Case No. 23-3100

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

APPELLANTS' OPENING BRIEF

Appeal from the U.S. District Court for the District of Kansas
Honorable Kathryn H. Vratil, District Judge
District Court Case No. 2:21-CV-02253-KHV-GEB

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF PRIOR OR RELATED APPEALS vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

ARGUMENT 11

I. De Novo Standard of Review Must Be Applied 12

II. Sending Voters a Pre-Filled Advance Ballot Application is *Conduct*, Not *Speech* 12

A. *Pre-Filling Official Advance Mail Ballot Applications is Not Inherently Expressive Activity* 12

B. *The Pre-Filled Advance Mail Ballot Application that VPC Sends to Voters Must be Disaggregated From the Accompanying Cover Letter* 18

III. The Pre-Filled Application Prohibition Must be Evaluated Under Deferential Standard 28

A. *Rational Basis Review Should be Applied* 28

B. *Assuming First Amendment is Implicated, Proper Standard for Evaluating VPC's Claims is Anderson-Burdick Test* 29

C. *Heightened Scrutiny Does Not Apply.* 31

1. The Pre-Filled Application Prohibition Does Not Target Core Political Speech 31

2. The Pre-Filled Application Prohibition is Content and Viewpoint Neutral 36

D. *Kansas' Interests Are Sufficient to Survive Any Level of Judicial Scrutiny* 40

1. Minimizing Voter Confusion, Enhancing Public Confidence, and Effectuating Orderly and Efficient Election Administration. 41

2. Avoiding Voter Fraud. 47

IV. The Pre-Filled Application Prohibition Does Not Contravene VPC's Freedom of Association Rights 49

V. The Pre-Filled Application Prohibition is Not Unconstitutionally Overbroad 52

CONCLUSION 55

STATEMENT IN SUPPORT OF ORAL ARGUMENT 56

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) 56

CERTIFICATE OF DIGITAL SUBMISSION 57

CERTIFICATE OF SERVICE 57

INDEX OF ATTACHMENTS 58

Attachment 1: Memorandum & Order (May 4, 2023) .... Attach. 1

Attachment 2: Judgment of the Court (May 4, 2023) .... Attach. 2

TABLE OF AUTHORITIES

Cases Page(s)

ACLU v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) 31

Am. Ass'n of People With Disabilities v. Herrera, 690 F.Supp.2d 1183 (D.N.M. 2010) 26

Anderson v. Celebrezze, 460 U.S. 780 (1983) 29, 30

Armour v. City of Indianapolis, 566 U.S. 673 (2012) 28

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) 40, 46

Buckley v. Am. Const. Law Found., Inc., 552 U.S. 182 (1999) 31

Burdick v. Takushi, 504 U.S. 428 (1992) 29, 30

Burson v. Freeman, 504 U.S. 191 (1992) 41, 54

Caruso v. Yamhill Cnty., 422 F.3d 848, 856 (9th Cir. 2005) 35

Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002) 33

Christian Legal Soc'y v. Martinez, 561 U.S. 661(2010) 51

City of Austin v. Reagan Nat'l, Advert., 142 S.Ct. 1464 (2022) 37

Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) 12, 13

Crawford v. Marion Cty. Election Bd., 553 U.S. 181(2008) 46, 47, 48

Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015) 12, 13

Dallas v. Stanglin, 490 U.S. 19 (1989) 49

Daunt v. Benson, 999 F.3d 299 (6th Cir. 2021) 45

Democracy N.C. v. N.C. State Bd. of Elections, 476 F.Supp.3d 158 (M.D.N.C. 2020) 24, 25, 26

Democracy *N.C. v. N.C. State Bd. of Elections,* 590 F.Supp.3d 8503 (M.D.N.C. 2022 26

Doe v. Reed, 561 U.S. 186 (2010) 31, 32, 39, 40, 41

DSCC v. Pate, 950 N.W.2d 1 (Iowa 2020) 41

Faustin v. City & Cty. of Denver, 423 F.3d 1192 (10th Cir. 2005) 54, 55

Feldman v. Ariz. Sec'y of State's Office, 843 F.366, 372 (9th Cir. 2016)...............25

Fish v. Schwab, 957 F.3d 1105 (10th Cir. 2020)..30

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 14

Heller v. Doe, 509 U.S. 312 (1993) 28, 29

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) 19

Knox v. Brnovich, 907 F.3d 1167 (9th Cir. 2018) 25

League of Women Voters of Fla. v. Cobb, 447 F.Supp.2d 1314 (S.D. Fla. 2006) ..24

Lichtenstein v. Hargett, 489 F.Supp.3d 742 (M.D. Tenn. 2020).............................20

Lichtenstein v. Hargett, 2021 WL 5826246 (M.D. Tenn. Dec. 7, 2021) 20

Marchioro v. Chaney, 442 U.S. 191 (1979) 41

Mazo v. N.J. Sec'y of State, 54 F.4th 124 (3d Cir. 2022) 34, 39

McCullen v. Coakley, 573 U.S. 464 (2014) 38, 39

Meyer v. Grant, 486 U.S. 414 (1988) 31, 32, 33, 34, 35

Munro v. Socialist Workers Party, 479 U.S. 189 (1986)..47

NAACP v. Button, 371 U.S. 415 (1963).. 51, 52

New Ga. Project v. Raffensperger, 484 F. Supp.3d 1265 (N.D. Ga. 2020) 25

New Ga. Project v. Raffensperger, 976 F.3d 1278 (11th Cir. 2020).......................25

New York v. Ferber, 458 U.S. 747 (1982) 54

Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) 30, 31

Project Vote v. Kelly, 805 F.Supp.2d 152 (W.D. Pa. 2011) 35, 36

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 37, 39

Richardson v. Tex. Sec'y of State, 978 F.3d 220 (5th Cir. 2020) 48

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) 23, 24

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 49

Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.,
547 U.S. 47 (2006).. 9, 13, 14, 15, 18, 23

Save Palisade Fruitlands v. Todd, 279 F.3d 1204 (10th Cir. 2002)........................28

Sheldon v. Grimes, 18 F.Supp.3d 854 (E.D. Ky. 2014)....36

Sickles v. Campbell Cnty., Ky., 501 F.3d 726 (6th Cir. 2007)....19

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).... 16, 17

Storer v. Brown, 415 U.S. 724 (1974)....41

Tenn. State Conf. of NAACP v. Hargett, 420 F.Supp.3d 683 (M.D. Tenn. 2019)...34

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).... 17, 42

United States v. O'Brien, 391 U.S. 367 (1968).... 13, 40

Utah Republican Party v. Cox, 892 F.3d 1066 (10th Cir. 2018).... 29, 30

Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).... 21, 22

Virginia v. Hicks, 539 U.S. 113 (2003)....55

VoteAmerica v. Raffensperger, 609 F.Supp.3d 1341 (N.D. Ga. 2022).... 19, 20, 22, 33, 52

*Voting for Am. v., Stee*n, 732 F.382, 391 (5th Cir. 2013).... 25, 26, 27, 32, 33

Voting for Am., Inc. v. Andrade, 488 F. App'x 890 (5th Cir. 2012)....50

Z.J. *Gifts D-2, LLC v. City of Aurora,* 136 F.3d 683 (10th Cir. 1998)....40

Statutes

28 U.S.C. § 1291....1

28 U.S.C. § 1331....1

Kan. Stat. Ann. § 12-3013....33

Kan. Stat. Ann. § 25-205....33

Kan. Stat. Ann. § 25-302a....33

Kan. Stat. Ann. § 25-303....33

Kan. Stat. Ann. § 25-1119(a)....36

Kan. Stat. Ann. § 25-1122(k)(2)....6

Kan. Stat. Ann. § 25-1122(l)(1)....6

Kan. Stat. Ann. § 25-2431....54

Kan. Stat. Ann. § 25-3601 33

Kan. Stat. Ann. § 25-3602 33

U.S. Const. art. I, § 4 31

Other Materials

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) 46

Ryan McCarthy, "*Pro Publica Responds to the Center for Voter Information*," Pro Publica (Oct. 30, 2020) 46

STATEMENT OF PRIOR AND RELATED APPEALS

There are no prior or related appeals in this matter.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331. The district court issued a Memorandum and Order, and a separate Judgment disposing of all claims in the case, on May 4, 2023. App.III 628, 670. Defendants-Appellants filed a timely notice of appeal on June 1, 2023. App.III 671. This Court now has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(I) Does Kansas' prohibition against third-parties pre-filling the advance ballot applications of other individuals ("Pre-Filled Application Prohibition") implicate the third parties' First Amendment rights?

(II) What is the proper standard of judicial scrutiny under which Kansas' Pre-Filled Application Prohibition must be evaluated?

(III) Does Kansas' Pre-Filled Application Prohibition contravene the freedom of association rights of third-parties who simply mail pre-filled advance voting applications to registered voters?

(IV) Is Kansas' Pre-Filled Application Prohibition unconstitutionally overbroad?

STATEMENT OF THE CASE

This case revolves around the process for advance voting by mail in Kansas, the complications that can and have arisen therefrom, and the State's authority to address those issues through appropriate legislation.

To vote by mail under Kansas' no-excuse advance voting rules, a registered voter must timely submit a properly completed advance ballot application to the county election office in which the individual is registered. App.III 597-¶28.[1] All information on the application must precisely match the data in the statewide voter registration database ("ELVIS") in order for the applicant to be issued an advance ballot. App.III 597-¶24, 598-¶37. If information does not match or is missing, county election officials must undertake a highly time-consuming process to contact the applicant and afford him/her a chance to cure the deficiencies. App.III 598-¶¶33-35. If an applicant cannot be reached or it would be impracticable to do so given the proximity of the election, a more labor-intensive provisional ballot may be issued, depending on the defect. App.III 598-¶36, 599-¶43.

VPC's Advance Ballot Application Activities in Kansas in 2020

Plaintiff Voter Participation Center ("VPC") is a 501(c)(3) entity which, along with its 501(c)(4) sister organization, Center for Voter Information ("CVI"), mails

[1] References to the Appendix include the volume number followed by the specific page number(s).

partially pre-filled advance ballot applications (in which the registrant's name, address, and county are pre-populated) to targeted individuals meeting certain demographics. App.III 595-¶6, 596-¶14, 600-¶48. The pre-filled applications are accompanied by a cover letter in which VPC touts the benefits of voting by mail, and a pre-addressed, pre-paid envelope to use in returning the completed application to the county election office. App.III 600-¶48, 674-678.

Any individual may obtain a list of all registered voters in the State. App.III 600-¶¶50-51. VPC relies on a vendor (Catalist) to provide the data that it uses to pre-populate its applications. App.III 600-¶52. Although the information Catalist sends to VPC is based upon publicly available information in ELVIS, Catalist also merges commercial data into the mix, meaning the information VPC receives does not always strictly track ELVIS data. App.III 602-¶63.

In the November 2020 Election, VPC and CVI mailed between one and five advance ballot application packets to approximately 507,864 Kansas voters. App.III 600-¶47, 615-¶165. This occurred over five "waves" of mailings. App.III 602-¶60. But there were serious quality control issues. Nationally, roughly 5% of VPC's pre-filled applications contained an erroneous middle name or initial and roughly 3% had a mismatched suffix. App.III 602-¶64. (In addition to Kansas, VPC undertook similar activity in seventeen other states. App.III 673.) While VPC did not know whether Kansas error rates exactly tracked the national numbers, it was sufficiently

concerned about the accuracy of the data it received from Catalist that it stopped pre-filling applications and instead sent blank applications in the third and fourth Kansas waves. App.III 602-¶¶61-62, 65.

Defendants' expert, Ken Block, also analyzed VPC's Kansas mailing list (or at least all data that VPC provided in discovery) and identified an array of errors in the names and addresses VPC used to pre-fill applications in Kansas. App.III 603-604-¶¶67-74. Mr. Block's analysis further revealed that VPC sent applications to hundreds of voters whose registrations had been cancelled prior to the mailings, in many cases long before. App.III 603-¶¶70-72. He discovered that, because of the 4-6 week lead time between the date VPC sent its data to its printer for pre-filling applications and the date such applications arrived in voters' mailboxes, and based on the dates VPC received updated Kansas data from Catalist, *at best*, VPC used a Kansas voter file from April 2020 to pre-populate the applications it sent to voters for the November 2020 Election. App.III 601-¶53, 603-¶68. Given that ELVIS is a dynamic system and updated in real time, App.III 601-¶58, VPC thus often used stale / inaccurate information.

Voter / Election Official Reaction to VPC's Activities

Shawnee County Election Commissioner Andrew Howell described receiving a large number of VPC-pre-filled applications containing information that did not match applicants' data in ELVIS (e.g., wrong address, last name, middle initial, or

suffix). App.III 611-¶139, 680-736. He additionally noted that the county received 4,217 duplicate applications, a staggering figure representing more than 15.4% of the total advance applications received. App.III 615-616-¶¶168-169. Ford County Clerk Debbie Cox testified similarly. Her office received 274 duplicates, nearly 9% of the 3,040 total applications. App.III 616-¶172. These figures bore no resemblance to the 2020 proportional increase in mail voting, considering that Shawnee County had never received more than a *dozen* duplicates in any prior election, and Ford County had never received more than *five*. App.III 616-¶¶169-170, 173. Election Director Bryan Caskey testified that other county election officials throughout the State shared their own similar experiences with him. App.III 614-¶¶161-162.

