IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

DEFENDANTS' RESPONSE TO PLAINTIFF VPC'S BRIEF FOLLOWING REMAND

Defendants submit this Response to Plaintiff Voter Participation Center's ("VPC") Brief Following Remand from the Tenth Circuit Court of Appeals (ECF No. 200) ("Pl.'s Br."). *See VoteAmerica v. Schwab*, 121 F.4th 822 (10th Cir. 2024). For the reasons set forth below, the challenged statute prohibiting the mailing of unsolicited, pre-filled advance ballot applications ("Pre-Filled Application Prohibition" or "Prohibition"), K.S.A. 25-1122(k)(1)-(2), does not violate Plaintiffs' First Amendment free speech rights. Defendants, therefore, respectfully request that the Court enter judgment in their favor.

I. – FACTUAL BACKGROUND

This case revolves around the process for advance voting by mail in Kansas, the problems and complications that can and have arisen therefrom, the State's authority to address those issues through appropriate legislation, and the proper deference that the Court owes to the State when evaluating constitutional challenges to such election integrity measures.

The Tenth Circuit, in addition to ordering the dismissal of VPC's freedom of association and overbreadth claims, rejected the application of strict scrutiny to VPC's free speech cause of action. The court of appeals held that, unless "the purpose or justification for the Prohibition was to suppress speech favoring mail voting" – which, as described below, is emphatically not present here – the Prohibition need only survive intermediate scrutiny. *VoteAmerica*, 121 F.4th at 851. Moreover, the case law governing First Amendment attacks on election integrity statutes in non-public fora, as an advance ballot application surely must be characterized, militates substantial deference to the State's interests. Few cases have *ever* invalidated statutes in this context, and the pending lawsuit presents no basis for an exception.

A. Advance Voting By Mail in Kansas

Kansas has long been at the forefront of absentee voting and has consistently had one of the most generous allowances in the country for citizens to cast their ballot by mail. The State first permitted members of the military to vote outside of their precinct during the Civil War.[1] In the following decades, it added categories of individuals who could vote absentee, including railroad employees (1901), the sick or physically disabled (1953), persons absent from the county during the entirety of Election Day (1967), voters with permanent physical disabilities or illnesses (1984), and finally, no excuse absentee mail voting for all (1995).[2] In fact, the law that permitted railroad employees to vote by mail was the first such law in the country,[3] and Kansas' adoption of no-

[1] Kan. Legis. Rsch. Dep't, *Kansas Voter Registration and Voting Law Changes since 1995-August 1, 2023*, p. 5 (Aug. 1, 2023) (citing 1868 Ch. 36 of the General Statutes, § 45; K.S.A. 25-1201 *et seq.*), https://www.kslegresearch.org/KLRD-web/Publications/ElectionsEthics/memo_genl_shelley_voting_registration_law_changes_2023update.pdf

[2] *Id.* (citations omitted).

[3] Smithsonian Nat'l Postal Museum, *Voting by Mail: Civil War to Covid-19, History 1861-2022* (recognizing that Kansas was the first state to permit mail voting but limited such voting to railroad employees), https://postalmuseum.si.edu/exhibition/voting-by-mail-exhibition/history-1861-2022.

excuse mail voting was one of the first such laws in America.[4] Kansas was one of only approximately 15 states to offer no-excuse absentee voting by mail in 1996.[5]

This flexibility continues to the current day. All registered voters in Kansas are eligible to vote by mail in advance of Election Day. To do so, a voter must simply timely submit an advance ballot application to the county election office in which the individual is registered. ECF No. 176 (Stipulated Facts), ¶ 28. In order to preserve the integrity of the process and protect against any potential fraud, all information on the application must precisely match the data in the State's voter registration database ("ELVIS") before the applicant will be issued an advance ballot. *Id.* at ¶¶ 24, 37. If the information does not match or is missing required data (unless the mismatch is clearly inadvertent, e.g., a misspelled street name, omitting the letter "e" in George, or signing as "Jim" despite being registered as "James"), then a ballot will not be promptly issued. *Id.* at ¶¶ 34-35. Instead, county election officials must then undertake a time-consuming process to contact the voter and allow him/her an opportunity to cure any deficiencies. *Id.* If the voter cannot be reached, or it would be impracticable to do so given the proximity of the election, a more labor-intensive provisional ballot may be issued, depending on the defect. *Id.* at ¶¶ 36, 43.

This cure process can be protracted and time consuming. Although it takes an experienced election official, on average, roughly three to five minutes to process an accurate advance ballot application, *id.* at ¶ 153, an average of fifteen minutes of staff time is typically necessary if the cure process must be utilized. *Id.* at ¶¶ 154-155. If a voter cannot be contacted and must instead be sent a provisional ballot, the process ordinarily consumes thirty minutes or more of staff time.

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[4] The Center for Election Innovation and Research, *The Expansion of Voting Before Election Day, 2000-2024* (July 2024), *https://electioninnovation.org/research/expansion-voting-before-election-day/*.

[5] N. Cemenska, *Report on the 1972-2008 Early and Absentee Voting Dataset*, Absentee Voting Laws (Dec. 14, 2009), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2009/NonPrecinctLaws197220081pdf.pdf.

Id. at 156. Review of duplicate applications, meanwhile, generally takes seven to ten minutes of staff time to process if the voter does not need to be contacted, but can take fifteen to thirty minutes or more if officials must communicate directly with the voter. *Id.* at ¶¶ 176-177.

B. VPC's Ballot Application Activities in Kansas

Plaintiff VPC, along with its sister organization, Center for Voter Information ("CVI"), mailed partially pre-filled advance ballot applications (in which the registrant's name, address, county, and election date were pre-populated) to targeted individuals in connection with the 2020 General Election. ECF No. 200, Exs. 1-2.[6] VPC relied on a vendor (Catalist) to provide the data used to pre-fill the forms. ECF No. 176, ¶ 52. Although the information Catalist sent to VPC was based upon publicly available information in ELVIS, Catalist also merged commercial data into the mix, meaning the information VPC received did not always track ELVIS data. *Id.* at ¶ 63. Because of the significant lag time between data gathering and the printing and mailing of the pre-filled applications, the information used to pre-populate the forms was also often stale. *Id.* at ¶¶ 53, 68. This resulted in substantial quality control issues with VPC's mailings.

