

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.

JOINT REVISED UNCONTROVERTED AND CONTROVERTED FACTS

The Parties respectfully submit the following stipulation of uncontroverted and controverted facts in response to and in accordance with the Court's November 15, 2022 Order (ECF No. 160), and in connection with the conference held with the Court on January 24, 2023, directing the Parties to confer in good faith and prepare a statement of all uncontroverted facts to which the parties can stipulate.

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I. REVISED UNCONTROVERTED FACTS

The following enumerated list of revised uncontroverted facts is integrated from and between Plaintiff's and Defendants' Statements of Facts (ECF Nos. 151 and 154) and Statements of Additional Facts (ECF Nos. 155 and 156) in Support of Plaintiff's and Defendants' Motions for Summary Judgment, respectively. These facts have been negotiated and agreed to by the Parties.

1. Plaintiff Voter Participation Center is a 501(c)(3) non-profit, nonpartisan organization founded in 2003. *See* Pre-trial Order Stipulated Facts, ECF No. 140 ("PTO-SF") ¶ 2(a)(vii); PXM 6 (Deposition of Thomas Lopach (May 18, 2022) ("Lopach Tr.)) at 57:25-58:1, 58:24-59:4; PXO 14 (Declaration of Thomas Lopach in Support of Plaintiff Voter Participation Center's Motion to Dismiss (Oct. 13, 2022) ("Lopach Decl.)) ¶ 2.¹
2. 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* PTO-SF ¶ 2(a)(viii); PXM 7 (Deposition of Lionel Dripps (Aug. 30, 2022) ("Dripps Tr.)) at 111:25-112:9; PXM 6, (Lopach Tr.) at 153:12-16, 96:14-17, 204:3-6; PXM 8 (Sept. 8, 2021 Hearing on Plaintiffs' Motion for Preliminary Injunction ("9/8/2021 PI Tr.)) at 50:9-20 (Thomas Lopach testimony); PXO 14 Lopach Decl. ¶¶ 7-11, 28.
3. 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. PXO 14 (Lopach Decl.) ¶¶ 8, 10.
4. 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. PXO 14 (Lopach Decl.) ¶ 10.

¹ References herein to "PXM" refer to Plaintiff's Exhibits Annexed to the Declaration of Mark P. Johnson in Support of Plaintiff Voter Participation Center's Motion for Summary Judgment, dated October 14, 2022.

References herein to "PXO" refer to Plaintiff's Exhibits Annexed to the Declaration of Mark P. Johnson in Support of Plaintiff Voter Participation Center's Opposition to Defendants' Motion for Summary Judgment, dated November 4, 2022.

5. VPC primarily encourages these voters to register and to participate in the electoral process through direct mailings. *See* PTO-SF ¶ 2(a)(ix); PXM 6 (Lopach Tr.) at 146:24-147:15; PXO 14 (Lopach Decl.) ¶¶ 7, 13.
6. 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. PXM 6 (Lopach Tr.) 185:25-186:3; PXM 8 (9/8/2021 PI Tr.) 59:23-60:20; Lopach Decl. ¶¶ 10, 21, 23, 28.
7. 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.” PXM 6 (Lopach Tr.) 167:22-168:15; *see also* PXM 14 (Lopach Decl.) ¶¶ 28-29.
8. 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. DXM G at 183:9-187:19.²
9. Mr. Lopach testified 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[.]” DXM G at 191:4-14.
10. VPC understands that the Personalized Application Prohibition would limit its associational activity with voters. PXM 6 (Lopach Tr.) at 190:10-12.
11. 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”, “and larger organizations”, and other “organized effort[s]” where Mr. Shew is unable to identify the sender. PXM 3 (Deposition of Jameson Shew (Sept. 15, 2022) (“Shew Tr.”)) at 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. PXM 8 (9/8/2021 PI Tr.) at 70:18-25 (Bryan Caskey testimony).
12. VPC’s message is that advance mail voting is safe, secure, accessible, and beneficial. PXO 14 (Lopach Decl.) ¶ 9.

² References herein to “DXM” refer to Defendants’ Exhibits Annexed Their Motion for Summary Judgment, dated October 28, 2022.

13. 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* PTO-SF ¶ 2(a)(x); PXM 7 (Dripps Tr.) at 124:14-125:2; PXO 14 (Lopach Decl.) ¶¶ 12, 17-18, 21, 23-24.
14. 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. PXO 14 (Lopach Decl.) ¶¶ 18, 21.
15. 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. PXM 6 (Lopach Tr.) at 149:11-13, 150:13-19, 151:14-16, 183:9-184:1, 185:21-186:3, 188:1-4; PXM 7 (Dripps Tr.) at 192:5-13; PXM 8 (9/8/2021 PI Tr.) at 44:24-45:7, 49:17-24 (Thomas Lopach testimony); PXO 14 Lopach Decl. ¶¶ 9, 23-24, 66.
16. 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. PXM 7 (Dripps Tr.) at 77:24-79:17, 116:3-18; PXM 6 (Lopach Tr.) at 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.
17. 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. PXM 14 (Lopach Decl.) ¶ 16; PXM 6 (Lopach Tr.) at 13:15-16:10; PXM 7 (Dripps Tr.) at 159:20-160:16.
18. VPC believes 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 pre-filled information drawn from states’ voter registration files best ensures that VPC’s message and assistance are both effective and accurate”); PXM 6 (Lopach Tr.) at 150:14-19, 151:14-16, 185:21-186:3, 188:1-4; PXM 8 (PI Hearing Tr.) at 44:24-45:7, 49:17-24, 60:11-20 (Thomas Lopach testimony).
19. Defendant Kansas Secretary of State Scott Schwab does business in and is an elected official in the state of Kansas. *See* PTO-SF ¶ 2(a)(i).
20. Defendant Schwab is the Chief Election Officer for the State of Kansas. PTO-SF ¶ 2(a)(ii).
21. 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* PTO-SF ¶ 2(a)(iii) (citing K.S.A. 25-124).

