IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and VOTER PARTICIPATION CENTER,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE in his official capacity as District Attorney of Johnson County,

Defendants.

Civil Action No. 2:21-CV-2253

PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs VoteAmerica and Voter Participation Center are two nonpartisan civic organizations that send letters to registered voters encouraging them to vote and, in particular, to vote by mail. In order for this message to be effective and to persuade voters actually to apply for an advance mail ballot, Plaintiffs enclose the necessary application. Often, they personalize the application with information provided by the voter or obtained from the public record. Plaintiffs have sent such letters and advance mail ballot applications in the past and had planned to do so in the upcoming Kansas elections. However, because Plaintiffs do not reside in Kansas, a new law—HB 2332—prohibits them from sending these advance mail ballot applications to Kansas voters. The law imposes no similar restrictions on in-state residents.

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Plaintiffs challenge two provisions of HB 2332: (i) Section 3(*l*)(1) (to be codified at Kan. Stat. Ann. § 25-1122) (the "Out-of-State Distributor Ban"), which bars any person or organization not a resident or domiciled in Kansas from mailing or causing to be mailed an advance mail ballot application to a Kansas voter; and (ii) Section 3(k)(2) (to be codified at Kan. Stat. Ann. § 25-1122) (the "Personalized Application Prohibition"), which criminalizes mailing advance mail ballot applications personalized with a voter's information (the "Ballot Application Restrictions"). The Ballot Application Restrictions are unconstitutional on their face. They prohibit core political speech. They discriminate based on the content, viewpoint, and speaker of the communication. They interfere with Plaintiffs' right to associate with voters and like-minded organizations. And they are substantially overbroad. The restrictions are therefore subject to strict scrutiny. Because they are not narrowly tailored to achieve any compelling government purpose, they fail that test.

The Out-of-State Distributor Ban also violates the dormant Commerce Clause because it explicitly bars only out-of-state actors from sending applications. Defendants do not contest that

Plaintiffs operate in interstate commerce. Such geographic discrimination on that activity is per se invalid. The purpose of the restriction, whether economic protectionism or otherwise, is irrelevant.

Plaintiffs have stated valid claims. Plaintiffs' claims are justiciable because Plaintiffs suffer both credible threats of enforcement and ongoing injuries, and their facial attacks are ripe. Defendants get no help from *Ex parte Young*. Their interpretation would bar all pre-enforcement challenges. And Defendants' abstention argument runs headlong into federal courts' "virtually unflagging obligation to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. U.S.*, 424 US. 800, 817 (1976). Defendants' Motion to Dismiss should be denied.

LEGAL STANDARD

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To withstand a motion under Rule 12(b)(1), a plaintiff must show that jurisdiction is proper. *Anderson v. Fort Hays State Univ.*, 2021 WL 351412, at *2 (D. Kan. Feb. 2, 2021). Where, as here, a defendant makes a facial challenge to subject matter jurisdiction under Rule 12(b)(1), "the Court presumes the accuracy of plaintiff's factual allegations and does not consider evidence outside the complaint." *Hobbs v. Kansas Dep't for Child. & Fams.*, 2021 WL 325839, at *1 (D. Kan. Feb. 1, 2021) (citing *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002)).

To withstand a motion under Rule 12(b)(6), a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Williams v. Wilkinson*, 645 F. App'x 692, 697 (10th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Courts must construe the "allegations in the light most favorable to the plaintiff." *Cressman v. Thompson*, 719 F.3d 1139, 1141 (10th Cir. 2013) (citation omitted).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE UNDER ARTICLE III

Defendants ask the Court to dismiss the Complaint for lack of subject matter jurisdiction, alleging Plaintiffs lack standing, their claims are not ripe for review, and Defendants are immune

from suit. These arguments essentially boil down to the same fact: HB 2332 does not take effect until January 1, 2022. But that date is rapidly approaching, and Plaintiffs are executing their communications plans and associated spending in the coming months. As demonstrated below, Plaintiffs have sufficiently alleged that they suffered an injury-in-fact and that their claims are ripe, while Defendants have no valid claim to Eleventh Amendment immunity.

A. Plaintiffs have standing to bring their constitutional claims.

Plaintiffs are nonpartisan civic organizations that advocate for advance mail voting in Kansas. Plaintiffs have demonstrated an "independent basis for organizational standing" for both their First Amendment Claims (Counts I-III) and their dormant Commerce Clause claim (Count IV), *see* Dkt. No. 1 ("Compl.") ¶¶ 76-125, because they have each been injured as an organization. *See Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010).

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1. Plaintiffs have standing to bring their First Amendment claims.

Plaintiffs have standing to bring their pre-enforcement First Amendment challenges to HB 2332 (to be codified at Kan. Stat. Ann. § 25-1122) because (1) they face a credible threat of criminal and civil penalties and (2) the statute currently chills their speech.[1]

a) The threat of prosecution is injury-in-fact.

"[A] plaintiff has standing when his actions are made illegal 'by the plain language of the statute.'" *Cressman*, 798 F.3d at 947 (citation omitted). Under this standard, Plaintiffs must "allege[] an intention to engage in a course of conduct arguably affected with a constitutional

[1] Defendants' standing argument focused on diverted resources is unavailing because that is not the theory of standing on which Plaintiffs principally rely. The requirement that an organization show a "direct conflict" between the law and the organization's mission, *see* Dkt. No. 27 ("MTD") at 5, is the standard for a specific type of organizational injury under *Havens Realty Corp. v. Coleman*, in which an organization must show "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." 455 U.S. 363, 379 (1982); *see also Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 995-96 (D. Kan. 2020). Plaintiffs satisfy *Havens* standing because HB 2332 expressly prohibits their most effective method for effectuating their core missions of expanding and encouraging vote-by-mail engagement, Compl. ¶ 50, and forces Plaintiffs to incur the expense of either establishing residency in Kansas or overhauling their operations to ensure compliance, *see* Cleaver Decl. ¶¶ 25-27; Lopach Decl. ¶¶ 23-26. While *Havens* is an independent basis for their standing, Plaintiffs need not rely on it because they also face a credible threat of prosecution *as an organization*, which in turn chills their protected speech.

interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted); *see Clark v. Schmidt*, 493 F. Supp. 3d 1018, 1027 (D. Kan. 2020); Compl. ¶¶ 6-8, 52-53, 88-89, 92-93. Such a threat is "credible where a challenged provision on its face prohibits the conduct in which plaintiffs wish to engage, and the state has not disavowed any intention of invoking the provision against them." *ALDF*, 434 F. Supp. 3d at 988 (Vratil, J.) (citations omitted). This basis for standing also extends to any "administrative action" with penalties that "give[s] rise to harm sufficient to justify pre-enforcement review." *Driehaus*, 573 U.S. at 165.

Plaintiffs sufficiently allege injury-in-fact under this theory because: (1) the plain text of the statute proscribes Plaintiffs' intended conduct; and (2) there is no question the State will investigate and prosecute violations of the statute.