Howell recounted that these inaccurate and duplicate applications resulted in calls, letters, e-mails, and in-office visits from voters expressing anger, confusion, and frustration at what they had received from VPC. App.III 612-¶¶142-144, 622-623. He and Cox added that many voters explained that they had submitted duplicate applications because they believed they were obligated to mail any and all pre-filled applications back to the county election office in order to receive an advance ballot, even if they had previously submitted one. App.III 616-¶171.

Inaccurate and duplicate applications had a deleterious impact on efficient election administration as well. Election officials described the extra time they had to spend processing each and every application, particularly duplicates, and going

through the elaborate curative process for voters submitting erroneous and duplicate applications. App.III 613-¶¶153-157, 617-¶¶176-178. Cox recalled the situation got so bad in Ford County that she took out an ad in the local paper to inform voters that she had nothing to do with VPC's mailings. App.III. 613-¶¶150-151, 679. Although existing safeguards prevented systemic fraud from occurring, VPC's activities made life far more difficult for Kansas election officials.

Legislative Reaction to 2020 Election and Ensuing Litigation

Largely in response to the events of the 2020 election, the Kansas legislature in its 2021 session adopted the Pre-Filled Application Prohibition, codified at Kan. Stat. Ann. § 25-1122(k)(2).[2] The statute makes it a misdemeanor for any person to solicit, by mail, a registered voter to file an advance ballot application if the mailing includes an application that has been partially or fully completed prior to the mailing.

Proceedings Below

Plaintiffs VoteAmerica and VPC commenced this lawsuit, alleging that the Pre-Filled Application Prohibition contravened their First Amendment freedoms of speech and association and was unconstitutionally overbroad. App.I 26. Plaintiffs

[2] The Legislature separately prohibited any person not residing or domiciled in Kansas from sending an advance ballot application to a Kansas voter. Kan. Stat. Ann. § 25-1122(*l*)(1). After the district court preliminarily enjoined that statute's enforcement, Defendants agreed to a permanent injunction, and Plaintiffs dismissed Count IV of their Complaint. App.I 121-124; App.III 618-¶187. Those claims are thus no larger part of this litigation.

moved for a preliminary injunction, which the district court granted. App.II 75. Following discovery,[3] the parties filed cross-motions for summary judgment. App.I 148 – App.III 590. The district court declined to rule on the motions and instead directed the parties to stipulate to as many facts as possible. App.III 459. The court also invited the parties to have the case submitted for trial on the written record generated by the summary judgment motions. App.III 460. After the parties accepted this invitation, the court denied the summary judgment motions in a minute order, but stated that the motions would be considered as trial briefs. App.III 591. The parties subsequently filed stipulated facts, App.III 592-624, and the case was submitted without oral argument. App.III 626. On May 4, 2023, the district court issued a Memorandum and Order declaring the Pre-Filled Application Prohibition violative of VPC's First Amendment rights to free speech and association, and unconstitutionally overbroad. App.III 628. The court simultaneously issued a Judgment to that effect, from which Defendants timely appealed.

SUMMARY OF THE ARGUMENT

At the heart of VPC's claims is its belief that it has a First Amendment right to fill out *someone else's* advance ballot application. No such right exists. The

[3] The parties stipulated that the activities of VoteAmerica, which operates an interactive website whereby voters can request that a pre-filled application be mailed to them, do not violate the challenged statute. App.III-619, ¶188. VoteAmerica, therefore, did not participate in any discovery.

application itself is not a forum for speech, and the act of filling in the name and address blanks on this official state form constitutes little more than non-expressive conduct warranting no constitutional protection. If there is any speech at all – and there is not – it is that of the *voter* (communicating a desire to receive an advance ballot), not a *third-party* like VPC.

Although the cover letter accompanying the pre-filled application in VPC's mailings is indisputably protected speech, VPC cannot bootstrap that correspondence onto the application itself and thereby evade the restrictions of Kansas' Pre-Filled Application Prohibition. Any message that VPC communicates about the virtues of voting by mail is delivered through the *cover letter*, not the *application*. And the challenged statute does not impede VPC from conveying its pro-mail voting message, explaining the process for obtaining an advance ballot, providing the recipient with a blank application, mailing a pre-filled application to a voter who requests one, or engaging in any one-on-one interaction or assistance with voters. The only thing restricted is the unsolicited mailing of a pre-populated application.

The district court reasoned that only an organization intending to convey a message would expend resources in pre-populating the applications. But the mere fact that an entity *intends* to communicate a message does not render its conduct inherently expressive in nature. Nor is there evidence in the record that recipients of VPC's pre-filled applications would have understood any message in the absence

of the cover letter. Where the expressive component of an entity's "actions is not created by the conduct itself but by the speech that accompanies it," that explanatory speech underscores "that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.*, 547 U.S. 47, 65-66 (2006) ("*FAIR*"). If the district court is correct that a State cannot enforce an election-related statute merely because a third-party engages in proscribed conduct as part of a written communiqué, a vast array of regulations would be in peril.

Moreover, the district court's characterization of VPC's actions in pre-filling strangers' advance ballot applications as core political speech, and its holding that the law prohibiting such conduct must be subject to strict scrutiny, misconstrues the relevant precedent. Because VPC's activities do not implicate the First Amendment, the statute should have been reviewed under a rational basis standard. But even if some limited expressive conduct is at play, the court should have evaluated the law with far more deference, as is necessary for most election administration provisions. When states exercise their constitutional authority to regulate elections, there will inevitably be an impact on individuals' voting, speech, and association rights under the First Amendment. The Supreme Court generally invokes a balancing test to evaluate such laws, recognizing that states enjoy broad latitude in managing election procedures and that important regulatory interests are generally sufficient to justify

reasonable, non-discriminatory restrictions, particularly when the purported impact on plaintiffs' rights is minimal.

Although the district court likened the Pre-Filled Application Prohibition to restrictions invalidated in the context of referendum signature collection efforts, the two are fundamentally distinct. The essence of a referendum entails an interactive process between the collector and the voter. And the initiative itself communicates a message that the voter is asked to endorse. By contrast, the Pre-Filled Application Prohibition involves no personal interactions whatsoever. It is a facially neutral regulation that merely restricts third-parties from sending unsolicited, pre-populated applications to strangers. Such a minimal limitation does not justify strict scrutiny.

The State's interests in adopting this law, meanwhile, are legitimate and reasonable. These interests – avoiding voter confusion, facilitating orderly and efficient election administration, enhancing public confidence in the electoral process, and deterring voter fraud – are well recognized and appropriately calibrated to the challenged law. VPC's pre-filled applications were often error-prone, both in Kansas and elsewhere. VPC also flooded voters with multiple pre-filled applications, which caused many individuals to believe they had to send in the duplicates for processing. These actions triggered substantial anger and confusion and wreaked havoc on election administration in numerous counties. The district court purported to balance

these interests with the burden on VPC's activities, but contrary to the court's conclusion, the fulcrum tilted heavily in favor of the State. And the court's balancing of policy considerations intruded on critical principles of federalism.

The district court's freedom of association holding was similarly flawed. Freedom of association does not protect connections between complete strangers who are not members of any organized association and are not coming together in pursuit of any common purpose. That some recipients of VPC's mailings – none of whom had a prior relationship and many of whom did not even know the mailings came from VPC – used VPC's pre-addressed envelope to mail an application to the county election office does not form the type of association that triggers constitutional protection. Recipients are nothing more than strangers and no association flows from their availing themselves of the convenience provided by VPC.

ARGUMENT

Kansas' Pre-Filled Application Prohibition targets conduct that is not expressive in nature and does not implicate the First Amendment. Even if the First Amendment is triggered, however, the statute's restrictions are unrelated to the suppression of free expression, and any impact on VPC's speech is merely incidental to the State's powerful interests in implementing this legislation.

I. *De Novo* Standard of Review Must Be Applied

In an appeal involving claims predicated on alleged First Amendment rights, this Court reviews the district court's decision *de novo*. *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015). "The factual findings, as well as the conclusions of law, are reviewed without deference to the trial court." *Id.*

II. Sending Voters a Pre-Filled Advance Ballot Application is *Conduct*, Not *Speech*

The Pre-Filled Application Prohibition targets only *non-expressive conduct*.[4] "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies," *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and VPC cannot do so.

A. Pre-Filling Official Advance Mail Ballot Applications is Not Inherently Expressive Activity

The First Amendment generally distinguishes between regulations of speech and regulations of conduct. "While pure speech activities are rigorously protected regardless of meaning, symbolic speech or conduct must be sufficiently imbued with elements of communication, and is subject to a relaxed constitutional standard." *Cressman*, 798 F.3d at 951-92 (quotations omitted). In assessing whether conduct is sufficiently communicative to implicate the First Amendment, the circuits are divided as to whether an actor must have conveyed a "particularized message"

[4] Defendants raised this issue at App.I 176-185.

through its conduct. *Id.* at 955-56 (describing the divergence and noting that Tenth Circuit has not weighed in). But all agree that, at best, conduct enjoys constitutional protection only if it is both "intended to be communicative," and, "in context, would reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. 288 at 294.

A speaker's mere intent will not suffice. The Supreme Court has "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *FAIR*, 547 U.S. at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The Court has "extended First Amendment protection only to conduct that is inherently expressive." *Id.* at 66.

Embracing VPC's argument, the district court held that "a recipient is highly likely to understand that the personalized ballot application communicates plaintiff's pro-advance mail voting message," i.e., "that advance mail voting is safe, secure and accessible." App.III 643. The court opined that "an organization with a neutral or negative opinion toward advance mail voting would not expend its resources to personalize mail ballot applications for specific voters." *Id.* And the fact that 69,000 Kansans used a VPC-provided envelope to mail in their advance ballot application during the 2020 General Election, the court found, was evidence of voters' understanding of VPC's message. *Id.*; App.III 606-¶97. The court thus concluded that

the *pre-filled application itself* (ignoring altogether the accompanying letter) constitutes protected speech. App.III 642-643, n.8.

The problem with this analysis is that the conduct at issue – pre-populating an advance ballot application with the name and address of the intended recipient and mailing the partially filled, unsolicited application to the recipient – is distinct from any message VPC seeks to convey about mail voting. Any message that VPC communicates to voters about the vote-by-mail process or the utility thereof is delivered through the contents of *the cover letter VPC sends with the application, not through the application itself*.[5] That cover letter, and the message(s) contained therein, are wholly unaffected by the Pre-Filled Application Prohibition. The pre-filling of the application, on the other hand, embodies *conduct*, not expression. Just because it involves written text on a piece of paper does not change the analysis. *See FAIR*, 547 U.S. at 62 ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

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[5] VPC also offered no evidence as to how many of its applications that voters mailed in were *pre-filled*. Recall that VPC was sufficiently concerned with the inaccurate data on the pre-filled applications it was sending to voters that it stopped pre-filling them (and included only *blank* applications) on two of the five mailings. App.III 602-¶¶60-62.

The district court attached great significance to the fact that VPC expended resources to personalize the advance ballot applications it mailed out, suggesting that only an organization intending to convey a pro-advance mail voting message would undertake such an expense. App.III 644. But the expenditure of funds hardly makes the product of that expense inherently expressive. The fact that VPC *intended* to communicate a message is likewise inadequate. *See FAIR*, 547 U.S. at 65-66. Moreover, there is no admissible evidence in the record that recipients of VPC's pre-filled applications would have understood any intended message absent the accompanying cover letter.

Nor is this issue a simple matter of "common sense," as the district court insisted. App.III 644. If H&R Block sends partially pre-filled Forms 1040 to taxpayers with whom it has no prior connection, would the targeted recipients glean a message from the form alone? Unlikely. If a travel agency sends out pre-populated passport applications, what is the message? Seemingly nothing. If a bank seeking to take advantage of processing fees sends pre-filled government loan applications (e.g., PPP) to potentially eligible entities with no accompanying cover letter, would a recipient understand any message in the mailing? No. So, too, here. The application that VPC mails is merely an official state form that communicates no message whatsoever (save, perhaps, the applicant's own message to election officials to send an advance ballot following submission). It is just part of the mechanics of the

voting process. Only the registrant can choose to speak (or not) by returning the application. To the extent there is any speech, it is the *applicant's*, not the party pre-filling the application on the applicant's behalf.

The district court further suggested that, by personalizing applications, VPC "engages in expressive conduct which is distinguishable from distributing blank absentee applications." App.III 645. Not so. The notion that VPC's insertion of a voter's name and address (drawn primarily from the State voter file) on an official application form, in the blank spaces where such information is to be written, is protected speech is illogical. There is nothing communicative in that act. While VPC argued below that its pre-filling of the application amounts to the creation and dissemination of information and thus enjoys constitutional sanctuary, the information is the voter's own purported biographical data. VPC cannot cloak itself in First Amendment protection merely by sharing a voter's name and address with *that particular voter*.

