IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and VOTER PARTICIPATION CENTER, Plaintiffs, 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.	Civil Action No. 2:21-CV-2253

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE FOLLOWING REMAND

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PRELIMINARY STATEMENT

Defendants far exceed the scope of remand. Ignoring the Tenth Circuit's instructions, Defendants now latch onto a procedurally barred argument that this Court should assess whether the content-based Personalized Application Prohibition (the "Prohibition") is a "reasonable" restriction on Plaintiffs' protected speech. *See* ECF No. 202 ("Opp.") at 16. The Tenth Circuit instructed the parties to submit "argument and evidence regarding whether the purpose or justification for the Prohibition was to suppress speech favoring mail voting." *VoteAmerica v. Schwab*, 121 F.4th 822, 851 (10th Cir. 2024) [hereinafter *VoteAmerica II*]. If so, the Court must review the Prohibition under strict scrutiny; if not, it should apply intermediate scrutiny. *Id.* at 852.

Defendants also ask this Court to draw factual findings anew. The Tenth Circuit did not scrutinize this Court's findings of fact, make findings of its own, or direct this Court to reassess its findings. *See id.* at 834. Moreover, Defendants obscure that the parties stipulated to the fact that witnesses gave particular testimony, not the truth of the underlying testimony. This Court resolved any contradictory testimony in its findings of fact. *See VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1234–40 (D. Kan. 2023) [hereinafter *VoteAmerica I*].

Procedural flaws aside, Defendants' arguments also fail on the merits. They have failed to rebut Plaintiffs' evidence and argument that the Prohibition was enacted for an impermissible purpose. This Court should apply strict scrutiny. But even if it does not, Defendants have failed to carry their burden that the Prohibition survives intermediate scrutiny.

Defendants' opposition boils down to a misleading retelling of the facts without applying the standards of intermediate scrutiny. They attempt to inject favorable standards based on inapposite case law. At bottom, the facts have not changed. Even under intermediate scrutiny, and even if this Court were to consider the stipulated facts anew, the outcome would be the same: Defendants have failed to carry their burden of proving the constitutionality of the Prohibition.

ARGUMENT

I. The Prohibition Was Enacted For An Improper Purpose And Fails Strict Scrutiny

The Prohibition applies only to speech advocating for mail voting. As this Court previously reasoned, "[a]n organization with a neutral or negative opinion toward advance mail voting would not expend its resources to personalize mail ballot applications for specific voters." *VoteAmerica I*, 671 F. Supp. 3d at 1242. Indeed, the process for personalizing applications adds additional steps and cost to the application mailing process. ECF No. 176 ("Stipulated Facts") ¶ 45. Thus, even if the Prohibition is facially viewpoint-neutral, in practice the Prohibition unconstitutionally singles out certain speech based on viewpoint; here, views advocating for mail voting. The Tenth Circuit acknowledged that this fact speaks to whether an impermissible purpose to suppress speech favoring mail voting underpins the Prohibition. *VoteAmerica II*, 121 F.4th at 851.

Defendants argue that the Prohibition cannot possibly be motivated by an improper justification because Kansas has "long been at the forefront of absentee voting." Opp. at 2. Whether and how Kansas accommodated out-of-precinct voters during the Civil War is beside the point.[1] While Defendants cite evidence of Kansas's historical support of mail voting from 1868 through 1996, Kansas has taken steps since then that are less favorable to mail voting. *See* Opp. at 2–3, 8. Kansas's recent history reflects legislation that may make it more difficult for voters to vote by mail.[2]

[1] In more recent history, two weeks ago the Kansas legislature overrode Governor Kelly's veto of a bill eliminating a three-day grace period for voters to return mail ballots that are postmarked by election day, leaving Kansas voters with only twenty days to return mail ballots, one of the shortest in the country. John Hanna, *Kansas has among the shortest windows for voting by mail in the US. It will get shorter next year*, THE ASSOCIATED PRESS (Mar. 25, 2025, 7:38 PM), https://apnews.com/article/voting-rights-mail-ballots-kansas-055b070d97c159ad5c1859686fba394f.