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First, Plaintiffs' conduct "fits squarely within the scope" of HB 2332, such that their "fear of prosecution under [HB 2332] is not ethereal and [they] ha[ve] sufficiently alleged injury to support standing to challenge [HB 2332]." *See ALDF*, 434 F. Supp. 3d at 992. HB 2332 bars anyone from "caus[ing] to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state." HB 2332 § 3(*l*)(1). It also provides that any "person who solicits by mail a registered voter" to apply "for an advance voting ballot and includes an application" may not complete any "portion of such application . . . prior to mailing [it] to the registered voter." HB 2332 § 3(k)(1)-(2). Plaintiffs neither reside nor domicile in Kansas, Compl. ¶¶ 16, 26; their established practice is to mail personalized advance mail ballot applications to voters; and they intend to mail them to Kansas voters. *Id.* ¶¶ 24-25, 34. Further, violations of HB 2332 are expressly punishable by steep civil or criminal sanctions: a $20 penalty

for *each mailing* of an advance voting ballot application, HB 2332 § 3(*l*)(3); Compl. ¶ 53; and a misdemeanor charge for mailing a partially prefilled application, HB 2332, § 3(k)(5); Compl. ¶ 67.

Defendants do not contest Plaintiffs' intent to engage in protected speech proscribed by HB 2332. *See* Compl. ¶¶ 24-25; 34. They claim only that Plaintiffs' concerns about prosecution or civil penalties are speculative. *See* MTD at 6-7. Because HB 2332 plainly prohibits Plaintiffs' expressive activities—mailing advance mail ballot applications, including ones personalized—Plaintiffs' concerns are not speculative. *See* HB 2332 §§ 3(*l*)(1), 3(k)(2); Compl. ¶¶ 5-6.

Second, there is no question that HB 2332 will be enforced. Under the law, *any person* may file a complaint alleging a violation of § 3(*l*), which Defendant Schmidt, as attorney general, *must* investigate. HB 2332, § 3(l)(2)-(3); Compl. ¶ 36. Defendant Howe, as District Attorney of Johnson County, investigates "all" criminal violations, including any violation of § 3(k). HB 2332, § 3(k)(5); Compl. ¶ 37. A credible fear exists where the "State has not suggested that the newly enacted law will not be enforced," nor any "reason to assume otherwise." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). Far from presenting any assurances that they will not penalize Plaintiffs under HB 2332, Defendants admit that they do not disclaim their "future prosecutorial intents under these statutes." MTD at 7.

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Defendants emphasize they *could* enact regulations under HB 2332 § 3(m), and, without saying how, posit that such regulations *could* minimize Plaintiffs' concerns. MTD at 7. But the potential to enact future regulations cannot defeat standing, which "is determined at the time the action is brought, and [courts] generally look to when the complaint was first filed, not to subsequent events." *Mink v. Suthers*, 482 F.3d 1244, 1253-54 (10th Cir. 2007) (citations omitted). Any regulations would not change HB 2332's core tenets, given "[t]he secretary of state *may* adopt rules and regulations in order to implement the provisions of this section," *see* HB 2332, §3(m)

(emphasis added), but the statute admonishes that "neither the executive branch nor the judicial branch of state government shall have any authority to *modify* the state election laws," *id.* at §3(b) (emphasis added). In any event, regulations cannot blunt the plain language of the statute. *Ruddick v. Boeing Co.*, 263 Kan. 494, 499 (1997). Plaintiffs have sufficiently pled a credible fear of prosecution to confer First Amendment standing.

b) The ongoing chilling effect on speech is an injury-in-fact.

Plaintiffs have also clearly alleged that HB 2332 chills Plaintiffs' speech, Compl. ¶¶ 8, 60, 93, 108, which Defendants do not challenge. This chilling effect is an ongoing injury and an additional, independently sufficient basis for Plaintiffs' First Amendment standing.

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An "alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Am. Booksellers*, 484 U.S. at 393). Such "a chilling effect" can constitute injury-in-fact if "it arises from an objectively justified fear of real consequences." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (internal quotation and citations omitted). Under this standing doctrine, Plaintiffs "satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced." *Id.* at 1089 (emphasis original).

Here, both Plaintiffs have engaged in the speech HB 2332 affects—mailing personalized advance mail voting applications—in the past. Compl. ¶¶18-23, 27-33; Cleaver Decl. ¶¶ 7-8;

Lopach Decl. ¶¶ 5-7.[2] They attest that they wish to mail personalized applications to Kansas voters in the future. Cleaver Decl. ¶ 23; Lopach Decl. ¶¶ 21-22. And as explained *supra* I.A.1.a., they cannot implement their plans to engage Kansas voters without running afoul of HB 2332, and have established a credible fear of prosecution if they proceed. Compl. ¶¶ 8, 24-25, 34; Cleaver Decl. ¶ 25; Lopach Decl. ¶ 24. Moreover, HB 2332 goes into effect in five months; it is *already* affecting Plaintiffs' operations because plans for 2022 primaries are already underway. *See* Cleaver Decl. ¶ 24; Lopach Decl. ¶ 26. Thus, Plaintiffs have shown "that they have specific plans or intentions to engage in the type of speech affected by the challenged government action," but are chilled from acting on these plans because of HB 2332's enforcement. *Walker*, 450 F.3d at 1089. This ongoing chilling effect establishes Plaintiffs' First Amendment standing.

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2. Plaintiffs have standing for their dormant Commerce Clause claim.

Defendants do not challenge Plaintiffs' standing to bring their dormant Commerce Clause claim. Standing is easily satisfied because the Out-of-State Distributor Ban curtails Plaintiffs' access to the interstate market and "[t]he denial of a nonresident's right to do business on the substantially equal terms with residents can constitute an injury-in-fact for purposes of standing." *McReynolds v. Lane*, 2012 WL 12886816, at *2 (D.N.M. Mar. 27, 2012) (citation omitted). Plaintiff VPC has standing because it participated in the market for voter services, *see* Compl. ¶¶ 29-32, and the Out-of-State Distributor Ban limits 100% of the market of Kansas voters that VPC serves. Plaintiff VoteAmerica also planned to offer its print-and-mail feature to distribute advance mail voting applications to Kansas voters, Compl. ¶ 24, but the Ban denies VoteAmerica's

[2] Defendants have not asserted a genuine factual attack on Plaintiffs' standing. However, in the event this Court decides to exercise its "wide discretion to allow affidavits . . . to resolve disputed jurisdictional facts under Rule 12(b)(1)," Plaintiffs offer the declarations attached to their Motion for Preliminary Injunction at Exhibits 1 and 2 (Dkt. Nos. 25-1, 25-3). *See Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002)

right to do business in Kansas at all, much less on substantially equal terms as in-state distributors. Plaintiffs have thus carried their burden of showing they have standing to bring this claim.

B. Plaintiffs' claims are ripe for review.

The Tenth Circuit has observed that "customary ripeness analysis is relaxed somewhat where a facial challenge, implicating First Amendment values, is brought." *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). Nonetheless, Defendants argue that Plaintiffs' case is not ripe because: (i) the fitness of the issue for judicial resolution; and (ii) the hardship to the parties of withholding judicial consideration. MTD at 8. Plaintiffs' claims satisfy both prongs.

First, Plaintiffs mount a facial attack on HB 2332, such that a "determination of the merits turns upon strictly legal issues" and does not "require[] facts that may not yet be sufficiently developed." *See Tex. Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018) (emphasis omitted). Defendants again argue that Defendant Schwab may implement regulations that define the contours of HB 2332. However, Defendants cite no authority suggesting that possible unidentified future regulations or statutory interpretations are "facts" that render claims unripe. Here, unlike in *Morgan v. McCotter*, on which Defendants principally rely, Plaintiffs have "presented an[] actual impediment to a proposed plan of" mailing applications to Kansas voters, and "establish[ed] that [they] ha[ve] been deterred by the [challenged law] from implementing such a plan." 365 F.3d 882, 891 (10th Cir. 2004).

