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

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PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs VoteAmerica and Voter Participation Center ("VPC") are non-partisan civic groups that seek to persuade registered Kansas voters to vote, particularly by advance mail ballot, and to assist those voters in doing so by mailing them personalized advance mail ballot applications. These communications express Plaintiffs' belief that a truly representative government requires the participation of all voters—including those who are unable to vote in person on election day or who require assistance to vote by mail. In 2020, Plaintiffs successfully conveyed this message by persuading and assisting tens of thousands of Kansas voters to vote by mail. But the Kansas legislature passed HB 2332, containing a range of new Ballot Application Restrictions that undermine Plaintiffs' pro-voting message and halt Plaintiffs in their tracks for fear of harsh penalties and criminal prosecution.[1] Plaintiffs seek a preliminary injunction to enjoin the enforcement of two HB 2332 provisions: (1) the Out-of-State Distributor Ban, which prohibits Plaintiffs, who are not residents or domiciled in Kansas, from mailing registered Kansas voters advance mail ballot applications; and (2) the Personalized Application Prohibition, which criminalizes the act of personalizing those applications.

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Plaintiffs' distribution of personalized advance mail ballot applications constitutes core political speech deserving of the utmost First Amendment protection. Supreme Court and Tenth Circuit precedent dictate this result, despite Defendants' reliance on a handful of out-of-Circuit cases to recast Plaintiffs' speech as non-expressive conduct. Those cases are inapposite and inapplicable here as Plaintiffs send *personalized* applications, which constitute speech, and their mailing is both inherently intertwined with and conveys Plaintiffs' pro-advance mail voting message. Plaintiffs' activities also serve their protected associational rights because, in distributing

[1] This Reply uses the defined terms in Plaintiffs' Moving Brief ("Mov. Br."), Dkt. No. 25.

the personalized applications, Plaintiffs associate with both voters and other civic groups to persuade them to action.

These Ballot Application Restrictions—which inhibit Plaintiffs' core political speech and association, while targeting Plaintiffs based on where they reside, the content of their speech, and the viewpoint they express—are subject to, and fail, strict First Amendment scrutiny. Defendants contend that a scattershot of state interests are undermined by the distribution of advance mail ballots from out-of-state third parties, but offer scant evidence to show those purported interests are real. Their unsupported statements cannot satisfy strict scrutiny, and to the extent they can be credited, the Ballot Application Restrictions are not narrowly tailored to further such interests. Moreover, HB 2332 separately violates the First Amendment because its restrictions are overbroad, burdening innocent associations and punishing a wide sweep of protected speech.

The Out-of-State Distributor Ban also breaches the dormant Commerce Clause. On its face, the law discriminates against Plaintiffs' activities in interstate commerce based on their residence outside Kansas. The dormant Commerce Clause protects these non-profits' activities as much as it protects the activities of major companies, and the law's facial discrimination against them is *per se* unconstitutional. These points are irrefutable, and Defendants do not contest them. Instead, they seek to obscure the proper standard and stretch the cases to create exceptions that do not exist.

Absent an injunction, Plaintiffs will suffer irreparable harm. Should HB 2332 go into effect, it will encumber their First Amendment freedoms and obstruct the free flow of the interstate market in which Plaintiffs participate. Failing to enjoin the Ballot Application Restrictions risks setting Plaintiffs back to where they cannot meet the fast-approaching deadline for finalizing their application distributions in time to advocate their beliefs during Kansas's 2022 primary elections.

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Enjoining the challenged provisions would not inflict substantial harm on Defendants. And it would further the public interest in promoting Kansans' ability to receive vital encouragement and assistance to exercise their rights to request and vote an advance mail ballot. In the face of this, Defendants repeatedly attempt to deflect by situating this lawsuit as part of some unspecified coordinated, political attack. This distraction effort is baseless and beside the point. Plaintiffs have no involvement in a separate action filed by unrelated Kansas-based organizations challenging other aspects of HB 2332 under state law in state court. What is relevant for the Court is that Plaintiffs' claims are substantially likely to succeed on the merits and they will suffer irreparable harm absent an injunction, whereas an injunction will not harm Defendants, and it will further the public interest. The Ballot Applications Restrictions should be preliminarily enjoined.

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ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE UNDER ARTICLE III

Defendants argue that (a) Plaintiffs lack standing; (b) Plaintiffs' claims are unripe; and (c) Defendants are entitled to sovereign immunity. As explained in Plaintiffs' Opposition to Defendants' Motion to Dismiss (Dkt. No. 31 ("Opp.")) at Section I., pp. 2-11, Defendants are wrong on all three fronts.

First, Plaintiffs have established that they suffer several injuries-in-fact: (1) they face a credible and imminent threat of prosecution and civil enforcement under HB 2332; (2) the statute *currently* chills their speech and associations; and (3) the statute curtails Plaintiffs' access to the interstate market by barring them from distributing advance mail ballots in Kansas. *See* Opp. at 3-8. These arguments apply with equal force here and are incorporated by reference in this Reply. Defendants do not assert any additional jurisdictional arguments in their Response to Plaintiffs' Motion for a Preliminary Injunction (Dkt. No. 29 ("Response" or "Resp.")). As such, Plaintiffs' Opposition fully addresses—and defeats—Defendants' jurisdictional arguments.

Moreover, Defendants recently have made several concessions that further establish the justiciability of Plaintiffs' claims. With respect to the threat of enforcement against Plaintiffs, Defendants now concede that Plaintiffs' conduct "fits squarely within the scope" of HB 2332. *See* Resp. at 6 n.2, 7 n.3 (noting that Plaintiff VPC "does engage in conduct targeted by § 3(k)" and "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)"). While Defendants contend that Plaintiff VoteAmerica is not subject to the Personalized Application Prohibition in HB 2332 § 3(k), given the statutory language, this legal argument is hardly the kind of assurance that would enable VoteAmerica to risk offering its print-and-mail tool in Kansas. A sworn statement or a stipulation is necessary. *Cf. Baker v. USD 229 Blue Valley*, 979 F.3d 866, 873 (10th Cir. 2020) (involving a declaration and formal Attorney General opinion that plaintiff's exemption would not be revoked).[2] Should Defendants change course and later argue that VoteAmerica does in fact solicit voters to return and file their advance voting ballot applications via their print-and-mail mailings, HB 2332 § 3(k) would be unconstitutional when applied to VoteAmerica for all of the reasons asserted below. *See infra* III.

