

In the  
**United States Court of Appeals**  
For the  
**Tenth Circuit**

VOTEAMERICA and VOTER PARTICIPATION CENTER,

*Plaintiffs-Appellees,*

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State;  
KRIS KOBACH, in his official capacity as Kansas Attorney General;  
and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County,

*Defendants-Appellants.*

*Appeal from a Decision of the United States District Court for the District of Kansas - Kansas City,  
No. 2:21-CV-02253-KHV · Honorable Kathryn H. Vratil*

**APPELLEES' ANSWERING BRIEF**  
***Oral Argument Is Requested***

DANIELLE M. LANG, ESQ.  
ALICE C.C. HULING, ESQ.  
KATE HAMILTON, ESQ.  
CAMPAIGN LEGAL CENTER  
1101 14th Street NW, Suite 400  
Washington, District of Columbia 20005  
(202) 736-2200 Telephone  
dlang@campaignlegalcenter.org  
ahuling@campaignlegalcenter.org  
khamilton@campaignlegalcenter.org

JONATHAN YOUNGWOOD, ESQ.  
SIMPSON, THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, New York 10017-3909  
(212) 455-2000 Telephone  
jyoungwood@stblaw.com

MARK P. JOHNSON, ESQ.  
DENTONS US LLP  
4520 Main Street, Suite 1100  
Kansas City, Montana 64111-7700  
(816) 932-4400 Telephone  
mark.johnson@dentons.com

*Attorneys for Appellees VoteAmerica and Voter Participation Center*



## DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a),(b), and/or (c), the undersigned, on behalf of VoteAmerica and Voter Participation Center, certifies that there is no information to disclose pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood

SIMPSON THACHER & BARTLETT LLP

425 Lexington Avenue

New York, NY 10017

Tel: (212) 455-2000

jyoungwood@stblaw.com

*Attorney for Plaintiffs/Appellees*

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## STATEMENT OF RELATED CASES

This is the second appeal in this case. The Tenth Circuit previously issued an opinion in Case No. 23-3100. *See VoteAmerica v. Schwab*, 121 F.4th 822 (10th Cir. 2024).

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## INTRODUCTION

For years, the country has been engaged in a vigorous debate about the merits of voting by mail. This debate reached a fever pitch during the run-up to the 2020 general election as the country grappled with how to conduct a high turnout presidential election in the midst of a worldwide pandemic. On the one hand, many organizations, campaigns, and elections officials encouraged voters to vote by mail. On the other hand, some leaders and politicians publicly questioned the validity of mail ballots, including by filing lawsuits—even prior to the election—challenging mail voting. Voters had concerns about lost or delayed mail. After the election, there were rampant (and baseless) claims that fraud had been perpetuated through mail ballots.

Appellee Voter Participation Center (“VPC”) stands strongly in favor of mail voting.<sup>1</sup> VPC believes that mail voting expands participation opportunities for all registered voters, especially for traditionally underrepresented groups. VPC believes that encouraging and assisting voters to vote by mail leads to more eligible voters participating in elections, which in turn leads to a more robust democracy in the United States. In Kansas, a registered voter must submit a completed advance mail ballot application, which must be processed and approved by the voter’s county

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<sup>1</sup> Plaintiff/Appellee VoteAmerica resolved all claims against Defendants/Appellants pursuant to a joint stipulation. App.IV 776 n.1.

election office, before the voter can receive an advance mail ballot. VPC exercises its First Amendment rights to advocate for increased mail voting by mailing advance mail ballot applications—personalized with the voter’s name, address, and county of registration pulled from Kansas’s voter rolls—to specific registered voters.

Following the 2020 election, the Kansas Legislature overrode a veto to pass House Bill 2332, codified at Kan. Stat. Ann. 25-1122, which enacted a number of restrictions on mail voting. Section 3(l) (the “Out-of-State Distributor Ban”) would ban anyone not a resident of, or domiciled in, Kansas from mailing an advance mail ballot application to a Kansas voter. Section 3(k) imposed requirements and restrictions on “[a]ny person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing,” including section 3(k)(2) (the “Personalized Application Prohibition” or “Prohibition”), which would criminally prohibit completing any portion the application “prior to mailing such application to the registered voter.” Because Appellants consented to a permanent injunction of the Out-of-State Distribution Ban, only the Personalized Application Prohibition is at issue in this appeal.

The Personalized Application Prohibition is a restriction on the protected speech of those who choose to advocate for more mail voting by soliciting Kansas voters to vote by mail. The Prohibition is subject to, and cannot survive, strict

scrutiny because the record demonstrates that the Prohibition was enacted to target and inhibit organizations that “solicit by mail a registered voter to file an application for an advance voting ballot” and encourage Kansans to vote by mail by including a personalized application in their mailing. Given this improper purpose, strict scrutiny is the appropriate level of review. Even if this Court were to disagree with the district court’s conclusion of improper purpose and apply intermediate scrutiny instead, the outcome would be the same. Appellants fail to establish the Personalized Application Prohibition is narrowly tailored to any significant government interests. The district court’s judgment should be affirmed.

#### **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. § 1983. The district court issued a Memorandum and Order on July 3, 2025 and invited the parties to be heard on the issue of judicial notice on or before July 14, 2025. App.IV 814-15. On July 16, 2025, the district court entered a final judgment in favor of Plaintiff/Appellee VPC on Count I and enjoined Defendants/Appellants from enforcing the second sentence of K.S.A. § 25-1122(k)(2); and judgment in favor of Defendants/Appellants on Counts II and III. App.IV 816-17. Defendants/Appellants filed a timely notice of appeal on August 13, 2025. App.IV 818. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Did the district court correctly hold that an impermissible purpose or justification underpins the Personalized Application Prohibition and that the Prohibition violates the First Amendment because it cannot withstand strict scrutiny?

2. Did the district court correctly hold that the Personalized Application Prohibition violates the First Amendment because it cannot withstand intermediate scrutiny?

## STATEMENT OF THE CASE

### A. Voter Participation Center

Appellee VPC is a nonprofit, nonpartisan organization whose “core mission is to promote voting among traditionally underserved groups—including young voters, voters of color and unmarried women.” App.IV 780. VPC believes that “encouraging and assisting voters to participate in elections through mail voting ensures a robust democracy” because “mail voting expands participation opportunities among its target voters—some of whom may not have the ability to vote in person or the resources to navigate the mail voting application process.” *Id.* To “encourage these voters to register and participate in the electoral process,” VPC “primarily uses direct mailings.” App.IV 781. VPC “believes sending personalized advance mail ballot applications increases voter engagement” and “that providing

underserved groups the necessary personalized advance mail voting applications is key to effectively advocating its message.” *Id.*

In 2020, VPC mailed advance mail ballot applications to certain Kansas voters that were personalized with each target voter’s name, address, and county. App.IV 782; *see* App.III 711 (sample VPC mailer). As this Court previously held, “VPC’s mailing of the prefilled mail-ballot applications constitutes speech entitled to First Amendment protection.” *VoteAmerica v. Schwab*, 121 F.4th 822, 838 (10th Cir. 2024) (hereinafter “*VoteAmerica I*”). As the district court found, “[t]hrough these communications, [VPC] communicates its message that advance mail voting is safe, secure, accessible and beneficial.” App.IV 78i.

**B. The 2020 Election in Kansas**

VPC joined other organizations, campaigns, and Kansas elections officials to encourage voting by mail in 2020. App.IV 786. In the general election, VPC and its sister organization, the Center for Voter Information (“CVI”), sent advance mail ballot applications to approximately 510,000 Kansas voters. App.IV 782. To personalize the applications, VPC used statewide voter registration files obtained from data vendors. *Id.* To complete an application sent by VPC, the voter must fill out the remaining fields: state and county where application is completed, driver’s license number or nondriver’s identification card number, date of birth, signature, date, and phone number. *See* App.III 711.

Several Kansas counties sent communications to their registered voters regarding the advance mail voting process, and certain counties also distributed prefilled applications to all registered voters. App.IV 786-88. For both the 2020 primary and general election, Johnson County mailed applications to all voters, and it spent additional resources to personalize the applications by prefilling even more information than VPC to “make[] it easier for the voter and reduce[] mistakes.” App.IV 787-88. Ford County Election Clerk Deborah Cox testified that, at least in some ways, “pre-filled information increased the likelihood and the ease that [her] office can match information between the voter file and application.” App.IV 787. Douglas County Elections Director Jamie Shew testified that if not for budgetary constraints, his office would actually prefer to prefill the applications sent to voters. *Id.* VPC’s expert witness Dr. Eitan Hersh concluded that VPC’s methods of prefilling applications “*reduced* the burden on election officials.” App.IV 784 (emphasis original).

These efforts to encourage voters to vote by mail were successful. The 2020 general election in Kansas was “one of a kind.” App.IV 785. It had “record turnout” and “a steep increase in advance mail voting,” with over three times as many mail ballots cast in the 2018 general election and over 2.5 times the mail ballots cast in the 2016 general election. App.IV 785-86. The administration of the election was also successful. As Kansas Secretary of State Elections Director Bryan Caskey

testified, the 2020 post-election audits revealed that every cast ballot was accounted for and counted properly, and did not uncover “any systemic fraud in Kansas elections in 2020.” App.IV 788.