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In this election-related case, it is critical that Plaintiffs' claims are resolved before the run-up to the 2022 primaries. As the Supreme Court explained in *Purcell v. Gonzalez*: "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5 (2006). If Plaintiffs sued closer to the next election, Defendants would undoubtedly raise this

equitable *Purcell* principle as a reason to deny Plaintiffs' relief.[3] This Court should reject Defendants' attempt to set up a Goldilocks dilemma where Plaintiffs either sue too far away or too close to an election and, by Defendants' estimation, can never get the timing "just right." *See, e.g.*, *DNC v. Bostelmann*, 466 F. Supp. 3d 957, 963-65 (W.D. Wis. 2020) (recognizing tension between ripeness and the *Purcell* principle in election law cases and rejecting ripeness argument); *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 942-43 (W.D. Va. 2018) (same).

Second, as explained *supra* I.A.1.a, Plaintiffs face the hardship of an objective fear of imminent prosecution. Notably, Defendants do not cite cases involving facial First Amendment challenges, for which "[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim." *Johnson*, 194 F.3d at 1155. Contrary to Defendants' argument, "[n]o one should have to go through" the statutory penalties "only to have a court find that the newly enacted statute is unconstitutional." *Id.* at 1154.

Moreover, Plaintiffs have also established the ongoing harm of HB 2332's chilling effect. *Supra* I.A.1.b. In chilled speech cases, First Amendment claims ripen when the "alleged injury is already occurring" because the challenged law "by its very existence" has a "dampening effect . . . on [the plaintiffs'] advocacy." *Walker*, 450 U.S. at 1098. Plaintiffs' claims are ripe.

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C. Defendants are not entitled to sovereign immunity under the *Ex Parte Young* exception to the Eleventh Amendment.

Defendants also ask the Court to dismiss the Complaint based on sovereign immunity under the Eleventh Amendment. This argument should be rejected because Plaintiffs satisfy the *Ex parte Young* exception. That exception "allows certain suits against individual state officers acting in their official capacity if the complaint alleges an ongoing violation of federal law and the plaintiff

[3] Indeed, counsel for Defendants have made precisely this *Purcell* equitable argument in another recent election law case in Kansas. *See Rangel-Lopez v. Cox*, 344 F. Supp. 3d 1285, 1290 (D. Kan. 2018); *see id.* Dkt. No. 18 at 26-27.

seeks prospective relief." *First Baptist Church v. Kelly*, 457 F. Supp. 3d 1072, 1076 (D. Kan. 2020) (citing *Levy v. Ks. Dept. of Soc. and Rehab. Svcs.*, 798 F.3d 1164, 1169 (10th Cir. 2015)). The officer must have (1) "a particular duty to enforce the statute in question" and (2) "a demonstrated willingness to exercise that duty." *See id.* at 1078 (citation omitted).

As to the first prong, Defendants do not deny, and therefore concede, that they have responsibility for enforcing HB 2332. As Plaintiffs alleged, Defendant Schwab is responsible for overseeing and interpreting HB 2332; Defendant Schmidt is required to investigate, and may prosecute, violations of the Out-of-State Distributor Ban, and has discretion to investigate and prosecute violations of the Personalized Application Prohibition; and Defendant Howe is responsible for investigating and prosecuting all criminal violations of state law. Compl. ¶¶ 35-37. This responsibility for enforcement *standing alone* sufficiently defeats claims of sovereign immunity. *See Petrella v. Brownback*, 697 F.3d 1285, 1293-94 (10th Cir. 2012); *ALDF*, 434 F. Supp. 3d at 1002 (ruling the Governor was a proper defendant based on his responsibility to enforce, without mentioning a demonstrated willingness to exercise responsibility).

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As to the second prong, Defendants cannot rely on any purported lack of meaningful enforcement because where "Plaintiffs have alleged a reasonable fear of actual prosecution and there is no reason to delay this adjudication . . . the Eleventh Amendment does not bar [a] suit [that] seeks prospective injunctive relief against state officials." *ACLU v. Johnson*, 4 F. Supp. 2d 1024, 1029 (D.N.M. 1998). If the Eleventh Amendment barred this type of suit, other successful pre-enforcement First Amendment cases "would have been dismissed." *Id.* (listing cases). Defendants' contrary arguments rely heavily on *Clark v. Schwab*, which turned on a declaration Secretary Schwab submitted stating "his Office will not prosecute election crimes," and established "his Office's lack of meaningful enforcement conduct to the contrary." 416 F. Supp.

3d 1260, 1270 (D. Kan. 2019). Here, no Defendant has sworn off prosecution under HB 2332. On the contrary, the declaration Defendants submitted reflects that the Secretary of State's office has "aggressively encouraged Kansans to not participate, particularly with third party advance by mail ballot applications," like those Plaintiffs send, and "look[s] forward to . . . encouraging voters to not provide information to third parties." Ex. B to Defs.' Mot., Dkt. No. 28 at 55. Accordingly, the Court should deny Defendants' motion to dismiss based on the Eleventh Amendment.

II. THE COURT SHOULD NOT ABSTAIN FROM HEARING PLAINTIFFS' CASE

Defendants' *Pullman* abstention argument should also be rejected. Abstention is "the exception and not the rule," and "is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 467 (1987). As such, to avoid further chilling Plaintiffs' free speech rights, this Court has repeatedly refused to abstain under *Pullman* from First Amendment challenges to state law. *See, e.g.*, *Yost v. Stout*, 2007 WL 1652063, at *4 (D. Kan. June 6, 2007); *Kansans For Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 934 (D. Kan. 1999).

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Here, *Pullman* abstention is inappropriate "because the state laws at issue are not unclear and no possible state court ruling (short of a state court ruling on the question of constitutionality) would obviate the need for a determination whether the [statute is] constitutional." *ACLF v. Meyer*, 113 F.3d 1245, at *3 (10th Cir. 1997). HB 2332 unambiguously prohibits out-of-state entities from causing advance mail ballot applications to be mailed and prohibits any distributor from personalizing applications. Where, as here, "there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971); *see also Zwickler v. Koota*, 389 U.S. 241, 251 n.14

(1967) ("[A]bstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction.").[4]

That no state court has yet interpreted HB 2332 does not change the analysis. "If the statute is not obviously susceptible of a limiting construction, then even if the statute has never been interpreted by a state tribunal it is the duty of the federal court to exercise its properly invoked jurisdiction." *Hill*, 482 U.S. at 468 (alterations omitted). Nor does the pendency of a state court proceeding bringing state law claims regarding HB 2332 favor abstention. Setting aside Defendants' wholly inaccurate claim that this lawsuit is somehow part of a "two-pronged coordinated attack," MTD at 1, the law is clear that "[a]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court," *Constantineau*, 400 U.S. at 439. Indeed, as Defendants must concede, the state court proceeding involves claims under the Kansas Constitution brought by organizations domiciled in Kansas—*not non-resident* civic organizations like Plaintiffs. Defendants also cannot dispute that the state court proceeding does not assert any violation of the dormant Commerce Clause or the First Amendment. While some of the state court claims may raise similar concerns for free speech and association, this Court is under no obligation to stand down while a state court adjudicates a state law claim. *See Friedman v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 781 F.2d 777, 791 & n.4 (10th Cir. 1985) (finding district court did not abuse its discretion by refusing to abstain to permit the state courts to resolve claim under a state constitution "Religion Clause" akin to the Free Exercise Clause of the First Amendment).[5]

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[4] Defendants' argument that this clear and unambiguous law is somehow rendered uncertain because the Secretary of State has yet to propagate regulations concerning its implementation, *see* MTD at 14, fails. Any regulations would not alter the Ballot Application Restrictions themselves as HB 3223 merely provides that "[t]he secretary of state *may* adopt rules and regulations in order to *implement* the provisions of this section," *see* HB 2332 § 3(m) (emphasis added).