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And although Defendants argue that they "have made no statements whatsoever about future prosecutorial intents under [HB 2332]," Defendants' Memorandum in Support of Motion to Dismiss (Dkt. No. 27 ("MTD")) at 7, earlier this week, Defendant Schmidt said that "election-integrity laws will be enforced and election crimes, like all other crimes, will be prosecuted when

[2] If Defendants truly do not intend to enforce the Personalized Application Prohibition against VoteAmerica, Plaintiffs request a formal declaration reflecting that intent. VoteAmerica also has no assurance that other Kansas entities with prosecutorial authority under HB 2332 § 3(k)(5), such as other District Attorneys, will not attempt to enforce this criminal provision against them—far from an idle risk given the text of the statute. Defendants' concession must offer more than a representation in briefing to allay VoteAmerica's credible fear of prosecution.

warranted by the evidence."[3] If there were any doubt about Plaintiffs' credible fear of prosecution—and there was not—Defendant Schmidt has resolved it in Plaintiffs' favor.

Second, given these imminent and ongoing injuries, all four of Plaintiffs' claims are ripe for review, and their facial attacks on HB 2332 do not implicate any prudential reasons for the Court to refuse to exercise its jurisdiction. *See* Opp. at Section I.B., pp. 8-9.

Finally, Plaintiffs properly rely on the *Ex parte Young* exception to Eleventh Amendment immunity, and Defendants offer no reason to believe they will not enforce HB 2332 against Plaintiffs. *See id.* at Section I.C., pp. 9-11. As noted above, Defendant Schmidt's recent statements demonstrate that HB 2332 *will* be enforced against Plaintiffs. Defendant Schmidt's "willingness to exercise" his enforcement duty vitiates his claim to Eleventh Amendment immunity. *See First Baptist Church v. Kelly*, 457 F. Supp. 3d 1072, 1078 (D. Kan. 2020).

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II. THE COURT SHOULD NOT ABSTAIN FROM PLAINTIFFS' CLAIMS

The Court should not abstain from adjudicating Plaintiffs' federal claims, which arise entirely under the Constitution of the United States. Defendants do not assert any additional arguments supporting abstention in their Response, and Plaintiffs likewise incorporate by reference the arguments asserted in their Opposition. *See* Opp. at Section II., pp. 11-13.

Plaintiffs have alleged an ongoing chilling effect caused by HB 2332's various violations of the First Amendment, and this Court has repeatedly refused to abstain under *Pullman* from First Amendment challenges to state law to avoid further chilling free speech rights. *See, e.g., Yost v. Stout*, No. 06-4122-JAR, 2007 WL 1652063, at *4 (D. Kan. June 6, 2007); *Kansans For Life, Inc.*

[3] "AG Derek Schmidt: Election crimes can be prosecuted in Douglas County," News Release, Kansas Attorney General (Aug. 2, 2021), https://ag.ks.gov/media-center/news-releases/2021-news-releases/2021/08/02/ag-derek-schmidt-election-crimes-can-be-prosecuted-in-douglas-county. The court may take judicial notice of Defendant Schmidt's public statements in a government press release. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009).

v. Gaede, 38 F. Supp. 2d 928, 934 (D. Kan. 1999). Moreover, while Defendants repeat the same unfounded and untrue assertion from their Motion to Dismiss that this lawsuit is "part of a two-prong coordinated attack" (Resp. at 1), the pendency of a lawsuit in state court bringing entirely state law claims does not favor abstention. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("Abstention should not be ordered merely to await an attempt to vindicate the claim in a state court."). Rather, the touchpoint of the abstention analysis under *Pullman* is whether the underlying state law at issue is ambiguous. *Id.* 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." *Id.* Indeed, Defendants concede that the Out-of-State Distributor Ban prohibits both VPC's and VoteAmerica's advance mail ballot activities.[4] *See* Resp. at 6 n.2, 7 n.3.

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III. PLAINTIFFS WILL LIKELY SUCCEED ON THE MERITS OF THEIR CLAIMS

Plaintiffs will likely succeed on the merits of their First Amendment and dormant Commerce Clause claims. The Ballot Application Restrictions curtail Plaintiffs' core political speech. They discriminate against speech based on its content, speaker, and viewpoint. They abridge Plaintiffs' association rights. And they are overbroad. For each of these independently sufficiently reasons, strict First Amendment scrutiny applies, and HB 2332 fails to satisfy that scrutiny because it is not narrowly tailored to serve any compelling state interest. Moreover, the Out-of-State Distributor Ban breaches the dormant Commerce Clause because it discriminates on its face against interstate commerce, restricting Plaintiffs' activity substantially affecting interstate commerce only because of their out-of-state residence.

[4] Concerning Defendants' argument that VoteAmerica is not the subject of the Personalized Application Prohibition, Defendants make no argument that the Court should abstain because that provision is ambiguous. Nor could they. At the very least Defendants concede the Prohibition unambiguously applies to VPC. *See* Resp. at 6 n.2, 7 n.3.

A. HB 2332's Ballot Application Restrictions violate the First Amendment

1. Plaintiffs are Engaged in Core Political Speech and Association

Plaintiffs' advance mail ballot activities constitute protected First Amendment speech and association, not merely non-expressive 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. *Meyer v. Grant*, 486 U.S. 414, 421, 422 & n.5 (1988); *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027-28 (10th Cir. 2008); *see generally* Mov. Br. at 12-14. Moreover, by speaking in favor of advance mail voting that is safe, accessible, and beneficial, Plaintiffs take sides in a contested political debate. Cleaver Decl. ¶¶ 15-17; Lopach Decl. ¶¶ 15-16, 19. Such "advocacy of a politically controversial viewpoint" in favor of mail voting is "the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). 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.