Prior to the November 2020 election, VPC and CVI mailed between one and five advance ballot application packets to nearly 508,000 Kansas voters. *Id.* at ¶¶ 47, 165. This occurred over five "waves" of mailings. *Id.* at ¶ 60. A large number of these pre-filled applications contained erroneous information. VPC's internal data revealed that nationally,[7] approximately 5% of its pre-filled applications contained an erroneous middle name or initial and about 3% had a mismatched suffix. *Id.* at ¶ 64. This would translate to more than *40,600* inaccurate applications in Kansas,

[6] VPC accompanied its pre-filled applications with a cover letter touting the purported virtues of voting early by mail. The Tenth Circuit made clear, however, that the pre-filled application must be entirely disaggregated from the cover letter in evaluating Plaintiffs' First Amendment claim. *VoteAmerica*, 121 F.4th at 834-36.

[7] In addition to Kansas, VPC undertook similar activity in seventeen other states.

assuming a similar error rate. Although VPC did not know whether Kansas' error rates exactly tracked its national error rate, it never argued that the rates did not track. And VPC was sufficiently concerned itself about the accuracy of the data it received from Catalist that it stopped pre-filling applications and instead sent blank applications in the third and fourth Kansas waves. *Id.* at ¶¶ 61-62, 65.

In discovery, VPC provided only a subset of its Kansas mailing list (just under 313,000 of the voters to whom it sent at least one advance ballot application), but Defendants' expert, Ken Block, identified an array of errors in the names and addresses that VPC used to pre-fill the applications, as well as highlighting almost 400 mailings to voters whose registrations had been cancelled. *Id.* at ¶¶ 67-74. He also discovered that, *at best*, VPC used a Kansas voter file from April 2020 to pre-fill the applications it sent to voters for the November 2020 Election. *Id.* at ¶¶ 53, 68. Given that ELVIS is a dynamic system and updated in real time, *id.* at ¶58, VPC thus often used stale / inaccurate information. Even Plaintiffs' expert, Dr. Eitan Hersh, acknowledged that at least 3% of VPC's Kansas voter database were inaccurate, suggesting that VPC and CVI sent at least 15,236 erroneous applications to Kansas voters in connection with the 2020 General Election. *Id.* at ¶ 88. Dr. Hersh observed that VPC could have achieved greater accuracy, but that VPC's cost-benefit assessment led it to refrain from taking any such measures. *Id.* at ¶ 90.

Then there were the duplicate applications. Shawnee County Election Commissioner Andrew Howell, for example, not only described receiving a substantial number of pre-filled applications containing information that did not match applicants' data in ELVIS (e.g., wrong address, last name, middle initial, or suffix), *id.* at ¶ 139, but he also noted that the county received 4,217 duplicate applications, a staggering figure representing more than 15.4% of the total advance applications received. *Id.* at ¶¶ 168-169. Ford County Clerk Debbie Cox testified similarly. Her

office received 274 duplicates, nearly 9% of the 3,040 total applications. *Id.* at ¶ 172. These figures bore no resemblance to the 2020 proportional increase in mail voting, considering that Shawnee County had never received more than a *dozen* duplicates in any prior election, and Ford County had never received more than *five*. *Id.* at ¶¶ 169-170, 173. Election Director Bryan Caskey testified that other county election officials throughout the State shared their own similar experiences with him. *Id.* at ¶¶ 161-162.

Howell recounted that these inaccurate and duplicate applications resulted in calls, letters, e-mails, and in-office visits from voters expressing anger, confusion, and frustration at what they had received from VPC. *Id.* at ¶¶ 142-144. While VPC seeks to dismiss the significance of the duplicate applications since Kansas does not prohibit duplicate mailings, Howell and Cox both noted that many voters explained that they had only submitted duplicate applications because they *believed they were obligated to mail any and all pre-filled applications back to the county election office*, even if they had previously submitted one, and even if they had no desire to vote by mail. *Id.* at ¶¶ 143, 171, 179. VPC responds that its mailers contained a statement advising voters that they need not submit the latest pre-filled application if they had already submitted one, Pls.' Br. at 10, but the avalanche of duplicate applications returned to county election offices underscored that voters clearly did not get the message and that VPC's disclaimer proved wholly ineffective.

These inaccurate and duplicate applications had a deleterious impact on efficient election administration. Election officials described the extra time they had to spend processing every application and going through the elaborate curative process for voters submitting erroneous and duplicate applications. *Id.* at ¶¶ 153-157, 176-178. Cox recalled the situation got so bad in Ford County that she took out an ad in the local paper to inform voters that she had nothing to do with VPC's mailings. *Id.* at ¶¶ 150-151, 679. VPC itself received enough complaints about its pre-filled

applications that it created an FAQ for staff to use in responding to voters in which voters were to be told that VPC was "aware" that it was mailing forms with "Someone else's information" and that voters should use the Secretary of State's website to obtain a *blank application* instead. *Id.* at ¶ 158. Officials in other states complained to VPC about its inaccuracies as well. *Id.* at ¶ 159.[8] Although existing safeguards fortunately prevented systemic fraud from occurring in Kansas, VPC's activities made election administration far more difficult for the State's election officials.

C. Kansas Legislature's Reaction to Problems with Pre-Filled Applications in 2020

In response to the events of the 2020 election, the Kansas legislature in its 2021 session adopted the Pre-Filled Application Prohibition, now codified at K.S.A. 25-1122(k)(2). The statute makes it a misdemeanor for any person to solicit, by mail, a registered voter to file an advance ballot application if the mailing includes an application that has been partially or fully completed prior to the mailing. The legislature employed a scalpel rather than a sledgehammer. It could have banned mail voting altogether (as many states do), prohibited the distribution of mail ballot applications by anyone other than county election officials (as Tennessee does via a statute that the Sixth Circuit recently upheld against a First Amendment challenge, *see Lichtenstein v. Hargett*, 84 F.4th 575 (6th Cir. 2023)), restricted the provision of *any assistance* of voters (even in person) with their advance ballot applications (as states like Minnesota do, *see* Minn. Stat. Ann. § 203B.03, Subd. 1(a)(7)), or imposed an array of other possible restrictions on the process. Instead, the legislature opted to target what it perceived to be one of the primary sources of voter confusion, and impediment to efficient election administration: the mailing of unsolicited, pre-filled applications.

