

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and
VOTER PARTICIPATION CENTER,

Plaintiffs,

vs.

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

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

Defendants.

UNCONTROVERTED AND CONTROVERTED FACTS

Parties submit this additional submission of uncontroverted and controverted facts in response to the Court's November 15, 2022 Order (Docket # 160) directing the parties to confer in good faith and prepare a statement of all uncontroverted facts to which the parties can stipulate. At the Court's direction, parties have met and conferred on several occasions for a total of at least three hours and have exchanged numerous drafts revising their facts and responses.

The parties submit the following facts and responses subject to and without waiving their objections as to materiality, lack of relevance, foundation, inadmissibility, or inconsistency relevant to other facts as set forth in the parties' submissions (ECF nos. 142, 145, 155, 156, 162, & 163).

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I. Undisputed Facts

The below lists include undisputed facts from Plaintiff's and Defendants' Statements of Facts (Docket Nos. 151 and 154) and Statements of Additional Facts (Docket Nos. 155 and 156) in Support of Plaintiff's and Defendants' Motions for Summary Judgment, respectively.¹ These facts have been negotiated and agreed to by the parties.

A. Plaintiff's Undisputed Facts

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

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

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

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

¹ Please see Joint Appendix A for a table listing corresponding numbering from the parties' motions for summary judgment briefing.

5. Defendant Schwab, as Kansas's Secretary of State, is responsible for maintaining an online voter registration database. 52 U.S.C. § 21083(a)(1)(A). All additions, deletions, and modifications of records in the database are performed by county election officials. Ex. HH at 40:5-42:17.

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

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

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

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

10. To vote by mail in Kansas a voter generally must complete an advance voting ballot application and return it to the county election office in the county in which the voter is registered to vote. *See id.* at § 2(a)(xxx). However, voters who are on the permanent advance voting list or who vote by mail pursuant to the Uniformed and Overseas Citizens Absentee Voting Act are not required to file an advance voting ballot application every time they wish to vote by mail.

11. If an advance voting ballot application has been timely submitted to the county election office, an individual working in such office processes the application and, if the county

accepts the application, the county will mail the voter an advance ballot packet. *See id.* at § 2(a)(xxxi).

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

13. Other than voters entitled to receive ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 et seq., counties cannot transmit advance ballots to voters prior to the 20th day before the election for which an application has been received. K.S.A. 25-1123(a), 25-1220.

14. Ballots must be issued to advance voting voters within two business days of the receipt of the voter's application by the election office or the commencement of the 20-day period. K.S.A. 25-1123(a). If a voter submits an inaccurate or incomplete application, adherence to the two-day policy is not always possible. Mr. Howell testified that Shawnee County officials will attempt to contact the voter and "cure" the application and still meet that deadline. Ex. KK at 188:13-189:22. But it is not always possible.

15. If an advance mail ballot application does not contain sufficient information, does not match the voter file, or if the information is illegible, the election office confirms the validity of the application before accepting it. K.A.R. § 7-36-7 and 7-36-9; K.S.A. §§ 25-1122(e), 25-1124; Declaration of Mark Johnson in Support of Plaintiff Voter Participation Center's Motion for Summary Judgment (Oct. 14, 2022) ("Johnson Decl."), Ex. 1, (Deposition of Connie Schmidt (Sept. 16, 2022) ("Schmidt Tr.)) 91:8-17, 93:9-13, 110:24-111:16; *id.* at Ex. 2, (Deposition of Deborah Jean Cox (Sept. 9, 2022) ("Cox Tr.)) 52:14-53:6, 56:22-57:11, 72:6-16; *id.* at Ex. 3, (Deposition of Jameson Shew (Sept. 15, 2022) ("Shew Tr.)) 51:12-13; *id.* at Ex. 4, (Deposition of

Andrew Howell (Sept. 14, 2022) (“Howell Tr.”) 66:13-25, 77:12-78:17, 132:17-133:21, 138:5-11, 147:8-148:23; *id.* at Ex. 5, (30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) (“KS SOS Tr.”)), Ex. 9 (Kansas Election Standards on Election Administration) at KS000167VA.

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

17. If the voter cannot be contacted, or it would be impracticable to make contact before the election, the voter will be mailed a provisional ballot. K.A.R. § 7-36-7(f); Stipulated Facts at § 2(a)(xxxiv).

18. Once an advance voting ballot application has been received and processed by the county election office, the fact and date of such processing is recorded in ELVIS. The office also documents in ELVIS the date on which it transmits the regular or provisional ballot to the voter. *See* Stipulated Facts at § 2(a)(xxxv).

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

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

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

21. 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.

22. VPC believes and supports that mail voting expands participation opportunities among its target voters, some of whom may not have the ability and availability to vote in person or the resources to navigate the mail voting application process. Ex. 14 (Lopach Decl.) at ¶ 10.

23. 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.

24. Douglas County Elections Director Jamie Shew testified that Douglas County sends advance mail ballot applications to registered voters, as do "state parties, both from the Democratic and Republican parties", "larger campaigns", "larger organizations", and other "organized effort[s]" where Mr. Shew is unable to identify the sender. Johnson Decl., Ex. 3 (Shew Tr.) 22:23-24:6. Kansas Secretary of State Elections Director Bryan Caskey testified that he was aware of VPC and the Democratic Congressional Campaign Committee sending advance mail ballot applications to Kansas voters. *Id.* at Ex. 8 (9/8/2021 PI Tr.) 70:18-25 (Bryan Caskey testimony).

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

26. VPC encourages registered Kansans 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.

27. Providing young voters, voters of color, and unmarried women with the necessary personalized applications provides the voter simple access to an advance mail ballot application that is personalized with required information. Ex. 14 (Lopach Decl.) ¶¶ 18, 21.

