IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA AND VOTER PARTICIPATOIN CENTER, *Plaintiffs*, vs. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County, *Defendants*.	Case No. 2:21-cv-2253-KHV-GEB

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Scott Schwab, Derek Schmidt and Stephen Howe, each sued in their official capacities and acting by and through their undersigned counsel, respectfully move to dismiss Plaintiffs' Complaint for: (i) lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1); and (ii) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I. – Introduction

This lawsuit is part of a two-pronged coordinated attack on the constitutionality of certain new election integrity statutes, recently passed by the Kanas Legislature over the Governor's veto. In a separate state court action filed almost simultaneously with this federal case (*League of Women Voters et al. v. Schwab et al.*, Case No. 2021-CV-299, Shawnee County District Court) (attached hereto as Exhibit A), different plaintiffs challenged multiple features of the same law under the Kansas Constitution, including – as relevant here – a prohibition on out-of-state individuals and entities from mailing, or causing to

be mailed, advance ballot applications to Kansas voters. Plaintiffs here take on that same provision (which they characterize as an "Out-of-State Distributor Ban"), but they ground their claims solely in *federal* law. Plaintiffs here also challenge the same law's restriction on anyone partially completing the advance ballot application prior to its being mailed to voters (which they characterize as a "Personalized Application Prohibition"). Plaintiffs refer to these two provisions collectively as the "Ballot Application Restrictions."

The flaws in this lawsuit are legion. The statute at issue, House Bill 2332, § 3(*l*),[1] does not take effect until January 1, 2022, *see id.* § 11, rendering the case unripe. In fact, the Secretary of State has not yet had an opportunity to develop rules and regulations implementing the challenged provisions – which the statute directs him to do, *id.* § 3(m) – that may obviate Plaintiffs' part of claims or at least guide the Court's analysis. Nor do these Plaintiffs have standing to bring a challenge in any event. Even if they did, there still would be no subject matter jurisdiction due to Defendants' sovereign immunity. The ongoing state court litigation also counsels in favor of this Court's abstention.

Further, none of Plaintiffs' causes of action state a claim upon which relief can be granted in light of the highly deferential standard that applies to election-related laws like the ones at issue here. Plaintiffs' claims challenge nondiscriminatory, common-sense measures designed to enhance the public's confidence in the integrity of our electoral process, an objective the Supreme Court has described as "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Defendants thus respectfully request that the Court dismiss Plaintiffs' Complaint.

[1] The statute will be codified at Kan. Stat. Ann. § 25-1122(*l*).

II. – Legal Standard Governing Motions to Dismiss

A. – Rule 12(b)(6): Motion to Dismiss for Failure to State a Claim

To adequately state a viable cause of action, Plaintiffs' Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In evaluating whether this standard is met, Plaintiffs' Complaint must contain "enough facts to state a claim to relief that is plausible on its face," and Plaintiffs must "nudge [their] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2006). The Complaint also must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 550. Equally insufficient is the "unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008). A claim has "facial plausibility" only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Under a Rule 12(b)(6) motion, this Court is to "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of Cnty. Com'rs of Cnty. of Arapahoe, Colo.*, 633 F. 3d 1022, 1025 (10th Cir. 2011). But this general rule is inapplicable where the plaintiff's allegations are simply legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). As the Supreme Court observed, "[w]here a Complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted).

B. – Rule 12(b)(1): Motion to Dismiss for Lack of Subject Matter Jurisdiction

The standard governing a Rule 12(b)(1) motion differs slightly from the standard applicable to a Rule 12(b)(6) motion. Motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) can take one of two forms. A defendant may assert a "facial challenge to the plaintiffs' allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint." *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). Similar to its review of Rule 12(b)(6) dismissal motions, the district court must accept the allegations in the Complaint as true when analyzing such a *facial* attack. *Id.* Alternatively, as is being done here, a defendant "may go beyond allegations contained in the Complaint and challenge the facts upon which subject matter jurisdiction depends." *Id.* The district court "does *not* presume the truthfulness of the complaint's factual allegations" in evaluating such a *factual* attack, but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.*

III. – Argument

Plaintiffs' claims fail both on jurisdictional grounds and on the merits. Dismissal is also warranted, at least in part, on traditional principles of federal abstention.

A. – Plaintiffs Claims are Not Justiciable

Plaintiffs' claims challenging H.B. 2332 fail to present a justiciable case or controversy sufficient to trigger the Court's subject matter jurisdiction due to their lack of standing, the unripe nature of the claims, and Defendants' sovereign immunity.

1. – Plaintiffs Lack Standing

The law of standing under Article III of the United States Constitution is built on

the fundamental premise of separation of powers. *TransUnion LLC v. Ramirez*, No. 20-297, --- S. Ct. ----, 2021 WL 2599472, at *6 (June 25, 2021). "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id.* "[F]ederal courts do not adjudicate hypothetical or abstract disputes[,]" they "do not issue advisory opinions[,]" and they "do not possess a roving commission to publicly opine on every legal question." *Id.* In simple terms, a plaintiff must be able to establish a personal stake in the matter that warrants invoking the judiciary's authority. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Without an actual injury, no case or controversy exists and Article III courts are without jurisdiction to review the plaintiff's claim. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). Plaintiffs, as the parties invoking this Court's jurisdiction, bear the burden of demonstrating that they have standing to bring this lawsuit. *TransUnion LLC*, 2021 WL 2599472 at *10.