True, the Supreme Court in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), indicated that certain factual information can constitute speech under the First Amendment. But the kinds of information referenced in that case all conveyed data likely unknown to the recipient or other consumers (e.g., information on a beer label or in a credit report). *Id.* at 570 (citations omitted). That is a far cry from claiming speech by pre-populating an official state form with the recipient's own

name and address.

Sorrell itself addressed whether data miners and pharmaceutical manufacturers had a right to access pharmacy records that reveal the prescribing practices of individual doctors. *Id.* at 557. The data was off limits due to State privacy laws, and the manufacturers wanted to use it for business purposes. That is nothing like this case. Here, the data VPC uses to pre-fill applications is freely available to everyone. In fact, VPC uses that data to prepare both the cover letters – which fully include its message about the importance and ease of voting by mail – and the pre-addressed envelopes it sends to voters. But there is no independent message created by printing a voter's name and address on the application form.

Nor is the ballot application itself a forum for any type of speech. It is simply a state-created form. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (while a person may express beliefs or ideas through a ballot, "[b]allots serve primarily to elect candidates, not as forums for political expression."). There is nothing that can be filled out on the form other than a voter's county of residence, driver's license number, address, birthday, phone number, date of application, and signature, all of which are unique to the individual voter. VPC has no discretion regarding the information entered into those fields if it wants the form to be accepted. There is no space on the form for any sort of messaging, nor would any messaging be permitted on the face of the application. Although VPC suggested below that the

application permits discretionary messaging because it can be pre-populated with different voters' names, that argument is nonsensical. Under that logic, every piece of written text, irrespective of context, is protected speech. The First Amendment is not nearly so broad.

B. The Pre-Filled Advance Mail Ballot Application that VPC Sends to Voters Must be Disaggregated From the Accompanying Cover Letter

In its alternative reasoning on the free speech claim, the district court held that VPC's pre-filled advance mail ballot applications are intertwined with, and cannot be disaggregated from, the accompanying cover letter. App.III 643-644, 652-654. This analysis is inconsistent with *FAIR*. The Supreme Court there held that where the expressive component of an entity's "actions is not created by the conduct itself but by the speech that accompanies it," that "explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *FAIR*, 547 U.S. at 66. A ruling to the contrary would mean that "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* The district court's only answer to *FAIR* is a conclusory statement that, unlike in that case, it is "overwhelmingly apparent to someone who receives the plaintiff's application that plaintiff is expressing a pro-advance mail voting message." App.III 644. Respectfully, saying it does not make it so. Although there is no question that the *cover letter* communicates protected speech, the pre-filled application included in the mailing does not.

The First Amendment does not protect conduct just because "at some point [it] might have a *connection* to speech." *Sickles v. Campbell Cnty.*, 501 F.3d 726, 734 (6th Cir. 2007) (emphasis added). VPC's applications – or at least its addition of voters' names and addresses thereon – must be analyzed distinctly from the accompanying cover letter. To hold otherwise would not only disregard *FAIR*, but it would allow litigants to claim to have engaged in speech at the highest level of generality and then sweep in virtually all conduct allegedly related to that speech as constitutionally protected. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010) (speech cannot be defined at the highest "level of generality" in assessing the reasonableness of government regulations on conduct).

In a recent decision analyzing a Georgia statute virtually identical to the law at issue here, the court in *VoteAmerica v. Raffensperger*, 609 F.Supp.3d 1341, 1356-57 (N.D. Ga. 2022), held that the First Amendment was not implicated by the plaintiff's distribution of pre-filled absentee ballot applications in tandem with a cover letter because there is nothing inherently expressive about pre-filled applications:

> [C]ombining speech (in the cover information) with the conduct of sending an application form, as Plaintiffs do here, is not sufficient to transform the act of sending the application forms into protected speech. Plaintiffs' pro-absentee voting message is not necessarily intrinsic to the act of sending prospective voters an application form. ... [W]ithout the accompanying cover information, the provision of an application form could mean a number of things to a recipient. For example, some voters likely perceived the state's decision to send absentee ballot applications to all eligible voters during the 2020 primary elections … as merely a convenience offered to citizens in light

> of the pandemic. This Court cannot say that the state's conduct in sending those forms would necessarily have been understood as communicating a pro-absentee voting message.

Id. at 1357. The court added that, "as in [*FAIR*], the expressive component of sending application packages . . . is not created by the conduct itself but by the included cover information encouraging the recipient to vote." *Id.*

The court in *Lichtenstein v. Hargett*, 489 F.Supp.3d 742 (M.D. Tenn. 2020), reached a similar conclusion. That case involved a constitutional challenge to a Tennessee statute prohibiting anyone other than an election official from giving an absentee ballot application to another person. The plaintiff handed out "literature about the benefits of absentee voting along with a blank absentee ballot application." *Lichtenstein v. Hargett*, 2021 WL 5826246, at *6 (M.D. Tenn. Dec. 7, 2021). The court concluded that the distribution proscription was not a ban on core political speech, *Lichtenstein*, 489 F.Supp.3d at 773, because it did "not restrict anyone from interacting with anyone about anything." *Id.* at 770. Of course, the avenues of communication available to VPC are far broader than those available in *Lichtenstein*, which prohibited the sending of *any* absentee ballot applications to voters. Kansas' Pre-Filled Application Prohibition merely restricts the *unsolicited* mailing of *pre-populated* applications.

The district court below sought to distinguish *Lichtenstein* on the basis that VPC sends pre-filled (as opposed to blank) applications to its targeted individuals.

App.III 645. This "personalization," the court found, renders the application expressive in nature. But there is nothing expressive about adding this data on the State's official form. It is, at best, a *convenience* to the voter. It is not *communicative*.

Nor do the cases cited by the district court support its First Amendment holding. The court, for example, relied heavily on *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), for the proposition that VPC's pre-filled applications are "intertwined" with the accompanying cover letter and thus cannot be disaggregated. The court reads too much into that decision, particularly when applying its principles in the context of election administration.

In *Schaumburg*, a municipal ordinance prohibited charities from soliciting donations if they did not use at least 75% of their donations directly for charitable purposes. *Id.* at 622. The Supreme Court noted that "[s]oliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632. The Court then held that the 75% limit was a direct and substantial limitation on constitutionally protected activity under the First Amendment because it effectively *barred* the fundraising operations of many charitable organizations. *Id.*

at 635. More specifically, the Court observed:

> [There are] organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who necessarily combine the solicitation of financial support with the functions of information dissemination, discussion, and advocacy of public issues. These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.

Id. (internal citations omitted).

In contrast to *Schaumburg*, there is nothing inextricably linked between the message communicated in VPC's cover letter and the pre-filled (versus blank) application that is included, along with a pre-addressed envelope, in the mailed package. Each can exist and be sent without the other. *See VoteAmerica*, 609 F.Supp.3d at 1355 (rejecting argument that pre-filling an absentee ballot application represented expressive conduct on the basis of *Schaumburg*). The Pre-Filled Application Prohibition does not restrict VPC from communicating its pro-mail voting message, explaining the process for obtaining an advance ballot, including a blank advance ballot application in its mailer (as VPC did in two of its five mailing waves in 2020),

mailing a partially completed application to a voter who requests one,[6] or engaging in any one-on-one conduct with voters. The only statutory prohibition is the mailing of a pre-filled application in the absence of a request by the voter.

The district court deemed it important that VPC's cover letter advises voters that a pre-filled advance ballot application is included in the mailing. App.III 653. But such explanatory references are at odds with the alleged inherently expressive nature of the pre-filling conduct. *See FAIR*, 547 U.S. at 66. In any event, under this logic, a litigant could avoid any state disclosure restriction or other prohibited conduct simply by referencing the information or proscribed act in a written communiqué.

The district court's citation to *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), is similarly unhelpful to its anti-disaggregation theory. The relevant statute there required fundraisers to publicly disclose the average percentage of gross receipts they turned over to a charity during the preceding year. *Id.* at 786. The Court invalidated this obligation under the First Amendment because it mandated speech the speaker would not otherwise make. *Id.* at 795. The Court further held that it could not "separate the component parts of charitable solicitations from the fully protected whole" because, "without solicitation[,] the flow of such information and advocacy would likely cease." *Id.* at 796. The Court explained that,

[6] *See supra*, note 3; App.I 123.

"where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.*

But there is little parallel between the impediments in *Riley* and the Pre-Filled Application Prohibition. Restricting an entity from pre-filling another individual's advance ballot application with the individual's own biographical data does not impede that entity from communicating any message to the targeted voter. And unlike soliciting charitable contributions, applying for an advance ballot application is not inextricably intertwined with any sort of speech, particularly by someone other than the applicant.

As for the trial court decisions on which the court below grounded its holding – *League of Women Voters of Fla. v. Cobb*, 447 F.Supp.2d 1314 (S.D. Fla. 2006), and *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F.Supp.3d 158 (M.D.N.C. 2020) – neither are compelling. *Cobb* addressed a First Amendment challenge to a statute imposing deadlines for the submission of voter registration applications and fines for late submissions by organizations other than political parties. *Id.* at 1315. The court held these laws implicated plaintiffs' free speech and association rights because the "collection and submission of voter registration drives is intertwined with speech and association." *Id.* at 1333-34. This wrongly decided opinion runs against the overwhelming case law – including the two circuits that have addressed

the issue – that collecting completed applications is *not* expressive conduct. *See New Ga. Project v. Raffensperger*, 484 F.Supp.3d 1265, 1300-01 (N.D. Ga. 2020) (collecting cases, including *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018), *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 372 (9th Cir. 2016), and *Voting for Am. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013)), *aff'd*, 976 F.3d 1278 (11th Cir. 2020).

Meanwhile, *Democracy N.C.* involved a First Amendment attack on a North Carolina statute which, *inter alia*, restricted unrelated third-parties from completing another voter's absentee ballot application. 476 F.Supp.3d at 174-77. Conceding that most other judges had reached a different result, the court nevertheless concluded that "assisting voters in filling out a request form for an absentee ballot is expressive conduct which implicates the First Amendment." *Id.* at 224. Ironically, the court went on to hold that the burden on plaintiffs' speech rights from this restraint was virtually non-existent and that a deferential review, rather than strict scrutiny, was warranted:

> Plaintiffs are not barred from talking with voters about absentee voting, or even talking them through the process of filling out a request form. Indeed, Plaintiffs can stand over the shoulder of a voter and explain step-by-step how to correctly fill out the absentee ballot request. Thus, it appears to the court, that Plaintiffs experience almost no burdening or restriction of their political speech, as long as they do not mark the voter's request form themselves.

Id. at 224-25. The court thus found that any "burdens on Plaintiffs' First Amendment speech and association rights are justified by the State's interest in preventing fraud." *Id.* at 225.

In subsequently ruling on defendants' motion to dismiss, the court expressed misgivings with its prior preliminary injunction ruling and noted that it was *not* ruling "that assisting voters in filling out a request form for an absentee ballot is expressive conduct which implicates the First Amendment *as a matter of law*." *Democracy N.C. v. N.C. State Bd. of Elections*, 590 F.Supp.3d 850, 863 (M.D.N.C. 2022) (emphasis added). The court opted to simply *assume* the First Amendment applied at the motion to dismiss stage and then address the matter definitively at summary judgment or trial. *Id.*; *cf. Am. Ass'n of People With Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1213-19 (D.N.M. 2010) (rejecting non-disaggregation theory in context of voter registration applications and, although declining to reject First Amendment theory at motion to dismiss stage, opining that "it is unlikely that the Court will conclude [the statute] imposes a severe burden on the Plaintiffs' First Amendment rights").

The Fifth Circuit's decision in *Steen* is also instructive. That case addressed whether various restrictions on voter registration activities contravened the First Amendment. In contrast to Kansas' Pre-Filled Application Prohibition, the activities in *Steen* all involved *in-person interactions* between voters and the volunteer deputy

registrars who were empowered to receive and deliver voters' completed registration applications. While there was no dispute that the interactions themselves implicated the First Amendment, the court held that each restriction still had to be analyzed piecemeal. *Steen*, 732 F.3d at 388 ("We are unpersuaded that the smorgasbord of activities comprising voter registration drives involves expressive conduct or conduct so inextricably intertwined with speech as to require First Amendment scrutiny. Instead, we analyze the challenged Texas provisions separately because . . . discrete steps of the voter registration drive are in fact separable and are governed by different legal standards."). The court noted that "this mode of analysis is required by the Supreme Court, which, in the context of election-related burdens on free expression, has long advised against substituting the hard judgments common in ordinary litigation with litmus-paper tests." *Id.* at 389. The panel also reiterated the Supreme Court's frequent admonition that "non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech." *Id.*

If the district court is correct that VPC's unsolicited mailing of pre-filled advance ballot applications to voters is expressive conduct just because the application is part of VPC's overall message to voters about the virtues of mail voting, then many election regulations are vulnerable. Individuals would presumably have a First

Amendment right to enter polling booths to urge voters to cast their ballots in a particular way. Or to fill out advance ballots on voters' behalf. Restrictions on handling completed advance ballots would also likely be forbidden. The First Amendment is not so rigid.

