IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA AND VOTER PARTICIPATION CENTER, *Plaintiffs*, vs. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; 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' RESPONSE TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendants Scott Schwab, Derek Schmidt, and Stephen Howe, each sued in their official capacities, submit this Response to Plaintiffs' Motion for a Preliminary Injunction (Doc. 24).

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) (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 an advance ballot application prior to its being mailed to voters (which they denominate a "Personalized Application Prohibition"). Plaintiffs refer to the

provisions collectively as "Ballot Application Restrictions."

Plaintiffs' motion for a preliminary injunction, like the underlying lawsuit itself, is flawed on multiple levels. The statutory provision at issue, House Bill 2332, § 3, does not even take effect until January 1, 2022, *see id.* § 11, rendering the case jurisdictionally unripe and clearly unworthy of preliminary injunctive relief.[1] Advance ballot applications for the 2022 primaries cannot even be accepted until April 1, 2022. *See id.* § 3(f)(1). Moreover, the Secretary of State has not yet had an opportunity to develop rules and regulations implementing the challenged provisions – as the statute directs him to do, *id.* § 3(m) – which may obviate part of Plaintiffs' claims or at least guide the Court's analysis.

Plaintiffs also have no standing to challenge this new legislation, either in their own right, on behalf of the members they purport to represent, or as conduits for the general public. Even if they did, there still would be no subject matter jurisdiction due to Defendants' sovereign immunity. And the ongoing state court litigation likewise counsels in favor of this Court's abstention.

Further, none of Plaintiffs' causes of action have substantive legal merit. Although dressed up as free speech/association challenges, Plaintiffs' attacks on the Ballot Application Restrictions are ultimately directed at *non-expressive conduct*, and thus are not entitled to any sort of heightened constitutional protection. Standard rational basis review applies, and the statutes easily pass that highly deferential threshold. The State's strong regulatory interests in avoiding fraud, minimizing voter confusion, and facilitating an orderly administration of the electoral process all outweigh any minor impact (to the extent there is an impact at all) on the rights of the Plaintiffs and/or the voters they purport to represent. The notion that Plaintiffs are at risk of imminent harm from any of these nondiscriminatory, common-sense measures designed to enhance the public's confidence in the integrity of our electoral process, an objective "essential to the functioning of our participatory

[1] A copy of the bill can be found at Exhibit C.

democracy," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), is groundless.

As for Plaintiffs' novel dormant Commerce Clause claim, it is textually foreclosed by Art. I, Sec. 4, Cl. 1 of the Constitution, which expressly confers authority upon states to regulate the manner in which elections are conducted. In the context of elections, while Congress may preempt virtually any state law with its own federal legislation, state legislatures otherwise have free reign to enact their own code for congressional elections, subject only to the constraints of the Bill of Rights and other *subsequent* constitutional amendments. But even if dormant Commerce Clause principles could be technically invoked here, the State's powerful regulatory interests, all of which are entirely disconnected to any economic protectionism objective, would nevertheless allow the Advance Ballot Restrictions to survive. For all of these reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

II. – Legal Standard Governing Requests for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1245-46 (10th Cir. 2017) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (internal quotation marks omitted). This well-established standard requires that a movant meet four separate factors: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs any injury that the opposing party will suffer under the injunction; and (4) the injunction will not be adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). Because this remedy is so extraordinary, it will only be awarded if the movant's right to relief is clear and unequivocal. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

III. – Argument

Injunctive relief is unwarranted here for a variety of reasons. Not only does the Court lack jurisdiction over Plaintiffs' claims, but even if the jurisdictional impediments could be overcome, abstention would be in order. There is also no conceivable urgency to Plaintiffs' claims – which lack merit in any event – given that the statutory provisions at issue do not even take effect until January 1, 2022, and implementing regulations have yet to be drafted.

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. Defendants advanced these identical defenses in their recently-filed Memorandum In Support of Motion to Dismiss (Doc. 27 at pp. 4-12), and those same arguments are now incorporated by reference in this Response.

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

The *Pullman* abstention doctrine, *see R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941), similarly counsels in favor of this Court refraining from adjudicating Plaintiffs' claims in light of the ongoing state court litigation involving the identical statute, and the fact that the Secretary of State has not yet even had an opportunity to draft and implement regulations that will help define the contours of the statute. Once again, Defendants addressed this defense in their Memorandum In Support of Motion to Dismiss (Doc. 27 at pp. 12-15), and those same arguments are likewise incorporated by reference herein.