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In arguing that Plaintiffs' advance mail voting activities are not core political speech, Defendants misguidedly rely on *Lichtenstein v. Hargett* (Resp. at 7-8), a case from the Middle District of Tennessee. *Lichtenstein* proceeds from the assumption—both incorrect and inapplicable here—that a recipient of a blank absentee ballot application, without additional written words, would not discern the message that the plaintiffs in that case wished to convey. 489 F. Supp. 3d 742, 768 (M.D. Tenn. 2020). Here, Plaintiffs' mailings *do* include additional words that encourage voters to submit the advance mail ballot application, making the object of their message

unmistakably clear. The mailings inform registered voters about the enclosed, personalized applications and include persuasive messages such as: "Voting by mail is EASY"; and "County election officials in Kansas encourage voters to use mail ballots in upcoming elections." *See* Voter Participation Center Sample Mailer (Dkt. No. 25-4). In fact, tens of thousands of Kansas voters understood Plaintiffs' message and successfully submitted advance mail ballot applications received from VPC, Lopach Decl. ¶ 6, and proactively requested applications from VoteAmerica, Cleaver Decl. ¶ 7. And, 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. Cleaver Decl. ¶¶ 5, 10, 16-17; Lopach Decl. ¶¶ 4, 7, 18-19.

Contrary to Defendants' argument that Plaintiffs' activities are not "so inherently expressive" to warrant First Amendment protection (Resp. at 12), Plaintiffs' distribution of personalized advance mail voting applications encourages and facilitates Plaintiffs' pro-mail voting message and is "characteristically intertwined" with expressing that message. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Indeed, while largely ignored by Defendants, other courts have found that distributing and assisting voters with requests for absentee ballots, as well as other voter registration activities, are protected speech and associational activities. *See, e.g.*, *DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785, at *30 (Minn. Dist. Ct. July 28, 2020) ("[T]he challenged laws do not exclusively involve the ministerial receipt and delivery of ballots, or acting as a mere scrivener . . . it is the discussion of whether to

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vote absentee and allow your ballot to be collected . . . that inherently implicates political thought and expression."); *see also* Mov. Br. at 12-13.[5]

The cases Defendants do cite concern restrictions on who may collect and return registration or applications and are thus inapposite. *See, e.g.*, *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 897 (5th Cir. 2012) (noting that the court was not considering a restriction on distributing voter registration applications and encouraging citizens to vote); *League of Women Voters of Florida v. Browning*, 575 F. Supp. 2d 1298, 1321-22 (S.D. Fla. 2008) (same); *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020) (same). Collecting and returning completed advance mail ballot applications is not the activity in which Plaintiffs engage. Rather, Plaintiffs distribute applications to voters—for voters to complete and return by themselves—in order to disseminate and facilitate their message encouraging voters to vote by advance mail ballot. Plaintiffs further persuade voters to do so by personalizing those applications and providing instructions, exhortations and educational messages, and postage-paid pre-addressed envelopes for voters to use. For example, while the Fifth Circuit in *Voting for America, Inc. v. Steen* rejected a

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[5] Defendants take issue with Plaintiffs' citation to *Priorities USA v. Nessel*, 462 F. Supp. 3d 792 (E.D. Mich. 2020) ("*Nessel I*"). *See* Resp. at 12 n.4. But Defendants cannot deny that the court clearly held (both in its ruling on the defendants' motion to dismiss and the plaintiffs' motion for a preliminary injunction) that the conduct plaintiffs wanted to engage in—including educating voters about their options to use and request absentee voter ballot applications and distributing applications—necessarily involved political communication and association and thus was subject to exacting scrutiny. *Id.* at 812; *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 612 (E.D. Mich 2020) ("*Nessel II*"). While Defendants are correct that the plaintiffs' motion for a preliminary injunction was denied, the court applied the incorrect level of scrutiny. *Id*. In applying an exacting scrutiny standard applicable only in the campaign finance disclosure context, the court in *Nessel II* looked to whether the law at issue had a substantial relationship to a "sufficiently important" governmental interest. *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). But here, under Tenth Circuit precedent, strict scrutiny is required, *see infra* III.A.2., and "demands state regulations imposing severe burdens on speech be narrowly tailored to serve a compelling state interest." *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (citation omitted). Moreover, in denying plaintiffs' motion for a preliminary injunction, the court focused on concerns about fraud in the collection and return of completed absentee ballot applications (concerns that actually appeared in the legislative record, unlike here), which are not present here because Plaintiffs' speech occurs on the distribution end and then voters complete and submit their own applications. *Nessel II*, 487 F. Supp. 3d at 614. Indeed, in denying relief the court noted that it was "impossible to separate the ban on possessing and returning applications to vote absentee from the ban on soliciting or requesting to return absentee ballot applications." *Id.* at 611.

First Amendment challenge to a law that provided only Texas residents may be appointed to receive and deliver completed voter registration applications, the court "accepted" that certain other registration activities, such as "'urging' citizens to register; 'distributing' voter registration forms; [and] 'helping' voters to fill out their forms," do involve protected speech. 732 F.3d 382, 389 (5th Cir. 2013).[6] Those speech activities are indistinguishable from Plaintiffs' speech here.

Additionally, the Tenth Circuit has explicitly rejected Defendants' argument that Plaintiffs' activities do not constitute speech because Plaintiffs have other avenues to express their message. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002) (holding that the Court is "not persuaded" by the argument that plaintiffs were not "completely shut out" of engaging in speech by the residency requirement because plaintiffs' freedom "to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection"). As in *Chandler*, Plaintiffs' preparation of personalized advance mail ballot applications and the provision of those applications to registered voters is Plaintiffs' "most effective, fundamental, and perhaps economical avenue of political discourse" and "[t]he First Amendment protects Plaintiffs right, not only to advocate their cause but also select what they believe to be the most effective means for doing so." *Id.* (quoting Meyer, 486 U.S. at 424); Cleaver Decl. ¶ 16; Lopach Decl. ¶ 18.

Defendants' further argument, based on the Fifth Circuit's decision in *Voting for America, Inc. v. Steen*, that in distributing personalized advance mail voting applications Plaintiffs seek to

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[6] Defendants' reliance on *League of Women Voters v. Browning*, Resp. at 8, is similarly misplaced. There, the court acknowledged that plaintiffs' "interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity," but ruled the challenged provisions "did not place any direct restrictions or preconditions on those interactions" such as "restrict[ing] who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to solicit new voters and distribute registration applications." 575 F. Supp. 2d at 1321-22. HB 2332 does restrict "who is eligible to participate" in the "constitutionally protected activity" that Plaintiffs' partake of (the Out-of-State Distributor Ban), and "what methods or means [they] may use to solicit new voters and distribute applications" (the Personalized Application Prohibition). *See id.*

not only speak, "but succeed in their ultimate goal" (Resp. at 9-10) misunderstands this point. *Steen* stands for the proposition that once a voter has *completed* his or her application, the act of collecting and returning that application is mere conduct in furtherance of the goal of registering that voter, and that any speech at that point is the voter's. 732 F.3d at 390. But under controlling Tenth Circuit and Supreme Court precedent, here, Plaintiffs' communications which *precede* any speech by the voter are protected core political speech. In *Meyer*, the plaintiffs were proponents of a ballot initiative petition who wished to gather the required signatures through paid petition circulators, which Colorado law banned.[7] The Supreme Court held this ban unconstitutional because restricting how plaintiffs could communicate their message—paying circulators—stripped plaintiffs of their most effective method for getting their message out and reduced the overall quantum of speech on the issue. 486 U.S. at 422-24. The question before the Supreme Court in *Meyer* was not whether paying circulators was itself speech, but whether by denying plaintiffs their most effective method of speaking, the law at issue violated the First Amendment.