III. The Pre-Filled Application Prohibition Must be Evaluated Under Deferential Standard

A. Rational Basis Review Should be Applied

Because the Pre-Filled Application Prohibition entails neither speech nor expressive conduct, and thus does not implicate the First Amendment, the statute is subject only to rational basis scrutiny.[7] *See Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (government classification that involves neither a "fundamental right" nor a "suspect" classification is constitutionally valid if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Under this standard, the statute "need only be rationally related to a legitimate government purpose." *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). The "statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (internal citation and alterations omitted). "A

[7] Defendants raised this issue at App.I 176-182, 186.

State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification" because a "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 320. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* As detailed in Part III.D., *infra*, the State's interests are amply sufficient to meet this standard (or *any* other standard).

B. Assuming First Amendment is Implicated, Proper Standard for Evaluating VPC's Claims is Anderson-Burdick Test

If this Court nevertheless concludes that the Pre-Filled Application Prohibition targets expressive conduct protected by the First Amendment, the proper methodological approach is to invoke *Anderson-Burdick* and apply a deferential degree of scrutiny.[8] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). When a State invokes its constitutional authority to regulate elections to ensure they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. These burdens "must necessarily accommodate a State's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party v. Cox*,

[8] Defendants raised this issue at App.I 193-194.

892 F.3d 1066, 1077 (10th Cir. 2018). The State's "important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions" on election procedures. *Anderson*, 460 U.S. at 789.

There is no "litmus-paper" test separating valid from invalid restrictions. *Id.* The Court instead applies a "more flexible standard." *Burdick*, 504 U.S. at 434. Under this approach, a "court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Cox*, 892 F.3d at 1077 (quoting *Burdick*, 504 U.S. at 434)); *Fish v. Schwab*, 957 F.3d 1105, 1121-22 (10th Cir. 2020).

Although flexible, this balancing test does contain certain core guidelines. If a state imposes "severe restrictions on a plaintiff's constitutional rights . . . , its regulations survive only if 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. 434. But "minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434). "Regulations falling somewhere in between

– i.e., regulations that impose a more-than-minimal but less-than-severe burden – require a 'flexible' analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (quotation omitted). Lurking in the background at all times, however, is the fundamental principle that "states have wide latitude in determining how to manage their election procedures." *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008); U.S. Const. art. I, § 4.

C. Heightened Scrutiny Does Not Apply

1. The Pre-Filled Application Prohibition Does Not Target Core Political Speech

The district court clearly erred in holding that Kansas' Pre-Filled Application Prohibition targets "core political speech" and in subjecting VPC's First Amendment attacks on the statute to strict scrutiny.[9] In imposing this standard, the court relied primarily on its aggregation theory. It reasoned that because VPC's cover letter represents core political speech, anything connected to the letter must undergo the same heightened scrutiny. As described above, that rationale misconstrues Supreme Court case law and is unsupported by the facts of this case.

The district court alternatively held that strict scrutiny is compelled by *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999); and *Doe v. Reed*, 561 U.S. 186 (2010). Parroting language from *Meyer*,

[9] Defendants raised this issue at App.I 187-193.

the court found that the Pre-Filled Application Prohibition "significantly inhibits communication with voters about proposed political change because it effectively eliminates the program which plaintiff *believes* most effectively delivers its message." App.III 654 (emphasis added). To be clear, VPC introduced no admissible evidence that pre-populating the advance ballot applications in its mailers yields a more effective response rate than sending blank applications. App.III 632-633, n.4. But the real defect in the court's analysis is that it improperly conflates speech issues at play in the context of *referendum petitions* – as in *Meyer*, *Buckley*, and *Reed* – with the absence of such issues in the *advance ballot application* process.

When it comes to a referendum, an "individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'" *Doe v. Reed*, 561 U.S. 186, 195 (2010) (citing *Meyer*, 486 U.S. at 421). "In either case, the expression of a political view implicates a First Amendment right." *Id.* That is why restrictions on who can interact with the public in procuring referendum signatures are seen as having "specifically regulated the process of advocacy itself, dictating who [can] speak . . . or how to go about speaking," thereby "reducing the total quantum of speech, the number of voices who will convey [the plaintiffs'] message and the hours they can speak, and . . . the size of the audience they can reach." *Steen*,

732 F.3d 390 (quoting *Meyer*, 486 U.S. at 422-23); *cf. Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002) (invalidating residency requirement on petition circulators).[10]

By contrast, Kansas' Pre-Filled Application Prohibition does not restrict anyone from communicating with anyone else about anything. It does not limit a third-party from mailing a blank application to another voter, or even providing a pre-populated application to a voter who has requested it. Nor does it prohibit any personal interactions between the third-party and voter (including assisting the voter in completing an application). The only constraint is on the *mailing* of an *unsolicited*, *pre-filled* application. Such a *de minimis* regulation cannot be deemed a limitation on core political speech such that it warrants the kind of exacting scrutiny that the district court imposed. *See VoteAmerica*, 609 F.Supp.3d at 1355 ("[D]istributing forms prefilled with a prospective voter's own personal information and the ability to send an essentially unlimited number of forms to a prospective voter do not require the type of interactive debate and advocacy that the Supreme Court found constituted core political speech in *Meyer*.")

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[10] The very nature of gathering signatures on a referendum necessitates an interactive process between the collector(s) and the citizenry. An individual cannot simply print a referendum from a computer and then send his one executed copy to the county election office. *See, e.g.*, Kan. Stat. Ann. §§ 12-3013(a) (outlining process for submitting petitions for proposed ordinances); 25-205, 25-303 (process for submitting primary and independent candidate petitions); 25-302a (process for political party recognition); 25-3601, 25-3602 (mechanics of petition submissions).

As the Third Circuit recently explained, the "Supreme Court has emphasized the 'interactive' nature of 'core political speech.'" *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022) (citing *Meyer*, 486 U.S. at 421-22). But "unlike leafletting, petition circulating, or even the wearing of political clothing at the polling place," pre-filling an absentee ballot application "cannot inspire any sort of meaningful conversation regarding political change." *Id.* A ballot application merely facilitates the mechanical delivery of a ballot to the voter.

The district court cited *Tenn. State Conf. of NAACP v. Hargett*, 420 F.Supp.3d 683, 704 (M.D. Tenn. 2019), for the idea that the Pre-Filled Application Prohibition constitutes a "direct regulation of communication and political association, among private parties, advocating for a particular change, namely an increase in advance mail voting for underrepresented voters." App.III 656. The judge in *Hargett* struck down a series of restrictions on voter registration activities (e.g., reporting, training, and disclaimer requirements) as violative of the First Amendment, suggesting that the law improperly regulated expressive conduct by constraining "the creation of new registered voters and, by extension, a change in the composition of the electorate." *Hargett*, 420 F.Supp.3d at 704. But under that flawed reasoning, virtually any administrative constraint on voter registration or advance ballot application, collection, or processing activities will run afoul of the Constitution. As the Ninth

Circuit noted in an analogous context, "the fact that the ballot is 'crucial' to an election does not imply that [an initiative proponent] therefore has a First Amendment right to communicate a specific message through it." *Caruso v. Yamhill Cnty.*, 422 F.3d 848, 856 (9th Cir. 2005).

Moreover, the district court reads far too much into the discussion from *Meyer* and *Chandler* about the right of individuals to choose what they believe to be the most effective means of communicating their message. Consider *Project Vote v. Kelly*, 805 F.Supp.2d 152 (W.D. Pa. 2011), a case in which a non-profit conducting voter registration drives challenged on First Amendment free speech grounds a Pennsylvania law that prohibited persons from giving, soliciting, or accepting payments to obtain voter registrations if such payment is based on the number of voter registrations obtained. *Id.* at 158. Refuting an argument very much like the one VPC advances here, the court there explained why *Meyer* cannot be construed so broadly:

> There is language in *Meyer* suggesting that the First Amendment protects the right of individuals "to select what they believe to be the most effective means" to convey their message. *Meyer,* 486 U.S. at 424. This language, however, must be read in context. The Colorado statute prohibiting the use of paid petition circulators had the "inevitable effect" of restricting "direct one-on-one communication," which the Supreme Court characterized as "the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* at 423-424. The reasoning employed in *Meyer* does not support the idea that Project Vote has an unqualified First Amendment right to choose the compensation system that it believes to be "the most effective way" to motivate its canvassers. The problem with the Colorado statute challenged in

> *Meyer* was that it completely foreclosed an entire "channel of communication." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 398, n.* (2000) (Stevens, J., concurring). It was that "channel of communication" (*i.e.,* "direct one-on-one communication") that was deemed to be "the most effective means" available to initiative proponents to express their message. *Meyer,* 486 U.S. at 424. Unlike the statute at issue in *Meyer,* [Pennsylvania's law] does not have the "inevitable effect" of preventing the Plaintiffs from engaging in "direct one-on-one communication." *Id.* at 423-424. After all, ACORN was able to collect roughly 40,000 voter-registration applications in Allegheny County during the 2008 election season.

Id. at 179-80; *accord Sheldon v. Grimes*, 18 F.Supp.3d 854, 859-60 (E.D. Ky. 2014).

2. The Pre-Filled Application Prohibition is Content and Viewpoint Neutral

The district court also suggested that the restrictions imposed by the Pre-Filled Application Prohibition are neither content- nor viewpoint-neutral. App.III 656. But the Kansas statute is agnostic as to both content and viewpoint. In arguing otherwise below, VPC claimed that the law singles out personalized information on advance voting ballot applications, and a pre-filled application is only consistent with a pro-vote-by-mail message. App.II 234-235. There is no message, however, in simply inserting someone's name on his/her official state form. Plus, there is no conceivable counterpoint to be written on the form such that the State could be said to have engaged in viewpoint-based discrimination.[11] Indeed, there is *nothing* else that could

[11] Far from discouraging voting by mail, Kansas was one of the first states to expand the use of vote-by-mail on a no-excuse basis and has maintained this flexible arrangement for almost thirty years. *See* Kan. Stat. Ann. § 25-1119(a); 1995 Kan. Sess. Laws ch. 192, § 17.

be written on the application. That VPC spends additional funds to pre-fill applications by inserting certain registrants' names and addresses on the form does not alter the First Amendment analysis.

In *City of Austin v. Reagan Nat'l Advert.*, 142 S.Ct. 1464 (2022), the Supreme Court recently clarified what constitutes a "content-based" versus "content-neutral" regulation of speech. That case involved a regulation of signage, with different rules applying to signs located on the premises of the place being advertised as opposed to offsite. The Court first reiterated that a "regulation of speech is facially content based under the First Amendment only if it 'target[s] speech based on its communicative content' – that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id.* at 1471 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Criticizing the overly broad interpretation that lower courts had ascribed to *Reed*, the Court explained that if the government's regulatory distinctions "require[] an examination of speech only in service of drawing neutral" lines, then the regulation "is agnostic as to content." *Id.* "[A]bsent a content-based purpose or justification," the law will be deemed content neutral and strict scrutiny will not be warranted. *Id.*

To the extent there is *any* speech implicated by the Pre-Filled Application Prohibition, the statute is indifferent to content. It is little more than a benign "time, place, or manner" regulation designed to avoid the harms that such pre-filled forms

have yielded in elections across the country, including Kansas. Nothing in the law precludes VPC from communicating any information or viewpoint about voting by mail or any other topic. VPC's own Rule 30(b)(6) witness testified that the statute does not impede VPC from encouraging individuals to vote by mail, instructing them how to obtain and vote an advance ballot, mailing voters an advance ballot application, or communicating any message it wants to convey in the mailers. App.III 595-¶8. That VPC cannot take the additional non-communicative step of pre-filling the application does not invite the most rigorous judicial scrutiny.

Nor is the district court's characterization of Kansas' statute as a content-based restriction reconcilable with *McCullen v. Coakley*, 573 U.S. 464 (2014). The plaintiff there argued that "virtually all speech affected by" a state-imposed buffer zone around abortion clinics "is speech concerning abortion, thus rendering the Act content based." *Id.* at 479. The Supreme Court held otherwise. It noted that the law did "not draw any content-based distinctions on its face" and that enforcement did not necessitate "examin[ing] the content of the message." *Id.* Although the Court conceded that the buffer zone had "the inevitable effect of restricting abortion-related speech more than speech on other subjects," it held that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* at 480. "On the contrary," it explained, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even

if it has an incidental effect on some speakers or messages but not others." *Id.*; *accord Mazo*, 54 F.4th at 180 (rejecting claim that regulation of political slogans on ballot violated First Amendment simply because it might indirectly discriminate against slogans that criticize individuals and incorporated associations).

Furthermore, even if this Court were to agree that some heightened scrutiny is warranted in VPC's challenge to the Pre-Filled Application Prohibition, the review would still necessitate deference to the State. As the Supreme Court explained in *Reed*, a case challenging the compelled disclosure of individuals who had signed referendum petitions – an indisputably expressive act – the electoral context is highly relevant to the First Amendment analysis. 561 U.S. at 195. The Court noted: "We allow States significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude." *Id.* at 195-96; *see also id.* at 212-13 (Sotomayor, J., concurring) ("States enjoy considerable leeway to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access . . . [E]ach of these structural decisions inevitably affects – at least to some degree – the individual's right to speak about political issues and to associate with others for political ends. . . . It is by no means necessary for a State to prove that such reasonable, nondiscriminatory restrictions are narrowly tailored to its interests.").