22. 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).
23. 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. DXO HH (Deposition Excerpts of Bryan Caskey ("Caskey Tr. Excerpts") at 40:5-42:17.³
24. The Kansas state voter registration database is known as the Election Voter Information System ("ELVIS"). *See* PTO-SF ¶ 2(a)(xi).
25. 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* PTO-SF ¶ 2(a)(xii).
26. 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. PTO-SF ¶ 2(a)(xiii).
27. 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. PTO-SF ¶ 2(a)(xiv); DXM A (Andrew Howell Affidavit ("Howell Aff.")) ¶ 10; DXM C (Bryan Caskey Deposition "Caskey Tr.") at 42:14-43:8.
28. 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* PTO-SF ¶ 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. *See id.* ¶ 2(a)(xxxiii).
29. 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* PTO-SF ¶ 2(a)(xxxii).
30. 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. PTO-SF ¶ 2(a)(xxxii); K.S.A. 25-1122(f)(2).

³ References herein to "DXO" refer to Defendants' Exhibits Annexed to Their Response to Plaintiff's Motion for Summary Judgment, dated November 4, 2022.

31. 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.
32. 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 ¶ 2(a)(xxxiii). 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 ¶ 2(a)(xxxi).
33. 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. DXO KK (Deposition Excerpts of Andrew Howell (“Howell Tr. Excerpts”)) at 188:13-189:22. But it is not always possible.
34. If an advance mail ballot application does not contain sufficient information, does not match the voter file, or if the information is illegible, or if there is a signature mismatch or missing signature, 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; PXM 1 (Deposition of Connie Schmidt (Sept. 16, 2022) (“Schmidt Tr.”)) at 91:8-17, 93:9-13, 110:24-111:16; PXM 2 (Deposition of Deborah Jean Cox (Sept. 9, 2022) (“Cox Tr.”)) at 52:14-53:6, 56:22-57:11, 72:6-16; PXM 3 (Shew Tr.) at 51:12-13; PXM 4 (Deposition of Andrew Howell (Sept. 14, 2022) (“Howell Tr.”)) at 66:13-25, 77:12-78:17, 132:17-133:21, 138:5-11, 147:8-148:23; PXM 5 (30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) (“KS SOS Tr.”)) Ex. 9 to PXM 5 (Kansas Election Standards on Election Administration) at KS000167VA.
35. In such cases, county election offices must attempt to contact the voter to obtain the correct information and cure the application. PXM 1 (Schmidt Tr.) at 130:14-131:22; PXM 2 (Cox Tr.) at 69:12-21; PXM 3 (Shew Tr.) at 40:6-14.
36. 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); PTO-SF ¶ 2(a)(xxxiv).
37. 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. DXM A (Howell Aff.) ¶ 25; DXM B (Jamie Shew Deposition (“Shew Tr.”)) at 35:6-40:5; 48:6-51:7.

38. 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* PTO-SF ¶ 2(a)(xxxv).
39. County election offices also document in ELVIS whether (and when) a voter has returned an advance ballot that was transmitted to the voter. DXM A (Howell Aff.) ¶ 23; DXM C (Caskey Tr.) at 48:17-49:18.
40. 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." PXM 1 (Schmidt Tr.) at 85:6-14. When asked, County Elections Director Debbie Cox testified that she would normally agree "that at least in some ways, pre-filled application -- prefilled information increases the likelihood and the ease that [her] office can match information between the voter file and application." PXM 2 (Cox Tr.) at 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. PXM 3 (Shew Tr.) at 24:15-20.
41. Connie Schmidt testified that "hard to read" handwriting does not generally "increase the amount of time for the application processing" due to other information on an application. DXO FF at 85:15-85:20.
42. Shawnee County Election Commissioner Andrew Howell testified "[p]enmanship was not usually an issue" in processing advance ballot applications and that he did not "find that to be a significant driver of errors" in applications submitted to his office. DXO KK at 270:22-271:12.
43. 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. DXM A (Howell Aff.) ¶¶ 11, 25; DXM U (Debbie Cox Affidavit ("Cox Aff.)) ¶¶ 12, 24; DXM B (Shew Tr.) at 48:25-50:7.
44. 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* PXM 1 (Schmidt Tr.) at 222:10-227:7, 234:23-236:20, 284:2-8; PXM 9 (Exhibit 32 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 32")) (Apr. 16, 2020 emails); PXM 10 (Exhibit 35 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 35")) (2020 prefilled Johnson County advance mail ballot application mailer); PXM 11 (Exhibit 38 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 38")) (same).
45. The process for personalizing applications adds additional steps and cost to the application mailing process. PXO 14 (Lopach Decl.) ¶ 21; PXM 2 (Cox Tr.) at 24:7-14.

