurate pre-filled applications. SOF ¶ 26 should be deemed admitted.

Reply to SOF ¶ 28

VPC's disagreement with SOF ¶ 28 is not material. Messrs. Lopach and Dripps hold equivalent titles at both VPC and its sister organization, the Center for Voter Information ("CVI"). Ex. OO at 8:12-9:9; VPC Ex. 6 at 152:20-153:9. Moreover, both entities mailed prefilled advance voting applications to Kansans in 2020. Ex. PP at 69:15-70:21; 87:13-88:18. Additionally, VPC's

counsel explicitly represented that CVI was ultimately responsible for the mailings for both organizations during the 2020 General Election. Ex. QQ at 108:17-25.

To the extent VPC argues these differences are somehow material, VPC had months to disclose the exact amounts of mailings by VPC vs. CVI and never did so. Defendants requested all documents supporting VPC's "allegation that an estimated 69,577 Kansas voters requested advance mail ballots in the 2020 general election using applications provided by VPC." Ex. SS. VPC responded by producing Exhibit E. Defendants deposed VPC's 30(b)(6) witness, Mr. Lopach, about this exhibit. Mr. Lopach testified that it was a chart of VPC's mailers. Ex. G at 123:17-124:20; Ex. PP 108:7-109:10. As VPC's 30(b)(6) witness, Defendants relied upon Mr. Lopach's testimony as it relates to the data in Exhibit E and VPC has not provided any updated information, outside of Mr. Dripps' speculation, that the numbers in Exhibit E represent anything other than that to which Mr. Lopach testified. Given that this is VPC's own data, this Court should deem SOF ¶ 28 admitted.

Reply to SOF ¶ 33

VPCs' objection is not material to summary judgment and does not controvert SOF ¶ 33. Furthermore, VPCs' implication that *only* Mr. Howell and Mr. Shew recognized VPC's mailers is not accurate. Connie Schmidt posted an FAQ addressing voter confusion caused by VPC's mailers. Ex. FF at 297:4-298:8. Ms. Cox also testified that she could identify VPC's mailers and that "[t]hose were the ones that [she] noticed that would have multiple applications sent from the same person." Ex. RR at 143:25-144:22.

Reply to SOF ¶ 37

Not only do VPC's citations not contravene SOF ¶ 37, but VPC misstates the testimony to try to create a disputed fact. With respect to part (a) of VPC's objection, VPC does not appear to

controvert SOF ¶ 37. With respect to part (b), VPC's response does not controvert SOF ¶ 37 and is not supported by the citations. First, the use of the term "data vendors," as opposed to Catalist, is meaningless. Catalist *is* a data vendor of VPC. VPC Ex. 4 at 112:19-23. Second, VPC's citation to Mr. Dripps' deposition does not support VPC's new claim that VPC does not "intentionally or routinely" use commercial data with state voter lists or that the use of commercial data was done so "mistakenly" by VPC's vendor. *Nowhere* does Mr. Dripps' testimony state, and VPC's citation does not support, this new argument that Catalist "mistakenly" appended commercial data when "merging records." While it may be that Catalist made a mistake in *how* it merged the data, which led to numerous inaccurate pre-filled applications being sent to Kansas voters, VPC's attempt to inject a dispute and new facts is impermissible and unsupported by the evidence they cite.

Additionally, it is untrue that "Mr. Dripps' 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." VPC Resp. SOF ¶ 37 (emphasis added). Mr. Dripps testified specifically that two of the five Kansas waves did *not* include pre-filled applications. Ex. F at 171:1-171:14. When asked about "the number of advance ballot applications that were sent out in Waves A and B in the state of Kansas," he stated that while he did not know "specifically" what the error rate was in Kansas, he knew that nationally the error rate was 5% involving a middle name or initial and 3% involving a suffix. Ex. F at 169:10-170:25. In other words, he merely testified that he did not know whether the national error rate was precisely the same as the Kansas error rate, *not* that VPC's mailers to Kansas were not part of VPC's errors. Ex. F. at 169:17-170:25. Accordingly, the Court should deem SOF ¶ 37 admitted.

Reply to SOF ¶ 38

Defendants' inverting of the percentages of the errors in pre-filled advance voting ballot applications was inadvertent and not material.

Reply to SOF ¶ 40

VPC's objection is once again immaterial to summary judgment. VPC does not controvert that this list of voters was provided by VPC in discovery in response to Defendants' request for the same. *See* Ex. TT. The fact that some or most of the pre-filled applications were mailed by VPC's sister organization, CVI, is not material. Ex. F at 177:9-177:22 (referring to CVI as "VPC's sister organization"); Compl. (Dkt. 1), ¶ 29. What is undisputed is that the pre-filled applications themselves were included in mailers that came from either VPC or CVI and that included language in the cover letter telling voters that the materials were from CVI. Ex. QQ at 105:24-107:25.

When testifying as VPC's 30(b)(6) witness, Mr. Lopach also did not testify that the 507,864 advance voting ballot applications that VPC sent out, identified in Exhibit E, consisted of both VPC and CVI mailers. Ex. G at 123:17-124:6. Furthermore, Mr. Dripps' testimony relied upon by VPC only states that he believed the numbers "could have been also VPC's sister organization, CVI," but that he did not "recall" whether that was true. Ex. F at 177:9-177:15. Ultimately, the distinction as to whether VPC or CVI mailed the pre-filled applications to voters is irrelevant for purposes of this case.

Reply to SOF ¶ 41

VPC does not controvert anything specific in SOF ¶ 41, and Defendants point the Court to ¶¶ 17, 24, 27-28 of Ex. M.

Reply to SOF ¶ 43

VPC concedes that Mr. Block testified that VPC failed to properly remove voters; VPC merely notes that Mr. Block did not testify that VPC did not remove "any" voters. This distinction is immaterial for purposes of summary judgment. The fact that VPC does not controvert that it failed to remove at least *some voters* from its list of Kansans to whom it mailed pre-filled advance voting ballot applications is sufficient for summary judgment.

Further, VPC's reliance on Mr. Hersh's 28-page rebuttal expert witness report, to which it cites only "generally," does not controvert SOF ¶ 43. Defendants *assume* that VPCs' citation to Paragraph 24 of Mr. Hersh's Declaration is the evidence that VPC believes controverts SOF ¶ 43. However, the quoted portion of Mr. Hersh's report is irrelevant to SOF ¶ 43. SOF ¶ 43 has nothing to do with estimating the accuracy of VPC's list based on some benchmark or reviewing the *entirety* of VPC's list to determine how many inaccurate mailings VPC sent, which is what Mr. Hersh discussed in Paragraph 24. Mr. Block was not "cherry-picking" data. SOF ¶ 43, and Mr. Block's Declaration, address the fact that VPC sent pre-filled applications to Kansans *after some of those Kansans had already been removed from the ELVIS voter list*. That statement does not require Mr. Block to find *every instance* that this occurred.

The data analyzed by Mr. Block shows that Mr. Lopach's testimony was not accurate as to VPC's operations. While Mr. Lopach testified that VPC removes voters from its database, Mr. Block identified numerous mailings by VPC that were sent to voters that had been removed from the Kansas voter rolls long before the date of the mailing. Ex. N at ¶¶ 9-10. Mr. Lopach's untrue statements cannot create a controverted fact.

Relatedly, VPCs' claim that Mr. Block "did not review any material that could prove" that VPC did not remove voters from its mailing list despite the voter having been previously removed

from the ELVIS system is simply false. As noted above, Kansas election officials confirmed, using lists provided by VPC and comparing that list to Kansas voter data, that VPC sent numerous mailings to voters who had already been removed from the Kansas voter rolls by the time VPC mailed the prefilled applications to them. Ex. M at ¶¶ 15-17. VPC just ignores those paragraphs.

The fact that Mr. Block used a February 2021 list is not relevant as it ignores Mr. Block's analysis and process. Rather than repeat why this is true, Defendants will simply point to their Response to VPC's Motion to Exclude Mr. Block's Report Testimony and Report (Dkt. 152, at 11-12). The same will be done with regard to VPC's objections to Mr. Block's qualifications. *Id.* at 7-9.

Reply to SOF ¶ 44

It is true that the specific reasons for each voter's removal from the Kansas registration list is not identified in Exhibit O, absent the voters with links to the voter's obituary. However, the specific reason why each voter was removed is not material for purposes of summary judgment. SOF ¶ 44 makes the point that VPC sent mailers to 385 Kansans that had already been removed from the ELVIS database *before* VPC sent voters its *initial* two mailers. In fact, VPC sent multiple mailers to many individuals who had already been removed from the Kansas voter registration rolls. Thus, regardless of the reason for the voter's removal, VPC was pre-filling advance voting ballot applications and mailing them to voters whose registrations had been cancelled. VPC does not controvert this fact.

Moreover, as discussed in Defendants' Response to VPC's Motion to Exclude Mr. Block's Report Testimony and Report (Dkt. 152), his testimony is admissible. And as an expert witness, he is entitled to rely on hearsay. In short, VPC has not properly controverted SOF ¶ 44.

Reply SOF ¶ 45

As discussed in Defendants' Response to VPC's Motion to Exclude Mr. Block's Report Testimony and Report (Dkt. 152), his testimony is admissible. And as an expert witness, he is entitled to rely on hearsay. VPC has thus not properly controverted SOF ¶ 45.

Reply SOF ¶ 46

VPC's objection to the term "hundreds" is not material. VPC concedes that approximately 341 voters were removed from the voter rolls by Kansas officials yet, nevertheless, received VPC mailings after having been removed. Ex. N. ¶¶ 10-13. Moreover, as discussed in Defendants' Response to VPC's Motion to Exclude Mr. Block's Report Testimony and Report (Dkt. 152), Mr. Block's testimony is admissible. And as an expert witness, he is entitled to rely on hearsay.

Reply SOF ¶ 47

VPC's evidence does not properly controvert Mr. Block's findings. While VPC avers that the fact that the same voter had separate registration numbers does not mean the two voters were not each sent mailers, it provides no evidence to disprove this fact and instead ignores the evidence suggesting otherwise that it produced in discovery. VPC cites Dr. Hersh's statement that it "was not clear" to him whether this occurred. Pls.' Ex. 5 at 14. But Ex. M ¶¶ 23-24 and Ex. P are derived from VPC's own list of voters whom *VPC represented to Defendants* had received mailers from VPC. *See* Ex. L. And Exhibit P itself shows the number of mailings VPC sent to each of the voters listed at the address. *See* Ex. P (column "gen_mailings").

Furthermore, the record shows that VPC sent applications to these addresses, as Mr. Block testified. For example, VPC's list of individuals to whom it mailed pre-filled applications includes two entries for Paula Marks one voter identification number and two addresses. Ex. L at VPC134-

00333, VPC134-01244. The same is true for Elizabeth Lopez. Ex. L at VPC134-00262, VPC134-03641.

VPC argues that Mr. Block's evidence does not state what Defendants assert. While SOF ¶ 47 did include one inadvertent misstatement (Mr. Block identified *21*, not *23*, pairs of voters), this minor error is immaterial. The other objections VPC makes are factually inaccurate. VPC argues that "five . . . of the twenty-three 'matched' pairs reflect" records for different people. While that is true, VPC ignores that its data vendor believed these individuals to be the same person with different addresses, which resulted in VPC sending inaccurately pre-filled applications to them. *See* Ex. P (Elizabeth Schultz, Danielle Morris, An Tran, Cameron Williams, Cheryl Simon).

VPC contends that thirteen pairs of individuals were not properly separated because they were not in Kansas' voter file. This obscures the larger point. The names were properly separated because one was in the voter file and *one was not*. Nevertheless, VPC sent pre-filled applications to voters who were not on the Kansas voter rolls for some inexplicable reason. *See* Ex. P (Salvador Correa, Tien Vo, Lindsay Vaughn, Sierra Taylor, Lily Julian, Margaret Admire, Luis Torres, Anna Robinson, Shaw Islam, Jorge Torres, Pablo Alba Guzman).

As for the individuals whose names are not listed in the voter file, VPC is proving Mr. Block's point. Kansas properly separated these individuals in the voter system – one person with that name and another person who did not have that name – but VPC nevertheless sent pre-filled applications to the person whose name did appear in the Kansas voter file.

Reply to SOF ¶ 48

The fifteenth voter was removed on April 10, 2020. Thus, depending on the time of day a Kansas voter registration was requested in relation to when the voter was removed, the number of removed would either be fourteen or fifteen at the time the voter list was downloaded from ELVIS.

The trivial difference is also immaterial. Moreover, as discussed in Defendants' Response to VPC's Motion to Exclude Mr. Block's Report Testimony and Report (Dkt. 152), Mr. Block's testimony is admissible. And as an expert witness, he is entitled to rely on hearsay.

Reply to SOF ¶ 49

VPC's purported controverting of SOF ¶ 49 is immaterial and/or refuted by other evidence and admissions. First, VPCs' quibbling about the frequency of VPC's inaccurate applications is not material to summary judgment. Second, although ¶ 39 of Exhibit M may not detail all of the steps an election official must undertake upon receiving an inaccurate application, VPC has elsewhere admitted that election officials must undertake a cure process when an application has information that does not match the information in ELVIS. *See* Resp. to SOF ¶ 62; *see also* Ex. A ¶ 26; Ex. U ¶ 25.

Third, VPC's own expert acknowledges that VPC's use of obsolete records – meaning records that have become stale because the data changed in ELVIS – involve instances where "a registrant moves, dies, or has been removed from voter files." VPC Ex. 5, ¶ 28. According to Mr. Hersh, it is "unavoidable" that groups like VPC will use obsolete records to pre-fill applications and that the rates identified by Mr. Block are "ordinary." Thus, not only does Mr. Hersh not controvert Mr. Block's assertion, he *admits* that it is "unavoidable" that VPC will send inaccurate prefilled applications to Kansas voters.

Fourth, Mr. Hersh's claim that "VPC methods reduced the burden on election officials" is pure speculation. It is also contradicted by testimony from Kansas election officials. *See* SOF ¶¶ 50-56, 60-64; VPC Ex. 1 at 207:13-208:20. Fielding hundreds of calls from concerned voters is not a reduction on an election official's burden.