C. – Restrictions on Solicitation of Advance Ballot Applications Do Not Implicate Plaintiffs' Core Political Speech Rights

The thrust of Plaintiffs' motion is that the Ballot Application Restrictions allegedly "curtail Plaintiffs' core political speech and associational activities protected by the First Amendment." (Mem. 11). Plaintiffs suggest that the act of providing voters with personalized advance mail

ballot applications "communicate[s] Plaintiffs' belief in the power of voting and encourage[s] Kansans to participate in the democratic process" through advance mail voting. (*Id.*). The inclusion of these personalized (i.e., partially completed) advance ballot applications in Plaintiffs' mailings to Kansas voters is purportedly "critical to making that speech effective." (*Id.*). Plaintiffs note that their ballot application distribution practices educate voters about both the importance and mechanics of voting via advance ballot, which they claim "necessarily involves the expression of a desire for political change." (*Id.* at 13). By advocating for advance voting by mail, Plaintiffs maintain that they are "tak[ing] sides on an important and disputed political issue," which "speech" is in turn "disabled" by the Ballot Application Restrictions. (*Id.* at 14).

1. – Plaintiff VoteAmerica's Purported Actions Do Not Implicate the Personalized Application Prohibition

Before turning to the substance of Plaintiffs' legal claims in their motion for a preliminary injunction, we highlight a fundamental deficiency in Plaintiff VoteAmerica's challenge to the Personalized Application Prohibition in H.B. 2332, § 3(k)(2). VoteAmerica seems to have misread the statute because, based on its own description of its operations, its activities would not even implicate this statutory subdivision. VoteAmerica notes that it provides an "interactive online Absentee and Mail Ballot tool that allows voters to provide their name, address, [and other information]," which it then uses to send a partially completed advance ballot application to the voters. (Mem. 6-7; Compl. ¶¶ 17-21). But those kind of activities do not violate § 3(k)(2). The text of Section 3(k) states as follows:

> (1) Any person *who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing* shall include on the exterior of such mailing, and on each page contained therein, except the application, a clear and conspicuous label in 14-point font or larger that includes:
>
> (A) The name of the individual or organization that caused such solicitation to be mailed;

(B) if an organization, the name of the president, chief executive officer or executive director of such organization;

(C) the address of such individual or organization; and

(D) the following statement: "Disclosure: This is not a government mailing. It is from a private individual or organization."

(2) The *application for an advance voting ballot included in such mailing* shall be the official application for advance ballot by mail provided by the secretary of state. No portion of such application shall be completed prior to mailing such application to the registered voter.

(3) An application for an advance voting ballot shall include an envelope addressed to the appropriate county election office for the mailing of such application. In no case shall the person who mails the application to the voter direct that the completed application be returned to such person.

(4) The provisions of this subsection shall not apply to:

(A) The secretary of state or any election official or county election office; or

(B) the official protection and advocacy for voting access agency for this state as designated pursuant to the federal help America vote act of 2002, public law 107-252, or any other entity required to provide information concerning elections and voting procedures by federal law.

(5) A violation of this subsection is a class C nonperson misdemeanor.

H.B. 2332, § 3(k) (emphasis added).

The statutory text in § 3(k)(1) only covers situations in which a person or entity "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." The prohibition against mailing partially completed ballots in § 3(k)(2), in turn, explicitly refers to "such mailing," i.e., the solicitation by mail constrained by § 3(k)(1). VoteAmerica, at least based on its own description of its activities, does not appear to be engaging in "solicitation by mail."[2] Indeed, the definition of "solicitation"

[2] Plaintiff Voter Participation Center, on the other hand, does engage in conduct targeted by § 3(k). It apparently uses statewide voter registration files to identify certain registered voters and then sends those individuals, via the mail, a partially completed advance ballot application. (Mem. 8-9; Compl. ¶¶ 27-33).

entails approaching another person or entity with a request or plea to take some action. *See Merriam-Webster's Collegiate Dictionary* (11th ed.) (2020). The only time that VoteAmerica says it mails out partially completed ballots to voters is when *voters themselves have first affirmatively gone to its website and requested such a ballot*. That VoteAmerica or one of its partners might have referred the voter to its website is irrelevant since the statute only criminalizes solicitations by mail *that include the advance ballot application in such mailing*.[3] In short, if we are to take VoteAmerica at its word that it is merely responding to a voter's request, there would be no violation of § 3(k)(2).

2. – Plaintiffs' Activities Do Not Involve Core Political Speech

Plaintiffs ask the Court, in evaluating their claims, to invoke an "exacting scrutiny" test that the Supreme Court has used when analyzing First Amendment challenges to core political speech (i.e., 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* – not speech – that is being regulated and election-related restrictions on non-expressive conduct are not exposed to exacting scrutiny.