However, the election was not without its challenges. The election was held “in the middle of a worldwide pandemic” that “presented new hurdles for some voters.” App.IV 786. “The 2020 election also stood out for another reason: widespread claims that the U.S. presidential election was fraudulent and that mail ballots in particular were partly to blame.” App.IV 796. Prior to the election, multiple lawsuits were filed regarding state election processes, including challenges to mail ballots. *Id.* In Kansas, “[t]he advance mail voting process includes multiple safeguards against fraud, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications.” App.IV 779.

Facing these new challenges, “[s]ome voters re-submitted their applications.” App.IV 786. Reviewing a duplicate application usually took election offices more time than reviewing the initial application. App.IV 787. Other voters “had concerns about lost applications or mail delays and called their election offices to inquire about the status of their applications.” App.IV 786. Shawnee County Election Commissioner Andrew Howell attested that some voters reached out to his office about duplicate and inaccurately prefilled advance mail ballot applications. *Id.* He “believed that voters were confused and frustrated, but not necessarily because they

received prefilled applications. He believed that voters erroneously assumed that the county had mailed multiple prefilled ballot applications and were frustrated at the purported incompetency of his election office.” *Id.* Similarly, Cox testified that she heard from up to 30 voters per day about advance ballot applications and that she had to post an advertisement in Ford County newspapers “to remind voters that most prefilled applications had not come from the county election office.” *Id.*

Howell and Cox attested that some voters told officials in Shawnee and Ford Counties that they thought they were required to return the prefilled applications even if they had already submitted an application. App.IV 786-87. Appellants stipulated that, “When voters called their election offices about advance mail ballot applications received in the mail, officials instructed voters that the application forms were legitimate and that the voters could complete and submit those applications if they chose to do so.” App.III 611-¶115. If voters expressed that they did not desire to vote by mail, “election officials informed the voter that the applications could be discarded.” App.III 611-¶116.

Howell and Cox stated that “they were easily able to identify” “VPC’s prefilled applications.” App.III 603-¶56. Nevertheless, Appellants did not proffer, and the record does not contain, any evidence of how many prefilled applications led to inaccurate or duplicate applications submitted to election officials; or whether these applications had been prefilled by a third party like VPC rather than, for example,

by a county election office. Accordingly, the district court’s factual findings were limited to what Kansas officials did not do. Kansas election officials, including Howell and Cox, “did not attempt to quantify how many duplicate applications in the 2020 general election involved VPC-prefilled applications.” App.IV 787. When Kansas election officials “received an incomplete or inaccurate application, officials did not determine whether it was prefilled or track how many of them were prefilled.” *Id.* Similarly, Appellants’ witness Ken Block, who analyzed applications that VPC sent to Kansas voters in the 2020 general election, did not purport to demonstrate that any application erroneously prefilled by VPC “came to the attention of election officials,” or “conclude that they negatively impacted the 2020 election process.” App.IV 784.<sup>2</sup>

### C. The Kansas Legislature Enacts H.B. 2332

Following the 2020 election, there were even more lawsuits claiming that mail-in ballots had been fraudulently submitted. App.IV 797. However, across the

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<sup>2</sup> Block attested that he identified errors with approximately 400 VPC applications (385 cancellations, 23 pairs of matched records). App.IV 783-84. Appellants falsely claim that Dr. Hersh “acknowledged that at least 3% of VPC’s Kansas voter database was inaccurate.” C.A. ECF 20 (“App.Br.”) at 5. Not so. As the district court found, Dr. Hersh testified that *assuming* the issues raised by Block existed, they would relate to just under 3% of the records in VPC’s database. App.IV 785 (citing ECF 156-6 (Hersh’s Report) ¶ 27). The same paragraph from Dr. Hersh’s report makes clear he did not accept that the errors identified by Block exist: “Even if one were to stipulate that *all* issues raised by Mr. Block represent actually erroneous or obsolete registrants contacted by VPC’s mailers (and, again, I would not stipulate as such) ... .” Supp. App. 62-¶ 27 (emphasis original).

country, courts dismissed these suits “because plaintiffs failed to prove fraud or illegal conduct.” *Id.* Nevertheless, on January 6, 2021, the day Congress was to certify the election results, President Trump made remarks at a rally repeatedly claiming that mail-in ballots were a “scam,” “illegally cast,” and “a fraud,” and specifically criticized the practice of sending unsolicited mail-in ballot applications to voters. App.IV 798. Five days later, on January 11, 2021, the Kansas Legislature convened, and the following month the Legislature introduced H.B. 2332. App.IV 799. “HB 2332 sought to regulate third parties who use direct mailings to Kansas voters to encourage them to vote by mail,” including by restricting the distribution of advance mail ballot applications via the Out-of-State Distributor Ban and the Personalized Application Prohibition. App.IV 776-77.

The Personalized Application Prohibition is not the only restriction in H.B. 2332 that applies to those “who solicit[] by mail a registered voter to file an application for an advance voting ballot”—section k(1) also requires (under threat of criminal penalties) that any such mailing that contains an application must include a “clear and conspicuous label in 14-point font” on the exterior of the envelope and each page of the mailing that includes the name and address of the sender and “Disclosure: This is not a government mailing. It is from a private individual or organization.” K.S.A. § 25-1122(k)(1)(A)-(D); *see* App.IV 776 n.2. H.B. 2332 also

expanded the crime of election tampering. *Id.* On May 3, 2021, the Legislature enacted H.B. 2332 over Governor Laura Kelly’s veto. App.IV 776.

Plaintiffs/Appellees challenged two of H.B. 2332’s provisions: the Personalized Application Prohibition (H.B. 2332 § 3(k)(2), K.S.A. § 25-1122(k)(2), which is at issue in this appeal, and the Out-of-State Distributor Ban (H.B. 2332 § 3(l)(1), K.S.A. § 25-1122(l)(1)). App.IV 788–89. The Out-of-State Distributor ban broadly forbade any non-Kansas resident from “mail[ing] or caus[ing] to be mailed an application for an advance voting ballot.” K.S.A. § 25-1122(l)(1); App.IV 776 n.2. The Personalized Application Prohibition barred those “who solicit[] by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing,” from mailing an advance mail ballot application with any information prefilled to a registered Kansas voter, including information drawn from the Kansas voter rolls. K.S.A. § 25-1122(k)(1)-(2); *see* App.IV 777. Any single violation of the Personalized Application Prohibition is a class C misdemeanor, punishable by up to one month in jail and/or fines, and with no scienter requirement. K.S.A. §§ 25-1122(k)(5), 21-6602(a)(3), (b); App.III 613-¶132, App.IV 777.

As the district court found, while the State argues that the Personalized Application Prohibition is necessary to minimize voter confusion, preserve voter confidence, and reduce voter fraud, “[t]hese rationales are not part of the Legislative

Record for HB 2332, and the State does not explain how the Personalized Application Prohibition advances these objectives.” App.IV 777-78. The Office of the Kansas Secretary of State’s written testimony regarding the 2020 election mentioned duplicate applications and discussed the office’s discouragement of engagement with applications mailed by third parties, but did not mention prefilling. App.IV 778. Similarly, the Kansas Secretary of State’s written testimony on H.B. 2332 “did not discuss prefilled applications but mentioned ‘incomplete mail ballot applications.’” *Id.* As the district court found, “prefilled applications ... would seem to prevent incomplete mail ballot applications, rather than facilitate them.” App.IV 795 n.20.

**D. Appellees Bring Suit and Move For Preliminary Injunction**

Plaintiffs/Appellees filed suit on June 2, 2021, asserting that the Personalized Application Prohibition and the Out-of-State Distributor Ban violate their First Amendment rights to free speech (Count I) and association (Count II) and are unconstitutionally overbroad (Count III), and that the Out-of-State Distributor Ban violates the Dormant Commerce Clause (Count IV). App.IV 788. Shortly thereafter, Appellees moved for a preliminary injunction. *Id.*

The district court held an in-person evidentiary hearing and heard live testimony. App.I 100. While Appellants argued that H.B. 2332 was justified by a range of state interests, the district court concluded that these interests “boil[ed]

down to an issue of administrative efficiency” that had “superficial appeal” but were unsupported by the facts. App.I 113-18.

On November 19, the district court preliminarily enjoined enforcement of both the Out-of-State Distributor Ban and the Personalized Application Prohibition. App.IV 788-89. Defendants did not appeal. App.I 123. On February 25, 2022, Appellants stipulated to a permanent injunction against the enforcement of the Out-of-State Distributor Ban and declaratory judgment, conceding that the Ban “violates the First and Fourteenth Amendments, both facially and as-applied to Plaintiffs.” App.I 123-27. Appellants also agreed to be permanently enjoined from enforcing the Personalized Application Prohibition against groups like Plaintiff VoteAmerica who mail solicited “application[s] for an advance voting ballot to [] registered voter[s].” App.I 124-25.

