FILED
United States Court of Appeals
Tenth Circuit

October 14, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VOTEAMERICA; VOTER PARTICIPATION CENTER,

Plaintiffs - Appellees,

v.

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; STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County,

Defendants - Appellants.

PUBLIC INTEREST LEGAL FOUNDATION; STATE OF OKLAHOMA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF IOWA; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF WEST VIRGINIA; HONEST ELECTIONS PROJECT,

Amici Curiae.

No. 25-3138

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Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:21-CV-02253-KHV)

Bradley J. Schlozman, Hinkle Law Firm LLC, Wichita, Kansas (Scott R. Schillings and Garrett R. Roe, Hinkle Law Firm LLC, Wichita, Kansas; Kris Kobach, Attorney General, and Anthony J. Powell, Solicitor General, Kansas Attorney General's Office, Topeka, Kansas, with him on the briefs), for Defendants-Appellants.

Alice C.C. Huling, Campaign Legal Center, Washington, District of Columbia (Danielle M. Lang and Kate Hamilton, Campaign Legal Center, Washington, District of Columbia; Jonathan Youngwood, Simpson, Thacher & Bartlett LLP, New York, New York; and Mark P. Johnson, Dentons US LLP, Kansas City, Montana, with her on the brief), for Plaintiffs-Appellees.

Kaylan Phillips, Public Interest Legal Foundation, Alexandria, Virginia, filed an Amicus Curiae Brief on behalf of Public Interest Legal Foundation in Support of Defendants-Appellants.

Garry M. Gaskins, II, Solicitor General, and Counsel of Record for Amicus Curiae State of Oklahoma, Zach West, Director of Special Litigation, and Will Flanagan, Assistant Solicitor General, Office of the Oklahoma Attorney General, Oklahoma City, Oklahoma; Steve Marshall, Attorney General of Alabama; Stephen J. Cox, Attorney General of Alaska; Tim Griffin, Attorney General of Arkansas; James Uthmeier, Attorney General of Florida, Chris Carr, Attorney General of Georgia; Raúl Labrador, Attorney General of Idaho; Todd Rokita, Attorney General of Indiana; Brenna Bird, Attorney General of Iowa; Liz Murrill, Attorney General of Louisiana; Austin Knudsen, Attorney General of Montana; Mike Hilgers, Attorney General of Nebraska; Dave Yost, Attorney General of Ohio; Alan Wilson, Attorney General of South Carolina; Jonathan Skrmetti, Attorney General of Tennessee; Ken Paxton, Attorney General of Texas; and John B. McCuskey, Attorney General of West Virginia, filed an Amici Curiae Brief on behalf of the States of Oklahoma and 16 Other States in Support of Defendants-Appellants.

Dallin B. Holt, Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Phoenix, Arizona, filed an Amended Amicus Curiae Brief on behalf of Honest Elections Project in Support of Defendants-Appellants.

Before **TYMKOVICH**, **MURPHY**, and **CARSON**, Circuit Judges.

TYMKOVICH, Circuit Judge.

PETITIONER PROJECT DEMOCRACYDOCKET.COM

To reduce voter confusion and increase confidence in elections, the Kansas legislature prohibited private parties from partially prefilling applications for mail ballots before those applications are sent to registered voters. VoteAmerica and Voter Participation Center sued, alleging that the restriction infringed on their freedom of speech guaranteed by the First Amendment. The district court has twice enjoined the Prohibition, and this is Kansas's second appeal of the court's most recent injunction.

On Kansas's first appeal, we reversed the injunction and instructed the district court to apply intermediate scrutiny to the Prohibition absent a finding that the Kansas legislature enacted it with improper motives. On remand, the district court found improper motives. Relying on the political reaction against mail-in voting and Kansas's failure to prove an adequate fit between its stated interests and the Prohibition, the court concluded that Kansas enacted the Prohibition to suppress speech supporting mail-in voting. Applying strict scrutiny (and intermediate scrutiny in the alternative), the court concluded that the law failed because it was not sufficiently tailored.

Kansas appeals again. Exercising our jurisdiction under 28 U.S.C. § 1291, we **REVERSE** the district court's judgment. The district court found an improper purpose without evidence from the Prohibition's justifications, text, or legislative history; it instead inferred an improper purpose from the national political debate on mail-in voting. That finding was in error. Because the Prohibition was enacted

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without an improper purpose, we apply intermediate scrutiny and find the Prohibition constitutional.

I. Background

The parties stipulated to the facts before the district court. We recounted many of those facts in the decision on Kansas's first appeal, *VoteAmerica v. Schwab*, 121 F.4th 822 (10th Cir. 2024) [*VoteAmerica I*], so we will highlight only those facts relevant to this appeal.

A. Factual Background

Voter Participation Center (VPC) is a nonprofit organization whose "core mission is to promote voting among traditionally underserved groups—including young voters, voters of color and unmarried women." App. 780. For purposes of this case, it promotes this mission through direct mailings, believing that sending personalized advance mail ballot applications will increase voter engagement. In 2020, VPC and its sister organization, the Center for Voter Information (CVI), sent mail ballot applications to around 510,000 Kansan voters. These mailers included a partially prefilled ballot application, a cover letter encouraging use of the mail ballot, and a pre-addressed and pre-paid envelope directed to the county election office. VPC and its counterpart obtained the needed demographic information from a third-party vendor that itself pulled public information from ELVIS, Kansas's voter

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registration database, as well as from commercial data.[1] Because VPC pulled the information roughly a month before voters received the prefilled applications, the mailed applications often contained errors.