[2] According to a nonpartisan law and policy institute, the restrictive voting laws the Kansas legislature enacted in 2021—including H.B. 2332 (which includes the Prohibition and the Out-of-State Distributor Ban) and H.B. 2183—"curtail access to mail voting," "curb[] voters' ability to receive assistance with absentee voting" under threat of criminal penalties, and shorten the window to return a mail ballot. *Voting Laws Roundup: September 2024*, BRENNAN CENTER FOR JUSTICE (Sept. 26, 2024), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-september-2024.

The history of H.B. 2332 itself suggests less support for mail voting, and particularly its encouragement by third parties. In her letter vetoing H.B. 2332, Kansas Governor Laura Kelly characterized the bill as "restrictive voting legislation" that provided "a solution to a problem that doesn't exist" and "mak[es] it more difficult for [Kansans] to participate in the democratic process."[3] Indeed, by the parties' stipulation, H.B. 2332's Out-of-State Distributor Ban (barring any non-resident and non-domiciliary of Kansas from mailing, or causing to be mailed, an advance mail ballot application) "violates the First and Fourteenth Amendments." ECF No. 73; *see* ECF No. 176 ¶ 187. This is direct evidence that the legislation enacting the Prohibition also enacted a separate provision that unconstitutionally targeted speech that encouraged mail voting.

To be clear, Plaintiffs are not suggesting that this Court strike down the Prohibition based solely on the Out-of-State Distributor Ban's unconstitutionality. But the full scope of H.B. 2332 provides insight into the legislature's purpose in enacting the legislation. It is likewise notable that none of Defendants' stated interests for the Prohibition are part of the legislative record, *VoteAmerica II*, 121 F.4th at 832; nor, as argued in Part II.B. *infra*, have Defendants established that these interests are served by the Prohibition.

This Court should hold that the Prohibition was enacted with the improper purpose of restricting pro-mail voting communications and apply strict scrutiny review. For the reasons this Court has already held, as well as for the reasons the Prohibition cannot survive even intermediate scrutiny, Defendants have failed to establish that the Prohibition survives strict scrutiny.

II. Defendants Have Failed to Carry Their Burden That The Prohibition Survives Intermediate Scrutiny

The Tenth Circuit instructed this Court to apply intermediate scrutiny if it did not find the Prohibition was enacted for an impermissible purpose. After initially conceding that the

[3] *See* PXM 33 (Governor Kelly's veto letter); *see also* ECF 176 ¶ 124.

Prohibition "must be analyzed under intermediate scrutiny," Opp. at 12, Defendants disregard the Tenth Circuit's instruction and try to justify a downward departure from that standard of review. Defendants argue for the first time that an advance mail ballot application "is, *at most*, a non-public forum," and courts must defer to "states' electoral regulations," such that "[t]he proper test is reasonableness," not intermediate scrutiny. Opp. at 14–16. These arguments are procedurally improper and lack merit. If the Court finds no improper purpose, then the proper test, as the Tenth Circuit instructed, is intermediate scrutiny. The government has the burden of persuasion.

Yet Defendants contend that, even if this Court applies intermediate scrutiny, the requirement that the government must demonstrate that its recited "harms are real" does not apply because the Prohibition is a ballot access restriction, *id.* at 20–21, states can adopt "prophylactic legislation" to "protect against voter confusion and ensure smooth election administration," *id.* at 26, and states can "enact[] preventative measures" to avoid voter fraud and enhance election integrity, *id.* at 27–28. These arguments are based on inapposite cases applying more deferential standards of review and should be disregarded. Defendants have failed to carry their burden.

A. The Proper Test Is Not Reasonableness

First, Defendants argue that because the advance mail ballot application is not a traditional public forum, intermediate scrutiny does not apply. Opp. at 14–15. This argument is waived as Defendants raise it for the first time on remand. While Defendants argued for the first time on appeal with respect to Plaintiffs' associational claim that "the alleged *association* is occurring via a non-public forum," Aplt. Br. at 51 (emphasis added), as Plaintiffs previously pointed out, that argument was waived. Aple. Br. at 41 n.13. "[A]bsent extraordinary circumstances, arguments raised for the first time on appeal are waived, . . . whether the newly raised argument is a bald-faced new issue or a new theory on appeal that falls under the same general category as an argument presented at trial." *Little v. Budd Co., Inc.*, 955 F.3d 816, 821 (10th Cir. 2020), *as*

corrected (Apr. 6, 2020) (quotations and citations omitted). Defendants' new public forum argument is certainly waived on remand. *See Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1093 (10th Cir. 2015) ("This court has long explained that non-jurisdictional arguments a party forfeits on appeal may not be asserted . . . on remand.").