Here, too, HB 2332 restricts Plaintiffs' most effective method of advocating advance mail voting: distributing personalized applications. Cleaver Decl. ¶¶ 2-5, 15-16, 22; Lopach Decl. ¶¶ 4, 15-19. Defendants' argument that this line of cases is distinguishable because petitions themselves are speech (Opp. 11-12) is unavailing. Not only is Plaintiffs' pro-advance mail voting message plainly speech, but the applications themselves, prepared and personalized by Plaintiffs, are also speech, and the distribution of those applications inherently conveys Plaintiffs' message.

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[7] *Chandler* and *Yes on Term Limits* are in the same vein—the laws that restricted the plaintiffs from advancing their petition with non-resident petition circulators both reduced the total quantum of speech and curtailed the plaintiffs' ability to employ the most effective means of disseminating their message.

2. Strict Scrutiny Applies to the Ballot Application Restrictions

HB 2332 abridges Plaintiffs' core political speech; limits Plaintiffs' speech based on content, viewpoint and speaker identity; and impedes Plaintiffs' right to associate with others to persuade to political action. As such, strict scrutiny, not *Anderson-Burdick* balancing, applies.

In the Tenth Circuit, strict scrutiny applies where "the government restricts the overall quantum of speech available to the election or voting process." *See Yes on Term Limits*, 550 F.3d at 1028; *Chandler*, 292 F.3d at 1242. The Ballot Application Restrictions reduce the total quantum of speech by banning all non-residents of Kansas from distributing advance mail ballot applications along with anyone else who would wish to send personalized applications. The Ballot Application Restrictions thus limit "the number of voices who will convey [Plaintiffs'] message" and "the size of the audience they can reach." *Meyer*, 486 U.S. at 422-23.

Strict scrutiny also applies because HB 2332 constrains Plaintiffs' speech based on what it says, the viewpoints expressed, and who expresses them. HB 2332 is content-based as it covers Plaintiffs' communications only because they include an advance mail ballot application to facilitate their effort to persuade voters to apply. It is viewpoint-based because only communications *advocating* advance mail voting would then include a personalized application. And the Out-of-State Distributor Ban is speaker-based because it allows in-state speakers to continue their communications unimpaired but bars the same speech from out-of-state speakers explicitly because of their residence. Defendants do not address these arguments, *see* Mov. Br. 17-18, despite conceding that HB 2332 discriminates against out-of-state speakers on its face, *see* Resp. at 26; MTD at 27. The law is clear that such restrictions based on content, viewpoint, and speaker are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015); *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 1000-01 (D. Kan. 2020) (Vratil, J.).

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Also unaddressed by Defendants is Plaintiffs' argument that 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. Plaintiffs have a right to "associate for the purpose of assisting persons" to request an advance mail ballot, and to "persuade [their audience] to action" through that association. *See NAACP v. Button*, 371 U.S. 415, 428-31, 437 (1963). The First Amendment also prohibits "governmental interference" with an organization's "means of communicating" to further their expressive associations. *Healy v. James*, 408 U.S. 169, 181-83 (1972). Plaintiffs associate to persuade their audience to action and increase participation in the electoral process from both voters and other civic organizations. They distribute advance mail voting applications as a means of communicating with their associational base and building a trusted relationship for further expressive engagement to achieve their shared pro-democracy goals. Lopach Decl. ¶¶ 3-6, 15-16, 20, 22; Cleaver Decl. ¶¶ 2-3, 7, 17-21. HB 2332 curtails these protected associations because it is a "direct regulation of communication and political association, among private parties, advocat[ing] for a particular change." *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 725 (M.D. Tenn. 2019). This abridgment of Plaintiffs' associational rights warrants strict scrutiny. *Button*, 371 U.S. at 438-39.

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Moreover, even if *Anderson-Burdick* were an appropriate analytical lens to affix the level of scrutiny, as Defendants implore,[8] strict scrutiny still would apply because Plaintiffs have established that HB 2332 severely burdens their speech. *Fish v. Schwab*, 957 F.3d 1105, 1124-25

[8] Defendants' argument for why and how *Anderson-Burdick* should apply makes clear it is inapplicable here. Defendants correctly explain that *Anderson-Burdick* is the framework with which courts analyze laws regulating elections that restrict the *right to vote* and access to the ballot. Resp. at 13. But here, Plaintiffs challenge HB 2332's restrictions to their own First Amendment free speech rights, not others' right to vote or ballot access. Moreover, in arguing that *Anderson-Burdick* should be applied in such a way that would be akin to rational basis review, Defendants represent HB 2332 as a "nondiscriminatory regulation." *Id.* at 14. But Defendants admit HB 2332 is facially discriminatory based on residency. Resp. at 26; MTD at 27. In all events, strict scrutiny, not lesser scrutiny under *Anderson-Burdick*'s sliding scale is the appropriate here. *Hargett*, 400 F. Supp. 3d at 724.

(10th Cir. 2020); *cf. Buckley*, 525 U.S. at 207 (Thomas, J., concurring) (stating that political speech burdens are *per se* severe). Under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as the severity of the burden on speech increases, the level of scrutiny rises. "[S]evere restriction[s]" must be "justified by a narrowly drawn state interest of compelling importance"—the functional equivalent of strict scrutiny. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008).

Here, the Ballot Application Restrictions are severe because they effectively stop Plaintiffs from speaking in Kansas by preventing them from distributing personalized advance mail ballot applications in Kansas altogether. *See* Cleaver Decl. ¶ 25; Lopach Decl. ¶ 24; *see also Chandler v. City of Arvada*, 233 F. Supp. 2d 1304, 1311 (D. Colo. 2001) (finding ordinance that restricted nonresidents from circulating petitions placed a "substantial and severe burden on political speech" because it excluded a large group of persons from participating in political speech, drastically limited the number of voices that convey the proponents' message, and significantly reduced the total quantum of speech on a public issue).