After months of depositions and further fact development, the parties cross-moved for summary judgment, including detailed responses to each other’s statement of uncontroverted facts. App.II 270-98, 355-424. At the direction of the district court, the parties prepared Joint Revised Uncontroverted and Controverted Facts regarding relevant testimony, even if that testimony included some inconsistency, including between what witnesses said during live deposition testimony and subsequently stated in affidavits prepared for purposes of summary judgment, which the parties expected the district court to resolve. *See* Supp. App.

86:14-25;<sup>3</sup> App.III 594-627. The parties agreed to submit the case on the written record and that their summary judgment briefs would serve as trial briefs for a bench trial on the papers. App.IV 789.

**E. The District Court Permanently Enjoins the Personalized Application Prohibition**

On May 4, 2023, the district court held that the Personalized Application Prohibition violates VPC’s First Amendment rights of speech and association (Counts I and II) and is unconstitutionally overbroad (Count III), and permanently enjoined its enforcement. App.III 670.

**F. Holding that VPC’s Prefilling is Protected Speech, The Tenth Circuit Reverses and Remands**

On appeal, this Court reversed the district court’s judgment on Appellees’ associational and overbreadth claims and remanded Appellees’ free speech claim. *VoteAmerica I*, 121 F.4th at 854. This Court held that “VPC’s mailing of the prefilled mail-ballot applications constitutes speech entitled to First Amendment protection.” *Id.* at 838. With respect to the appropriate level of scrutiny, the Court agreed with Appellees that the Personalized Application Prohibition was “content-based,” but “conclude[d] that (absent evidence of an improper purpose or justification for the statutory provision) the proper level of scrutiny to apply to the

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<sup>3</sup> The district court asked for “the testimony straight up,” and stated that the court would “have to draw whatever conclusions [it] will draw from the testimony.” Supp. App. 86:19-23.

Prohibition under the Free Speech Clause of the First Amendment is intermediate scrutiny, which requires that the ‘restriction on speech or expression ... be narrowly tailored to serve a significant governmental interest.’” *Id.* at 850-51 (quoting *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022)).

The Court noted Appellees’ argument that the Prohibition discriminates against “pro-mail-voting groups [that] are more likely to use prefilled applications to advance their message ... concerns whether ‘an impermissible purpose or justification underpins’ the Prohibition.”” *VoteAmerica I*, 121 F.4th at 851 (quoting *City of Austin*, 596 U.S. at 76). Accordingly, the Court instructed, “[o]n remand the district court can consider argument and evidence regarding whether the purpose or justification for the Prohibition was to suppress speech favoring mail voting.” *Id.*

“Unless, for the reasons identified above, the district court determines again that the Prohibition must be reviewed under strict scrutiny,” the Court directed it to apply intermediate scrutiny, under which the “government has the burden of persuasion” and “must show that the regulation ‘is narrowly tailored to achieving significant government interests, and ... leaves open ample alternative channels of communication.’” *Id.* at 852 (quoting *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1220 (10th Cir. 2021); citing *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012)). The Court welcomed “more full and focused briefing by the parties (and perhaps further evidence), of the remaining free-speech issues in this case.” *Id.*

**G. On Remand, the District Court Again Permanently Enjoins the Personalized Application Prohibition**

On remand, the parties submitted written submissions on the remaining issues and agreed that no further discovery was necessary. *See* App.III 672, 677; App.IV 776. The district court found that Appellants’ stated rationales for the Personalized Application Prohibition “are not a part of the Legislative Record for HB 2332, and the State does not explain how the Personalized Application Prohibition advances these objectives.” App.IV 778. The district court reasoned that Appellants “stated justifications do not explicitly address the logic behind the Personal Application Prohibition. On this record, the evidence raises a reasonable inference that the legislature enacted the Personalized Application Prohibition because of disagreement with speech which advocates voting by mail,” especially when “read alongside the Out-of-State Distributor Ban, which is also part of HB 2332, and viewed in historical context.” App.IV 796. Thus, the district court found “that it is more probably true than not true that the Kansas Legislature enacted the Personal[ized] Application Prohibition to suppress speech which favors voting by mail,” which “therefore merits strict scrutiny.” App.IV 799-800.

The district court again determined that the Personalized Application Prohibition could not withstand strict scrutiny on each of Appellants’ stated rationales: preventing voter confusion, promoting efficient election administration, or preventing voter fraud and preserving election integrity. App.IV 801-07.

Having found that the Personalized Application Prohibition failed strict scrutiny, the district court also proceeded to analyze it under intermediate scrutiny. The district court rejected Appellants' argument to apply a test of "reasonableness" based on the advanced mail ballot application as a non-public forum because "defendants raise this argument for the first time on remand," and in any event, "the Tenth Circuit conducted a robust analysis on the proper standard of review and directed the Court on remand to apply intermediate scrutiny—not reasonableness—unless defendants enacted the prohibition for an improper purpose or justification." App.IV 808 n.27. The district court acknowledged that narrow tailoring under intermediate scrutiny differs from that under strict scrutiny, and, applying the intermediate scrutiny standard, concluded that Appellants failed to establish that the Personalized Application Prohibition is narrowly tailored to any of their stated interests. App.IV 809-13. Thus, even though the district court found that the Prohibition left open alternative channels of communications, the Prohibition cannot withstand intermediate scrutiny. App.IV 814.

The district court held that the Personalized Application Prohibition is an unconstitutional infringement of VPC's First Amendment right to freedom of speech and enjoined Appellants from enforcing it. *Id.* After giving the parties an opportunity to be heard on judicial notice—which no party challenged—the district

court entered judgment in favor of VPC on Count I and, per this Court’s mandate, entered judgment in favor of Appellants on Counts II and III. App.IV 814-16.

### SUMMARY OF THE ARGUMENT

As this Court correctly held, VPC’s mailing of the prefilled mail-ballot applications constitutes speech entitled to First Amendment protection. *VoteAmerica I*, 121 F.4th at 838. The Personalized Application Prohibition abridges this protected speech, and therefore, if there is evidence of an improper purpose or justification, it must be subjected to strict scrutiny; otherwise, intermediate scrutiny applies. *Id.* at 851-52. While this Court did not address whether there was an improper purpose or justification in the first instance, it directed the district court to consider VPC’s argument that the Prohibition unconstitutionally discriminates against speech based on viewpoint. *Id.* at 851.

On remand, the district court correctly held that the Prohibition cannot survive First Amendment strict or intermediate scrutiny and therefore is an unconstitutional infringement on VPC’s First Amendment rights to speech. App.IV 814. This court should affirm the district court’s judgment.

*First*, the district court correctly found that “HB 2332 sought to regulate third parties who use direct mailings to Kansas voters to encourage them to vote by mail.” App.IV 776-77. It then properly determined that the Prohibition was enacted

because of disagreement with speech which advocates voting by mail and therefore merits strict scrutiny. App.IV 800.

*Second*, the district court correctly determined that the Prohibition cannot withstand strict scrutiny because it is not narrowly tailored to the State's purported interests of minimizing voter confusion, facilitating efficiency in election administration, or fostering confidence in and protecting the integrity of the election process. The district court properly found that Appellants failed to establish how the Prohibition would serve any of those interests. App.IV 802, 804, 807.

*Third*, the district court correctly determined that even if the State had not enacted the Prohibition for an improper purpose, the Prohibition would not survive intermediate scrutiny. App.IV 807-14. The district court properly disregarded Appellants' argument that the proper test is reasonableness, both because this argument was not properly preserved and because it contradicts the Tenth Circuit's clear instruction to apply intermediate scrutiny. App.IV 808 n.27.

The district court correctly found that even under the less demanding "degree of precision required" under intermediate scrutiny, Appellants failed to establish that the Prohibition was sufficiently tailored to their stated interests. App.IV 809-10, 811 ("Absent evidence that voter confusion existed because the applications were prefilled, defendants' means are unrelated to the ends."), 812 ("Even if defendants had demonstrated real harm [to efficient election administration], the statute is not

designed to alleviate these harms”; “Even if the harms [of voter fraud and election integrity concerns] were real, the Personalized Application Prohibition does nothing to alleviate election integrity concerns.”).

In sum, in light of this Court’s holding that the Personalized Application Prohibition infringes protected First Amendment speech, Appellants’ failure to demonstrate or explain how the Prohibition furthers its stated interests is fatal, regardless of whether this Court applies strict or intermediate scrutiny. This Court should affirm the district court’s decision that the Personalized Application Prohibition is an unconstitutional infringement on VPC’s First Amendment right to freedom of speech and must be permanently enjoined.

### STANDARD OF REVIEW

On an appeal from a bench trial, this Court “reviews the district court’s factual findings for clear error, and its legal conclusions *de novo*.” *Obeslo v. Great-W. Life & Annuity Ins. Co.*, 6 F.4th 1135, 1148 (10th Cir. 2021) (internal quotations and citations omitted). Factual findings are clearly erroneous only if the Court has “the definite and firm conviction that a mistake has been made after reviewing all the evidence” or “they are unsupported in the record.” *Id.* (quotations omitted). Where First Amendment interests are implicated, any “constitutional facts” are reviewed *de novo*. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027 (10th Cir. 2008). For constitutional facts, reviewing courts undertake “an independent examination of

the whole record” to ensure “the judgment does not constitute a forbidden intrusion on the field of free expression.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (citation omitted).