28. VPC believes that distributing personalized advance mail ballot applications as a part of its advance mail voting mailer conveys its viewpoint that voting by mail is convenient and a good option for the recipient to participate in democracy. Johnson Decl., Ex. 6 (Lopach Tr.) 149:11-13, 150:13-19, 151:14-16, 183:9-184:1, 185:21-186:3, 188:1-4; *id.* at Ex. 7 (Dripps Tr.) 192:5-13; *id.* at Ex. 8 (9/8/2021 PI Tr.) 44:24-45:7, 49:17-24 (Thomas Lopach testimony); Lopach Decl. ¶¶ 9, 23-24, 66.²

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

30. During the deposition of former Johnson County Elections Director Connie Schmidt, she was asked "when your office receives advance mail voting applications, and one is typed and one is handwritten, is there any difference in the level or difficulty of processing those applications?" In response she testified "I think that would be obvious" explaining that "[s]ometimes handwriting can be hard to read." Johnson Decl. Ex. 1 (Schmidt Tr.) 85:6-14. When asked, County Elections Director Debbie Cox testified that she would normally agree "that at least

² Defendants respond that Plaintiff's Uncontroverted Fact 26 is Uncontroverted as to VPC's beliefs.

in some ways, prefilled application -- prefilled information increases the likelihood and the ease that [her] office can match information between the voter file and application." Johnson Decl., Ex. 2 (Cox Tr.) 150:9-14. Douglas County Elections Director Jamie Shew testified that if not for budgetary constraints, his office would prefer to personalize the applications sent to voters with their prefilled information. *Id.* at Ex. 3 (Shew Tr.) 24:15-20.

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

32. 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.

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

34. 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.

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

36. 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. Johnson Decl., Ex. 6 (Lopach Tr.) 91:4-92:18; Lopach Decl. ¶¶ 37-40. VPC attempts to cull its lists to ensure it is running its program as efficiently and accurately as possible. *See* Lopach Decl. ¶¶ 18, 40; Johnson Decl., Ex. 6 (Lopach Tr.) 33:2-35:3, 92:13-25. Mr. Dripps testified that it is his recollection "that VPC understood there was an error with the data [VPC was] receiving from [its] data vendor [and] that until [VPC] could be confident that the information that [VPC] had was completely correct [VPC] did not want to send prefilled advance ballot application mail with that information" and therefore it sent two waves of mailers with blank applications." *Id.* at Ex. 7 (Dripps Tr.) 168:3-9. Mr. Dripps further testified that it was his "recollection [] that VPC worked with [its] data vendors to obtain a list of voters that was exactly as the data vendor had received it from the various state election officials" so that it could resume sending prefilled applications. *Id.* at 174:6-9.

37. 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.

38. 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.

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

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

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

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

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

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

45. An estimated 112,000 Kansas voters used a VPC or CVI-provided pre-paid/pre-addressed envelope to mail their advance ballot application to their respective county election office in the 2020 general election. An estimated 69,000 of such Kansas voters mailed an advance voting ballot application provided by VPC. Ex. 14 (Lopach Decl.) ¶ 26; Ex. G at 124:16-124:20.

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

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

48. 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.

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

50. In the 2020 election cycle, the Kansas Director of Elections confirmed to VPC in writing that its advance mail voting application form and instructions complied with Kansas law

and with the forms that the Secretary of State's office uses. Johnson Decl., Ex. 16 (KS SOS Tr. Ex. 16) VPC000048—50 (June 22, 2020 to July 1, 2020 email thread).

51. The 2020 General Election in Kansas had record turnout (1,375,125 total votes cast, a 70.9% turnout rate) and had more votes cast than the 2018 General election (1,039,085 total votes cast, a 56.4% turnout rate) and the 2016 General Election (1,225,667 total votes cast, a 67.4% turnout rate). *See* Stipulated Facts at §2(a)(xxxvi).

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

53. It also presented new hurdles for some voters who, as Ms. Schmidt testified, were "frightened" and "in their homes" due to Covid-19, and for that reason requested advance mail ballots. *Id.* at Ex. 1 (Schmidt Tr.) 149:4-150:6.

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

55. A national debate has unfolded about the efficacy and security of mail voting as public figures both in Kansas and nationwide expressed their views on whether voters should or should not vote by mail. *See, e.g., id.* at Ex. 20 (Bryan Lowry & Sarah Ritter, *Despite Trump's*

attacks, Kansas voters request 2020 mail ballots at historic rate, The Kansas City Star (May 29, 2020), <https://www.kansascity.com/news/politics-government/article243052656.html>).

56. Many organizations, campaigns, and elections offices, including Plaintiff VPC as well as Kansas election officials, sought to encourage voters to vote by mail in the 2020 election. *Compare*, Lopach Decl. at Ex. A (2020 VPC mailer) *and* Johnson Decl., Ex. 21 (Schmidt Tr. Ex. 17) (May 18, 2020 emails); *see also* Johnson Decl., Ex. 1 (Schmidt Tr.) 287:4-14.

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

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

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

60. When incomplete or inaccurate applications were submitted, county election officials attempted to help voters cure them regardless of whether the voter had used a blank form

or a form pre-populated with personalized information. Mr. Howell testified that in Shawnee County, "we don't spend time determining was it prefilled out or not and because we don't track it that way, it really isn't, to me, a question of was it prefilled or not. It's really a question of was it accurate, were there duplicates, was there some other issue that caused us to get off on the track of having to cure information that either wasn't correct or wasn't provided and then ended up going down to the provisional road for that voter. *Id.* at Ex. 1 (Schmidt Tr.) 84:18-85:20, 86:22-87:5, 134:6-22, 135:25-136:13, 294:2-13; *id.* at Ex. 2 (Cox Tr.) 67:9-68:1; 89:3-90:5; *id.* at Ex. 4 (Howell Tr.) 245:13-246:16, 252:11-23, 254:3-11; *id.* at Ex. 17 (KS SOS Tr.) 250:18-252:6.