Kansas experienced a record-turnout election in 2020 including a surge of mail-in voting. During that election, Kansas voters and election officials expressed concerns about the mail-in voting process. 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." App. 616. County officials were frustrated because the information mismatch increased the required time to process the ballot applications. Without any mismatch, an experienced election official processed accurate non-duplicates in three to five minutes. But when an application did not substantially match the information in ELVIS, the county needed to "cure" the error by contacting the voter.[2] *Id.* at 600. If a ballot application needed to be cured, the processing time would increase to about fifteen minutes of staff time. If a

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[1] ELVIS is Kansas's Election Voter Information System. It is a dynamic system that is updated by county officials as they receive new voter information.

[2] The information on a mail-in voting ballot application "must precisely match" the information in ELVIS for the county election office to process the application without having to contact the voter to cure mismatches or discrepancies. App. 600. "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') [could] be overlooked." *Id.*

voter could not be contacted, a provisional ballot was sent, and processing time increased to thirty minutes or more. If the application was a duplicate, the county likewise had to check the duplicate against the original and contact the voter to resolve any discrepancies. That process took seven to ten minutes of staff time if the voter did not need to be contacted, and fifteen to thirty minutes or more if the voter did need to be contacted. Other officials echoed Director Caskey's concerns about the administrative burden. Shawnee County Election Commissioner Andrew Howell reported that his office "received a large number of advance voting ballot applications from voters that had been pre-filled by VPC and contained information that did not match the voters' information in ELVIS"; "the mismatched information included erroneous addresses, last names, suffixes, and/or middle initials." *Id.* at 613.[3]

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County officials also reported that voters were "confused" by the prefilled applications, believing that they had to complete and return the prefilled applications

[3] Kansas's expert, Ken Block, identified concerns that touched around 3% of the voter records in VPC's database. Block's error rate suggests that VPC and CVI sent around 15,000 error-filled applications to Kansas voters in 2020. Dr. Hersh, Plaintiffs' expert, said that with these error rates the mailings were "accurate compared to reasonable benchmarks," and "nothing out of the ordinary, given population churn and the logistics of sending large mailers out to voters." App. 607. He also testified that "it seems likely that the VPC methods *reduced* the burden on election officials." *Id.* at 606.

Additionally, nearly 15,000 duplicate applications were sent to Kansas county election offices using VPC- or CVI-provided envelopes. *VoteAmerica I*, 121 F.4th at 829.

to the election office even if they had not intended to send in an application, or if they had already applied. *Id.* at 618. Some "expressed anger and frustration at the purported incompetency of [their county] office" and "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." *Id.* at 614. Commissioner Howell's office expended "substantial time and resources" responding to these voters. *Id.* at 619–20. Howell attested that during the 2020 election the most significant "burden and strain" on his staff from handling ballot applications was "having to contact thousands of voters who had submitted inaccurate or duplicate applications." *Id.* at 619.

Ford County Election Clerk Deborah Cox attested to many of the same problems in her county. Like Howell, Cox attested that voters told her office they were "confused" by the prefilled applications and some believed incorrectly that the prefilled applications had originated with her office, and that they needed to complete them even if they had previously applied. *Id.* at 618. She also said 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." *Id.* at 615. To fend off the confusion and minimize the calls, she placed an advertisement in three Ford County Newspapers to remind voters of the source of the prefilled applications.

At the same time, some officials believed that prefilled applications helped to minimize human error. Johnson County election officials said that they "decided to

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pre-fill as much of the voter's information from their registrant record as possible, believing that doing so makes it easier for the voter and reduces mistakes that we then have to work harder to fix on the back end." *Id.* at 602 (citation modified). Cox testified that she would normally agree "that at least in some ways, pre-filled . . . information increases the likelihood and the ease that her office can match information between the voter file and application." *Id.* at 601. Douglas County Elections Director Jamie Shew testified that his office would prefer to prefill applications if not for budgetary constraints.

Responding to the surge in mail-in voting, in May 2021 the Kansas legislature enacted H.B. 2332, which contains the Prohibition at issue. The Prohibition states: if "[a]ny person" "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," "[n]o portion of such application shall be completed prior to mailing such application to the registered voter." Kan. Stat. Ann. §§ 25-1122(k)(1)–(2). The bill also contained a separate provision, the Out-of-State Distributor Ban, which provided that "[n]o person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state." App. 613 (quoting Kan. Stat. Ann. § 25-1122(l)(1)).

Prior to the bill's passage, the Office of the Kansas Secretary of State submitted written testimony to the Legislature. The Office remained "neutral on this legislation but believe[d] it nicely addresse[d] growing concerns with voter information in Kansas." Aple. App. 49. It noted that:

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> [l]eading up to the 2020 general election, state and county election offices 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 officers were preparing for a high turnout, statewide election, in the middle of a pandemic.

Id. The testimony added that "[s]ome of the mailers had the local election office as the return recipient but many had [CVI's] Springfield office as the return address. Again, this caused widespread confusion among voters who continued to receive these mailings in September and October of last year." *Id.* The Office stated that it planned to continue to encourage voters to request advance mail ballot applications from local election offices, not third parties, to reduce the voter confusion and administrative burden caused by third-party applications submitted as incomplete or duplicates.

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The Legislature enacted H.B. 2332 with a two-thirds majority to override the governor's veto.