Finally, as to the claims of inadmissibility of Mr. Block's Exhibit VII, as an expert witness, he was entitled to rely on the information in forming his conclusions. Furthermore, even if it were inadmissible from Mr. Block, the document would be admissible as a business record of Mr. Howell. After all, the applications that comprise VPC Ex. 8 are advance voting ballot applications received by the Shawnee County Election office and produced in third-party discovery by Mr. Howell. Ex. QQ at 215:13-215:16. Notwithstanding VPC's claim to the contrary, Mr. Howell acknowledged producing these documents and testified that he was familiar with them. Ex. QQ at 217:9-220:10. Mr. Howell is also qualified to testify as to their authenticity. *See* Fed. R. Evid. 703(6). VPC is also incorrect that Mr. Howell did not recognize these documents.

Reply to SOF ¶ 50

VPC takes issue with the term "large," but its dispute with the term is based on attorney argument, not facts, and does not properly controvert SOF ¶ 50. VPC merely cherry-picks a few lines from Mr. Howell's deposition that do not contradict his affidavit while ignoring the other testimony in the deposition that is consistent with his affidavit. The testimony cited by VPC states that Mr. Howell "doesn't track" the reason his office must cure an advance ballot application and that he doesn't know precisely "how much time" his staff spent on only prefilled applications. Pls.' Ex. 1 at 253:24-254:11. But Mr. Howell also testified that he was "aware of [] problems processing advance mail ballot applications that are specific to VPC's prefilling of the applications" and it took "a great deal of staff time to deal" with them. Ex. QQ at 255:21-256:14. He further clarified that it was not only duplicates, but that "it takes a great deal of staff time to deal with" VPC's pre-filled applications. Ex. QQ at 256:15-256:21. Just because Mr. Howell did not "know the exact number" of applications, he testified that the "applications that took the most

time for staff to deal with inaccuracies and duplicates were the ones that came from the Center for Voter Information," consistent with his affidavit. Ex. QQ at 256:22-257:5.

The remainder of VPC's attempt to controvert SOF ¶ 50 is likewise grounded upon attorney speculation. VPC suggests that these applications did not create an additional burden because VPC believes that only 12 of them went through the cure process. There was no suggestion that these 12 represented the entire universe of problematic pre-filled applications from VPC/CVI. It was a *sample*. And VPC's admission that those 12 applications had to go through the cure process confirms that pre-filled applications did place additional burdens on the Shawnee County Election office, consistent with Mr. Howell's testimony. Ex. QQ at 252:24-253:18.

For all but two of the remaining applications, VPC again speculates as to what the documents reveal. For example, VPC suggests that perhaps the voter (as opposed to an election official) crossed out information before returning the application, but VPC provides no evidence to support the speculation. VPC also speculates the pre-filled application may have been accurate but intended for a different voter also residing at that address. Again, no evidence to support that speculation. Whatever happened to the applications, VPC's contention that pre-filled applications were not erroneously pre-populated because someone crossed-out and corrected the information before it reached the election office in no way undermines the fact that the information had been pre-filled inaccurately in the first place. *See, e.g.* Ex. Q at 12 (Jamie Huske), 14 (Tammy Guffey-Morgan), 18 (Megan Gilbert), 19 (Ashley Craig-which also includes an incorrect prefilled address), 20 (Jullie Whitney), 21 (Jill Paletta). (This is only a sample of Ex. Q).

Reply to SOF ¶ 51

With regard to VPC's hearsay argument/objection, Defendants point the Court to footnote 11 in the brief. As for VPC's argument that the term "numerous" is inaccurate, this misstates Mr.

Howell's testimony. VPC cites to a question posed in his deposition about whether he had "received a prefilled ballot application that is not – it's not filled out, it just notes on it this person is deceased[,]" to which he responded that he "received a couple of those, at least." VPC Ex. 1 at 199:6-199:13. But his affidavit speaks to a broader category of individuals, not just the applications that he received that were "not filled out" and "notes . . . deceased." Elsewhere in his deposition, he also confirmed that he had "received an advance mail ballot application with the information of a voter who is listed as deceased in ELVIS[.]" VPC Ex. 1 at 198:9-13. And he was not asked about phone calls regarding deceased individuals. In any event, he produced more than "a couple" in discovery. *See* Pls.' Ex. 8.

With respect to Exhibit R, VPC is correct that the first two exhibits do not have an indication of "deceased." And it is true that one of those applications was not prefilled by VPC. But those minor discrepancies are immaterial to summary judgment.

Reply to SOF ¶ 52

The phrase used in SOF ¶ 52 is neither vague nor ambiguous; it is referring to the "inaccurately pre-filled advance voting ballot applications" that voters received from VPC. And the affidavit repeatedly identifies CVI (who mailed VPC's packets, including the applications) as the source of the mailers. *See*, *e.g.*, Ex. A at ¶¶ 38-40, 42, 44.

The remainder of VPC's Response to SOF ¶ 52 is attorney argument. VPC asks the Court to ignore the anger, confusion, and frustration caused by VPC's prefilled applications and instead focus on excessive duplicate applications, which was another, closely related problem caused by VPC's use of pre-filled applications. VPC also asks the Court to assume that voters were angry because they believed that Shawnee County election officials had sent the inaccurately pre-filled applications and, had the voters realized that VPC sent the applications, the voters would not have

been angry, frustrated or confused. This argument seeks to deflect blame and does not controvert SOF ¶ 52 at all. It was the pre-filled applications themselves that was causing the emotions, not simply that voters believed the Shawnee County election office got their information wrong or that the office sent numerous applications. Had the applications not been pre-filled, the voters would not have been angry and confused about the inaccurate information in the first place. In any event, VPC's theory also confirms another reason voters were confused, i.e., voters thought that pre-filled applications came from the county election office, not from a third-party.

As for Mr. Howell's testimony, it does not controvert his affidavit. VPC cherry-picks one sentence from a 270-page deposition to misstate the testimony. Mr. Howell testified that the "difference" between earlier elections and the 2020 election that caused a drastic increase in duplicate applications was "[p]refilled applications by third parties that either had inaccuracies or duplicate entries." Ex. S at 269:2-13. Mr. Howell also testified that he was "aware of [] problems processing advance mail ballot applications that are specific to VPC's prefilling of the applications" and that it took "a great deal of staff time to deal" with them. Ex. QQ at 255:21-256:14. He further clarified that the problem was not only duplicates, but that "it takes a great deal of staff time to deal with" VPC's pre-filled applications. Ex. QQ at 256:15-256:21. Thus, just because Mr. Howell did not "know the exact number" of inaccurately pre-filled applications that his office had received, he clearly testified that the "applications that took the most time for staff to deal with inaccuracies and duplicates were the ones that came from the Center for Voter Information," consistent with his affidavit. Ex. QQ at 256:22-257:5. Finally, the information contained in his affidavit is not inadmissible hearsay. *See* footnote 11.

Reply to SOF ¶ 53

First, the information is not inadmissible hearsay. *See* footnote 11. Second, VPC does not controvert the statements contained in Mr. Howell's affidavit (Ex. A at ¶ 38) as it relates to voters' confusion, frustration and anger about having received CVI-prefilled applications with inaccurate information. Instead, VPC challenges three other sections (Ex. A at, ¶¶ 40-42), claiming that these paragraphs merely state that the voters were confused, frustrated, and angry only about the sender, not the "content" of the applications. This is a distinction without a difference. The voters would not have been angry and contacted the county election office had the applications sent by VPC been blank. The reason for the voters' confusion and anger stems from the pre-filled applications themselves.

Reply to SOF ¶ 54

Ms. Cox's testimony supports the SOF ¶ 54. She testified that the reason she placed an ad in the local papers was in response to voters asking about where the information used to pre-fill their advance voting ballot applications was coming from. She noted that she was receiving 20-30 calls a day regarding these applications, with each call averaging five minutes in length. Ex. T at 131:19-132:12. Furthermore, her affidavit (at ¶ 37) is referencing "overall confusion" caused by the pre-filled applications. That is not vague. The confusion is referencing the confusion voters reported experiencing from having pre-filled applications, as discussed in Ex. U at ¶¶ 32-36. These paragraphs, to which ¶ 37 of her affidavit refers, address concerns about inaccurate or duplicate applications, contrary to VPC's claim. VPC incorrectly claims that this was not the reason Ms. Cox took out these ads, but her affidavit indicates otherwise. VPC's own citation shows this to be true. VPC thus does not actually controvert SOF ¶ 54. And to the extent it does, any contravention is not material for purposes of summary judgment.

Reply to SOF ¶ 56

VPC is correct that Defendants inadvertently cited Ex. A rather than Ex. S. But SOF ¶ 56 is relevant as an example of the burdens on election offices flowing from having to deal with pre-filled applications containing inaccurate information.

Reply to SOF ¶ 57

VPC claims that Mr. Caskey's deposition testimony regarding the calls he received from voters is inadmissible hearsay. The information is not inadmissible hearsay. *See* footnote 11. In any event, VPC does not dispute that Mr. Caskey had these calls with voters and election officials regarding complaints over pre-filled advance voting ballot applications. The exact details of the calls with Mr. Caskey are immaterial. The point is that the use of the pre-filled applications caused election officials – including Mr. Caskey – to have to expend a significant amount of time dealing with voter complaints, which ultimately had an adverse impact on election administration.

Reply to SOF ¶ 58

VPC claims that Mr. Caskey's deposition testimony regarding the calls he received from voters is inadmissible hearsay. The information is not inadmissible hearsay. *See* footnote 11.

Reply to SOF ¶ 59

This SOF addresses information that the Legislature received related to voter confusion and workload on county election officials caused by advance mail ballot applications. As such, it is relevant and material.

Reply to SOF ¶ 60

VPC addresses immaterial, collateral issues but does not actually controvert SOF ¶ 60. As such, it should be deemed admitted.

Reply to SOF ¶ 61

VPC addresses immaterial, collateral issues but does not actually controvert SOF ¶ 61. As such, it should be deemed admitted.

Reply to SOF ¶ 62

Mr. Howell's testimony does not conflict with his affidavit. VPC's citation addresses Mr. Howell's reservation about guessing the average time it takes to cure an advance voting ballot application anytime the application is missing information. He testified that it depended upon how easily the information could be obtained, meaning curing "can happen anywhere from almost immediately to as far out as you could never catch the person, they don't live there, the address you sent the envelope to was incorrect so it never gets there . . . It can range the full gamut on both ends to never getting there, clear up to solving it within an hour." VPC Ex. 1 at 168:12-168:21. Mr. Howell's affidavit, on the other hand, is limited to the times where his office is "able to reach the voter" and "attempt to work with [the voter] to correct the discrepancy/omission." Ex. A at ¶ 26. Furthermore, elsewhere in his deposition, Mr. Howell stated that when going through the cure process with a voter, his office spends "an average of three to five minutes filling out an application if everything goes well, then we're going to spend 15 or 20 minutes, at an absolute minimum, just doing the basic amount of cure." Ex. QQ at 253:4-12. Mr. Howell also testified that if a provisional ballot had to be issued, it would take "another 25 to 30 minutes of staff time." *Id.* at 253:13-16. The other portions of Mr. Howell's testimony referenced by VPC are not pertinent to SOF ¶ 62 or material to this summary judgment motion.

Reply to SOF ¶ 63

VPC does not actually controvert SOF ¶ 63. As such, it should be deemed admitted.

Reply to SOF ¶ 64

SOF ¶ 64 is not "at odds" with Mr. Howell's deposition testimony. The deposition testimony cited by VPC consists of his description of the provisional ballot process. The election office must prepare and issue a provisional ballot when a voter's advance voting ballot application cannot be timely cured. *See* PTO-SF, ¶ xxxiv; VPC Ex. 1 186:11-187:12, 187:23-188:12. The fact that the Shawnee County Election Office continues to attempt to contact voters to cure applications – thereby permitting the provisional ballot to be counted if the deficiencies are cured – has nothing to do with SOF ¶ 64. SOF ¶ 64 does not even reference the two-day time period. VPC does not actually controvert Mr. Howell's testimony, but instead raises irrelevant facts which illustrate that inaccurate applications resulting in provisional ballots further increase the burden on election administration. Accordingly, SOF ¶ 64 should be deemed admitted.

Reply to SOF ¶ 65

Once again, VPC does not actually controvert SOF ¶ 65. Instead, it points to *other* canned responses in VPC's FAQs, none of which are material. The fact that its call center had other canned responses does not change the fact that VPC's FAQs contained canned responses to respond to voters who contacted VPC about problems with advance voting ballot applications. SOF ¶ 65 should be deemed admitted.

Reply to SOF ¶ 66

Rather than controverting SOF ¶ 66, VPC attempts to explain away the confusion that its pre-filled absentee ballot applications have caused in other states. And it often mischaracterizes the evidence in the process.

With respect to Ex. Y at 4-5, the emails show that VPC sent pre-filled applications out to voters who, upon receiving the applications, inaccurately completed a remaining unfilled portion.

While the voter may have selected the incorrect election, the county cited the pre-filling of the application related to the date of the election as being problematic. Indeed, the county explicitly noted that it was the pre-filling of the *election date* by VPC that prevented the county from being able to process the application for the "General or Special election" given the date pre-filled by VPC. Had VPC not pre-filled that date, there would not have been that specific question whether the county could process the application.

In Ex. Y at 10, VPC omits that the email states that the county "continue[s] to receive calls from voters with questions and suspicions of where the form originated and whether it is legitimate or fraudulent," opting instead to claim it was only about another problem VPC had with its mailing program related to return addresses.

In Ex. Y at 26, VPC omits that the County Commissioner was frustrated not merely with VPC's errors related to the return address, but the fact that "Virginia has been dealing with [VPC's] error after error for nearly a decade now" and that his request is that VPC "cease mailing anything to Virginia voters."

Ex. Y at 28-31, which VPC omits from its objection, addresses an issue that Kansas also experienced – specifically, VPC using old data and complaints by voters. By using old lists, VPC mails applications to individuals who have died or moved and potentially have not even lived at an address for years. The election commissioner also stated that VPC's "last mailing cost literally 100's of hours for [the] office."

Ex. Y at 32, also omitted by VPC, describes phone calls from concerned voters regarding CVI's communications that indicate individuals are either not registered or eligible for absentee ballots and that the forms they are receiving include "information on the request [that] is grossly inaccurate."