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

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

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

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

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

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

67. The advance mail voting process includes multiple safeguards against fraud, *id.* at Ex. 1 (Schmidt Tr.) 64:3-20, 124:9-25, 212:25-216:9; *id.* at Ex. 2 (Cox Tr.) 58:5-8; *id.* at Ex. 4

(Howell Tr.) 42:9-23, 113:4-19, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications. *See, e.g.*, K.S.A. § 25-2431.

68. Kansas Secretary of State Elections Director Bryan Caskey testified that the 2020 post-election audits examined “ballots not, the source of ballots” and its “results were every ballot that was cast was accounted for and counted properly either by hand or by machine.” When asked whether they “reveal[ed] any systemic fraud in Kansas elections in 2020” Mr. Caskey responded “They did not.” Johnson Decl., Ex. 17 (KS SOS Tr.) 282:25-283:13.

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

70. On March 17, 2021, the Kansas Secretary of State’s Office submitted written testimony on HB 2332 that mentioned “incomplete mail ballot applications” but 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.*

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

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

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

74. HB 2332’s Personalized Application Prohibition bans any person or organization who solicits a registered voter by mail from mailing registered Kansas voters a personalized advance mail voting application that is prefilled with any information, such as a voter’s name and

address. *See* H.B. 2332 § 3(k)(2) (codified at K.S.A. § 25-1122(k)(2)) (“No portion of such [advance mail voting application] shall be completed prior to mailing such application to the registered voter.”).

75. This prohibition applies to “[a]ny person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing,” even if the prefilled information is derived from the State’s publicly available voter registration file. *Id.*

76. 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)).

77. A violation of the Personalized Application Prohibition is a class C nonperson misdemeanor, which is punishable by up to one month in jail and/or fines. *Id.* § 3(k)(5); K.S.A. §§ 21-6602(a)(3), (b).

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

79. 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.*

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

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

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

83. 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.

84. 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.

85. 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.

86. 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.

87. At Mr. Howell's deposition, when asked "Is it your opinion that -- that voters became even more confused and frustrated when the applications contained prefilled information?" he testified “I don't think that the prefilled information, in and of itself, was what all of the concern was.” *See* Ex. 1 (Howell Tr.) 245:13-19.

88. 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.

89. 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.

90. 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.

91. 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.

92. 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. None of these applications were pre-filled.

93. 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.

94. 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.

B. Defendants’ Undisputed Facts

1. Plaintiff VPC is a 501(c)(3) organization. VPC’s mission is to provide voter registration, early voting, vote-by-mail, and get out the vote resources and information to

traditionally underserved groups, including young voters, voters of color, and unmarried women. Pretrial Order (Dkt #140) Stipulated Facts (“PTO-SF”), ¶¶ vii-viii.

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

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

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

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

6. Section 3(l)(1) of HB 2332 (codified at K.S.A. 25-1122(l)(1)) provides that “[n]o person shall mail or cause to be mailed an application for an advance voting ballot, unless such

person is a resident of this state or is otherwise domiciled in this state.” This statute will be referred to as the “Out-of-State Distributor Ban.” PTO-SF ¶ xxiv.

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

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

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

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

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

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

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

14. Other than voters entitled to receive ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 *et seq.*, counties cannot transmit advance ballots to voters prior to the 20th day before the election for which an application has been received. K.S.A. 25-1123(a) and 25-1220.

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

16. If an advance voting ballot application is timely submitted to the county election office, an official in such office processes the application and, if the county accepts the application, the county will mail the voter an advance ballot packet. PTO-SF ¶ xxxi.

17. If the required information on an advance voting ballot application does not contain sufficient information or if the information is illegible, or if there is a signature mismatch or missing signature, the county election office must attempt to contact the voter to obtain the correct information and/or signature before Election Day. Kan. Admin. Reg. 7-36-7 and 7-36-9; K.S.A. 25-1122(e). If the voter cannot be contacted, or it would be impracticable to make contact before the election, the voter will be mailed a provisional ballot. Kan. Admin. Reg. 7-36-7(f). PTO-SF ¶ xxxiv.

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

19. Mr. Howell, Ms. Cox, and Mr. Shew all noted that county election officials in their respective counties will not send an advance ballot to a voter who submitted an application with an erroneous middle initial or suffix. Such an application will instead enter the curative process. Ex. A at ¶¶ 11, 25; Ex. U at ¶¶ 12, 24; Ex. B at 48:25-50:7.

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

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

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

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

24. Any individual or organization similarly may obtain a list of all registered voters in Kansas who have submitted an advance voting ballot application that has been processed by a county election office (as of the date of the request). This data can be purchased (or, in some counties, obtained for free) from either the Secretary of State's Office or a county election office. Ex. C at 118:13-119:17, 121:3-124:21; Ex. B at 102:23-103:24.25

25. Because ELVIS is a dynamic system, even if a third-party utilizes voter registration information obtained from ELVIS to partially pre-fill advance voting ballot applications, some information on the pre-populated application may not match the State's voter file database when a voter receives the pre-filled application if there is a lag time between the date the third-party acquires the ELVIS data and the date it mails out the pre-filled application to the voter. Ex. A ¶ 9.

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

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

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

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

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

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

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

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

33. Mr. Howell, Ms. Cox, and Mr. Shew all noted that, due to the unique nature of VPC’s pre-filled applications, they were easily able to identify them. Ex. A ¶ 14; Ex. U at ¶ 15; Ex. B at 18:10-21:22.

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

35. VPC sent five “waves” of mailers to Kansas voters for the 2020 General Election.

The dates were as follows:

PTO-SF ¶ xl.