The Tenth Circuit has adhered to the waiver doctrine on this exact issue. In *Verlo v. Martinez*, the Tenth Circuit noted that the defendant had "either made a strategic decision to forgo any argument that the Restricted Areas are nonpublic fora, or inadequately presented that argument to the district court" such that "the argument is waived." 820 F.3d 1113, 1128–29 (10th Cir. 2016). The Tenth Circuit reiterated that "the procedural posture of this appeal restricts the scope of our inquiry. That is, we need not determine whether the Restricted Areas are, in fact, public or nonpublic fora to resolve this interlocutory appeal." *Id.* at 1130; *see also Brewer v. City of Albuquerque*, 18 F.4th 1205, 1219–20 (10th Cir. 2021) (assuming restrictions impacted a traditional public forum because defendants did not contest the forum analysis on appeal).

Here, Defendants did not mount a forum analysis challenge before this Court. Defendants' appeal focused on "the proper standard of judicial scrutiny under which Kansas' Pre-Filled Application Prohibition must be evaluated." Aplt. Br. at 1 (Statement of the Issues). Nowhere in this lengthy section of Defendants' appellate brief do Defendants raise, or even mention, a forum analysis. *See* Aplt. Br. at 28–47 (III. The Pre-Filled Application Prohibition Must be Evaluated Under [sic] Deferential Standard). Since forum analysis was not at issue before the Tenth Circuit and, heretofore, was never raised to this Court, it should not be entertained now.

Tellingly, the Tenth Circuit raised *sua sponte* the "somewhat analogous context of content restrictions on the use of government property constituting a nonpublic forum" and cited the standard that applies in that context. *See VoteAmerica II*, 121 F.4th at 849–51 (discussing

Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007)). If the Tenth Circuit had determined that the *Davenport* standard applied, it would have said so or, at the very least, directed this Court to consider whether that standard applies.[4] It did not. Instead, it directed this Court to apply "intermediate scrutiny" whereby "the government must show that the regulation 'is narrowly tailored to achieving significant government interests, and … leaves open ample alternative channels of communication.'" *VoteAmerica II*, 121 F.4th at 852 (quoting *Brewer*, 18 F.4th at 1220). The Tenth Circuit explicitly decided that intermediate scrutiny applies on remand (absent a finding of an impermissible purpose) and, by implication, decided that the *Davenport* standard for nonpublic fora—or any other "less-demanding scrutiny"—is inapplicable. *Id.* at 849.

Even if Defendants' argument were not procedurally barred, it would fail on the merits. Defendants argue that the advance mail ballot application form itself is a non-public forum. Opp. at 14–15. However, the Prohibition does not restrict access to the form itself; it bars Plaintiffs from using the mail to solicit others to vote by mail by sending a personalized form.

Even under the *Cornelius* standard advanced by Defendants, the forum analysis proceeds in three steps: (1) Is the speech at issue protected by the First Amendment? (2) What is the nature of the forum in which the speech occurs? (3) Do the "justifications for exclusion from the relevant forum satisfy the requisite standard"? *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). For example, in *Cornelius*, the speech was the solicitation of funds, and the forum was an annual charitable fund-raising drive held in a federal workplace. *See id.* at 797, 801. Here, the protected speech is the personalized applications. *See VoteAmerica II*, 121 F.4th at 836 (describing "the prefilled applications" as "speech" that is not transformed to "conduct"

[4] *Cf. Verlo*, 820 F.3d at 1138 (noting that because the district court must reach a final decision on whether to enter a permanent injunction, "the parties must present evidence, and the district court must enter factual findings supporting its conclusion, that each of the Restricted Areas constitutes a traditional public forum, a designated public forum, or a nonpublic forum").

because the Prohibition restricts the distribution of the speech). The forum in which the speech occurs—and to which the Prohibition denies access—is the mail.