This case is virtually identical 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.

[3] To be clear, both Plaintiffs, as non-Kansas residents, would be prohibited from mailing, or causing to be mailed, advance ballot applications to Kansas voters by virtue of the constraints imposed by § 3(*l*)(1).

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.

While the First Amendment theoretically protects both speech and certain types of conduct, "only conduct that is 'inherently expressive' is entitled to First Amendment protection." *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006)). In assessing whether particular conduct has "sufficient 'communicative elements' to be embraced by the First Amendment, courts look to whether the conduct shows an 'intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Just as was true in *Lichtenstein*, there is no constitutionally protected speech or conduct being impacted by the Ballot Application Restrictions in this case:

> [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.

Lichtenstein, 489 F. Supp.3d at 768; *see also 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, concluding that the law did not curtail any core speech rights); *League of Women Voters v. Browning*, 575 F. Supp.2d 1298, 1319 (S.D. Fla. 2008) (collection and handling of voter registration applications is not inherently expressive activity).

H.B. 2332 in no way prevents 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 and how to obtain an advance ballot application. It likewise does not impede Plaintiffs from posting or mailing content, or otherwise advocating in favor of the absentee voting process. The number of ways for Plaintiffs to communicate their message to Kansas voters is virtually limitless. The abstract messages they claim to want to convey – encourage all eligible voters to vote by advance mail ballots, reassure all Kansans that voting by mail is safe and secure, and emphasize the importance of democratic participation by every eligible citizen (Mot. 2) – are not hampered whatsoever by the statute. The fact that every avenue of expressive conduct remains available to them to impart those messages to voters totally undercuts their claim that the Ballot Application Restrictions impermissibly restrict or even threaten core speech. While Plaintiffs 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." *Steen*, 732 F.3d 388 (citing *Rumsfeld*, 547 U.S. at 66); *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."); *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020) ("[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do no communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny.").

Plaintiffs further suggest that personalizing the advance ballot applications represents the most effective means of "communicating their message" and is "crucial to the persuasiveness of their advocacy." (Mot. 15). But as the Fifth Circuit noted in rejecting this identical argument, Plaintiffs "essentially seek a First Amendment right not just to speak out or engage in 'expressive

conduct' but also to succeed in their ultimate goal regardless of any other consideration." *Steen*, 732 F.3d at 391 (quotation omitted). "Only two possibilities flow from this reasoning. . . . [Either] throwing voter registration forms in the trash would have to be constitutionally protected expressive conduct, [or] "supporting voter registration is the canvasser's speech, while actually completing the forms is the voter's speech, and collecting and delivering the forms are merely conduct." *Id.* at 391-92. In explaining why this theory cannot be squared with First Amendment case law, the Fifth Circuit observed:

> One clear principle that can be derived from the long line of election-related speech cases is that the degree of protection afforded under the First Amendment does not vary in accordance with anyone's regard for the content of the message at issue. Thus, the logic of the Appellees extends to parties who wish to see fewer citizens vote even if it is true that Appellees' ultimate goal is to have more citizens vote. The prevailing cases also do not extend First Amendment protection to an "anything goes" philosophy that seeks to insulate any conduct that may relate in any way to speech or expression. Here, Appellees offer a novel interpretation of the First Amendment. They contend that expressive activity, the promotion of voter registration in this case, is contingent upon the "success" factor of *actually registering voters*. While the First Amendment protects the right to express political views, nowhere does it guarantee the right to ensure those views come to fruition. To maintain otherwise would mean that a group seeking to discourage voting and voter registration would have the "right" to achieve its expressive goals by throwing the registration cards away.

Steen, 732 F.3d at 392 n.5 (emphasis in original) (internal citation omitted); *accord Lichtenstein*, 489 F. Supp.3d at 772 (while "the First Amendment protects Plaintiffs' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing, . . . this proposition does not mean that the Plaintiffs get to decide what *conduct* they think would be the most effective means of advocating their message and thereby automatically obtain First Amendment protection for such means.") (emphasis added). The bottom line here is that the distribution of advance ballot applications is simply not protected speech. It is *non-expressive conduct* that the State is free to regulate as part of a legitimate, non-discriminatory election process.