To establish organizational standing, each Plaintiff must show that it "suffered a concrete and demonstrable interest to its activities which goes beyond a mere setback to abstract social interests." *Animal Legal Def. Fund v. Kelly*, 434 F. Supp.3d 974, 995–96 (D. Kan. 2020). A direct conflict between Defendants' conduct and Plaintiffs' respective missions must also be present to establish organizational standing. *Id.*

Plaintiffs are unable to meet their burden. Absent from the Complaint are any legitimate instances of particularized harm to Plaintiffs. In *TransUnion*, the Supreme Court reiterated that a plaintiff's injury must be "real," as opposed to "abstract." 2021 WL

2599472 at *7. Plaintiffs fail to show they have actually diverted resources to counteract any purported impact on their respective missions caused by the Ballot Application Restrictions in H.B. 2332. The mere fact that Plaintiffs elected to pursue litigation to challenge the restrictions does not equate to a concrete injury in fact for standing purposes. *See Animal Legal Def. Fund*, 434 F. Supp.3d at 996 (recognizing that self-induced litigation is not a proper diversion of resources). Nor are Plaintiffs injured simply because they have to adjust their methods and exclude the actual advance mail voting application in their mailings. *See, e.g.*, *Clark v. Edwards*, 468 F. Supp.3d 725, 748 (M.D. La. 2020) ("Injury does not arise because of [an organization's] desire or preference for a different scheme of absentee by mail voting, nor because they adjust their organization's activities in response to the Virus and the Virus-related changes to the law. The law is not static. It cannot follow that every change in voting laws that causes voting advocacy groups to 'check and adjust' is an injury."). The Ballot Application Restrictions do not preclude Plaintiffs from engaging in voter education, voter outreach, or advocacy. Plaintiffs, in short, suffer no real harm.

There is also no imminent threat of criminal prosecution or imposition of fines by Defendants. "When a plaintiff alleges injury from the potential enforcement of a law or regulation, courts find an injury in fact only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). More specifically, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest,

but proscribed by a statute, *and there exists a credible threat of prosecution thereunder*.'" *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (emphasis added). A credible threat does not exist when the threat is imaginary, speculative, or hypothetical; instead, it must be well-founded and grounded in reality. *Id.* "*The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute.*" *Id.* (emphasis added).

At this juncture, Plaintiffs' concerns about criminal prosecution or civil penalties are nothing more than hypothetical fears that may never come to fruition. The Ballot Application Restrictions do not go into effect for another six months, and Defendants have made no statements whatsoever about future prosecutorial intents under these statutes.

Moreover, the law specifically empowers the Secretary of State to enact regulations to implement the Ballot Application Restrictions, *see* H.B. 2332, § 3(m), and it remains to be seen what those regulations will look like in practice. Indeed, Defendant Schwab may enact regulations that alleviate, or at least minimize, Plaintiffs' concerns about their ability to communicate their message to Kansas voters. At this stage, however, any consideration by the Court of Plaintiffs' claims would amount to little more than an advisory opinion based on incomplete information. Article III of the United States Constitution does not permit such an act by this Court.

2. – Plaintiffs' Claims Are Not Ripe For Review

Plaintiffs' claims also must be dismissed because none are ripe for review. Ripeness is a justiciability doctrine designed "to prevent courts from entangling themselves in abstract disagreements by avoiding premature adjudication." *Utah Republican Party v.*

Cox, 892 F.3d 1066, 1092 (10th Cir. 2018) (internal quotations omitted). "[T]he doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (internal quotations omitted).

Although the standing and ripeness doctrines enjoy similarities in that both are rooted in the "case or controversy" requirement and both look to "whether the challenged harm has been sufficiently realized at the time of trial," *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004), they are not the same. The Court's determination as to whether a dispute is ripe "focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) (quoting *Morgan*, 365 F.3d at 890). In other words, the ripeness doctrine "addresses a *timing* question: *when* in time is it appropriate for a court to take up the asserted claim." *Id.* (quotation omitted) (emphasis in original).

Two primary factors guide the Court's evaluation as to whether the case is ripe for disposition: (i) the fitness of the issue for judicial resolution; and (ii) the hardship to the parties of withholding judicial consideration. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir. 1990) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In examining this first factor, the Court looks to "whether determination of the merits turns upon strictly legal issues or *requires facts that may not yet be sufficiently developed*." *Tex. Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018) (emphasis in original). The second factor probes what harm, if any, might befall Plaintiffs from the Court delaying

consideration of the issue and the direct impact on Plaintiffs' day-to-day activities. *Yeutter*, 911 F.2d at 1415. The real question is whether withholding review places Plaintiffs in "a direct and immediate dilemma." *Tex. Brine Co.*, 879 F.3d at 1230.