Unlike a workplace that "exists to accomplish the business of the employer," the mail is a quintessential public forum. *Cornelius*, 473 U.S. at 805. To determine whether a particular forum is public or nonpublic, courts look at "the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1067 (10th Cir. 2020) (internal quotation omitted). "The Postal Service . . . is a public forum." *Id.* (quoting *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 101 (1981) (White, J. concurring)). "The mails have played a crucial role in communication in this country from its earliest days." *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985), *aff'd*, 817 F.2d 87 (10th Cir. 1987). Accordingly, the appropriate standard would still be intermediate scrutiny, not "reasonableness." *Brewer v*, 18 F.4th at 1220.

Second, continuing to flout the Tenth Circuit's instructions, Defendants argue that the history of regulating elections warrants "a standard more akin to reasonableness." Opp. at 15–16. Defendants argue that *Vidal* compels this conclusion. *Id.* at 15. It does not. The Tenth Circuit merely raised *Vidal* as one of several examples of a "content-based" but "viewpoint-neutral restrictions" subject to "less-demanding scrutiny" to justify a departure from the "general rule" that strict scrutiny applies to for content-based restrictions. *See VoteAmerica II*, 121 F.4th at 848–49 (discussing *Vidal v. Elster*, 602 U.S. 286 (2024)). The Tenth Circuit gave no indication that this Court should determine the level of scrutiny to apply to the Prohibition based on whether election regulations—like the trademark restrictions at issue in *Vidal*—are "uniquely content-based" and have a long history of coexistence with the First Amendment under *Vidal*. To the contrary, the Tenth Circuit already rejected this reasoning when it rejected Defendants' argument that the

Anderson-Burdick balancing test applies. *See VoteAmerica II*, 121 F.4th at 838–43. Defendants try to analogize the history of trademark regulation to the history "of federal courts deferring to states' election regulations" to argue that the Prohibition "simply functions as a critical component of the actual voting process." Opp. at 15–16 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). This is nothing more than a repackaging of Defendants' *Anderson-Burdick* argument that the Tenth Circuit already rejected by explaining that the rationales for applying the *Anderson-Burdick* test do not apply "whenever an election law is challenged," but rather only to election regulations that govern certain "electoral mechanisms," like those that "control ballot access." *VoteAmerica II*, 121 F.4th at 843. The Tenth Circuit concluded that the Prohibition regulates "pure speech," not the "mechanisms of the electoral process." *Id.* This Court should not apply a "reasonableness" review.[5]

B. Defendants Fail To Carry Their Burden That The Prohibition Is Narrowly Tailored

Under intermediate scrutiny, "[t]he government has the burden of persuasion" and "must show that the regulation 'is narrowly tailored to achieving significant government interests, and ... leaves open ample alternative channels of communication.'" *VoteAmerica II*, 121 F.4th at 852 (quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012); *Brewer*, 18 F.4th at 1220). Defendants fail meet this burden.

Narrow tailoring under intermediate scrutiny requires the government to "demonstrate not only that the regulation does not sweep too broadly, but also that the interests advanced as justifying the regulation are real, and not speculative—and that the regulation addresses or ameliorates those interests in a direct manner." *Brewer*, 18 F.4th 1205 n.14. For each of their purported interests—to minimize voter confusion, facilitate orderly and efficient election

[5] In any event, given the lack of tailoring between Defendants' stated interests and the Prohibition, *see infra* Part II.B., Plaintiffs doubt they could carry their burden to establish that the Prohibition is reasonable.

administration and enhance public confidence in the integrity of the electoral process, and avoid voter fraud—Defendants have failed to demonstrate a "real" harm, establish that the Prohibition would ameliorate that harm, or explain why less restrictive alternatives are insufficient.