46. Staff in the Johnson County Elections Office decided to “pre-fill as much of the [voter’s] information from their registrant record as possible,” PXM 12 (Exhibit 31 from the Deposition of Connie Schmidt (“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,” PXM 9 (Schmidt Tr. Ex. 32) at 1 (Apr. 16, 2020 emails).
47. 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. DXM E (VPC’s Advance Voting Ballot Application Mailing Statistics for 2020 General Election); DXM F (Dripps Tr.) at 175:6-176:24, 177:24 178:15; DXM G (Lopach Tr.) at 108:7-19, 123:17-124:6.
48. 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. PXO 14 (Lopach Decl.) Ex. A at VPC000001-005 (2020 VPC mailer). PTO-SF ¶ 2(a)(xxxviii). A sample of VPC’s cover letter, pre-filled advance voting ballot application, and pre-addressed envelope that it sent in 2020 can be found at Defendants’ Exhibit I. *See* DXM I (Sample of VPC Cover Letter with Pre-Filled Ballot Application).
49. 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* PXO 14 (Lopach Decl.) Ex. A at VPC000002. The step-by-step guide was printed on the reverse side of the enclosed personalized advance ballot application. PXO 14 (Lopach Decl.) Ex. A at VPC000004.
50. A list of all registered voters in Kansas can be purchased from the Secretary of State’s office for a \$200 fee. DXM C (Caskey Tr.) at 114:25-116:16; DXM D (Kansas Secretary of State’s Office Voter Registration Data Request Form). 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. DXM C (Caskey Tr.) at 114:25-115:7.
51. 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. DXM C (Caskey Tr.) at 118:13-119:17, 121:3-124:21; DXM B (Shew Tr.) at 102:23-103:24.25.
52. 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. DXM G (Lopach Tr.) at 92:14-93:4; DXM F (Dripps

- Tr.) at 164:7-13; DXM H (Pls.' Resp. to Interrog. No. 16 in Defs.' Second Set of Interrogs.) at 3.
53. VPC received Kansas active voter registration lists from Catalist on January 31, April 10, and September 15 of 2020. PTO-SF ¶ 2(a)(xxxix).
 54. VPC CEO Lopach testified that he does not know how often Catalist requests an updated voter file from the Secretary of State's Office. DXM G (Lopach Tr.) at 104:2-105:13.
 55. To personalize the applications it sends, VPC uses statewide voter registration files obtained via its data vendors and fills-in parts (the voter's name and address) of the advance mail ballot applications with the voter's information. PXM 6 (Lopach Tr.) at 91:4-92:18; PXO 14 (Lopach Decl.) ¶¶ 37-40. VPC attempts to cull its lists to ensure it is running its program as efficiently and accurately as possible. *See* PXO 14 (Lopach Decl.) ¶¶ 18, 40; PXM 6 (Lopach Tr.) at 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." PXM 7 (Dripps Tr.) at 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. PXM 7 (Dripps Tr.) at 174:6-9.
 56. 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. DXM A (Howell Aff.) ¶ 14; DXM U (Cox Aff.) ¶ 15; DXM B (Shew Tr.) at 18:10-21:22.
 57. 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 DXM J. *See* DXM J (Same VPC pre-filled advance voting ballot application).
 58. 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. DXM A (Howell Aff.) ¶ 9.
 59. 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). DXM A (Howell Aff.) ¶ 10.
60. VPC sent five “waves” of mailers to Kansas voters for the 2020 General Election. The dates were as follows:
- a. Wave A: data uploaded on 7/6/2020, expected in homes on 8/17/2020;
 - b. Wave B: data uploaded on 7/27/2020, expected in homes on 8/26/2020;
 - c. Wave C: data uploaded on 8/10/2020, expected in homes on 9/8/2020;
 - d. Wave D: data uploaded on 8/24/2020, expected in homes on 9/16/2022; and
 - e. Wave E: data uploaded on 8/24/2020, expected in homes on 9/28/2020. *See* PTO-SF ¶ 2(a)(xl).
61. 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. DXM F (Dripps Tr.) at 171:1-23.
62. 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. DXM F (Dripps Tr.) at 163:6-164:16.
63. 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. DXM F (Dripps Tr.) at 171:24-174:1; DXM K (Pls.’ Response to Defs.’ RFA No. 8).
64. 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. PXO 4 (Deposition of Lionel Dripps (Aug. 30, 2022) (“Dripps Tr.”)) at 167:24-168:9, 169:17-170:2.
65. Mr. Dripps testified that he did not know whether these errors appeared in the Kansas data in line with the national numbers. PXO 4 (Dripps Tr.) at 169:10-16, 170:11-25.
66. 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). DXM L (Kansas Voters to Whom VPC Sent Advance Voting Ballot Application in 2020 General Election).