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3. The Ballot Application Restrictions Fail any Level of Scrutiny

The Ballot Application Restrictions fail strict scrutiny, or any alternative level of scrutiny, because they are not sufficiently tailored to serve a compelling state interest. *See Yes on Term Limits*, 550 F.3d at 1028. Defendants' unsupported claims about "the strength of the governmental interest" fail to "reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010). Defendants must "do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality) (citations omitted). They must demonstrate *through evidence* "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*; *accord Buckley*, 525 U.S. at 210 (applying *Turner* and concluding that "the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem").

Defendants' bare assertions of interest—supported by no sufficient evidence, documentation, citation or common sense—are inadequate to establish that the interests are real.

Here, Defendants claim that their interests are primarily avoidance of confusion and facilitation of an orderly and efficient administrative process. Resp. at 14. But Defendants have failed to proffer any evidence—and nothing in the record before this Court suggests—that out-of-state speakers *as a class*, or personalized applications *as a practice*, are the source of any purported voter confusion or administrative burdens. *See Yes on Term Limits*, 550 F.3d at 1029-31 (requiring evidence of a class-wide problem to justify a class-wide restriction).

For example, while Defendants state that "many individuals" received multiple advance ballot applications forms "some of which were partially completed, and often incorrectly" and voters called their county clerks' offices "angry and confused," they provide no evidence of this. In fact, Exhibit B to Defendants' Response—to which Defendants do not even cite for this proposition—merely states that county election officers received calls from confused (not angry) voters who received "unsolicited advance ballot applications from third parties" (not necessarily out-of-state) and merely cites as one example that "multiple mailings" (not necessarily applications) were sent by the Center for Voter Information based out of Springfield, Missouri. *See* Resp. at Ex. B. Exhibit B is silent on the issue of whether partially completed applications were completed incorrectly, except perhaps by voters who, for example, did not properly affix a signature. *Id.* These baseless and conclusory assertions are plainly insufficient; it simply "does not follow like the night the day that" out-of-state distributors as a class and personalized applications as a practice are responsible for confusion and burdens, *see Buckley*, 525 U.S. at 204 n.23, and Defendants fail to provide the necessary factual basis to show that these asserted interests are real.

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Similarly, Defendants' purported interest in preventing fraud is implausible. Defendants claim that a hypothetical individual receiving multiple advance mail ballot applications is an "invitation for potential fraud," which the state has an interest in avoiding. Resp. at 15. Missing from this argument, however, is any explanation of how.[9] While voters request an advance mail ballot by sending in an application, and perhaps even multiple applications (contrary to explicit instructions in the case of applications provided by VPC, *see* Lopach Decl. ¶ 7), that is not voting, and the cases to which Defendants cite are about perceived fraud *in actual voting*, itself a vanishingly rare occurrence.[10]

In Kansas, election officials maintain a list of every voter who requests an advance mail ballot and do not send out more than one per voter. Kan. Stat. Ann. § 25-1122(i). And Secretary Schwab himself stated after the 2020 election that "Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems . . . . We are very pleased with how the election has gone up to this point."[11] Indeed, Defendants' entire proffered interest in preventing fraud and concerns about voters obtaining duplicate advance mail ballot applications from out-of-state entities "potentially engaging in other" (entirely undefined and unsubstantiated) "nefarious activities" is a red herring given that the absentee ballot application is

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[9] Contrary to Defendants' argument, Plaintiffs do not argue that the State is "restricted" to only the interests stated explicitly in the legislative record. *See* Resp. at 15 n.6. However, at the time of filing this Motion, preventing voter confusion as a most general matter was the only State interest apparent from the legislative record on HB 2332. Indeed, although Defendants had the opportunity in their Response to substantiate any further interests relevant here beyond the legislative record, they have failed to do so. Plaintiffs do dispute, however, that "any plausible state interest" "unsupported by evidence or empirical data" (*id.*), is sufficient. The cases to which Defendants cite for this proposition all concern rational basis review, which is not applicable here. *See supra* III.A.2.

[10] Indeed, numerous courts have credited empirical expert testimony establishing that the voter fraud narrative in U.S. elections "is a fiction." *See, e.g.*, *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 822, 835 (D. Mont. 2020); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 606 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012).

[11] *See* Nick Corasaniti, Reid J. Epstein & Jim Rutenburg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times (Nov. 19, 2020), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html.

available from the Secretary of State on the Secretary of State's website where voters can print out and submit as many as they please.[12]

Insofar as Defendants claim that HB 2332 is needed to "verify the accuracy of the sender's disclosures through Kansas records" because out-of-state entities are more difficult to monitor, Resp. at 28, this post hoc rationalization is deficient. The Tenth Circuit has twice rejected residency requirements on who can engage in speech implemented on that basis. *See Yes on Term Limits*, 550 F.3d at 1030 (finding that a residency requirement was not narrowly tailored even if the state had "adequately established its contentions that the ability to question non-resident circulators . . . is necessary to prevent fraud and that non-resident circulators are more difficult to locate and question" because the state could require that circulators enter into an agreement with the state providing their contact information, agreeing to return for questioning and criminal penalties could be imposed on those who fail to do so); *see also Chandler*, 292 F.3d at 1244 (residency restriction is "substantially broader than necessary to ensure the petition process' integrity and is therefore unconstitutional"). HB 2332 itself also undermines this interest because the statute already mandates that distributors provide their required identifying information and criminally punishes noncompliance. *See* HB 2332 §§ 3(k)(1), (5). Moreover, Defendants cannot plausibly claim inability to verify out-of-state records in an era of seamless interstate communication and online access to national databases.[13]

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Even accepting Defendants' purported interests for purposes of argument, the Ballot Application Restrictions are not narrowly tailored. To begin with, they are both over- and under-

[12] *See* Application for Advance Ballot by Mail, Office of the Kansas Secretary of State, https://www.kssos.org/forms/elections/AV1.pdf (last accessed Aug. 5, 2021).

