IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and VOTER PARTICIPATION CENTER, *Plaintiffs,* vs. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County, *Defendants.*	C.A. NO. 2:21-cv-02253-KHV-GEB

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The parties agree that this case presents the Court with a narrow legal question: whether a ban on distributing personalized vote-by-mail applications, the Personalized Application Prohibition, violates the First Amendment. This Court already held that Plaintiff Voter Participation Center's ("VPC") communications advocating for advance mail voting and assisting voters constitute speech and expressive conduct in an area "where the First Amendment has its fullest and most urgent application." *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 888 (D. Kan. 2021) (citation omitted). The Court also ruled that the Prohibition on Plaintiff's protected communications fails constitutional scrutiny. *Id.* at 889-93. Discovery is now closed, and this question has been briefed exhaustively. But the result remains clear: relevant precedent and the evidence demonstrate that Plaintiff's personalized communications are protected speech that the Prohibition unconstitutionally restricts. While Defendants may prefer that civic organizations speak in a different manner, the First Amendment stands in the way of such government intrusion.

Defendants fail to produce any new evidence or legal argument that require this Court to depart from its prior analysis. They opt instead for conflation and repetition. Defendants conflate the facts concerning Kansans' receipt of personalized applications with receipt of multiple applications, as well as the precedent about political advocacy during the distribution of voting materials with inapposite cases about the collection and return of materials after that advocacy. And they otherwise rehearse arguments this Court rejected. Defendants take this approach because the record is devoid of evidence that the Personalized Application Prohibition advances the interests Defendants proffer. Juxtaposed against the "paltry record evidence" of a real harm that it ameliorates, and the lack of tailoring to any harm, the Prohibition cannot satisfy the core First Amendment protections implicated here. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1226 (10th Cir. 2021).

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS STATEMENT OF UNCONTROVERTED FACTS

The following 56 facts are uncontroverted or controverted only for purposes of minor immaterial corrections and a response from Plaintiff is not required: 1-13, 15-18, 20-22, 31-34, 36-47, 49-50, 52, 55-56, 59, 61-65, 67, 69-76.

In addition, though purportedly disputing the following 16 facts, Defendants merely raise immaterial facts and/or make legal arguments not appropriate for factual contentions such that Defendants' responses do not warrant replies from Plaintiff and do not present any actual facts in dispute: 14, 19, 23-24, 26-30, 48, 53-54, 57-58, 60, 66.

Finally, Defendants raise no genuine factual dispute with respect to the remaining 5 of Plaintiff's factual statements. The statements, Defendants' responses, and Plaintiff's replies are set forth below.

PLAINTIFF'S UNCONTROVERTED FACT ¶ 25:

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

DEFENDANTS' RESPONSE TO ¶ 25:

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

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ¶ 25:

Plaintiff's factual statement is uncontroverted. Defendants' response does not controvert the fact that VPC endeavors to personalize the applications it sends to voters using voter information originating in the voter file that VPC obtains from the data vendor that VPC

pays for data management services. *See* Decl. of Mark P. Johnson In Supp. of Pl.'s Mot. Summ. J., (Oct. 14, 2022) ("Johnson Decl."), Ex. 6 (Lopach Tr.) at 33:2-35:3, 92:14-25, 93:20-96:8; *see also id.* at Ex. F (Dripps Tr.) 167:24–174:21.

PLAINTIFF'S UNCONTROVERTED FACT ¶ 35:

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

DEFENDANTS' RESPONSE TO ¶ 35:

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

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ¶ 35:

Plaintiff's factual statement is uncontroverted. Defendants' response does not controvert the fact that VPC endeavors to personalize the applications it sends to voters using voter information originating in the voter file that VPC obtains from the data vendor that VPC pays for data management services. *See* Johnson Decl., Ex. 6 (Lopach Tr.) 33:2-35:3, 92:13-25, 93:20-96:8; *see also* Ex. F (Dripps Tr.) 167:24-174:2.

PLAINTIFF'S UNCONTROVERTED FACT ¶ 51:

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

DEFENDANTS' RESPONSE TO ¶ 51:

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

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ¶ 51:

Plaintiff's factual statement is uncontroverted. As Ms. Schmidt testified, that voters were "frightened" and "in their homes" due to COVID-19, and for that reason they requested advance mail ballots. *See* Johnson Decl., Ex. 1 (Schmidt Tr.) 149:4-150:6, ECF No. 145-2.

PLAINTIFF'S UNCONTROVERTED FACT ¶ 68:

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

DEFENDANTS' RESPONSE TO ¶ 68:

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

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ¶ 68:

Plaintiff's factual statement is uncontroverted. Reference to "incomplete mail ballot applications," is not discussion of personalized applications.

PLAINTIFF'S UNCONTROVERTED FACT ¶ 77:

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

DEFENDANTS' RESPONSE TO ¶ 77:

Controverted and immaterial. First, as a matter of law, the Legislature was not required to memorialize its interests in adopting the legislation as part of any formal record. Second, Plaintiffs only cite to the bill page of the Kansas Legislature's website and thus have not shown that their citation is to the entire "Legislative Record." Second, at least one proponent did cite voter confusion, inaccurate applications, and other information that would address these categories. Testimony of John M. Toplikar in Support of H.B. 2332

(http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_l/documents/testimony/20210218_18.pdf) (last visited Oct. 25, 2002). Third, the Kansas County Clerks & Election Officials testified that they "appreciate[d] Representative Toplikar's intent under this bill and d[id] not disagree with what he [was] trying to accomplish." Testimony of Rick Piepho, Kansas County Clerks & Election Officials Elections Committee Chair, available at http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_l/documents/testimony/20210218_15.pdf (last visited Oct. 25, 2022). The Secretary's testimony likewise highlighted these issues. Ex. Z, Secretary of State Testimony.

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ¶ 77:

Plaintiff's factual statement is uncontroverted. Defendants misdescribe their citations to the legislative record. Nothing in the cited documents have an articulated connection to personalized applications or "inaccurate information." *See also, e.g.*, Supplemental Note on House Bill No. 2332, http://kslegislature.org/ li/b2021_22/ measures/documents/ supp_note_hb2332_03_0000.pdf ("In the House Committee hearing on the bill, Representative Toplikar testified as a proponent, stating the bill was introduced to address voter confusion and as a result of certain voters receiving multiple applications for advance voting ballots during the 2020 election cycle.").

PLAINTIFF'S RESPONSE TO DEFENDANTS' ADDITIONAL MATERIAL FACTS

Each of Defendants' 57 "Additional Material Facts" cites an identical or materially identical fact included in Defendants' Statement of Uncontroverted Facts in support of their Motion for Summary Judgment. *See* Defs.' Mem. in Supp. Mot. for Summ. J. ("Defs.' Mot.") at 6-21, ECF No. 151. Plaintiff incorporates its prior responses and objections. *See* Pl.'s Opp'n to Defs' Mot. for Summ. J. ("Pl.'s Opp'n") at 14-75, ECF No. 156 (responding to Defendants' Statement of Uncontroverted Facts 17-18, 29-30, 32, 35, 37-87, renumbered in Defendants'

Statement of Additional Material Facts as 1-57). Plaintiff also incorporates its general objections. *See id.* at 4-6.