Throughout their response, Defendants attempt to downplay their burdens by reference to inapposite cases, often those that apply the *Anderson-Burdick* framework rather than intermediate scrutiny. *See, e.g.*, Opp. at 27 (citing *Daunt v. Benson*, 999 F.3d 299, 329–31 (6th Cir. 2021) (Readler, J., concurring) (criticizing the subjectivity of the *Anderson-Burdick* balancing). For example, Defendants rely heavily on *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986). *See* Opp. at 21, 26, 28. But *Munro* is inapposite: it reaffirmed and applied the standard from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (of the *Anderson-Burdick* framework) to "restrictions on ballot access." 479 U.S. at 194–96. The Tenth Circuit foreclosed reliance on this line of cases when it "conclude[d] that the Prohibition is not subject to *Anderson-Burdick* balancing" because "[t]he Prohibition does not regulate any of the electoral mechanisms traditionally analyzed under Anderson-Burdick balancing: it does not control ballot access . . . or voters' ability to vote." *VoteAmerica II*, 121 F.4th at 843. Defendants also reference the relaxed burden of proof that applies to electioneering prohibitions, *see* Opp. at 26 (citing *Frank v. Lee*, 84 F.4th 1119, 1140 (10th Cir. 2023)), ignoring that *Frank* states that, "where the 'First Amendment right does not threaten to interfere with the act of voting itself,' . . . the modified burden does not apply. Instead, in those circumstances, 'states must come forward with more specific findings to support the regulation.'" 84 F.4th at 1141 (internal alterations and citations omitted). *Frank* is inapposite. The Prohibition affects pure speech; it does not interfere with the act of voting itself.[6]

[6] Defendants also collect cases where other speech regulations that have survived intermediate scrutiny. Opp. at 24–25. But "[g]eneral reference to other cases involving other cities, other restrictions, other interests to be served, and other constitutional challenges do not relieve the [defendant]'s burden in this case." *Doe*, 667 F.3d at 1134

Stripping away these inapt comparisons, Defendants' opposition boils down to a reliance on cherry-picked snippets of declarations while ignoring contradictory live testimony and this Court's findings of fact that resolved such contradictions against Defendants. The factual record remains fundamentally unchanged from this Court's prior opinion and fares no better under intermediate scrutiny. Defendants have failed to carry their burden under intermediate scrutiny.

1. The Prohibition Is Not Narrowly Tailored To Minimize Voter Confusion

Defendants try to show that avoiding voter confusion was a compelling reason to enact the Prohibition, but each of their arguments falls flat.

First, Defendants argue that they need not "prove actual voter confusion . . . as a predicate for the imposition of reasonable ballot access restrictions." Opp. at 21 (quoting *Munro*, 479 U.S. at 194–95). As explained above, *Munro* and its application of *Anderson* are inapposite and foreclosed by the Tenth Circuit's decision.

Second, Defendants assert that they may justify speech restrictions with anecdotes or even "based solely on history, consensus, and simple common sense." Opp. at 20 (quoting *Brewer*, 18 F.4th at 1243–44). But the very next sentence in *Brewer* is: "But the City's prerogative to determine how to support a regulation *does not extinguish its burden to show that its recited harms are real*." 18 F.4th at 1244 (emphasis added) (internal quotations and citations omitted). The *Brewer* court concluded that "the City put forward inadequate evidence of real, non-speculative harms" that the regulation at issue was purportedly designed to prevent and that, "more significantly, the evidence [the City] *has* put forward *belies* any notion that the City, in reality, faces such harms." *Id.* (emphasis original). The *Brewer* court concluded that the City's "reliance on scattered anecdotes in the record and its generic invocation of 'common sense' are simply not enough to demonstrate that [the restriction] is directed at remediating real harms." *Id.* Here, too, Defendants' proffered evidence belies that voters were confused by the fact that the applications

they received were prefilled, including Shawnee County Election Commission Andrew Howell's testimony that he "does not believe that voters were confused or frustrated because the applications which they received were pre-filled." *VoteAmerica I*, 671 F. Supp. 3d at 1253.