However, “the special *Bose* rule applies only to ‘constitutional facts’ and not to the basic historical facts upon which the claim is grounded, which are subject to the usual ‘clearly erroneous’ standard of review.” *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008). It does not “alter ... that reviewing courts cannot overturn factual findings unless ‘clearly erroneous.’” *United States v. Wheeler*, 776 F.3d 736, 742 (10th Cir. 2015). “Rather, it simply directs reviewing courts to determine for themselves whether the fact-finder appropriately applied First Amendment law to the facts.” *Id.* As such, “[t]he independent review function is not equivalent to a ‘de novo’ review of the ultimate judgment itself.” *Bose*, 466 U.S. at 514 n.31.

A district court’s “decision whether to take judicial notice of facts is reviewed for abuse of discretion.” *Lozano v. Ashcroft*, 258 F.3d 1160, 1164 (10th Cir. 2001). An abuse of discretion occurs only when the district court’s decision is “arbitrary, capricious or whimsical,” or results in a “manifestly unreasonable judgment.” *Moothart v. Bell*, 21 F.3d 1499, 1504-05 (10th Cir. 1994) (quotations omitted).

## ARGUMENT

### I. THE PERSONALIZED APPLICATION PROHIBITION CANNOT SURVIVE STRICT SCRUTINY

In *VoteAmerica I*, this Court directed the district court to “consider argument and evidence regarding whether the purpose or justification for the Prohibition was to suppress speech favoring mail voting.” 121 F.4th at 851. The district court did exactly that, concluding that Appellants “enacted the Personalized Prohibition to suppress speech which advocates voting by mail.” App.IV 800. In so doing, the district court correctly held VPC to its burden. *See* App.IV 793 (“[P]laintiff bears the burden of showing by a preponderance of the evidence that defendants adopted the regulation because of disagreement with the message it conveys.”). And because VPC has demonstrated that Kansas enacted the Prohibition for the impermissible purpose of suppressing speech favoring mail-in voting, the district court found that “Plaintiff has made this showing.”<sup>4</sup> App.IV 800. As such, the court correctly concluded, the Prohibition “merits strict scrutiny” and “could not withstand” it.<sup>5</sup> App.IV. 800-01.

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<sup>4</sup> Raised at App.III 690.

<sup>5</sup> Raised at App.III 693.

**A. The Personalized Application Prohibition Was Enacted for An Impermissible Purpose**

This Court previously held that the Prohibition was “content-based but [facially] viewpoint-neutral,” *VoteAmerica I*, 121 F.4th at 848, and that whether it “unconstitutionally singles out certain speech based on viewpoint” “concerns whether ‘an impermissible purpose or justification underpins’ the Prohibition.” *Id.* at 851 (quoting *City of Austin*, 596 U.S. at 76). Though they suggest no alternative standard, Defendants assail the district court’s “curious” logic in referencing cases “prob[ing] whether content neutral regulations may nevertheless be treated as content based, and whether statutes should be classified as discriminatory based on viewpoint.” App.Br. 18. But there is nothing untoward in the district court’s finding “[t]he key question in determining whether a regulation is neutral is whether the law is ‘justified without reference to the content of the regulated speech.’” App.IV 793 (quoting *McCullen v. Coakley*, 573 U.S. 464, 480 (2014)).

The district court thus looked to other cases in which courts had assessed the purpose or justification of a particular speech regulation for guidance. In these cases, courts considered both the purported justification and the actual scope of the regulation at issue to determine whether it was permissible. For example, in *United States v. Eichman*, the Supreme Court invalidated a federal law against flag desecration after finding that the government’s “interest” in the law was “related to the suppression of free expression.” 496 U.S. 310, 315 (1990) (internal quotations

omitted). Though the government asserted that its interest was merely in “protecting the physical integrity” of the American flag “without regard to the actor’s motive, his intended message, or the likely effects of his conduct on onlookers,” the Court was unpersuaded, finding instead that the government’s interest “is implicated only when a person’s treatment of the flag communicates a message to others that is inconsistent with [the identified] ideals.” *Id.* at 315-16 (internal quotations omitted). As such, the Court found that the regulation was impermissible since it “proscrib[ed] expressive conduct *because* of its likely communicative impact.” *Id.* at 318 (emphasis added).

Per *Eichman*, courts may look to the government’s asserted interest in a regulation—alongside how that regulation functions—to determine whether it was actually adopted for the impermissible purpose of suppressing speech. *See also McCullen*, 573 U.S. at 464 (considering the government’s purported interest, as well as the scope of the regulation, to determine that it was not enacted for an impermissible purpose). Guided by this case law, the district court considered the State’s asserted purposes and justifications for the Personalized Application Prohibition, as well as the law’s actual scope. As VPC has consistently asserted, both the scope of and specious justifications for Prohibition demonstrate that it was enacted for the purpose of suppressing speech favoring mail voting.

The Prohibition functionally restricts only messages encouraging a specific individual to vote by mail. The Prohibition only applies to anyone “who solicits ... a registered voter to file an application.” It only applies to these advocates; it does not apply to voters who wish to vote by mail or supply instructions as to how these voters should complete the application. In reality, only those seeking to encourage mail voting would provide a personalized advance mail ballot application. VPC’s message, expressed through its personalized advance ballot applications, is that advance mail voting is safe, secure, accessible and beneficial. App.IV 781. Throughout this litigation VPC has asserted that the Prohibition disables this political speech and hinders participation in the ongoing debate over mail voting. If VPC were unable to send personalized applications in Kansas, it would reconsider its resource allocation decision to send applications at all. App.III. 598-¶18.<sup>6</sup> The Prohibition’s practical impact of suppressing only communications encouraging registered voters to vote by mail is no coincidence; and the record suggests that this is the exact impermissible purpose for which H.B. 2332 was enacted.

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<sup>6</sup> Appellants’ own evidence of applications on which voters have written “I plan on voting in person” or “I am voting in person” undercuts their argument that “no conceivable counterpoint” could be written on an application. App.IV 861-62; *cf.* App.Br. 25. One could easily imagine an anti-mail voting group mailing applications inscribed with a message: “Warning – beware prefilled applications like this sent by third party organizations. If you received this form, you do not need to fill it out.” The Prohibition would not prevent such advocacy.

Although the State’s purported justifications for the Prohibition are facially neutral, “it is nevertheless clear that the Government’s asserted *interest* is related to the suppression of free expression” by third parties advocating for mail voting like VPC. *See Eichman*, 496 U.S. at 315 (emphasis original) (internal quotations and citations omitted). As the district court found, there is no rationale that links prefilling applications to the stated justifications for the Prohibition. App.IV 799-800. Prefilling does not increase the risk of voter fraud, voter confusion, or inefficient election administration; and it does nothing to prevent organizations from sending multiple applications to voters, which could lead to duplicate submissions. App.IV 802 (Appellants “have not established... that “prefilled applications caused the alleged [voter] confusion.”), 804 (“The prohibition does nothing to address duplicate application concerns, and [Appellants] have not established that prefilling ... hinders election administration.”), 807 (“The Personalized Application Prohibition does nothing to address the alleged [fraud] concern.”). A statute does not become ““justified without reference to the content of the regulated speech” simply because the statute itself and those defending it in court *say* that it is,” especially where “[e]very objective indication shows that the provision’s primary purpose is to restrict speech that [advances a certain viewpoint].” *See McCullen*, 573 U.S. at 502 (Scalia, J., concurring in judgment) (emphasis original).

Here, there is evidence of a legislative intent to specifically target the pro-vote-by-mail message of third parties sending advance mail ballot applications. While H.B. 2332 was being considered, the Kansas Secretary of State's Office submitted written testimony on the proposed legislation. App.IV 778 (quoting ECF 151-26; citing ECF 145-31). Though ultimately neutral on the proposal because it had not authored the bill, the Secretary of State's office nevertheless expressed its "aggressive[] encourage[ment]" of "Kansans to not participate, particularly with third party advance by mail ballot applications" to the Legislature, noting that H.B. 2332 "nicely address[ed]" its "concerns." Supp. App. 43, 49. The testimony specifically singled out "third parties [that] have sincere intent to *encourage* voter participation." *Id.* (emphasis added). It also identified VPC's sister organization CVI—and only CVI—as a third party with which the Secretary of State's office discourages public engagement. *Id.* Thus, consideration of H.B. 2332 specifically included disapproval of VPC's and others' encouragement of voters participating via advance mail ballots. Appellants' assertions that "VPC offered no evidence" and that the district court's "conclusion is predicated on rank speculation" are inaccurate. App.Br. 22.