ARGUMENT

I. The First Amendment Protects Plaintiff's Distribution of Personalized Advance Mail Ballot Applications

As Plaintiff details in its Opening Brief[1] and its opposition to Defendants' cross-motion for summary judgment, VPC's distribution of personalized advance mail ballot applications is First Amendment-protected activity under at least four different approaches to the doctrine: (1) Plaintiff's communications assisting and persuading Kansans to vote by mail represent a single package of speech in which the personalized application is an integral and intertwined part; (2) Plaintiff's personalization of the applications it distributes—identifying and disseminating the information of VPC's chosen audience—is itself speech; (3) VPC's distribution of personalized advance mail ballot applications is expressive conduct; and (4) VPC distributes its personalized applications as associational activity to promote engagement in the political process.[2] *See* Pl.'s

[1] "Opening Brief" and "Pl.'s Summ. J. Br." refer to Plaintiff's Memorandum in Support of Its Motion for Summary Judgment. *See* ECF No. 154. "SOF" refers to Plaintiff's Statement of Uncontroverted Facts in Support of its Motion for Summary Judgment. *See* ECF No. 154 at 2–17. "Opposition" and "Opp'n" refer to Defendants' Response to Plaintiff's Motion for Summary Judgment. *See* ECF No. 155.

[2] Throughout their responses to Plaintiff's statement of facts, Defendants repeatedly do not dispute factual questions concerning VPC's speech because they state that First Amendment coverage of an activity is a legal question. *See, e.g.*, Defs.' Resp. to SOF ¶ 23 (citing *In re Motor Fuel Temperature Sales Pracs. Litig.*, 07-1840, 2012 WL 13050524, at *2 (D. Kan. Apr. 4, 2012)). True enough, but in taking that approach, Defendants leave uncontested Plaintiff's material facts concerning the speech elements of its communications. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995), Defendants' repeated concession of VPC's speech facts supports Plaintiff's motion for summary judgment. Their citation to this Court's decision in *In re Motor Fuel*—a case with no bearing on free speech claims—is not to the contrary.

Summ. J. Br. at 19-24; Pl.'s Opp'n at 83-94. Defendants' claim that VPC's distribution of personalized applications is non-expressive conduct fails for several reasons.

A. Defendants' Efforts to Dictate and Disaggregate Plaintiff's Speech Fail

Defendants contend that the State can direct how VPC should communicate its message—through means other than distributing personalized applications. Opp'n at 45-46, 48-49, 61, 72-73. That argument misconstrues the facts, is logically flawed, and violates binding precedent.

To begin, Defendants' focus on VPC's cover letter misstates the undisputed facts. They claim, without support, that "[n]othing in the challenged statute impedes VPC from engaging in any of the messaging that it imparts through its cover letter" and the "cover letter, and the message contained therein . . . is wholly unaffected by the [Personalized] Application Prohibition." *Id.* at 45. But Defendants do not contest that VPC's cover letter explicitly says, for example: "I have sent you the enclosed advanced ballot by mail application already filled out with your name and address." SOF ¶ 34. And they do not dispute that the entire point of VPC's cover letter and other instructional materials is to inform and persuade the recipient voter that opting to vote by mail is easily done *with the attached personalized application*. *Id.* The personalized application cannot be isolated from its context.

Moreover, the fact that VPC hypothetically could separately speak through a different cover letter or distributing a blank application does nothing to undermine the First Amendment protections covering its decision to distribute personalized applications. The Supreme Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000). Indeed, it has "reject[ed] summarily" the argument that speech can be limited when other communicative channels remain available because of the longstanding maxim that "one is not to have the exercise of his liberty of expression in appropriate

places abridged on the plea that it may be exercised in some other place." *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). If Defendants' contrary perception of the First Amendment were reality, then *Meyer* would have come out differently. But the Supreme Court rejected exactly that type of argument. *Meyer*, 486 U.S. at 424 (rejecting Colorado's attempt to argue the same and holding that the fact that a speaker remains "free to employ other means to disseminate their ideas" does not take their speech "outside the bounds of First Amendment protection").[3]

The Tenth Circuit reinforced the same rule in *U.S. West v. FCC*, a case concerning speech restrictions and facts analogous to this case. 182 F.3d 1224, 1228-30 (10th Cir. 1999). The challenged law in *U.S. West* limited a speaker's ability to use recipient information in a database to transmit targeted direct mail. *Id*. The government claimed, like Defendants here, that restricting the method of "target[ing]" the speaker's message did "not prevent [the speaker] from communicating with its customers or limit anything that it might say to them." *Id.* at 1232. The court rejected this claim as "fundamentally flawed" because the "existence of alternative channels of communication . . . does not eliminate the fact that the [challenged laws] restrict speech." *Id*. The same is true of Plaintiff's use of specific voter information to target its pro-advance mail voting communications here, which further reinforces its communicative character.[4] VPC's speech warrants even greater protection than the commercial speech in *U.S. West* because VPC's communications represent its core political speech taking a stance in the heated national debate about mail voting. Such "advocacy of a politically controversial viewpoint" in favor of mail voting

[3] *See* Oral Argument Transcript at 19-21, *Meyer v. Grant*, No. 87-920 (U.S. Apr. 25, 1988), https://www.supremecourt.gov/pdfs/transcripts/1987/87-920_04-25-1988.pdf.

[4] *See, e.g.*, Daniel E. Rauch, *Customized Speech and the First Amendment*, 35 Harv. J.L. & Tech. 405 (2022) (collecting sources and concluding that "[d]octrinally, the First Amendment robustly protects Speech Customization").

is "the essence of First Amendment expression." *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 347 (1995).

Defendants' slicing and dicing of Plaintiff's speech fails along similar lines. *See LWV of Tenn. v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (rejecting "slicing and dicing" speech in voter registration context).[5] Defendants attempt to "disaggregate[]" VPC's personalized "application . . . from the cover letter" and invent the rule that voters must discern VPC's message from the "application itself, separate and apart from the other materials and messaging in the mailer." Opp'n at 48-49. But precedent forecloses this notion. The Supreme Court has "refuse[d] to separate the component parts of" a communication "from the fully protected whole." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (applying *Meyer*, among other cases). Defendants do not dispute VPC's facts that the personalized applications are "characteristically intertwined" with its entire package of speech. *Id.* (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)); *see also, e.g.*, SOF ¶¶ 23, 37. The legal significance of those facts is clear: the Court must view the speech as a whole and "cannot parcel out the speech" because "[s]uch an endeavor would be both artificial and impractical." *Riley*, 487 U.S. at 796.[6]

[5] Defendants emphasize that the *LWV of Tennessee* court cited the dissenting opinion in *Voting for America v. Steen*, 732 F.3d 382 (5th Cir. 2013), to condemn the "slicing and dicing" of protected speech. *See* Opp'n at 48, 53. But Defendants incorrectly suggest that the *Steen* majority—a nonbinding Fifth Circuit decision—somehow has greater bearing than the dissent, which is more persuasive. *See LWV of Tenn.*, 400 F. Supp. 3d at 720-71 & n.6. In any event, even the *Steen* majority supports Plaintiff's position here. 732 F.3d at 289-90 ("accept[ing]" that "'distributing' voter registration forms" and 'helping' voters to fill out their forms" are expressive, and finding that while the collection of completed voter registration forms is not speech, "[s]oliciting, urging, and persuading [a] citizen to vote are the canvasser's speech").