As for Ex. Y at 35, although VPC claims the email is limited to suggesting "instructions" for its mailers, the text of that email illustrates that the reason the clerk is asking for changes to the instructions is that the pre-filled applications her office was receiving were resulting in individuals not providing their required photo ID. VPC likewise characterizes Ex. Y at 38-39 as being limited to suggestions for "instructions." But VPC omits that one instruction stems from counties being "inundated with duplicate absentee ballot requests[.]" Ex. Y at 38. Another instruction stems from voters not providing complete information when they return a VPC pre-filled application because VPC's instructions were not compliant with state law. *Id.* at 39.

Finally, as to Ex. Y at 41-42, while VPC correctly notes that this email had to do with voter registration applications, the problems with those mailings are similar to what Kansas has experienced with advance voting ballot applications, namely VPC sending letters to individuals with the wrong names.

Reply to SOF ¶ 68

VPC has not properly controverted SOF ¶ 68. VPC does not controvert that 507,864 voters were sent application packets nor does it controvert that 112,597 voters used the VPC-provided envelopes to return applications. Instead, citing Mr. Dripps' testimony, VPC claims that some, not all, of those mailers and applications "could have" been CVI packets rather than VPC packets. VPC also relies upon Mr. Lopach's affidavit, purportedly identifying the approximate number of voters who "responded to advance mail ballot applications" in 2020.

This distinction is immaterial to summary judgment. This case involves a prohibition on pre-filling advance voting ballot applications *regardless of the entity that mails those applications*. And the distinction is particularly irrelevant when it relates to CVI and VPC. CVI is VPC's "sister organization," the entities share many, if not all, of the same officers. CVI was responsible for

mailing both VPC's and CVI's packets in the General Election of 2020, and both organizations sent pre-filled advance mail ballot applications. Ex. OO at 8:12-9:9; Ex. PP at 69:15-70:21, 87:13-88:18; VPC Ex. 6 at 152:20-153:9; Ex. QQ at 108:17-25. For purpose of SOF ¶ 68, what is material is that VPC admits that 507,864 mailings were sent to Kansans during the 2020 General Election by VPC *and* CVI. It is also material that VPC effectively admits that approximately 112,597 mailings from VPC *and* CVI were returned to Kansas county election offices in that election. The fact that some of the applications may have come from CVI is wholly immaterial.

Furthermore, the Court should not permit VPC to attempt to raise this issue at this late date. If VPC believed this distinction was material – and it is hard to see how it is – VPC had months to disclose the amount of applications sent only by VPC. Defendants requested all documents supporting VPC's "allegation that an estimated 69,577 Kansas voters requested advance mail ballots in the 2020 general election using applications provided by VPC." Ex. SS. VPC responded by providing Ex. E and Defendants deposed VPC's 30(b)(6) witness, Mr. Lopach, about this chart. Mr. Lopach indicated that document was a chart of VPC's mailers. Ex. G 123:17-124:20; Ex. PP at 108:7-109:10. Defendants relied on Mr. Lopach's 30(b)(6) testimony regarding the numbers in this chart, and VPC has not provided updated information, outside of Mr. Dripps' speculation as to what "could also" be included in the cited numbers, to further clarify these numbers. Defendants also requested information, including name, address, and number of advance mail ballot applications sent to Kansans, and VPC responded by providing a list of over 500,000 individuals. Ex. TT; Ex. L. This is VPC's own data.

As for VPC's claim that SOF ¶ 68 is immaterial and irrelevant, that is not the case. This SOF addresses the number of advance voting ballot applications that were prepared by VPC/CVI and returned by Kansas voters during the 2020 General Election. These numbers, combined with

other facts, reveal the potential scope of voter confusion and election administration inefficiencies caused by pre-filled applications.

Reply to SOF ¶ 69

VPC seeks to controvert on the basis that the stated numbers "could also" include CVI applications numbers. For the reasons stated previously, this distinction, which only claims that these numbers "could also" include both CVI and VPC mailers, is not material for purposes of summary judgment. *See* Reply to SOF ¶ 68. And it is too late for VPC to attempt to insert this new fact for the reasons stated previously. *See* Reply to SOF ¶ 68.

Reply to SOF ¶ 70

VPC raises the same objections to SOF ¶ 70 as it did to SOF ¶¶ 68-69. For the same reasons stated in reply to those SOFs, VPC's objections are not material to defeat summary judgment.

Reply to SOF ¶ 71

VPC's Response to ¶ 71 does not controvert SOF ¶ 71 and raises non-responsive issues. SOF ¶ 71 focuses on the advance voting ballot applications and duplicates the Shawnee County Election Office received during the 2020 General Election. SOF ¶ 71 does not address prior years, the numbers that were pre-filled by VPC, or Mr. Howell's description at the preliminary injunction hearing of his experience in the 2020 Election. These additional statements do not controvert SOF ¶ 71 and should be stricken. If VPC wanted to add additional facts, the proper procedure was to include them separately as additional material facts, not insert non-responsive information into their Response to SOF ¶ 71. *See* D. Kan. Local Rule 56.1(b).

Furthermore, VPC's attempt to controvert the number of duplicate applications Shawnee County received in 2020 lacks credible evidence. VPC cites to Mr. Howell's *preliminary injunction* testimony, not his *deposition testimony*, in order to try to manufacture a controverted

fact. As this Court knows, evidence introduced at the preliminary injunction is often preliminary and the evidence, upon further development of the record, can change. In discovery, VPC subpoenaed Mr. Howell and demanded that he produce documents "sufficient to show," *inter alia*, the "number of advance mail voting applications received." Ex. UU, Deposition Notice of Andrew Howell, at 9. VPC also commanded Mr. Howell to testify about, *inter alia*, "[t]he volume of advance mail voting applications received from voters[.]" *Id.* at 16-17. At his deposition, Mr. Howell testified *repeatedly* that the number of duplicate applications his office received in the 2020 General Election was 4,217 applications, a number higher than the amount he identified at preliminary injunction and equal to the number identified in his Affidavit. Ex. S at 117:4-117:9; Ex. QQ at 252:11-252:23, 270:3-270:14; VPC Ex. 1 at 232:21-233:16. Mr. Howell also explained how he reached the number of 4,217 duplicate applications. Specifically, when his office originally determined the number, it "missed a box or two . . . [s]o in order to be accurate" Shawnee County Election Office staff went "back through all of [the applications], [to] try to do a hand analysis of the total number of duplicates, as well as an accounting of how many there were in each set of duplicates." VPC Ex. 1 at 232:21-233:8. Thus, Howell clearly explained why a discrepancy in duplicate numbers existed between the preliminary injunction testimony and his later deposition testimony and affidavit. VPC had the opportunity to explore that further at Mr. Howell's deposition but chose not to do so. SOF ¶ 72 should thus be deemed admitted.

Finally, while VPC mentions that the number of advance mail ballot applications in 2020 increased by approximately 270% as compared to the 2016 General Election and approximately 195% as compared to the 2018 General Election, the number of duplicate applications received by the Shawnee County Election Office in the 2020 General Election increased by ***35,040%*** as compared to the 2016 and 2018 general elections. *See* Ex. A at ¶¶ 15, 17.

Reply to SOF ¶ 72

VPC's Response to ¶ 72 does not controvert SOF ¶ 72 and raises non-responsive issues. SOF ¶ 72 focuses on the advance voting ballot applications and duplicates the Shawnee County Election Office received during the 2020 General Election. SOF ¶ 72 does not address prior years, the numbers that were pre-filled by VPC, or Mr. Howell's description at the preliminary injunction hearing of his experience in the 2020 Election. These additional statements do not controvert SOF ¶ 72 and should be stricken. If VPC wanted to add additional facts, the proper procedure was to include them separately as additional material facts, not insert non-responsive information into their Response to SOF ¶ 72. *See* D. Kan. Local Rule 56.1(b).

Furthermore, VPC's attempt to controvert the number of duplicate applications Shawnee County received in 2020 lacks credible evidence. VPC cites to Mr. Howell's *preliminary injunction* testimony, not his *deposition testimony*, in order to try to manufacture a controverted fact. As this Court knows, evidence introduced at the preliminary injunction is often preliminary and the evidence, upon further development of the record, can change. In discovery, VPC subpoenaed Mr. Howell and demanded that he produce documents "sufficient to show," *inter alia*, the "number of advance mail voting applications received." Ex. UU, Deposition Notice of Andrew Howell, at 9. VPC also commanded Mr. Howell to testify about, *inter alia*, "[t]he volume of advance mail voting applications received from voters[.]" *Id.* at 16-17. At his deposition, Mr. Howell testified *repeatedly* that the number of duplicate applications his office received in the 2020 General Election was 4,217 applications, a number higher than the amount he identified at preliminary injunction and equal to the number identified in his Affidavit. Ex. S at 117:4-117:9; Ex. QQ at 252:11-252:23, 270:3-270:14; VPC Ex. 1 at 232:21-233:16. Mr. Howell also explained how he reached the number of 4,217 duplicate applications. Specifically, when his office

originally determined the number, it "missed a box or two . . . [s]o in order to be accurate" Shawnee County Election Office staff went "back through all of [the applications], [to] try to do a hand analysis of the total number of duplicates, as well as an accounting of how many there were in each set of duplicates." VPC Ex. 1 at 232:21-233:8. Thus, Howell clearly explained why a discrepancy in duplicate numbers existed between the preliminary injunction testimony and his later deposition testimony and affidavit. VPC had the opportunity to explore that further at Mr. Howell's deposition but chose not to do so. SOF ¶ 72 should thus be deemed admitted.

Finally, while VPC mentions that the number of advance mail ballot applications in 2020 increased by approximately 270% as compared to the 2016 General Election and approximately 195% as compared to the 2018 General Election, the number of duplicate applications received by the Shawnee County Election Office in the 2020 General Election increased by ***35,040%*** as compared to the 2016 and 2018 general elections. *See* Ex. A at ¶¶ 15, 17.

Reply to SOF ¶ 73

VPC does not actually controvert anything stated in SOF ¶ 73. Instead, VPC simply adds facts that are nonresponsive and irrelevant. If VPC believed these additional facts were material – and they clearly are not – the proper procedure would have been to include such additional facts in an additional statement of material facts. SOF ¶ 73 should be deemed admitted. *See also* Reply to SOF ¶¶ 71-72 regarding comparisons between 2016, 2018 and 2020.

Reply to SOF ¶ 74

As an initial matter, the testimony regarding what county election officials heard from voters about advance voting ballot applications is not inadmissible hearsay. *See* footnote 11. And VPC does not actually controvert SOF ¶ 74 other than to quibble with quantification issues.

Moreover, contrary to VPC's cherry-picked statement from Mr. Howell's deposition transcript, the affidavit testimony of Ms. Cox and Mr. Howell, as well as other Howell testimony, underscores that voters were confused by the pre-filled advance voting ballot application that they had received in the mail, that voters believed the applications had originated from the election offices, and that voters believed they had to return the applications in order to vote. See Ex. A at ¶ 41; Ex. U at ¶ 19.

As for Mr. Howell's deposition testimony, on the page following VPC's cherry-picked quote, Mr. Howell discusses voters contacting the election office about inaccuracies on pre-filled applications and mistakenly thinking that they were sent by the election office. He also clarified his statement: "I guess, to say it another way, inaccuracies are their own issue and duplicates sent multiple times also create a lot of voter confusion and concern." VPC Ex. 1 at 245:24-246:16. For these reasons, SOF ¶ 74 should be deemed admitted as VPC has not properly controverted it.

Reply to SOF ¶ 75

SOF ¶ 75 is relevant and material because it addresses the numbers of advance voting ballot applications and duplicates that the Ford County Election Office received in the 2020 General Election. As discussed repeatedly, pre-filled applications were one of the drivers of the duplicate applications that county election offices received.

Furthermore, VPC does not actually controvert SOF ¶ 75. Instead, it attempts to add its own facts, which should have been included in an additional statement of material facts, not as

part of an argument for "context." Regardless, SOF ¶ 75 does not, and was not intended to, address only pre-filled applications sent by VPC/CVI. And if the Court finds VPC's "context" relevant – which it is not – then Defendants note that Ms. Cox testified that her office did *not* pre-fill the applications it sent to voters and that she prefers that applications not be pre-filled due to potential inaccuracies. Ex. RR at 107:16-108:7, 115:24-116:5.

Finally, while VPC mentions that Ford County had "a lot more voters" voting by mail in 2020 than in 2016 or 2018, the number of advance mail ballot applications received in Ford County in connection with the 2020 General Election increased by approximately ***53,800%*** as compared to the 2016 and 2018 general elections. *See* Ex. U at ¶ 16, 18.

Reply to SOF ¶ 76

This statement is relevant and material because it addresses the numbers of duplicate advance voting ballot applications that the Ford County Election Office received in connection with the 2020 General Election. As discussed repeatedly, pre-filled applications were a major driver of the duplicate applications that election offices received.

VPC does not actually controvert SOF ¶ 76 but instead merely argues it is incomplete because it does not include irrelevant facts that Plaintiffs want included for context. Having not controverted anything in the statement, SOF ¶ 76 should be deemed admitted. And if the Court feels context is relevant, Defendants note that Ms. Cox testified that her office did *not* pre-fill the applications it sent to voters and that she prefers that applications not be pre-filled due to potential inaccuracies. Ex. RR at 107:16-108:7, 115:24-116:5.

Finally, while VPC mentions that Ford County had "a lot more voters" voting by mail in 2020 than in 2016 or 2018, the number of advance mail ballot applications received in Ford County

in connection with the 2020 General Election increased by approximately ***53,800%*** as compared to the 2016 and 2018 general elections. *See* Ex. U at ¶ 16, 18.

Reply to SOF ¶ 77

VPC does not actually controvert SOF ¶ 77, but simply raises a baseless foundation objection in an attempt to dispute that the majority of pre-filled applications came from VPC/CVI. Mr. Howell and Ms. Cox are permitted to testify based on their personal knowledge, belief, and observations as to the source of the majority of the duplicate applications received by their offices. Both testified that they could identify VPC/CVI pre-filled applications by specific markings. Ex. A at ¶ 14, 16 ("The overwhelming majority of the duplicate applications [the Shawnee County Election Office] received had been partially pre-filled by CVI[.]"; Ex. U at ¶ 15. They were thus able to identify which applications were prefilled by VPC/CVI, and they can testify that they observed the quantity of those applications were, relative to other pre-filled applications, a majority of the duplicates. Accordingly, SOF ¶ 77 should be deemed admitted.