Consideration of the entirety of H.B. 2332 sheds additional light on the Legislature's actual motivations. In addition to the Personalized Application Prohibition, H.B. 2332 included the Out-of-State Distributor Ban that proscribed any

non-Kansas resident from mailing an application for an advance voting ballot, K.S.A. § 25-1122(l)(1), further restricting the distribution of advance mail ballot applications. Both restrictions only apply to those encouraging voters to vote via advance mail ballot, which underscores H.B. 2332’s goal of limiting effective communication in favor of mail voting, especially by third-party organizations like VPC. And the fact that the alleged issue identified in the Secretary of State’s testimony undergirding both restrictions—problems with duplicative applications—was not restricted in practice does indeed give away the game, no matter Appellants’ claims otherwise. App.Br. 25. Here, the only plausible explanation for the Personalized Application Prohibition supported by objective evidence is the State’s desire to restrict the pro-vote-by-mail message conveyed by organizations like VPC that solicit Kansans to vote by mail. The district court so found, and held it to be an impermissible purpose.

Dissatisfied with this result, Defendants incorrectly accuse the district court of “*flipp[ing] the burden of proof.*” App.Br. 19 (emphasis original). But the district court did no such thing. Throughout this litigation, VPC has met its burden and Appellants have done little to rebut VPC’s evidence or introduce their own evidence to support their stated rationales for the Prohibition, despite being repeatedly placed on notice since prior to the preliminary injunction hearing that they must present evidence that addresses “the substance of any legitimate interests which the State of

Kansas seeks to advance.” App.I 11. The above evidence in the factual record satisfies VPC’s burden to establish the Prohibition was enacted for an improper purpose. In response, the district court noted that the State ultimately offered three retroactive justifications for their regulations, App.IV 794, which it found on examination “do not explicitly address the logic behind the Personal Application Prohibition,” App.IV 796. In the absence of evidence to the contrary, of which Appellants produced none, the district court appropriately found VPC’s evidentiary burden to have been satisfied and concluded “that it is more probably true than not true that the Kansas Legislature enacted the Personal[ized] Application Prohibition to suppress speech which favors voting by mail.” App.IV 799-800.

This record is more than sufficient to demonstrate that the Prohibition was enacted to suppress speech which advocates voting by mail. Nevertheless, to further support its conclusion, the district court took judicial notice—to which Defendants did not object—of additional historical context surrounding the passage of the Prohibition. App.IV 796. The district court was well within its right to do so; judicial notice may be taken where “facts in question are ‘not subject to reasonable dispute;’” and are instead “‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *Lozano*, 258 F.3d at 1165 (quoting FED. R. EVID. 201(b)). To that end, the district court noted that the 2020 election—which took place roughly three months before the passage of H.B.

2332—spawned “numerous lawsuits regarding state election processes, including challenges to mail ballots.” App.IV 796. These lawsuits supported the narrative advanced by President Trump in contemporaneous public statements implying that “the U.S. presidential election was fraudulent and that mail ballots in particular were partly to blame.” App.IV 796, 798 (recounting statements). The existence of these lawsuits and statements is not subject to reasonable dispute; they fill the Federal Reporter and newspapers from the time period in which H.B. 2322 was passed and “evidence the fact that voting by mail became a topic of partisan political debate and widespread litigation.” App.IV 797 n.22. That there was an indisputably hostile climate toward vote-by-mail at the time of H.B. 2332’s passage, alongside the fact that Appellants have never put forth a supported justification for the Prohibition, reinforced the district court’s conclusion that the Prohibition was passed for the impermissible purpose of suppressing pro-vote-by-mail speech. The district court appropriately subjected the Personalized Application Prohibition to strict scrutiny.

**B. The Personalized Application Prohibition Cannot Survive Strict Scrutiny**

As the district court previously, and correctly, held, the Personalized Application Prohibition could not withstand strict scrutiny because Appellants failed

to demonstrate that it is narrowly tailored to serve a compelling state interest.<sup>7</sup> App.IV 800–01. Appellants have not established that “prefilled applications caused the alleged [voter] confusion,” “hinder[ed] election administration,” or caused “any ‘surge’ of ‘inaccurate and duplicate’” applications that could increase the risk of fraud; nor have they established that any “purported errors in [VPC]’s mailing list ... had any impact on election processes.” App.IV 802, 804, 806, 807. Thus, Appellants’ stated justifications fall far short of meeting strict scrutiny’s standard that the Prohibition be “the least restrictive means of achieving a compelling state interest.” *McCullen*, 573 U.S. at 478.

## II. THE PERSONALIZED APPLICATION PROHIBITION CANNOT SURVIVE INTERMEDIATE SCRUTINY

In *VoteAmerica I*, this Court held that had the State not enacted the Personalized Application Prohibition for an impermissible purposes, the district court “should apply intermediate scrutiny,” under which “the government must show that the regulation ‘is narrowly tailored to achieving significant government interests, and ... leaves open ample alternative channels of communication.’” *VoteAmerica I*, 121 F.4th at 852 (quoting *Brewer*, 18 F.4th at 1220). In this inquiry, the government has the burden of persuasion. *See id.*; *Doe*, 667 F.3d at 1131. This Court instructed “the district court in the first instance to apply that standard,” *id.*,

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<sup>7</sup> Raised at App.III 693.

which the district court did when it correctly determined that Appellants failed to carry their burden that the Prohibition is “narrowly tailored to achieving” *any* of their stated interests. App.IV 813.<sup>8</sup>

**A. Appellants Fail To Demonstrate That The Personalized Application Prohibition Is Narrowly Tailored**

The Personalized Application Prohibition is a total ban on the protected speech of prefilling advance mail ballot applications sent by mail by those seeking to encourage mail voting. It does not merely limit how, when, or how many times applications can be prefilled when used to solicit mail voters; nor does it provide instructions to voters on how to complete the application. Rather, the Prohibition is a complete ban on pro-mail voting advocates that mail personalized advance mail ballot applications to voters—even if advocates like VPC accurately personalize applications using the same data sources, timing, and methods as multiple Kansas counties that mailed personalized applications to voters.

Under intermediate scrutiny, the government has the burden of showing that the regulation “is narrowly tailored to achieving significant government interests” and “leaves open ample alternative channels of communication.” *Brewer*, 18 F.4th at 1220. Appellants assert three justifications for the Prohibition: (1) enhancement of public confidence in the integrity of electoral processes and deterrence of voter

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<sup>8</sup> Raised at App.III 693.

fraud; (2) avoidance of voter confusion; and (3) facilitation of orderly and efficient election administration. App.Br. 40.

As a threshold matter, Appellants fail to “specifically define” their interests, which this Court requires “lest [this Circuit’s] narrow tailoring test more closely resemble the reasonably necessary standard.” *Brewer*, 18 F.4th, at 1226. Instead, they rely on impermissibly “broad” justifications. *Id.* (citing *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1071 n.10 (10th Cir. 2020)).

Throughout their argument, Appellants also ignore both the legislative and factual record. To determine whether the government’s stated harms are “real,” courts begin with “an examination of the circumstances surrounding [the Prohibition]’s enactment.” *Doe*, 667 F.3d at 1132 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315, (2000); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). Here, the legislative record for the Prohibition contains no support for any of the purported state interests. App.IV 778. Appellants also disregard the district court’s factual findings, which must be upheld absent clear error. *See supra* Standard of Review. Rather, as detailed below, they ask this Court to find new facts that do not appear in the record and draw different factual inferences than those drawn by the district court. But this Court must “view the evidence in the light most favorable to the District Court’s ruling,” not in the light most favorable to

Appellants. See *Mathis v. Huff & Puff Tracking, Inc.*, 787 F.3d 1297, 1305 (10th Cir. 2015).

These threshold matters aside, Appellants nevertheless fail to “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner*, 512 U.S. at 664; see *Brewer*, 18 F.4th at 1227 (same). As the district court properly found, Appellants fail to connect the mailing of prefilled applications to their stated interests: “[T]he State does not explain how the Personalized Application Prohibition advances these objectives.” App.IV 778.<sup>9</sup> If the government cannot demonstrate that the restriction provides more than “ineffective or remote support” for its stated purpose or “sufficiently serves those public interests” in a “direct and effective i.e., material way,” then this Court is “constrained to conclude that the [restriction] is not narrowly tailored and, consequently, contravenes the First Amendment.” *Brewer*, 18 F.4th at 1227 (internal citations and alterations omitted).

Moreover, Appellants make no argument and present no evidence that the Prohibition does not “burden substantially more speech than is necessary,” *Ward v.*

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<sup>9</sup> See App.IV 812 (the “Prohibition does nothing to alleviate election integrity concerns”), 810 (Appellants “have not met their burden of showing that voters were confused because the applications were prefilled”); 811-12 (Appellants “have provided no evidence of how many duplicate, incomplete or inaccurate prefilled applications were submitted to county offices,” and the Prohibition “is not designed to alleviate these harms”).

*Rock Against Racism*, 491 U.S. 781, 799 (1989); that alternative, less burdensome measures “would fail to achieve the government’s interests,” *McCullen*, 573 U.S. at 495; or that “the government g[ave] *serious consideration* to such less-restrictive means before opting for a particular regulation.” *Brewer*, 18 F.4th at 1255 (emphasis original).<sup>10</sup> This failure alone is a sufficient basis to conclude Appellants have not carried their burden to establish that the Prohibition is narrowly tailored.