A review of Plaintiffs' Complaint and the surrounding circumstances reveal the answer to the foregoing question is unequivocally "no." First, the constitutionality of the Ballot Application Restrictions are not fit for judicial resolution at this time. H.B. 2332 does not go into effect until January 1, 2022, and Defendant Schwab has not had a chance to draft implementing regulations that will provide guidance for Plaintiffs and the Court in interpreting the contours and constitutionality of the statute. Without the benefit of such regulations, the legal parameters of the issues are unknown. The facts underlying any potential dispute are likewise mostly unknown since they have not yet occurred. As such, any ruling by the Court at this juncture would be premature.

Second, there is no pending arrest or real threat of prosecution (or fine) of Plaintiffs' respective members. Nor could there be at this point. None of the Defendants have made any public statements about prosecutorial plans in connection with this statute or made any effort to target individuals engaged in voter education and outreach programs. Thus, any allegation by Plaintiffs that they fear possible exposure or risk in the future is a far cry from the type of actual, matured claim necessary to warrant judicial intervention. "In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1250 (10th Cir. 2011), *aff'd*, 569 U.S. 614 (2013). "[A] regulation is not ordinarily considered . . . 'ripe' for judicial review

. . . until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Were the Court to adjudicate Plaintiffs' dispute on the merits at this time, the case would be largely undeveloped and would represent exactly the type of anticipation of contingent events that the ripeness doctrine was intended to forestall. *Morgan*, 365 F.3d at 891.

Further, Plaintiffs will not suffer any undue hardship from the Court's delay of a decision on the merits until Plaintiffs face a *real threat* of criminal prosecution or liability, should that ever occur. Any injury that Plaintiffs *might* suffer in the future is complete speculation. The Court's postponement of a decision until Plaintiffs *do* suffer some particularized, concrete injury (if they *ever* do) does not constitute an independent harm. *Morgan*, 365 F.3d at 891. In sum, Plaintiffs' claims are unripe for review and thus should be dismissed for lack of subject matter jurisdiction.

3. – Defendants Enjoy Sovereign Immunity from Plaintiffs' Claims

Defendants are also immune from suit. "Per the Eleventh Amendment, '[s]tates may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity.'" *Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019). The Eleventh Amendment, i.e., sovereign immunity, has been extended to state officials. *Id.* "Generally, state sovereign immunity precludes suits against state officials in their official capacities." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020).

The Supreme Court announced a narrow exception to this general rule in *Ex parte Young*, 209 U.S. 123, 164–65 (1908), which allows "suits for prospective . . . relief against state officials acting in violation of *federal law*." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (emphasis added). To be applicable, though, not only must the state official be tasked with enforcement of the law, but he/she "must have taken some step to enforce" it. *Tex. Democratic Party*, 961 F.3d at 401; *see also Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021) (*Ex Parte Young* "require[s] that the state official have a particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty.") (internal quotations omitted) (emphasis added). Examples of such steps include: (i) compulsion or constraint; or (ii) demonstration of a willingness to exercise one's enforcement powers. *Tex. Democratic Party*, 961 F.3d at 401. Without the requisite affirmative action by the state official being hauled into federal court, sovereign immunity remains a barrier to being prosecuted in federal court. *Id.*

In *Texas Democratic Party*, the Fifth Circuit recognized that "there is 'significant overlap'" between standing and *Ex Parte Young* analyses. *Id.* (quotation omitted). As previously noted, Defendants have taken no affirmative steps to enforce H.B. 2332 or to penalize Plaintiffs in any way. Nor could they as H.B. 2332 does not go into effect for another six months. Defendant Schwab has not even had an opportunity to adopt any regulations or guidance to help implement the challenged law.

The instant case is comparable to *Clark v. Schwab*, 416 F. Supp.3d 1260, 1270–72 (D. Kan. 2019), wherein the Court held that the Secretary of State was entitled to Eleventh Amendment immunity because he had "neither threatened nor taken an action that alters

the validity of enforcement against plaintiffs, nor has he attempted to actually enforce Kansas election crime laws against plaintiffs." *Cf. First Baptist Church v. Kelly*, 457 F. Supp.3d 1072, 1082 (D. Kan. 2020) (denying governor's claim of Eleventh Amendment immunity because she had previously indicated a willingness to enforce her executive order in question). In sum, Defendants have satisfied their burden to show that they are entitled to Eleventh Amendment immunity, and Plaintiffs' claims must be dismissed for lack of subject matter jurisdiction.