[6] Defendants concede that VPC's cover letter is protected speech, Opp'n at 45-46, and that VPC's distribution of generic advance mail ballot applications is First Amendment-protected activity. *Id.* at 43; *cf. id.* at 2. But the breadth of Defendants' arguments against personalization contradicts this concession. For example, Defendants' misplaced reliance on *Timmons v. Twin Cities Area*

Finally, Defendants differentiate between solicited and unsolicited speech, suggesting that the First Amendment protects the former over the latter. But the law makes no such distinction. The Supreme Court has long held—even specifically in the direct mail context—that speakers have a protected right to convey unsolicited speech.[7] Thus, solicited or not, Plaintiff's personalized advance mail ballot mailer communications represent protected First Amendment activity.

B. Defendants Misconstrue the Expressive Conduct Analysis

The Court has already observed that Plaintiff's distribution of personalized applications "is inherently expressive conduct that the First Amendment embraces." *VoteAmerica*, 576 F. Supp. 3d at 875. Defendants do not dispute the developed facts that continue to support this conclusion: (1) VPC identifies a specific audience for its communications; (2) during the election, it sends the personalized application mailer to the selected recipient; (3) VPC's message is that mail voting is beneficial and convenient, and that the specific voter should use the personalized application to

New Party, 520 U.S. 351, 363 (1997), to say "state-created forms" cannot be part of speech would also mean that distributing a blank application is not First Amendment activity. Opp'n at 46. Defendants' claim that the personalized applications are not speech because they purportedly do not convey a message "separate and apart" from the cover letter also contradicts the First Amendment interest Defendants concede VPC has in distributing a generic application. *Id.* at 49. And Defendants explicitly ask the Court to rely on cases they believe support "that the distribution of advance ballot applications is not protected speech"—whether personalized or not. *Id.* at 50. Defendants' concession that distributing applications is speech, while contradictorily pressing arguments against that concession, undermines their persuasiveness.

[7] *See, e.g.*, *Bolger v. Youngs Drug Prod. Corp.* 463 U.S. 60, 69 (1983) (ruling that "the mailing of unsolicited contraceptive advertisements" is protected speech that "not only implicates 'substantial individual and societal interests' in the free flow of commercial information, but also relates to activity which is protected from unwarranted state interference"); *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 532, 535 (1980) (a ban on the unsolicited "inclusion in monthly electric bills of inserts discussing controversial issues of public policy" was a "prohibition of discussion of controversial issues [that] strikes at the heart of the freedom to speak"); *see also Revo v. Disciplinary Bd. of the Supreme Ct. for N.M.*, 106 F.3d 929, 933 (10th Cir. 1997) ("the solicitation letters" of attorneys' services "are protected commercial speech"); *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 305 (1965) ("[T]he use of the mails is almost as much a part of free speech as the right to use our tongues" (quotation omitted)).

participate; and (4) over 69,000 Kansans acted upon VPC's message to opt into mail voting. SOF ¶¶ 20-26, 33-34, 37, 42. These undisputed facts, viewed in the context of the election and the overall mailer package, establish that distributing personalized applications is "sufficiently imbued with elements of communication" to be expressive conduct. *Cressman v. Thompson*, 798 F.3d 938, 954 (10th Cir. 2015).

Instead of contesting these facts, *see supra* note 2, Defendants urge that VPC must show both "an intent to convey a particularized message" and that VPC's audience must in fact subjectively "understand the… message." Opp'n at 47. Defendants' articulation of the applicable test is wrong. First, as the Supreme Court clarified in *Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection," and is not "confined to expressions conveying a 'particularized message' . . . ." 515 U.S. at 569 (quoting *Spence*, 418 U.S. at 411). After *Hurley*, the particularized message "factors" considered in prior cases "are not necessarily prerequisites for First Amendment protection for" expressive conduct. *Cressman*, 798 F.3d at 955.[8] It is instead sufficient to show that the conduct is "intended to be communicative," as viewed "in context." *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 294 (1984). Second, Plaintiff is also under no obligation to show that voters subjectively understood a particular message. Opp'n at 47-48. For communicative conduct to "fall[] within the free speech guarantee

[8] There is widespread agreement that *Hurley* eschewed any particularized intended message prerequisite for expressive conduct. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) (observing that "a 'particularized message' is not required, or else the freedom of speech 'would never reach … unquestionably shielded'" conduct (quoting *Hurley*, 515 U.S. at 569)); *id.* at 1748 n.1 (Ginsburg, J., dissenting) ("[F]or conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative."); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022); *Troster v. Pa. State Dep't of Corr.*, 65 F.3d 1086, 1090 & n.1 (3d Cir. 1995). Because the Tenth Circuit in *Cressman* ultimately found that the plaintiff *could* articulate a particularized and specifically understood message, the court concluded that any difference between *Hurley* and *Johnson* was immaterial for purposes of resolving that case. *Id.* at 956-60.

of the First Amendment," the test is simply whether the conduct is "*reasonably perceived* to convey *a message*." *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987) (emphases added). The analysis is objective and broad: whether the conduct could "reasonably be understood by" the hypothetical observer "to be communicative" of some message. *Clark*, 468 U.S. at 294; *see also NetChoice*, 34 F.4th at 1212 (assessing "whether the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message" (citation omitted)). Thus, the rule is that "expressive conduct need not convey a specific message" and "[t]he critical question is whether a reasonable observer would interpret the conduct as conveying *some* sort of message." *AARA v. Clean Elections USA*, No. 22-cv-01823, 2022 WL 15678694, at *4 (D. Ariz. Oct. 28, 2022) (citing *Hurley*, 515 U.S. at 569).

Plaintiff's distribution of personalized advance mail ballot applications more than meets this standard.[9] VPC distributes personalized applications to communicate its pro-advanced mail voting views to Kansans. *See* SOF ¶¶ 23-27, 37. In fact, organizations would only do so if they supported mail voting. *See infra* Part II.A.2. A reasonable voter would also discern some sort of message from receiving VPC's personalized application, particularly when viewed in context of the election season and the rest of VPC's mailer package. *See Cressman*, 798 F.3d at 953 (emphasizing the "context-driven nature of the inquiry"); *accord Clark*, 468 U.S. at 294; *Spence*, 418 U.S. at 409. That over 69,000 voters did in fact understand and act upon VPC's application is instructive. *See* SOF ¶ 42. Defendants' arbitrary suggestion that this total is somehow not

[9] Indeed, the facts show that Plaintiff satisfies even Defendants' incorrect standard. *See* Pl.'s MSJ Opp'n at 89. Defendants emphasize Mr. Lopach's answer in response to leading and speculative questions that he did not know if voters receive "a *political message*" from VPC's communications. SOAF ¶ 55 (emphasis added). But this answer is far from Defendants' extrapolation that he testified voters do not "discern[] *any* message." Opp'n at 47. Regardless, Mr. Lopach's testimony and his sworn declaration elsewhere make clear that VPC does believe voters receive a message from these communications. *See* SOF ¶¶ 23-27, 37.

enough people to indicate voters got the message invents a rule based in neither law nor fact. Opp'n at 49.