67. Defendants' expert witness, Ken Block, analyzed DXM 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. DXM M (Ken Block's Initial Declaration).
68. 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. DXM H (Pls.' Resp. to Interrog. No. 16 in Defs.' Second Set of Interrog.) at 3; PTO-SF ¶ 2(a)(xl).
69. 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. DXM N (Ken Block's Supplemental Declaration ("Block Supp. Decl.)) ¶ 10.
70. 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. DXM N (Block Supp. Decl.) ¶ 9; DXM O (Exhibit XI to Ken Block's Supplemental Declaration ("Exhibit XI to Block Supp. Decl.)) (date of voters' cancelled registration is found in Column E).
71. 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.
- DXM N (Block Supp. Decl.) ¶ 9; DXM O (Exhibit XI to Block Supp. Decl.).
72. 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. DXM N (Block Supp. Decl.) ¶¶ 10-13.

73. 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. DXM M (Ken Block's Initial Declaration) ¶¶ 23-24; DXM P (Exhibit V to Ken Block's Supplemental Declaration ("Exhibit V to Block Supp. Decl.")).
74. 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). DXM O (Exhibit XI to Block Supp. Decl.).
75. 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. DXM M (Ken Block's Initial Declaration) ¶ 39.
76. 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. PXO 7 (Block Tr.) at 268:14-24.
77. 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* PXO 7 (Deposition of Kenneth Block (Sept. 13, 2022) ("Block Tr.)) at 272:18-23.
78. Mr. Block testified that he did not know "what the error rates are in VPC's data." PXO 7 (Block Tr.) at 267:18-268:7.
79. 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 Kansas election officials. PXO 7 (Block Tr.) at 272:9-17.
80. Dr. Eitan Hersh, who analyzed the expert reports of Defendants' proffered expert witness Kenneth Block, testified that "it seems likely that the VPC methods *reduced* the burden on election officials." PXO 5 (Expert Rebuttal Decl. & Report of Dr. Eitan D. Hersh ("Hersh Rpt.)) ¶ 41 (emphasis in original).
81. 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." DXM B (Shew Tr.) at 35:6-13.
82. 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.” PAX 1 (Deposition of Dr. Eitan Hersh (Sept. 6, 2022) (“Hersh Tr”)) at 92:2-93:3.⁴

83. 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.” PAX 1 (Hersh Tr.) at 104:22-25.
84. 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.” PAX 2 (Deposition of Connie Schmidt (Sept. 16, 2022) (“Schmidt Tr.”)) at 107:19-24.
85. 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.” PXO 5 (Hersh Rpt.) ¶¶ 11, 12, 14.
86. 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.” PXO 5 (Hersh Rpt.). 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.” PXO 5 (Hersh Rpt.) ¶ 20.
87. In his report, Dr. Hersh attested that in his opinion, “the VPC data are accurate compared to reasonable benchmarks.” PXO 5 (Hersh Rpt.) ¶ 24.
88. 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* PXO 5 (Hersh Rept.) ¶ 27.
89. Mr. Block did not have the full list of individuals to whom CVI sent its own application mailers with which to conduct his analysis. But given that VPC and CVI collectively mailed 507,864 pre-filled applications to Kansas voters in connection with the 2020 General Election, using the 3% figure referenced by Dr. Hersh, as a hypothetical, that would equate to 15,235 [0.03 x 507,864] total erroneous applications across both VPC and CVI’s respective advance mail ballot programs.

⁴ References herein to “PAX” refer to Plaintiff’s Additional Exhibits Annexed to the Declaration of Alice Huling in Support of Plaintiff VPC’s Additional Facts Included in Parties’ Submission of Uncontroverted and Controverted Facts, dated December 8, 2022..

90. Dr. Hersh testified that it “might be theoretically possible” to get “much more frequent” updates to the State’s voter registration database without allowing for “months of lag time” between the date that the data is obtained and the date the mailer is sent. But such frequency “comes with [a] cost, and organizations [] have to make cost-benefit assessments.” See DXO MM at 147:20-148:18.
91. 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. PXM 6 (Lopach Tr.) at 100:12-101:13; PXM 7 (Dripps Tr.) at 123:13-21, 147:16-20; PXO 14 (Lopach Decl.) ¶ 39.
92. 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. PXO 14 (Lopach Decl.) ¶¶ 11, 17-18, 22, 28-29; PXM 8 (9/8/2021 PI Tr.) at 47:7-13.
93. In 2018, VPC sent approximately 90,000 advance mail ballot application mailers to Kansas voters in a single wave of mailers. PXO 14 (Lopach Decl.) ¶ 35.
94. Approximately 5,000 Kansans applied for an advance mail ballot in 2018 using a personalized application from VPC. PXO 14 (Lopach Decl.) ¶ 26.
95. In 2020, VPC anticipated that the pandemic would result in many voters voting by mail for the first time. PXM 7 (Dripps Tr.) at 136:4-16; PXO 14 (Lopach Decl.) ¶ 33.
96. 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. PXO 14 (Lopach Decl.) ¶¶ 34-35.
97. 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. PXO 14 (Lopach Decl.) ¶ 26; DXM G (Lopach Tr.) at 124:16-124:20.
98. For the 2022 election, VPC sent one wave of advance mail voting mailers. PXM 7 (Dripps Tr.) at 135:12-20; PXO 14 (Lopach Decl.) ¶¶ 47, 52.
99. The 2022 mailers contain the same basic components as VPC’s prior mailer communications, including a personalized advance mail ballot application. PXO 14 (Lopach Decl.) ¶ 17; PXO 14 (Lopach Decl.) Ex. B at VPC000743-746 (2022 VPC mailer).
100. VPC also sent a follow-up letter in September 2022 to remind voters that they had previously received a personalized advance mail ballot application and further encouraging the voter to return the application and vote by advance mail ballot. PXO 14 (Lopach Decl.) ¶ 52; PXM 6 (Lopach Tr.) at 30:3-10.