[8] Georgia adopted a bill (S.B. 202) very similar to Kansas' Prohibition on March 25, 2021, several months before Kansas' legislature enacted the law at issue here. *See* Ga. Code Ann. § 21-2-381(a)(1)(C)(ii). Georgia's law was also passed in response to significant voter complaints about the inaccurately pre-filled absentee vote applications they received from VPC in connection with the 2020 General Election, which are recounted in *VoteAmerica v. Raffensperger*, 696 F.Supp.3d 1217, 1226 (N.D. Ga. 2023).

II. – ARGUMENT

A. The Prohibition is not subject to strict scrutiny

Seeking to avail itself of the tiny window crack left open by the Tenth Circuit, VPC argues as a preliminary matter that the Prohibition must be subjected to strict scrutiny because the purpose or justification of its passage was to suppress speech favoring mail voting. VPC theorizes that "the only rational purpose of the . . . Prohibition was to target and suppress speech by third parties like VPC that express a pro-vote-by-mail message." Pls.' Br. at 7; *see also id.* at 8-11. This position is indefensible. Its acceptance would require a disregard of not only the stipulated facts in this case, but also Kansas' long and consistent role as a leader in promoting mail voting.

As noted in Part I.A. above, Kansas has been, and remains today, one of the most flexible states in the union in terms of its solicitude of mail voting. No excuse is necessary in order to vote early via the mail. And the process could hardly be easier, as VPC's own mailers explicitly acknowledge. The notion that Kansas' adoption of measures designed to address at least part of the problems that occurred in connection with the 2020 General Election (both in this State and elsewhere) meant that it had suddenly reversed many decades of consistent policy and exhibited impermissible animus towards voting by mail defies common sense. Nor is the Prohibition being challenged here restrictive of VPC's ability to communicate its message. Indeed, the Tenth Circuit held that any threat to free speech posed by the Prohibition is "small." *VoteAmerica*, 121 F.4th at 850. The Court explained:

> Although VPC cannot, without invitation, complete answers to the questions on the mail-ballot application seeking noncontroversial demographic information to satisfy legal requirements, it can provide that information to the voter in multiple alternative ways, including, for instance, on a sheet with that information attached to the form. We are not sufficiently imaginative to see how the Prohibition could "effectively drive [any] ideas or viewpoints from the marketplace." *Davenport [v. Wash. Educ. Ass'n*], 551 U.S. [177,] 188 [2007].

Id. at 850. The Court then added:

> [T]he history of regulations (instructions) governing the filling out of noncontroversial information on government forms provides substantial comfort that such regulation is fully compatible with a lively market in controversial ideas. We think the likelihood that the Prohibition's restrictions on what can be done with a government form would impair the free marketplace of ideas is even less than the potential impairment from the somewhat analogous context of content restrictions on the use of government property constituting a nonpublic forum.

Id. at 851 (internal citations and alterations omitted). This analogy is particularly instructive given that regulations on *non-public fora*—which an official advance mail ballot application form is, *at most*—typically survive judicial scrutiny. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800 (1985) (speech restrictions may be imposed on non-public fora as long as they are reasonable and do not constitute viewpoint discrimination); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (postal sidewalk is a nonpublic forum and thus can be reasonably regulated by the government).

As for VPC's contention that the Prohibition is undergirded by an improper justification because it constrains only views that advocate in favor of mail voting, the facts and common sense suggest otherwise. VPC seems to believe that a pre-filled application is only consistent with a pro-vote-by-mail message, and thus any restrictions on the pre-filling necessarily must trigger strict scrutiny. But even if VPC's insertion of a voter's name and address on an advance mail ballot application represents speech, there is no conceivable counterpoint to be written on the form. The application contains only discrete data fields. There is *nothing* else that *could* be written on it. It is simply a government form. As the Tenth Circuit noted, "to state the obvious, the use of forms by the government inherently requires some content restrictions. One would be hard-pressed to name an official form that is not accompanied by a set of instructions on how to complete it—instructions which not uncommonly exceed the length of the form itself." *VoteAmerica*, 121 F.4th at 850-51.

"In particular, instructions governing the time, place, and manner in which someone can fill out for another person a government form seeking noncontroversial information do not on their face suggest hostility to any idea or point of view." *Id.* at 851.

In its briefing before the Court of Appeals, VPC posited that an anti-vote-by-mail group could send an adulterated application with bolded letters urging voters not to vote by mail. But in that scenario, the form being used as background would no longer represent a valid application; it would effectively function as a cover letter articulating a specific message. Plus, if the *destruction* of an application is necessary to communicate a counter-message, then the form does not lend itself to multiple viewpoints. The bottom line is that Kansas is indifferent to any message that VPC seeks to communicate. There is no improper purpose or justification behind the Prohibition. The State is merely trying to minimize voter confusion, facilitate efficiency in election administration, and foster confidence in, and protect the integrity of, the electoral process.

VPC claims that the legislative record of the now-challenged statute reflects an improper hostility to organizations that encourage voters to vote by mail. Pls.' Br. at 3-4, 10. This represents a mischaracterization of the legislature's actions. No entity was singled out based on its view-points. The only reason the legislative debate over HB 2332 included references to the activities of third-parties was because the problems the bill was attempting to address—e.g., voter confusion and frustration, inefficient election administration, and diminished confidence in the integrity of the electoral process—were *caused by* the referenced third-parties' erroneous pre-filling and duplicate mailings of advance ballot applications. That certainly does not suggest any unconstitutional discrimination.[9] Moreover, given the unprecedented torrent of duplicate applications, it is rather

[9] VPC's references to the testimony of certain state and county election officials *in this lawsuit* as a basis for suggesting that *the legislature* improperly targeted organizations like itself when adopting HB 2332 *back in 2021*, Pls.' Br. at 10, makes no sense and further underscores the lack of merit in its theory.

rich for VPC to attempt to trumpet its supposed efforts to avoid this scenario by including what was indisputably a completely ineffective statement on its cover letters advising voters that they need not send in duplicate applications. In any event, the Tenth Circuit rejected Plaintiffs' argument that the Prohibition's speaker distinctions invite strict scrutiny. *VoteAmerica*, 121 F.4th at 848.