B. – The Court Should Abstain From Reviewing Plaintiffs' Claims

Within a day of this lawsuit being filed, four other organizations – the League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center (collectively, the "State Plaintiffs") – filed a similar suit in Shawnee County District Court (the "Shawnee County Case"), also challenging H.B. 2332, § 3(*l*). *See* Exhibit A. With respect to this statute, the State Plaintiffs effectively raise the same claims as those asserted by Plaintiffs before this Court (other than the dormant Commerce Clause count). *See id.* ¶¶ 113-121; ¶¶ 177-179 (Count I – freedom of speech and association); ¶ 211 (Count IV – overbreadth). The State Plaintiffs are also involved in the same types of voter engagement activities as Plaintiffs in this federal suit. Given the overlapping nature of the claims in the two cases, and the fact that Plaintiffs here are challenging *state* election laws, as opposed to a *federal* statute, the Court should refrain from exercising jurisdiction over Plaintiffs' claims pursuant to the *Pullman* abstention doctrine. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

Not every lawsuit, even those touching on federal issues, are appropriate in

federal court. *See Curtis v. Oliver*, 479 F. Supp. 3d, 1039, 1093 (D.N.M. 2020) (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 813 (1986)). "District courts must exercise 'prudence and restraint' when determining whether a federal question is presented by a state cause of action because 'determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.'" *Id.* (quoting *Merrell Dow Pharms. Inc.*, 478 U.S. at 810). As such, varying doctrines of abstention have developed over time because there are instances where it is desired, if not required, that a federal court abstain from addressing state laws when a similar claim is also pending in state court. *See Harman v. Forssenius*, 380 U.S. 528, 534 (1965). "In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law." *Id.*

The *Pullman* abstention doctrine is a prominent example of this principle. *Pullman* abstention permits a court to take jurisdiction over a dispute, but also allows the court to use its discretion in "postponing its exercise of proper jurisdiction." *Trump for President, Inc. v. Boockvar*, 481 F. Supp.3d 476, 487 (W.D. Pa. 2020).

The Tenth Circuit has identified three requirements that must be met to justify abstention under *Pullman*: "(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies." *Caldara v. City of Boulder*, 955 F.3d 1175, 1179 (10th

Cir. 1992). Importantly, "the Supreme Court has not recognized a categorical rule against abstention in cases involving constitutional rights . . . [and] consideration of the nature of the right and the chilling effect of abstention is a secondary assessment to determining whether the *Pullman* requirements are met." *Id.* at 1182.

Here, the requirements for the *Pullman* abstention doctrine are easily satisfied. One day prior to Plaintiffs filing the instant action, the State Plaintiffs filed the Shawnee County Case challenging, *inter alia*, the Out-of-State Distributor Ban set forth in H.B. 2332 § 3(*l*)(1). The Court need not worry about delay or impairment to Plaintiffs' rights given that the Shawnee County Case includes challenges pending before this Court. Moreover, resolution of Plaintiffs' federal constitutional claims are dependent on the determination of uncertain issues of state law because the Secretary of State (Defendant Schwab) has yet to implement regulations concerning H.B. 2332, § 3. Such regulations will ultimately serve as guideposts on how the Out-of-State Distributor Ban will be interpreted. In the absence of any such regulatory guidance, and with no Kansas court having evaluated the statute yet, abstention is particularly appropriate. *See Boockvar*, 481 F. Supp.3d at 490-96 (uncertainty of state law supported *Pullman* abstention). Were this Court to undertake a review at this stage of Plaintiffs' constitutional claims, the resolution would likely amount to a tentative decision creating "needless friction" with state law. *Cf. City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 172 (1942) (recognizing that the passage of a new law created a new issue that was not before the court when the case was first filed and "[t]he delicacy of that issue and an appropriate regard for the rightful independence of state governments . . . reemphasize that it is a wise and permissible policy for the federal

chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals.") (internal quotations and citations omitted).

Additionally, the Kansas Supreme Court customarily interprets the provisions of the Kansas Constitution to echo provisions in the U.S. Constitution. *See Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 377 (2006) (collecting cases). Given the timing and claims at issue, there is a real possibility that this Court and the state court could travel down divergent paths in determining whether Plaintiffs here and the State Plaintiffs have raised viable free speech and association and overbreadth challenges. This, in turn, could have a significant, disruptive effect on the clarity of state law. *Compare Caldara*, 955 F.3d at 1181 (applying *Pullman* abstention because "there [was] a concern . . . as to the appropriate relationship between federal and state authorities functioning as a harmonious whole.").

There is no question that state election laws are significant to the State of Kansas, and as such, the Out-of-State Distributor Ban should be interpreted by state courts. *See Boockvar*, 481 F. Supp.3d at 483. ("[T]he important principles underlying the *Pullman* abstention doctrine – federalism, comity, constitutional avoidance, error prevention, and judicial efficiency – all weigh strongly in favor of letting state courts decide predicate disputes about the meaning of Pennsylvania's state election code."). Indeed, "under the Constitution, the critical responsibility of administering elections is reserved for the states." *Id.* at 498 (citing U.S. Const. art. I, § 4, cl. 1.). Therefore, abstention is appropriate in this case and the Court should exercise its discretion and dismiss Plaintiffs' challenges to the Out-of-State Distributor Ban.