Reply to SOF ¶ 78

The testimony regarding Mr. Caskey's conversations with county election officials is not inadmissible hearsay. *See* footnote 11. And VPC does not actually controvert SOF ¶ 78. VPC's suggestion that not all pre-filled applications came from VPC (or CVI) is irrelevant. VPC has asserted a facial and as applied challenge to the constitutionality of the Pre-Filled Application Prohibition. The statute prohibits anyone, not just VPC from pre-filling advance voting ballot applications. Whether the calls to which Mr. Caskey testifies specified VPC is not material. SOF ¶ 78 should be deemed admitted.

Reply to SOF ¶ 79

The statement is material and relevant to burdens on election officials. Furthermore, despite VPC's clarification, it does not actually controvert SOF ¶ 79 and its clarification is not material to summary judgment. VPC also cites no evidence to support any inference that other election officials do not process applications in the manner described.

Reply to SOF ¶ 80

This statement goes to the burdens of duplicate advance voting applications on election administration and is therefore relevant and material. Furthermore, despite VPC's clarification, it does not actually controvert SOF ¶ 80 and its clarification is not material to summary judgment. VPC also cites no evidence to support any inference that other election officials do not process applications in the manner described.

Reply to SOF ¶ 81

Nothing in VPC's response controverts anything in SOF ¶ 81. Instead, VPC injects legal argument about the processing of advance voting ballot applications that are not material. VPC also raises issues that SOF ¶ 81 does not address. And VPC incorrectly claims that SOF ¶ 81 does "not pertain" to VPC applications. While that is not relevant given the Pre-Filled Application Prohibition restricts *any* third-parties from pre-filling applications, Mr. Howell testified that the "overwhelming majority of the duplicate applications" that the Shawnee County Election Office received were the ones that had been partially pre-filled by VPC/CVI. Ex. A at ¶ 16. SOF ¶ 81 thus should be deemed admitted. *See also* Reply to SOF ¶¶ 71-72 regarding comparisons between 2016, 2018 and 2020.

Reply to SOF ¶ 82

SOF ¶ 82 addresses voter confusion and the burdens on election administrators caused by pre-filled applications. As such, it is relevant and material to summary judgment. It is also not inadmissible hearsay. *See* footnote 11.

VPC does not actually controvert this statement and admits that it accurately reflects the cited evidence. Instead, VPC merely argues that the statement "does not pertain" to VPC's applications. While this distinction is immaterial and is irrelevant to SOF ¶ 82, VPC also ignores that Mr. Howell testified that the "overwhelming majority" of pre-filled applications that the Shawnee County Election Office received came from VPC/CVI. Ex. A at ¶ 16.

Reply to SOF ¶ 83

This statement addresses voter confusion and burdens on election administration. It is therefore relevant and material to summary judgment. VPC does not actually controvert SOF ¶ 83, but instead includes other facts that it apparently would prefer to be included in SOF ¶ 83. This is improper. If VPC wants to include additional facts that it believes are material, they should have been added as part of its statement of additional material facts. Regardless, nothing in the facts that VPC adds as "context" for its response is material. SOF ¶ 83 merely addresses the voters who requested an advance ballot yet nevertheless voted in person on Election Day. Accordingly, SOF ¶ 83 should be deemed admitted. *See also* Reply to SOF ¶¶ 71-72 regarding comparisons between 2016, 2018 and 2020.

Reply to SOF ¶ 84

The statement goes to VPC's First Amendment claims, namely the purported message (or absence thereof) that voters receive from a pre-filled application as opposed to a blank application. It is relevant and material. And VPC has not actually controverted SOF ¶ 84 for numerous reasons.

First, VPC's cited evidence about a 2006 study is inadmissible hearsay and lacks a proper foundation. VPC did not designate an expert or submit competent and admissible evidence that pre-filled applications have higher rates of return than blank applications. Defendants explicitly requested during discovery any studies that VPC believed supported its belief that pre-filled advance voting ballot applications were more effective than blank applications. Ex. CC, #4, 15. Initially, VPC produced one "study" that does not even address pre-filled vs. blank applications. Ex. PP at 16:6-17:13. At his deposition, Mr. Lopach then identified a purported "study" conducted in 2006 by Dr. Mann with VPC's predecessor organization, Ex. PP at 17:15-20:13, and a second purported "study" by Dr. Green which, when finally disclosed, was merely an expert report in another case, dated March 21, 2022. Ex. PP at 27:3-27:18. Following the deposition, Defendants requested a copy of the 2006 study referenced by Mr. Lopach given that it was not previously produced. Ex. DD. In response, VPC produced a 111-page document, all but four pages of which were redacted. Ex. EE. The document stated that VPC's predecessor conducted a study in 2006 that "tested both the messages of its mailings and different combinations of mail and phone calls." Ex. EE at 92. The only unredacted portion of the alleged study's conclusion that was produced was a two-sentence statement stating that a "pre-populated form produces a higher response rate than a blank form." Ex. EE at 96. Defendants know nothing about how the study was conducted, the sample size, controls, or its reliability. In short, the study lacks any foundation, is inadmissible hearsay, and, without some expert witness to testify about it, VPC cannot rely on it.

Mr. Lopach also lacks the requisite personal knowledge to rely upon Dr. Mann's study. Indeed, Mr. Lopach testified that he did not know "the size of the sample or anything else" about the study. Ex. PP at 19:2-19:9. Mr. Lopach likewise testified that he is "not aware of any studies examining how the recipient of a vote-by-mail mailing that is pre-filled compared to one that is

not pre-filled [or] how the recipient reacts or responds to that mailing." Ex. PP at 27:19-28:13. To now imply that such studies exist in his Declaration amounts to a sham affidavit.

Citing to Mr. Lopach's deposition, VPC also claims that "Columbia University faculty" have allegedly evaluated and opined on this issue. But neither introduced this study into evidence nor designated an expert who could do so. In fact, when VPC provided this purported "study," months later, it turned out to be nothing more than an expert report by Dr. Green in another case, dated March 21, 2022. Ex. PP at 27:3-27:18. It is inadmissible hearsay and, given that it is dated after this lawsuit was commenced, VCP cannot possibly claim that the study served as a basis for sending pre-filled applications to voters in 2020 (or any time before then).

Because VPC has cited no admissible evidence to controvert SOF ¶ 84, it must be deemed admitted.

Reply to SOF ¶ 85

The statement goes to VPC's First Amendment claims, namely the purported message (or absence thereof) that voters receive from a pre-filled application as opposed to a blank application. It is relevant and material. And VPC has not actually controverted SOF ¶ 85. VPC does not, and could not, suggest that Mr. Lopach discerns a political message from a pre-filled advance voting ballot application. In any event, as detailed in the Argument section of this brief, any message that is contained in VPC's mailers comes from the cover letter, not the pre-filled application. And that is a legal issue.

Reply to SOF ¶ 86

This statement goes to VPC's freedom of association claim. It is relevant and material. VPC does not actually controvert SOF ¶ 86, but instead offers additional facts that supposedly add "context" to Mr. Lopach's testimony. But the "context" does not address the statement in SOF ¶

86, and Mr. Lopach's "belief" about VPC's "strongest encouragement" is irrelevant. Indeed, Mr. Lopach's theory that pre-filling an application is a "message" is nothing more than an inadmissible legal conclusion. SOF ¶ 86 should be deemed admitted.

Reply to SOF ¶ 87

This statement goes to VPC's First Amendment speech claims. It is relevant and material. VPC does not actually controvert SOF ¶ 86. Instead, it attempts to insert additional facts that it claims add "context." But these additional facts do not address the statement in SOF ¶ 86. VPC cites to a portion of Mr. Lopach's deposition that is both irrelevant and inadmissible. It is irrelevant because the excerpted testimony addresses what the Pre-Filled Application Prohibition permits and does not permit. Mr. Lopach's belief as to successful methods of voter encouragement does not address SOF ¶ 86.

The statement is also inadmissible because Mr. Lopach lacks any foundation from which to make the statement that VPC cites from his deposition. The only basis for Mr. Lopach's theory as to successful methods of voter encouragement derive from inadmissible studies (*see* SOF ¶ 84 above) to which he could not testify when asked about in his deposition. Indeed, with respect to the "study" he primarily cited to, he admitted he did not know the "size of the sample or anything else" about the study. Ex. PP at 19:2-19:9. Moreover, whether pre-filling an application conveys a message separate and apart from the cover letter is an inadmissible legal conclusion.

B. Reply to VPC's Statement of Additional Uncontroverted Facts

1. Plaintiff VPC's core mission is to promote voting among traditionally underserved groups, including young voters, voters of color, and unmarried women at rates commensurate with voters in other groups. See Stipulated Facts at § 2(a)(viii); Johnson Decl., Ex. 7 (Deposition of Lionel Dripps (Aug. 30, 2022) ("Dripps Tr.")) 111:25-112:9; *id.* at Ex. 6, (Lopach Tr.) 153:12-16,

96:14-17, 204:3-6; *id.* at Ex. 8 (September 8, 2021 Hearing on Plaintiffs' Motion for Preliminary Injunction ("9/8/2021 PI Tr.")) 50:9-20 (Thomas Lopach testimony); Lopach Decl. ¶ 7-11, 28.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted that Mr. Lopach states that this is VPC's belief in ¶ 8 of his Declaration. However, it is immaterial because the Pre-Filled Application Prohibition does not prohibit anything stated in SOAF ¶ 2.

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.

RESPONSE: Controverted in part, but immaterial. The cited evidence merely refers to VPC's "belie[f] and support[]" that mail voting "expands participation opportunities[.]" The cited evidence also does not refer to individuals who do not "know how to navigate the mail voting application process." Regardless, SOAF ¶ 3 is immaterial. The Pre-Filled Application Prohibition does not restrict anyone from voting by mail, advocating for mail voting, or instructing on how to vote-by-mail. Ex. G at 184:4-185:7. The challenged provision only prohibits third-parties from pre-filling advance voting ballot applications. *Id.*

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

RESPONSE: Uncontroverted but immaterial. The only issue in this case is whether pre-filling an advance voting ballot application constitutes speech or expressive conduct and communicates a message that is constitutionally protected. Whether pre-filling an official government form with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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

6. RESPONSE: Uncontroverted but immaterial. Mr. Lopach's Declaration does make this statement. However, whether pre-filling a government form with someone else's information to request an advance ballot via mail constitutes speech or expressive conduct is a legal question, not a fact. It is also immaterial and irrelevant because Mr. Lopach testified that, other than the restriction regarding the insertion of 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.

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

RESPONSE: It is uncontroverted that VPC sends mailers to Kansas voters that include information advocating for mail voting and that at least some of those mailers include a pre-filled advance voting ballot application. However, whether pre-filling an official State

form with someone else's information to request an advance ballot via mail constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: Controverted to the extent that SOAF ¶ 7 means that (i) VPC (and the vendors with which it contracts) only uses official State voter registration data in pre-filling the advance voting applications or (ii) all of the applications VPC sends to voters are pre-filled only with "the voter's information as it appears in the state records." VPC Executive V.P. Lionel Dripps specifically testified that VPC does *not* pre-populate advance voting ballot applications simply with information drawn from the State voter file. Ex. F at 171:24-172:17. Rather, VPC's vendor supplements the State file with commercially available data. Ex. F at 173:13-174:1. Moreover, the commercial data used to "supplement" the information from the State voter file included faulty data. *Id.* Thus, the pre-filled applications VPC sent to voters in connection with the 2020 General Election often did *not* match "the voter's information as it appears in the state records." Because VPC, in pre-filling applications for use in the 2020 General Election, also used voter data that its vendor had obtained from the State *at least* 4-6 months before those applications were mailed to voters, the information on the pre-filled application often had changed and did not match the data by the time VPC sent its mailer to the voter. Ex. M at ¶¶ 34-35.

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.

RESPONSE: Uncontroverted but immaterial.

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

RESPONSE: Uncontroverted.

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.

RESPONSE: Uncontroverted.

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).

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

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. Id. at ¶ 52; Johnson Decl., Ex. 6 (Lopach Tr.) 30:3-10.

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

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.

RESPONSE: Uncontroverted but immaterial. The only issue in this case is whether pre-filling an advance voting ballot application constitutes speech or expressive conduct and communicates a message that is constitutionally protected.

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; *id.* at Ex. 5 (Dripps Tr.) 192:5-13; *id.* at 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.

RESPONSE: Uncontroverted that this is VPC's "belief," but VPC's subjective beliefs are immaterial in establishing this assertion as fact. VPC conceded that it does not know if voters receive any message from a pre-filled advanced ballot application. Ex. PP at 98:17-100:10; 151:18-152:2. Indeed, Mr. Lopach testified that he could not "speak to how an individual or group of people would respond to pre-filled vote-by-mail application versus a blank vote-by-mail application outside of the study we did in 2006 or other studies presented by academics or practitioners who have done similar work." (None of which were produced in this case). Ex. PP at 99:2-99:7. Mr. Lopach lacks the personal knowledge to support his claim that a pre-filled application "conveys" VPC's viewpoint to a voter. Whether pre-filling an official State form with someone else's information to request an advance ballot via mail constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: Controverted. First, VPC's belief is directly at odds with Mr. Lopach's testimony that immediately follows the pages cited by VPC. Mr. Lopach agreed that nothing "in the prohibition against partially-completed advance ballot applications [] prohibits VPC from associating, sending its mailers, to any individual Kansas voter[.]" VPC Ex. 6 at 169:2-8. Second, VPC has no admissible evidence on which to base its "belie[f] that personalizing its applications increases voter engagement, which in turn, [allegedly] allows VPC to build a broad associational base with potential voters in Kansas." *See* Reply to SOF ¶ 84, *supra*.

Third, Mr. Lopach has not been designated as an expert in the area of "increase[ing] voter engagement" or analyzing any effect that pre-filling a mail ballot application has on

building "an associational base," whatever that is intended to mean. While he may be able to broadly state what VPC's *subjective* belief is in Paragraph 21 of his Declaration, which is immaterial to summary judgment and the resolution of this case, there is no admissible evidence to support the basis for such a belief. Indeed, Mr. Lopach admitted that the Pre-Filled Application Prohibition does not prevent VPC from associating with anyone. VPC Ex. 6 at 169:2-8.