Nearly all the cases Plaintiffs rely on in support of their motion are readily distinguishable. *Meyer*, for example, struck down a Colorado statute prohibiting the payment of circulators of an initiative petition. 486 U.S. at 428. But as the Fifth Circuit pointed out in refusing to apply *Meyer* to a Texas law restricting non-Texas residents from serving as volunteer deputy registrars (i.e., individuals authorized to receive and deliver completed voter registration applications):

> Petitions by themselves are protected speech, and unlike a completed voter registration form, they are the circulator's speech. Assuming a voter registration application is speech, it is the *voter's* speech indicating his desire to be registered. Soliciting, urging and persuading the citizen to vote are the forms of the canvasser's speech, but only the voter decides to "speak" by registering. Logically, what the VDR does with the voter's form *follows* the voter's completion of the application but is not itself "speech." One does not "speak" in this context by handling another person's "speech." As the state's brief observes, the voter could refuse to return a registration application to the VDR and say, "I'll mail it myself."

Steen, 732 F.3d 390. At most, "an intended recipient would understand the distribution to him or her as merely a means to carry out an otherwise-conveyed message (again, something like "vote!" or "voting is important" or "vote absentee" or "Consider voting absentee") rather than as a means for reiterating or emphasizing, or conveying something new about, that message." *Lichtenstein*, 489 F. Supp.3d at 767. "In other words, the intended recipient would not in all likelihood understand these messages from the mere act of being offered an absentee-ballot application." *Id.*

Unlike the case at bar, the Colorado statutes at issue in *Meyer* and *Buckley* also "specifically regulated the process of advocacy itself, dictating who could speak (only unpaid circulators and registered voters) or how to go about speaking (with name badges and subsequent detailed reports)," thereby "reducing the total quantum of speech, the number of voices who will convey [Plaintiffs'] message and the hours they can speak, and . . . the size of the audience they can reach." *Steen*, 732 F.3d 390 (quoting *Meyer*, 486 U.S. at 422-23). By contrast, the Ballot Application Restrictions do not restrict any inherently expressive conduct. For that matter, they do not restrict anyone from communicating with anyone else about anything. The only thing being constrained

is the distribution of partially completed advance ballot applications and the distribution of any such advance ballot applications by non-Kansas entities. Under any reasonable interpretation, those activities are not so "inherently expressive" that they warrant the kind of sanctified constitutional protection and exacting scrutiny that Plaintiffs demand.

Plaintiffs also cite prominently to *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) and *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). Both of those cases, however, revolved around restrictions on non-residents' collection of *initiatives and referendums*. In fundamental contrast to an advance ballot application, a *petition itself* is protected speech and the "circulation and submission of an initiative is closely intertwined with the underlying political ideas put forth by the petition." *Lichtenstein*, 489 F. Supp.3d at 771 (quoting *Andrade*, 488 F. App'x at 898 n.13. Whereas "the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign," any possible expressive conduct involved in the distribution of advance-ballot applications (e.g., encouraging democratic participation and voting) "does not implicate a third-party's right to process the application." *Id.* (citing *Andrade*, 488 F. App'x at 898 n.13). To the contrary, advance-ballot applications are "individual, not associational, and may be successfully submitted without the aid of another," which means no actual speech has been limited. *Id.* (citing *Andrade*, 488 F. App'x at 898 n.13).[4] In sum, Plaintiffs' claims are not properly subjected to exacting scrutiny.

[4] Plaintiffs oddly point to *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020) in support of their motion. Although it is true that the district judge there found Michigan's absentee ballot application restrictions triggered First Amendment protections under the *Meyer-Buckley* framework, *id.* at 812, the court later denied the plaintiffs injunctive relief, holding that "the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are sufficiently related to the limitations and burdens set forth in [the statute] . . . that plaintiffs are unlikely to succe[ed] on their First Amendment challenge to the Absentee Ballot Law." *Priorities USA v. Nessel*, 487 F. Supp.3d 599, 615 (E.D. Mich. 2020).

3. – Proper Standard for Evaluating Plaintiffs' Claims is *Anderson-Burdick* Test

To the extent the Court even finds that the First Amendment is implicated here, the proper standard to be applied would be 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).[5] 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, nondiscriminatory 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

[5] If, as appears likely, the First Amendment is not implicated at all, straight rational basis review would apply.