C. Defendants Misapprehend the Relevant Cases

Defendants have little answer to the key binding decisions in, for example, *Meyer*, *Buckley*, *Chandler*, and *Yes on Term Limits*. That precedent provides the proper framework for evaluating the scope of the First Amendment protections in this case and how the exacting scrutiny standard should be applied. *See* Pl.'s Summ. J. Br. at 24-27. The *Meyer-Buckley* framework is "not limited to the circulation of initiative petitions," and "[i]f anything" the issues here are even closer to the nucleus of protected core political speech because "a person's decision to sign up to vote is more central to shared political life than his decision to sign an initiative petition." *LWV of Tenn.*, 400 F. Supp. 3d at 724; *see also id.* (noting that a person's decision to vote "inherently 'implicates political thought and expression'" (quoting *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 195 (1999)).

Defendants attempt to dismiss the other persuasive cases that Plaintiffs cite—and this Court relied upon—as "outlier[s]" or representing the "minority view," Opp'n at 53, but that does not make it so. Instead, numerous decisions support that the activity involved in *distributing* vote-by-mail or voter registration applications warrants First Amendment protection. *See* Pl.'s Summ. J. Br. at 24. For example, just recently in Missouri, a state trial court ruled that "[e]ngaging and assisting voters in registering to vote or applying to cast an absentee ballot is 'the type of interactive communication concerning political change that is appropriately described as "core political speech" . . . an area in which the importance of First Amendment protections is at its zenith.'" Reply Ex. 1, *LWV of Mo. v. Missouri*, 20AC-CC04333 (Cole Cty. Cir. Ct. Oct. 25, 2022) (quoting *Meyer*, 486 U.S. at 420-28).

Defendants' specific attempts to distinguish some of the pertinent persuasive authorities are also unfounded. For example, Defendants diminish the *Priorities USA v. Nessel* litigation by noting that the district court there later denied the plaintiff's motion for a preliminary injunction. *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 612 (E.D. Mich. 2020) ("*Nessel II*"). Defendants overlook that key differences in the *Nessel II* factual record and the court's misapplication of the exacting scrutiny standard there combine to explain the contrary result. Notably, the *Nessel II* court reaffirmed its conclusion that the plaintiff's activities were protected core political speech. *Id.* But the court focused on record evidence of impropriety in the collection and return of completed absentee ballot applications and ruled that the states' purported interests were "sufficiently" important and "sufficiently" related to the limitations in the statute. *Id.* at 612-14.[10] Such evidence is not present in this case, and regardless is unrelated to Plaintiff's *distribution* of applications.[11]

Defendants' effort to minimize *AAPD v. Herrera* is also unavailing. Defendants fail to develop their bare conclusion that the front end "voter registration activity" in *AAPD v. Herrera* is "materially different than assistance with absentee ballot applications." Opp'n at 55. Instead, the facts show that, like the speech in *AADP v. Herrera*, Plaintiff's distribution of personalized applications similarly represents "public endeavors to assist people [that] are intended to convey a

[10] In concluding that the state's interests justified the speech restriction, the court incorrectly employed a less stringent "exacting scrutiny" standard used only in the campaign finance disclosure context. *Id.* at 614 (applying *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Tenth Circuit precedent here, however, requires strict scrutiny. *See infra* Part II.A.

[11] Defendants' reference to the *Nessel* court's Rule 12(c) decision oversimplifies the court's reasoning. Opp'n at 53. Notably, the court distinguished cases such as *Meyer* and *LWV of Tennessee* because it found that the remaining challenged law "restricts only the possession of a completed ballot application" and imposes no "front-end restriction" on speech such as on distributing "applications to voters." No. 2:19-CV-13341, 2022 WL 4272299, at *5-7 (E.D. Mich. Sept. 15, 2022) ("*Nessel III*"). The court's decision indicates that front-end activities "helping voters navigate the absentee application process" would be expressive. *Id.* at *5.

message that voting is important, that the Plaintiffs believe in civic participation, and that the Plaintiffs are willing to expend the resources to broaden the electorate," 690 F. Supp. 2d 1183, 1215-16 (D.N.M. 2010), "communicates a message that democratic participation is important," *id.* at 1216; and "take[s] a position and express[es] a point of view in the ongoing debate whether to engage or to disengage from the political process," *id.* The *AADP v. Herrera* court's reasoning supporting its holding that the First Amendment protected the plaintiffs' registration activities applies with equal force here.[12]

As discussed in Plaintiff's opposition to Defendants' motion, their "overwhelming majority" of contrary authority is a mirage as they nearly all concern form collection and return activity. *See* Pl.'s Opp'n at 92-94.[13] These are distinct from front-end advocacy activities, like VPC's distribution of personalized applications, which "bear[] directly on the expressive and associational aspects" of core of get-out-the-vote work that involves "both encouraging and facilitating" civic participation. *LWV of Tenn.*, 400 F. Supp. 3d at 720; *see also* Pl.'s Opp'n at 92-93. Thus, Defendants' "overwhelming majority" erodes to two non-binding cases that limit speech protections for distribution activities: *VoteAmerica v. Raffensperger* and *Lichtenstein v. Hargett*. The *Raffensperger* decision is unpersuasive because it takes the incorrect view—contrary to this

[12] Though Defendants emphasize that the *AAPD* court ultimately applied *Anderson-Burdick* balancing, it is notable that the *AAPD* plaintiffs accepted that *Anderson-Burdick* applied and did not separately develop the *Meyer-Buckley* strict scrutiny standard in their briefing. *See, e.g.*, Pl.'s Summ. J. Br. at 16, *AAPD v. Herrera*, 08-cv-702 (D.N.M. July 2, 2010),ECF No. 120; Pl.'s Mot. to Dismiss Opp'n at 5, *AAPD v. Herrera*, 08-cv-702 (D.N.M. Sept. 16, 2009), ECF No. 81.

[13] *See, e.g., DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1233 (N.D. Okla. 2020) (addressing restrictions on "returning an absentee voter's ballot"); *New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1300 (N.D. Ga. 2020) ("collecting ballots does not qualify as expressive conduct"); *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018) (rejecting "First Amendment rights of ballot collectors"); *Feldman v. Ariz. Sec'y of State*, 843 F.3d 366, 392 (9th Cir. 2016) ("consider[ing] whether ballot collection is expressive conduct"); *cf. League of Women Voters v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (assuming that collecting registrations is expressive).

Court's reasoning and Defendants' concession here—that nothing in VPC's application distribution is expressive. 1:21-cv-01390, 2022 WL 2357395, at *7 (N.D. Ga. June 30, 2022). The decision also misreads precedent, addresses a record unlike the developed facts here, and at times follows internally contradictory reasoning, all of which reduce its persuasiveness. *Id.* at *8-12 (ruling, for example, that applications are not platforms for speech but deeming an application disclaimer is compelled speech). *Lichtenstein* is likewise both distinguishable and unpersuasive for reasons this Court has already identified. *See VoteAmerica*, 576 F. Supp. 3d at 874-75.