The remaining cited paragraphs of Mr. Lopach's affidavit are immaterial, do not support SOAF ¶ 15, or are contrary to the sworn testimony. Paragraph 22 of Mr. Lopach's Declaration states that VPC includes a scannable barcode to track which voters returned the pre-paid envelope, which is undisputed by Defendants, but then makes numerous immaterial claims about what VPC believes the barcode on its envelopes may reveal about voters. Any message in VPC's mailers is conveyed through the cover letter, however, not the pre-filled application. The Pre-Filled Application Prohibition imposes no restriction on what messages VPC can communicate. Thus, to the extent VPC tests which messages in its mailers are more effective than others, that fact is entirely irrelevant to this lawsuit. Moreover, Mr. Lopach testified that VPC has not "done any testing to see whether or not the recipients of those ballot applications discern a different message from a partially-filled-out ballot application versus a blank advance ballot application." VPC Ex. 6 at 20:21-21:2.

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 is 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; Lopach Decl. ¶¶ 10, 21, 23, 24.

RESPONSE: Controverted. While VPC may "consider" the pre-filling of advance voting ballot applications as "key" to the effectiveness of its message, there is no competent evidence in the record to support VPC's assertion that sending an unsolicited, *pre-filled* application is more effective at advocating its message than sending a blank application. VPC did not designate any expert or submit competent and admissible evidence that pre-filled applications have higher rates of return than blank applications. For the reasons stated in Reply to SOF ¶ 84 and Response to SOAF ¶ 15, the cited evidence is inadmissible.

Furthermore, nothing in the Pre-Filled Application Prohibition prevents VPC from performing the actions identified in Paragraphs 10, 21, or 23 of Mr. Lopach's Declaration, with the exception of pre-filling the application. Nor does the challenged provision prevent VPC from providing blank applications and communicating any message it wants to voters. In any event, whether pre-filling an official state form / application with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: Controverted but immaterial. It is uncontroverted that the pre-filled applications VPC provides to voters often contain certain information required in order to obtain an advance ballot. However, it is controverted, as Mr. Lopach suggests in ¶ 18 of his Declaration, that pre-filling applications "best ensures" their accuracy. VPC V.P. Lionel Dripps testified that VPC does *not* solely use information from the Kansas voter file to pre-fill applications; rather, its vendor (Catalist) merges commercially available data with information from the State's voter file. Ex. F at 173:14-174:1. Additionally, election officials in Kansas and VPC officials testified that VPC (and/or CVI) has pre-filled applications with

information that does not match the State's voter file (meaning it is not information required from the voter file), and Mr. Dripps testified that these inaccuracies caused VPC to briefly stop mailing pre-filled applications. Ex. A, ¶¶ 11-12, 35, 38; F at 171:2-11; Ex. QQ at 256:22-257:5, 269:2-13; Ex. U, ¶¶ 30-34, 36. That is why some Kansas election officials prefer that voters fill out their own information because the voter has access to the most accurate information. Ex. A, ¶ 13. In any event, whether pre-filling an official state form / application with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: Uncontroverted but immaterial. However, this statement conflicts with Mr. Lopach's 30(b)(6) testimony regarding 2020 responses. Ex. G at 124:16-124:20 (claiming that VPC "had 112,000 respondents send 127,336 responses").

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; *id.* at Ex. 6 (Lopach Tr.) 14:15-20:13, 116:17-117:12, 154:25-157:15, 165:1-166:9, 170:7-174:9.

RESPONSE: It is uncontroverted that VPC "uses data to identify its target voters" and "tracks recipient responses to its communications" to the extent it is claiming that it tracks when the recipients of its mailings use its pre-paid, pre-addressed envelopes to send advance voting ballot applications to county election offices. But Defendants controvert that VPC knows whether a voter perceives any purported message from a pre-filled advance

voting ballot application. *See* Response to SOAF ¶ 15 above. In any event, whether pre-filling an official state form / application with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: Controverted. VPC is improperly trying to admit expert testimony, apparently by Christopher B. Mann, via lay witness Lopach, to support its claim. VPC did not designate or disclose any expert (i) "in voting behavior and quantitative research" or (ii) who could address the issue of whether "personalizing applications is effective at conveying the organization's pro-advance mail voting message." *See* Response SOAF ¶ 15. Moreover, any studies that VPC officials may have relied upon to assess the efficacy of its program are inadmissible hearsay. In any event, whether pre-filling an official state form / application with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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.

RESPONSE: It is uncontroverted that Mr. Lopach claimed a "study" was conducted by this organization in 2006. Everything beyond that is controverted. VPC is impermissibly

attempting to introduce expert testimony evidence and a study without a qualified expert. None of these studies are admissible. *See* Reply to SOF ¶ 84 and Response to SOAF ¶ 15.

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.

RESPONSE: Controverted. While Mr. Lopach may have stated these words, he lacks the qualification or foundation to testify about the 2006 study. He is not designated as expert and his description of what a study purportedly found is inadmissible hearsay. *See* Reply to SOF ¶ 84 and Response to SOAF ¶ 15.

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.

RESPONSE: Controverted. VPC has not produced this alleged "study" and cannot now introduce it into evidence at summary judgment. *See* Reply to SOF ¶ 84 and Response to SOAF ¶ 15. In fact, VPC's Ex. 17, which it labels "excerpts," contains only three of the four partially un-redacted pages, omitting the rest of what was produced to Defendants. *Compare* Ex. DD *with* VPC Ex. 17.

24. The Personalized Application Prohibition bans any person who solicits by mail a registered voter to file an advance mail ballot application and includes an application for an advance voting ballot in such 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))

RESPONSE: VPC misquotes both the parties' Stipulation and the relevant statute. PTO-SF ¶ xxiii, which partially K.S.A. § 25-1122(k)(2), states:

> **Section 3(k)(2) of HB 2332 (codified at K.S.A. 25-1122(k)(2)) states that "The application for an advance voting ballot included in [a mail solicitation to a registered voter to file an advance voting ballot application] shall be the official application for advance ballot by mail provided by the secretary of state. No portion of such application shall be completed prior to mailing such application to the registered voter." This statute will be referred to as the "Personalized Application Prohibition."**

To the extent more is required, it is uncontroverted that the challenged provision does not permit a person, who solicits by mail a registered voter to submit an application for an advance mail ballot, to pre-fill any portion of the advance voting ballot application included in such mailing, which would include the voter's name and address.

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)).

RESPONSE: Uncontroverted but immaterial.

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.*

RESPONSE: Uncontroverted but immaterial. However, this statement represents a legal conclusion, not a fact.

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.*

RESPONSE: Uncontroverted but immaterial.

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

RESPONSE: Uncontroverted but immaterial.

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).

RESPONSE: Whether the Pre-Filled Application Prohibition contains a "scienter requirement" is a legal (statutory construction) argument being made in a statement of facts. It is inappropriate for inclusion in the statement of facts.

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 pre-filled 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; Id. at Ex. 15 (PI Hearing Tr.) 44:24-45:7, 49:17-24, 60:11-20 (Thomas Lopach testimony).

RESPONSE: Controverted. While VPC may believe that pre-filling the advance voting ballot applications it sends to voters is the most effective means of conveying whatever message it wants to convey in its mailers, there is no competent evidence in the record to support it. *See* Response to SOAF ¶ 15. Moreover, whether pre-filling an official state form / application with someone else's information constitutes speech or expressive conduct is a legal question, not a fact.

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

RESPONSE: Controverted. This statement is directly contrary to the testimony of Mr. Lopach and is not supported by the citation. First, the citation VPC uses confirms that

it is Mr. Lopach's belief that the Pre-Filled Application Prohibition "limits the success of our engagement with voters but it does not prohibit us from engaging." VPC Ex. 6 at 190:10-12. This vague statement is referring to Mr. Lopach's opinion as to the return rates pre-filled versus blank applications. Ex. PP 189:18-190:21. As discussed previously, however, VPC has no admissible evidence to support that theory. *See* Reply to SOF ¶ 84 and Response to SOAF ¶ 15. Second, almost immediately after the citation provided by VPC, Mr. Lopach confirms that "there is nothing in the personalized application prohibition that keeps [VPC] from associating with other persons or organizations to encourage the use of advanced mail voting[.]" Ex. G at 191:4-14.

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.

RESPONSE: Uncontroverted.

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.

RESPONSE: It is uncontroverted that Mr. Dripps did not know whether the national error rate was the same in Kansas as it was nationally. Thus, Mr. Dripps's testimony does not establish whether the Kansas error rate was higher or lower than the national error rate. However, Mr. Dripps did testify that VPC "had enough concern about the level of recipients of partially completed advance ballot applications and there being incorrect information either in the form of prefixes, suffixes, or middle initials" that VPC "sent out non-partially completed applications" in two waves. Ex. F at 171:2-11.

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.

RESPONSE: Controverted in part. This statement lacks context. As an initial matter, as reflected in SOF ¶ 40, VPC produced only a subset of the Kansas voters to whom it mailed advance voting ballot applications in the 2020 General Election. Specifically, VPC produced a list containing only 312,918 of the approximately 507,864 total Kansas voters to whom it sent applications. *See* Ex. L. Mr. Block, therefore, only had a partial list of the individuals to whom VPC sent applications with which to conduct his analysis. Had Mr. Block been provided the full list of voters, the number of errors may have been much greater.

Furthermore, even using the 3% figure referenced by Dr. Hersh, that would equate to 15,235 [0.03 x 507,864] erroneous applications. That is a substantial number of erroneous applications for county election officials to have to deal with. Dr. Hersh testified that such errors are unavoidable and that VPC simply made a cost-benefit calculation and determined that ensuring that only the latest data was used in pre-filling applications to voters was not worth the cost. *See* Ex. MM at 147:20-148:18.

Finally, Dr. Hersh's testimony does not address the significant error rates on pre-filled applications that VPC itself (via Mr. Dripps) acknowledged. *See* SOF ¶ 38.

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.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted but immaterial. Mr. Block was retained as an expert to analyze VPC's data and the accuracy (or inaccuracy) of that data as compared to the Kansas state voter file. He was not retained to analyze the specific impact of VPC's activities on election administration in the State.

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.").

RESPONSE: Controverted. First, VPC's citation proves that this statement is not accurate. Mr. Howell testified that he did not "think the pre-filled information, *in and of itself,* was what *all* of the concern was." (emphasis added). Second, VPC ignores other

portions of Mr. Howell's deposition testimony where he confirms that voters were confused by pre-filled applications, particularly when they contained inaccurate information. Ex. QQ at 117:24-125:2; 255:21-257:5; Ex. A at ¶¶ 35-42. Other election officials also discussed confusion and frustration due to pre-filled applications. Ex. RR at 130:6-132:5; Ex. U at ¶ 37; Ex. HH at 150:13-152:15, 212:20-213:4, 237:11-245:20.

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.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted but immaterial. Defendants emphasize, however, that Ms. Schmidt was discussing a missing middle initial, not an incorrect middle initial.

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.

RESPONSE: Uncontroverted but immaterial.

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.

RESPONSE: Uncontroverted but immaterial. But VPC omits critical context. While VPC mentions that Ford County had "a lot more voters" voting by mail in 2020 than in 2016 or 2018, the number of advance mail ballot applications received in Ford County in connection with the 2020 General Election increased by approximately *53,800%* as compared to the 2016 and 2018 General Elections. *See* Ex. U at ¶ 16, 18.

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.

RESPONSE: Uncontroverted, but VPC omits important context. Indeed, Ms. Cox also testified that she mailed advance voting ballot applications to all registered voters before the 2018 General Election and that she intentionally did not, and does not, pre-fill any of those applications. VPC Ex. 16 at 102:12-13; Ex. RR at 115:24-116:5.

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.

RESPONSE: Uncontroverted and immaterial.

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.

RESPONSE: Uncontroverted but immaterial. Moreover, post-election audits do not address possible voter fraud resulting from pre-filled advance voting ballot applications. A post-election audit merely verifies that "every ballot that was cast was accounted for and counted properly either by hand or by machine." Ex. HH at 283:14-283:21; Ex. RR at

105:19-106:9 (explaining that a post-election audit occurs by hand-counting the votes cast in 1% of the precincts and verifying that number matches the machine count); Ex. QQ at 40:24-41:15 (explaining that the audit occurs by verifying that a hand count of the votes match what was reported on election night and covers a minimal number of precincts). Fraud in applying for, obtaining, and casting a mail ballot would not be revealed by a post-election audit.

III. – ARGUMENT

I. Pre-Filling an Advance Voting Ballot Application is *Conduct*, Not *Speech*

VPC's opposition brief adamantly insists that VPC engages in core political speech when pre-filling the advance voting ballot applications which it sends to individuals along with the other materials in its get-out-the-vote mailings. Br. at 84-89. VPC glibly dismisses the recent decision in the Northern District of Georgia that rejected the identical claims asserted here against a virtually identical statute, *VoteAmerica v. Raffensperger*, No. 1:21-cv-1390, 2022 WL 2357395 (N.D. Ga. June 30, 2022), characterizing the case as "wrongly decided" and inconsistent with this Court's preliminary injunction ruling. Br. at 93. Reiterating this Court's prior ruling, the legal standard in which Defendants respectfully submit was mistaken with respect to the Pre-Filled Application Prohibition,[1] VPC maintains that its pre-population of third-parties' applications is "intertwined with [its] overall communication" and that pre-filling the applications "is itself [VPC's] added speech." Br. at 84. This contention does not stand up to scrutiny.

As it has done at every phase of the case, VPC cites *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.* 525 U.S. 182 (1999), as if those two cases were some sort of oracle for the key issues in this dispute. But those cases in no way support

[1] The Court's findings of facts and conclusions of law from the preliminary injunction hearing are not binding in subsequent phases of the case. *Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981).

the notion that pre-filling an unsolicited advance voting ballot application amounts to expressive conduct.