B. VoteAmerica I

VPC and VoteAmerica[4] sued Kansas and sought a preliminary injunction against the Prohibition in H.B. 2332 as violating their First Amendment free speech

[4] VoteAmerica later resolved all claims against Kansas pursuant to a joint stipulation below. App. 776 n.1.

rights, which the court granted.[5] The parties then cross-moved for summary judgment. They filed stipulated facts and the case was submitted as a bench trial, without oral argument, with the summary-judgment motions serving as briefs.

The parties disputed whether the Prohibition implicated the First Amendment. The district court found that mailing the prefilled applications was speech or inherently expressive conduct. And because the Prohibition restricted speech on the core political issue of mail-in voting, the court applied strict scrutiny. It then found the Prohibition was not narrowly tailored to Kansas's interests—preventing voter confusion, facilitating the orderly and efficient administration of elections, and protecting election integrity—so the court enjoined its enforcement.

On appeal, we agreed that the mailing of prefilled applications was protected First Amendment speech. *VoteAmerica I*, 121 F.4th at 834. But we reversed the district court's application of strict scrutiny. We concluded that while the Prohibition was content based, it was facially viewpoint-neutral and presented a de minimis risk to the free exchange of ideas and viewpoints—so intermediate scrutiny was the appropriate standard. *Id.* at 850–51. We therefore remanded to the district court to apply intermediate scrutiny, absent a showing that Kansas enacted the Prohibition with an "improper purpose," that is, to suppress views favoring mail-in voting. *Id.*

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[5] The parties stipulated to a permanent injunction against the Out-of-State Distributor Ban as violating Plaintiffs' First and Fourteenth Amendment rights. App. 789.

C. VoteAmerica II

On remand, the district court concluded that VPC sustained its burden to show that the Prohibition was enacted with improper purpose. *VoteAmerica v. Schwab*, 790 F. Supp. 3d 1255, 1276 (D. Kan. 2025) [*VoteAmerica II*]. The court acknowledged that Kansas's justifications for the Prohibition, on their face, did "not reference the content of ballot application forms or reflect disagreement with the message that plaintiff conveys[.]" *Id.* at 1272. Yet it nevertheless inferred improper purpose from (1) contemporaneous widespread public vitriol about mail-in voting, and (2) Kansas's failure to tailor its stated interests to the Prohibition's operation. *See id.* at 1275 (noting that "before and after the 2020 election, mail-in voting had become one of several scapegoats for the alleged 'stealing' of the 2020 presidential election"). As a result, the district court applied strict scrutiny and, alternatively, intermediate scrutiny. Although Kansas offered compelling state interests, the district court concluded that the Prohibition was not sufficiently tailored under either level of scrutiny.

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First, the Prohibition was not narrowly tailored to minimize voter confusion because the court concluded that voter confusion stemmed solely from the *source* of the prefilled applications, and not the *fact* that they were prefilled. And the Prohibition did not ameliorate the source confusion.

Nor was the Prohibition narrowly tailored to facilitate efficient elections. Kansas did not show real administrative harm stemming from prefilled applications because it provided no evidence of how many voters submitted incomplete and

inaccurate prefilled applications. Even if Kansas had done so, the court concluded that the true inefficiency came from *duplicate* applications, not from prefilled applications. The Prohibition did not address the problem of duplication.

Finally, the Prohibition was not narrowly tailored to foster confidence in and protect the integrity of Kansas's elections. Kansas presented no evidence of voter fraud from prefilled ballots, and even if it had, the Prohibition failed to mitigate fraud because it did not limit the number of ballot applications a third party may send to a voter or that a voter may submit.

The Prohibition thus failed both strict and intermediate scrutiny. The court enjoined the Prohibition, and Kansas appeals once more.

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II. Discussion

Kansas contends that the district court erred in finding improper purpose on the record below and concluding that the Prohibition fails intermediate scrutiny. We agree on both points.

A. Standard of Review

We review the district court's decision de novo, conducting "an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (quoting *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007)). This de novo review extends to the district court's interpretation of the stipulated facts. *See Braxton v. United States*, 500 U.S. 344, 350 (1991). VPC urges us to review the court's

interpretations for clear error. The "[d]etermination of the meaning and effect of a stipulation, however, is not a factual finding." *Id.* So "we review [an interpretation of a stipulation] just as we would review a determination of meaning and effect of a contract, or consent decree, or proffer for summary judgment." *Id.*

B. Improper Purpose

In *VoteAmerica I*, we instructed the district court to analyze the Prohibition under intermediate scrutiny absent a showing that Kansas adopted the law with an "improper purpose or justification." 121 F.4th at 834. The district court concluded that Kansas did so—it enacted the Prohibition "to suppress speech which advocates voting by mail." *VoteAmerica II*, 790 F. Supp. 3d at 1276. Kansas contends that the district court erred by inferring improper purpose on the record before it.