Although it is hard to see how *any* speech or expressive conduct is involved with the Pre-Filled Application Prohibition, *at worst*, the statute would be exposed to intermediate scrutiny under *O'Brien*, 391 U.S. at 376-77. The statute would pass muster under that test as an incidental burden on whatever constitutionally protected actions VPC is engaged in. *See id*. at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). As long as ample alternative channels of communication are available from a content-neutral constraint, the First Amendment is not violated. *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683, 688 (10th Cir. 1998).

D. Kansas' Interests Are Sufficient to Survive Any Level of Judicial Scrutiny

The State's regulatory interests in the challenged law are the avoidance of voter confusion, facilitation of orderly election administration, enhancement of public confidence in the integrity of the electoral process, and deterrence of voter fraud. All are well-recognized and indisputably legitimate interests. *See Brnovich v. DNC*, 141 S.Ct. 2321, 2340 (2021) (combatting fraud is "strong and entirely legitimate" reason for enacting voting laws); *Reed*, 561 U.S. at 197-98 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important . . . [and it]

extends more generally to promoting transparency and accountability in the electoral process."); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (State has "compelling interest in protecting voters from confusion and undue influence."); *Marchioro v. Chaney*, 442 U.S. 191, 196 (1979) ("The State's interest in ensuring that [its electoral] process is conducted in a fair and orderly fashion is unquestionably legitimate."); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); *DSCC v. Pate*, 950 N.W.2d 1, 5-7 (Iowa 2020) (rejecting constitutional challenge to statute that prohibited third-parties from pre-populating voters' absentee ballots based on same state interests).

1. Minimizing Voter Confusion, Enhancing Public Confidence, and Effectuating Orderly and Efficient Election Administration

The proliferation of pre-filled advance ballot applications in the 2020 General Election triggered substantial confusion, anger, and frustration among the electorate, diminished public confidence in the electoral process, had a negative impact on the efficiency of election administration, and pushed the limits of the State's anti-fraud safeguards. A big part of the problem was that the third-party-pre-filled applications sent to voters often contained erroneous information. VPC admitted that roughly 5% of the pre-filled applications it mailed to targeted voters across the country contained an incorrect middle name or initial and roughly 3% contained an incorrect

suffix. Considering that VPC and CVI mailed applications to nearly 508,000 voters in Kansas in connection with the November 2020 election, more than 25,000 likely contained erroneous data. And that's a conservative estimate given that VPC sent as many as three pre-filled applications to many Kansas voters.

The district court discounted this critical fact because VPC did not know if error rates for Kansas matched nationwide figures. App.III 635. But VPC never claimed they did not. Besides, in the election law space, states need not provide "elaborate, empirical verification of the weightiness" of their asserted justifications. *Timmons*, 520 U.S. at 364. Moreover, VPC itself was concerned enough with the inaccurate data that it decided to stop pre-filling its applications and instead send out blank applications to Kansas voters for two of its five mailers. VPC presumably recognized that if a voter submits an application with faulty data, the voter will not receive an advance ballot unless and until election officials complete a highly time-consuming process designed to allow the voter to cure the defect. App.III 598-¶¶34-37, 599-¶43, 613-¶¶154-157. To suggest that the State acted unconstitutionally by seeking to mitigate an issue that VPC itself recognized as a serious dilemma is unreasonable.

Defendants' expert also discovered that VPC sent pre-filled applications to nearly 400 individuals whose voter registrations had been cancelled at the time of the mailing (due to death or residency change), often long before such mailing. The

number was likely greater, but VPC produced in discovery only a subset of the total applications it mailed out. App.III 602-¶66. Election offices also received pre-filled applications containing incorrect last names and/or addresses (indicating that, if the information was *ever* correct, it had changed since the date the form was mailed). App.III 611-¶139. The district court responded that VPC's expert testified that Defendant's expert had raised concerns with only 3% of the records in VPC's database. App.III 636, 661. But that does not take into account all the erroneous middle names/initials and suffixes and, in any event, a 3% error rate would amount to approximately *15,000* of the 508,000 Kansas voters to whom VPC and CVI sent pre-filled applications. VPC's expert acknowledged that VPC could have updated its data in a more timely manner or mailed closer to the print date in order to ensure more accurate pre-filled applications, App.III 606-¶90, but VPC apparently decided the "cost-benefit assessment" was not worth the effort.[12]

Election officials, meanwhile, testified that their offices were inundated with calls, letters, e-mails, and visits from angry and confused voters, complaining about

[12] The district court criticized Defendants' expert for "not connect[ing] the alleged errors in plaintiff's mailing list with errors in applications received by election officials." App.III 661. But by producing this list, VPC acknowledged that it had sent pre-filled applications to intended recipients with erroneous data. Defendants do not shoulder a burden to identify the origin of every inaccurate submission. Moreover, while not every erroneous pre-filled application was submitted to a county election office, the diminished public confidence resulting from thousands of inaccurate applications floating throughout the State is enough to justify Kansas' legislative response.

the pre-filled applications they received in the mail. Although the district court suggested that voters complained only about having received duplicate applications, App.III 663, the stipulated facts show otherwise. For example, Shawnee County Election Commissioner Howell described voters venting frustration at having received pre-filled advance ballot applications from third-parties that contained the wrong name or address, particularly when the voters had previously communicated changes to the election office.[13] Many of these voters erroneously thought the applications had come from his office rather than a third-party like VPC, causing them to question his staff's competency. State Election Director Caskey and Ford County Clerk Cox had similar experiences.

Moreover, the issue of duplicates was not irrelevant to the Pre-Filled Application Prohibition. Voters told election officials that they often submitted duplicate applications because they believed they were obligated to mail any and all pre-filled applications back to the county election office in order to receive an advance ballot,

[13] The district court also mischaracterized Howell's stipulated testimony. The court stated that "Howell does not believe that voters were confused or frustrated because the applications which they received were pre-filled. Rather, he believes that voters erroneously assumed that the county had mailed the duplicate ballot applications and were frustrated by the purported incompetency of his election office." App.III 662. What Howell actually testified to was simply that he did not "think that the pre-filled information, *in and of itself*, was what *all of the concern was*." App.III 612-¶141 (emphasis added). All he meant was that it was *both* the errors on the third-party pre-filled applications and the duplicate mailings that triggered negative emotions from voters.

even if they had previously submitted one. The fact that, in the 2020 General Election, roughly 15.4% of the total applications Shawnee County received were duplicates, and nearly 9% were duplicates in Ford County, underscores that the problem was not just a few confused voters. This is especially true when one compares the *exponentially* greater number of duplicates received in 2020 to the number received in prior elections. The difference cannot be explained by the pandemic or supposed issues with the Postal Service. And these duplicates had a deleterious impact on orderly and efficient election administration in many counties, taxing the time and resources of already short-staffed and overworked county election offices.

Unsurprisingly, as is true with most election-related legislation, there is some divergence of opinion as to the benefits and drawbacks of pre-filling advance ballot applications. While some election officials see mostly problems, others think that pre-filling is advantageous on the whole. Referencing this conflicting testimony, the district court concluded that, "on balance, such activity is more helpful than harmful to overburdened election[] officials." App.III 660. But it is not the role of the federal judiciary to second-guess a state legislature's policy decisions. *See Daunt v. Benson*, 999 F.3d 299, 329-31 (6th Cir. 2021) (Readler, J., concurring) (describing separation of powers concerns when election regulations are stricken under *Anderson-Burdick* balancing). This is especially true under the far more deferential review that should have been applied here. That voters might have utilized mail-in voting in 2020 in

greater numbers due to the pandemic hardly undermines the State's right to adopt prophylactic measures designed to minimize the harms from the activities of third-parties like VPC.

Furthermore, the problem with pre-filled absentee ballot applications was not limited to Kansas. VPC's activities wreaked havoc in many other states, evidenced by the written complaints regarding inaccurate applications that VPC received from officials in those jurisdictions. App.III 614-¶159. In fact, the media widely covered these problems, highlighting the bipartisan frustration with VPC and CVI, and describing how their mailers "contained mistakes and confused voters at a time when states are racing to expand vote by mail." 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.[14] Kansas had every right to take other states' issues into consideration when passing its own legislation. *See Brnovich*, 141 S.Ct. at 2348 (upholding Arizona's ballot collection restrictions despite "Arizona ha[ving] the good fortune to avoid" fraud, and referencing fraud from proscribed activity in North Carolina); *Crawford v. Marion Cnty. Election Bd.*,

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[14] https://www.propublica.org/article/a-nonprofit-with-ties-to-democrats-is-sending-out-millions-of-ballot-applications-election-officials-wish-it-would-stop; *see also* Ryan McCarthy, "*Pro Publica Responds to the Center for Voter Information*," Pro Publica, Oct. 30, 2020, available at https://www.propublica.org/article/propublicaresponds-to-the-center-for-voter-information

553 U.S. 181, 194-95 (2008) (upholding Indiana voter ID law even though "[t]he record contained no evidence of any such fraud actually occurring in Indiana at any time in its history," but noting "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history").

2. Avoiding Voter Fraud

The district court additionally minimized the State's interest in using the Pre-Filled Application to avoid potential fraud because "defendants have presented no evidence of voter fraud effectuated through advance mail voting or otherwise," and the 2020 General Election was devoid of "widespread, systematic issues of voter fraud, intimidation, irregularities or voting problems." App.III 659. This reasoning misstates the law.

First, the fact that Kansas has avoided any major voter fraud from advance ballots is irrelevant. The Supreme Court has held repeatedly that "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986). The law does not require that "a State's political system sustain some level of damage before the legislature can take corrective action." *Id.* at 195. Nor is a state confined to demonstrating harms only within its own borders in adopting anti-fraud electoral measures. *See supra*.

Second, the risk of voter fraud is particularly acute with mail-in voting. *See, e.g., Crawford*, 553 U.S. at 195-96; *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 239 (5th Cir. 2020). While Kansas appears to have dodged any systemic fraud in its recent elections, the surge of inaccurate and duplicate pre-filled advance ballot applications in 2020 taxed the ability of county election offices to timely and efficiently process such applications, thereby increasing the opportunity for mistakes to be made and testing the limits of the State's safeguards against fraud. The district court rejected this argument by suggesting that it would mean that "any activity that takes up an election official's time and attention can be criminalized on the basis of potential fraud." App.III 661. But under that logic, the State would be severely hampered in adopting measures designed to minimize the possibility of fraud falling through the cracks, e.g., via misaddressed applications being submitted by someone other than the intended recipient. True, existing statutes prohibit falsely impersonating a voter. Kansas is permitted, however, to adopt additional safeguards to stave off already-prohibited (but difficult to detect) fraudulent conduct.

VPC believes it is doing voters a favor by bombarding them with multiple, pre-populated advance ballot applications that often do not match the data in the state voter file. The confusion, anger, and frustration that occurred in Kansas and elsewhere from these actions indicate otherwise. Not everyone was unhappy, of course. But the legislature made an entirely defensible decision to adopt the Pre-

Filled Application Prohibition in order to minimize the likelihood of these problems from recurring, and thereby facilitate greater efficiency and public confidence in election administration. In short, the district court erred in invalidating the statute on First Amendment grounds.

IV. The Pre-Filled Application Prohibition Does Not Contravene VPC's Freedom of Association Rights

The district court further erred in holding that the Pre-Filled Application Prohibition abridges VPC's freedom of association under the First Amendment by limiting "its ability to associate with Kansans to persuade them to vote by mail and assist them in requesting an advance mail ballot," and preventing it "from using the assistance it offers its intended population of underrepresented voters to gain a foothold for future electoral engagement with those voters." App.III 646.[15]

Freedom of association protects "joining in a common endeavor" or engaging in "collective effort on behalf of shared goals." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984). It does not protect connections between people who "are not members of any organized association," are "strangers to one another," and do not come together to "take positions on public questions." *Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989); *accord Jaycees*, 468 U.S. at 621 (rejecting freedom of association claim where "much of the activity central to the formation and maintenance of the

[15] Defendants raised this issue at App.I 198-200.

association involves the participation of strangers to that relationship").

The district court held that VPC had "associated" with certain recipients of its targeted mailings because it knew such individuals had used its envelope to return an advance ballot application to the county election office, and it mailed additional get-out-the-vote communications to such individuals. App.III 648. But there is no connection between VPC and the recipients of its pre-filled applications. In fact, it is undisputed that many individuals who used a VPC-provided envelope to return their completed application thought the application had come from the *county*.

Mailing a pre-populated application (or a get-out-the-vote reminder) to a voter with whom VPC has no prior connection does not implicate the freedom of association. It is a unilateral act that can be ignored by the would-be associate. Recipients are not members of any organization or otherwise joined in a common endeavor or collective effort on behalf of shared goals. They are strangers who simply receive similar mass-mailers. Some complete the application in the hope of electing a particular candidate, some complete it and never vote, and some ignore it altogether. Moreover, unlike a referendum petition that requires joint effort, "applications are individual, not associational, and may be successfully submitted without the aid of another." *Voting for Am., Inc. v. Andrade*, 488 F.App'x 890, 898 n.13 (5th Cir. 2012). The mere fact that a recipient does not take the affirmative step of e-mailing VPC and asking to be removed from a mailing list (to which he/she had never even

subscribed) in no way creates any type of association. That would be like suggesting that individuals who use the free return-address labels they receive in the mail from certain charities have created an association with the sender. If the sort of bare communication used by VPC constitutes First Amendment association, most of modern civilization would be immune from regulation.