[5] *Caldara v. City of Boulder* is not to the contrary. 955 F.3d 1175 (10th Cir. 2020). There, the court's hesitation was about a federal court ruling on whether the Colorado constitution preempted a local ordinance, a state law question of substantial uncertainty given the Colorado Supreme Court had split evenly in ruling on it. *Id.* at 1180. *Caldara* does

Put simply, Plaintiffs allege—and Defendants do not dispute—that the Ballot Application Restrictions prohibit Plaintiffs, who are not Kansas residents, from sending personalized advance mail ballot applications into Kansas. The only question of interpretation before the Court is of the United States Constitution, not state law, and that question is squarely within this Court's domain.

III. PLAINTIFFS STATE VALID CLAIMS FOR RELIEF

A. The Ballot Application Restrictions violate the First Amendment (Counts I-II).

Plaintiffs' advance mail voting operations involve Plaintiffs' core political speech and associational rights protected by the First Amendment. HB 2332 impedes that speech and violates those rights, discriminating based on the content of the speech, the viewpoints expressed, and the speakers expressing them. Compl. ¶¶ 55-72, 82-104. The Restrictions therefore must satisfy strict scrutiny. They fail under that standard or any other.

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1. Plaintiffs engage in protected First Amendment speech and association.

The Complaint sufficiently alleges that Plaintiffs' advance mail ballot activities constitute First Amendment speech and association, not merely unprotected conduct.

Elections are necessarily about "political change," and Plaintiffs' distribution of advance mail voting applications—communications that encourage and facilitate Plaintiffs' pro-voting message—"involve[] . . . the expression of a desire for political change," "communication of information," and "dissemination and propagation of views and ideas" to voters, which constitutes protected speech. *Meyer v. Grant*, 486 U.S. 414, 421, 422 & n.5 (1988) (citing *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)); *see also Buckley v. ACLF*, 525 U.S. 182, 192 (1999); *Yes on Term Limits, Inc., v. Savage*, 550 F.3d 1023, 1027-28 (10th Cir. 2008).

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not support that a federal court should abstain from a federal constitutional claim because it may reach a different result than a state court adjudicating a state constitutional claim. *See* MTD at 15. Defendants do not explain why deciding this distinct case would upset state law on issues of its own constitution. *See* MTD at 15.

Plaintiffs' message is that increased electoral participation is essential to a representative government, and that voting by mail is safe and accessible. Compl. ¶¶ 1-4, 9, 16, 79-81. Plaintiffs' desired political change is to promote convenient mail voting to broaden the electorate to all eligible voters, not just those who can vote in-person, have a printer, or can afford postage. *Id.* ¶¶ 2, 5-6, 16, 26, 29, 50. In the debate whether to trust or distrust mail voting, Plaintiffs advise trust and encourage citizens to vote by mail. *Id.* ¶¶ 1, 79-81. To persuade voters to turn Plaintiffs' encouragement and advice into action—*i.e.*, to actually apply to vote by advance mail ballot—Plaintiffs create and disseminate letters that provide the necessary information, instruction, and resources. *Id.* ¶¶ 16-18, 26, 29, 80-81, 108. In addition to a cover letter, Plaintiffs include a pre-printed advance mail ballot application, personalized with information provided by the voter or pulled from state records. *Id.* ¶¶ 1, 6, 19-25, 27-30. In sending these letters, Plaintiffs disseminate their speech and propagate their pro-mail voting message. Such communications are "core political speech," for which First Amendment protection is "at its zenith." *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (quoting *Meyer*, 486 U.S. at 42).

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Several courts have held that distributing mail ballot applications and "assisting voters in filling out [the mail ballot] request form[s]" is core First Amendment activity. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (distributing absentee ballot applications and other vote-by-mail operations "necessarily involve political communication and association"); *DSCC v. Simon*, 2020 WL 4519785, at *29-30 (Minn. Dist. Ct. July 28, 2020) (assisting voters to submit absentee ballots entails "discussion of whether to vote absentee and to allow your ballot to be collected" that "inherently implicates political thought and expression").

Courts routinely rely on the same principles to rule that circulating initiative petitions—expressing a desire for a particular political change by delivering a petition to a voter and asking them to sign it—is core political speech. *See, e,g.*, *Buckley*, 525 U.S. at 192; *Meyer*, 486 U.S. at 421-22; *Chandler*, 292 F.3d at 1241; *Yes On Term Limits*, 550 F.3d at 1028. And courts have applied this reasoning to find that communications about "whether or not a person should register to vote . . . inherently 'implicates political thought and expression'" deserving of First Amendment protection. *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 724 (M.D. Tenn. 2019) (quoting *Buckley*, 525 U.S. at 195); *see also Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1215-16 (D.N.M. 2010); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006). Even in finding certain dissimilar voter registration activities were not speech, the Fifth Circuit nevertheless "accepted" that specific voter registration activities akin to the advance mail voting advocacy in which Plaintiffs engage here, are speech: "'urging' citizens to register; 'distributing' voter registration forms; [and] 'helping' voters to fill out their forms[.]" *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389 (5th Cir. 2013).

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Plaintiffs' distribution of personalized advance mail voting applications encourages and facilitates Plaintiffs' pro-mail voting message and is "characteristically intertwined" with expressing it. *See Schaumburg*, 444 U.S. at 632. Plaintiffs' message also "inherently 'implicates political thought and expression.'" *Hargett*, 400 F. Supp. 3d at 724. Indeed, by speaking in favor of advance mail voting specifically, Plaintiffs take sides in a contested political debate. *See* Compl. ¶¶ 1, 79-81. Such "advocacy of a politically controversial viewpoint" in favor of mail voting is "the essence of First Amendment expression." *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 347 (1995). And, the distribution of personalized advance mail ballot applications inherently

conveys Plaintiffs' message and viewpoint: voters should increase their participation in the political process by mail voting, and here is the application to do so.

Defendants take refuge in a lone case from the Middle District of Tennessee, *Lichtenstein v. Hargett*, to contend that HB 2332 limits non-expressive conduct rather than protected speech. 489 F. Supp. 3d 742 (M.D. Tenn. 2020).[6] *Lichtenstein* does not control here, and it is both wrong and distinguishable. In denying First Amendment protection, the court proceeded on the assumption that a recipient of a blank absentee ballot application, without additional written context, could not discern whether the plaintiffs encouraged absentee voting or asked the recipient to "please throw it away." *Id.* at 768. This assumption is inapplicable here for three reasons.