II. The Personalized Application Prohibition is Subject to Strict Scrutiny

Despite Defendants' repeated assertions that the Personalized Application Prohibition does not implicate the First Amendment, they fail to present any facts that contravene what this Court previously found—that the Personalized Application Prohibition "significantly inhibits communicati[on] with voters about proposed political change and eliminates voting advocacy by plaintiffs." *Id.* at 888 (quotations omitted). Rather, the record makes clear that the Personalized Application Prohibition infringes VPC's First Amendment rights, *see supra* Part I, warranting strict scrutiny and summary judgment for Plaintiff. And even if lesser scrutiny under the unrelated *Anderson-Burdick* balancing standard applied, the undisputed facts still weigh in favor of guarding Plaintiff's speech against Defendants' nonexistent interests.

A. Strict Scrutiny Applies to the Restriction on Plaintiff's Speech

The undisputed facts demonstrate that the Personalized Application Prohibition (i) abridges Plaintiff's core political speech, (ii) is content-based discrimination, (iii) limits Plaintiff's associational activity, and (iv) is unconstitutionally overbroad. For each of these independently sufficient reasons, the Prohibition is subject to strict scrutiny, not some lesser level of review.

1. The Prohibition Abridges Plaintiff's Core Political Speech

Plaintiff's distribution of personalized applications is core political speech expressing VPC's pro-advance mail voting message to certain, carefully identified Kansas voters. *See supra* Part I.A; Pl.'s Summ. J. Br. at Part I; Pl.'s Opp'n at Part I.A. As such, it is subject to strict scrutiny. *Yes On Term Limits, Inc.. v. Savage*, 550 F.3d 1023,1028 (10th Cir. 2008).

Contrary to Defendants' argument, and as discussed *supra* Part I.A., the existence of other potential means of communication does not make the Prohibition's restriction on VPC "*de minimis*," Opp'n at 61. The Prohibition would instead "have the inevitable effect of reducing the total quantum of speech on [this] important public issue," *VoteAmerica*, 576 F. Supp. 3d at 888-89, and deprive Plaintiff of their First Amendment right to "select what [it] believe[s] to be the most effective means" of advocating its message, *Meyer*, 486 U.S. at 424; SOF ¶ 48.

Disregarding this, Defendants contend that VPC has failed to demonstrate the superior effectiveness of its personalized applications in expressing its pro-advance mail voting, asserting that VPC is consequently not entitled to heightened scrutiny. Opp'n at 57-58. The record does not support this contention. SOF ¶¶ 27-28. But equally important is that VPC is not required to empirically prove the effectiveness of its preferred method of conveying its message—nothing in the applicable and binding precedent imposes such a requirement. *See Meyer*, 486 U.S. at 424 (recognizing First Amendment protection for what plaintiff *believes* to be their most effective means of communication); *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002) (same). The relevant consideration is VPC's belief—as it consistently attests—that mailing personalized applications is its most effective means of conveying to its intended recipients that

advance mail voting is convenient, safe, and beneficial and they should participate through this means. SOF ¶¶26-28.[14]

Defendants attempt to distinguish this case from controlling precedent by claiming the restriction at issue here is different from restrictions in the petition circulator context. Opp'n at 60-61. But Defendants provide no meaningful distinction. *Id.* Citizen petitions, like advance ballot applications, are state-created forms that both have an effect in the political process and can be used by advocates to express their speech. *Meyer*, 486 U.S. at 421; *Buckley*, 525 U.S. at 192.[15]

2. The Prohibition Is Unconstitutional Content Discrimination

This Court previously found that the Personalized Application Prohibition "eliminates voting advocacy by plaintiffs . . . based on the content of their message." *VoteAmerica*, 576 F. Supp. 3d at 888. Defendants identify nothing in the record that would change that analysis. *See* Opp'n at 58-60. Instead, Defendants again attempt to analogize the Prohibition to the regulation of billboards at issue in *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464

[14] Based on *Steen*, Defendants contend that in personalizing applications VPC seeks to not only communicate "but also to succeed in their ultimate goal." Opp'n at 49-50. This misunderstands both *Steen* and Plaintiff's argument. *See supra* Part I.B. VPC is not advocating for a right to a successful program, but for its "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424; *see* SOF ¶¶ 26, 28, 30.

[15] Defendants assert that the applications, being "official state forms with no room for any extraneous communications," cannot "serve a communicative purpose." Opp'n. at 59. This directly conflicts with *Doe v. Reed*, 561 U.S. 186 (2010), where the Court explicitly found a signature placed on an official state ballot petition form to have a communicative purpose. 561 U.S. at 195. Defendants' attempt to distinguish *Doe* on the basis that advance ballot applications are distinguishable from petitions are unavailing. *See* Opp'n at 60. In *Doe*, the Supreme Court found that by its very inclusion on a ballot petition form, a "signature [] expresses the political view [of the signor] that the question should be considered 'by the whole electorate,'" and thereby constitutes "the expression of a political view implicat[ing] a First Amendment right." *Doe*, 561 U.S. at 195. Here, by personalizing the application it sends to a specific voter, VPC is similarly expressing its political view that the recipient whose name has been personalized on the application should complete and submit the application to request an advance mail ballot and participate in the upcoming election. SOF ¶¶ 26, 37. The speech at issue in these two contexts is analogous.

(2022). As Plaintiff has previously described, that comparison is inapposite. *See* Pl.'s Opp'n at 98-99. The Prohibition is not "'absent a content-based purpose or justification,'" *see* Opp'n at 58 (quoting *City of Austin*, 142 S. Ct. at 1471), as claimed by Defendants, because it defines the regulated speech based on the category of document it covers (SOF ¶ 73) and bans the content VPC uses to convey its message: particular voters' names and addresses. SOF ¶ 72.

Defendants also liken the Prohibition to the restriction in *Burson v. Freeman*, but that comparison is similarly unhelpful to their argument. *Burson* concerns an electioneering prohibition near polling locations, which the Supreme Court found to be "a facially content-based restriction on political speech." 504 U.S. 191, 193, 197-98 (1992). The Personalized Application Prohibition is a similar content-based restriction because "[w]hether individuals may exercise their free speech rights [] depends entirely on whether their speech is related to [the regulated content]." *Id.* at 197.[16]

The Prohibition is also content-discriminatory because it disfavors some speech based on viewpoint and speaker. *See Reed*, 576 U.S. at 170 (explaining that viewpoint- and speaker-based discrimination are subsets of content-discriminatory laws that unconstitutionally "single[] out" certain speech). VPC has taken sides in the ongoing national debate around mail voting, and whether it is a trustworthy method for voters to cast their ballots. SOF ¶ 54. By limiting communications in favor of mail voting while imposing no limitation on communications against it, the Personalized Application Prohibition is viewpoint discrimination. *See SD Voice v. Noem*, 432 F. Supp. 3d 991, 996 (D.S.D. 2020); *see also* Pl.'s Summ. J. Br. at Part II.B.

[16] The Court ultimately held that the *Burson* restriction was one of the rare cases where a content-based speech restriction was sufficiently narrowly tailored to its compelling state interest of ensuring voters could cast their ballots free from intimidation and fraud. 504 U.S. at 210. *See infra* at Part III.A.