C. – Plaintiffs' First Amendment Claims Failure to State a Claim

Turning to the merits, Plaintiffs allege in Counts I and II that the Ballot Application Restrictions violate their freedom of speech and freedom of association rights under the First Amendment. They claim that the Out-of-State Distributor Ban is content-based in that it restricts communications that promote advance ballots but allows communications about other issues, including criticism of advance voting. (Compl. ¶¶ 84, 86). They also claim that the law is constitutionally infirm because it only restricts *non-Kansas*-domiciled entities. (*Id.* ¶ 85). These prohibitions allegedly impede Plaintiffs' ability to associate with other entities to facilitate greater use of advance voting in Kansas. (*Id.* ¶¶ 98-100).

Plaintiffs suggest that Ballot Application Restrictions constrain their core speech rights, thereby subjecting them to "exacting scrutiny" under the so-called *Meyer-Buckley* test. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999). But the restrictions at play in H.B. 2332, § 3(k) and (*l*) are not focused on core speech at all. It is simply *conduct* that is being regulated and election-related restrictions on conduct are not exposed to such exacting scrutiny.

This case is similar to *Lichtenstein v. Hargett*, 489 F. Supp.3d 742 (M.D. Tenn. 2020), which involved a constitutional challenge (freedom of speech and freedom of association) to a Tennessee statute prohibiting anyone other than an election official from giving an absentee ballot application to any other person. The district court concluded that the ban on distribution of absentee voter applications was in no way a ban on core political speech. *Id.* at 773. The law, the court noted, did "not restrict anyone from interacting with anyone about anything." *Id.* at 770. The court detailed a long list of ways that the

plaintiff could encourage a person to vote using the absentee ballot application. *Id.* at 764–65. "[H]owever one slices it," the statute "prohibits no spoken or written expression whatsoever and also leaves open a very wide swath of conduct, prohibiting just one very discrete kind of act." *Id.* at 765.

In finding that distribution of absentee-ballot applications is not constitutionally protected speech, the court further noted:

> [I]f unaware of any words accompanying such distribution, an observer would not have any particular reason to associate any specific message with the action of giving someone an absentee-ballot application. . . . And the observer perhaps could speculate that there is not really any discernable message at all. The Supreme Court has advised that if an observer cannot tell, without accompanying words, that the action conveys the message that plaintiff claims it conveys, then the action is not inherently expressive.

Id. at 768; *accord Voting for Am., Inc. v. Andrale*, 488 F. App'x 890, 898 & n.13 (5th Cir. 2012) (rejecting First Amendment challenge to state statute restricting non-election officials' distribution of absentee ballots and concluding that the law did not curtail any core speech rights).

The same is true here. H.B. 2332 does not prevent Plaintiffs from publishing or mailing content that educates Kansans on how to vote in person or by mail. Nor does it prohibit Plaintiffs from providing information on where to access an advance mail voting application. It likewise does not prohibit Plaintiffs from posting or mailing content in favor of the absentee voting process. The number of ways for Plaintiffs to communicate their message to Kansas voters is virtually limitless, which undercuts their claim that the Ballot Application Restrictions impermissibly restrict or threaten core speech. While Plaintiffs aggressively seek to fit the statutory prohibitions into a free speech box, the

reality is that "[c]onduct does not become speech for First Amendment purposes merely because the person engaging in the conduct intends to express an idea." *Lichtenstein*, 489 F. Supp.3d. at 766; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (recognizing that while a person or party may express beliefs or ideas through a ballot, "[b]allots serve primarily to elect candidates, not as forums for political expression.").

The proper standard, therefore, is what is commonly referred to as the *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). When a state invokes its constitutional authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. These burdens "must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party*, 892 F.3d at 1077. That is why a state's "important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions" on election procedures. *Anderson*, 460 U.S. at 789.

There is "no 'litmus-paper' test that will separate valid from invalid restrictions." *Id.* The Court instead applies a "more flexible standard." *Burdick*, 504 U.S. at 434. Under this flexible approach, referred to as *Anderson/Burdick* balancing, a "court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those

interests make it necessary to burden the plaintiff's rights.'" *Cox*, 892 F.3d at 1077 (quoting *Burdick*, 504 U.S. at 434)); *Fish v. Schwab*, 957 F.3d 1105, 1121-22 (10th Cir. 2020).

Although flexible, this balancing test does contain certain core guidelines. If a state imposes "severe restrictions on a plaintiff's constitutional rights (here, the right to vote), its regulations survive only if 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. 434. But "minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434). "Regulations falling somewhere in between – i.e., regulations that impose a more-than-minimal but less-than-severe burden – require a 'flexible' analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (quotation omitted). Lurking in the background at all times, however, is the fundamental principle that "states have wide latitude in determining how to manage their election procedures." *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008).

As described above, the burden on Plaintiffs' advocacy work is minimal. Yet the State's interests in imposing Ballot Application Restrictions are substantial, outweighing any minor inconveniences that Plaintiffs may experience, particularly when subjected (as they must be) to a highly deferential rational basis review. *See Burdick*, 504 U.S. at 434.