1. The Personalized Application Prohibition Is Not Narrowly Tailored to Promote Public Confidence Or Deter Voter Fraud

The district court correctly found that (1) Appellants failed to demonstrate that any loss of public confidence in the electoral system or voter fraud was “real,” and that (2) even if these harms were real, the Prohibition does nothing to alleviate them. App.IV 812. Tellingly, Appellants do not cite the factual record to support their argument that the Prohibition actually promotes public confidence in the integrity of elections. App.Br. 51-53. Their conclusory statement that “[t]he State had every right to adopt measures to shore up the public’s faith that mail voting is free and

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<sup>10</sup> See App.Br. 45-53. At most, Appellants’ “Summary of the Argument” claims it does not burden more speech than necessary because it only eliminates one method of transmitting voter data, and the State did not take more extreme measures such as “bann[ing] mail voting.” App.Br. 15-16. But whether alternative channels or more burdensome measures exist has no bearing on whether *less burdensome* restrictions would serve the State’s interests. And Appellants provide neither argument nor evidence to support any contention that the State actually considered any such alternatives, or that any alternative would fail to protect the State’s interests.

fair,” App.Br. 51, is insufficient to “demonstrate that the recited harms are real, not merely conjectural.” *See Turner*, 512 U.S. at 664.

Appellants effectively concede that they have not offered “evidence of any actual fraud or mistakes leading to improperly issued ballots in Kansas in the 2020 election.” App.Br. 51-52. They vaguely reference “inaccurate applications” and “calls and letters received by county election officials.” App.Br. 51. But as the district court correctly found, even assuming VPC’s mailing list contained errors, “the record contains no evidence that these errors had any impact on election processes.” App.IV 812-13. Appellants have also not shown that voters were calling their election offices “because the applications were prefilled.” App.IV 810, *see* App.IV 801-02. Thus, there is no evidence in the record that due to personalized applications, there was any risk of voter fraud in the 2020 election or that voters lost “faith that mail voting is free and fair,” questioned “the integrity of the electoral process,” or were discouraged from “participation in the democratic process.” *Cf.* App.Br. 51-52 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)).

Absent such evidence, Appellants attempt to argue that they have “buil[t] the roof” before “wait[ing] for the raindrop.” App.Br. 52. But even this prophylactic action cannot be justified because “the advance mail voting process includes multiple safeguards against fraud,” “Kansas law criminalizes creation or submission

of fraudulent advance mail ballot applications,” and “Kansas officials publicly declared that the 2020 election was successful, without widespread, systematic issues of voter fraud, intimidation, irregularities or voting problems.” App.IV 812.

Rather than cite to evidence, Appellants rely on an inapposite case arising under section 2 of the Voting Rights Act that reasoned that third parties *collecting* completed mail ballots “can lead to pressure and intimidation” and therefore potential fraud. *Brnovich v. DNC*, 594 U.S. 647, 685-86 (2021). But “intermediate scrutiny is not satisfied by the assertion of abstract interests,” even preventing voter fraud. *Rideout v. Gardner*, 838 F.3d 65, 72-73 (1st Cir. 2016) (concluding that under intermediate scrutiny, prohibition was not justified by state’s interests in preventing vote buying and voter coercion because the state offered “no evidence or anecdotes in support of its restriction” (emphasis original)). Appellants functionally argue that because mail-in voting “creates opportunities for fraud,” any regulation of mail-in voting is justified by avoiding fraud. App.Br. 53. This cannot be. Especially where, as here, Appellants make no effort to describe how the personalization of advance mail ballot applications could contribute to potential fraud,<sup>11</sup> and therefore fail to

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<sup>11</sup> Any such argument is particularly unconvincing given that to complete a personalized application, a voter must add any information that is not prefilled (such as driver’s license number and date of birth) and sign the application. A county election official must confirm that the information and signature match the voter file before the voter even receives a blank mail ballot. *See* App.III 599-¶¶28-29, 600-¶34.

demonstrate how the Prohibition “will in fact alleviate these harms in a direct and material way.” *See Turner*, 512 U.S. at 664. Accordingly, Appellants have failed to carry their burden of showing that the Prohibition is narrowly tailored to any interest in promoting public confidence or deterring voter fraud.

2. The Personalized Application Prohibition Is Not Narrowly Tailored To Minimize Voter Confusion

The district court correctly determined that Appellants “have not met their burden of showing that voters were confused because the applications were prefilled” or showing “how the prohibition will alleviate that harm in a direct and material way.” App.IV 810.

On this second appeal, Appellants improperly ask this Court to overturn the findings of fact reached by the district court after careful consideration of (sometimes conflicting) testimony and stipulated facts.<sup>12</sup> Given the absence of clear error, this Court must uphold the district court’s findings, even if “there are two permissible views of the evidence.” *See Mathis*, 787 F.3d at 1305-06.

The district court determined that Appellants’ concern was that voters were confused about the source of the prefilled applications. App.IV 802. The district

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<sup>12</sup> Appellants also mischaracterize testimony and stipulated facts. App.Br. 45-49. The parties stipulated to certain objective facts, and also established that certain testimony was given (*e.g.*, by Election Commissioners Howell and Cox) without stipulating to the truth of the matters asserted in that testimony. *E.g.*, compare App.III 618-¶171 (“Mr. Howell and Ms. Cox attested that ...”) with 618-¶172 (stipulating the number of applications received in Ford County).

court examined both Howell's deposition testimony and his affidavit and determined that, while his affidavit stated that his office was contacted by voters who received inaccurately prefilled applications, he testified during his deposition that he did not believe that voters were confused or frustrated because the applications were prefilled, but instead believed that voters were confused because they thought duplicate applications were being sent by his office. App.IV 786; *see* App.III 614-¶¶141-43. Appellants' differing interpretation of what Howell "meant" establishes no clear error. App.Br. 46. Cox's testimony similarly reflects that voters mistakenly believed the prefilled applications had been sent by her office. App.IV 786; *see* App.III 615-¶150. Likewise, Howell's and Cox's attestations that voters told election officials that they thought they were required to return prefilled applications suggests these voters thought the applications had been sent by the county.<sup>13</sup>

In light of the factual record, the district court correctly concluded that Appellants "presented no evidence on how criminalizing the mailing of personalized mail ballot applications would prevent confusion as to the source of the prefilled

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<sup>13</sup> Moreover, Appellants stipulated that any such confusion was promptly remedied: when these voters spoke to election officials, they were told they could choose to either submit the application or discard it. App.III 611-¶¶115-16. And in any event, as described below, the district court determined any surge in duplicate applications was not attributable to prefilling. App.IV 803. Voters were confused and frustrated by the uncertainty of voting by mail during a pandemic, which provides yet another explanation for increased calls to election offices and submission of duplicate applications. *See id.*; App.IV 786.

advance mail ballot.” App.IV 802. Applying intermediate scrutiny, this Court has rejected similar “vague, second-hand accounts” of the government’s interests where, as here, “in many respects the situations described by the anecdotes”—confusion about the sender of applications—are largely divorced from the central thrust of the [restriction]”—prefilling applications. *See Brewer*, 18 F.4th at 1237. Similarly, in *McCraw v. City of Oklahoma City*, this Court rejected “generic” evidence that does not address the relationship between the harm and the relevant restriction. 973 F.3d at 1074; *see id.* at 1071 n.11 (concluding that the government cannot meet its burden even with “ample evidence of citizen complaints” about a related issue without showing the connection between those complaints and the purported harm).<sup>14</sup>

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<sup>14</sup> Appellants’ belated citation to news articles (which are not part of the factual record) only further demonstrates that any voter confusion was due to confusion about the source of the mailers and not the fact that they were prefilled. *See* App.Br. 47-78; Joshua Eaton et al., “*A Nonprofit with Ties to Democrats Is Sending Out Millions of Ballot Applications. Election Officials Wish It Would Stop*,” Pro Publica, Oct. 23, 2020, <https://www.propublica.org/article/a-nonprofit-with-ties-to-democrats-is-sending-out-millions-of-ballot-applications-election-officials-wish-it-would-stop> (noting that third-party mailers could “be mistaken for official documents sent by state or local governments”); Ryan McCarthy, “*Pro Publica Responds to the Center for Voter Information*,” Pro Publica, Oct. 30, 2020, available at <https://www.propublica.org/article/propublica-responds-to-the-center-for-voter-information> (“Voters across several states told ProPublica that CVI’s mailings, which can be confused for documents sent by state or local governments, left them baffled or concerned.” (emphasis added)).

Crucially, as the district court determined, another provision of H.B. 2332 is specifically aimed at making sure voters are aware of the sender of any advance mail ballot applications. App.IV 802; *see* K.S.A. § 25-1122(k)(1)(A)-(D)). This provision requires the *exterior* and *each page* of mailings that include applications to state: “Disclosure: This is not a government mailing.” *Id.*<sup>15</sup> Appellees did not challenge this disclosure requirement, which is a far more tailored legislative remedy to the problem identified in the record.