Finally, Defendants' Opposition Brief argues that the Prohibition is distinguishable from cases such as *Meyer* because it is not "dictating who can speak" or limiting "the number of voices who will convey the plaintiffs' message." Opp'n. at 60-61 (citations and internal alterations omitted). That is not the case. The Prohibition is instead also content-based discrimination because it explicitly permits the government to choose some speakers who can personalize applications but prohibit others. *See Reed*, 576 U.S. at 170. The law exempts from the Prohibition Kansas's designated Protection and Advocacy for Voting Accessibility (PAVA) non-profit under the Help America Vote Act, *see* 52 U.S.C. § 21061, allowing that civic organization to continue speaking through personalized applications. *See* K.S.A. § 25-1122(k)(4) (stating that "provisions of this subsection shall not apply to" the PAVA designee organization). But it bars civic organizations such as Plaintiff from speaking in the same manner. This is textbook content discrimination based on speaker that facially permits the state to select some categories of speakers to engage in communication but not others. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011).

3. The Prohibition Infringes on Plaintiff's Associational Rights

The Personalized Application Prohibition's limits on VPC's ability to associate for the purposes of assisting voters to request an advance mail voting application violates its First Amendment rights. *VoteAmerica*, 576 F. Supp. 3d at 876; *see also* Pl.'s Summ. J. Br. at 23-24; Pl.'s Opp'n at Part I.A.3. Nothing in the record supports Defendants' hyperbolic claim in response that "most of modern civilization would be immune from regulation" should the Court find for Plaintiff on this question. Opp'n. at 69.

Defendants' uncited assertion that a recipient's ability to ignore VPC's outreach somehow renders it not entitled to First Amendment protection is at odds with the relevant case law that protects activity initiating an association. *See NAACP v. Button*, 371 U.S. 415, 429 (1963). The

undisputed facts also show that VPC identifies a specific group of voters to target for its associations and does in fact continue its association with those voters by, for example, tracking who responds to its personalized applications and following up by sending further get-out-the-vote communications. *See* SOF ¶¶ 26, 27, 37. These circumstances are distinct from *City of Dallas v. Stanglin*, relied upon by Defendants, Opp'n at 69, where the asserted associational activity was open to "all who [were] willing to pay the admission fee." 490 U.S. 19, 22, 24 (1989).

Finally, Defendants cite language in *Voting for America v. Andrade* in a misguided attempt to differentiate the Prohibition from restrictions on petition circulation, the associational nature of which is undisputed. Opp'n at 69. This comparison is unhelpful, however, as *Andrade* considered restrictions on *collecting and returning* completed applications, which the Fifth Circuit itself "perceive[d] [as] significant[ly] distinct[]" from "activity that urges citizens to vote," such as the relevant activity here. *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890 898 (5th Cir. 2012).

4. The Prohibition is Unconstitutionally Overbroad

Defendants do not dispute that assessing overbreadth requires an examination of whether the law's plain text "chills a substantial amount of protected speech," *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010), in comparison to the law's "legitimate and illegitimate applications." *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1309 (10th Cir. 2022). Yet, they fail to describe any legitimate sweep of the Prohibition. *See* Opp'n at 70-73. To the extent Defendants insinuate a legitimate application of the law to prevent inaccurate applications, it is limited solely to inaccurately pre-filled advance mail ballot applications. *Id.* at 70-71. Despite this, the Prohibition on its face proscribes *all* personalization, regardless of its accuracy or source. *See* SOF ¶ 72. Moreover, the Prohibition punishes *all* personalization with the potential of criminal penalties that "may cause others not before the court

to refrain from constitutionally protected speech or expression." *Hernandez-Calvillo*, 39 F.4th at 1302 n.6.

As applied to Plaintiff, Defendants make much of any limited inaccuracies that may have occurred in personalized applications. Opp'n. at 70-71.[17] But the record indicates that the occurrence of any such inaccuracies was, at most, in the single digits of personalized applications sent to Kansas voters. Opp'n, Defendants' Statement of Additional Facts ("SOAF") ¶ 8. It is also undisputed that Plaintiff endeavors to base any personalization upon the state's own records. SOF ¶ 35. And, despite Defendants' continuous misrepresentation to the contrary, the record does not show that any personalization errors were a cause of administrative burden (as compared to receipt of duplicative applications). *See e.g.*, Pl.'s Statement of Additional Facts (ECF No. 156) at ¶¶ 39-42. Thus, Defendants can produce no evidence of errors for over 90% of the hundreds of thousands of personalized applications VPC mailed to Kansas voters, making plain that the Personalized Application Prohibition is unconstitutionally overbroad because it both "punishes a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep," *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)), and "by [its] broad sweep . . . burden[s] innocent associations." *Broadrick*, 413 U.S. at 612.

B. *Anderson-Burdick* Does Not Apply

Strict *Meyer-Buckley* scrutiny applies "to cases governing election-related speech rather than 'the mechanics of the electoral process.'" *LWV of Tenn.*, 400 F. Supp. 3d at 722 (quoting *McIntyre*, 514 U.S. at 345). And while Defendants characterize—without citation—the

[17] Once again Defendants list other permitted expressive conduct and speech unaddressed by the Prohibition in an effort to mitigate the severity of the Prohibition. Opp'n at 72-73. This is irrelevant, however, as the potential availability of some other forms of expression, which are entirely outside the applications of the law, has no bearing on the law's legitimate or illegitimate applications.

Prohibition as regulating "an essential part of the mechanics of the electoral process," Opp'n at 64, it in fact does not apply to voters' (or third parties') *submission* of advance mail ballot application and is not aimed at establishing the time, place, or manner of election administration. Rather, its specific limitation is on third parties "who solicit[] by mail a registered voter to file an application for an advance voting ballot," *i.e.*, those engaged in voting-related advocacy. SOF ¶ 73. The *Anderson-Burdick* framework is inapplicable here because the Personalized Application Prohibition infringes upon Plaintiff's "election-related speech and associations" and thereby "go[es] beyond the intersection between voting rights and election administration, and veer[s] into the area where the First Amendment has its fullest and most urgent application." *VoteAmerica*, 576 F. Supp. 3d at 888 (citations and quotations omitted).

Additionally, and as previously discussed, the Prohibition is unlawful content discrimination. *See supra* Part II.A.2; *see also* Pl.'s Summ. J. Br. at Part II.B; Pl.'s Opp'n at Part II.A.2. The *Anderson-Burdick* framework is therefore inapplicable as it only applies to content-neutral regulations. *VoteAmerica*, 576 F. Supp. 3d at 887; *see also* Pl.'s Opp'n at 103.

Even if considered under the *Anderson-Burdick* balancing approach, however, strict scrutiny still applies because the Personalized Application Prohibition "impacts speech in a way that is not minimal" but is severe. *VoteAmerica*, 576 F. Supp. 3d at 888. Indeed, burdens on core political speech are *per se* severe. *See Buckley*, 525 U.S. at 207 (Thomas, J., concurring); *Yes On Term Limits, Inc.*, 550 F.3d at 1028-29. The record establishes that the Prohibition would eliminate Plaintiff's most effective way of communicating its message, SOF ¶ 48, and Kansas's interest in prohibiting personalized applications is virtually nonexistent. *See infra* Part III; *see also* Pl.'s Summ. J. Br. at Part III; Pl.'s Opp'n at Part III.