Having fallen short on its direct assault, VPC next attempts to mount an indirect attack to get to strict scrutiny by claiming that the legislature must have had nefarious motives in adopting the Prohibition because the State's asserted interests in the law are not served by the statute. Even if true—which it emphatically is not—VPC's argument is predicated on a "logical fallacy of the inverse," also known as the denial of the antecedent (i.e., the failure of the means does not prove an improper motive). *See NLRB v. Noel Canning*, 573 U.S. 513, 589 (2014) (Scalia, J. concurring) (discussing the fallacy); *Ace Fire Underwriters Ins. Co. v. Romero*, 831 F.3d 1285, 1291 n.7 (10th Cir. 2016) (same). In other words, even if the State's interests were not served by the statute, that would in no way constitute evidence of any improper motive justifying the application of strict scrutiny. VPC's fallacious theory is ultimately beside the point, however, because, as detailed in Part II.B. below, the Prohibition *does* closely serve Kansas' interests.

VPC also avers that another provision in HB 2332—the statutory prohibition against non-Kansas residents mailing advance ballot applications to Kansas voters, (what VPC characterizes as the Out-of-State Distributor Ban, codified at K.S.A. 25-1122(*l*)(1)), which has been permanently enjoined by stipulation—is evidence that the bill "was aimed at limiting the flow of pro-vote-by-mail communications to Kansas voters." Pls.' Br. at 10. But that statute is no longer at issue in the case, and the Court cannot analyze the constitutionality of these provisions under a "one bad apple spoils the whole barrel" methodology. The Court must assess each statute on its own merits, even

if enacted alongside other allegedly unconstitutional provisions. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). As anyone even remotely familiar with the legislative process knows well, different provisions in an omnibus bill are frequently proposed, amended, and adopted by a divergent cast of legislators and committees. Legislative text is added and deleted in committee and on the floor of each house. The notion that every line in a bill reflects the universal consensus or motivation of each member voting in favor of final passage is simply untrue. The long and arduous path that HB 2332 took to passage shows this bill is no exception. *See* https://kslegislature.gov/li_2022/b2021_22/measures/hb2332/.

In sum, there is a paucity of evidence that the Prohibition was adopted by the legislature for the purpose, or with the justification, of suppressing speech favoring mail voting. There is thus no basis for subjecting the statute to strict scrutiny. It must instead must be analyzed under intermediate scrutiny, as described in the Tenth Circuit's *VoteAmerica* opinion.

B. The Prohibition survives intermediate scrutiny review

The Tenth Circuit explained that, in evaluating VPC's First Amendment free speech claim under intermediate scrutiny, the Court must assess whether the Prohibition's "restriction on speech or expression" are "narrowly tailored to serve a significant governmental interest." *VoteAmerica*, 121 F.4th at 851 (quoting *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022)). The Prohibition clearly passes that test.

1. *Any restrictions on speech in the context of advance mail ballot applications occur, at most, in a non-public forum where regulatory latitude is much greater*

In describing the "narrowly tailoring" requirement, VPC suggests that it is a one-size-fits-all inquiry. It is not. VPC primarily focuses on *Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021); *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020); and *Citizens for*

Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007). Each of those cases, however, involved significant restrictions—virtual *complete bans*—on speech in *traditional public fora*, "which occupy a special position in terms of First Amendment protection, have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Brewer*, 18 F.4th at 1219 (quotations omitted). "In these traditional public fora, the government's right to limit expressive activity is sharply circumscribed." *Id.* at 1220 (quotations omitted). The ground surrounding a highway entrance (*Brewer*), public median (*McCraw)*, and hotel perimeter (*Citizens for Peace in Space*) are classic examples of traditional public fora where constraints (let alone bans) on protesting, panhandling, or distributing literature have a high likelihood of limiting ideas or viewpoints from the marketplace.[10] The Tenth Circuit heavily emphasized the public forum context in those cases. *See id.* at 1222-23 n.14 (describing a more flexible narrow tailoring test in commercial speech than in public fora, the former being much more analogous to the Prohibition at issue here).

The same is true of the other cases VPC cites on this issue, each of which involved a broad and sweeping limitation on speech in traditional public fora. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 476-77 (2014) (street and sidewalk outside abortion clinic are traditional public fora; "government's ability to restrict speech in such location is very limited"); *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016) (prohibition against posting ballot-selfies on the internet—the *ultimate traditional public forum*—held not to be narrowly tailored under intermediate scrutiny).

[10] Notably, the speech restrictions in *Citizens for Peace in Space* (a total ban on protestors) were still ultimately upheld as valid time/place/manner limits, even though the court was required to impose the more robust intermediate scrutiny test applicable to traditional public fora. 477 F.3d at 1221-26. So, too, was a First Amendment free speech claim rejected, applying intermediate scrutiny, against a city ordinance prohibiting loitering in a traffic median. *See Evans v. Sandy City*, 944 F.3d 847, 854-60 (10th Cir. 2019).

By contrast, in a *non-public forum*, the government has much greater latitude to impose restrictions "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Id.* at 808.

Moreover, "[n]ot every instrumentality used for communication . . . is a traditional public forum or a public forum by designation." *Id.* at 803. That is why, for example, the Supreme Court characterized advertising space on city buses as a non-public forum and upheld restrictions therein. *Id.* at 803-04 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). It is also why the Supreme Court in *Cornelius* rejected a First Amendment challenge to the government's restrictions on which entities could participate in the annual Combined Federal Campaign charity drive. *Id.* at 811-12. The Court reasoned that the necessity for regulation in this campaign reflected that the government did not intend to create an arena for open-ended expression, and it was appropriately labeled a non-public forum. *Id.* at 804-06. The underlying rationale is that the scope of the First Amendment typically turns on "the nature of the property" and the "disruption that might be caused by the speaker's activities." *Id.* at 800.

An official government form like Kansas' advance mail ballot application that is used as a critical component of the voting process is *not* properly characterized as a traditional public forum. There may be information communicated meriting First Amendment protection, *VoteAmerica*, 121 F.4th at 838, but the form itself is, *at most*, a non-public forum. *See id.* at 850-51 (describing how

this type of government form inherently needs content restrictions). Indeed, the Tenth Circuit held that "the likelihood that the Prohibition's restrictions on what can be done with a government form would impair the free marketplace of ideas is *even less* than the potential impairment from the somewhat analogous context of content restrictions on the use of government property constituting a *nonpublic forum*." (emphasis added); *cf. Doe v. Reed*, 561 U.S. 186, 196 (2010) (exacting scrutiny test used for determining if disclosure mandate unreasonably burdened speech requires that the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."). To subject any regulations/instructions imposed by Kansas on this form to the same level of scrutiny applied in connection with a public gathering space or other traditional public forum is illogical.