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First, Plaintiffs' mailings *do* include additional words that encourage voters to submit, and inform them about, the enclosed applications, including persuasive messages such as: "Voting by mail is EASY"; and "County election officials in Kansas encourage voters to use mail ballots in upcoming elections." Compl. ¶ 47. Second, tens of thousands of Kansas voters understood Plaintiffs' message and successfully submitted the advance mail ballot application received from VPC, *see id.* ¶ 32, and proactively requested applications from VoteAmerica, *see id.* ¶ 23. Third, unlike in *Lichtenstein*, the advance mail ballot applications here are personalized with the voter's information to further encourage and assist engagement in the democratic process by completing and submitting the application. *Id.* ¶¶ 17-19, 29-31. Indeed, as noted in *Lichtenstein*, courts have held that assisting voters in applying to vote by mail is "expressive conduct" and protected First Amendment speech. 489 F. Supp. at 769 n.33 (citing *Democracy N.C.*, 476 F. Supp. 3d at 224).

[6] Defendants also cite *Voting for Am., Inc. v. Andrade*, which considered restrictions on voter registration activity, not distribution of absentee ballots. 488 F. App'x 890, 892 (5th Cir. 2012). The court noted that "importantly," it was not considering a restriction on distributing voter registration applications and encouraging citizens to vote. *Id.* at 897.

Moreover, the unsupported assertion that Plaintiffs have "virtually limitless" other ways to communicate their message, MTD at 17, which Defendants import from *Lichtenstein*, misses the point. That Plaintiffs "remain free to employ other means to disseminate their ideas" does not strand their distribution of personalized advance mail ballot applications to voters "outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424. Creating and disseminating personalized applications is itself speech. *See also ALDF*, 434 F. Supp. 3d at 999 ("[C]reation and dissemination of information are speech."). And that speech encourages and facilitates Plaintiffs' pro-mail voting advocacy in a way "characteristically intertwined" with that message. *See Schaumburg*, 444 U.S. at 632. Moreover, the Tenth Circuit has made clear that Plaintiffs have a concomitant First Amendment right to "[s]elect what they believe to be the most effective means" for communicating their message. *Chandler*, 292 F.3d at 1244. Mailing advance mail voting applications (which the Out-of-State Distribution Ban penalizes) and personalizing them (which the Personalized Application Prohibition criminalizes) is essential to Plaintiffs' speech and the "most effective means" of conveying their message. Compl. ¶¶ 1, 6, 10, 16, 25, 28, 34.

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2. HB 2332 is subject to strict scrutiny.

Plaintiffs adequately allege that HB 2332 (1) abridges Plaintiffs' core political speech; (2) limits speech based on content, viewpoint and speaker identity; and (3) impedes Plaintiffs' right to associate with others to persuade to political action. Defendants challenge only the first point and ignore, and thus concede, that strict scrutiny applies for the second and third reasons.[7]

[7] To the extent Defendants offer even a "one sentence argument for the dismissal" of Plaintiffs' claims on these grounds, the Court should reject the argument because the "issues [are] adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Burns v. Federated Mut. Ins.*, 2007 WL 38025, at *4 (D. Kan. Jan. 4, 2007) (quoting *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004)).

a) HB 2332 restricts core political speech.

First, as discussed *supra* III.A.1., HB 2332 abridges Plaintiffs' core political speech. Compl. ¶¶ 60-61, 69-72, 80-82, 88-89. In curtailing this speech, HB 2332 both "restricts the overall quantum of speech available to the election or voting process" to deliver Plaintiffs' message and eliminates "what they believe to be the most effective means for so doing." *Chandler*, 292 F.3d at 1241-42, 1244 (citations omitted). Strict scrutiny governs such impositions. *See id.* at 1241-42; Pls.' PI Br. at 16-17. Defendants' argument that lesser scrutiny applies because Plaintiffs could speak to Kansans through other means is beside the point. *See* MTD at 17, 19. That a challenged law "leaves open more burdensome avenues of communication [] does not relieve its burden on First Amendment expression" of strict scrutiny under *Meyer-Buckley*. *See Meyer*, 486 U.S. at 424 (quotations omitted). Plaintiffs, not the State, are entitled to choose their means of expression.

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b) HB 2332 limits speech based on content, viewpoint, and speaker.

Second, Plaintiffs sufficiently allege HB 2332 constrains their speech based on what it says, the viewpoints expressed, and who expresses them. Compl. ¶¶ 55-57, 83-91. These restraints are content, viewpoint, and speaker-based. Defendants do not address this infirmity. *See supra* n.7.

To begin with, HB 2332 "target[s] speech based on its communicative content" and is "presumptively invalid." *ALDF*, 434 F. Supp. 3d at 997 (citations omitted). In *McIntyre*, for example, the Supreme Court held that a restriction only on publications designed to influence voters in an election discriminated based on content because the document's content defined the law's coverage. 514 U.S. at 345. Here, too, HB 2332 limits Plaintiffs' speech because the content covers advance mail voting; other communications, such as Plaintiffs' indistinguishable voter registration work, are unaffected. *See Buckley*, 525 U.S. at 209 (Thomas, J., concurring) (restriction on initiative petitions but not candidate petitions was content-based). Additionally, HB 2332 unconstitutionally "regulate[s] speech based on the speaker's specific motivating ideology,

opinion or perspective"—here, Plaintiffs' effective advocacy for more advance mail voting participation, when *anti*-advance mail voting messages are not restricted. *ALDF*, 434 F. Supp. 3d at 1000 (citation omitted). Finally, by singling out non-residents, the Out-of-State Distributor Ban unconstitutionally "target[s certain] speakers and their messages for disfavored treatment." *Sorrell*, 564 U.S. at 565. Such restrictions based on content, viewpoint, and speaker are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015); *ALDF*, 434 F. Supp. 3d at 1000.

c) HB 2332 abridges Plaintiffs' associational rights.

Third, HB 2332 abridges Plaintiffs' right to associate with Kansas voters and organizations because it curtails Plaintiffs' ability to engage and broaden their associational base for political change. Compl. ¶¶ 60, 98-99. The Out-of-State Distributor Ban against "causing" an advance mail voting application to be mailed, for example, prevents Plaintiffs from recruiting, consulting, or otherwise associating with Kansas organizations that distribute such applications. *Id.* ¶¶ 60, 98. The Personalized Application Ban interferes with Plaintiffs' associations by, for example, prohibiting VoteAmerica from working with Kansas organizations to provide VoteAmerica's Absentee and Mail Voting Tool. *Id.* ¶ 99. By prohibiting the distribution of personalized advance mail ballot applications with civil and criminal sanctions, HB 2332 proscribes Plaintiffs' "means of communicating" to further their expressive associations. *Healy v. James*, 480 U.S. 169, 181 (1972). It also curtails their ability to "associate for the purpose of assisting persons" to request an advance mail ballot, to "persuade [their audience] to action" through that association. *NAACP v. Button*, 371 U.S. 415, 428-31, 437 (1963). This interference warrants strict scrutiny. *Id.* at 438-39.

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d) The *Anderson-Burdick* framework is the improper analysis to apply, but nevertheless requires strict scrutiny.