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

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

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

38. VPC Executive Vice President Lionel Dripps testified that VPC discovered, in the wake of Waves A and B, that approximately 5% of the pre-filled applications it had sent to voters throughout the United States contained an erroneous middle initial (i.e., an initial that did not match the data in the states’ voter files), and approximately 3% of the pre-filled applications contained an erroneous suffix (i.e., a suffix that did not match the data in the states’ voters files). Ex. F at 167:24-170:9.

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

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

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

42. Because of the 4-6 week lead time between the date that VPC sent its data to its printer for pre-filling advance voting ballot applications and the date such applications arrived in voters' mailboxes, and based on the dates that VPC received updated Kansas voter files from Catalist, *at best*, VPC was using the Kansas voter file from April 10, 2020, to pre-populate the applications sent to Kansas voters in connection with the 2020 General Election. Ex. H at 3; PTO-SF ¶ 2(a)x1.

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

44. Mr. Block attested that in its first wave of mailings, which VPC sent to the printer on July 6, 2020, for delivery to voters on or about August 17, 2020, 385 Kansas voters to whom

VPC sent pre-filled advance voting ballot applications had had their voter registrations cancelled prior to that date. Ex. N ¶ 9; Ex. O (date of voters' cancelled registration is found in Column E).

45. Mr. Block attested that in its mailings to Kansas voters for the 2020 General Election, VPC sent out:

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

Ex. N ¶ 9; Ex. O.

46. Mr. Block attested that in the time between when VPC sent its mailers to the printer in connection with its first wave of mailings and its final wave of mailings for the 2020 General Election, approximately 341 Kansas voters had had their voter registration cancelled yet still received a mailing from VPC due to its failure to remove such no-longer-registered voters. Ex. N ¶¶ 10-13.

47. Mr. Block attested that he identified pairs of matched records in which two different voters showed the same voter registration number, which he attested indicated that VPC had sent a pre-filled application for Voter #1 to Voter #2. Mr. Block further attested that these individuals were properly separated in Kansas' own voter file to which VPC (and any other member of the public) had access. Ex. M ¶¶ 23-24; Ex. P.

48. Mr. Block attested that Kansas election officials identified 15 voters to whom VPC sent advance voting ballot applications in connection with the 2020 General Election yet whose registration status had been cancelled in ELVIS on or *prior to April 10, 2020* (meaning that their

names would not have appeared on a list of voters by anyone requesting the statewide voter file as of that date). Ex. O.

49. Mr. Block attested that VPC's use of stale voter registration data to pre-fill the advance voting ballot applications it sent to Kansas voters imposed an extra burden on county election officials. Ex. M ¶ 39.

50. Mr. Howell attested in his affidavit that duplicate and inaccurately pre-filled advance voting ballot applications resulted in telephone calls, letters, e-mails, and in-office visits from voters regarding what they had received from VPC. Ex. A ¶¶ 12, 37, 40, 44; Ex. S at 117:24-125:2; Mr. Howell further testified that he spoke with hundreds of these voters. Ex. S at 121:11-122:12.

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

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

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

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

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

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

57. Mr. Howell and Ms. Cox attested that, on average, it takes an experienced election official in their respective offices three to five minutes to process an accurate, non-duplicate advance voting ballot application. Ex. A ¶ 24; Ex. U ¶ 23.

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

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

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

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

62. VPC provided in discovery a set of FAQs, which including the following two questions and answers to be used to respond to individuals who contacted VPC regarding materials they received by VPC:

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

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

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

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

Ex. X.

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

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

65. The 112,597 Kansas voters who used a VPC or CVI-provided pre-paid/pre-addressed envelope to mail their completed applications back to their respective county election offices sent in 127,336 applications using the VPC or CVI-provided envelopes. In other words,

approximately 14,739 duplicate applications were sent to county election offices by Kansas voters using a VPC- or CVI-provided envelope. Ex. E; Ex. F at 178:16-182:3; Ex. G at 124:16-125:18.

66. Of the 112,597 Kansas voters who used a VPC- or CVI-provided pre-paid/pre-addressed envelope to send in a completed advance voting ballot application to their county election office, only 111,199 voters ultimately received an advance ballot. In other words, 1,398 voters who returned an advance voting ballot application in a VPC- or CVI-provided envelope never submitted a successful application such that they could receive an advance ballot in connection with the 2020 General Election. Ex. E; Ex. F at 182:20-184:1; Ex. G at 128:3-25.

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

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

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

70. Mr. Howell and Ms. Cox attested that voters told county election officials in their offices that they were confused by the pre-filled advance voting ballot applications that they had received during the 2020 General Election and some voters believed (erroneously) that the applications had originated from the election office. Mr. Howell and Ms. Cox attested that these voters told election officials in Shawnee and Ford Counties that they thought they were required to complete and mail back the pre-filled applications to the county election office even if they had already submitted another application. Ex. A ¶ 41; Ex. S at 269:14-270:1; Ex. U ¶ 19.

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

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

73. Although Kansas election officials did not attempt to quantify how many duplicate advance voting ballot applications in the 2020 General Election involved VPC-pre-populated applications, Mr. Howell and Ms. Cox attested that they believed the majority of duplicate applications their offices received to have been pre-filled by VPC. Ex. A ¶ 16; Ex. U ¶ 17.

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

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

76. Mr. Howell and Ms. Cox attested in their respective affidavits that after receiving a duplicate application, their election offices cannot assume that the initially submitted application was correct. Depending on the situation, the offices may need to send a provisional ballot to the voter. For this reason, the review of a duplicate application usually takes their offices more staff time than the review of the initially submitted application. If their offices do not have to contact

the voter, the review of the duplicate application generally takes 7-10 minutes. If the offices does have to contact the voter, the review of the duplicate application can take from 15-30 minutes (and occasionally more) of total staff time. Ex. A ¶ 30; Ex. U ¶ 28.