The district court sought to distinguish *Stanglin* and *Andrade* on the basis that VPC targets specific individuals. Under that reasoning, a community organization funding a mailing that urges residents in a certain zip code to exercise more (or visit the local zoo) would establish an association with targeted recipients. That would turn *Jaycees* on its head. Furthermore, the fact that the alleged association is occurring via a non-public forum like an advance ballot application – where the government's regulatory authority is at its peak – dampens the court's reasoning. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 680-81 (2010).

The court also relied heavily on *NAACP v. Button*, 371 U.S. 415 (1963). But that case is readily distinguishable. There, members of the NAACP and an affiliated chapter distributed forms to potential litigants, parents, and school boards urging them to engage designated staff attorneys in order to pursue desegregation litigation. *Id.* at 421-23. The State, however, forbade the solicitation of legal business in this manner. *Id.* at 423-24. The Supreme Court held such prohibition violated the First Amendment because it impaired members of the organization from associating with

potential litigants who might share a common interest in fighting discrimination and achieving desegregation. *Id.* at 443-44.

Contrary to the plaintiffs in *Button*, VPC's mailing of pre-filled advance voting ballot applications does not further a common interest or goal shared by both VPC and Kansas voters. The recipients of VPC's mailers are not members of any particular organization and have no demonstrated interest in encouraging other Kansas voters to vote by advance mail ballot. Unlike the solicitation of litigants to jointly fight against discrimination in *Button*, recipients of pre-filled advance voting applications do not subsequently join in a common endeavor with VPC. There is simply no associational component between VPC and its targeted voters that is hindered by the Pre-Filled Application Prohibition. *See VoteAmerica*, 609 F.Supp.3d at 1358 (rejecting identical claim against identical statute).

V. The Pre-Filled Application Prohibition is Not Unconstitutionally Overbroad

The district court next held that the Pre-Filled Application Prohibition is unconstitutionally overbroad on both a facial and as-applied basis. App.III 664-668. For largely the same reasons set forth in Parts II-IV, this holding is predicated on an analysis that is factually and legally flawed.[16]

[16] Defendants raised this issue at App.I 200-203; App.II 402-405.

Defendants do not take issue with the court's recitation of the legal standards generally governing VPC's overbreadth claim. The foundational problem is that the First Amendment is not implicated by the challenged statute, VPC's activities have no associational component that enjoys constitutional protection, and the State had sound reasons for adopting this statute.

The district court held that, not only does the Pre-Filled Application Prohibition "criminalize[] a substantial amount of protected speech," but "any legitimate applications are hypothetical or rare." App.III 666. As Defendants detailed at length in Part III.D., that conclusion is belied by the stipulated record. There is no serious dispute that the pre-filled applications VPC sent to voters contained a significant number of errors, and that VPC was concerned enough with these inaccuracies that it decided *on its own* to cease pre-populating the applications for a period of time. There is likewise ample evidence in the stipulated facts that both the erroneous and duplicate pre-filled applications had an adverse impact on the orderly administration of the 2020 General Election in multiple counties. The negative impact of these applications on the public's confidence in the integrity of the election was also well documented.

The district court did not address any of the aforementioned state interests in its analysis of the overbreadth claim. Instead, the court focused exclusively on the issue of fraud, referencing the availability of other statutory tools to proscribe the

creation or submission of fraudulent advance ballot applications. But Kansas is not required to rely exclusively on such a blunt instrument – a felony provision prohibiting individuals from impersonating other voters, Kan. Stat. Ann. § 25-2431, which may not even apply to many of the problems created by pre-filled advance ballot applications – in seeking to deter difficult-to-detect fraudulent conduct. Nor is it obligated, as the court suggested, to produce "evidence that fraudulent applications are a problem in Kansas." App.III 667.

The court also highlighted the fact that state and county election officials are permitted to pre-fill applications. *Id.* But no serious issues have arisen from the handful of counties that sent out pre-filled applications, all of whom used data straight from ELVIS and mailed the forms to voters within days of printing. *See Burson*, 504 U.S. at 207 ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.").

The overbreadth doctrine is "strong medicine" and must be applied "with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982). Even if a law touches on speech protected by the First Amendment, declaring a statute invalid may not be appropriate in light of the State's interests. "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law

that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Faustin v. City and County of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). The Pre-Filled Application Prohibition leaves abundant space for a nearly unlimited amount of speech and expressive conduct. VPC's overbreadth claim has no merit and the district court erred in reaching a contrary conclusion.

CONCLUSION

Defendants request that this Court reverse the district court's judgment and remand with instructions to grant judgment in favor of Defendants.

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants request oral argument because of the important state interests at issue, most notably, a federal court striking down a state law as allegedly violative of the U.S. Constitution. Defendants believe that oral argument will materially assist this Court in resolving the complex constitutional questions at issue here.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman

CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made pursuant to Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5. The document is a native PDF document. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, SentinelOne (version 22.3.4.612), which was last updated July 25, 2023. According to the program, the document is virus free.

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman

CERTIFICATE OF SERVICE

I certify pursuant to Fed. R. App. P. 25 and 10th Cir. R. 25.4 that on this 25th day of July 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which in turn caused electronic notifications of such filing to be sent to all counsel of record.

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman

INDEX OF ATTACHMENTS

Memorandum and Order (May 4, 2023) .... Attachment 1

Judgment of the District Court (May 4, 2023) .... Attachment 2

ATTACHMENT 1

District Court's Memorandum & Order

(May 4, 2023)

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

Defendants.

CIVIL ACTION

No. 21-2253-KHV

MEMORANDUM AND ORDER

Voter Participation Center ("VPC") brings suit for declaratory and injunctive relief against 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. Plaintiff alleges that the Personalized Application Prohibition in Section 3(k)(2) of HB2332 (codified as K.S.A. § 25–1122(k)(2)) violates its First and Fourteenth Amendment rights, U.S. Const. amends. I and XIV.[1] The parties have submitted the matter for a bench trial.[2] After careful consideration, based on largely stipulated facts, the Court makes the following findings of fact and conclusions of law, as required by

[1] The Personalized Application Prohibition does not cover plaintiff VoteAmerica's conduct because VoteAmerica mails personalized advance mail ballot applications only to voters who have specifically requested them on its interactive website.

[2] The parties stipulated that their briefs on cross-motions for summary judgment would serve as trial briefs.

Rule 52(a)(1) of the Federal Rules of Civil Procedure.

Findings Of Fact

Based on the stipulations of the parties, the Court makes the following findings of fact:

Personalized Application Prohibition

On February 10, 2021, the Kansas Legislature introduced HB 2332, which restricted the distribution of advance mail ballot applications to potential Kansas voters. On May 3, 2021, over the veto of Governor Laura Kelly, the Legislature enacted HB 2332. Plaintiff challenged two of HB 2332's provisions. Only one—the Personalized Application Prohibition—is still at issue in this lawsuit.

The Personalized Application Prohibition prohibits any person or organization (1) who solicits a registered voter by mail (2) from mailing to a registered Kansas voter a personalized advance mail ballot application (3) that is pre-filled with any information, such as the voter's name or address. K.S.A. § 25-1122(k)(2). A violation is a class C nonperson misdemeanor, which is punishable by up to one month in jail and/or fines. HB 2332 carves out exceptions by permitting a subset of state and county election officials to mail pre-filled advance mail ballot applications. H.B. 2332 § 3(k)(4).

The state argues that the Personalized Application Prohibition is necessary to (1) minimize voter confusion and disenfranchisement, (2) preserve and enhance voter confidence and (3) reduce the rejection of inaccurate applications and inefficiencies in the election administration, and reduce potential voter fraud. Exhibit 34 (Doc #145-37) at 3-4. These rationales are not a part of the Legislative Record for HB 2332.

In February of 2021, the Office of the Kansas Secretary of State submitted written

testimony to both the House and Senate Committees on Federal and State Affairs regarding the state's 2020 general election. Among other things, the testimony advised the legislature as follows:

> Leading up to the 2020 general election, state and county election officials were inundated with calls from confused voters who submitted an advance by mail ballot application but continued to receive unsolicited advance ballot applications from third parties. This created a substantial workload increase for local election offices who had to process thousands of duplicate forms at a time when county election officials were preparing for a high turnout, statewide election, in the middle of a pandemic.

Exhibit Z (Doc. #151-26). On March 17, 2021, the Kansas Secretary of State submitted written testimony on HB 2332 which mentioned "incomplete mail ballot applications" but did not discuss pre-filled applications. Exhibit 32 (Doc. #145-31) at 3.

Voting In Kansas

Schwab is the Chief Election Officer for Kansas. As such, he oversees all Kansas elections and administers the state's election laws and regulations. Schwab also issues guidance and instruction to county election officers on election procedures and requirements. Kansas law permits Schwab to adopt rules and regulations related to advance voting, including the general form of advance voting ballots and applications for advance mail voting. K.S.A. §§ 25-1131, 25-1121(a)-(b), 25-1122d(c); see also HB 2332, Session of 2021 (Kan.), §§ 3(k)(2), (m).

The Kansas state voter registration database is known as the Election Voter Information System ("ELVIS"). Schwab is responsible for maintaining an online voter registration database. 52 U.S.C. § 21083(a)(1)(A). County election officials in all 105 counties in Kansas perform all additions, deletions and modifications of records in the database, and ELVIS reflects the voter data maintained by those county officials. When a county election office receives a voter

registration application, election officials put that voter's registration information into the state's central database and thereby create a voter record in ELVIS. ELVIS reflects real-time changes that officials make to individual voter files.

To vote by mail in Kansas, a voter generally must complete an advance ballot application and return it to the county election office where the voter is registered. Voters on the permanent advance voting list or who vote by mail pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 et seq., need not file advance ballot applications to vote by mail. The advance mail voting process includes multiple safeguards against fraud, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications. See, e.g., K.S.A. § 25-2431.

If a voter timely submits an advance voting ballot application, a county election official processes the application, and if the county accepts the application, mails the voter an advance ballot packet.[3] If a voter submits an inaccurate or incomplete application, county election officials must contact the voter and "cure" the application. If officials cannot contact the voter, the office will mail the voter a provisional ballot.

For the county election office to process an application without having to contact the voter to cure a mismatch or discrepancy, an advance voting ballot application must precisely

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[3] Under Kansas law, an advance voting ballot application can be filed with the county between 90 days prior to the General Election and the Tuesday of the week preceding such General Election. K.S.A. § 25-1122(f)(2). Other than voters entitled to receive ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act, counties cannot transmit advance ballots to voters before the 20th day before the election for which an application has been received. K.S.A. §§ 25-1123(a), 25-1220. For advance voting ballot applications received by the county election office on or after the 20th day before the election, the county generally must process them within two business days of their receipt. K.S.A. § 25-1123(a).

match the information in ELVIS; officials may only overlook clear inadvertent mismatches (e.g., minor misspelling of a street name such as omitting the letter "e" or signing as "Jim" despite being registered as "James"). Once the county election office processes an advance ballot application, it documents in ELVIS the date it processed the application and transmitted the regular or provisional ballot to the voter. County election offices also document in ELVIS whether (and when) a voter has returned an advance ballot.

Voter Participation Center

Plaintiff's core mission is to promote voting among traditionally underserved groups—including young voters, voters of color and unmarried women—at rates commensurate with voters in other groups. Plaintiff believes that when more eligible voters participate in elections, it benefits democracy in the United States and that encouraging and assisting voters to participate in elections through mail voting ensures a robust democracy. Plaintiff believes that 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.

Plaintiff primarily uses direct mailings to encourage these voters to register and participate in the electoral process. VPC President and Chief Executive Officer Thomas Lopach testified that plaintiff believes sending personalized advance mail ballot applications "increases voter engagement," which Lopach thinks would be a broad associational base with potential voters in Kansas. Exhibit 7 (Doc. #147-5) at 167:22–168:15.[4] Plaintiff considers that providing

[4] To support its belief that sending personalized applications increases voter engagement, plaintiff relies on a 2006 election cycle study which, among other things, evaluated the effectiveness of personalizing advance mail ballot applications. Defendants argue that the study is inadmissible hearsay. The Court finds that plaintiff may not rely on the study to prove (continued . . .)

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

Plaintiff encourages registered Kansans to participate in this manner by mailing voters a communication package that advocates for mail voting and provides a personalized advance mail ballot application. Through these communications, plaintiff communicates its message that advance mail voting is safe, secure, accessible and beneficial. Providing personalized applications to young voters, voters of color and unmarried women provides them simple access to advance mail ballot applications. Plaintiff tracks recipient responses to its communications and conducts randomized control trials to evaluate the effectiveness of its mailings.