Thus, as the district court correctly concluded, Appellants “have presented minimal evidence of voter confusion and frustration and have not established that the prefilled applications caused the alleged confusion,” and “have not met their burden of showing that voters were confused because the applications were prefilled.” App.IV 802, 810. Without this evidence, “[u]nder intermediate scrutiny, defendants have not established that the Personalized Application Prohibition is narrowly tailored to achieve any interest in preventing voter confusion.” App.IV 811.

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<sup>15</sup> The effectiveness of the “small disclosure at the bottom of VPC’s cover letter” (*see* App.III 710) does not suggest that Kansas’s new and far more robust disclosure requirement would be ineffective. *See* K.S.A. § 25-1122(k)(1)(A)-(D) (requiring “a clear and conspicuous label in 14-point font or larger” “on the exterior of such mailing, and on each page contained therein” that includes the name and address of the sender and “the following statement: ‘Disclosure: This is not a government mailing. It is from a private individual or organization.’”); *cf.* App.Br. 46-47.

Appellants also fail to carry their burden because they make no attempt to point to evidence that the State gave “*serious consideration* to such less-restrictive means before opting for a particular regulation, which is “a necessary part of a government’s narrow tailoring showing” in this Circuit. *See Brewer*, 18 F.4th at 1255 (emphasis original).<sup>16</sup> Rather, Appellants baldly assert that “[t]he legislature endeavored to maintain its solicitude of mail voting and limit the intrusion on any speech rights while still addressing a problem that had occurred in 2020,” even though the record is devoid of any such evidence supporting this assertion. App.Br. 48; App.IV 778 (finding the legislative record silent on prefilling). Contrary to Appellants’ assertion, as the district court noted, H.B. 2332 contained a litany of restrictions on advance mail voting, which suggests hostility, not “solicitude,” towards mail voting. App.IV 776, 794-95 & nn.2, 19. “[A] bald assertion by the government that an ordinance is not substantially broader than necessary will not ordinarily be sufficient to satisfy the narrow-tailoring inquiry or render unnecessary an inquiry into less-burdensome alternatives.” *Brewer*, 18 F.4th at 1255. Here, as in *Brewer*, the government’s “not-substantially-broader-than-necessary assertion

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<sup>16</sup> VPC does not suggest that Appellants are required to show that they actually tried or tested alternative approaches before enacting the Prohibition, only that they considered them. *See id.* at 1254-55.

does not have sufficient grounding in the record evidence to be labeled anything other than ‘bald.’” *Id.*

At most, Appellants make conclusory arguments as to why alternatives suggested by VPC would be “ineffective,” “have little utility,” or are “a folly.” App.Br. 48-49.<sup>17</sup> But this Court need not speculate as to whether VPC’s proposed less-restrictive means would address the State’s interests as efficaciously as the Prohibition. “After all, the narrow tailoring burden is on the [government]—not Plaintiffs.” *Brewer*, 18 F.4th at 1256. And in any event, “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*, 573 U.S. at 495. Appellants have not shown that Kansas “seriously undertook to address the problem” at all, much less that it undertook to address the problem “with less intrusive tools readily available to it.” *Id.* at 494. To the contrary, in the same legislation, the Legislature sought to ban distribution of any applications at all by out-of-state speakers. This evidences no interest by the Legislature to tailor

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<sup>17</sup> Appellants’ arguments suggest yet another potential alternative: require any third parties that mail voters personalized advance mail ballot applications to use only information on ELVIS after the voter registration deadline. If a voter submits an application pre-filled by a third party (which would be clear given H.B. 2332’s required disclosures about the sender) that contains prefilled information that does not match ELVIS (a process election officials must perform anyway, *see* App.IV 780), the State could have a basis to initiate an investigation of a violation.

its prohibitions to minimize suppression of speech. For this independently sufficient reason, Appellants have failed to carry their burden that the Prohibition is narrowly tailored to minimize voter confusion.

3. The Personalized Application Prohibition Is Not Narrowly Tailored To Facilitate Orderly Or Efficient Election Administration

The district court correctly determined that Appellants have not demonstrated prefilling caused any “real” harms on election administration, and even if they had, the Prohibition is not designed to alleviate these harms. App.IV 811-12.

Appellants argue that they have provided evidence of how much time it takes election offices to process “inaccurate and duplicate applications.” App.Br. 49-50. However, the district court correctly concluded that Appellants “have provided no evidence of how many duplicate, incomplete or inaccurate prefilled applications were submitted to county offices.” App.IV 811.<sup>18</sup> The district court again weighed the testimony of Howell and Cox, on which Appellants relied on remand. *Id.*

With respect to duplicates, Howell and Cox attested that they “believed that most duplicate applications were prefilled by VPC.” App.IV 811. As the district court correctly determined, these “beliefs” do not satisfy Appellants’ burden to demonstrate that “the interests advanced as justifying the regulation are real, and not

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<sup>18</sup> Tellingly, Appellants do not cite the record when they assert that “the record reflects there were many” erroneously pre-filled application submitted to county election offices. App.Br. 51.

speculative.” *Brewer*, 18 F.4th at 1205 n.14; *see* App.IV 811. Rather, the district court afforded weight to the stipulated fact that “Kansas election officials did not attempt to quantify how many duplicate advance voting ballot applications involved VPC-prefilled applications,” App.IV 811; *see* App.III 618-¶174; even though Howell and Cox noted “they were easily able to identify” “VPC’s pre-filled applications,” App.III 603-¶56. Moreover, as the district court reasoned, Appellants “have not established that in the context of an unprecedented election during a global pandemic, any ‘surge’ of inaccurate and duplicate applications was fairly attributable to activity which the Personalized Application Prohibition seeks to prohibit.” App.IV 803; *see* App.IV 786 (describing how some voters resubmitted applications due to concerns about lost applications or mail delays during the pandemic). And in any event, the Prohibition does not address duplicate applications. App.IV 803.

With respect to inaccurately prefilled applications, the district court found pertinent deposition testimony that “[w]hen officials received an incomplete or inaccurate application, they did not determine whether it was prefilled, or track how many were prefilled.” App.IV 811, *see* App.IV 787; App.III 610-¶111, 613-¶140. To the extent Appellants cite contrary, post-deposition attestations by Howell and Cox, it is the district court’s responsibility to resolve such inconsistencies; and here, there was no clear error in the district court’s conclusions.

On appeal, Appellants also cite to errors in VPC’s mailing list identified by their witness Ken Block. App.Br. 49. However, as the district court found, Block “did not purport to demonstrate that any erroneously prefilled application came to the attention of election officials,” “conclude that they negatively impacted the 2020 election process,” or “explain how” VPC’s “use of stale voter registration data to prefill the advance mail ballot applications imposed an extra burden on county election officials.” App.IV 783-84.

Here, as in *Brewer*, “not only has the [government] put forward inadequate evidence of real, non-speculative harms arising from [the restricted speech], but, more significantly, the evidence it *has* put forward *belies* any notion that the [government], in reality, faces such harms.” 18 F.4th at 1244 (emphasis original). The district court credited the testimony of elections officials Cox and Shew and evidence from Johnson county that personalizing advance mail ballot applications facilitates orderly and efficient election administration. App.IV 803-04.<sup>19</sup> VPC’s

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<sup>19</sup> The district court did not purport to “substitute [these officials’] judgement for that of the Kansas Legislature,” *cf.* App.Br. 50 ((citing *Daunt v. Benson*, 999 F.3d 299, 329-31 (6th Cir. 2021) (Readler, J., concurring)); it merely made a finding about what “the record suggests on balance,” App.IV 803. Judge Readler’s concurrence in *Daunt*, 999 F.3d at 329-31—which is not binding on the Sixth Circuit, let alone the Tenth—is an inapposite criticism of the subjectivity of *Anderson-Burdick* balancing. Even if this Court were to accept Appellants’ argument based on *Daunt*, it would severely undercut their near-exclusive reliance on testimony by election officials to establish that prefilling harms election administration.

expert Dr. Eitan Hersh also testified that VPC’s prefilling reduced the burden on election officials. App.IV 784.

On this record, the district court correctly determined that Appellants “have not shown a close fit between prohibiting the distribution of prefilled ballot applications and facilitating efficient election administration.” App.IV 812.

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In sum, the Personalized Application Prohibition is not narrowly tailored to any of Appellants’ stated interests.

**B. Alternative Channels Are Irrelevant**

Appellants have wholly failed to carry their burden to “demonstrate not only that the regulation does not sweep too broadly, but also that the interests advanced as justifying the regulation are real, and not speculative—and that the regulation addresses or ameliorates those interests in a direct manner.” *Brewer*, 18 F.4th at 1222 n.14. Thus, this Court “need not consider whether the [Prohibition] leaves open ample alternative channels of communication.” *Id.* at 1257.<sup>20</sup>

**C. Appellants’ Efforts To Recast Intermediate Scrutiny As Directed By This Court In *VoteAmerica I* Are Meritless**

Perhaps in recognition of their failure to satisfy intermediate scrutiny, Appellants argue that this Court did not mean what it said, and that the Prohibition

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<sup>20</sup> Raised at App.III 702.

should instead be subject to a less-searching inquiry than “narrowly tailored to serve a significant government interest.” Specifically, Appellants argue that (1) the Prohibition need only be “reasonable and viewpoint-neutral,” App.Br. 28; and (2) the district court “misapplied the law in terms of the State’s requisite evidentiary burden” because “in election law[,] prophylactic regulation is constitutionally permissible without a demonstrable record of abuse.” App.Br. 41. The district court disregarded both of these arguments in footnotes. App.IV 808 nn.27-28. This Court should similarly pay little mind to Appellants’ meritless (and waived) arguments.<sup>21</sup>

1. “Reasonableness” Is Not The Proper Test For The Personalized Application Prohibition

Appellants’ public forum argument is waived and, in any event, incorrect.