77. The number of advance mail ballot applications the Shawnee County Election Office received during the 2020 general election increased by approximately 270 percent as compared to the 2016 general election, and approximately 195 percent as compared to the 2018 general election. *Compare* Ex. A ¶ 15 (stating that the Shawnee County Election Office received and ‘processed’ 23,156 plus an additional 4,217, totaling 27,373 applications received) *with id.* ¶ 17 (stating the Shawnee County Election Office received 7,394 applications in 2016 and 9,272 applications in 2018). The Shawnee County Election Office typically assigns 6-7 staff members to handle the processing of advance voting ballot applications. Nearly double that number had to be assigned to the task for the 2020 General Election. Mr. Howell attested in his affidavit that the most significant time burden and strain on staff came from having to contact thousands of voters who had submitted inaccurate or duplicate applications. At one point, Mr. Howell had to assign almost 30 staff members just to review and process applications in order to ensure that the office could process applications within the time imposed by State law. Ex. A ¶ 33.

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

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

80. During Mr. Lopach's deposition he was asked "And so you don't know if the person receiving [the pre-filled advance mail ballot application] sees any political message in the fact that their name and address are filled out for them on the advance ballot application?" Mr. Lopach answered "I don't know if the recipient views a political message in whether or not their name is filled out on" the application." Ex. G at 99:22-100:10.

II. Facts In Dispute

The parties engaged in serious, good-faith negotiations to greatly reduce the number of disputed facts, leaving only the following facts in dispute. The below lists include disputed facts from Plaintiff's and Defendants' Statements of Facts and Statements of Additional Facts in Support of Plaintiff's and Defendants' Motions for Summary Judgment, respectively.³

A. Plaintiff's Facts In Dispute

1. VPC has stated that it considers providing young voters, voters of color, and unmarried women—who may have fewer resources for, and less access to, printing and postage—with the necessary personalized applications to be key to its effectively advocating its message. Johnson

³ Please see Appendix A for a table listing corresponding numbering from the parties' briefing.

Decl., Ex. 6 (Lopach Tr.) 185:25-186:3; *id.* at Ex. 8 (9/8/2021 PI Tr.) 59:23-60:20; Lopach Decl. ¶¶ 10, 21, 23, 28.

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

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

EE at 96. The study is inadmissible hearsay and, without some expert witness to testify about it, VPC cannot rely on it in support of its motion.

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

PLAINTIFF'S REPLY: Defendants merely raise immaterial facts and/or make legal arguments not appropriate for factual contentions such that Defendants' response does not warrant a reply from Plaintiff and does not present any actual facts in dispute.

2. Mr. Lopach testified that VPC believes sending personalized advance mail ballot applications "increases voter engagement, which [Mr. Lopach] think[s] would be a broad associational base with potential voters in Kansas." Ex. 6 (Lopach Tr.) 167:22-168:15; *see also* Ex. 14 (Lopach Decl.) ¶¶ 28-29.

DEFENDANTS' 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* Defs.’ Reply in Support of Defs.’ Fact in Dispute No. 5.

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. 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.

3. VPC has stated that it 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.

DEFENDANTS’ 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 Defs.' Reply in Support of Defs.' Fact in Dispute No. 5 and Defs.' Resp. to Pl.s' Fact in Dispute No. 2, 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.

4. Mr. Lopach and Mr. Dripps both testified that VPC engages voting behavior and quantitative research professionals, including but not limited to Christopher B. Mann, an associate professor of political science at Skidmore College, to analyze the efficacy of every aspect of its direct mail programs. Lopach Decl. 16; Johnson Decl., Ex. 6 (Lopach Tr.) 13:15-16:10; *id* at Ex. 7 (Dripps Tr.) 159:20-160:16.

DEFENDANTS' RESPONSE: Controverted. 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." Any studies that VPC officials claim to have relied upon to assess the efficacy of its program are inadmissible hearsay.

PLAINTIFFS' REPLY: Defendants merely raise immaterial facts and/or make legal arguments not appropriate for factual contentions such that Defendants' response does not warrant a reply from Plaintiff and does not present any actual facts in dispute.

5. VPC also personalizes its applications with pre-filled information which Mr. Lopach testified that VPC believes makes the application processing easier for election officials. Lopach Decl. ¶ 60.

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

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

The evidence also shows that pre-filled applications are often *not* easier for election officials to process. Shawnee County's Election Office, for example, received numerous pre-filled advance voting ballot applications from voters with information that did not match the State's voter file and/or applications from (or on behalf of) individuals who had died or whose registrations had otherwise been cancelled. Ex. A at ¶¶ 11-12, 35; Ex. Q (examples of inaccurate applications); Ex. R (examples of applications of previously canceled voters). These inaccurate pre-filled applications “overwhelmed” the Shawnee County Election Office with telephone calls, letters, e-mails, and in-office visits from voters who were confused, angry, and frustrated at what they had received from VPC. Ex. A at ¶¶ 12, 37, 40, 44; Ex. KK at 117:24-125:2. Shawnee County Election Commissioner Andrew Howell personally spoke with hundreds of angry, frustrated, and confused voters about their pre-filled applications. Ex. KK at 121:11-122:12.

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

PLAINTIFFS' REPLY: Defendants merely raise immaterial facts and/or make legal arguments not appropriate for factual contentions such that Defendants' response does not warrant a reply from Plaintiff and does not present any actual facts in dispute.

6. Plaintiff's expert witness Dr. Eitan Hersh, who analyzed the expert reports of Defendants' proffered expert witness Kenneth Block, stated in his report that "Mr. Block's concerns related to just under 3% of the records in the VPC database" and "[e]ven if one were to stipulate that *all* the issues raised by Mr. Block . . . the total number of problems identified by Mr. Block is quite in line with [his] expectations." See Ex. 5 (Hersh Rept.) ¶ 27.

DEFENDANTS' RESPONSE: Controverted in part. This statement lacks context. As an initial matter, as reflected in Defs.' Undisputed Fact No. 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. Defs.' Undisputed Fact No. 38.