1. Legal Framework

VPC bears the burden to show that the Prohibition was enacted with viewpoint-discriminatory purpose. *Cf. Abbott v. Perez*, 585 U.S. 579, 603 (2018) ("Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State."). We have not yet held that a plaintiff bears the burden of showing an improper purpose (thus triggering strict scrutiny) when challenging a law that is among "the narrow group of [facially] content-based but viewpoint-neutral regulations subject only to intermediate scrutiny." *See VoteAmerica I*, 121 F.4th at 848. But in the Equal Protection context, the plaintiff bears the burden to overcome the presumption of legislative good faith and show that the legislature passed the law with discriminatory intent. *United States*

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v. Amador-Bonilla, 102 F.4th 1110, 1116–17 (10th Cir. 2024); *cf. Louisiana v. Callais*, 146 S. Ct. 1131, 1157 (2026) (holding that a plaintiff bringing a claim under Section 2 of the Voting Rights Act must show racially discriminatory intent in redistricting). The same is true in another First Amendment context, where "a plaintiff may carry the burden of proving a free exercise violation" by showing the government enacted a regulation with the improper purpose of targeting religious practice. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525–26 (2022) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)). So it should be here. The presumption of legislative good faith dictates that a plaintiff bears the burden to show improper purpose.

To determine whether a law was adopted with improper purpose, we ask whether the government's asserted interest is "*related to the suppression of free expression*."[6] *United States v. Eichman*, 496 U.S. 310, 315 (1990) (emphasis added) (quotations omitted). To answer that question, we examine whether the government's stated interest in the law is inseparable from the law's restriction on

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[6] Another way a plaintiff might demonstrate that a law was enacted with an improper purpose is to prove "its restriction on expression cannot be justified without reference to the content of the regulated speech." *Eichman*, 496 U.S. at 318 (citation modified). But this test is more appropriate for assessing whether a facially content-*neutral* restriction on speech is in fact content-based based on the government's justifications for enacting it. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 479–81 (2014). And here, because the Prohibition is content-based (although of the sort that is only subject to intermediate scrutiny), we focus our improper purpose analysis on whether the statute impermissibly targets speech based on its viewpoint of favoring mail-in voting.

speech. A law is adopted with improper purpose if it was adopted "because of disagreement with the message the speech conveys." *TikTok Inc. v. Garland*, 604 U.S. 56, 70–71 (2025). One example is *United States v. Eichman*, where the Court identified improper purpose in the enactment of the Flag Protection Act. 496 U.S. at 315. The Act criminalized "physically defil[ing]" the flag of the United States except when "it ha[d] become worn or soiled." *Id.* at 314 (quoting 18 U.S.C. § 700 (1988 ed., Supp. I)). The government claimed its interest in the Act was "protecting the physical integrity of the flag under all circumstances" to safeguard its identity as the "symbol of the Nation." *Id.* at 315 (citation modified). The Court determined that this interest was directly tied to suppressing speech—the Act suppressed flag desecration "out of concern for its likely communicative impact." *Id.* at 317. As a result, the Court held that the Act was enacted with improper purpose.

We do not, however, assume that a law is adopted with improper purpose simply "because it may disproportionately affect speech on certain topics," or because "it has an incidental effect on some speakers or messages but not others." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (citation modified); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (upholding an ordinance diverting the location of adult motion picture theaters away from residential areas because it was targeted at the "secondary effects" of those theaters, not the speech itself); *Ward v. Rock Against Racism,* 491 U.S. 781, 792 (1989) (upholding a city's requirement that bandshell events use its sound technician and equipment because the regulation's "principal justification" was "the city's desire to

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control noise levels," an interest unrelated to the message the speakers wished to convey). After all, legislatures do not have to address all aspects of a problem or address every topic of concern. *McCullen*, 573 U.S. at 481 ("States adopt laws to address the problems that confront them." (quotation omitted)). Most legislation is piecemeal or incremental.

Recently, in *McCullen v. Coakley*, the Supreme Court reaffirmed this principle. 573 U.S. 464 (2014). It scrutinized a Massachusetts Act prohibiting standing on public walkways within thirty-five feet of entrances to facilities offering abortions. The Court concluded that the Act was not enacted with an improper purpose despite its disproportionate effect on pro-life speech on those walkways. The Act's stated purpose was to increase public safety and access to healthcare by ensuring unobstructed walkways; concerns the Court had previously deemed permissible legislative interests. *Id.* at 480. And even though the Act only applied outside abortion clinics, the Court found the Act's disparate impact on pro-life speech did not prove that the legislature acted with improper purpose.[7] *See id.* at 482

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[7] VPC nevertheless contends that disparate impact can *sometimes* show improper purpose and cites to Justice Scalia's concurrence in *McCullen*. In *McCullen*, Justice Scalia argued that disproportionate impact, together with the law's structure and operation *can* reveal improper purpose—and it did so in that case. *See* 573 U.S. at 501 (Scalia, J., concurring).

But whatever merit Justice Scalia's concurrence may have, it does not control our decision. The *McCullen* majority explained that we do not infer an improper purpose merely because a law might disproportionately affect some speech more than others. *See id.* at 480–82. We are bound to follow that principle. And in any event, we agree with the *McCullen* majority's observation that "the poor fit noted by Justice

("The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics.").

In sum, to determine whether a facially viewpoint-neutral law was enacted with improper purpose, we must first determine whether the government's stated interest is related to the suppression of free expression, like it was in *Eichman*. If not, and the government's interest only incidentally restricts certain speech, as in *Renton, Ward*, and *McCullen*, the law was likely not enacted with an improper purpose. This inquiry requires us to focus on the government's stated interests, as well as the law's text and enactment history—not on whatever disparate effect the statute might have on some speech over other speech.

With this legal framework in mind, we analyze the parties' arguments.

2. Analysis

Kansas contends that the district court wrongly inferred improper purpose when the Prohibition's text, enactment history, and the State's justifications for the law evince no such purpose. We agree.