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 many individuals who had themselves received multiple advance ballots application forms (some of which were partially completed, and often incorrectly) 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 frequently feeling compelled to send all of the 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.[6] As the Supreme Court observed earlier this month, 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.*, 141 S. Ct. 2321, 2340 (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 ("Baker-Carter Commission"),

[6] Plaintiff implies that the State is somehow restricted to a "voter confusion" regulatory interest because no other interest was explicitly discussed in the Conference Committee Report. (Mem. 19 & n.8). This argument has no merit. Unlike an executive branch agency developing administrative regulations, a legislature is not required to make any sort of record in conjunction with its lawmaking activity. "Under what is a sensible rule – not least because the particular legislative purpose(s) behind a statute often goes unstated by the legislature – a court is not limited to considering the actual purpose behind the statute being challenged; rather it may consider any *plausible state interest*." *Lichtenstein*, 489 F. Supp.3d at 755 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993) ("Where there are plausible reasons for Congress' action, our inquiry is at an end."). In fact, the Supreme Court has held explicitly that, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315; *accord Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004).

Building Confidence in U.S. Elections 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

The problem is especially acute when out-of-state entities are responsible for sending the duplicate advance ballot applications and potentially engaging in other nefarious activities. It is infinitely more difficult for the State to identify, monitor, and exercise oversight of individuals and organizations not located in Kansas. Although Plaintiffs feign frustration that H.B. 2332, § 3(*l*)(1) does not reach "Kansas-resident entities [that] may be responsible for errors and repeat mailers" (Mot. 19), Defendants are unaware of any Kansas entities that operate in Plaintiffs' space on these issues. Not surprisingly, every complaint that legislators responsible for this bill heard from voters and county election officials about duplicate advance ballot applications involved out-of-state organizations. But the critical point here is that, as described in Part III.E., the last thing the State is interested in is providing cover for *any* entity that may be contributing to the electoral chaos that Plaintiffs' activities generate.

Plaintiffs suggest that existing statutes adequately address any potential problems. (Mot. 20). The statutes they cite – Kan. Stat. Ann. §§ 25-1122(i), 25-2431 – either have nothing at all to do with the problems at issue here (25-2431) or are woefully inadequate to rectify the havoc that is created by a wave of duplicate advance applications inundating county election officials (25-1122(i)). In any event, the idea that election-related criminal proscriptions currently on the books represent a baseline above which a legislature cannot go without justifying to a court why such greater sanction is necessary is fundamentally at odds with the separation of powers among the coordinate branches. A court has no warrant to second-guess legislative activity on that ground.

The same regulatory interests at issue in *Lichtenstein*, which the court there embraced as legitimate measures to enhance election integrity and decrease voter confusion, are 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, neutral, 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 who are not domiciled in Kansas (whose activities the State has little ability to monitor or regulate) 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 any injunctive relief here, let alone an invalidation of the statute. Not only is there no narrow tailoring requirement under the *Anderson-Burdick* framework, but as the Supreme Court recently explained, a 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*, 141 S. Ct. at 2340. Under those circumstances, Plaintiffs can establish no entitlement to relief.

D. – Plaintiffs' Overbreadth Claim Is Legally Unsound

Plaintiffs alternatively predicate their request for injunctive relief on the ground that the Ballot Application Restrictions are allegedly unconstitutionally overbroad. (Mot. 19-20). They raise both facial and as-applied attacks on the statute. (Compl. ¶¶ 107-108). Neither claim stands up to scrutiny.

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); *see also United States v. Williams*, 553 U.S. 285, 292 (2008) ("In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (emphasis in original). In other words, the mere fact that *some* impermissible applications of a law may be conceivable does not render that law unconstitutionally overbroad; there must be a realistic danger that the law will *significantly* compromise recognized First Amendment protections. This is particularly true where, as is the case here, *conduct* and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Court examines both the text of the law and the facts on the ground when undertaking this analysis. *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (citing *Hicks*, 539 U.S. at 122).

The overbreadth doctrine is "strong medicine" and thus must be applied "with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982). Thus, if a statute is readily susceptible to a narrowing construction that will remedy any constitutional infirmity, the statute will be upheld. *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). To the extent a statute is not readily susceptible to a narrowing construction, if the unconstitutional language is severable from the remainder of the statute, "that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quotations omitted). Moreover, even if a law touches on political speech protected by the First Amendment, declaring a statute invalid may not be appropriate in light of the State's interests. "[T]here 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).

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

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).

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 advance ballot application in their mailers. Plaintiffs acknowledge, however, that while the new law prohibits them from mailing advance ballot applications, it does not prevent them from mailing any other communication about the political process, candidates, or voting in general. (Compl. ¶ 56). There is no bar to Plaintiffs' ability to send mailers expressing any of the messages they wish to convey about the importance of voting in general or voting by mail via an advance-ballot, how to vote in person or by mail, or where to access an advance mail voting application. *See* Part III.C.2, *supra*. Indeed, there are an infinite number of ways for Plaintiffs to communicate their message. The only thing being restricted is not speech at all; it is *non-expressive conduct* – i.e., mailing an advance voting application itself directly to a Kansas voter. *See, e.g., Lichtenstein*, 489 F. Supp.3d at 776.