C. Rational Basis Review Does Not Apply

As has already been discussed at length, VPC's personalization of advance mail ballot applications is protected speech. *See supra* Part I.A; Pl.'s Summ. J. Br. at Part I; Pl.'s Opp'n at Part I.A. As such, rational basis review does not apply. *VoteAmerica*, 576 F. Supp. 3d at 889 ("Plaintiffs have shown a sufficiently heavy burden on First Amendment rights to justify a significantly more demanding standard of review than the 'rational basis' standard . . . .").

III. The Prohibition Cannot Survive Strict Scrutiny

Contrary to Defendants' arguments, the Personalized Application Prohibition falls far short of satisfying strict scrutiny or even lesser scrutiny under *Anderson-Burdick*'s sliding scale approach. Defendants fail to—and cannot—prove that the Prohibition is narrowly tailored to serve any compelling state interest, as strict scrutiny requires. *See Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014) ("[W]hen a law infringes on the exercise of First Amendment rights, its proponent . . . bears the burden of establishing its constitutionality." (citation omitted)).

A. The Court Should Reject Defendants' Mischaracterization of the Applicable Legal Standards

As a threshold matter, the Court should reject Defendants' mistaken understanding of the analyses under strict scrutiny and the *Anderson-Burdick* framework. *See* Opp'n at 65, 68 (arguing that no narrow tailoring framework applies here). The cases Defendants invoke to support their view of the applicable analyses are inapposite. First, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021), has no bearing here. *See* Opp'n at 68 (arguing that the state's "entire system of voting" must be examined "when assessing the burden imposed by a challenged provision"). The *Brnovich* court's discussion that Defendants cite was in the context of § 2 of the Voting Rights Act of 1965, which applies a standard assessing racial discrimination in voting that is entirely distinct from the pertinent First Amendment analysis here. *See Brnovich*, 141 S. Ct. at 2330.

Second, Defendants' reliance on *Burson v. Freeman*, 504 U.S. 191 (1992), is likewise misplaced. *See* Opp'n. at 60. Instead *Burson* supports Plaintiff because the Court "agree[d] that distinguishing among types of speech requires that the statute be subjected to strict scrutiny." 504 U.S. at 207. But the *Burson* Court noted the matter presented "the rare case in which we have held that a law survives strict scrutiny," and decided to reduce the level of scrutiny because the challenged law implicated a constitutional "compromise" where two fundamental rights—"the exercise of free speech rights" and "the right to cast a ballot in an election free from the taint of intimidation and fraud"—conflicted. *Id.* at 211. There is no analogous conflict of fundamental rights here. If anything, the scrutiny should be more intensive for the restriction on Plaintiff's speech because VPC exercises its rights in order to reinforce and perpetuate the right to vote.

Thus, the legal standards are not as forgiving for the government as Defendants portray. Whether under strict scrutiny or *Anderson-Burdick*, Defendants must present legitimate, extant interests and show the challenged law is sufficiently tailored to those established interests. Restrictions on core political speech must survive the *Meyer-Buckley* standard that "is well-nigh insurmountable," *Meyer*, 486 U.S. at 425; content-discriminatory laws "are presumptively unconstitutional," *Reed*, 576 U.S. at 163; and the narrow "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms" concerning associational rights, *Button*, 371 U.S. at 438.

Also contrary to Defendants' arguments about *Anderson-Burdick*, tailoring is required because "the seriousness of the injury increases 'the rigorousness of [the] inquiry into the propriety' of the [state's] justifications." *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1283–84 (10th Cir. 2019) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). For severe burdens on the plaintiff's rights, as is the case here, the law "must be 'narrowly tailored to serve a compelling state interest.'" *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018)

(quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)). And even if an intermediate scrutiny standard applies, Defendants must still prove the Prohibition is sufficiently tailored. The *Anderson* Court itself struck down a ballot access law as unconstitutional in part because "its coverage is both too broad and too narrow." *Anderson v. Celebrezze*, 460 U.S. 780, 805 (1983).

Thus, under the correct First Amendment analysis here, the State must carry a "heavy burden of demonstrating that a [speech] restriction is 'the least restrictive means among available, effective alternatives.'" *Peck v. McCann*, 43 F.4th 1116, 1135 (10th Cir. 2022) (quoting *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 665-66 (2004)); *accord United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality) ("[W]hen the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available, effective alternatives.'"). The State must show "that no alternative exists that is both 'less restrictive' than the existing law and would effectively achieve the state's compelling interest." *Peck*, 43 F.4th at 1135. In other words, "by demanding a close fit between ends and means, the [First Amendment] tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citations and quotations omitted).

B. The Record Contains No Evidence Demonstrating that the Prohibition Serves the Interests Defendants Claim It Does

Defendants claim that the Prohibition reduces voter confusion, facilitates efficient election administration, enhances public confidence, and deters voter fraud. Opp'n at 56. However, as discussed in Plaintiff's Opening Brief and opposition to Defendants' motion for summary judgment, the record contains insufficient admissible evidence to establish that the Prohibition serves any of these interests. *See* Pl.'s Summ. J. Br. at 34-43; Pl.'s Opp'n at 105-09.

As discussed in Plaintiff's opening brief, under strict scrutiny, courts must look to the "actual considerations that provided the essential basis for the [decision-making], not post hoc

justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 179 (2017); *accord McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 190 (D. Mass. 2015) ("[A]fter-the-fact explanations cannot help a law survive strict scrutiny" under the First Amendment.").

Tellingly, the legislative history for the Personalized Application Prohibition makes no mention of any of the interests Defendants proffer. Indeed, the legislative record does not concern personalization at all. SOF ¶ 77. Given the legislature's silence on these interests, Defendants can offer little more than conclusory statements about the Prohibition's connection to their purported state interests. *See, e.g.*, Opp'n at 63 (asserting that the Prohibition "facilitates more efficient election administration," "minimizes voters' confusion," "enhances confidence in the electoral process," and "minimizes the possibility of voter fraud" without any citation to the record or even to legal authority). A restriction on speech and expressive conduct, "juxtaposed against [] paltry record evidence of real, non-speculative harms ameliorated by the" restriction—as is the case here—cannot survive strict scrutiny. *Brewer*, 18 F.4th at 1226. Put another way, Defendants have failed to demonstrate that the "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality op.) (citations omitted).

Recognizing that nothing in the record mentions the personalization of applications, Defendants attempt to conflate two distinct issues—voters and elections officials' receipt of multiple advance mail ballot applications, on one hand, and the personalization of applications, on the other. *See* Opp'n at 57, 66, 67 (repeatedly invoking the phrase "inaccurate and duplicate applications"); *see also* Pls.' Opp'n at 105 (citing at least six instances in which Defendants deploy the same phrase). This is likely because the legislative history *does* mention voters' receipt of multiple advance mail ballot applications. *See e.g., supra*, Plaintiff's Reply to Defendants

Response to SOF ¶ 77. But the Personalized Application Prohibition does not concern this subject—nothing in the Prohibition prevents voters, for example, from receiving multiple successive applications. Defendants attempt to link the two issues in only one sentence of their opposition: "As Andrew Howell and Debbie Cox noted, many voters submitted duplicate applications to county election offices because, after receiving pre-filled applications, they believed that they were required to return them even if they had already submitted another one." Opp'n at 65. This statement omits why Defendants' witnesses say these voters thought they had to return the applications they had received—not because they were personalized, but rather purportedly because (a) they thought *a county election office* had mailed the applications (due to the return envelope, not the personalized information), *see* Opp'n Ex. S at 269:14-270:1 (testifying that Mr. Howell spoke with voters where the voters said *because the applications were sent "with a return envelope* from [Mr. Howell's] office, they thought they had to send in" (emphasis added)); or (b) they knew the application was from a third-party, but they may have thought they had to submit all applications they received, *see* Opp'n Ex. U ¶ 19 (stating that voters called "to ask whether they were required to submit the duplicate application"). *See also* Opp'n Ex. A ¶ 41 (stating that many voters told Mr. Howell that they thought his office was responsible for sending the applications and the voters believed they were required to return every application they received). Defendants cannot point to any evidence that voters were confused by applications *because they were personalized*. And, in all events, the undisputed evidence does not support such conflation between personalization and duplicates, and attempting to tie the distinct topics is insufficient to meet strict scrutiny or any lesser level of review.