This analysis is fully consistent with, and even compelled by, *Vidal v. Elster*, 602 U.S. 286 (2024), which the Tenth Circuit relied upon in rejecting a strict scrutiny standard in this case. *See VoteAmerica*, 121 F.4th at 848-49. Just as is the case with viewpoint-neutral trademark restrictions, there is a long history of federal courts deferring to states' electoral regulations. The Judiciary has consistently recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). *Vidal* instructs courts to look at that history when evaluating the scope and impact of the First Amendment on the regulation at issue.[11] *Vidal*, 602 U.S. at 300. Despite acknowledging that a content-based, viewpoint neutral speech restriction was involved in the trademark dispute,

[11] To be sure, as the Tenth Circuit also noted, *Vidal* indicated that a historical practice of regulation is not required for a viewpoint-neutral regulation to pass constitutional muster under the First Amendment. *VoteAmerica*, 121 F.4th at 849. This point is reinforced, the Tenth Circuit observed, by *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

the Supreme Court held that the absence of a public forum, combined with the lack of a government intent to create a designated forum for speech simply by providing for the federal registration of trademarks, counseled in favor of a standard more akin to reasonableness as would exist in a non-public forum. *Id.* at 309; *see also Burson v. Freeman*, 504 U.S. 191, 214-16 (1992) (Scalia, J. concurring) (content-based, viewpoint-neutral restrictions on speech around polling place are not subject to any heightened scrutiny because they regulate a non-public forum).

The same is true of advanced mail ballot applications. Far from intending to establish any designated forum for speech, the official application form — accompanied by detailed instructions and governed by a comprehensive election code — simply functions as a critical component of the actual voting process. In fact, exercising their broad authority to regulate elections under U.S. Const. Art. 1, § 4, states have created a plethora of laws governing voter registration and ballot casting, which rely on a variety of government forms. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (collecting cases regarding laws subject to the Elections Clause). These forms, which necessarily restrict speech under the Tenth Circuit's interpretation, have long co-existed with the First Amendment, and the Prohibition should be viewed in a similar light.

In sum, the State enjoys substantial flexibility to regulate in this arena. Whether an advance mail ballot application is branded a non-public forum or simply a mechanism at the far end of the continuum where government regulation of speech is at its peak (i.e., the immediate proximity of a non-public forum), the limits on state authority that VPC advocates here from traditional public fora precedent are inapplicable. The proper test is reasonableness.

2. *The Prohibition meets any intermediate scrutiny test*

Even if the Court applies the intermediate scrutiny test for speech restrictions in a public forum, however, the Prohibition still survives unscathed. With public fora, the narrow tailoring

component of intermediate scrutiny requires the court to "look to the amount of the speech covered by the [regulation] and whether there is an appropriate balance between the affected speech and the governmental interests that the [regulation] purports to serve." *Brewer*, 18 F.4th at 1224 (quoting *Evans v. Sandy City*, 944 F.3d 847, 856 (10th Cir. 2019)). The fit need not be perfect. There is no mandate that the challenged regulation "be the least restrictive or least intrusive means of serving the government's interests." *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)); *accord Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). "Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation without burdening *substantially more* speech than is necessary to further the government's legitimate interests." *Brewer*, 18 F.4th at 1225 (citations and internal alterations omitted). "In other words, restrictions on the time, place, or manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* "The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Evans*, 944 F.3d at 856-57 (cleaned up).

3. *The Prohibition is narrowly tailored to meet Kansas' significant interests*

Defendants have identified numerous compelling reasons that supported the enactment of the Prohibition, including the avoidance of voter confusion, facilitation of orderly and efficient election administration, enhancement of public confidence in the integrity of the electoral process, and deterrence of voter fraud. All are well-recognized and indisputably legitimate interests in the context of election administration. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 672 (2021) (combatting fraud is a "strong and entirely legitimate" reason for enacting voting laws);

Doe v. Reed, 561 U.S. 186, 197-98 (2010) ("State's interest in preserving the integrity of the electoral process is undoubtedly important . . . [and it] extends more generally to promoting transparency and accountability in the electoral process."); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (State has "compelling interest in protecting voters from confusion and undue influence."); *Burdick*, 504 U.S. at 438 ("We have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls."); *Marchioro v. Chaney*, 442 U.S. 191, 196 (1979) ("The State's interest in ensuring that [its electoral] process is conducted in a fair and orderly fashion is unquestionably legitimate."); *DSCC v. Pate*, 950 N.W.2d 1, 5-7 (Iowa 2020) (rejecting constitutional challenge to statute that prohibited third-parties from pre-populating voters' absentee ballots).

VPC does not take issue with the *general* importance of any of these interests. Instead, it argues that these interests were not set forth in the legislative record when HB 2332 was enacted, that the State failed to marshal evidence of the harms that led to the Prohibition's passage, and that the Prohibition is not a proper fit for such harms in any event. None of those contentions has merit.

As a threshold matter, the fact that the legislature did not create a comprehensive record of all its rationale for adopting the Prohibition is irrelevant. The legislature was under no obligation to "show its work" when enacting the statute. "[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Burson*, 504 U.S. at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)); *see also Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1198-99 (9th Cir. 2013) (in conducting intermediate scrutiny review as part of First Amendment free speech challenge, court looks to evidence developed in the litigation and is not

restricted to legislative history); *id.* at 1199 ("As a matter of course, in multiple First Amendment cases, the [Supreme] Court has looked beyond the record before Congress at the time of enactment.") (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994)). And the stipulated factual record contains ample evidence to support the State's interests.

a. The Prohibition minimizes voter confusion

VPC maintains that Defendants offered only "minimal" evidence of voter confusion, which was anecdotal in nature and did not constitute "real" harm. Pl.'s Br. at 15-17. VPC further claims that the Prohibition would not alleviate such harm in any event. False, all the way around.