The State's primary regulatory interests in the Ballot Application Restrictions are the avoidance of confusion and the facilitation of an orderly and efficient administrative process in carrying out the election. Indeed, in 2020, county election officials across the

State reported receiving multiple advance ballot applications from individuals who had themselves received multiple advance ballots application forms (some of which were partially completed) from various out-of-state organizations. Voters were calling in to the county clerks' offices angry and confused, not knowing how to handle the different forms, and often feeling compelled to send all applications in. The result was chaos that greatly taxed the time and resources of already short-staffed and overworked county election offices. Unsurprisingly, a regulatory interest in orderly election administration was expressly endorsed by the Supreme Court in *Doe v. Reed*, 561 U.S. 186, 198 (2010).

In addition, having multiple advance ballot applications being sent in by the same individual is an invitation for potential fraud, which the State also has a strong interest in avoiding. As the Supreme Court observed just last week, although "every voting rule imposes a burden of some sort," a "strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich v. Democratic Nat'l Comm.*, __ S. Ct. ___, Nos. 19-1257 and 19-1258, 2021 WL 2690267, at *13 (U.S. July 1, 2021). The risk of voter fraud is particularly acute with mail-in voting. *See, e.g., Crawford*, 553 U.S. at 195-96 ("flagrant examples of [voter] fraud . . . have been documented throughout this Nation's history by respected historians and journalists, and . . . Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of

voter fraud real but that it could affect the outcome of a close election."); *Richardson*, 978 F.3d at 239 ("Texas's signature-verification requirement is not designed to stymie voter fraud only in the abstract. It seeks to stop voter fraud where the problem is most acute – in the context of mail-in voting."); Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections ("Baker-Carter Commission"), *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

The same regulatory interests at issue in *Lichtenstein*, which the court embraced wholeheartedly as legitimate measures to increase election integrity and decrease voter confusion, are also at play here:

> Among other things, there is a rational basis to believe that by prohibiting everyone (other than election commission employees) from distributing absentee-ballot applications, the State can: (a) increase the integrity of the absentee ballot process by, among other things, better ensuring that an absentee-ballot application is being submitted by someone who truly wants to submit the application, that the applicant does not miss out on voting absentee (and perhaps, as a direct result, voting at all) due to misleading addressing or other information provided by a distributor, and that the applicant is not mistakenly provided by election officials with multiple absentee ballots; and (b) decrease the risk of voter confusion arising from, among other things, voters' receipt of (i) applications mistakenly believed by some recipients to be from election officials, (ii) applications from multiple distributors, or (iii) incorrect addressing or other information from the distributor regarding absentee voting.

Lichtenstein, 489 F. Supp.3d at 783-84.

The Ballot Application Restrictions at issue are reasonable, non-discriminatory prophylactic measures that leave open virtually every conceivable type of written and/or verbal expression except two – the distribution of advance ballot applications by third-parties not domiciled in Kansas and the distribution of partially completed advance ballot

applications. While we question the premise that *any* voters might be negatively affected by the law, even if they are, that would not justify an invalidation of the statute. Not only is no narrow tailoring requirement under *Anderson-Burdick*, but as the Supreme Court recently explained, the State's "entire system of voting" – not just the impact on a small segment of the electorate – must be examined "when assessing the burden imposed by a challenged provision." *Brnovich*, 2021 WL 2690267, at *13. Accordingly, Counts I and II must be dismissed.

D. – Plaintiffs' Overbreadth Claim Is Legally Insufficient

In Count III of their Complaint, Plaintiffs claim the Ballot Application Restrictions violate the First Amendment because they impermissibly regulate a substantial amount of protected speech and associations. (Compl. ¶ 107). Plaintiffs launch a facial attack on H.B. 2332, § 3 and with it, carry a significant burden. Plaintiffs also claim the statute impermissibly chills their own protected speech rights, thereby making an as-applied overbreadth argument. (*Id.* ¶ 108).

"Facial challenges based on overbreadth are disfavored," *Clark v. Schmidt*, 493 F. Supp.3d 1018, 1033 (D. Kan. 2020), and the Court must begin its analysis by presuming that the statute is constitutional. *Id.*

When making an overbreadth claim pursuant to the First Amendment, the challenger must show that the statute in question "punishes a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2004). "The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth

exists." *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 122). Furthermore, the statute's overbreadth must be real. *Id.*

"Striking down a statute as overbroad is 'strong medicine,' and [courts] should only do so 'as a last resort.'" *Stout*, 519 F.3d at 1121–22. The mere fact that a law may carry some impermissible applications does not warrant striking down the law as unconstitutionally overbroad. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Even if a law touches on political speech protected by the First Amendment, declaring a statute invalid may not be appropriate given the State's interests. "The Supreme Court has noted that 'there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Faustin*, 423 F.3d at 1199 (quoting *Hicks*, 539 U.S. at 119).