[13] This includes, for example, Plaintiffs' federal tax registrations. *See* Search for Tax Exempt Organizations, IRS.gov, https://apps.irs.gov/app/eos/ (last accessed Aug. 5, 2021) (search for VoteAmerica and Voter Participation Center).

inclusive because there is no reason to believe that out-of-state residents as a class create any more administrative difficulties or propagate more confusion or fraud than in-state residents, or that a personalized application creates more administrative difficulties or opportunities for fraud than a blank one. *See Yes on Term Limits*, 550 F.3d at 1029 (where the evidence did "support the inference that, *as a class*, non-resident circulators are more likely to engage in fraud than resident circulators" the ban on non-resident circulators was not "narrowly tailored to protect the initiative process due to a higher rate of non-resident circulator fraud"); *see also* Mov. Br. at 19-21; *ALDF*, 434 F. Supp. 3d at 1002 (to survive strict scrutiny, restriction "must not be underinclusive"). And, 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 have 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 1030, such as implementing reasonable registration, unsubscribe, or due diligence protocols for both in-state and out-of-state speakers to abide. Thus, the Ballot Application Restrictions are not sufficiently tailored to serve the State's purported interests.

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4. The Ballot Application Restrictions are Unconstitutionally Overbroad

As established in the Moving Brief, 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. 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. HB 2332 is overbroad both as applied to Plaintiffs and to parties not before the Court.

The Ballot Application Restrictions reach a substantial amount of constitutionally protected expression. In arguing that Plaintiffs and others not before this Court are still able to use means other than distributing personalized advance mail ballot applications themselves in order to encourage Kansas voters to vote by advance mail ballot (Resp. at 19-20), Defendants misapprehend why HB 2332 is overbroad. 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) (citation omitted). Assuming Defendants' asserted justifications for the Ballot Application Restrictions, their purported "legitimate sweep" would reach only speech inviting fraud or confusion. But they are overbroad because HB 2332 reaches much further than that.

As applied to Plaintiffs, the Out-of-State Distributor Ban is overbroad because Defendants do not argue that *Plaintiffs'* speech is fraudulent or confusing. Moreover, on its face, the Out-of-State Distributor Ban deters not just Plaintiffs but *all* out-of-state individuals and organizations (and even in-state organizations) from conveying advance mail voting applications to Kansas voters. *See* HB 2332 § 3(*l*)(1). Indeed, while Defendants claim that Plaintiffs fail to show a chilling effect on the First Amendment rights of parties not before the court, the state court complaint attached to Defendants' response demonstrates the contrary. *See, e.g.*, Resp., Ex. A at ¶ 22 ("[Plaintiff] would like to be able to send advance ballot applications in future elections using mail vendors who are out of state. The Advocacy Ban prevents them from doing so"); ¶ 28 ("[HB 2332 places plaintiff] at risk of being charged with criminal penalties if it mails absentee applications to voters and it continues to use the same out-of-state vendors it currently uses to send them, diminishing their ability to engage in this form of speech and associate with their constituencies in

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this way."). "[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).

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. HB 2332 § 3(k)(2). 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. 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. Cleaver Decl. ¶¶ 5-7, 10, 16, 22-23; Lopach Decl. ¶¶ 4, 7-8.

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B. The Out-of-State Distributor Ban Violates the Dormant Commerce Clause

The Out-of-State Distributor Ban on its face discriminates against Plaintiffs as non-Kansas residents and impedes their operations in interstate commerce. Defendants contest neither of these points. Such facial discrimination against interstate commerce is *per se* invalid under the dormant Commerce Clause. But even if the Court weighed the State's asserted interests in its discriminatory Ban, Defendants fail to establish that they have legitimate, non-protectionist interests and that there are no nondiscriminatory alternatives to protect any purported interests. Defendants also fail on their fallback arguments seeking to expand the market-participation exception, inflate the State's general Elections Clause authority, and shoehorn this case into the inapplicable *Pike v. Bruce Church* balancing analysis for facially neutral laws. Plaintiffs have established a substantial likelihood of success on their claim that HB 2332's Out-of-State Distributor Ban contravenes the dormant Commerce Clause.

1. The Ban is Facially Discriminatory and *Per Se* Invalid

As Defendants concede, *see* Resp. at 26, MTD at 27, on its face, the statute bans distribution of advance mail ballot applications only by entities that are not "resident[s] of [Kansas] or [] otherwise domiciled in this state." HB 2332 § 3(*l*)(1). Under the Commerce Clause's "nondiscrimination principle," a state law that facially "discriminates against interstate commerce" is "generally struck down . . . without further inquiry." *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (citation omitted).[14] This prohibition applies as much to profitmaking companies as to nonprofit institutions, and as much to the corporate giant as to a small Christian summer camp. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584-86 (1997); *see also United States v. Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001).

The geographic disparity in treatment here could not be clearer. Under the Out-of-State Distributor Ban, Kansas residents can send advance mail ballots to in-state voters and participate in the associated interstate commerce market. Out-of-state residents cannot. This discriminatory treatment restricts Plaintiffs' operations that substantially affect interstate commerce. Mov. Br. at 23-26. Because the Ban "overtly prevents foreign enterprises from competing in local markets," it is *per se* unconstitutional. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 39 (1980).

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2. The Ban Fails "Strictest" Dormant Commerce Clause Scrutiny

The *per se* rule aside, discriminatory laws such as the Out-of-State Distributor Ban are "[a]t a minimum" subject to "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). "This is an extremely difficult burden" for Defendants to carry. *Camps Newfound*, 520 U.S. at 582. They

[14] Plaintiffs provided additional dormant Commerce Clause argument concerning the Out-of-State Distributor Ban's unconstitutional facial discrimination in their opposition to Defendants' Motion to Dismiss, Opp. at 26-30, and incorporate those arguments here.

fail to carry it here because they cannot establish that the Ban furthers any legitimate local interests. Whatever their objectives, Defendants also cannot show that there are no nondiscriminatory alternatives to achieve them. To survive strict scrutiny, Defendants must show both.

Prohibiting an entire class of interstate market participants serves no legitimate local purpose. The State's local interest must be "demonstrably justified" through "concrete record evidence," *Granholm*, 544 U.S. at 492-93, and the analysis takes a class-wide view. *Lewis*, 447 U.S. at 43. In *Lewis*, for example, the Supreme Court ruled unconstitutional a law that "prohibit[ed] ownership of local investment or trust businesses" by any firms that had their "location of principal operations outside [the State]." *Id.* at 37. The State's asserted non-protectionist interests were in "discouraging undue economic concentration in the arena of high finance; . . . protect[ing] local residents from fraud; and . . . maximizing local control over locally based financial activities." *Id.* at 43. The Court discounted these purported interests because the State "demonstrated no basis for an inference that all out-of-state [entities] are likely to possess the evils" the State sought to prevent; nor did the State prove that such entities as a class "are more likely to" engage in the targeted activity "than their homegrown counterparts[.]" *Id*.