*First*, Appellants do not dispute that they did not raise this issue to the district court prior to remand.

*Second*, Appellants are separately barred from raising their “reasonableness” argument on remand in light of this Court’s mandate in *VoteAmerica I* to apply intermediate scrutiny to the Prohibition. “The mandate rule ... requires the district court to strictly comply with any mandate rendered by this court on remand.” *United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020) (internal citations omitted). None of Appellants’ cited cases support their argument that a forum analysis is a

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<sup>21</sup> Raised at App.IV 761.

“component of [] narrow tailoring” under intermediate scrutiny or “a key part of applying that standard.” See App.Br. 28,<sup>22</sup> 36. Appellants’ argument is particularly unavailing considering that in *VoteAmerica I*, this Court expressly considered the “somewhat analogous context of content restrictions on the use of government property constituting a nonpublic forum” and the reasonableness test that applied in that setting, yet concluded that intermediate scrutiny narrow tailoring was the appropriate standard. 121 F.4th at 849-51. If the *VoteAmerica I* Court thought that “reasonableness” applied, or that the district court should conduct a forum analysis, it would have said so.

*Third*, none of the exceptions to the mandate rule apply. See *Huffman v. Saul Holdings Ltd. P’ship*, 262 F.3d 1128, 1133 (10th Cir. 2001) (finding “[n]one of these exceptions is present here”). In *VoteAmerica I*, this Court did not “announce[] a new legal standard,” but rather instructed the district court to apply the familiar intermediate scrutiny test because the present case, consistent with *City of Austin*, was a content-based but viewpoint-neutral restriction. Unlike the waiver arguments

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<sup>22</sup> See *Evans v. Sandy City*, 944 F.3d 847, 853, 854 (10th Cir. 2019) (applying narrow tailoring only after addressing forum); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (never applying intermediate scrutiny or narrow tailoring because the forum was nonpublic); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (same); see also *Walden v. Kosinski*, 153 F.4th 118, 136, 140 (2d Cir. 2025) (never applying intermediate scrutiny or narrow tailoring where the *Anderson-Burdick* balancing test applied and the burden was not severe).

made by plaintiffs on remand in *City of Austin*, Appellees here are not arguing that Appellants “have waived any argument that the [Prohibition] does not survive intermediate scrutiny,” but rather that Appellants cannot argue that a different, lower standard of “reasonableness” applies when this Court issued a clear mandate to apply intermediate scrutiny on remand. *See Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 64 F.4th 287, 291 (5th Cir. 2023).

*Fourth*, even if this Court were to consider Appellants’ waived and barred public forum argument, “reasonableness” would not apply. Even under Appellants’ favored case, *Cornelius*, the forum from which “the Government [] limit[s] access” is the mail. 473 U.S. at 797. The Prohibition applies to any person who “solicits *by mail* a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot *in such mailing*.”<sup>23</sup> *VoteAmerica I*, 121 F.4th at 831 (quoting K.S.A. §§ 25-1122(k)(1)-(2);) (emphasis added). The Prohibition does apply to personalized applications distributed through any other means, such as in person, by hand delivery, or via email. “The Postal Service ... is a public forum.” *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 101 (1981) (White, J. concurring). Even under *Cornelius*, the Prohibition would be

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<sup>23</sup> VPC is not arguing that all regulated speech is entitled to public forum protection upon being “sent by mail.” *Cf.* App.Br. 33. Rather, it is clear that Prohibition singles out speech sent by mail, and therefore the mail is the forum from which the State has limited access to transmitting personalized advance mail ballot applications.

subject to heightened scrutiny. 473 U.S. at 800. Thus, Appellants’ forum argument provides them no aid.

In sum, Appellants’ arguments to apply “reasonableness” are waived, foreclosed by *VoteAmerica I*, and meritless.

2. No “Modified Burden of Proof” Applies To The Personalized Application Prohibition

The district court correctly rejected Appellants’ arguments that they have a relaxed burden of proof under *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality). App.IV 808-09 n.35. As Appellants acknowledge, the *Burson* plurality clearly stated that the modified burden of proof “applies only when the First Amendment right threatens to interfere with the act of voting itself.” *Id.* at 209 n.11. In all other cases “in which there is a conflict between First Amendment rights and a State’s election process,” “States must come forward with more specific findings to support regulations.” *Id.*

Appellants would expand this “modified” burden of proof to be a “broadly applicable principle” that all prophylactic election regulations—no matter how remote from the act of voting itself—are permissible. App.Br. 41. Yet Appellants fail to cite a single case where *Burson*’s burden of proof has been applied beyond the two specific circumstances set forth by the plurality: ballot access and polling-

place restrictions.<sup>24</sup> In rejecting Appellants’ arguments that *Anderson-Burdick* balancing applies, this Court in *VoteAmerica I* already held that “the Prohibition regulates not the ‘mechanics of the electoral process’ but instead ‘pure speech.’” 121 F.4th at 843 (quoting *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995)). The same reasoning applies here. The Prohibition restricts the right of third parties to solicit voters to submit an *application* to vote by mail, which is removed from a voter’s completion and return of the application, and even further removed from the voter’s receipt, completion, and return of an actual mail ballot. The Prohibition does not impose any restrictions on voters themselves, including how or when a voter completes and submits an advance mail ballot application, how an election official reviews that application or sends a mail ballot, how a voter can complete and return a mail ballot, or “whether and how a citizen may cast a lawful ballot.” *Cf.* App.Br. 44. No “modified” burden applies here.

In any event, the district court did not require Appellants to offer “empirical proof of actual harm,” *cf.* App.Br. 41; but under intermediate scrutiny, Appellants must demonstrate the harms are real and that these harms are ameliorated by the

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<sup>24</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-70 (1997) (applying *Anderson-Burdick* to a ballot access restriction on a political party); *Burson*, 504 U.S. at 198 (applying strict scrutiny to a restriction on certain activity within 100 feet of a polling place); *Frank v. Lee*, 84 F.4th 1119, 1141 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1349 (2024) (same, to a 300-foot restriction).

Prohibition, *see* App.IV at 34. As explained above, Appellants have failed to connect the speech banned by the Prohibition to the harms they seek to prevent (even assuming such harms were real). As the *Burson* plurality acknowledged, even “longstanding election regulations” can be struck down where there is “no rational connection between the asserted interest and the regulation.” 504 U.S. at 208 n.10.

### CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017  
Tel: (212) 455-2000  
jyoungwood@stblaw.com

Mark P. Johnson (KS Bar #22289)  
DENTONS US LLP  
4520 Main Street, Suite 1100  
Kansas City, MO 64105  
Tel: (816) 460-2400  
mark.johnson@dentons.com

Danielle M. Lang  
Alice C.C. Huling  
Kate Hamilton  
CAMPAIGN LEGAL CENTER  
1101 14th Street, NW, St. 400  
Washington, D.C. 20005  
Tel: (202) 736-2200  
dlang@campaignlegalcenter.org  
ahuling@campaignlegalcenter.org  
khamilton@campaignlegalcenter.org

*Attorneys for Plaintiffs/Appellees*

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## STATEMENT REGARDING ORAL ARGUMENT

In accordance with 10th Circuit Rule 28.2(C)(2), Appellees respectfully request that this case be heard at oral argument. This appeal presents fundamental constitutional questions that bear serious consequences for VPC. Counsel believe that oral presentation would aid this Court's disposition of the case.

Dated: January 7, 2026

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, this APPELLEES' ANSWERING BRIEF:

1. Compiles with Rule 32(a)(7) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rules 32(f) of the Federal Rules of Appellate Procedure, this document contains 12,008 words; and
2. Compiles with the typeface requirements of Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because the foregoing was prepared in a proportionally spaced type face using Microsoft Word 2016 in 14-point, Times New Roman font.

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017  
Tel: (212) 455-2000  
jyoungwood@stblaw.com  
*Attorney for Plaintiffs/Appellees*

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Vipre, 111379 – 7.100101, January 7, 2026, and according to the program are free of viruses.

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017  
Tel: (212) 455-2000  
jyoungwood@stblaw.com

*Attorney for Plaintiffs/Appellees*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of January 2026, an electronic copy of the foregoing APPELLEES' ANSWERING BRIEF was served on Defendants/Appellants and all counsel of record via the Court's CM/ECF system.

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017  
Tel: (212) 455-2000  
jyoungwood@stblaw.com

*Attorney for Plaintiffs/Appellees*

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