When considering an as-applied overbreadth challenge, courts recognize that the statute in question may be constitutional in many of its applications, but is not so as applied to the plaintiff and his/her applicable circumstances. *See N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010). "A successful as-applied challenge is, thus, a necessary, but not sufficient, ingredient to a successful facial challenge." *United States v. Streett*, 434 F. Supp. 3d 1125, 1171–72 (D.N.M. 2020). "[T]he Supreme Court has instructed courts facing simultaneous as-applied and facial challenges to first resolve the as-applied challenge before addressing the facial challenge in order to avoid "proceed[ing] to an overbreadth [facial] issue unnecessarily." *Martinez v. City of Rio*

Rancho, 197 F. Supp. 3d 1294, 1309 (D.N.M. 2016) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–85 (1989)).

1. – H.B. 2332 is Not Overbroad as Applied to Plaintiffs' Actions

When considering overbreadth, the Court's preliminary inquiry is whether the statute "will have a substantial effect on constitutionally protected activity[.]" *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 479 (7th Cir. 2012). Here, the answer is a resounding "no".

Plaintiffs allege that their ability to encourage Kansans to engage in the democratic process is burdened because they will not be able to include an absentee mail voting application in their mailers. Plaintiffs freely acknowledge, however, that while H.B. 2332 prohibits them from mailing advance mail voting applications, it does not prohibit them from mailing other communications about the political process, candidates, or voting in general. (Compl. ¶ 56). There is no bar whatsoever to Plaintiffs' ability to send mailers communicating the importance of voting through the mail-in process. Plaintiffs may even direct Kansans exactly where to obtain advance mail voter applications and provide instructions on how to fill it out. The only thing Plaintiffs cannot do is to mail the advance voting application itself directly to the Kansas voter.

This logistical prohibition was adopted by the Legislature in order to prevent voter confusion and help ensure the orderly administration of the electoral process. *See Hearing Testimony on H.B. 2332 Before the House Elections Committee*, 2021 Legis. Sess. (Kan. Feb. 18, 2021) (statement of Katie Koupal, Deputy Assistant Secretary of State), attached hereto as Exhibit B. The statute was not intended to, and does not, function as a prohibition on the

communication itself. *See, e.g.*, *Lichtenstein*, 489 F. Supp.3d at 776.

In fact, this case is strikingly similar to *Lichtenstein* discussed *supra*. For the same reasons articulated in Part III.C.1. above, the Ballot Application Restrictions at issue here do not restrict Plaintiffs from publishing or mailing content that educates Kansans on how to vote in person or by mail, do not constrain them from providing information to voters on where to access an advance mail voting application, and do not prohibit them from posting or mailing content in favor of the absentee voting process. Indeed, there are an infinite number of ways for Plaintiffs to communicate their message. It is not reasonable to suggest that the Ballot Application Restrictions impermissibly regulate a substantial amount of protected speech and associations. In short, Plaintiffs fail to meet their heavy burden and their as-applied overbreadth challenge must fail.

2. – H.B. 2332 is Not Facially Overbroad

Plaintiffs' inability to satisfy the standards necessary to establish an as-applied challenge is also fatal to their facial overbreadth challenge. As noted above, H.B. 2332, § 3 allows for a plethora of expressive conduct and core political speech by any person or entity, regardless of whether they are a Kansas resident or not. There is no prohibition on communicating with Kansas residents on the importance of voting, or about particular candidates or any political viewpoints. All individuals and organizations may encourage Kansans to vote by using an absentee mail-in ballot; they simply cannot send a Kansas resident an advance mail voting application if they live out-of-state or an application that has pre-filled information. Such limited restrictions do not equate to a substantial impairment to constitutional activity. "Rarely, if ever, will an overbreadth challenge

succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Hicks*, 539 U.S. at 124. Nor have Plaintiffs sufficiently plead that H.B. 2332 may have a chilling effect on the free speech rights of parties not before the court. *See e.g.*, *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000) (requiring the plaintiff to show the existence of a "realistic danger" that will "significantly compromise recognized First Amendment protections of parties not before the court."). In sum, Count III of Plaintiffs' Complaint must be dismissed.

E. – H.B. 2332 Does Not Contravene the Dormant Commerce Clause

Plaintiffs further challenge the Out-of-State Distributor Ban on the grounds that it violates the dormant Commerce Clause. However, Plaintiffs' claim must be dismissed because the State has a legitimate purpose for enacting this restriction that may not be advanced through nondiscriminatory alternatives. Additionally, the State is a market participant and therefore an exception to the dormant Commerce Clause exists.

The Supreme Court has interpreted the "Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several States,' Art. I, § 8, cl. 3," to also include "'a further, negative command, known as the dormant Commerce Clause,' . . . that 'create[s] an area of trade free from interference by the States[.]'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). The dormant Commerce Clause is implicated when "a state law improperly interferes with interstate commerce. The primary concern is economic protectionism." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1135 (10th Cir. 2016). But "States retain 'broad power' to legislate protection for

their citizens in matters of local concern such as public health, . . . and . . . not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (internal citation omitted).