This logistical prohibition was adopted by the Legislature primarily to prevent confusion among voters 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 Deputy Ass't Sec'y of State Katie Koupal) (Exhibit B). It also was intended

to minimize potential fraud. To suggest that the Ballot Application Restrictions impermissibly regulate a substantial amount of Plaintiffs' protected speech and associations rings hollow.[7]

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

"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.* In this case, Plaintiffs' inability to satisfy the standards necessary to establish an as-applied challenge is also fatal to their facial overbreadth challenge. As noted, the challenged statute allows for an unlimited array 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 at all 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 advance mail-in ballot; they simply cannot send a Kansas resident an advance ballot application if they live out-of-state, and no private party can send a voter an application that has been partially completed. 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 come close to demonstrating that H.B. 2332 will have a chilling effect on the First Amendment rights of parties not before the court. *See 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

[7] Plaintiffs argue that the new criminal provisions in H.B. 2332, § 3(*l*) are also suspect because they have no scienter requirement. (Mot. 22). Not true. Except for a small category of cases set forth in Kan. Stat. Ann. § 21-5203 – none of which are applicable here – "a criminal intent is an essential element of every crime defined by the criminal code." *State v. Richardson*, 289 Kan. 118, 121, 209 P.3d 696 (2009); *accord* Kan. Stat. Ann. § 21-5202(d) ("If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.").

"significantly compromise recognized First Amendment protections of parties not before the court."). In sum, Plaintiffs are unable to demonstrate a likelihood of success on their overbreadth claim.

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. The Supreme Court has construed the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, to encompass "'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 targets state laws that improperly interfere with interstate commerce. "The primary concern is economic protectionism." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1135 (10th Cir. 2016). So far as we can tell, this clause has never been invoked to challenge a state election/voting law, and for good reason. There are multiple problems with Plaintiffs' theory.

1. – Article I, Section 4 of the Constitution Forecloses Plaintiffs' Claim

The Constitution's Elections Clause, U.S. Const. art. I, § 4, cl. 1, directs that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*" (emphasis added), subject to the directives of Congress. The provision operates as an express grant of constitutional authority for states to regulate the manner in which elections are conducted, *Fish*, 840 F.3d at 727, and vests state legislatures, subject to congressional enactments, with authority "to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). This "broad power to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (internal quotation marks omitted), includes authority to enact "the numerous requirements as to

the procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U.S. at 366; *Cook*, 531 U.S. at 523–24; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (state legislatures may enact election laws in order to ensure that elections are "fair and honest" and that "some sort of order, rather than chaos, is to accompany the democratic process").

The Elections Clause "functions as a 'default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) ("*ITCA*") (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). The clause "stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states 'not what they must do but what they can or cannot do.'" *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (quoting *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir.1995)). As a result, "[s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (citation and internal quotation marks omitted). Thus, "the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." *Id.*; *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) ("[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject."); *The Federalist No. 57*, at 348 (James Madison) (Clinton Rossiter ed., 1961). Congress' own Election Clause authority "is paramount, and may be exercised at any time, and to any extent which it deems expedient, and *so far as it is exercised, and no farther*, the regulations affected supersede those of the State which are inconsistent therewith." *ITCA*, 570

U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880) (emphasis added). But unless and until Congress so acts, Kansas has extraordinarily broad power, rooted directly in constitutional text, to regulate the manner of its elections.

Plaintiffs do not argue that Congress enacted a federal law under its Elections Clause authority that supersedes the Out-of-State Distributor Ban. Instead, Plaintiffs argue that the Kansas law is invalid under the implied dormant Commerce Clause. However, in light of the Elections Clause's express grant of authority to states to regulate in this area, the Commerce Clause simply does not act as a restraint on states' electoral-related time/place/manner regulatory activity. Indeed, the Supreme Court has explicitly distinguished the preemptive authority under the Elections Clause from Congress' other preemptive authority. *See e.g.*, *ITCA*, 570 U.S. at 14 (presumption against preemption does not apply when Congress acts under its Elections Clause authority).