Third, Defendants claim to have produced "objective evidence" of voter confusion. Opp. at 19–20. The underlying stipulated facts are far more limited. Some stipulate only to what Defendants' witnesses attested about what someone else told them, while others intentionally obfuscate whether the confusion was caused by duplicate applications or the fact that applications were prefilled. Defendants seem to claim that voter confusion "led to an explosion of duplicate applications." Opp. at 19. But the underlying stipulated facts do not demonstrate that any purported voter confusion caused duplicate applications. Further, Defendants ignore testimony attributing more duplicate applications to an overall increase in mail voting due to greater voter participation and the COVID-19 pandemic. ECF No. 176 ¶¶ 147–48. In sum, Defendants provide no reason for this Court to disrupt its prior finding that Defendants failed to "demonstrate[] that in this context, any 'surge' of 'inaccurate and duplicate' advance mail ballot requests was fairly attributable to activity which the [] Prohibition seeks to prohibit." *VoteAmerica I*, 671 F. Supp. 3d at 1252.

Moreover, Defendants fail to "specifically define" their interest in preventing voter confusion. *See Brewer*, 18 F.4th at 1226 (10th Cir. 2021) (quoting *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1223 (10th Cir. 2007)). "This specificity requirement is 'critical to prevent restrictions on speech designed to advance other interests that would not on their own justify the burden on expression.'" *Brewer*, 18 F.4th at 1226–27 (quoting *McCraw*, 973 F.3d at 1071 n.10). Here, Defendants do not assert the specific form of voter confusion the Prohibition supposedly prevents, whether confusion about the source of the mailings or something

else.[7] And "defendants presented no evidence on how criminalizing the mailing of personalized mail ballot applications would prevent confusion as to the source of the pre-filled advance mail ballot." *VoteAmerica I*, 671 F. Supp. 3d at 1253.

Fourth, Defendants try to explain why less restrictive alternatives are insufficient by asserting (without citation) that "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." Opp. at 23. They ignore Plaintiffs' argument that other provisions of H.B. 2332 effectively remedy voter confusion about the sender, *see* Pls. Br. at 17, though "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Defendants have not shown that Kansas "seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 494.

In sum, Defendants are unable to demonstrate that the Prohibition provides more than ineffective or remote support for Defendants' stated purpose, or sufficiently serves those public interests in a direct and effective (i.e., material) way, such that the Prohibition is not "narrowly tailored and, consequently, contravenes the First Amendment." *See Brewer*, 18 F.4th at 1227.

2. The Prohibition Is Not Narrowly Tailored To Promote Orderly And Efficient Election Administration And Enhance Public Confidence In The Electoral Process

Defendants likewise fail to establish that the Prohibition is narrowly tailored to promoting efficient election administration and enhancing public confidence in the electoral process.[8]

[7] *See* ECF 176 ¶ 143 (confusion "that the applications had been sent to them by the Shawnee County Election Office"); ¶ 144 (voters reporting applications had been sent to deceased individuals); ¶ 150 (describing an "effort to remind voters that most prefilled applications had come from CVI and not the county election office").

[8] Defendants' theory that personalized application diminish public confidence appears only in a footnote in its appellate brief that referenced "the diminished public confidence resulting from thousands of inaccurate applications floating throughout the State." Aplt. Br. at 43 n.12.

First, Defendants rely on *Frank*, 84 F.4th at 1140 and *Munro*, 479 U.S. at 195 to argue that in the context of election regulation, states are afforded a greater degree of deference to adopt prophylactic legislation to protect against voter confusion and ensure smooth election administration. Opp. at 26 As discussed above, these cases are inapposite. The Prohibition at issue is not an electioneering or ballot access regulation. A more deferential standard does not apply.

Second, Defendants claim (without citation) that "many" erroneously pre-filled applications were submitted to county election officials. Opp. at 26. However, even if this evidence appeared in the record, it would be undercut by the repeated testimony from election officials that they did not track and do not know how many of the applications that they received had been prefilled, never mind erroneously prefilled. *See* ECF No. 176 ¶¶ 111, 140, 174. Then, Defendants re-raise their argument that the pre-filling cause voters to submit duplicate applications. Again, they ignore this Court's conclusion that "Defendants have not demonstrated that in this context, any 'surge' of 'inaccurate and duplicate' advance mail ballot requests was fairly attributable to activity which the [] Prohibition seeks to prohibit." *VoteAmerica I*, 671 F. Supp. 3d at 1252.