In determining whether H.B. 2332 improperly interferes with interstate commerce, the Court considers whether the applicable language unjustifiably discriminates on its face against out-of-state entities, or imposes "burdens on interstate trade that are clearly excessive in relation to the putative local benefits." *Am. Trucking Ass'ns, Inc.*, 545 U.S. at 433 (internal quotations omitted). Plaintiffs maintain the Out-of-State Distributor Ban is discriminatory on its face because it limits non-Kansas residents from mailing advance ballot applications to Kansas voters. A discriminatory law is generally invalid "and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives[.]" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal quotations omitted). Although Plaintiffs bear the burden of showing the law is discriminatory, the State bears the burden of showing a legitimate purpose is served and reasonable nondiscriminatory alternatives are unavailable. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Defendants do not deny that H.B. 2332 restricts non-Kansas residents from mailing advance mail voting applications to Kansas voters. The State, however, has a legitimate interest in enacting legislation that aims to minimize voter confusion, eliminate potential voter fraud, and preserve limited resources from being expended on rectifying problems flowing from the same, including having to wade through duplicative advance mail

voting applications. *See Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) ("Avoiding voter confusion is also a compelling state interest."); *Const. Party of Kan. v. Biggs*, 813 F. Supp. 2d 1274, 1279 (D. Kan. 2011), *aff'd sub nom. Const. Party of Kan. v. Kobach*, 695 F.3d 1140 (10th Cir. 2012) ("The state has a legitimate interest in avoiding voter confusion, deception, or other election process frustrations without presenting empirical evidence that the contested measure in fact reduces those risks."). "[I]t is . . . clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358.

The Out-of-State Distributor Ban is designed to combat voter confusion and the waste of vital resources needed by our State and local election offices to operate a smooth and orderly election—a purpose our Constitution endorses. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick*, 504 at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). By requiring a person to be a Kansas resident if he/she desires to mail an advance mail voting application to a Kansas voter, the State not only limits the amount of advance mail voting applications a Kansas voter receives, but it also ensures the State's ability to verify the accuracy of the sender's disclosures through Kansas records. (That is why, incidentally, the statute requires any in-state sender to provide a host of identifying information about itself. *See* HB 2332, § 3(k)(1).) Both interests are legitimate concerns that cannot be served through nondiscriminatory alternatives.

Moreover, the goal behind the Out-of-State Distributor Ban is emphatically *not* to promote economic protectionism. Indeed, Defendant Schwab's office would prefer that *no* Kansas resident return an advance mail voting application from *any* unofficial third party, whether it be domiciled in Kansas or not. Defendant Schwab's office desires that a Kansas voter only request and return an advance mail voting application from either the Secretary of State's Office or a local election office. *See Hearing Testimony on H.B. 2332 Before the House Elections Committee*, 2021 Legis. Sess. (Kan. Feb. 18, 2021) (statement of Katie Koupal, Deputy Assistant Secretary of State), Ex. B. Thus, the State, through Defendant Schwab's office and local election offices, is actually a market participant.

An exception to the dormant Commerce Clause exists when the State acts as a market participant. The "'market-participant' exception reflects a 'basic distinction . . . between States as market participants and States as market regulators,' . . . '[t]here [being] no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market[.]" *Davis*, 553 U.S. at 339. "State and local governments that provide public goods and services on their own, unlike private businesses, are 'vested with the responsibility of protecting the health, safety, and welfare of [their] citizens,' . . . and laws favoring such States and their subdivisions may 'be directed toward any number of legitimate goals unrelated to protectionism[.]'" *Id.* at 340 (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)).

The purpose of the Out-of-State Distributor Ban is not at all to promote Kansas businesses to the disadvantage of out-of-state businesses. Instead, the State favors its own Secretary of State's Office and local election offices to serve the legitimate goals of

preventing voter confusion, avoiding potential fraud, and preserving the resources of its election offices by preventing them from having to sift through duplicative advance mail voting applications. Indeed, virtually every county in the State was confronted with large numbers of duplicative advance ballot applications in the 2020 general election due to a plethora of out-of-state companies sending multiple applications to the same voters.

This State goal is wholly unrelated to protectionism and thus does not contravene the dormant Commerce Clause. In fact, it is Defendant Schwab's desire to have *the State* shoulder the burden of mailing advance mail voting applications to Kansas residents, as opposed to shifting the burden to private third-parties. This position is the exact opposite of a discriminatory intent. *See United Haulers Ass'n, Inc.*, 550 U.S. at 345 ("Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."). Plaintiffs' claim alleging a violation of the dormant Commerce Clause must be dismissed.

IV. – Conclusion

In sum, this case presents no justiciable controversy given that the challenged law is not ripe for judicial review (with an effective date nearly six months away), Plaintiffs have no standing to bring their claims, and Defendants are immune from suit under the Eleventh Amendment. The parallel state court litigation also counsels in favor of this Court's abstention. Finally, Plaintiffs' claims have no legal merit in light of the highly deferential standard that governs these type of election-integrity statutes. Accordingly, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list, including counsel for the Plaintiff.

By: /s/ Bradley J. Schlozman