Meyer and *Buckley* involved statutes restricting who could participate in referendums and initiative-petitions. The Supreme Court struck down, as violative of the First Amendment, requirements that circulators could not be paid, had to identify themselves, and had to report their compensation. *Meyer*, 486 U.S. at 420-23; *Buckley*, 525 U.S. at 192. Those decisions (and follow-on cases like *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008)) made total sense because the *petitions themselves* communicate a message of legal change and thus represent the protected speech of the circulators.[2] *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 390 (5th Cir. 2013). Indeed, "the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign." *Id.* (citing *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 898 n.13 (5th Cir. 2012)). The interactions are almost always direct, in-person, one-on-one conversations as well. The restrictions on those activities, therefore, had the effect of limiting the ability of the circulators (and their sponsoring organizations) from disseminating their message.

By contrast, the Pre-Filled Application Prohibition at issue here does not prevent or limit any message from being conveyed. SOF ¶ 87. Moreover, the advance voting ballot application that VPC mails to voters is nothing more than an official state form that communicates no message (save, perhaps, the applicant's own message to election officials to send the applicant an advance ballot following submission). Only the voter can choose to speak (or not) by returning (or not returning) the application. In other words, to the extent there is any speech at all – and there is

[2] The same would be true of restrictions on candidate petitions to gain access to the ballot. *See, e.g.*, *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000); *Lerman v. Bd. of Elections*, 232 F.3d 135, 146 (2d Cir. 2000).

none – it would be the *applicant's* speech, not the party pre-filling the application on the applicant's behalf.

VPC's argument that the Pre-Filled Application Prohibition "directly dictates the content" of its "communications and eliminates VPC's core means of expressing its message through its activity" (Br. at 95) borders on the absurd. There is no question that the letter in VPC's mailers to targeted voters conveys a message that voting by mail is safe, secure, accessible, and beneficial. But that message comes from the *cover letter*, not the pre-filled application. The act of pre-filling the application is wholly distinct from the message that VPC communicates to voters about the vote-by-mail process and the benefits thereof in the cover letter.[3] The cover letter and the message contained therein are not affected at all by the Pre-Filled Application Prohibition. Pre-filling the application merely embodies *conduct*, not expression.

VPC responds to this point by contending that "the distribution of personalized applications is 'characteristically intertwined' with [its] pro-mail-voting communication." Br. at 85 (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). VPC has misread that case. In *Schaumburg*, a municipal ordinance prohibited charities from soliciting donations if they did not use at least 75% of their donations directly for charitable purposes. *Id.* at 622. The Court noted that "[s]oliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632. The Court

[3] It is nonsensical to argue that a registered voter who receives VPC's mailing and a blank advance voting ballot application would not understand VPC's intended message if the voter's name was not already pre-filled on the application. The name "John Smith" on an application conveys no additional message.

then held that the 75% limit was a direct and substantial limitation on constitutionally protected activity under the First Amendment because it effectively *barred* the fundraising operations of many charitable organizations. *Id.* at 635. More specifically, the Court observed:

> [There are] organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who 'necessarily combine' the solicitation of financial support with the 'functions of information dissemination, discussion, and advocacy of public issues.' These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.

Id. (internal citations omitted).

Here, in contrast to *Schaumburg*, there is nothing inextricably linked or "characteristically intertwined" between the message communicated in VPC's cover letter and the pre-filled (versus blank) application that is included, along with a pre-addressed envelope, in the mailed package. Each can exist and be sent without the other. *See VoteAmerica*, 2022 WL 2357395, at *8 (rejecting argument that pre-filling an absentee ballot application represented expressive conduct on the basis of *Schaumburg*); *Am. Ass'n of People With Disabilities v. Herrera*, 580 F. Supp.2d 1195, 1228 (D.N.M. 2008) (rejecting same argument in the context of voter registration applications); *Am. Ass'n of People With Disabilities v. Herrera*, 690 F. Supp.2d 1183, 1213 (D.N.M. 2010) (same). The Pre-Filled Application Prohibition does not in any way restrict VPC from communicating its pro-mail-in voting message, explaining the process for obtaining an advance ballot, or even including an advance voting ballot application in its mailer. The only thing the statute does is

prohibit VPC from pre-filling the application in the absence of a request by the voter. *Schaumburg* thus provides no support for VPC's "intertwined" theory.[4]

VPC likewise gains no traction from *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). VPC cites this case for the proposition that the pre-filled applications in its mailers cannot be disaggregated from the cover letter. Br. at 85-86. Like *Schaumburg*, *Riley* dealt with a restriction on how much professional fundraisers could charge as a percentage of the gross revenue they solicited on behalf of charitable organizations. *Riley*, 487 U.S. at 784-85. The statute at issue also required the fundraiser to disclose, *inter alia*, the average percentage of gross receipts that it turned over to the charity during the preceding year. *Id.* at 786. The Court invalidated the disclosure obligation on First Amendment grounds, concluding that it mandated speech that the speaker would not otherwise make. *Id.* at 795. The Court then declined the State's invitation to characterize the disclosure rules as commercial speech, which would be evaluated under a more lax standard, reasoning, "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* at 796. But for the same reasons described above with *Schaumburg*, there is no parallel between the impediments in *Riley* and the Pre-Filled Application Prohibition in the case at bar. Under no reasonable construction of Kansas' law can it be said that restricting a party's

[4] VPC argues that, because it tells voters in its cover letter that it has pre-filled the advance voting ballot application included in their mailer, protected speech somehow flows therefrom. Br. at 85 n.13. Not so. The Supreme Court has held that where the expressive component of an individual's "actions is not created by the conduct itself but by the speech that accompanies it," that "explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *Rumsfeld v. F. for Acad. & Institutional Rts, Inc.*, 547 U.S. 47, 66 (2006) ("FAIR"). Were the rule otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

ability to pre-fill *another person's* advance voting ballot application impedes that party from communicating any message to the targeted voter.

For similar reasons, VPC's reliance on *League of Women Voters v. Hargett*, 400 F. Supp.3d 706 (M.D. Tenn. 2019), Br. at 86, also falls flat. As an initial matter, that case revolved around voter registration activities, which – as Defendants explained in their original motion, Dkt. 151 at 36-37 – are fundamentally different than absentee ballot applications. In addition, the "slicing and dicing" language that VPC quotes from that opinion is from the *dissent* in *Steen*. *Id.* at 720 (quoting *Steen*, 732 F.3d at 401). The *Steen majority*, on the other hand, properly found, consistent with Supreme Court precedent, that an apparently limitless variety of conduct cannot be labeled "speech" any time a person engaging in such conduct intends thereby to express an idea. *Id.* at 388-390.[5]

In fact, if VPC were correct that its unsolicited mailing of pre-filled advance voting ballot applications to voters was expressive conduct just because it was part of its overall message to voters about the virtues of mail voting, then no election regulation would be safe. Individuals would presumably have a First Amendment right to enter polling booths to urge voters to cast their ballot in a particular way. Or fill out the voter's advance ballot on his/her behalf. And any restrictions on handling completed advance ballots would likely be verboten. The First Amendment simply does not have the reach that VPC claims.

[5] VPC's (and this Court's) attempt to distinguish *Lichtenstein v. Hargett*, 489 F. Supp.3d 742 (M.D. Tenn. 2020), dissolves upon closer examination. In its preliminary injunction ruling, this Court suggested that *Lichtenstein* was not relevant to this case because, unlike in *Lichtenstein*, VPC's application packets include speech that communicates a pro-mail voting message. *VoteAmerica v. Schwab*, 576 F. Supp.3d 862, 875 (D. Kan. 2021). But the *Lichtenstein* court subsequently made clear in its order dismissing the case that the plaintiffs there, just like VPC here, sent voters a whole packet of "voter engagement materials" along with a blank absentee ballot application. *Lichtenstein v. Hargett*, __ F. Supp.3d __, 2021 WL 5826246, at *6 (M.D. Tenn. Dec. 7, 2021).

VPC next argues that its pre-filling of advance voting ballot applications is written speech because the pre-filling represents "words chosen by VPC – specific names from the voter rolls and the associated addresses – written on a page." Br. at 86. This theory would push the scope of the First Amendment far beyond the jurisprudence in this area. The notion that VPC's insertion of a voter's name and address (drawn from the State voter file) on an official state form, in the blank spaces where the voter's name and address are to be written, is "protected speech" is indefensible. While VPC contends that its pre-filling of an advance voting ballot application "amounts to the creation and dissemination of information" and thus enjoys constitutional sanctuary, Br. at 86, the information is nothing more than a voter's biographical information. It makes no sense to argue that VPC can cloak itself in First Amendment protection merely by sharing a voter's name and address with *that particular voter*.

VPC seeks haven in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), but that case offers no refuge. *Sorrell* addressed whether data miners and pharmaceutical manufacturers had a right to access pharmacy records that reveal the prescribing practices of individual doctors. *Id.* at 557. The data was off limits due to State privacy laws, and the manufacturers wanted to use it for their business purposes. That is nothing at all like this case. Here, the data that VPC uses to pre-fill the applications it sends to voters is freely available to VPC (and everyone else). In fact, VPC uses that data to prepare both the cover letters – which fully include its message about the importance and ease of voting by mail – and the pre-addressed, pre-paid envelopes that it sends to voters. But there is no independent message created by printing the voter's name on the state form. To suggest, as VPC does, Br. at 88, that the State's official advance voting ballot application form allows for any type of discretionary messaging because it can be filled out with different voters' names is

beyond the pale. Under that logic, every piece of written text – no matter the context – is protected speech. That is a triumph of form over substance and is completely unreasonable.

VPC relatedly argues that pre-filling advanced voting ballot applications is also expressive conduct. Br. at 88-90. As Defendants have explained repeatedly, any message communicated to voters comes from the *cover letter* that VPC includes in its mailings. There is nothing inherently expressive about the pre-filled application. And the Supreme Court's decision in *FAIR* forecloses VPC's premise. The Court there held that, where the expressive component of an individual's "actions is not created by the conduct itself but by the speech that accompanies it," that "explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *FAIR*, 547 U.S. at 66. A ruling to the contrary would mean that "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

VPC responds in part by contending that a speaker need not isolate a particular message apart from other types of expression in order for conduct to be expressive. Br. at 89. As long as a voter discerns *some sort of message*, VPC contends, expressive conduct is present. Although not a model of clarity, this argument contradicts *Texas v. Johnson*, 491 U.S. 397 (1989), which held that, "in deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Court asks "whether an intent to convey *a particularized message* was present, and whether the likelihood was great that *the message* would be understood by those who viewed it." *Id.* at 404 (emphasis added) (citation and internal alterations omitted).[6]

[6] In support of its "some sort of message" argument, VPC also cites *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022), a wholly irrelevant case in which internet and social media platform trade associations challenged a Florida statute restricting the ability of those platforms to control the content that is disseminated on their platforms. The Eleventh Circuit, citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), held that a "private entity's decisions about whether, and to what extent, and in what manner[,] to disseminate third-party-created content to the

VPC also ignores the fact that its CEO, Mr. Lopach, expressly testified that he (and thus VPC, since he was its Rule 30(b)(6) witness) did not know if the recipient of a pre-filled application views a political message from whether or not the recipient's name is filled out on the application. SOF ¶ 85. He further testified that he could not speak to how an individual would respond to a pre-filled application versus a blank application. SOF ¶ 84. That VPC spent additional money to pre-fill applications with voters' names and addresses, a fact to which VPC attaches significance, Br. at 90, is immaterial regarding the existence of a message (or absence thereof) in the pre-filling of the application. In short, there is no competent or admissible evidence in the record about the effectiveness of the pre-filled applications, but even if there was, that would not move the needle in terms of discerning an *independent message* from the pre-populated application. The message is exclusively found in the accompanying cover letter.

II. The Case Law Does Not Support VPC's Legal Position

VPC's description of the allegedly "binding and persuasive" precedent supporting their position is both inaccurate and misleading. Br. at 91-94. VPC dismisses out-of-hand the one *on-point* case in which the Court rejected the identical arguments asserted here in a challenge to an identical statutes. Br. at 93 (citing *VoteAmerica*, 2022 WL 2357395, at *7-10). VPC simply characterizes the decision as "wrongly decided" and inconsistent with this Court's equally non-binding preliminary injunction ruling.

Another opinion that VPC cites (Br. at 92) – *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020) – was subsequently reversed by the district court, which determined that the

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public are editorial judgments protected by the First Amendment." *NetChoice*, 34 F.4th at 1212. The Fifth Circuit reached a contrary result. *See NetChoice, LLC v. Paxton*, 49 F.3d 439 (5th Cir. 2022). Regardless, the Tenth Circuit has explicitly held, relying on *FAIR* and *Johnson*, that conduct falls within the safeguards of the First Amendment only if the speaker intended to convey a particularized message, the target of that message was likely to understand the particularized message, and the conduct was inherently expressive. *Meyers v. E. Okla. Cnty. Tech. Ctr.*, 776 F.3d 1201, 1207-08 (10th Cir. 2015).

legal analysis in the initial opinion was mistaken and that Michigan's restrictions on non-family/household members from soliciting or offering to help a voter return an absentee ballot application did *not* amount to expressive conduct under the First Amendment. *Priorities USA v. Nessel*, __ F. Supp.3d __, No. 2:19-cv-13341, 2022 WL 4272299, at *5 (E.D. Mich. Sept. 15, 2022). Ironically, now that the district court vacated the expressive conduct holding that VPC had found so critical, VPC partially retreats from the decision and suggests in a footnote that it was not so important after all. Br. at 92 n.16.[7]

As for the other cases VPC references, none come close to dictating (or even supporting) a holding in VPC's favor. Defendants discussed and distinguished, *supra*, the *League of Women Voters* and *American Association of People With Disabilities* cases. Neither opinion provides a foundation for VPC's farfetched legal theories. Defendants also explained in detail in their own motion for summary judgment and in response to VPC's motion for summary judgment why the other district court cases that VPC again references (and that the Court relied upon in issuing a preliminary injunction) have little to no relevance to the Pre-Filled Application Prohibition. Dkt. 151 at 27-31; Dkt. 155 at 52-55.