It is beyond cavil that the Bill of Rights, which was ratified in 1791, several years after the original text of the Constitution took force, applies fully to a state's electoral regulatory activity. So, too, do any other subsequent amendments (e.g., the Civil War Amendments and the 24th and 26th Amendments). The specific and positive grant of authority in the Elections Clause, however, takes precedence over any general language in the Commerce Clause, especially an implied restraint like the the dormant Commerce Clause. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989) ("The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized . . . standard."); *City of Tulsa v. S.W. Bell Tel. Co.*, 75 F.2d 343, 351 (10th Cir. 1935) ("It is a well-settled rule of construction that where there is, in an act or Constitution, a specific provision relating to a particular subject, such provision will govern in respect to that subject as against general provisions in the act or Constitution, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates.")

To be sure, the Supreme Court has held that the dormant Commerce Clause can apply to situations in which a state has engaged in *economic protectionism* under the guise of some other grant of constitutional authority. For example, in *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the Court held that the dormant Commerce Clause served to limit a state's ability to impose a durational residency requirement for retail alcohol licenses, despite the Twenty-First Amendment's language seemingly giving states latitude to legislate in this area. But the Court reached this conclusion only after explaining that the developments culminating in the adoption of the amendment made clear that its aim "was not to give States a free hand to restrict the importation of alcohol for *purely protectionist purposes*." *Id.* at 2469 (emphasis added). The Court pointedly noted that the constraints on out-of-state distributors could be justified "as a public health or safety measure or on some other legitimate nonprotectionist ground," but that Tennessee had mounted no such defense and there was simply no evidence that the challenged statute had any connection to those permissible regulatory interests. *Id.* at 2474.

In direct contrast, the Kansas legislature adopted H.B. 2332, § 3(*l*) solely for the purpose of safeguarding the integrity of the election process, minimizing voter confusion, and helping to ensure orderly electoral administration. There was no intent whatsoever to engage in economic protectionism. While it is impossible to say for certain how this provision will be implemented until such time as the Secretary of State has an opportunity to draft regulations defining its scope – making Plaintiffs' plea for a premature advisory opinion intended to tie the Secretary's hands in that drafting process especially inappropriate here – the fact is that the advance ballot application havoc generated in 2020 seemed to be attributable entirely to out-of-state entities like the Plaintiffs. In the event that Kansas-domiciled entities opt to enter this space in the future and contribute to the chaos from duplicative advance voting applications, they will be much easier for the Kansas Attorney General (to whom all enforcement is entrusted under § 3(*l*)(2) of the new law) to identify,

monitor, and exercise enforcement authority over than out-of-state organizations. As described in this Response, time and again, the Supreme Court has recognized this sort of interest as completely legitimate.

Furthermore, unlike the Twenty-First Amendment, one will search in vain for any history of federal courts imposing dormant Commerce Clause constraints on a state's legislative activity regulating the time, place, and manner of elections. The counter-history in the context of alcohol regulation was critical to the Supreme Court's holding that economic protectionism-grounded state laws involving liquor licenses were not fully insulated from the dormant Commerce Clause. *See Thomas*, 139 S. Ct. at 2463-69. With no such historical limits on state legislative authority under the Elections Clause, the textual argument for finding the dormant Commerce Clause altogether inapplicable is even stronger. In short, there is no constitutional basis for holding that the dormant Commerce Clause can displace a State's Election Clause authority.

2. – Kansas' Non-Economic Interests Behind H.B. 2332, § 3(*l*) Defeat Plaintiffs' Dormant Commerce Clause Claim

Even putting aside Kansas' textually rooted Election Clause authority to adopt the Out-of-State Distributor Ban, Plaintiffs' dormant Clause Commerce claim does not warrant any injunctive relief in light of the State's compelling regulatory interests that were neither motivated by, nor connected to, any concerns over economic protectionism. There is no intent whatsoever to favor in-state businesses to the detriment of out-of-state businesses. 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 elsewhere. To the contrary, his office desires that a Kansas voter only request and obtain an advance ballot application from either the Secretary of State's Office or a county election office. *See* Ex. B.

The primary thrust behind the Supreme Court's finding an implied, dormant component in the Commerce Clause is the avoidance of economic Balkinization. *See C&A Carbone, Inc. v.*

Town of Clarkston, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.") (citations omitted). But there is no economic component to a state's own election ballots. The issues involved on a ballot are, by necessity, peculiar to that jurisdiction and entirely local in nature. A state thus has every right to regulate such an internal matter unfettered by foreign state interference.