C. Defendants' Purported Interests Do Not Withstand Scrutiny

Upon closer inspection, each interest Defendants offer in support of the Prohibition—(1) reducing voter confusion and enhancing public confidence in the electoral system, (2) facilitating

efficient election administration, and (3) deterring voter fraud—fails to withstand scrutiny. *See* Opp'n at 56. Each alleged interest is addressed below in turn.

First, especially given the lack of admissible evidence concerning purported voter confusion about personalized applications, *see* Pl.'s Opp'n at 106, the Prohibition cannot survive constitutional scrutiny on the ground that it minimizes voter confusion. The Supreme Court has held that freedom of speech, which "embraces the right to distribute literature . . . and necessarily protects the right to receive it," "may not be withdrawn even if it creates the minor nuisance for a community." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The Court has "never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Bolger*, 463 U.S. at 72.

Moreover, the Prohibition is not narrowly tailored to serve this interest because other less drastic means could be used to minimize voter confusion. For example, VPC already includes in its mailers an option for recipients to unsubscribe, and Kansas could codify this requirement into law or add further regulations to facilitate individual Kansans to unsubscribe.[18] *See, e.g.*, *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 737 (1970) (upholding law permitting individuals to unsubscribe from commercial mailers in part because giving *individuals* the power to unsubscribe "avoid[s] possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official").

Second, courts have repeatedly held that fundamental rights, such as the right to free speech, cannot be sacrificed for the sake of mere administrative convenience. *See Buckley*, 525 U.S. at 192 (speech restrictions were not narrowly tailored to serve, *inter alia*, purported

[18] VPC also clearly identifies itself in its mailers. SOF ¶ 9. Such identification is now also required under HB 2332, and VPC does not challenge this requirement. K.S.A. § 25-1122(k)(1).

government interest of administrative efficiency); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 930 (9th Cir. 2004) (purported interest in promoting administrative efficiency did not outweigh free speech interests); *cf. Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012) (the right to vote "must not be sacrificed to administrative chicanery, oversights, or inefficiencies"). Any asserted "[a]dministrative convenience . . . is not usually enough to justify what is . . . a significant restriction of speech rights." *Bernbeck v. Moore*, 936 F. Supp. 1543, 1566 (D. Neb. 1996); *see also Riley*, 487 U.S. at 795 ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency").

The evidence also contradicts Defendants' argument that the Prohibition facilitates efficient election administration. Kansas county election officials indicated their support for the benefits of personalized applications, and at least one testified that, if not for budgetary constraints, his office would prefer to personalize applications sent to voters. SOF ¶ 30. At least one county did in fact personalize applications that it sent to voters, prefilling more information than VPC does, because staff believed doing so "makes it easier for the voter and reduces mistakes that [staff] then ha[s] to work harder to fix on the back end." SOF ¶¶ 31-32. And, county officials also testified that their offices were able to and did in fact process applications with minor errors or variations in names or addresses. *See* Pl.'s Opp'n at 107-08.

Moreover, Defendants attribute far too much of the purported difficulties in the 2020 election to Plaintiff's personalization of applications. The 2020 election was a challenge because numerous Kansans switched to voting by mail for the first time in the middle of a global pandemic, which was fraught with difficulties for both the election and the society in which it took place. *See, e.g.*, SOF ¶¶ 40-41, 50-52. This context matters when considering Defendants' stated interests, and further shows the weak tie between 2020 election complications and the discrete action of personalized applications. In addition, voters had other valid concerns about mail delays,

which contributed to the volume of applications sent and submitted. SOF ¶¶ 59-61; *see also New York v. Biden*, No. 20-CV-2340 (EGS), 2022 WL 5241880, at *13 (D.D.C. Oct. 6, 2022) (discussing evidence of "nationwide delays" in election mail service in 2020 and permanently enjoining U.S. Postal Service's unlawful policy changes). But again, that volume of applications has nothing to do with VPC's personalization of advance mail voting applications—the prohibited activity here.

Third, Defendants fail to demonstrate that the Prohibition is connected to any documented problems of voter fraud. Under strict scrutiny, Defendants must demonstrate that the Prohibition is "vital to ensuring the integrity" of elections. *Chandler*, 292 F.3d at 1243. Here, Defendants fail to demonstrate any connection between the Prohibition and voter fraud. Indeed, Defendants do not—and cannot—offer evidence of *any* voter fraud, let alone any fraud connected with personalized advance mail ballot applications, especially when the advance mail voting process contains multiple safeguards against fraud. *See* SOF ¶¶ 64-66; *see also Buckley*, 525 U.S. at 210 (Thomas, J., concurring) (concluding that "the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem").

Finally, Defendants attempt to cite communications from other states regarding VPC's mailer communications. Opp'n at 66. Defendants misapply the relevant factual contentions and extrapolate voter registration programs to vote-by-mail advocacy, though they otherwise attempt to distinguish the two programs. *Id.* at 54, 55, 59. Regardless, Defendants' attempts to focus on alleged conduct outside of Kansas fails to appreciate the applicable First Amendment standards, which requires a localized analysis of the government interests. In *Brewer*, for example, the Tenth Circuit required proof of "traffic safety problems *in Albuquerque*" to justify a speech restriction, not general issues in other jurisdiction that are "too generic or isolated" to bear on local issues. 18 F.4th at 1227-35 (emphasis added). Other courts have likewise required concrete and localized

support for the state interest to justify a speech restriction. *See McCullen*, 573 U.S. at 490 (requiring concrete, case-specific evidence under strict scrutiny); *Yes On Term Limits*, 550 F.3d at 1029 (same). Similar requirements apply under *Anderson-Burdick* because even if the proffered state interests are "legitimate in the abstract," the government must establish "concrete evidence that 'those interests make it necessary to burden the plaintiff's rights' in this case." *Fish v. Schwab*, 957 F.3d 1105, 1132 (10th Cir. 2020) (citing *Burdick*, 504 U.S. at 434).

In sum, Defendants' purported interests cannot sustain the Personalized Application Prohibition under strict scrutiny or even lesser scrutiny under *Anderson-Burdick*.

CONCLUSION

For the foregoing reasons, and as further stated in Plaintiff's moving brief and opposition brief to Defendants' motion, the Court should grant summary judgment in favor of Plaintiff.

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Respectfully Submitted,

By: /s/ Mark P. Johnson

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 18th day of November 2022, a copy of the foregoing document was emailed to:

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