7. Mr. Lopach testified that VPC (then named "Women's Voices. Women Vote") conducted a study that he understood to evaluate 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.

DEFENDANTS' 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* Defs.' Reply in Support of Defs.' Fact in Dispute No. 5 and Defs.' Resp. to Pl.s' Fact in Dispute No. 2.

8. Mr. Lopach testified that he understood the 2006 Study to find 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.

DEFENDANTS' 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* Defs.’ Reply in Support of Defs.’ Fact in Dispute No. 5 and Defs.’ Resp. to Pl.s’ Fact in Dispute No. 2.

9. The 2006 Study states that “a pre-populated form produces a higher response rate than a blank form.” Ex. EE (2006 Study) at VPC000851. Specifically, the 2006 Study states that pre-populated forms had a response rate over 11% higher than un-populated forms. *See id.* at VPC000852.

DEFENDANTS’ RESPONSE: Controverted. VPC has not produced this alleged “study” and cannot now introduce it into evidence at summary judgment. *See* Defs.’ Reply in Support of Defs.’ Fact in Dispute No. 5 and Defs.’ Resp. to Pl.s’ Fact in Dispute No. 2.

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

DEFENDANTS’ RESPONSE: Controverted. There is no competent evidence in the record to support VPC’s assertion 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. *See* Defs.’ Resp. to Pl.s’ Fact in Dispute No. 1.

PLAINTIFFS' REPLY: Defendants merely raise immaterial facts and/or make legal arguments not appropriate for factual contentions such that Defendants' response does not warrant a reply from Plaintiff and does not present any actual facts in dispute.

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

DEFENDANTS' 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* Defs.' Reply in Support of Defs.' Fact in Dispute No. 5 and Defs.' Resp. to Pl.s' Fact in Dispute No. 2. 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.

- 12.** 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: Controverted and immaterial. First, as a matter of law, the Legislature was not required to memorialize its interests in adopting the legislation as part

of any formal record. Second, Plaintiffs only cite to the bill page of the Kansas Legislature’s website and thus have not shown that their citation is to the entire “Legislative Record.” Second, at least one proponent did cite voter confusion, inaccurate applications, and other information that would address these categories. Testimony of John M. Toplikar in Support of H.B. 2332 (http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_1/documents/testimony/20210218_18.pdf) (last visited Oct. 25, 2002). Third, the Kansas County Clerks & Election Officials testified that they “appreciate[d] Representative Toplikar’s intent under this bill and d[id] not disagree with what he [was] trying to accomplish.” Testimony of Rick Piepho, Kansas County Clerks & Election Officials Elections Committee Chari, available at http://kslegislature.org/li/b2021_22/committees/ctte_h_electns_1/documents/testimony/20210218_15.pdf (last visited Oct. 25, 2022). The Secretary’s testimony likewise highlighted these issues. Ex. Z, Secretary of State Testimony.

PLAINTIFFS’ REPLY: 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.”).

B. Defendants' Facts In Dispute

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

PLAINTIFF'S RESPONSE: Controverted in part. Plaintiff does not dispute that Mr. Howell's affidavit supports Defendants' statement. However, Mr. Howell could not testify to "how much time his staff spent curing applications that contained prefilled information during the 2020 general election." Ex. 1 (Howell Tr.) at 253:24–254:11. Mr. Howell admitted his office "doesn't spend time determining" whether an application in the cure process was "prefilled or not. It's really of question of was it accurate, were there duplicates, was there some other issue. . . ." *Id.* Mr. Howell's deposition testimony that he does not keep track of whether applications were personalized undercuts paragraphs 11 and 35 of his affidavit in which he states that his office received a "substantial" or "large number" of applications personalized by VPC that did not match ELVIS. *Compare id. with* Ex. A. ¶¶ 11, 35.

Defendants' Exhibit Q contains a collection of fifty-one (non-Bates stamped) advance mail ballot applications. Plaintiff does not dispute that Defendants' Exhibit Q contains fifty-one examples of advanced mail ballot applications that appear to be personalized by VPC where the applicant crossed out some of the personalized information on the application. However, Plaintiff disputes this purported fact insofar as Defendants seek to draw the inference that these crossed-out applications created an additional burden

on Shawnee County election officials. Of these fifty-one applications, only *twelve* appear to have entered the cure process, Ex. Q at pp. 1–9, (4 applications), 37–39 (2 applications), 48–53 (6 applications); and another *two* do not request a mail ballot, but rather indicate that the voter does not wish to vote by mail, *id.* at pp. 35, 36. The remaining thirty-seven applications appear to have been personalized by VPC, but the voter crossed out some personalized information and wrote-in their information. During his deposition, Mr. Howell was shown an application personalized by VPC, including a suffix. Ex. 9 (Howell Tr., Ex. 7 at 55) (excerpted). The voter submitted the application to Shawnee County with the suffix crossed out. *Id.* Looking at this exhibit, Mr. Howell admitted that if a voter crosses out a piece of pre-filled information, as long as the information that is not scratched out is correct and matches the system, the application would be accepted. Ex. 1 (Howell Tr.) at 184:16–185:11.

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

Plaintiff further disputes that Exhibit Q's 51 applications support Defendants' characterization that the Shawnee County Election Office received a "large number" applications personalized by VPC with information that does not match the voter file; especially given Shawnee County produced over 300 documents containing nearly 10,000 pages of applications for advance mail ballots to Plaintiff in this matter, and Shawnee

County received approximately 23,000 advance mail ballot applications in 2020 alone, *see* Ex. 1 (Howell Tr.) at 231:12–234:16.

DEFENDANTS' REPLY: 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 Defs.' Fact in Dispute No. 1. 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 Defs.' Fact in Dispute No. 1 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).