Lopach and VPC Executive Vice President Lionel Dripps testified that plaintiff engages voting behavior and quantitative research professionals, including but not limited to Christopher B. Mann, associate professor of political science at Skidmore College, to analyze the efficacy of its direct mail programs. Plaintiff believes that the personalized applications are the most effective means of conveying its pro-mail voting message, and if the Prohibition stands, plaintiff must reconsider its communications with Kansas voters.

<u>2020 Elections In Kansas</u>

For the 2020 General Election, plaintiff and its 501(c)(4) sister organization, the Center for Voter Information ("CVI"), sent advance mail ballot application packets to approximately 507,864 Kansas voters. Plaintiff's communications included a letter that (1) encouraged each voter to request and cast an advance ballot and provided instructions on how to do so,

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the true effectiveness of the personalized applications. This finding does not, however, dispute plaintiff's evidence of its *belief* that personalizing the applications increases engagement.

(2) detailed how to opt out of future VPC communications and (3) provided a step-by-step guide on how to submit the included application. The packet also included a postage-paid envelope addressed to the voter's county election office. The letter's opening paragraph specifically referred to "the enclosed advance voting application already filled out with [the voter's] name and address" and mentioned the personalization in the closing "P.S." message: "We have already filled in your name and address on the enclosed form. Please take a minute to complete the form, sign and date it, and place the form in the pre-addressed, postage-paid envelope." Exhibit A (Doc. #145-34) at 3. On the reverse side of the enclosed personalized advance ballot application, plaintiff also printed a step-by-step guide.

To personalize the applications, plaintiff uses statewide voter registration files obtained from data vendors and fills in parts of the advance mail ballot applications with voter information (the voter's name and address). Plaintiff relied on a vendor, Catalist, LLC, to provide the voter registration data for the Kansas voters whom plaintiff targeted with advance voting ballot application packets.[5] For a $200 fee, the Secretary of State's office will provide a list of all registered voters in Kansas. That list comes from ELVIS and presents a snapshot of the state's voter file as it appears on the date when the office generates the registration list. On January 31, April 10 and September 15, 2020, Catalist sent Kansas active voter registration lists to plaintiff. Plaintiff's CEO Lopach testified that he does not know how often Catalist requests updated voter files from the Secretary of State's office.

Plaintiff attempts to cull its lists to ensure efficiency and accuracy. Because ELVIS is a

[5] It is not clear exactly which voters plaintiff targets. Plaintiff at least targets some underrepresented voters who may not have the ability and availability to vote in person or the resources to navigate the mail voting application process.

dynamic system, if a third party relies on voter registration information obtained from ELVIS, some information on the pre-filled application may not match the state's voter file database when the voter receives it. This happens when an official has updated ELVIS (e.g., noting a change of name, change of address, death or ineligibility due to criminal conviction) after the Secretary of State's office generates the voter file which the third party has requested (using the stale data).

VPC Executive Vice President Dripps testified that *nationally*, plaintiff detected that roughly five per cent of the data vendor records had an incorrect middle name or initial and roughly three per cent had a suffix that did not match the voter file. Dripps testified that he did not know whether the errors in Kansas data matched the national numbers.

Defendants' expert witness, Ken Block, analyzed a subset of the advance ballot applications that plaintiff sent to Kansas voters in the 2020 General Election. This subset contained 312,918 of the approximately 507,864 applications that plaintiff sent. Block identified errors in the information that plaintiff used to pre-populate the applications. Block attested that during the 2020 General Election, plaintiff's data contained information on 385 Kansas voters whose registrations had been cancelled. Of those 385 Kansans, plaintiff sent (1) five separate mailings to 176 of the Kansans; (2) four separate mailings to 99 of the Kansans; (3) three separate mailings to 39 of the Kansans; and (4) two separate mailings to 11 of the Kansans. Exhibit N (Doc. #151-14) at 3-4. Block also attested that he identified 23 pairs of matched records in which two different voters showed the same voter registration number, which purportedly indicates that plaintiff had sent a pre-filled application for Voter #1 to Voter #2. Block further attested that Kansas' own voter file properly separated these individuals. Block did not address whether recipients actually returned these erroneous advance mail ballot

applications, or purport to demonstrate that any erroneously pre-filled application came to the attention of election officials or negatively impacted the 2020 election process. Block nonetheless attested that plaintiff's use of stale voter registration data to pre-fill the advance mail ballot applications imposed an extra burden on county election officials.

Dr. Eitan Hersh, who analyzed Block's reports, testified that actually "it seems likely that the [plaintiff's] methods *reduced* the burden on election officials." Exhibit 5 (Doc. #156-6) ¶ 41 (emphasis in original). During his deposition, Dr. Hersh stated, "all voter registration data, whether it's sourced from the state or whether it's sourced from a third party, contain obsolete records essentially the day that it is downloaded." Exhibit 1 (Doc. #167-1) at 104:22–25. Connie Schmidt, Johnson County Elections Director, testified that she is "sure there are always data entry errors" in ELVIS. Exhibit 2 (Doc. #167-2) at 107:19–24.

In his report, Dr. Hersh attested that any errors in plaintiff's lists raised by Block "are nothing out of the ordinary, given population churn and the logistics of sending large mailers out to voters." Exhibit 5 (Doc. #156-6) ¶ 16. Dr. Hersh further attested that attempts to eliminate routine error in mailing lists would be "extreme," "costly and labor intensive, and it would delay the eventual sending of the mailing." Id. ¶ 20. Dr. Hersh concluded that "Block's concerns relate to just under 3% of the records in" plaintiff's database and "[e]ven if one were to stipulate that all the issues raised by" Block existed, "the total number of problems identified by [him] is quite in line with [Dr. Hersch's] expectations." Id. ¶ 27.

Plaintiff now contracts with two data vendors to ensure it has the most accurate data when creating mailing lists. Each year, plaintiff notifies the Kansas Director of Elections of its upcoming advance mail voting program and seeks feedback on the forms and instructions that

plaintiff plans to distribute. In the 2020 general election, an estimated 112,000 Kansas voters used a VPC- or CVI-provided pre-paid/pre-addressed envelope to mail an advance ballot application to their county election office. An estimated 69,000 of such Kansas voters mailed an advance voting ballot application provided by plaintiff. In 2020, county election offices received approximately 14,739 duplicate applications from Kansas voters using VPC- or CVI-provided envelopes.[6]

The 2020 general election in Kansas had record turnout (1,375,125 votes cast, a 70.9% turnout rate) and a steep increase in advance mail voting (459,229 voted by mail, 3.2% of total votes). This compared to 1,039,085 total votes cast in the 2018 general election, which represented a 56.4% turnout rate with 152,267 votes cast by mail, and 1,225,667 total votes cast in the 2016 general election, which was a 67.4% turnout rate with 173,457 votes cast by mail.

Conducting a high-turnout presidential election race in the middle of a worldwide pandemic introduced many challenges for election administrators. It also presented new hurdles for some voters due to COVID-19. In the 2020 primary and general elections, many organizations, campaigns and elections offices, including plaintiff and Kansas election officials, encouraged voters to vote by mail. Several Kansas counties sent communications to their registered voters regarding the advance mail voting process, including advance mail ballot applications.

Many voters with concerns about lost applications or mail delays called their respective election offices to inquire about the status of their applications. Some voters re-submitted their

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[6] It is not clear how many Kansas voters, if any, submitted duplicate VPC- or CVI-provided applications before the 2020 general election.

applications. Election Commissioner Andrew Howell attested that in Shawnee County, duplicate and inaccurately pre-filled advance mail ballot applications resulted in telephone calls, letters, e-mails and in-office visits from voters. Howell testified, however, that he does not believe voters were necessarily confused and frustrated because they received pre-filled applications. Rather, he believes that voters erroneously assumed that the county had mailed the pre-filled ballot applications and were frustrated at the purported incompetency of his election office. The Shawnee County Election Office received 4,217 duplicate applications in 2020, as compared to the dozen or fewer that it received in the 2016 and 2018 general elections.

Howell and Ford County Election Clerk Deborah Cox attested that after receiving a duplicate application, their election offices cannot assume that the initially submitted application was correct. Depending on the situation, the offices may need to send a provisional ballot to the voter. For this reason, reviewing a duplicate application usually takes staff more time than the review of the initially submitted application. If the office does not need to contact the voter, staff can review the duplicate application in about seven to 10 minutes. If the office must contact the voter, staff can review the duplicate application in about 15 to 30 minutes (occasionally longer).

Cox testified that she would normally agree 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." Exhibit 2 (Doc. #145-3) at 150:9–14. Douglas County Elections Director Jamie Shew testified that if not for budgetary constraints, his office would actually prefer to pre-fill the applications sent to voters. In 2020, for the primary and general elections, Johnson County mailed applications to all voters—opting to expend additional resources to personalize the applications and it actually pre-filled more information than

plaintiff. Staff in the Johnson County Election Office chose to pre-fill as much of the voter's information as possible. Exhibit 12 (Doc. #145-11) at 4. The Office reasoned that doing so "makes it easier for the voter and reduces mistakes that [officials] then have to work harder to fix on the backend." Exhibit 9 (Doc. #145-8) at 2.

Bryan Caskey, Kansas Secretary of State Elections Director, testified that the 2020 post-election audits revealed that every cast ballot was accounted for and counted properly either by hand or by machine. When asked whether the audits revealed "any systemic fraud in Kansas elections in 2020," Caskey responded, "They did not." Exhibit 17 (Doc. #146-16) at 282:25–283:13.

Procedural History

On June 2, 2021, plaintiff filed this suit, alleging that the enforcement of K.S.A. §§ 25-1122(k)(2) and 25-1122(l)(1) violated its First and Fourteenth Amendment rights and breached the Constitution's Dormant Commerce Clause. On November 19, 2021 (and a nunc pro tunc Order on December 15, 2021), the Court preliminarily enjoined enforcement of Sections 3(k)(2) and 3(l)(1) of HB 2332. Through a stipulation with plaintiff that the Court entered on February 25, 2022, defendants agreed to a permanent injunction against the enforcement of the Out-of-State Distributor Ban as violative of plaintiff's First and Fourteenth Amendment rights.

The only claims remaining in dispute pertain to the Personalized Application Prohibition. Plaintiff alleges that the statutes violate its freedom of speech (Count I) and freedom of association (Count II) and are unconstitutionally overbroad (Count III).

Conclusions of Law

Count I alleges that sending personalized mail ballot applications constitutes expressive

conduct, and Count II alleges that plaintiff's mailings constitute protected association. Count III asserts that the Personalized Application Prohibition is unconstitutionally overbroad, facially and as applied to plaintiff, because it needlessly regulates a substantial amount of protected expression and associations and impermissibly chills plaintiff's speech. Defendants argue that plaintiff's activity is non-expressive conduct, not speech or association, and that the Personalized Application Prohibition is not unconstitutionally overbroad.

I. Counts I and II

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The party invoking the First Amendment's protections must prove that it applies. Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 293 n.5 (1984). The First Amendment protects several categories of speech and expression, and the Supreme Court's decisions in this area have created a "rough hierarchy" of available protections. R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992). "Core political speech occupies the highest, most protected position" in the hierarchy, while obscenity and fighting words receive the least protection. See id. Other categories of speech rank somewhere between these poles. See id.

A. Whether the Prohibition Implicates Plaintiff's First Amendment Rights

Defendants assert that the Personalized Application Prohibition regulates non-expressive conduct and does not implicate plaintiff's First Amendment rights. Therefore, under defendants' theory, the Personalized Application Prohibition need only be rationally related to a legitimate state interest. If plaintiff establishes that the Personalized Application Prohibition infringes upon its protected speech, conduct or association, however, the prohibition must withstand some form

of heightened scrutiny. Accordingly, the Court will first address whether the Prohibition restricts plaintiff's expressive conduct and association.

i. Expressive Conduct (Count I)

The First Amendment "literally forbids the abridgement only of speech," but its protection is not limited to just spoken or written words. Texas v. Johnson, 491 U.S. 397, 404 (1989). Conduct that is "sufficiently imbued with elements of communication"—known as "inherently expressive" conduct—falls within the scope of the First and Fourteenth Amendments. Id.; see also Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006). The test to determine whether conduct is sufficiently communicative to warrant First Amendment protection was originally articulated in two seminal free-speech cases, Spence v. Washington, 418 U.S. 405 (1974), and Texas v. Johnson, 491 U.S. 397 (1989). Summarizing these cases in Cressman v. Thompson, 719 F.3d 1139 (10th Cir. 2013) ("Cressman I"), the Tenth Circuit found that the Spence-Johnson test requires "(1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by those who viewed the symbolic act or display." Id. at 1149.[7] Under this test, courts must analyze plaintiff's

[7] The Tenth Circuit has questioned the viability of the Spence-Johnson test. Cressman I, 719 F.3d at 1149. In Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos., 515 U.S. 557 (1995), the Supreme Court revisited the Spence-Johnson test and "suggested the Spence-Johnson factors are not necessarily prerequisites for First Amendment protection for symbolic speech." Cressman I, 719 F.3d at 1149. After Hurley, the circuit courts took "divergent approaches" to reconciling the three cases. Cressman v. Thompson, 798 F.3d 938, 955 (10th Cir. 2015) ("Cressman II"). The Second Circuit, for example, has "interpreted Hurley to leave intact the Supreme Court's test for expressive conduct in Texas v. Johnson." Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 205 n.6 (2d Cir. 2004) (citation omitted); see also Voting for Am., Inc. v. Steen, 732 F.3d 382, 388 (5th Cir. 2013) (same). The Third Circuit, on the other hand, has held that Hurley "eliminated the 'particularized message' aspect of the Spence-Johnson test." Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144,
(continued . . .)

conduct "with the factual context and environment in which it was undertaken." Spence, 418 U.S. at 410; see also Clark, 468 U.S. at 294 (expressive conduct examined "in context").