The parties *stipulated* that election officials were inundated with calls from confused and angry voters who had received inaccurately pre-filled applications. ECF No. 176, ¶¶ 142-144, 161-162. Andrew Howell in Shawnee County described voters venting frustration at having received applications that contained the wrong name and address, particularly when those voters had previously communicated changes to the election office. Id. at ¶ 143. Ford County alone received 20-30 phone calls *per day* and placed newspaper ads to alert voters that the county had not mailed out any pre-filled applications. *Id.* at ¶ 150. The parties also *stipulated* that, as attested by election officials, many voters were so confused by pre-filled applications that they believed they were required to complete and mail back any pre-filled application even if they had already submitted one. *Id.* at ¶¶ 171, 179.[12] This led to an explosion of duplicate applications, which imposed significant burdens on election officials. *Id.* at ¶¶ 152, 168-170, 172-174. To suggest that Defendants

[12] This testimony was *not* hearsay. The election officials' statements were offered to demonstrate voters' *state of mind* after receiving the VPC materials, which is not hearsay. Fed. R. Evid. 803(3); *United States v. Smalls*, 605 F.3d 765, 785 n.18 (10th Cir. 2010). Testimony about a third-party's confusion in particular is either not hearsay or falls within the hearsay exception under Rule 803(3). *CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 589 (6th Cir. 2015) (witness' testimony about telephone call with declarant in which declarant expressed confusion about the status of order was not hearsay); *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City*, 383 F.3d 110, 132-33 (3d Cir. 2004) (bank tellers' testimony about customers' out-of-court statements regarding customers' confusion was not hearsay).

offered no evidence of voter confusion is nonsense.

VPC now engages in a *post-hoc* attack on these stipulated facts by attempting to minimize them as useless anecdotes. But the election officials' testimony regarding their interactions with voters—and the confusion, anger, and frustration of those voters arising out of the unsolicited, pre-filled advance ballot applications they had received in the mail—*is* objective evidence of such confusion. Indeed, the Tenth Circuit has held that "the government is permitted to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even based solely on history, consensus, and simple common sense, and it need not proffer either empirical data accompanied by a surfeit of background information or a double-blind empirical study or a linear regression analysis to bear its First Amendment burden." *Brewer*, 18 F.4th at 1243-44 (internal alteration and quotations omitted); *see also Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 989-93 (10th Cir. 2020) (noting that "the government is not limited in the evidence it may use to meet its burden" of justifying a regulation of speech, and discussing district court record, including post-ordinance evidence, to determine if burden had been sustained). It is not clear what VPC thinks is required, but to impose the kind of evidentiary burden it seems to be proposing would hamstring election officials and represent a major intrusion on state sovereignty and the separation of powers.

VPC's suggestion that the evidence presented fails to show that the "harms are real" falls flat as well. In contrast to the safety concerns in *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020), on which VPC rests this argument, an election statute targeting voter confusion requires no extensive studies. Defendants had no obligation to secure affidavits from thousands of voters or to present evidence of voter confusion from every county in the State. Defendants produced competent (and stipulated) evidence from state and county election officials who interacted

with voters on a daily basis. Moreover, as the Supreme Court has explained, "[t]o require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro*, 479 U.S. at 195-96.

As for VPC's contention that the Prohibition would not alleviate the recited harms, this claim ignores the record. Voter confusion in the 2020 General Election was not confined to the widespread dissemination of duplicate applications. VPC *stipulated* that 5% of its pre-filled applications contained an incorrect middle name or initial and 3% contained an erroneous suffix. ECF No. 176, ¶ 64. Considering that VPC and CVI mailed applications to nearly 508,000 Kansas voters during in that election, that would equate to more than *40,000* erroneous applications. Even the 3% error rate acknowledged by VPC's expert translates to more than 15,000 incorrect applications. *Id.* at ¶¶ 88-89. While VPC did not know for certain if the error rates for Kansas matched its overall national error rates, *id.* at ¶ 65, it was clearly concerned about the erroneous data on the applications because, on its own initiative, it stopped pre-filling the applications and instead sent out blank applications to Kansas voters for two of its five mailers. *Id.* at ¶¶ 61-62. VPC even created an FAQ for its call center to tell voters complaining about the erroneous applications that they should seek a new, blank one from the Secretary of State's website. *Id.* at ¶ 158. And this was in addition to the pre-filled applications it sent to the wrong individuals or to persons who had died or moved out of the State, a problem created by VPC's poor quality control issues and the significant delay

between the time of printing and date of mailing. *Id.* at ¶¶ 68-74.

Nor was the pre-filled application predicament limited to Kansas. VPC's activities wreaked havoc in many other states, evidenced by the written complaints regarding inaccurate applications that VPC received from officials in those jurisdictions. *Id.* at ¶ 159. The media widely covered these problems, highlighting the bipartisan frustration with VPC and CVI, and describing how their mailers "contained mistakes and confused voters at a time when states are racing to expand vote by mail." Joshua Eaton et al., "*A Nonprofit with Ties to Democrats Is Sending Out Millions of Ballot Applications. Election Officials Wish It Would Stop*," Pro Publica, Oct. 23, 2020.[13] Kansas had every right to take other states' issues into consideration.

Clearly, then, the problem was not simply with duplicate applications, and the Prohibition properly targeted a major source of the voter confusion. But the issue of duplicates *was* relevant. Indeed, as discussed above, voters told election officials that they often submitted duplicate pre-filled applications because they thought they were required to mail back any pre-filled application even if they had already submitted one.[14] The voters were plainly confused, and the legislature was not rendered impotent to respond to this mess just because VPC included an obviously ineffective disclaimer on its applications. In any event, the fact that Kansas also had problems with duplicate applications, which are not prohibited, does not diminish the State's interests in the Prohibition.

[13] https://www.propublica.org/article/a-nonprofit-with-ties-to-democrats-is-sending-out-millions-of-ballot-applications-election-officials-wish-it-would-stop; Ryan McCarthy, "*Pro Publica Responds to the Center for Voter Information*," Pro Publica, Oct. 30, 2020, available at https://www.propublica.org/article/propublicaresponds-to-the-center-for-voter-information.

[14] The stipulated testimony of Shawnee County Election Commissioner Andrew Howell was also mischaracterized during the earlier proceedings. The court stated, "Howell does not believe that voters were confused or frustrated because the applications which they received were pre-filled. Rather, he believes that voters erroneously assumed that the county had mailed the duplicate ballot applications and were frustrated by the purported incompetency of his election office." *VoteAmerica v. Schwab*, 671 F.Supp.3d 1230, 1239 (D. Kan. 2023). What Howell actually testified to, however, was simply that he did not "think that the pre-filled information, *in and of itself*, was what *all of the concern was*." ECF No. 176, ¶ 141 (emphasis added). All he meant was that it was *both* the errors on the pre-filled applications and the duplicate mailings that triggered such negative emotions from voters.