Defendants ask the Court to apply the *Anderson-Burdick* sliding scale to Plaintiffs' speech and association claims. Under *Anderson-Burdick*, courts permit lesser scrutiny for laws that are (1) "nondiscriminatory" and (2) impose insubstantial restrictions on the right of "access to the

ballot." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *Anderson-Burdick* is inapplicable here for two reasons. First, Plaintiffs challenge HB 2332's discriminatory restrictions to their First Amendment rights, not ballot access limitations affecting the right to vote. Plaintiffs are "masters of the complaint," and even if Plaintiffs "could have brought suit" to vindicate their (or their served constituencies') right to vote, "they chose not to." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-95 (1987). Second, *Anderson-Burdick* cedes to the applicable First Amendment analysis for claims against laws that discriminate based on content, viewpoint, or speaker, or restrict civic organizations' core political speech and association to promote electoral engagement.[8] As set forth above, *see supra* III.A.2.b-c, the Ballot Application Restrictions discriminate on all of these grounds, so strict scrutiny applies. And as one court explained in declining to apply *Anderson-Burdick*: while that doctrine is concerned with the "competing interests" of an individual's right to vote and the state's interest in regulating ballot access, laws restricting "election-related speech and association," such as HB 2332, "go beyond merely the intersection between voting rights and election administration, veering instead into the area where 'the First Amendment has its fullest and most urgent application.'" *Hargett*, 400 F. Supp. 3d at 722.

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Even if *Anderson-Burdick* were an appropriate analytical lens, strict scrutiny still would apply because Plaintiffs sufficiently allege that HB 2332 severely burdens their speech. *Fish v. Schwab*, 957 F.3d 1105, 1124-25 (10th Cir. 2020); *cf. Buckley*, 525 U.S. at 207 (Thomas, J., concurring) (stating that political speech burdens are *per se* severe). Plaintiffs plead that HB 2332 requires overhauling their advocacy in a way that substantially impedes their efforts to convey

[8] Although the Tenth Circuit applied sliding-scale balancing to a First Amendment claim in *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018), that case involved the association rights of *political parties*, which implicates a distinct doctrine, not at issue here, under *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). The Tenth Circuit's application of *Anderson-Burdick* in *Campbell v. Buckley* also does not inform the analysis here, as the court held that the challenged law constituted "content-neutral regulation of the voting process." 203 F.3d 738, 744-45 (10th Cir. 2000). HB 2332, by contrast, discriminates based on content, viewpoint and speaker; and restricts speech and association advocating for increased mail voting participation rather than regulating access to the ballot.

their message and deters them from engaging in election-related speech on this issue in Kansas. Compl. ¶¶ 5, 6, 10, 25, 34, 50, 55, 58, 69-72, 88-89, 97, 101. Plaintiffs cannot both comply with HB 2332 and continue effective advance mail ballot communications. To abide by the Out-of-State Distributor Ban and continue expressing their pro-mail voting message, Plaintiffs would, for example, have to spend prohibitive portions of their budgets to establish Kansas residency. *Id.* ¶¶ 5, 59, 61. And Plaintiffs simply cannot get around the Personalization Application Prohibition, which criminalizes Plaintiffs' most effective means of advocating their views. *Id.* ¶¶ 67, 69-72.

Ignoring these well-pled allegations, Defendants ask the Court instead to accept their supposition that the burdens here are merely "minor inconveniences." MTD at 19. Aside from contradicting the allegations of the Complaint, improper on a motion to dismiss, Defendants' argument fails because it again assumes that allowing Plaintiffs to continue to speak through "'more burdensome' avenues of communication" somehow diminishes their First Amendment injury. *Meyer*, 486 U.S. at 424. Having alternative ways to communicate their views does "not relieve [the law's] burden on [Plaintiffs'] First Amendment expression." *Id.*; *Cobb*, 447 F. Supp. 2d at 1334 (same). The First Amendment, for example, does not tolerate a ban on handbills so long as the speaker can write a book. In sum, given the severe burdens on Plaintiffs' speech, applying *Anderson-Burdick* "is just another road to strict scrutiny." *Hargett*, 400 F. Supp. 3d at 725 n.9.

3. HB 2332's ballot application restrictions are unconstitutional under either strict scrutiny or a lesser *Anderson-Burdick* scrutiny.

Plaintiffs sufficiently allege that the Ballot Application Restrictions are unconstitutional because they curtail Plaintiffs' core political speech; discriminate based on content, viewpoint, and speaker; abridge associational rights; and are insufficiently tailored to a compelling state interest.

First, Plaintiffs sufficiently allege that the State lacks a compelling interest based on voter confusion or administrative burden to justify a wholesale ban of out-of-state speakers as a class

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and personalization as a practice. Compl. ¶¶ 11, 87-88, 91-92, 102-103. At this stage, the allegations of the Complaint control, and Defendants' unsupported assertion about "the strength of the governmental interest" cannot overcome Plaintiffs' allegations "reflect[ing] the seriousness of the actual burden on First Amendment rights." *See Doe v. Reed*, 561 U.S. 186, 196 (2010).[9]

Second, the Ballot Application Restrictions are not narrowly tailored. HB 2332 is both over- and under-inclusive because there is no reason to believe that out-of-state entities as a class create any more difficulties than in-state, or that a personalized application creates more difficulties than a blank one. Compl. ¶¶ 62-64, 87, 91; *see also* MTD at 19-21; *ALDF*, 434 F. Supp. 3d at 1002 (to survive strict scrutiny, restriction "must not be underinclusive"). Moreover, to satisfy First Amendment scrutiny, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Defendants made no attempt to show "the ineffectiveness of plausible alternatives to the blanket ban on" an entire class of speakers and method of conveying speech, *Yes On Term Limits*, 550 F.3d at 1031, such as implementing reasonable registration, unsubscribe, or due diligence protocols for both in-state and out-of-state speakers to abide. *See* Compl. ¶¶ 103, 123. Plaintiffs have plausibly alleged that the Ballot Application Restrictions are insufficiently tailored to serve the State's purported interests.

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B. Plaintiffs state valid First Amendment claims for overbreadth (Count III).

HB 2332's ballot application restrictions are unconstitutionally overbroad because they "punish[] a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v.*

[9] Defendants, relying on an inapposite Voting Rights Act case in *Brnovich v. DNC*, speculate that HB 2332 serves an ill-defined anti-voter fraud interest. MTD at 20. The connection of a purported fraud interest to HB 2332 is as unapparent to Plaintiffs as it was to the Kansas legislature, which did not consider fraud as a justification for HB 2332. *See also Buckley*, 525 U.S. at 204 n.23 (rejecting unsupported fraud interest).

Oklahoma, 413 U.S. 601, 615 (1973)). They are also overbroad because, "by their broad sweep," they "burden[] innocent associations." *Broadrick*, 413 U.S. at 612.

To assess overbreadth, courts examine whether the law's plain text "reaches a substantial amount of constitutionally protected conduct," *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005); in absolute terms and in comparison to the law's "legitimate and illegitimate applications." *Harmon v. City of Norman, Okla.*, 981 F.3d 1141, 1153 (10th Cir. 2020). The law must pose a "realistic danger" of chilling speech. *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005). That danger is acute if "the overbroad statute imposes criminal sanctions." *Hicks*, 539 U.S. at 119. Here, Plaintiffs adequately allege that the challenged provisions are overbroad both as applied to Plaintiffs and to parties not before the Court. First, the Out-of-State Distributor Ban reaches a substantial amount of constitutionally protected expression. *See supra* III.A.1. Assuming Defendants' asserted justifications for the Ballot Application Restrictions, their "legitimate sweep" would reach speech that invites fraud or confusion. But Defendants do not argue that *Plaintiffs'* speech is fraudulent or confusing. In fact, VPC's mailers expressly informed Kansans that they should not submit more than one advance mail ballot request and provided voters a streamlined unsubscribe process to diminish any concerns about repeat communications. Compl. ¶ 31.