Third, Defendants attempt to minimize the evidence suggesting that "pre-filling applications can make processing them easier" by arguing that "it is not the role of the federal judiciary . . . to second-guess a state legislature's policy decisions." Opp. at 27 (citing *Daunt*, 999 at 329–31 (Readler, J., concurring)). As explained above, Judge Readler's concurrence—which is not binding on the Sixth Circuit, let alone the Tenth—appears in an inapplicable case applying the *Anderson-Burdick* framework. It cannot distract from the fact that Defendants have failed to "put forward evidence of real, non-speculative harms" arising from personalized applications, including because "the evidence it *has* put forward"—including Defendants' evidence of the success of the 2020 election, Johnson County's sending of prepopulated applications, and County Elections

Director Debbie Cox's testimony that, in some ways, personalized applications are easier to process, *see* ECF No. 176 ¶¶ 40, 109, 117, 119, 184—"belies [the] notion that [the government], in reality, faces such harms." *See Brewer*, 18 F.4th at 1244.

In sum, Defendants' arguments fail to establish that the Prohibition is narrowly tailored to its enhancing efficient election administration or public confidence.

3. The Prohibition Is Not Narrowly Tailored To Prevent Voter Confusion

With respect to their purported interest in voter fraud, Defendants do not even attempt to establish that such fraud is "real" or how the Prohibition would prevent any such fraud.

Defendants argue that they need not establish any actual fraud, again relying on *Munro*'s standard for justifying "reasonable ballot access restrictions," *see Munro*, 479 U.S. at 195–96; Opp. at 28; which, as noted above, the Prohibition is not. And "intermediate scrutiny is not satisfied by the assertion of abstract interests." *See Rideout v. Gardner*, 838 F.3d 65, 72 (1st Cir. 2016).

As to whether the Prohibition addressed fraud, Defendants rely on *Frank v. Walker*, 768 F.3d 744, 750–51 (7th Cir. 2014), where the Seventh Circuit discusses the "legislative fact" that a photo ID requirement promotes public confidence in the electoral system. *See* Opp. at 28. The same is simply not true here. Defendants' assertion that the Prohibition "makes it more difficult for nefarious actors to secure an advance ballot by using the data already partially pre-populated," Opp. at 28, finds no support in precedent, the record, or common sense. VPC's personalized applications include the voter's name, address, and county. *See* Aplt. App'x at 676 (Sample VPC mailer). To complete the application, the voter must add their driver's license number (or nondriver's ID card number), date of birth, phone number, and signature. *See id.* It is implausible to suggest that prefilling publicly available information would facilitate a fraudster who must, at a minimum, identify a voter's driver's license number and birthday and forge the voter's signature.

* * *

In sum, Defendants have not carried their burden to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994). Thus, the Prohibition "is not narrowly tailored and, consequently, contravenes the First Amendment." *See Brewer*, 18 F.4th at 1227. Moreover, Defendants repeatedly ignore Plaintiffs' arguments that less restrictive alternative measures would serve their interests. *See* Pls. Br. at 14–15, 19–20.

C. Defendants Fail To Carry Their Burden That The Prohibition Leaves Open Ample Channels For Communications

Because Defendants have not established that the Prohibition is narrowly tailored for their asserted interests, this Court "need not consider whether the [Prohibition] leaves open alternative channels of communication." *Brewer*, 18 F.4th at 1257. In any event, Defendants' argument mistakenly relies on the Tenth Circuit's discussion of whether *Meyer-Buckley* strict scrutiny applies to this case, *see* Opp. at 29 (quoting *VoteAmerica II*, 121 F.4th at 845), which is distinct from whether there are ample adequate alternative channels under intermediate scrutiny. Defendants also decline to meaningfully engage with Plaintiffs' argument that open alternative channels may be functionally unavailable if organizations like Plaintiffs are unable to justify or afford access to these channels. *See* Pls. Br. at 20.

CONCLUSION

Defendants have failed to carry their burden to justify the Prohibition under intermediate scrutiny. By extension, they cannot justify the Prohibition under strict scrutiny. This Court should enter judgment in favor of Plaintiffs and permanently enjoin the enforcement of the Personalized Application Prohibition.

Date: April 4, 2025

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 4th day of April 2025, a copy of Plaintiffs' Reply Brief has been served upon other counsel of record via electronic mail only, to the following:

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