101. 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* PXM 15 (Exhibit 15 to 30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) (“KS SOS Tr. Ex. 15”)) at KS001922VA—2068VA (Apr. 19, 2018 email); PXM 16 (Exhibit 16 to 30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) (“KS SOS Tr. Ex. 16”)) at VPC000048—50 (June 22, 2020 to July 1, 2020 email thread); PXM 18 (Exhibit 8 to Deposition of Lionel Dripps (Aug. 30, 2022) (“Dripps Tr. Ex. 8”)) at VPC000706-09 (July 28, 2022 emails); PXM 19 (Exhibit 9 to Deposition of Lionel Dripps (Aug. 30, 2022) (“Dripps Tr. Ex. 9”)) at VPC000712-16 (Aug. 25, 2022 emails).
102. 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. PXM 16 (KS SOS Tr. Ex. 16) at VPC000048—50 (June 22, 2020 to July 1, 2020 email thread).
103. 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 compared with 152,267 votes cast by mail during the 2018 General Election and 173,457 votes cast by mail in the 2016 General Election). 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 ¶ 2(a)(xxxvi).
104. 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* PXM 1 (Schmidt Tr.) at 155:7–156:20; PXM 2 (Cox Tr.) at 98:25-100:13; PXM 4 (Howell Tr.) at 49:2-25; PXM 3 (Shew Tr.) at 85:5-24.
105. 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. PXM 1 (Schmidt Tr.) at 149:4-150:6.
106. 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.*, PXM 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>).
107. 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 PXO 14 (Lopach Decl.) at Ex. A (2020 VPC mailer) with PXM 21 (Exhibit 17 from the Deposition of Connie Schmidt (“Schmidt Tr. Ex. 17”)) (May 18, 2020 emails); *see also* PXM 1 (Schmidt Tr.) at 287:4-14.

108. Several Kansas counties sent mailers regarding the advance mail voting process, including advance mail ballot applications, to their registered voters. *See, e.g.*, PXM 1 (Schmidt Tr.) at 82:25-83:2; PXM 2 (Cox Tr.) at 102:9-15; PXM 3 (Shew Tr.) at 21:23-22:2.
109. The Johnson County election office opted to send advance mail ballot applications that were prepopulated with the voter's data on the application form. PXM 1 (Schmidt Tr.) at 227:2-236:20, 240:12-243:12; 285:12-286:19; *see also* PXM 12 (Schmidt Tr. Ex. 31) (Apr. 3, 2020 emails); PXM 9 (Schmidt Tr. Ex. 32) (Apr. 16, 2020 emails); PXM 10 (Schmidt Tr. Ex. 35); PXM 22 (Exhibit 36 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 36")); PXM 23 (Exhibit 37 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 37")); PXM 11 (Schmidt Tr. Ex. 38) (redacted examples of Johnson County prefilled mailers from May 2020).
110. 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.*, PXM 1 (Schmidt Tr.) at 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; PXM 24 (Exhibit 43 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 43")) (Johnson County FAQ and Face-book post); PXM 2 (Cox Tr.) at 91:18-24, 107:9-15, 146:3-147:19.
111. 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. PXM 1 (Schmidt Tr.) at 84:18-85:20, 86:22-87:5, 134:6-22, 135:25-136:13, 294:2-13; PXM 2 (Cox Tr.) at 67:9-68:1; 89:3-90:5; PXM 4 (Howell Tr.) at 245:13-246:16, 252:11-23, 254:3-11; PXM 17 (KS SOS Tr.) at 250:18-252:6. 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." PXM 4 (Howell Tr.) at 254:3-11.
112. 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. PXM 1 (Schmidt Tr.) at 195:1-196:8, 293:13-18; *see also* PXM 2 (Cox Tr.) at 73:25-74:5, 100:14-101:1.
113. Some voters re-submitted their applications, resulting in duplicative advance mail ballot applications being received in county election offices. PXM 1 (Schmidt Tr.) at 120:12-24; PXM 2 (Cox Tr.) at 100:14-101:1. PXM 1 (Schmidt Tr.) at 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; PXM 17 (KS SOS Tr.) at 150:13-19 (testifying to conversations about duplicate applications that election offices received in the 2020 election); PXM 2 (Cox Tr.) at 91:13-17; 100:19-101:1; PXM 3 (Shew Tr.) at 73:13-74:7.