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On its face, the Out-of-State Distributor Ban deters not just Plaintiffs but *all* out-of-state individuals and organizations from conveying advance mail voting applications to Kansas voters. Compl. ¶¶ 52, 59, 109. "[W]here," as here, "the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984). Facially, the legitimate sweep of the Out-of-State Distributor Ban pales in comparison to the protected expressive activity it prohibits

because, contrary to Defendants' inappropriate and baseless factual assertions, *see* MTD at 20, Kansas has not experienced problems with fraud or irregularities. Compl. ¶¶ 44, 73 & n.2.[10]

And notwithstanding Defendants' argument, mailing an advance ballot application to a Kansas voter is not "[t]he only thing Plaintiffs cannot do" under HB 2332. MTD at 24. The Out-of-State Distributor Ban reaches much further to prohibit all out-of-state speakers from even "caus[ing]" an application "to be mailed" to a Kansas voter, Compl. ¶¶ 52. Out-of-state entities could "cause" an advance ballot application "to be mailed" into Kansas by, for example, encouraging a partner organization to mail applications to Kansas voters, encouraging a Kansas-based voter to mail applications to their Kansas-based family, or providing grants and technical support to Kansas organizations to mail applications to Kansas voters. *See id.* ¶ 60. Illegitimate applications of the Ban outnumber its legitimate applications, which are non-existent because mailing advance mail ballot applications is protected political speech, and there is no issue with fraud. HB 2332's steep per-mailing penalty and the requirement that the Attorney General investigate *every* alleged violation, *id.* ¶¶ 53-54, deter Plaintiffs and others outside Kansas from engaging with anyone who might mail advance ballot applications into Kansas, *id.* ¶¶ 60, 93, 108.

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The Personalized Application Prohibition also reaches substantial protected activity and chills speech. Under the Prohibition, "[n]o portion" of an advance mail ballot application may be personalized before mailing. *Id.* ¶ 65. The Prohibition applies even when the personalized information is true, is personalized by drawing from the State's own voter information database, and is inscribed by the voter or at their specific request. *See id.* ¶ 100. The Prohibition is overbroad as-applied given that Plaintiff VoteAmerica would only send an application at a voter's request, and Plaintiff VPC uses information from *state-generated* voter registration lists. *Id.* ¶¶ 29, 45.

[10] The Court may take judicial notice of these statements on a motion to dismiss. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009).

Plaintiff VPC's 1.2 million personalized applications sent to Kansas voters in the 2018 and 2020 elections again demonstrate the scale of speech restricted by this prohibition. *Id.* ¶ 29.[11] And the threat of *criminal* sanctions attached to each purported violation pose a "realistic danger" of chilling protected speech of Plaintiffs and third parties. *Id.* ¶ 108; *Faustin*, 423 F.3d at 1199.

C. Plaintiffs state a valid dormant Commerce Clause claim (Count IV).

To state a claim under the dormant Commerce Clause, Plaintiffs must plead that the law "mandate[s] 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994)). Plaintiffs have done so.

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Defendants do not deny that Plaintiffs engage in interstate commerce. MTD at 26-27; *see* Compl. ¶ 117. Defendants also do not contest that the Out-of-State Distributor Ban facially discriminates against interstate commerce, MTD at 27, nor could they given the plain language of the Ban. *See* HB 2332 § 3(l)(1); Compl. ¶ 52. In fact, Defendants do not even argue that Plaintiffs have *failed to plead* a valid dormant Commerce Clause claim, as they must to sustain their motion to dismiss. This should end the Court's analysis. Rather, Defendants attempt to carry *their* burden of defending the discriminatory Out-of-State Distributor Ban by relying entirely and inappropriately on purported facts beyond those alleged in the Complaint. Defendants' backup argument based on the market participant exception also fails because the State admits it is acting as a market regulator, rather than a market participant. MTD at 16, 18, 28.

1. The Out-of-State Distributor Ban facially discriminates against interstate commerce and is thus per se unconstitutional.

Defendants "do not deny that H.B. 2332 restricts non-Kansas residents from mailing advance mail voting applications to Kansas voters." MTD at 27. This concession should end the

[11] HB 2332 § 3(d)(4) permits narrow exceptions to the Personalized Application Prohibition for certain public officials but not Plaintiffs and all other private entities that solicit voters to apply to vote by advance mail ballot. Compl. ¶ 110.

inquiry. Statutes that mandate differential treatment of in-state and out-of-state entities by "explicitly identifying geographical distinctions . . . facially discriminate[] against interstate commerce." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1141 (10th Cir. 2016); *see Granholm*, 544 U.S. at 475 ("[R]equir[ing] an out-of-state firm to become a resident in order to compete on equal terms" discriminates against interstate commerce). A state law that discriminates against interstate commerce, "is virtually per se invalid." *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994). Courts "have generally struck [them down] without further inquiry," *Brown-Forman Distillers Corp. v. N.Y. St. Liquor Auth.*, 476 U.S. 573, 579 (1986).

Defendants' claim that the "State['s] goal is wholly unrelated to protectionism," is irrelevant. MTD at 26, 28-30. "[F]acial discrimination by itself may be a fatal defect, *regardless of the State's purpose*, because 'the evil of protectionism can reside in legislative means as well as legislative ends.'" *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). In fact, "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste*, 511 U.S. at 100. The Tenth Circuit, for example, held that a law criminalizing online distribution of material harmful to minors violated the dormant Commerce Clause. *Johnson*, 194 F.3d at 1160; *see also SD Voice v. Noem,* 380 F. Supp. 3d 939, 951 (D.S.D. 2019) (same for law banning out-of-state contributions to ballot question committees). Regardless of the State's goal, the Out-of-State Distributor Ban "mandate[s] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (quoting *Or. Waste*, 511 U.S. at 99). No further inquiry is needed. *See Brown-Forman,* 476 U.S. at 579.

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2. Even if the Out-of-State Distributor Ban were not per se illegal, the State could not justify its discrimination against interstate commerce.

Moreover, even if the per se rule did not apply,"[a]t a minimum . . . facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of

nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337. As Defendants acknowledge, MTD at 27, ultimately, "[t]he burden is on the State to show that the discrimination is demonstrably justified," *Granholm v. Heald*, 544 U.S. 460, 492 (2005). This burden is heavy. Courts may "uph[o]ld state regulations that discriminate against interstate commerce *only* after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 493 (emphasis added). Defendants have not met this burden, nor could they in contrast to Plaintiffs' well-pled allegations. *Cressman*, 719 F.3d at 1141, 1153.

Defendants advance only speculation to justify the discriminatory ban. MTD at 27-30. Defendants assert that the Out-of-State Distributor Ban "combat[s] voter confusion" and conserves local election resources by "limit[ing] the amount of advance mail voting applications a Kansas voter receives" and "ensur[ing] the State's ability to verify the accuracy of the sender's disclosures through Kansas records." *Id.* at 28. However, on its face, the Out-of-State Distributor Ban does not in fact limit the *number* of advance mail voting applications a Kansas voter receives because in-state distributors can mail as many as they want. Defendants' claim that there are no nondiscriminatory alternatives to "verify the accuracy of the sender's disclosures through Kansas records," *id.* at 28, is similarly unsound. HB 2332 requires the sender to disclose its name, address, and (if the sender is an organization) the name of its president, chief executive officer, or executive director. HB 2332 § 3(k)(1). Defendants cannot plausibly claim that, in this era of seamless interstate communications, it will be more difficult to verify the information required by HB 2332 for out-of-state distributors compared to in-state distributors.