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

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

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

Plaintiff disputes that Defendants' Exhibit R supports their characterization that the Shawnee County Election Office received "numerous" applications that had been personalized by VPC and sent to deceased voters whose registration had been cancelled before the application was printed. Defendants' Exhibit R contains eleven (non-Bates stamped)⁴ advanced ballot applications sent by VPC. *See* Ex. R. Only ten of these applications were personalized by VPC. *See id.* at 13–14 (blank application sent by VPC). Two of these applications do not indicate the recipient is deceased. *See id.* at 1 (no notations), 2 (notation that "Moved out of state," but no notation that recipient is deceased). The remaining eight applications are personalized by VPC and contain hand-written annotations or notes that the recipient has passed away, but only four indicate the recipient's registration was cancelled on May 11, 2020, prior to when VPC uploaded data

⁴ Exhibit R appears to be a compilation of 11 advance mail ballot applications submitted to the Shawnee County Election Office and accompanying correspondence. This compilation appears to have been drawn from Shawnee County's production of nearly 10,000 pages of applications for advance mail ballots (which were not limited to applications provided to voters by VPC). Plaintiff notes that Shawnee County did not produce these applications with Bates stamps, but instead in over 300 named pdf documents.

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

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

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

for its first mailing on July 6, 2020, *see id.* at 5-6, 7-8, 17-18; three indicate the recipient’s application was cancelled between VPC’s first data upload and when its first wave of mailers landed in homes on August 17, 2020, *see id.* at 3-4 (July 23), 11-12 (August 8), 19-22 (July 24); and one was cancelled between VPC’s third data upload on August 10, 2022 and when its third wave landed in homes on September 8, 2022, *see id.* at 15-16 (Sept. 1).⁵

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

⁵ VPC sent five “waves” of advance voting ballot application mailers to Kansas voters in advance of the 2020 General Election. The dates were as follows:

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

DEFENDANTS' REPLY: With regard to VPC's hearsay argument/objection, Defendants point the Court to footnote 11 in their Reply 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.

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

PLAINTIFF'S RESPONSE: Controverted in part. Plaintiff does not dispute the general statement that Shawnee County election Office sent out letters to voters who submitted advance voting ballot applications containing information that did not match the data in

ELVIS. However, the cited sources do not support Defendants' statement.⁶ Mr. Howell's cited testimony references "a copy of every letter that we sent out to every voter," but nowhere indicates that these letters were sent to voters who submitted advance voting ballot applications containing information that did not match the data in ELVIS. *See* Ex. S at 120:6–121:4.

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

This statement is vague and ambiguous about which of these specific form letters were sent to voters, when, or how often. Several of these form letters do not address

⁶ Defendants' Exhibit A is Mr. Howell's affidavit, numbered with paragraphs. For the purposes of responding to this statement, Plaintiff assumes that the correct citation is to Defendants' Exhibit S, excerpts of Mr. Howell's deposition transcript, which contains numbered lines.

advance mail ballot applications that do not match ELVIS. *See* Ex. W at 3 (voter registration), 4 (data of birth for Help America Vote Act compliance), 5 (ineligibility due to felony status, not mismatched information), 6 (same). The one non-form letter does not address mismatched information between an application and ELVIS. *See id.* at 7-8 (addressing a voter question about CVI). Moreover, several of these letters appear to be outdated, as they have a different letterhead with a former employee listed. *See id.* at 4, 7 (listing Mark A. Stock). These form letters lack an adequate foundation and, given that Defendants cite no evidence of these letters *actually* being sent to voters, their existence as blank “form” letters is irrelevant to any disputed issue in this case.

DEFENDANTS’ REPLY: VPC is correct that Defendants inadvertently cited Ex. A rather than Ex. S. But Defs.’ Fact in Dispute No. 3 is relevant as an example of the burdens on election offices flowing from having to deal with pre-filled applications containing inaccurate information.

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

PLAINTIFF’S RESPONSE: Controverted in part. The cited sources do not support Defendants’ characterization that these emails reflect “complaints” about “inaccurate” absentee ballot applications. The vast majority of Defendants’ cited sources do not reflect

inaccuracies with the personalized portions of the absentee ballot applications VPC sent to voters in states other than Kansas during the 2020 election cycle. Ex. Y at 1–3 (noting a potential issue with zip codes on the return address of VPC’s envelopes), 4-5 (describing how VPC left a field *blank*—*i.e.*, the absence of personalization of this field), 6-8 (noting an issue with the city pre-addressed on VPC’s prepaid return envelopes), 9 (same), 10-11 (same), 12-13 (same), 14-16 (same), 17-18 (same),¹⁰19-25 (same), 26 (same), 34-37 (discussing suggested changes to instructions and information in mailers), 38-40 (same); 41-42 (noting past errors with VPC’s *voter registration* mailing list).

DEFENDANTS’ REPLY: Rather than controverting Defs.’ Fact in Dispute No. 4, 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

¹⁰ Plaintiff produced this document as a complete, three-page email chain bearing Bates numbers VPC000396 – VPC000398. Defendants unnecessarily excerpted this document. *See* Ex. 11. Plaintiff also produced the document containing VPC000408 as a complete, four-page email chain bearing bates numbers VPC000407 – VPC000410. Defendants unnecessarily excerpted this document. *See* Ex. 12. Plaintiff produced the document containing VPC000429 – VPC000431 as a complete, five-page email chain bearing bates numbers VPC000429 – VPC000433. Defendants unnecessarily excerpted this document as well. *See* Ex. 13.

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.

5. VPC's Rule 30(b)(6) witness, Mr. Lopach, testified that he cannot "speak to how an individual or a group of people would respond to a pre-filled vote-by-mail application versus a blank vote-by-mail application." Ex. G at 98:17-99:20.