States are not required to "choose between attacking every aspect of a problem or not attacking the problem at all." *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

VPC additionally insists that the Prohibition is not narrowly tailored because the State had less restrictive (and unspecified) alternatives available to combat the problem. Not true. Bearing in mind that Kansas was not obligated to select the least restrictive means to rectify its concerns, and that there was an array of more restrictive measures the State could have undertaken, *see* Part I.C. above, the legislature clearly endeavored to maintain its solicitude of mail voting and limit the intrusion on any speech rights while still addressing the problem that had occurred in 2020.

Precluding entities from sending more than one pre-filled application to any single voter, for example, would be ineffective given that there are multiple organizations and parties engaging in this activity. Nor would requiring that all applications be pre-filled exclusively with data directly from ELVIS have much utility. Not only would such a mandate be impossible to police, but ELVIS is a dynamic database that updates in real time as election officials input new/updated information from voters. *Id.* at ¶¶ 58-59. When data is downloaded, it reflects a snapshot of the system at the time of download. *Id.* at ¶ 50. As a result, data can become outdated almost immediately after it is downloaded. When there is a long delay between the download and the printing of a pre-filled application—as there was with VPC—the likelihood of a mismatch grows substantially. *Id.* at ¶ 59. The notion that the State could enforce a time limit on the printing/mailing lag time is folly. Plus, the volume of ELVIS data updates hits a peak as the Election Day registration deadline looms because that is the time when most individuals tend to focus on their voter registration information and ensuring that any changes to their profile (e.g., address and name) are current. Given that this is also the time when most pre-filled applications are sent to voters, it means that errors will not be avoided by a restriction on the source of the pre-filled data.

Ironically, in a separate federal lawsuit in Georgia challenging a law virtually identical to the Prohibition at issue here, VPC explicitly stated that "the challenged provisions of S.B. 202 [the Georgia law] are fundamentally more restrictive than the provision of Kansas law considered by the Tenth Circuit that infringed on Plaintiffs' speech, here limiting significantly more of Plaintiffs' speech. S.B. 202 limits the number of people to whom Plaintiffs can speak, categories of people to whom Plaintiffs can speak (newly registered voters), when Plaintiffs can speak, and even how Plaintiffs speak to voters." *VoteAmerica v. Raffenspberger*, Case No. 1:21-cv-1390 (N.D. Ga.), Doc. No. 259, at 4.

It is also worth noting that, outside situations where there is a complete ban on speech in a traditional public forum, speech regulations regularly survive intermediate scrutiny review. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n.*, 551 U.S. 177 (2007) (upholding, under intermediate scrutiny review, a content-based, viewpoint-neutral prohibition against public-sector unions from using agency fees deducted from non-member employees' wages to influence election without first securing affirmative consent of the employee); *Reagan Nat'l Advertising of Austin, Inc. v. City of Austin*, 64 F.4th 287 (5th Cir. 2023) (on remand from Supreme Court, in case cited by Tenth Circuit as a basis for invoking intermediate scrutiny here, court held that city's ban on digitizing off-premises billboards was sufficiently narrowly tailored to satisfy intermediate scrutiny test); *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1249-52 (10th Cir. 2023) (state law requiring permits for paid billboard message, but no such requirement for unpaid messages, did not violate First Amendment based on intermediate scrutiny review); *Aptive Env't,* 959 F.3d at 989-93 (applying intermediate scrutiny to ordinance imposing curfew on door-to-door solicitations, and concluding that the provision did not infringe on the sellers' First Amendment free speech rights). In fact, even where was a total ban on speech in a traditional public forum, the

Tenth Circuit has deemed such laws consistent with the First Amendment on multiple occasions. *See* footnote 10 at page 13 above (citing *Citizens for Peace*, 477 F.3d at 1221-26, and *Evans*, 944 F.3d at 854-60).

b. The Prohibition facilitates orderly and efficient election administration, and enhances public confidence in the integrity of the electoral process

VPC also disputes that the Prohibition is justified by Kansas' interest in promoting orderly and efficient election administration. Pl.'s Br. at 18-20. This interest is closely tied to the State's interest in enhancing public confidence in the integrity of the electoral process, which is a critical interest in and of itself and which VPC does not address in its brief on remand. Regardless, the State's interests are sound and borne out by the record.

Defendants offered an abundancy of evidence of the extensive amount of extra time it took county election officials to process the inaccurate and duplicate advance ballot applications, and the elaborate and highly time-consuming cure process that such officials had to take each time they confronted such a non-compliant application. ECF No. 176, ¶¶ 33-36, 111, 139-144, 150, 152-157, 161, 163, 175-180. The Tenth Circuit specifically took notice of these stipulated facts. *See VoteAmerica*, 121 F.4th at 827-28 and 829-31.

In response, VPC mostly parrots back the district court's prior opinion, which was decided, the Tenth Circuit held, under an insufficiently deferential standard of review. While not expressly contesting there was a surge in inaccurate and duplicate applications in the 2020 General Election, VPC faults Defendants for "not connect[ing] the alleged errors in plaintiff's mailing list with errors in applications received by election officials" that required curing. Pl.'s Br. at 18 (citing *VoteAmerica*, 671 F.Supp.3d at 1252-53). But just from the partial subset of Kansas recipients of VPC/CVI pre-filled applications that VPC produced in discovery, the analyses of both Defendants' expert and VPC's expert indicated there was at least 15,000 (and likely more than 40,600) voters

who received erroneously pre-filled applications. Particularly in the context of electoral regulations, it is unreasonable and inconsistent with case law to force the State to identify the origin of every inaccurate submission before it can adopt prophylactic legislation. *See Frank v. Lee,* 84 F.4th 1119, 1140 (10th Cir. 2023) (even in case governed by strict scrutiny, states must be afforded a degree of deference when enacting laws that protect against voter confusion and ensure smooth election administration). VPC is essentially making a "little harm, no foul" argument, namely, that because only a subset of the tens of thousands of inaccurate applications it mailed out were returned to election offices, the State has no legitimate interest in preventing voter confusion, efficient election administration, and enhancing public confidence in elections through the Prohibition. Not only does that contention ignore the communications from voters expressing confusion, anger, and frustration with the pre-filled applications (as to both inaccuracies and duplicates), but it would effectively mean that Kansas would have to wait for even *greater* harm to its election processes before it could act, something the Supreme Court has said states need not do. *Munro,* 479 U.S. at 195. Whatever merit VPC's contention might have in a strict scrutiny analysis (not much, Defendants believe), it has no place under intermediate scrutiny review.