114. Other voters' concerns of mail delays were grounded in experience. *See, e.g.*, PXM 1 (Schmidt Tr.) at 195:1-197:21, 201:7-12, 211:24-212:8, 293:13-294:1; PXM 25 (Exhibit 25 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 25")) (July 22, 2020 Johnson County Election Office Facebook post); PXM 26 (Exhibit 26 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 26")) (July 24, 2020 emails); PXM 27 (Exhibit 27 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 27")) (Apr. 11, 2020 emails).
115. 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.*, PXM 1 (Schmidt Tr.) at 297:25-298:8; PXM 24 (Schmidt Tr. Ex. 43) (Johnson County FAQ and Facebook post).
116. Voters who expressed a desire to not do so, election officials informed the voter that the applications could be discarded. *See id.* PXM 1 (Schmidt Tr.) at 294:20-295:1; PXM 2 (Cox Tr.) at 139:20-140:3.
117. The 2020 General Election nevertheless saw high turnout throughout Kansas and state and local Kansas election officials deemed it a successful election. PXM 17 (KS SOS Tr.) 274:5-22, 282:8-9; PXM 1 (Schmidt Tr.) at 167:10-168:11; PXM 28 (Exhibit 15 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 15")) (Aug. 5, 2020 letter); PXM 29 (Exhibit 23 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 23")) (Johnson County Board of Canvassers report); PXM 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..."); PXM 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. . .").
118. The advance mail voting process includes multiple safeguards against fraud, PXM 1 (Schmidt Tr.) at 64:3-20, 124:9-25, 212:25-216:9; PXM 2 (Cox Tr.) at 58:5-8; PXM 4 (Howell Tr.) at 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.
119. 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." PXM 17 (KS SOS Tr.) at 282:25-283:13.
120. 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* PTO-SF ¶ 2(a)(xvii).

121. 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. PTO-SF ¶ 2(b)(x); PXM 32 (Exhibit 17 to 30(b)(6) Deposition of the office of Kansas Secretary of State (May 24, 2022) ("KS SOS Tr. Ex. 17")); *id.* PXM 17 (KS SOS Tr.) at 295:21-297:7.
122. The Office's official position was "neutral." *Id.*
123. 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. PTO-SF ¶ 2(a)(xix)-(xxi).
124. On May 3, 2021, the Legislature enacted HB 2332 over the Governor's veto. *See* PTO-SF ¶ 2(a)(xxi); PXM 33 (Exhibit 4 from the Deposition of Connie Schmidt ("Schmidt Tr. Ex. 4")) (Governor Kelly's veto letter).
125. Plaintiffs challenged two of HB 2332's provisions, but only one—the Personalized Application Prohibition—is still at issue in this lawsuit. *See* PTO-SF ¶ 2(a)(xxviii).
126. 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.").
127. 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. PTO-SF ¶ 2(a)(xxii). The prohibition applies even if the prefilled information is derived from the State's publicly available voter registration file.
128. 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)).
129. 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, at 2-3, ECF No. 73.

130. Section 3(l)(1) of HB 2332 (codified at K.S.A. 25-1122(1)(1)) provides that “[n]o person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is other-wise domiciled in this state.” This statute will be referred to as the “Out-of-State Distributor Ban.” PTO-SF ¶ 2(a)(xxiv).
131. 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 ¶ 2(a)(xxv).
132. 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. H.B. 2332 § 3(k)(5); K.S.A. §§ 21-6602(a)(3), (b).
133. 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. H.B. 2332 § 3(k)(4).
134. 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.*
135. The Personalized Application Prohibition does not limit the number of advance mail ballot applications that may be mailed to a registered voter. *See id.*
136. The Personalized Application Prohibition does not require the sender of advance mail ballot applications to identify itself on such mailings. *See id.*
137. 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. PXM 34 (Defendant Schwab’s Responses and Objections to Plaintiff’s First Interrogatories) at 3-4.
138. 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).
139. 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. Mr. Howell attested that the mismatched information included erroneous addresses, last names, suffixes, and/or middle initials. DXM A (Howell Tr.) ¶¶ 11, 35.
140. At his deposition, Mr. Howell was asked “how much time [his] staff spent curing applications that contained pre-filled information during the 2020 general election.” PXO 1 (Howell Tr.) at 253:24–254:11. Mr. Howell testified that 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.*