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Defendants' purported local interests suffer from the same defects. *See supra* III.A.3. And, Defendants' citation of the Deputy Assistant Secretary of State's testimony concerning HB 2332, *see* Dkt. No. 29-2, does not provide a plausible rationale for the Ban's residency discrimination for multiple reasons. First, even if the Secretary of State "would prefer" that all advance mail ballot distributors, wherever domiciled, be banned, that preference is irrelevant because the Kansas legislature enacted a law that did *not* ban all distributors, but *only out-of-state* ones. *See* Resp. at 25. Further, the testimony does not mention the residency restriction, focusing instead of HB 2332's disclaimer requirement. Resp. at Ex. B. Nor does it discuss, much less justify,

discriminating against the class of out-of-state distributors. *Id.* In particular, the testimony provides broad summations of purported confusion or burdens without attributing any of them to the "out-of-state-ness" of any distributors. *Id.* Defendants' reliance on this generalized testimony—disconnected from the Out-of-State Distributor Ban, the residency distinction, and any actual facts or data—fails to satisfy their heavy burden to adduce concrete record evidence supporting their interest. As in *Lewis*, such broad-gauged but groundless assertions of interests cannot form the "basis for an inference that all out-of-state [distributors] are likely" to cause confusion or burdens, or that they do so more "than their homegrown counterparts" in a way that could warrant the Ban's facial discrimination. *See* 447 U.S. at 43. The Commerce Clause "demand[s] more than mere speculation to support discrimination against out-of-state" entities operating in interstate commerce, and Defendants fall short in meeting that demand. *Granholm*, 544 U.S. at 492.

Defendants also fail to establish that their purported interests "cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (citation omitted). Far from doing so with "concrete record evidence," *id.* at 493, Defendants attempt to argue that so long as they can devise any non-protectionist motivation, scrutiny under the dormant Commerce Clause evaporates. *See* Resp. at 26. But the Supreme Court has repeatedly rejected that argument. In *Maine v. Taylor*, for example, the Court upheld a discriminatory ban on importing out-of-state baitfish into Maine because the State proved—through the trial testimony of "three scientific experts"—that its legitimate ecological (not economic) purposes "could not adequately be served by available nondiscriminatory alternatives." 477 U.S. 131, 141, 151 (1986). By contrast, in *Hughes v. Oklahoma* and *Philadelphia v. New Jersey*, the Court struck down discriminatory laws despite their legitimate environmental conservation (not economic) purposes because the State failed to also prove "the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337; *see also City*

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of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978). Thus, "whatever [the State's] ultimate purpose," economic protectionism or not, "it may not be accomplished by discriminating against" interstate commerce unless that is the only available option to serve that purpose. *Id.*; *see also Lewis*, 447 U.S. at 36, 44. Defendants do not even attempt to prove that reasonable, nondiscriminatory alternatives are unavailable. *See supra* III.A.3. This shortcoming is fatal to Defendants' argument. *See Granholm*, 544 U.S. at 493-94.

3. The Limited Market Participation Exception is Inapplicable

Defendants' invitation for the Court to expand the market participation exception to these circumstances raises no new arguments from their Motion to Dismiss briefing, and should be rejected for the same reasons as Plaintiffs have explained. Opp. at 28-30.[15] Again, the Court need look no further than HB 2332 itself to reject Defendants' main assertion that the State is seeking to participate as "the only entity in Kansas distributing advance mail voting applications." Resp. at 28. HB 2332 does not achieve, or even attempt to achieve, this purported objective. It is not plausible that the Ban seeks a state government monopoly on distribution of advance mail ballots when it allows in-state residents to distribute them without impediments.

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Instead, HB 2332 facilitates Kansas acting as a *market regulator* by using its distinct lawmaking power to ban out-of-state entities from the market in favor of their in-state counterparts, punishing the former with civil penalties for continuing their operations. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277-78 (1988); *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 419-22 & n.21 (3d Cir. 2011) (collecting cases). Even Defendants repeatedly argue that they are acting as a regulator and are achieving their asserted "regulatory interests" through implementing the

[15] Moreover, the two cases on which Defendants wholly rely in seeking to expand the market participation exception are unavailing; one does not even hinge on the exception, and the other serves only as a plurality opinion of the Court that in fact supports Plaintiffs' arguments that the State is acting as a regulator. *See* Opp. at 30 n.13.

Out-of-State Distributor Ban. *See, e.g.*, Resp. at 2-3, 7, 10, 13-16. Under the dormant Commerce Clause, such regulation that affects interstate commerce may not discriminate against out-of-state residents. *New Energy*, 486 U.S. at 273.

4. There is no Elections Clause Exception to the Commerce Clause

Defendants' categorical argument that the State's general Elections Clause authority exempts it from Commerce Clause restraint has no grounding in the text, structure, or judicial interpretations of the Constitution. Indeed, Defendants' theory would relegate the dormant Commerce Clause to second-class constitutional status, which plainly was not the Framers' intent.[16] Although states are authorized to run their elections, the Supreme Court has repeatedly stressed the limits of this power: "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power . . . to evade important constitutional restraints." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)). Accordingly, the State's Elections Clause "authority does not extinguish the State's responsibility to observe the limits established" in other parts of the Constitution. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). This authority must still respect both individual rights (such as the First Amendment, *see id.*, and Equal Protection Clause, *see Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)) and other structural restraints (such as the Qualifications Clauses of Article I, *see Thornton*, 514 U.S. at 835; *Wesberry*

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[16] Defendants are also incorrect that the dormant Commerce Clause "has never been invoked to challenge a state election/voting law." Resp. at 21; *see, e.g.*, *Yes on Term Limits*, 550 F.3d at 1031; *Constitution Party of Kansas v. Kobach*, 695 F.3d 1140, 1143 n.3 (10th Cir. 2012); *SD Voice v. Noem*, 380 F. Supp. 3d 939, 951 (D.S.D. 2019). But pointing out that such challenges are rare only proves the point that Kansas's facial discrimination against non-resident civic engagement organizations is far outside the norm compared to other states. *See* Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives, Nat'l Conf. of State Legis. (Aug. 6, 2020), www.ncsl.org/research/elections-and-campaigns/vopp-table-5-applying-for-an-absentee-ballot-including-third-party-registration-drives.aspx (showing no other residency requirements for absentee ballot application distribution).

v. Sanders, 376 U.S. 1, 7-8 (1964)). Invoking the Elections Clause does not empower the State "to evade important constitutional restraints." *Cook*, 531 U.S. at 523.