No doubt, not all erroneously pre-filled applications were submitted to county election offices. But the ones that *were* submitted—and the stipulated record reflects there were many—heavily taxed the time and resources of election officials. Any suggestion that the Prohibition will not facilitate more efficient election administration in the processing of mail votes blinks at reality. In addition, the diminished public confidence in the integrity of the electoral process resulting from many thousands of inaccurate applications floating throughout the State is itself sufficient to justify Kansas' legislative response. And as noted in Part II.B.3.a above, the pre-filled applications triggered many duplicate applications as well because of large numbers of voters thinking that they

had to return each and every pre-filled application in order to vote. This, too, caused havoc that the Prohibition will help prevent from recurring.

VPC emphasizes the evidence it offered from its executives and county election officials who believed that pre-filling applications can make processing them easier. It is true that, as with many election-related provisions, there is some divergence of opinion as to the benefits and drawbacks of pre-filling advance ballot applications. While some election officials see mostly problems, others think that pre-filling is advantageous on the whole. But it is not the role of the federal judiciary—and certainly not the role of third-party organizations or county officials—to second-guess a state legislature's policy decisions. *See Daunt v. Benson*, 999 F.3d 299, 329-31 (6th Cir. 2021) (Readler, J., concurring) (describing separation of powers concerns when election regulations are stricken). This is especially true under the far more deferential review that the Tenth Circuit ordered the district court to apply on remand. That voters might have utilized mail-in voting in 2020 in greater numbers due to the pandemic hardly undermines the State's right to adopt preventive measures like the Prohibition that are designed to minimize the harms from activities of third-parties like VPC.

In sum, Kansas has adequately proven that the Prohibition serves its legitimate interests in promoting orderly and efficient election administration, and enhancing the public's confidence in the integrity of the electoral process.

c. Voter Fraud

VPC next argues that the Prohibition is not narrowly tailored to the State's interest in avoiding voter fraud. Pl.'s Br. at 13-15. VPC claims that, because Kansas has not had a history of systemic fraud affecting the outcome of its elections, the State is precluded from adopting the kind of prophylactic election integrity laws issue in this case. That is not how the law works in this area.

It is well settled that states are not required to sustain injury to their electoral system and processes before enacting preventative measures. See *Munro*, 479 U.S. at 195-96. Furthermore, to focus myopically on confirmed cases of fraud that have been both detected and successfully prosecuted greatly undervalues the prophylactic effect of election integrity laws like the Prohibition. The utility of this law is in no way undermined by a small number of fraud cases (either historically or contemporaneously). After all, not only is voter fraud extremely hard to detect, but prosecutors have discretion as to what cases to charge and may well have other priorities.

The flaw in VPC's argument is also underscored by Judge Easterbrook's opinion for the Seventh Circuit in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). In that case, a group of voters and advocacy organizations challenged a Wisconsin statute requiring photo ID in order to vote. The plaintiffs argued, through testimony from a political science professor, that Wisconsin did not have any history of impersonation fraud, the only sort of harm that a photo ID would avoid. *Id.* at 749-50. The court explained, however, that "whether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." *Id.* at 750. In other words, "[p[hoto ID laws promote confidence, or they don't; there is no way they could promote confidence in Indiana (as *Crawford* concluded) and not in Indiana. This means that they are valid in every state . . . or they are valid in no state." *Id.* The same is true here. The Prohibition's restriction on the pre-filling of advance ballot applications makes it more difficult for nefarious actors to secure an advance ballot by using the data already partially pre-populated. While the history of such fraud is thankfully rare, no such history is required. And the extremely minimal burden on VPC's rights from the Prohibition (as the Tenth Circuit explicitly found) reinforces the narrow tailoring conclusion from this state interest.

4. *The Prohibition leaves open ample channels for communication*

Having established that the Prohibition is narrowly tailored, the remaining question is whether it leaves open ample channels for communication. Clearly, it does, as the Tenth Circuit expressly acknowledged in its opinion. Reflecting on the statute's limited reach of only precluding the mailing of unsolicited prefilled applications, the Tenth Circuit observed:

> The Kansas Prohibition is a far cry from "restrict[ing] access to" an entire "fundamental ... avenue of political discourse," as in *Meyer* [*v. Grant*], 486 U.S. [414,] 424 [1988]. VPC may continue using the mails to send unsolicited letters to Kansas voters advocating for mail voting and may even include a separate sheet with all the information VPC previously placed on prefilled applications along with a blank application and instructions for using it. The mailing of prefilled applications is hardly a "fundamental" method of communication or one that "is the essence of First Amendment expression," like the distribution of political leaflets or the one-on-one discussions accompanying the circulation of petitions. *McCullen*, 573 U.S. at 488–89 (internal quotation marks omitted). In short, despite the Prohibition, VPC remains free to choose what avenue of communication it will use to advocate for mail voting, including the use of unsolicited mailers.

VoteAmerica, 121 F.4th at 845. Individuals and entities are free to communicate any message they want with an advance ballot application and they are fully permitted to express such views through any medium outside of mailing a pre-filled, unsolicited application. There is no credible argument that the Prohibition fails to leave ample channels open for VPC to communicate its ideas. VPC's reference to the complete ban on speech in a traditional public forum in *McCraw* to suggest the absence of alternative communication options, *see* Pl.'s Br. at 20, rings hollow.

III. – CONCLUSION

In conclusion, the Prohibition was carefully crafted to address the specific harms Kansas elections experienced from unsolicited, pre-filled advance ballot applications during the 2020 General election. In doing so, Kansas has not restricted anyone from conveying any message they wish, as long as an unsolicited advance ballot application remains blank. The statute is narrowly tailored, leaves more than sufficient avenues for groups like VPC to communicate their chosen

messages, and satisfies the intermediate scrutiny test. Accordingly, the Court should reject VPC's free speech challenge to the Prohibition and grant judgment to Defendants.

Respectfully Submitted,

By /s/ Bradley J. Schlozman
Bradley J. Schlozman (KS Bar #17621)
Scott R. Schillings (KS Bar #16150)
Garrett R. Roe (KS Bar #26867)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, Kansas 67206
Telephone: (316) 267-2000
Facsimile: (316) 630-8466
Email: bschlozman@hinklaw.com
E-mail: sschillings@hinklaw.com
E-mail: groe@hinklaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2025, I electronically filed the foregoing Defendants' Response to Plaintiffs' Brief Following Remand with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By /s/ Bradley J. Schlozman