141. 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 in-formation?" he testified "I don't think that the prefilled information, in and of itself, was what all of the concern was." *See* PXO 1 (Deposition of Andrew Howell (Sept. 14, 2022) ("Howell Tr.)) at 245:13-19.
142. 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. DXM A (Howell Aff.) ¶¶ 12, 37, 40, 44; DXM S (Andrew Howell Deposition ("Howell Tr.)) at 117:24-125:2; Mr. Howell further testified that he spoke with hundreds of these voters. DXM S (Howell Tr.) at 121:11-122:12.
143. 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. DXM A (Howell Aff.) ¶¶ 38, 40-42.
144. Mr. Howell attested that the Shawnee County Election Office also received calls from voters who reported that advance voting ballot applications that had been pre-filled were sent to individuals who were deceased. Mr. Howell attested that most of the applications sent alerting this office of the voter's death were sent to voters who had been removed from ELVIS prior to the date on which VPC mailed its pre-filled applications. DXM A (Howell Aff.) ¶ 12.
145. Mr. Howell testified that if a voter crossed out a prefilled suffix, and the remaining information on the application was correct, it would probably be accepted. *See* DXM A (Howell Aff.) ¶ at 184:16-185:11; PXO 9 (Exhibit 7 from the Deposition of Andrew Howell (Sept. 14, 2022) ("Howell Tr. Ex. 7")) at 55.
146. 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* PXO 18 (Excerpts of the Deposition of Connie Schmidt (Sept. 16, 2022) ("Schmidt Tr.)) at 103:25-104:14.
147. 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* PXO 2 (Deposition of Jameson Shew (Sept. 15, 2022) ("Shew Tr.)) at 74:3-19.
148. 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* PXO 16 (Deposition of Deborah Jean Cox (Sept. 9, 2022) ("Cox Tr.)) at 102:3-8.

149. 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* PXO 16 (Cox Tr.) at 102:9-12. None of these applications were pre-filled.
150. 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. DXM T (Debbie Cox Deposition (“Cox Tr.”)) at 130:6-132:5; DXM U (Cox Aff.) ¶ 37. The text of the ad can be found at DXM V.
151. 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. DXM T (Cox Tr.) at 130:6-17.
152. The Shawnee County Election Office sent out letters or emails to the voters who submitted advance voting ballot applications containing information that did not match the data in ELVIS. DXM S (Howell Tr.) at 120:6-121:4.
153. 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. DXM A (Howell Aff.) ¶ 24; DXM U (Cox Aff.) ¶ 23.
154. 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. DXM A (Howell Aff.) ¶ 25; DXM U (Cox Aff.) ¶ 24.
155. 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. DXM A (Howell Aff.) ¶ 26; DXM U (Cox Aff.) ¶ 25.
156. 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. DXM A (Howell Aff.) ¶ 26; DXM U (Cox Aff.) ¶ 26.
157. 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. DXM A (Howell Aff.) ¶ 28.

158. 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.

DXM X (VPC Call Center FAQs).

159. VPC received complaints from election officials in states other than Kansas about the inaccurate absentee ballot application mailers or voter registration mailers that VPC or CVI was sending to voters in those states during the 2020 election cycle. DXM Y (e-mails between VPC outside counsel Jennifer Carrier and other state election officials).
160. A majority of the correspondence attached as DXM Y does not discuss inaccurately pre-filled advance mail ballot applications.
161. 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. DXM C (Caskey Tr.) 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. DXM C (Caskey Tr.) at 212:20 213:11, 237:11-240:5.
162. 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. DXM C (Caskey Tr.) at 209:15-210:9, 240:6-242:7.
163. 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.” DXM Z (Written Testimony from Kansas Secretary of State’s Office to Kansas Legislature).

164. The Kansas voters whom VPC targeted with mailings in the 2020 General Election received between one and five advance voting ballot applications from VPC. DXM L (Kansas Voters to Whom VPC Sent Advance Voting Ballot Application in 2020 General Election); DXM G (Lopach Tr.) at 206:9-207:14, 209:3-210:22.
165. Of the approximately 507,864 Kansas voters to whom VPC or 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. DXM E (VPC’s Advance Voting Ballot Application Mailing Statistics for 2020 General Election); DXM F (Dripps Tr.) at 177:24 179:20; DXM G (Lopach Tr.) at 123:17-124:20.
166. 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. DXM E (VPC’s Advance Voting Ballot Application Mailing Statistics for 2020 General Election); DXM F (Dripps Tr.) at 178:16-182:3; DXM G (Lopach Tr.) at 124:16-125:18.
167. 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. DXM E (VPC’s Advance Voting Ballot Application Mailing Statistics for 2020 General Election); DXM F (Dripps Tr.) at 182:20-184:1; DXM G (Lopach Tr.) at 128:3-25.
168. 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. DXM A (Howell Aff.) ¶ 15.
169. 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. DXM A (Howell Aff.) ¶ 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* DXM (Howell Aff.) A ¶¶ 15, 17.
170. 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). DXM A (Howell Aff.) ¶ 17.
171. 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. DXM A (Howell Aff.) ¶ 41; DXM S (Howell Tr.) at 269:14-270:1; DXM U (Cox Aff.) ¶ 19.
172. 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. DXM U (Cox Aff.) ¶ 16.
173. 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. DXM U (Cox Aff.) ¶ 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* DXM U (Cox Aff.) ¶¶ 16, 18.
174. 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. DXM A (Howell Aff.) ¶ 16; DXM U (Cox Aff.) ¶ 17.