Defendants acknowledge, as they must, that subsequent amendments to the Constitution constrain the Elections Clause. *See* Resp. at 23. They argue, however, that other constitutional limitations are categorically inapplicable. Without these, however, a State could violate Article I, § 9 by laying an unconstitutional "Tax or Duty" on a ballot application distributed by entities from out of state, pass an *ex post facto* law making prior distribution of ballot applications a retroactive crime, or form an "agreement or compact with another state" without Congressional approval concerning ballot applications. Defendants' theory of the Elections Clause would even permit a "religious test" for federal candidates, in violation of Article VI, § 3. As the Supreme Court has recognized, nothing in the Elections Clause exempts it from these other important constitutional restraints, whether in a subsequent amendment or otherwise. *See Cook*, 531 U.S. at 523; *Thornton*, 514 U.S. at 833-35; *Wesberry*, 376 U.S. at 7-8.

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The dormant Commerce Clause is one such important constitutional restraint. Defendants' attempt to diminish its fundamental significance in our constitutional system is unfounded. The Supreme Court has frequently emphasized that this "'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison," who wrote that the Commerce Clause was principally "intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (citation omitted); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 n.16 (1976) (discussing historical foundation of the dormant Commerce Clause). Far from second-class, the dormant Commerce Clause embodies the Framers' core "conviction that in order to succeed, the

new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes*, 441 U.S. at 325-26. Defendants' effort to demote this foundational component of our federalist system would improperly elevate *dissenting* opinions that question the dormant Commerce Clause into the governing law. *See, e.g.*, *Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting). Under binding precedent, the State's Elections Clause powers must abide by dormant Commerce Clause restraints, just like any other structural constitutional requirement.

5. The *Pike* Balancing Standard is Inapplicable

The *Pike v. Bruce Church* balancing test applies only to a law that "regulates evenhandedly with only 'incidental' effects on interstate commerce" not one that "discriminates against interstate commerce." *Hughes*, 441 U.S. at 336. Defendants' fallback argument that the *Pike* test governs here contradicts their concession that HB 2332 is facially discriminatory. Resp. at 26; MTD at 27. Even under this inapplicable test, however, Plaintiffs are still substantially likely to succeed on the merits of their claim.

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A non-discriminatory state law breaches the dormant Commerce Clause if its burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* test, HB 2332 unconstitutionally burdens interstate commerce because (1) the putative local benefits are virtually nonexistent, *see supra* III.A.3; (2) the burdens on interstate commerce from this ban are severe, *see* Cleaver Decl. ¶¶ 11-13, 19, 25-28; Lopach Decl. ¶¶ 11-14, 23-26; *supra* III.A.2; (3) these severe burdens are excessive compared to the nominal local interests; and (4) Kansas has numerous less burdensome alternatives to promote any purported interests. *See Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs of Cty. of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (applying *Pike* to reject excessive burden on interstate commerce); *see also ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (same).

Plaintiffs are therefore likely to succeed in their claim that HB 2332's Out-of-State Distributor Ban violates the dormant Commerce Clause.

IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM FROM THE ABSENTEE BALLOT RESTRICTIONS AND THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR PRELIMINARY INJUNCTIVE RELIEF

The Ballot Application Restrictions inflict substantial and irreparable harm on Plaintiffs and the public, which far outweigh any purported harm to Defendants by granting preliminary injunctive relief. HB 2332 denies Plaintiffs the opportunity to engage in constitutionally protected expression and restricts their activities in interstate commerce. *See supra* III; Opp. at 3-8, 13-26. These constitutional injuries are substantial and irreparable. *See Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1185 (D. Colo. 2001) (citing *Johnson*, 194 F.3d at 1163) ("Violation of Commerce Clause rights is itself an irreparable injury.").

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Contrary to Defendants' suggestion, Plaintiffs' harms absent an injunction are neither remote nor speculative. Plaintiffs face a credible and imminent threat of prosecution and civil enforcement under HB 2332, which will go into effect in a mere five months. And the Restrictions are *already* chilling Plaintiffs' expression and impeding their activity in Kansas because planning for the 2022 primaries begins months in advance and is well underway. *See* Cleaver Decl. ¶ 24; Lopach Decl. ¶ 26; Opp. at 3-8. These injuries are certain "to occur before the district court rules on the merits." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1249–50 (10th Cir. 2017). And as the *Hargett* court explained in an analogous context: "[f]orcing the plaintiffs to wait while a case winds its way through litigation would mean taking away chances to participate in democracy that will never come back." 400 F. Supp. 3d at 733.

The *only* injury Defendants assert here is the general harm from enjoining an enacted state law. Resp. at 29-30 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2002)). Defendants do not—and cannot—point to any "ongoing and concrete harm to [Kansas's] law enforcement and public safety interests" or any other public interest that will be injured by enjoining the Ballot Application Restrictions. *See King*, 567 U.S. at 1303; *supra* III.A.3. Granting preliminary relief will only "further[] rather than harm[]" the public's interest in broad exercise of constitutional rights. *See Fish v. Kobach*, 840 F.3d 710, 756 (10th Cir. 2016). Indeed, Plaintiffs' activities further the public interest because they provide registered Kansas voters essential encouragement and assistance to successfully request an advance mail ballot to participate in our electoral process. *See Hargett*, 400 F. Supp. 3d at 734. "[W]hatever damage [a] preliminary injunction may cause Defendants' inability to enforce . . . an unconstitutional statute" pales in comparison to the concrete harm Plaintiffs and the public will suffer absent an injunction. *See Johnson*, 194 F.3d at 1163. The balance of equities and the public interest thus favor preliminary relief.

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CONCLUSION

Because this Court has jurisdiction, and because the Ballot Application Restrictions violate the First Amendment and the dormant Commerce Clause, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction.

Date: August 5, 2021

By: */s/ Mark P. Johnson*
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 5th day of August 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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