Defendants are at a loss as to why VPC thinks that *Steen* is helpful to it. Br. at 93. The voter registration activities that the State of Texas conceded involved speech all involved *in-person interactions* between voters and the voluntary deputy registrars who were empowered to receive and deliver voters' completed voter registration applications. *See Steen*, 732 F.3d at 385, 389. To

[7] VPC oddly attaches significance to a line in the latest *Nessel* opinion in which the court noted that "Plaintiffs may provide potential absentee voters with blank applications" and that "such conduct be a 'vehicle' to discuss the 'importance of voting, as well as the merits of candidates and ballot measures.'" *Nessel*, 2022 WL 4272299, at *5 (citation omitted). But in the case at bar, Kansas does not prohibit VPC from providing voters with blank advance voting ballot applications. And there is no conceivable way to read the *Nessel* opinion as suggesting that *pre-filling* an absentee ballot application is independent speech or expressive conduct.

the extent a party undertakes the same type of activities (to which Texas offered its concession) in the context of absentee ballot applications, Defendants would make a similar acknowledgment. None of those activities are precluded, however, by Kansas' Pre-Filled Application Prohibition.

The irrelevancy of VPC's case law support is particularly true of the petition circulator cases it cites. Br. at 92 (citing *Meyer*, 486 U.S. at 422-23; *Buckley*, 525 U.S. at 186; *Yes on Term Limits*, 550 F.3d at 1028; *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002)). Defendants have repeatedly explained in this litigation, why the cases involving restrictions on initiative-petition circulators are a world apart from the legal issues at play here with advance voting ballot applications. The most recent *Nessel* case that VPC now largely seeks to disavow is just the latest court to reach this same conclusion. *Nessel*, 2022 WL 4272299, at *5-6.

Surrendering not a single inch, VPC, again citing *Meyer*, avers that it has a right to select the most effective means for communicating its message and that pre-filling advance voting ballot applications is necessary to that success. Br. at 95. But *Meyer* simply has no applicability here. Further, as Defendants highlighted in their response to VPC's summary judgment motion, Dkt. 155 (Response to VPC's SOF ¶ 24), there is no competent evidence in the record to support VPC's assertion that sending an unsolicited, *pre-filled* application is more effective at conveying its message than mailing a blank application. VPC did not designate any expert or submit competent and admissible evidence that pre-filled applications have higher rates of return than blank applications. VPC's evidence on this point is simply its own *ipse dixit* that must be ignored in the absence of any other admissible evidence.

In any event, *Steen*'s discussion of why this legal theory makes no sense is spot on, *see* Dkt. 151 at 26-27, and VPC makes almost no effort to explain otherwise. To understand why VPC

has badly misread *Meyer*, Defendants also direct the Court to *Project Vote v. Kelly*, 805 F. Supp.2d 152 (W.D. Pa. 2011), a case in which a non-profit organization conducting voter registration drives challenged on First Amendment free speech grounds a Pennsylvania law that prohibited persons from giving, soliciting, or accepting payments to obtain voter registrations if such payment is based on the number of voter registrations obtained. *Id.* at 158. Addressing an argument very much like the one VPC advances here, the court there explicated why *Meyer* cannot be construed so broadly:

> There is language in *Meyer* suggesting that the First Amendment protects the right of individuals "to select what they believe to be the most effective means" to convey their message. *Meyer,* 486 U.S. at 424. This language, however, must be read in context. The Colorado statute prohibiting the use of paid petition circulators had the "inevitable effect" of restricting "direct one-on-one communication," which the Supreme Court characterized as "the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* at 423-424. The reasoning employed in *Meyer* does not support the idea that Project Vote has an unqualified First Amendment right to choose the compensation system that it believes to be "the most effective way" to motivate its canvassers. The problem with the Colorado statute challenged in *Meyer* was that it completely foreclosed an entire "channel of communication." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 398, n.1 (2000) (Stevens, J., concurring). It was that "channel of communication" (*i.e.,* "direct one-on-one communication") that was deemed to be "the most effective means" available to initiative proponents to express their message. *Meyer,* 486 U.S. at 424. Unlike the statute at issue in *Meyer,* [Pennsylvania's law] does not have the "inevitable effect" of preventing the Plaintiffs from engaging in "direct one-on-one communication." *Id.* at 423-424. After all, ACORN was able to collect roughly 40,000 voter-registration applications in Allegheny County during the 2008 election season. The record indicates that, throughout all of Pennsylvania, ACORN procured 127,156 voter-registration applications in 2008.

Id. at 179-80; *cf. Sheldon v. Grimes*, 18 F. Supp.3d 854, 859-60 (E.D. Ky. 2014) (*Meyer*'s use of the term "means" in explaining speaker's right to select "most effective means" of communicating its message is not limitless and must be construed in context).[8]

[8] In support of its argument regarding the alleged effectiveness of pre-filling advance voting ballot applications, VPC references a study that it neglected to produce in discovery except for a few un-redacted pages. Br. at 97 n.19. Given its decision not to turn over the full study, the foundation of which is unknown, VPC's attempted reliance on it at summary judgment is egregious. We know nothing at all about how the (clearly inadmissible) hearsay study was conducted or its reliability. Even so, the supposed conclusions of that study only reinforce why *Meyer* is inapplicable here. As the court in *Project Vote* noted, the concern

While VPC takes issue with Defendants' characterization of the "overwhelming majority" of case law supporting Defendants' legal position, it is difficult to locate *any* case law – other than the preliminary injunction ruling here – that supports VPC's position. The Pre-Filled Application Prohibition does not preclude from VPC or any other entity from distributing advance voting ballot applications to voters, from assisting voters in person to complete the applications, from mailing pre-filled applications to voters who have requested them, or from communicating any message at all to voters. No speech or expressive conduct whatsoever has been constrained. VPC seeks to isolate this Court on an island in urging a summary judgment holding that merely pre-filling an application is itself expressive conduct. Defendants urge the Court to avoid taking that path.

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

VPC next contends that the Pre-Filled Application Prohibition contravenes their freedom of association rights under the First Amendment. Br. at 90-91, 100. VPC advances this argument despite Mr. Lopach's concession that the statute does not inhibit VPC from banding together with other persons or organizations to engage potential voters and encourage the use of advance mail voting. SOF ¶ 86. Mr. Lopach's own recognition of the limited scope of the Kansas law begs the question how any constitutional violation will occur when VPC may continue to associate with Kansas voters and share its message about the ease and reliability of advance mail voting. Indeed, this form of engagement is precisely what the First Amendment was designed to protect, and VPC

in *Meyer* was that the regulation on circulation petitioners cut off a whole "channel of communication" (direct one-on-one conversations between the circulators and their targets). *Project Vote*, 805 F. Supp.2d at 179-80. If, as VPC represents, its own study showed that a pre-populated form produced a 4.0% return rate while an unpopulated form produced a 3.6% rate (VPC Ex. 17 at VPC000852) – a 0.4% difference – that would in no way serve as the basis for arguing that an entire channel of communication has been foreclosed by the Pre-Filled Application Prohibition.

agrees it may carry on with this type of speech regardless of the Pre-Filled Application Prohibition.[9]

VPC cites to *Kusper v. Pontikes*, 414 U.S. 51 (1973) (Br. at 100), but that case is of little help to it. Unlike the plaintiff in *Kusper*, who was deprived of the ability to vote for the political party of her choosing in a primary due to Illinois' 23-month waiting period before a voter could change political party affiliation, 414 U.S. at 58, Kansas' Pre-Filled Application Prohibition poses no "substantial restraint" or "significant encroachment" on VPC's ability to send its message to, and associate with, the State's voters. VPC does not and cannot argue that the challenged statute prohibits it from disseminating its materials or messages to anyone.

Furthermore, the deference given to an association in choosing how to associate with others is not without limits. *See e.g.*, *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 841 (6th Cir. 2016) ("[W]e need not accept HCEA's claim of impairment when it has failed to demonstrate how the Board's letter either disrupts its ability to associate or substantially weakens its message by imposing restrictions on association."). This Court must still evaluate whether the Pre-Filled Application Prohibition significantly or substantially intrudes on VPC's ability to engage with Kansas voters and encourage them to vote by mail. In light of the parties' Stipulation (Dkt. 73) and Mr. Lopach's testimony, a reasonable factfinder cannot conclude that the challenged statute significantly intrudes on VPC's associational rights with Kansas voters.

Moreover, VPC's struggle to find common ground with Kansas voters by sending them pre-filled advance voting ballot applications as opposed to blank applications is a far cry from the

[9] Although no association is being restricted via the Pre-Filled Application Prohibition, it's not even clear that VPC is seeking to form any type of membership or association. All that VPC does is send pre-filled applications to certain persons and then track whether those individuals returned the application using a VPC-provided envelope. There is no ensuing membership or organization that is being, or attempted to be, formed.

associational issues addressed in *NAACP v. Button*, 371 U.S. 415 (1963), and *Healy v. James*, 408 U.S. 169 (1972). Try as it might, VPC simply cannot show that its members are similarly situated to the plaintiffs in *Button* and *Healy*.

In *Button*, members of the NAACP and its affiliated Virginia Conference were distributing forms to potential litigants, parents, and local school boards to engage designated staff attorneys of the NAACP and/or Virginia Conference for the purpose of pursuing civil rights litigation to achieve desegregation. *Button*, 371 U.S. at 421–23. Eventually, the Virginia legislature enacted a prohibition forbidding solicitation of legal business by a "runner" or "capper," which was defined to include an agent for the individual or organization which retains a lawyer in connection with an action to which it is not a party or has no pecuniary right or liability. *Id.* at 423–24. The Supreme Court ultimately found this prohibition violated the First Amendment because it impaired members of the NAACP and Virginia Conference from associating with potential litigants who shared a common interest in fighting discrimination and achieving desegregation. *Id.* at 443–44.

Contrary to the plaintiffs in *Button*, VPC's act of mailing pre-filled advance voting ballot applications does not further a common interest or goal shared by both VPC and Kansas voters. The recipients of VPC's mailers are not members of any particular organization and have no demonstrated interest in encouraging other Kansas voters to vote by advance mail ballot. Unlike the act of soliciting potential litigants to jointly fight against discrimination at issue in *Button*, there is no boomerang effect here. In other words, recipients of pre-filled advance voting applications do not subsequently join in a common endeavor with VPC. There is simply no associational component between VPC and its targeted voters that is hindered by the Pre-Filled Application Prohibition.

VPC's reliance on *Healy* is equally misplaced. In *Healy*, university students desired to form a local chapter of Students for a Democratic Society; however, the university's president denied the students' application for campus recognition. *Healy*, 408 U.S. at 172, 174–75. While the Supreme Court noted that the university's failure to afford official campus recognition to these students' chapter impaired their ability to associate with other university students, *id.* at 181–82, the case did not end there. The Supreme Court concluded that the record was insufficient to allow it to determine whether a constitutional violation had taken place. *Id.* at 185. The Supreme Court astutely recognized that there is a "line between permissible speech and impermissible conduct" when considering the constitutional right of association. *Id.* at 189. "Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected." *Id.* at 192–93. The Supreme Court reiterated the need to balance requirements that might limit certain conduct when such requirements do not impose an impermissible condition on associational rights. *Id.* at 193.

Here, VPC erroneously likens the act of mailing pre-filled applications to certain Kansas voters as protectable association similar to the *Healy* petitioners' act of obtaining official campus recognition to associate with like-minded students at meetings held on campus. The two scenarios share no commonalities and *Healy* adds nothing to VPC's position. The act of mailing pre-filled applications to Kansas voters with whom VPC shares no connection in no way implicates freedom of association. The recipient voters do not share a common goal or desire to associate with VPC. Instead, a recipient voter takes the pre-populated application and independently does with it as the voter chooses, in the voter's discretion, without consideration of VPC's or other Kansas voters' interests. There is simply no associational link between the two. *See VoteAmerica*, 2022 WL 2357395, at *10 ("The record here shows that Plaintiffs send application forms to strangers whose

information they obtain from the state's voter roll. While it is undisputed that Plaintiffs' overall program involves advocacy work, there is no evidence of the type of two-way engagement that characterizes cases like *Button*.").

IV. The Pre-Filled Application Prohibition Must Be Evaluated Under a Rational Basis, Not Strict Scrutiny Review Standard

For all the reasons set forth in Parts I and II, *supra*, the Pre-Filled Application Prohibition regulates only non-expressive conduct. The First Amendment is not even implicated. As such, the statute must be evaluated under rational basis review. *See Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). But even if some expressive conduct is incidentally touched by the statute, it is certainly not the kind of core political speech that triggers strict scrutiny, as VPC insists. Br. at 96-103. Defendants are not aware of a single case that supports the imposition of such a standard in the context of absentee ballot applications. Moreover, the only case applying such heightened scrutiny with regard to the distribution of *voter registration applications* – a process which, as Defendants have noted time and again, is very different from the distribution of *absentee ballot applications* – is *League of Women Voters v. Cobb*, 447 F. Supp.2d 1314 (S.D. Fla. 2006), an old, wrongly decided, outlier opinion that contradicts every federal district and circuit case over the last sixteen years. *See* Dkt. 151 at 28-29.

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

VPC claims that it mails unsolicited pre-filled advance voting ballot applications in order to encourage what it characterizes as "under-represented groups" to vote by mail and participate in the democratic process. Br. at 97. VPC contends that this activity is constitutionally protected core political speech because it advocates for a political controversial viewpoint in favor of voters trusting and using advance mail voting. And VPC avers that the Pre-Filled Application Prohibition "directly blocks VPC's most effective means of advocacy because it bans VPC from personalizing

its applications." *Id.* Defendants explained in detail both in their original motion, Dkt. 151 at 34-39, as well as Parts I and II, *supra*, why VPC's reasoning is both factually and legally indefensible, and Defendants expressly incorporate that analysis here.