It is true that, under dormant Commerce Clause jurisprudence, "[u]nless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a 'discriminatory law is virtually per se invalid.'" *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013). However, a facially discriminatory statute is not necessarily unconstitutional if it is not designed for economic protectionism. *See e.g.*, *Maine v. Taylor*, 477 U.S. 131, 148-49 (1986) (state law prohibiting importation of baitfish did not violate Commerce Clause because it served legitimate local purpose, i.e., protecting native fisheries from parasitic infection and adulteration by non-native species, that could not be served as well by available nondiscriminatory means). In fact, "[a]bsent discrimination for the forbidden purpose [i.e., economic protectionism], . . . the law 'will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Dep't of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). While H.B. 2332 § 3(*l*)(1) may appear to be facially discriminatory as written – and we again emphasize that the true contours of the statute will not be known until after regulations are adopted by the Secretary of State – the purpose behind the law is in no way to protect Kansas businesses or any other forbidden purpose. Thus, the Court must apply the balancing test announced in *Pike*.

"Used in the absence of 'discrimination for the forbidden purpose,' *Pike* balancing requires courts to consider 'whether the state law[ ] unjustifiably . . . burden[s] the interstate flow of articles of commerce.'" *McBurney*, 667 F.3d at 468 (quotation marks and citation omitted). Under *Pike*, the regulatory measure at issue is not subject to strict scrutiny and "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. "State laws frequently survive this *Pike* scrutiny[.]" *Davis*, 553 U.S. at 338–39.

Kansas has an indisputably legitimate interest in enacting legislation aimed at minimizing voter confusion, eliminating potential voter fraud, and preserving limited resources from having to be 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."). The Supreme Court has made "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.

Furthermore, the actual burden on interstate commerce here, if there is any, is *de minimis*. Plaintiffs may continue their voting outreach efforts virtually unabated. They may continue to communicate with Kansans about advance voting by almost any means, other than sending an advance voting ballot application itself. It is hard to see how such a minor restriction, when countered by the State's overwhelming regulatory interest, fails to survive *Pike*'s balancing test.

Although strict scrutiny is not applicable here, Kansas could easily satisfy such a standard. "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 U.S. at 433 (quoting *Storer*, 415 U.S. at 730). 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 greatly avoids the possibility of voters receiving duplicative advance voting applications, 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* H.B. 2332, § 3(k)(1).) Both interests are legitimate concerns that cannot be served through nondiscriminatory alternatives, and both are essential to ensuring a smooth and orderly election process.

3. – Kansas's Status as a Market Participant in its Election Regulatory Process Further Undermines Plaintiffs' Dormant Commerce Clause Claim

Moreover, the State, through Defendant Schwab's office and local election offices, desires to be the only entity in Kansas distributing advance mail voting applications to Kansas residents. The State is thus a market participant, which serves as still another basis for defeating Plaintiffs' dormant Commerce Clause claim.

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 (internal quotations omitted). "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 sizable numbers of duplicative advance ballot applications in the 2020 general election due to a plethora of out-of-state companies sending multiple such applications to the same voters. This State goal is wholly unrelated to protectionism.

As previously noted, the Legislature was focused on facilitating Defendant Schwab's goal of allowing the State and counties to 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."). In sum, Plaintiffs' claim alleging a violation of the dormant Commerce Clause fails on every level, and there is no basis for granting injunctive relief.

F. – Remaining Factors Governing Preliminary Injunction Motions Counsel Against Awarding Plaintiffs Any Relief

In addition to Plaintiffs being unable to show a likelihood of success on the merits, none of the remaining factors governing motions for preliminary injunctions justify relief either. Given that the challenged statute does not even take effect until the beginning of 2022, and advance ballot will cannot be accepted until April 1, 2022, there is little chance that Plaintiffs will suffer any harm, let alone imminent and substantial harm, from a denial of preliminary injunctive relief at this stage. The State, on the other hand, would be injured. "[A]ny time a State is enjoined by a

court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quotation omitted); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) ("a ruling of unconstitutionality frustrates the intent of the elected representatives of the people"). A court that too easily invalidates a statute that has made its way fully through the legislative process risks undermining public confidence in a government whose power was intended to flow from the citizenry itself. That is why a movant takes on a heightened burden when it requests temporary injunctive relief in the form of a facial challenge to a law enacted through the democratic process. The balancing this Court must undertake militates strongly in favor of denying Plaintiffs the relief they seek.

IV. – Conclusion

The unripe nature of the claims being litigated, the Plaintiffs lack of standing to pursue those claims in any event, the Defendants' entitlement to sovereign immunity, the pendency of the ongoing state court lawsuit, and the lack of substantive merit of Plaintiff's causes of action all dictate that Plaintiffs' motion should be denied. Defendants request that the Court so rule.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 22, 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