175. 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. DXM C (Caskey Tr.) at 150:13-19.
176. 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. DXM A (Howell Aff.) ¶ 29; DXM U (Cox Aff.) ¶ 27.
177. 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. DXM A (Howell Aff.) ¶ 30; DXM U (Cox Aff.) ¶ 28.
178. 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 DXM A (Howell Aff.) ¶ 15 (stating that the Shawnee County Election Office received and ‘processed’ 23,156 plus an additional 4,217, totaling 27,373 applications received) with DXM A (Howell Aff.) ¶ 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. DXM A (Howell Aff.) ¶ 33.
179. 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. DXM A (Howell Aff.) ¶ 47.
180. 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. DXM A (Howell Aff.) ¶ 47.
 181. 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." DXM G (Lopach Tr.) at 98:17-99:20.
 182. 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. DXM G (Lopach Tr.) at 99:22-100:10.
 183. Ms. Schmidt testified that the Johnson County Election Office did not detect any instances of voter fraud in 2020. *See* PXO 18 (Schmidt Tr.) at 212:25-213:22.
 184. 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* PXO 16 (Cox Tr.) at 105:5-106:9.
 185. 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. at 22-33, ECF No. 1.
 186. 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. ECF Nos. 50, 61.
 187. 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 ¶ 2(a)(xxvii). The only claims remaining in dispute pertain to the Pre-Filled Application Prohibition. PTO-SF ¶ 2(a)(xxviii).

188. 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 ¶ 2(a)(xxix).

II. REVISED CONTROVERTED FACTS

The following enumerated list of revised controverted facts is integrated 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.

PLAINTIFFS' FACT IN DISPUTE 1: VPC also personalizes its applications with pre-filled information which Mr. Lopach testified that VPC believes makes the application processing easier for election officials. PXO 14 (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. DXO 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. DXM A at ¶¶ 11-12, 35; DXM Q (examples of inaccurate applications); DXM 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. DXM A at ¶¶ 12, 37, 40, 44; DXO 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. DXO KK at 121:11-122:12.

Other election officials experienced similar calls from confused, angry, and frustrated voters. DXO LL at 130:6-132:5; DXM U at ¶ 37; DXO 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. DXM Y (e-mails between VPC outside counsel Jennifer Carrier and other state election officials).

PLAINTIFFS’ REPLY: Defendants’ response does not dispute that it is VPC’s belief that pre-filled applications make the application processing easier for election officials. *See also supra* Part I Stipulated Facts 46, 79.

PLAINTIFFS’ FACT IN DISPUTE 2: 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. PXM 6 (Lopach Tr.) at 17:15–18:7, 20:7–13.

DEFENDANTS’ RESPONSE: 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. DXO CC, Nos. 4, 15. Initially, VPC produced one “study” that does not address pre-filled vs. blank applications. DXO

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, DXO 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. DXO 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. DXO DD. In response, VPC produced a 111-page document, all but four pages of which was redacted. DXO 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.” *Id.* 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.” *Id.* 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. DXO 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.” DXO 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).

PLAINTIFFS' REPLY: Defendants' response fails to dispute the study's ultimate findings or VPC's belief that pre-filled applications are its most effective means of communicating its pro-advance mail voting.

PLAINTIFFS' FACT IN DISPUTE 3: 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." PXM 6 (Lopach Tr.) at 18:24-19:6.

DEFENDANTS' RESPONSE: *See* response to Plaintiffs' Fact in Dispute 2.

PLAINTIFFS' REPLY: *See* reply to Plaintiffs' Fact in Dispute 2.

PLAINTIFFS' FACT IN DISPUTE 4: The 2006 Study states that "a pre-populated form produces a higher response rate than a blank form." DXO 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: *See* response to Plaintiffs' Fact in Dispute 2.

PLAINTIFFS' REPLY: *See* reply to Plaintiffs' Fact in Dispute 2.

DEFENDANTS FACT IN DISPUTE 1: DXM Q consists of examples of inaccurate applications received by Shawnee County.

PLAINTIFFS' RESPONSE: Of these fifty-one applications, only twelve appear to have entered the cure process, DXM Q at 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. PXO 9 (Howell Tr. Ex. 7) at 55 (excerpted). The voter submitted the application to Shawnee County with the suffix crossed out. PXO 9 (Howell Tr. Ex. 7) at 55. 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. PXO 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 "inaccurate." For example, some voters crossed out and replaced the first name and middle initial. *See, e.g.*, DXM Q 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.

DEFENDANTS' REPLY: The critical point is that these voters received pre-filled applications from VPC or CVI that contained inaccurate information. The fact that a voter may have corrected the erroneous information in certain instances did not eliminate the frustration, anger, and confusion that voters felt at having received applications that were inaccurate (and, if uncorrected by the voter or during the cure process), would have potentially prevented the voter from casting a valid ballot. In addition, the fact that some diligent election officials (and some diligent voters) were able to identify the mistakes of VPC/CVI and correct the inaccurate pre-filled applications and thereby ensure that the voter received an advance ballot hardly

excuses the actions of VPC/CVI nor does it minimize the additional administrative burden that such actions imposed on election officials.

Date: February 2, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 2nd day of February 2023, 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/ Bradley J. Schlozman

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