B. The Pre-Filled Application Prohibition Is Content- and Viewpoint Neutral

VPC further argues that the Pre-Filled Application Prohibition is content- and viewpoint-discriminatory. Br. at 98-99. This argument runs contrary to the Supreme Court's recent teaching in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022). That case involved a municipal code regulating signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. *Id.* at 1468. When the city denied permits to certain advertising companies that sought permits to digitize their off-premises billboards, the companies sued alleging violations of the Free Speech Clause of the First Amendment. *Id.* at 1470. On appeal, the Fifth Circuit concluded that "the fact that a government official has to read a sign's message to determine the sign's purpose is enough to render a regulation content based and subject to strict scrutiny." *Id.* (citations and internal alterations omitted). But the Supreme Court explicitly rejected that reasoning. It determined that a rule holding "that a regulation cannot be content neutral if it requires reading the sign at issue[] is too extreme an interpretation of this Court's precedent." Id. at 1471. Instead, the Court held, "the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines" and is thus "agnostic as to content." *Id.* As a result, the Court found the City's distinction to be content neutral and not warranting the application of strict scrutiny. *Id.*

VPC responds that, in contrast to *City of Austin*, the Pre-Filled Application Prohibition is not agnostic as to content because it singles out personalized information on advance voting ballot applications. Br. at 99. That makes no sense; there is nothing content-based about the law. First,

the absence of any message at all in simply writing someone's name on a state form highlights the absurdity of this argument. Second, there is no conceivable counterpoint to be written on the form such that the State could be said to have engaged in viewpoint-based discrimination. Indeed, there is *nothing* else that could be written on the application. Nothing in the statute takes a position on mail voting. The fact that VPC spends additional funds to pre-fill applications by inserting certain voters' names and addresses on an official state form does not alter the First Amendment analysis. In short, VPC is trying to jam a square peg into a round hole here and it simply does not fit.

VPC's theory is also at odds with *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), another lawsuit challenging a municipal ordinance dealing with signs on public property. The city regulation at issue barred the posting of signs on public property, but specifically exempted certain plaques "commemorating an historical, cultural, or artistic event, location, or personality" and the "painting of house numbers upon curbs." *Id.* at 791 n.1. To apply these exemptions, an official would need to look at, and often read, the object at issue to determine whether it fell into an exempted category. In spite of this inquiry, however, the Court upheld the regulation, underscoring that the "text of the ordinance is neutral . . . concerning any speaker's point of view" and thus did not trigger strict scrutiny. *Id.* at 804.

C. The Pre-Filled Application Prohibition is Not Unconstitutionally Overbroad

The parties appear to be in agreement over the legal standards for evaluating an overbreadth cause of action, but VPC contends that the Pre-Filled Application Prohibition lacks any plainly legitimate sweep. Br. at 101-102. In light of the record developed in discovery, that is a rather audacious claim.

To begin with, VPC's own vice-president, Mr. Dripps, testified that, in the wake of its first two mailers to Kansas voters, VPC discovered that approximately 5% of the pre-filled applications

it sent to voters throughout the United States contained an erroneous middle initial (i.e., an initial that did not match the data in the State's voter registration files), and approximately another 3% of the pre-filled applications it sent to voters contained an erroneous suffix (i.e., a suffix that did not match the data in the State's voter registration files). SOF ¶ 38.[10] VPC was so concerned about these inaccuracies in the pre-filled applications (which were pre-populated with data that it had obtained from its vendor, Catalist), that it opted to send blank applications to Kansas voters in the third and fourth and waves. SOF ¶ 39. To criticize the State of Kansas for taking steps to address the very issue that VPC itself identified as a major problem is legally indefensible.

VPC nevertheless complains that the Pre-Filled Application Prohibition reaches too far because "over 90%" of its pre-populated applications did not contain inaccurate information. But in the 2020 General Election, VPC (through its sister organization, CVI) sent advance voting ballot applications to approximately 507,867 Kansas voters. SOF ¶ 40. That means more than *40,000* of the pre-filled applications sent to voters likely included incorrect information. And that does not even account for the thousands of other pre-filled ballots that VPC/CVI sent to voters who were not eligible to vote by virtue of having died, moved out of the State, or committed a felony. SOF ¶¶ 41-48.

When an inaccurate application is submitted to a county election office, officials there must then expend significant time reviewing the voter's registration records, contacting the voter, and attempting to allow the voter to cure the deficiency. SOF ¶¶ 17-19, 61-64. Plus, the inaccurate applications caused confusion and anger among many voters, who subsequently contacted county and state election officials to express their frustration. SOF ¶¶ 53-54, 57-58. The impact on both county election officials and voters alike from these inaccurate applications was thus undeniable.

[10] As VPC correctly pointed out in its Opposition Brief, Defendants inadvertently transposed the 5% and 3% figures in SOF ¶ 38 of their summary judgment motion.

While VPC argues that the problems flowing from the mailing of *duplicate* applications to voters is irrelevant to the State's legitimate interests in the Pre-Filled Application Prohibition, VPC overlooks the fact that many voters submitted duplicate applications because they were confused at having received a pre-filled application. Those voters believed that they were obligated to mail any such pre-filled applications to the county election office, even if they had previously submitted one or more applications already. SOF ¶ 74.[11] And Mr. Howell noted that the majority of the duplicate applications received by the Shawnee County Election Office had been pre-filled. SOF ¶ 77.

VPC suggests that Kansas, in adopting legislation to address these problems, was limited to prohibiting *inaccurate* pre-filled applications, and not pre-filled applications altogether. Br. at 102. This is nonsensical. It would be impossible, and a State is not required, to legislate with a scalpel of such fine precision in the electoral context. Such a restriction would effectively neuter the State from enacting prophylactic measures to mitigate the harms identified here.

[11] VPC contends that voters' statements to county election officials about the confusion such voters experienced at having received inaccurate and/or duplicate advance voting ballot applications from VPC (through CVI) would be inadmissible hearsay because the comments would relate to memory or belief. Br. at 106 n.25. Not so. Defendants are not offering these statements to prove that any particular voter received an inaccurate or duplicate application. Evidence of inaccurate and duplicate applications is available via the applications themselves, the testimony of county election officials, and VPC's own witness, Mr. Dripps. *See* SOF ¶¶ 38-39, 50-51, 56, 71-72, 75. The statements from Mssrs. Howell and Caskey, and Ms. Cox on this issue, *see* SOF ¶ 52-55, 57-58, are simply offered to prove (i) voters' state of mind upon receiving the CVI-pre-populated applications and (ii) the fact that state and county election officials fielded calls from hundreds of voters confused by the pre-filled applications. The relevant evidence is that election officials were forced to take these calls, and the calls consumed an enormous amount of their time. Whether any particular caller's pre-filled application was actually incorrect or duplicate is irrelevant, as is the identity of any particular caller material. *See Morris Jewelers, Inc. v. Gen. Elec. Credit Corp.*, 714 F.2d 32, 33-4 (5th Cir. 1983); *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 252 and n.11 (3d Cir. 1999) ("The relevance of their statements depends only on the fact that they were the plaintiffs' customers, not their particular identities."); *SiOnyx, LLC v. Hamamatsu Photonics K.K.*, 332 F. Supp.3d 446, 477 (D. Mass. 2018) (same); Kraft Gen. Foods, Inc. v. BC-USA, Inc., 840 F. Supp. 344, 347-48 (E.D. Pa. 1993) (admitting anecdotal evidence of customers' confusion under Rule 803(3)). For that matter, whether a particular caller was *actually* confused or not is beside the point; what matters is that election officials had to field many hundreds of calls from voters who professed confusion and frustration at the pre-filled applications they received in the mail.

Fortunately, the Court here need not explore the exact contours of the State's legislative authority because the Pre-Filled Application Prohibition targets only non-expressive conduct and there is thus no impact on VPC's First Amendment rights. But even if there is some impact on VPC's rights, it certainly cannot be characterized as substantial. To the contrary, it would pale in comparison to the State's clear and legitimate interests in preventing voter confusion, facilitating confidence in the election process and the officials who administer it, ensuring efficient and orderly administration of elections, and minimizing the potential for voter fraud. *Cf. Thompson v. DeWine*, 959 F.3d 804, 811 (6th Cir. 2020) (even intermediate scrutiny under *Anderson-Burdick* balancing does not require narrow tailoring).

D. Assuming the Pre-Filled Application Prohibition Is Implicated, Anderson-Burdick Provides the Appropriate Standard of Review

Although Defendants maintain that the Pre-Filled Application Prohibition targets only non-expressive conduct and thus does not implicate the First Amendment, the Court, even if it disagrees with this position, still must apply a rational basis type of review in evaluating the constitutionality of the statute. In other words, to the extent any speech rights are triggered in connection with this election-related statute, the *Anderson-Burdick* standard would apply.

VPC avers, without case law support (save this Court's preliminary injunction ruling), that the challenged law here is directed at speech, not merely election mechanics, rendering *Anderson-Burdick* inapplicable. Br. at 103-04. As an initial matter, VPC cannot simply label any restriction with which it disagrees as addressing "speech" and thereby invite heightened scrutiny. The Court in *FAIR* made that abundantly clear. *FAIR*, 547 U.S. at 66. Moreover, *Burdick* itself involved free speech rights, yet the Supreme Court applied the balancing test that VPC now seeks to avoid. *See Burdick v. Takushi*, 504 U.S. 428, 437-38 (1992) ("petitioner submits that the write-in prohibition . . . conditions his electoral participation upon the waiver of his First Amendment right to remain

free from espousing positions that he does not support, and discriminates against him based on the content of the message he seeks to convey through his vote."); *see also Fusaro v. Cogan*, 930 F.3d 241, 257-64 (4th Cir. 2019) (law restricting access to list of State's registered voters to certain persons and prohibiting use of such list for purposes unrelated to electoral process reviewed under *Anderson-Burdick* standard); *Schmitt v. LaRose*, 933 F.3d 628, 639-42 (6th Cir. 2019) (challenge to county's refusal to certifiy ballot initiative as alleged prior restraint on speech reviewed under *Anderson-Burdick* balancing test). Regardless of how VPC attempts to mischaracterize it, the Pre-Filled Application Prohibition does nothing more than to restrict how an official state form can be pre-populated with biographical data for which which the form itself provides no discretion in completing. The notion that the law targets "pure speech" along the lines of Ohio's prohibition against all anonymous campaign literature in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) is absurd. Other than the largely discredited *Cobb* decision cited above (which arose in the very different context of voter registration), there is no precedent (let alone binding precedent) to support VPC's insistence that the Court disregard *Anderson-Burdick* in its attack on the challenged Kansas law.

E. The Pre-Filled Application Serves Legitimate State Interests

Short of ignoring the record altogether, it is difficult to explain how VPC can argue that the Pre-Filled Application Prohibition serves no legitimate state interests. Br. at 105-09. VPC suggests that any harms from its activities flow exclusively from its sending of duplicate advance voting ballot applications to voters and that Defendants have conflated inaccurate applications with duplicates. Br. at 105. That is simply not true. Shawnee County Election Commissioner Andrew Howell testified that incorrectly pre-filled applications caused significant burdens on his office, typically taking three to five times longer to process than accurately completed applications. Ex.

QQ at 252:24-253:23. He also described, and included numerous examples, of error-prone CVI-pre-filled applications that were submitted by voters to his office. SOF ¶¶ 50-51. And he discussed the adverse impact these erroneous applications had on election administration. SOF ¶¶ 52-53, 60-64. Ford County Clerk Deborah Cox likewise testified about inaccurate pre-filled applications that her office received, Ex. RR at 139:9-140:3, and the deleterious impact of the same on election administration. SOF ¶¶ 54-55. Defendants' expert witness Ken Block also discussed the large number of mailings sent to individuals whose voter registrations had been cancelled. SOF ¶¶ 41-48.

Moreover, the issue of duplicates is not irrelevant. As noted above, voters told county election officials that they often submitted duplicate applications because they believed that they were obligated to mail any and all pre-filled applications back to the county election office in order to receive an advance ballot, even if they had previously submitted one. SOF ¶ 74. The fact that Shawnee County received 4,217 duplicate applications (more than 15.4% of the total number of applications the office received during the 2020 General Election), and that Ford County received 274 duplicate applications (nearly 9% of the total applications the office received during the 2020 General Election), SOF ¶¶ 71-72, 75, underscores emphatically that the problem was not just a few confused voters. This is especially true when one compares the *exponentially* greater number of duplicates received in 2020 to the number received in prior elections. SOF ¶¶ 73, 76; Reply to Pls.' Resp. to SOF ¶¶ 71-73, 75-76, 81, 83. The difference cannot be explained by the pandemic or supposed issues with the Postal Service.

Nor does VPC anywhere acknowledge that the problems seen in Kansas were present in other states throughout the country as well. SOF ¶ 66. The Kansas Legislature painted on a canvas in which these disturbing colors were clearly present, and the law is clear that a State is entitled to

rely on harms elsewhere in enacting legislation designed to prevent such problems from rearing their head in that State. Dkt. 151 at 42-43. Moreover, the fact that Kansas has (at least apparently, so far as we know) avoided any systemic fraud from mail ballots – a problem that the Supreme Court has readily acknowledged, *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021) – hardly means that this interest cannot be considered by the Court in evaluating the Pre-Filled Application Prohibition. Br. at 106-07.

In a related vein, VPC concedes the substantial overall error rate – nationally – on its pre-filled applications, Br. at 107, but claims that Defendants did not specifically tie these errors to Kansas. Such a theory cannot carry the day. There is no evidence that Kansas was immune from the high error rate afflicting VPC's mail ballot program. Indeed, VPC itself believed the problem was of such magnitude that it stopped pre-populating advance voting ballot applications in Kansas. Further, a State is not confined to addressing problems only within its own borders when adopting legislation targeted at facilitating election integrity.

IV. – CONCLUSION

VPC proposes a legal standard that affords virtually no deference to the State in adopting election integrity measures designed to address and prevent the actual and potential problems that arise (and/or can arise) with pre-filled advance voting ballot applications. VPC also has blatantly misrepresented the record here and attempted to thrust evidentiary obligations on the State that are inconsistent with Supreme Court precedent. The State enjoys far more latitude in this context. For all these reasons stated herein, Defendants respectfully request that the Court grant their motion for summary judgment with regard to Counts I-III of the Plaintiffs' Complaint.

Respectfully Submitted,

By /s/ Bradley J. Schlozman
Bradley J. Schlozman (KS Bar #17621)
Scott R. Schillings (KS Bar #16150)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, Kansas 67206
Telephone: (316) 267-2000
Facsimile: (316) 630-8466
Email: bschlozman@hinklaw.com
E-mail: sschillings@hinklaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2022, I electronically filed the foregoing Defendants' Reply to Plaintiff Voter Participation Center's Opposition to Defendants' Motion for Summary Judgment Regarding Counts I-III with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By /s/ Bradley J. Schlozman