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In any event, Defendants fail to articulate a legitimate local interest in banning *only* out-of-state distributors of advance mail voting applications that could not be served by nondiscriminatory alternatives. While claiming 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," MTD at 27-28, Defendants fail to explain why banning out-of-state distributors, but not their in-state counterparts, serves those interests. Nothing in the record before the legislature (nor in Defendants' brief, for that matter) demonstrates that out-of-state distributors as a class behave differently from in-state distributors. This flaw is fatal to Defendants' argument. *Granholm*, 544 U.S. at 494; *cf. Yes on Term Limits*, 550 F.3d at 1030 (rejecting a similar argument under strict scrutiny based on failure to "prove[] that, as a class, non-resident petition circulators" behaved differently).

Defendants also fail to explain why nondiscriminatory alternatives are unavailable to meet these purported goals. Even if the State were seeking to achieve legitimate, non-protectionist interests, it must still establish that "nondiscriminatory alternatives have proved unfeasible." *Hughes*, 441 U.S. at 338. Defendants identify no reason why the State cannot implement reasonable, nondiscriminatory protocols for both in-state and out-of-state entities to minimize any risk of voter confusion, fraud, and expenditure of administrative resources. MTD at 27-28; *see* Compl. ¶ 123. Defendants suggest a nondiscriminatory alternative: prohibiting all "unofficial third part[ies]" from distributing advance mail voting applications. MTD at 29.[12] HB 2332's discriminatory Ban breaches the dormant Commerce Clause because "nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Hughes*, 441 U.S. at 338.

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3. The market participant exception does not bar Plaintiffs' claim.

Defendants invoke a limited exception to the dormant Commerce Clause applicable when a state acts as a market participant. MTD at 29. *New Energy Co. of Indiana v. Limbach*, 486 U.S.

[12] Defendants' suggested alternative has multiple constitutional and practical drawbacks, but facial discrimination in violation of the dormant Commerce Clause is not one of them, and Defendants deny any constitutional infirmity.

269, 277 (1988). But, by banning an entire class of private actors from participating in the relevant interstate markets on threat of civil penalties, the State is acting as a market *regulator*, not as a market *participant*. This exception therefore cannot immunize the Out-of-State Distributor Ban.

The market participant exception "differentiates between a State's acting in its distinctive governmental capacity" as a regulator, "and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause." *New Energy*, 486 U.S. at 277; *White v. Massachusetts*, 460 U.S. 204, 207 (1983) (emphasizing "distinction . . . between States as market participants and States as market regulators"). For instance, "[w]hen a public entity participates in a market, it may sell and buy what it chooses to or from whom it chooses, on terms of its choice," including in ways that discriminate against interstate commerce. *Tri-M Grp. v. Sharp*, 638 F.3d 406, 420 (3d Cir. 2011). The State, for example, could print ballots only on paper made in-state. But the exception does not shield discriminatory restrictions governing activity outside the state's own transactions in the market; "the doctrine only protects the state's participation itself." *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 624-25 (5th Cir. 2010); *see Waste Mgmt. Holdgs., Inc. v. Gilmore*, 252 F.3d 316, 345 (4th Cir. 2001) (state "was not acting as a private participant" by regulating conduct of others in market). When a state "use[s] its regulatory power to control the actions of others in [a] market," the exception does not apply. *Tri-M*, 638 F.3d at 420; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992) (rejecting market participation exception and striking down a state requirement that all Oklahoma power plants to use at least 10% Oklahoma coal because the law also regulated private participants in the market).

Here, by barring out-of-state entities from distributing applications, Kansas is "regulat[ing] *others* in the market in which it participates." *Davis*, 602 F.3d at 625 (emphasis added). Because

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the Out-of-State Distributor Ban "evinces an effort to regulate," rather than participate in a market, the market participant exception does not apply. *Waste Connections of Kansas, Inc. v. City of Bel Aire, Kan.*, 191 F. Supp. 2d 1238, 1246 (D. Kan. 2002); *see Wyoming*, 502 U.S. at 456.[13]

Moreover, "the inclusion of a civil penalties provision in a state statute [is] indicative that the section constitute[s] a regulatory measure outside the bounds of the market participant exception." *Tri-M*, 638 F.3d at 425. A state invoking this exception cannot "employ tools in pursuit of compliance that no private actor [in the market] could wield." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006).

Defendants' assertion that the objective of the Ban is to have *the State* act as the principal or sole distributor of advance mail voting applications, *see* MTD at 29-30, is implausible as the law allows in-state distributors to continue mailing applications without restriction.

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If there were any doubt that the exception applies, it dissipates with Defendants' concession that the State is regulating through the Out-of-State Distributor Ban. *See* MTD at 18 (asserting the State is using its "authority to regulate elections"); *id.* at 28 (arguing "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots"); *id.* at 16 (contending "[i]t is simply conduct that is being regulated" by HB 2332). Defendants cannot have it both ways.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

[13] Defendants' reliance on *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) is misplaced. Unlike here, that ordinance "treat[ed] all private companies exactly the same." *Id.* at 342. And it was "decided independently of the market participation precedents." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 228, 339 (2008). The plurality opinion in *Department of Revenue of Kentucky v. Davis*, supports Plaintiffs' argument. The Court recognized that "in the paradigm of unconstitutional discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by local private actors, not by governments and those they employ to fulfill their civic objectives." *Id.* at 347. The Out-of-State Distributor Ban falls into this "forbidden paradigm" since it "favors . . . local private [distributors]" on its face. *Id.* at 348.

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By: */s/ Mark P. Johnson*
Mark P. Johnson

DENTONS US LLP
Mark P. Johnson KS Bar #22289, D. Kan. #22289
Wade Carr KS Bar #25105, D. Kan. #25105
4520 Main Street, Suite 1100
Kansas City, MO 64105
816/460-2400
816/531-7545 (fax)
mark.johnson@dentons.com
wade.carr@dentons.com

SIMPSON THACHER & BARTLETT LLP
Jonathan K. Youngwood (*pro hac vice*)
Meredith D. Karp (*pro hac vice*)
Brooke Jarrett (*pro hac vice forthcoming*)
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
jyoungwood@stblaw.com
meredith.karp@stblaw.com
bonnie.jarrett@stblaw.com

CAMPAIGN LEGAL CENTER
Robert N. Weiner (*pro hac vice*)
Aseem Mulji* (*pro hac vice*)
Dana Paikowsky* (*pro hac vice*)
Hayden Johnson (*pro hac vice*)
Alice C.C. Huling (*pro hac vice*)
1101 14th Street, NW, St. 400
Washington, D.C. 20005
(212) 736-2000
RWeiner@campaignlegalcenter.org
AMulji@campaignlegalcenter.org
DPaikowsky@campaignlegalcenter.org
HJohnson@campaignlegalcenter.org
AHuling@campaignlegalcenter.org

* Licensed to practice in CA only; supervised by Robert N. Weiner, member of the D.C. Bar

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 30th day of July 2021, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Mark P. Johnson

Mark P. Johnson

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