PLAINTIFF'S RESPONSE: Controverted in part. This statement is uncontroverted to the extent that lines 98:17 through 99:20 of Mr. Lopach's deposition contains the statement set forth in ¶ 84. This statement is controverted to the extent the context is incomplete. Just after Mr. Lopach makes the aforementioned statement, he clarifies that he is unable to speak to differences "outside of the study we did in 2006 or other studies presented by

academics or practitioners who have done similar work.” Ex. G at 98:17-99:8. This referenced study evaluated the 2006 election cycle and indicated that pre-filled “vote-by-mail applications had a higher rate of return than blank vote-by-mail applications.” Ex. 6 (Lopach Tr.) at 18:24-19:6. This study would constitute VPC’s evaluation of the effectiveness. *See id.* at 20:7-13. Columbia University faculty have also evaluated this question and determined that pre-filled applications are “more successful at engaging voters” compared to blank applications. Ex. G at 27:10-15.

DEFENDANTS’ REPLY: 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 Defs.’ Fact in Dispute No. 5 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, VPC 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 Defs.' Fact in Dispute No. 5, it must be deemed admitted.

6. Mr. Lopach testified that nothing in the Pre-Filled Application Prohibition prohibits VPC from banding together with other persons or organizations to engage potential voters and assist community members in encouraging advance mail voting. Ex. G at 189:18-191:14.

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

DEFENDANT'S REPLY: This statement goes to VPC's freedom of association claim. It is relevant and material. VPC does not actually controvert Defs.' Fact in Dispute No. 6, but instead offers additional facts that supposedly add "context" to Mr. Lopach's testimony. But the "context" does not address the statement in Defendants' 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. Defs.' Fact in Dispute No. 6 should be deemed admitted.

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

PLAINTIFF'S RESPONSE: Controverted in part. This statement is uncontroverted to the extent lines 183:9 through 187:19 of Mr. Lopach's deposition contain the statement set forth in ¶ 87. This statement is controverted to the extent the context is incomplete. The most successful method of voter engagement to convey a message and empower voters to participate in democracy is through a prefilled form. Ex. 6 (Lopach Tr.) at 187:21-188:4.

DEFENDANTS' REPLY: This statement goes to VPC's First Amendment speech claims. It is relevant and material. VPC does not actually controvert Defs.' Fact in Dispute No. 7. Instead, it attempts to insert additional facts that it claims add "context." But these additional facts do not address the statement in Defs.' Fact in Dispute No. 7. 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 Defs.' Fact in Dispute No. 7.

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.

III. Additional Facts

Below listed are additional facts identified by Plaintiff to be included as part of the bench trial record.⁷

1. Dr. Hersh testified that "it seems likely that the VPC methods *reduced* the burden on election officials." Johnson Decl, Ex. 5 (Hersh Rpt.) ¶ 41 (emphasis in original).
2. During his deposition, Douglas County Elections Director Jamie Shew was asked what issues "will cause you to go into the curative process prior to sending that voter an advance ballot?" Mr. Shew replied "Number one's probably they forgot to sign it. Number two is the signature doesn't match." Defendants' Ex. B (Shew Tr.) 35:6-13.

⁷ These Additional Facts were included in neither Plaintiff's Statement of Facts nor Plaintiff's Statement of Additional Facts in Support of Plaintiff's Motion for Summary Judgment and as such Defendants object to their inclusion as being beyond the scope of the Court's November 15, 2022 Order (Docket # 160).

3. When asked whether there was a higher percentage of duplicative applications in 2020 as compared to 2016, Mr. Shew testified that “in a presidential [Douglas County] always receive[s] a lot of duplicates, so it was probably about the same. It could have been more just because we had so many more people applying.” Johnson Decl., Ex. 3 (Shew Tr.) 74:3-7.

4. When asked during his deposition whether a change to information from the voter file made by VPC’s data vendor would create more work for the county election office, Dr. Hersh replied that it “is a relative question, depends on what we’re comparing it to. And as [he] say[s] in [his] report, Mr. Block provides no basis for comparing what VPC does and what [VPC’s data vendor] does to any reasonable alternative.” Declaration of Alice Huling (Dec. 8, 2022) (“Huling 12/8 Decl.”), Ex. 1, (Deposition of Dr. Eitan Hersh (Sept. 6, 2022) (“Hersh Tr.”)) 92:2-93:3.

5. During his deposition, Dr. Hersh stated, “all voter registration data, whether it’s sourced from the state or whether it’s sourced from a third party, contain obsolete records essentially the day that it is downloaded.” Huling 12/8 Decl., Ex. 1 (Hersh Tr.) 104:22-25.

6. At her deposition, Ms. Schmidt was asked “Are you aware of any data entry errors, like misspellings in the entry in the information in ELVIS, that would lead to a lack of finding a record” to which she replied, “I’m sure there’s always data entry errors.” Huling 12/8 Decl., Ex. 2 (Deposition of Connie Schmidt (Sept. 16, 2022) (“Schmidt Tr.”)) 107:19-24.

7. In his report, Dr. Hersh attested that “human errors are present in registration records,” that “Kansas has obsolete and duplicate records in its system,” and that “no list is perfectly accurate. People die and move and change their names all the time.” Ex. 5 (Hersh Rpt.) ¶¶ 11, 12, 14.

8. In his report, Dr. Hersh attested that any errors in VPC’s lists raised by Mr. Block “are nothing out of the ordinary, given population churn and the logistics of sending large mailers

out to voters.” Ex. 5 (Hersh Rpt. ¶ 16). Dr. Hersh further attested that attempts to eliminate routine error in mailing lists would be “extreme,” “costly and labor intensive, and it would delay the eventual sending of the mailing.” Ex. 5 (Hersh Rpt.) ¶ 20.

9. In his report, Dr. Hersh attested that in his opinion, “the VPC data are accurate compared to reasonable benchmarks.” Ex. 5 (Hersh Rpt.) ¶ 24.

Date: December 8, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 8th day of December 2022, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all Counsel of record.

/s/ Mark Johnson
Mark P. Johnson

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