First, Kansas's stated interests in the Prohibition are not intrinsically tied to restricting a viewpoint. Kansas stated that the Prohibition is meant to (1) minimize voter confusion; (2) facilitate efficiency in election administration; and (3) foster confidence in and protect the integrity of the electoral process. These are each legitimate interests—and they are independent of any alleged purpose in restricting

Scalia goes to the question of narrow tailoring," not the improper-purpose prong of the inquiry. *Id.* at 482.

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VPC's pro-mail-in-voting viewpoint. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion) (noting the state has a "compelling interest in protecting voters from confusion"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion 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." (quotation omitted)); *Doe v. Reed*, 561 U.S. 186, 197 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("While [protecting public confidence 'in the integrity and legitimacy of representative government'] is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); *cf.* Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (2005) ("Absentee ballots remain the largest source of potential voter fraud . . . [because] [a]bsentee balloting is vulnerable to abuse in several ways . . . .").

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Unlike *Eichman*, in which the government's stated interest in protecting the flag as the symbol of our Nation was inseparable from the Act's prohibition on the expressive conduct of flag mutilation, Kansas's stated interests are distinct from any alleged purpose in restricting the message, if any, presented by prefilled ballot applications. *See Eichman*, 496 U.S. at 317. The interests of minimizing voter confusion, facilitating election efficiency, and fostering confidence in and protecting

the integrity of the electoral process justify the Prohibition's restriction without reference to the underlying speech. *See id.* at 315.

VPC counters that we must look beyond Kansas's stated interests to the Prohibition's operation. For, if "[e]very objective indication shows that the provision's primary purpose is to restrict speech that [advances a certain viewpoint]," we should not conclude that the provision was enacted with a proper purpose "simply because the statute itself and those defending it in court *say* that it is[.]" *See McCullen*, 573 U.S. at 502 (Scalia, J., concurring). VPC highlights the Prohibition's disproportionate effect on the pro-mail-in voting viewpoint. It urges that the Prohibition functions to target only mail-in voting advocates because those against mail-in voting would not prefill applications.

That may be true, but caselaw forecloses VPC's argument. *See supra* n.7. Without more, incidental disproportionate effect on one subject or viewpoint does not prove improper purpose. *See McCullen*, 573 U.S. at 480 (majority opinion) ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."); *Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

Instead, we conclude the Prohibition is like the laws the Court upheld in *Renton* and *Ward* against improper-purpose challenges.

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In *Renton*, for example, the Court did not infer improper animus to suppress pornographic speech of adult theaters because the ordinance merely circumscribed the location for those theaters. The ordinance's limit on location showed that it instead targeted the "secondary effects" that attended those theaters. 475 U.S. at 47–48. So too here. The Prohibition primarily targets the negative "secondary effects" of prefilling. The Prohibition does not meaningfully target speech advocating mail-in voting or even mail-in voting itself: under the Prohibition, VPC may still advocate for advance mail-in voting within its mailers, and it may continue to send advance mail applications.

And in *Ward*, the Court did not infer improper purpose from the regulation requiring the use of the city's own sound equipment and technician because the city's principal justification—controlling noise—had nothing to do with the underlying speech of respondent's rock concerts. And the requirement "ha[d] no material impact" on any performer's artistic control of the concert. 491 U.S at 792, 802. Just so here. The Prohibition's interests are separate from the pro-mail-voting viewpoint that VPC communicates in its mailers, and the Prohibition has "no material" impact on VPC's control of that message. Like the laws in *Renton* and *Ward*, the Prohibition aims at interests other than speech and only incidentally impacts VPC's expression.[8]

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[8] Whether the Prohibition even detrimentally affects the pro-mail-voting viewpoint is debatable. The Prohibition prohibits the filling out of non-controversial demographic information. VPC may still mail ballot applications together with inserts advocating for mail-in voting, detailed instructions, prepaid envelopes, and such. As a result, its claim that the Prohibition disparately impacts the pro-mail-

The district court here noted that Kansas's asserted justifications did not facially reflect disagreement with VPC's proffered message, and that "viewing HB 2332 as a whole, the legislature could have enacted it to generally minimize voter confusion, mitigate workload issues for local election offices and protect the integrity of the electoral process with regard to advance ballot applications." *VoteAmerica II*, 790 F. Supp. 3d at 1273. Yet the district court still concluded "that the legislature enacted the [Prohibition] because of disagreement with speech which advocates voting by mail" because Kansas's "stated justifications do not explicitly address the logic behind the [Prohibition]." *Id.* But as we explained, assessing the Prohibition's means-end fit against Kansas's stated justifications comes at the tailoring stage; a court should not rely on a law's operational effect to infer an improper purpose. *See McCullen*, 573 U.S. at 480–82.

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And none of the other provisions of H.B. 2332 reveal an improper motivation that we might impute onto the State's enactment of the Prohibition. VPC points to a now-enjoined provision of H.B. 2332, the Out-of-State Distributor Ban, which prohibited non-residents and non-domiciliaries from mailing applications for mail-in voting to Kansas residents. Using that provision, VPC argues that Kansas enacted the Prohibition with the intent to suppress advocacy for mail-in voting. But its

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voting viewpoint is tenuous. *See VoteAmerica I*, 121 F.4th at 850 ("We are not sufficiently imaginative to see how the Prohibition could 'effectively drive [any] ideas or viewpoints from the marketplace.'" (alteration in original) (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007))).

contention fails. While we may reasonably infer that the enjoined distributor ban was enacted to restrict mail-in voting, we cannot infer that the ban was enacted to suppress *speech* supporting mail-in voting. The ban prohibited the mailing of mail ballot applications, not messages supporting mail-in voting. Even imputing the presumed intent behind the distributor ban—intent to restrict mail-in voting—to the Prohibition, VPC still shows no improper motive to restrict a viewpoint.[9] For instance, a legislature might intend to restrict a certain activity, but that does not necessarily show it intends to also restrict *advocacy* for that activity.

In sum, the Prohibition is "unrelated to the suppression of free speech" because it was not "adopted by the government because of disagreement with the message the speech conveys." *TikTok Inc.,* 604 U.S. at 70 (citation modified). Kansas's stated interests are unrelated to viewpoint suppression. VPC fails to show that Kansas enacted the Prohibition to suppress its pro-mail-voting viewpoint. The district court's reliance on cultural antagonism against mail-in voting to infer the Kansas legislature enacted the prohibition with an improper purpose—when the law's justifications, text, and enactment history reveal no such purpose—was in error. *See*

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[9] VPC contends that we can garner "legislative intent" from written testimony submitted to the legislature by the Kansas Secretary of State's Office. Aple. Br. at 27. But we cannot impute intent from one branch to another. And even if we could, the testimony provides no basis to presume an anti-mail-in-voting viewpoint. The testimony *supported* mail-in voting: it affirmed the office's intent to continue "encouraging voters to not provide information to third parties and instead, request an advance by mail ballot application with our office or local election offices." Aple. App. 49.

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017) ("An inference is unreasonable if it requires a degree of speculation and conjecture that renders the factfinder's findings a guess or mere possibility." (citation modified)).

C. Intermediate Scrutiny

Because VPC fails to show that Kansas enacted the Prohibition with an improper purpose, *VoteAmerica I* holds that we evaluate the law under intermediate scrutiny. 121 F.4th at 834. The district court did so and concluded that the Prohibition was not sufficiently tailored to the State's interests. Kansas proposes that we apply a relaxed version of intermediate scrutiny to this election law, and contends that even if we do not, the Prohibition passes muster. We need not reach Kansas's first proposition—the Prohibition survives without it.

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1. Legal Framework

Kansas bears the burden to establish that the Prohibition satisfies intermediate scrutiny. *See Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Mun. of Golden*, 744 F.2d 739, 746 (10th Cir. 1984) ("[W]hen a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.").

Speech restrictions survive intermediate scrutiny if they "(a) serve a significant government interest; (b) are narrowly tailored to advance that interest; and

(c) leave open ample alternative channels of communication."[10] *Verlo v. Martinez*, 820 F.3d 1113, 1134 (10th Cir. 2016) (quoting *Doe v. City of Albuquerque,* 667 F.3d 1111, 1130–31 (10th Cir. 2012)).

Because the heart of this issue is narrow tailoring, we focus our explanation on that element. At base, "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 v. City of Albuquerque*, 18 F.4th 1205, 1225 (10th Cir. 2021) (citation modified). We "look to the amount of speech covered by the [law] and whether there is an appropriate balance between the affected speech and the governmental interests that the [law] purports to serve." *Id.* at 1224 (citation modified). In practice, narrow tailoring requires the government to "show that its recited harms, specifically defined, are real and that the [law] will in fact alleviate them in a direct and material way." *Id.* at 1227 (citation modified). The fit need not be perfect.[11] "[R]estrictions on . . .

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[10] We typically subject only "content-*neutral* time, place, and manner restrictions" to intermediate scrutiny, *Verlo*, 820 F.3d at 1134 (emphasis added), but for reasons we explained in *VoteAmerica I*, we apply such scrutiny here as well. 121 F.4th at 848–51.

[11] The term "narrowly tailored" appears in the tests for both strict scrutiny and intermediate scrutiny. *Compare Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (explaining strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (citation modified)), *with City of Austin v. Reagan Nat'l Advert. of Austin*, 596 U.S. 61, 76 (2022) ("[T]o survive intermediate scrutiny, a restriction on speech or

protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 1225 (quotations omitted).

2. Analysis

Kansas contends that the Prohibition is sufficiently tailored and well supported by the stipulated record.

a. Significant Government Interests

Kansas's stated interests are significant. *See Burson*, 504 U.S. at 199 (voter confusion); *Burdick*, 504 U.S. at 433–34 (efficient election administration); *Reed*, 561 U.S. at 197 (preserving election integrity); *Crawford*, 553 U.S. at 197 (fostering confidence in election integrity). The district court concluded the same. App. 801 (voter confusion); 803 (efficient election administration); 804 (public confidence in elections and election integrity).

VPC does not question the legitimacy of Kansas's interests. Instead, it charges Kansas with failing to "specifically define" its interests, transforming the tailoring test into the "reasonably necessary" test we use for speech restrictions in non-public

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expression must be narrowly tailored to serve a significant governmental interest." (citation modified)). There are, however, "subtle differences in the way [we] apply the concept of narrow tailoring in the two contexts." *Verlo*, 820 F.3d at 1134. For example, strict scrutiny narrow tailoring requires the restriction be "the least restrictive means of achieving the government's compelling objective." *Id.* While under intermediate scrutiny, "[t]he regulation need not be the least restrictive means of serving the State's interest [and] the regulation's validity does not turn on our agreement with the legislature concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Free Speech Coal. v. Paxton*, 606 U.S. 461, 496 (2025) (citation modified).

forums. Aple. Br. at 33 (quoting *Brewer*, 18 F.4th at 1226). The government must sufficiently define its interests to permit us to discern whether a challenged restriction was directed to legitimate interests or those that would fail constitutional scrutiny. *Brewer*, 18 F.4th at 1226–27. It prevents the government from naming a broad, significant interest that would protect a restriction truly targeting illegitimate interests.

But Kansas meets this burden. Kansas identified the harm of voter confusion that the prefilled applications caused. The State says some voters called in angry and perplexed by inaccurate prefilled applications. And it points to others who unnecessarily submitted multiple applications after receiving the prefilled forms. Kansas identified the administrative burdens caused by the erroneously prefilled applications, duplicate submissions (caused, at least in part, by the prefilling confusion), and time spent assuaging voters' concerns and confusion. And Kansas identified lost confidence in the electoral process. County election officials were flooded with calls and letters from voters frustrated by the purported incompetence of their county because of errors in the prefilled applications.

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In short, Kansas identified specific, significant interests in response to a problem. *See Verlo*, 820 F.3d at 1134. This is precisely the way most legislation advances.

b. Tailoring

The Prohibition is also adequately tailored to address Kansas's legislative interests and does not restrict substantially more speech than necessary. *See Brewer*,

18 F.4th at 1225, 1227. And because the Prohibition minimally burdens speech, it was not necessary to point to alternative regulatory schemes.[12] *See id.* at 1241–42 (explaining that the ordinance in *Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019), survived narrow tailoring without a showing of alternatives).

First, minimizing voter confusion. Kansas cites evidence of voter confusion caused by the prefilled applications. Kansas showed that the prefilled applications caused confusion among voters because of the applications' errors and many voters' beliefs that they needed to sign and mail prefilled applications even if they had already submitted one. App. 614 ¶¶ 142–44 (testimony from Howell); 618 ¶ 171 (testimony from Howell and Cox); 619–620 ¶ 179 (further testimony from Howell); 616 ¶ 162 (testimony from Caskey).

The Prohibition is tailored to alleviate this harm. Because of the Prohibition, voters will receive blank ballot applications with no error, removing any confusion resulting when voters received erroneous applications but had previously reported

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[12] In *Brewer*, we explained that to satisfy narrow tailoring under intermediate scrutiny, "the government will *ordinarily* need to show that it *seriously considered* alternative regulatory options that burden less protected speech or expressive conduct, yet also have the potential of achieving its real and significant interests." 18 F.4th at 1246. We announced this standard in an effort to harmonize our prior precedents that appeared to contradict each other on whether the government must show it considered less-burdensome alternatives to a challenged regulation. But to the extent this approach was even *necessary* for the government to survive intermediate scrutiny, intervening Supreme Court authority makes clear that there is no such consideration-of-less-restrictive-means requirement. *See Free Speech Coal. v. Paxton*, 606 U.S. 461, 496 (2025) ("The regulation need not be the least restrictive means of serving the State's interest" to be "sufficiently tailored . . . [u]nder intermediate scrutiny[.]").

their information change to the county election office. And we can reasonably infer that some voters who felt compelled to submit the prefilled applications will not feel compelled to do the same when they are blank.

VPC protests that Kansas's evidence is "too generic" to support the Prohibition and does not support the "nexus between the injuries described and the [speech]" proscribed. *Brewer*, 18 F.4th. at 1237. For example, in *Brewer*, the city only offered evidence of *general* traffic safety issues and vehicle-pedestrian conflicts to justify its prohibition of pedestrian presence on traffic medians. *Id.* We concluded that the city's evidence did not support the harms the ordinance was meant to address because they were generic safety statistics "divorced" from the thrust of the particular harms. *Id.* But unlike the evidence in *Brewer*, the evidence here directly relates to the Prohibition—county officials testified to voter confusion resulting from (1) error in prefilled applications, and (2) receipt of prefilled applications, when voters had already submitted applications.

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VPC also relies on the district court's conclusion that the Prohibition was not narrowly tailored to voter confusion because the confusion stemmed solely from the *source* of the prefilled applications, and not the *fact* that they were prefilled. The court concluded this based on Howell's response to whether voters became more confused because of the prefilled applications. He said, "I don't think that the prefilled information, in and of itself, was what all of the concern was." App. 614 ¶ 141. Howell's statement, however, shows that the prefilling was *part*, though not all, of the source of confusion. VPC counters that we should defer to the district

court's interpretation of Howell's statement because we review it for clear error. But we determine the meaning of stipulated facts de novo. *Braxton*, 500 U.S. at 350. And even accepting the court's interpretation as VPC insists, other parts of the record still show confusion from the error in prefilling and confusion about being required to submit the prefilled applications. *See, e.g.*, Aple. App. 49 ("Again, this caused widespread confusion among voters who continued to receive these mailings in September and October of last year." (Statement of the Office of the Kansas Secretary of State on H.B. 2332)). It is sufficient then that the Prohibition directly addresses confusion resulting from prefilling, even if it does not fix confusion that may result regardless of prefilling. *See Free Speech Coal.*, 606 U.S. at 498 ("[U]nder intermediate scrutiny, the First Amendment imposes no freestanding underinclusiveness limitation, and [a state] need not address all aspects of a problem in one fell swoop." (citation modified)).

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The Prohibition also does not burden substantially more speech than necessary to minimize voter confusion resulting from prefilled ballot applications. *Brewer*, 18 F.4th at 1225. Kansas's solution—outright prohibiting the prefilling of applications—was reasonable and "the threat to free speech posed by the Prohibition is sufficiently small." *See VoteAmerica I*, 121 F.4th at 850. There are few (if any) less-burdensome alternatives that could cure the problem because "the use of forms by the government inherently requires content restrictions." *Id.*; *see also id.* ("We are not sufficiently imaginative to see how the Prohibition could 'effectively drive

[any] ideas or viewpoints from the marketplace.'" (alteration in original) (quoting *Davenport*, 551 U.S. at 188)). This showing is sufficient to survive narrow tailoring.

VPC disagrees—urging that Kansas's failure to give "*serious consideration* to such less-restrictive means before opting for a particular regulation" is dispositive. *Brewer*, 18 F.4th at 1255. "But, even assuming [there exist] approaches [that] are equally or more effective, under intermediate scrutiny a regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Free Speech Coal.*, 606 U.S. at 497– 98 (citation modified). Kansas's interests "would be achieved less effectively absent [the Prohibition], and it cannot be said that a substantial portion of the burden that [it] imposes fails to achieve [Kansas's] goals." *Id.* at 498 (citation modified). "That is enough to show that the [Kansas] Legislature adequately tailored [the Prohibition], regardless of whether some other approach might be superior." *Id.*

Second, administering efficient elections. Kansas presented evidence of the administrative burden caused by the erroneously prefilled applications (and duplicate submissions of prefilled applications). *See Brewer*, 18 F.4th at 1227. Kansas demonstrated that county offices regularly received erroneous prefilled applications and duplicate applications because voters believed they needed to submit the prefilled applications they received. App. 613 ¶ 139 (testimony from Howell about receipt of erroneous prefilled applications); 616 ¶ 161 (testimony from Caskey about the same); 619 ¶ 175 (testimony from Caskey about large number of prefilled duplicates). Kansas produced evidence that these erroneous prefilled ballots and

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duplicate submissions produced a significant administrative burden. *Id.* at 615 ¶¶ 153–56 (testimony from Howell and Cox about time to process erroneous applications); 619–20 ¶¶ 175–78 (testimony from both about extra time required to process duplicates). The three to five minutes processing time for an accurate, non-duplicate application could increase to over thirty minutes. The Prohibition alleviates this processing burden by reducing the amount of erroneously prefilled and duplicate applications county offices receive.

VPC nevertheless counters that Kansas failed to provide evidence of harm because it did not show *how many* duplicate or inaccurate prefilled applications county offices received. But the record demonstrates that at least 3% of VPC's Kansas voter database was inaccurate, suggesting that VPC sent more than 15,000 erroneous applications to Kansans during the 2020 general election. And county offices reported, without providing exact numbers, that the number of duplicate and erroneous prefilled applications skyrocketed. Kansas offers sufficient evidence supporting the claim that prefilled applications caused administrative harm. *See Brewer*, 18 F.4th at 1243–44 (permitting the city to show that the speech restriction was tailored to stated harms through anecdotes and common sense).

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To rebut Kansas's showing of narrow tailoring, VPC also relies on the district court's conclusion that the "real issue" producing the administrative burden was duplicate applications. App. 803. But Kansas shows that it expended extra resources on duplicates *and* error-riddled prefilled applications. And Kansas points to evidence

showing that voters submitted duplicates in part because they were prefilled—they thought they had to.

The district court reached the contrary conclusion that the prefilled applications did not cause administrative harm in large part because Cox and Shew testified that in some ways they preferred prefilled applications. But the district court erred in concluding that the Prohibition's potential allowance of one problem—increased human error in applications—negated the adequacy of the Prohibition's tailoring to a different problem, third-party error in the prefilled applications. Kansas has a right to act prophylactically to minimize administrative burden, and to do so in its best judgment by addressing one problem contributing to it. *See Brewer*, 18 F.4th at 1243–44 ("The government may act proactively . . . 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." (citation modified)). Perhaps the Prohibition will be net neutral. But Kansas tailored the Prohibition to a discrete problem producing an administrative burden and directly ameliorated *that* problem. And because the Prohibition does not burden substantially more speech than necessary to further Kansas's interest in facilitating efficient elections, the Prohibition is narrowly tailored. *See McCullen*, 573 U.S. at 486.

Third, fostering confidence in election integrity. Kansas offers record evidence of voter frustration and distrust caused by the prefilled ballot applications. Howell described voters venting frustration at the alleged incompetence of their county upon receiving applications that contained a wrong name and address; some

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who had previously communicated changes to the office were especially frustrated. App. 614 ¶ 143. The Prohibition addresses this distrust and frustration by removing the source of the voters' complaints.

c. Ample Alternative Channels

Finally, the Prohibition leaves open ample alternative channels of communication. *See Verlo*, 820 F.3d at 1134. VPC "remains free to choose what avenue of communication it will use to advocate for mail voting, including the use of unsolicited mailers." *VoteAmerica I*, 121 F.4th at 845. It may even include a sheet with the previously prefilled information alongside a blank application. *Id.*

Because the Prohibition is adequately tailored under intermediate scrutiny, its minimal restriction on the content of VPC's speech is permissible under the First Amendment. *See id.* at 850 ("[T]he threat to free speech posed by the Prohibition is sufficiently small that . . . adequate protection is provided by intermediate scrutiny.").

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III. Conclusion

For the foregoing reasons, we reverse the district court's judgment.