Plaintiff argues that (1) it "personalizes the applications to express a specific pro-advance mail voting message to a specific voter recipient whose information [it] conveys on its communications" and (2) "tens of thousands of Kansans did in fact receive and act on [its] specific message by completing and submitting an application that [it] sent." Plaintiff Voter Participating Center's Opposition To Defendants' Motion For Summary Judgment (Doc. #156) filed November 4, 2022 at 89. Defendants do not deny that plaintiff intends to communicate a particularized message but argue that (1) plaintiff communicates its messages "through the contents of a cover letter that [it] sends with the application, not through the application itself" and (2) nothing in the Personalized Application Prohibition impedes plaintiff from distributing the cover letter. Defendants' Memorandum In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) filed October 28, 2022 at 23.[8] Defendants assert that

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160 (3d Cir. 2002). "Other circuits fall somewhere in the middle." Cressman II, 798 F.3d at 956 (citing Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005) (claimants must show conduct conveys particularized message, but message need not be narrow or succinctly articulable), and Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (looking to whether "reasonable person would interpret [a display] as some sort of message, not whether an observer would necessarily infer a specific message")). Ultimately, the Tenth Circuit has not defined a post-Hurley test but has "observed that Hurley suggests that a Spence-Johnson 'particularized message' standard may *at times* be *too high a bar* for First Amendment protection." Id. (quoting Cressman I, 719 F.3d at 1150) (emphasis in original).

Plaintiff argues that Hurley eschewed any particularized message prerequisite for expressive conduct. Although plaintiff may be correct, the Court need not reach this issue because plaintiff's conduct satisfies even the more stringent particularized message standard under Spence-Johnson.

[8] As explained below, the Court doubts that "the First Amendment would countenance slicing and dicing" plaintiff's actions for constitutional purposes. League of
(continued . . .)

plaintiff has not established that any recipient of the personalized application discerns any particular message.

Viewed in context, a recipient is highly likely to understand that the personalized ballot application communicates plaintiff's pro-advance mail voting message. Defendants' argument that only the cover letter communicates plaintiff's message is not convincing. An organization with a neutral or negative opinion toward advance mail voting would not expend its resources to personalize mail ballot applications for specific voters. A recipient would readily understand that through the personalized mail ballot application, plaintiff is communicating that advance mail voting is safe, secure and accessible. Plaintiff presented evidence that in the 2020 general election, approximately 69,000 recipients submitted advance voting ballot applications which it provided, which strongly suggests that Kansans not only understood plaintiff's pro-advance mail voting message but also acted on its encouragement. Plaintiff has established that through mailing personalized advance mail ballot applications to select voters in Kansas, it intends to communicate a pro-advance mail voting message and that recipients understand that message.

Relying on Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) ("FAIR"), defendants assert that plaintiff's decision to include an explanatory cover letter in its mailing packet demonstrates that a recipient would not understand plaintiff's alleged message through the personalized mail ballot application alone. In FAIR, a group of law schools sought to restrict military recruiting on their campuses because they objected to the

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Women Voters v. Hargett, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (quoting Steen, 732 F.3d at 401 (Davis, J. dissenting)) (quotation marks omitted). This issue does not affect the Court's analysis here, however, because it concludes that the personalized mail ballot applications constitute protected speech.

government's policy on homosexuals in the miliary. Id. at 52. Accordingly, the group challenged the Solomon Amendment—which withheld federal funds from schools that denied equal access to military recruiters—arguing that forcing them to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive federal funds violated their First Amendment rights. Id. The Supreme Court concluded that "the conduct regulated by the Solomon Amendment is not inherently expressive." Id. at 66. The Court explained as follows:

> Prior to the adoption of the Solomon Amendment's equal access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." . . . An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

Id. (quoting Johnson, 491 U.S. at 406).

Plaintiff correctly responds that its personalized mail ballot applications are readily distinguishable from the conduct in FAIR. Unlike in FAIR, it is overwhelmingly apparent to someone who receives plaintiff's application that plaintiff is expressing a pro-advance mail voting message. Again, only an organization which intends to convey such a message would expend its resources to personalize and distribute advance mail ballot applications. Defendants' argument that the Personalized Application Prohibition merely regulates names and addresses on paper and that a recipient would not think anything of the personalized application oversimplifies plaintiff's claim and defies common sense.

Defendants further argue that in its order on defendants' motion to dismiss, the Court

improperly distinguished Lichtenstein v. Hargett, 489 F. Supp. 3d 742 (M.D. Tenn. 2020). Defendants again assert that by mailing application packets and distributing personalized mail ballot applications, plaintiff is not engaging in speech or expressive conduct. Lichtenstein involved First Amendment challenges to a Tennessee statute which prohibited anyone except election officials from distributing absentee ballot applications. Id. at 748. The district court held that the law did not prohibit spoken or written expression and therefore did not restrict expressive conduct. Id. at 773.

In its previous order, the Court concluded that Lichtenstein is not germane because plaintiff's application packets include speech that communicates a pro-mail voting message. Memorandum And Order (Doc. #50) filed November 19, 2021 at 12. Defendant argues that "there is no basis for this factual distinction" and that the court in Lichtenstein subsequently clarified that plaintiffs there—like plaintiff here—included other "voter engagement materials" with the applications. Defendants' Memorandum In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) at 38; Lichtenstein v. Hargett, No. 3:20-cv-00736, 2021 WL 5826246, at *6 (M.D. Tenn. Dec. 7, 2021). Defendants' arguments miss the point. By personalizing the mail ballot applications, plaintiff engages in expressive conduct which is distinguishable from distributing blank absentee ballot applications. Moreover, as explained below, the Court rejects defendants' invitation to disaggregate the application and plaintiff's other voter engagement materials. In the final analysis, Lichtenstein is not persuasive or binding.

The Court finds that mailing the personalized applications is inherently expressive conduct that the First Amendment embraces. See League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); see also Democracy N.C. v. N.C. State Bd. of Elections, 476

F. Supp. 3d 158 (M.D. N.C. 2020).[9]

ii. Association (Count II)

In Count II, plaintiff asserts that the Personalized Application Prohibition infringes upon its First Amendment right of association. Specifically, plaintiff argues that the Personalized Application Prohibition interferes with its associational rights by (1) "limiting its ability to associate with Kansans to persuade them to vote by mail and assist them in requesting an advance mail ballot" and (2) foreclosing plaintiff "from using the assistance it offers its intended population of underrepresented voters to gain a foothold for future electoral engagement with those voters." Plaintiffs' Memorandum In Support Of Their Motion For Summary Judgment (Doc. #145) filed April 14, 2022 at 30. Defendants argue that because plaintiff's communications are unilateral acts which a recipient may ignore, the Personalized Application Prohibition does not impact plaintiff's right to associate.

The right to associate to advance beliefs and ideas is at the heart of the First Amendment. NAACP v. Button, 371 U.S. 415, 430 (1963). An organization's attempt to broaden the base of public participation in and support for its activities is conduct "undeniably central to the exercise

[9] Defendants attempt to distinguish Cobb by arguing that voter registration drives are materially different from advance mail ballot applications. Defendants seemingly argue that because advance voting ballot applications are more directly connected to the act of voting than registration drives, Cobb is not instructive. As plaintiff correctly responds, even if defendants' argument is correct, this speaks to state rationales for the Personalized Application Prohibition—not the expressive nature of plaintiff's conduct.

Defendants also argue that Democracy North Carolina is distinguishable from this case because "nothing in Kansas law prevents a third-party from assisting a voter in completing an advance mail ballot application." Defendants' Memorandum In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) at 37. In the same step, however, defendants concede that the Personalized Application Prohibition *does* bar third parties from assisting voters by personalizing and distributing unsolicited applications. Id. The Court is not persuaded by defendants' hollow attempt to distinguish Democracy North Carolina.

of the right of association." Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1202 (D.N.M. 2010) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 214–15 (1986)), on reconsideration in part, No. CIV-08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010). Public endeavors which "assist people with voter registration are intended to convey a message that voting is important," and public endeavors which expend resources "to broaden the electorate to include allegedly under-served communities" qualify as expressive conduct which implicates the First Amendment freedom of association. Democracy N.C., 476 F. Supp. 3d at 223 (quoting Am. Ass'n of People with Disabilities, 690 F. Supp. 2d at 1215–16).

In Button, the Supreme Court emphasized that the state "cannot foreclose the exercise of constitutional rights by mere labels." 371 U.S. at 429. The Court continued that plaintiff's conduct was a protected "form of political expression" because it was "a means for achieving the lawful objectives of equality of treatment by all government" for Black communities in the United States. Id. The Court emphasized that "in order to find constitutional protection for th[is] kind of cooperative, organizational activity," it "need not . . . subsume such activity under a narrow, literal conception of free of speech, petition or assembly." Id. at 430.

Plaintiff argues that as in Button, the Prohibition abridges its ability "to engage in association for the advancement of beliefs and ideas" to "persuade [its audience] to action." Id. at 430, 437. Plaintiff uses personalized mail ballot applications as its chosen "means for achieving" its desired result: persuading its audience to request a mail ballot and assisting them in such process. Id. at 429. Plaintiff relies on the perceived effectiveness of its personalized communications, and the ease with which voters can act on its persuasion, to build relationships and increase advance mail voting in Kansas. On this record, plaintiff has established that its

personalized mail ballot applications attempt to broaden the base of public participation in and support for its activities. Plaintiff expends resources to (1) convey a message that voting is important, (2) assist potential voters to vote by advance mail and (3) broaden electorate participation to include underserved communities who may not have the ability and availability to vote in person or the resources to navigate the mail voting application process. Plaintiff's associational actions implicate First Amendment protections.

Defendants argue that unlike the recipients of plaintiff's communications in Button—who responded to the NAACP's communications by joining its litigation efforts—the recipient of a personalized mail ballot application does not subsequently join plaintiff in a common endeavor. Defendants liken plaintiff's activity to that in City of Dallas v. Stanglin, 490 U.S. 19 (1989), and Voting for America v. Andrade, 488 F. App'x 890 (5th Cir. 2012). Plaintiff responds that its association is distinct from Stanglin, where the asserted associational activity was open to "all who [were] willing to pay the admission fee." 490 U.S. at 24. Similarly, plaintiff asserts that Andrade is not instructive because Andrade addressed restrictions on collecting and returning completed ballot applications, which the Fifth Circuit "perceive[d] [as] significant[ly] distinct[]" from "activity that urges citizens to vote." 488 F. App'x at 898.

Plaintiff here identifies a specific group of voters to target for its associations and continues to associate with these voters by, for example, tracking responses to its personalized applications and sending further get-out-the-vote communications. In the 2020 general election, 69,000 voters joined plaintiff's common endeavor by requesting advance mail ballots. Plaintiff includes unsubscribe information to ensure that it only associates with voters who are engaged in its advocacy and want to associate with its cause. Unlike Stanglin and Andrade, plaintiff's

activity is directed at specific voters—underrepresented members of the electorate—and clearly urges them to vote. The Court is not persuaded by defendants' attempt to distinguish Button and finds that the Personalized Application Prohibition implicates plaintiff's First Amendment right to freedom of association.

B. What Level of Scrutiny Applies

Because the Prohibition infringes upon plaintiff's First Amendment rights of speech and association, the Court must decide what level of scrutiny applies: strict scrutiny or the Anderson-Burdick balancing test. See Chandler v. City of Arvada, Colo., 292 F.3d 1236, 1241 (10th Cir. 2002); Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson, 236 F.3d 1174, 1196 (10th Cir. 2000). Plaintiff argues that strict scrutiny applies because the Personalized Application Prohibition restricts core political speech. Defendants argue that because the Prohibition does not regulate core political speech, the more flexible Anderson-Burdick balancing test applies.

Strict scrutiny applies to restrictions on core First Amendment activities. See Yes On Term Limits, Inc. v. Savage, 550 F.3d 1023, 1028–29 (10th Cir. 2008). Under strict scrutiny, a state must assert a significant and compelling government interest that is sufficiently narrowly tailored to serve that interest. See Perry Educ. Ass'n. v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983); see also Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009) ("If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest.").

The Supreme Court has stated, however, that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order,

rather than chaos, is to accompany the democratic process." Storer v. Brown, 415 U.S. 724, 730 (1974); see Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and-campaign-related disorder."). The Supreme Court has noted that state voting laws, whether they govern "the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affect—at least to some degree—the individual's right to vote and his right to associate with others for political ends." Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

Accordingly, First Amendment challenges to "election code provisions governing the voting process itself" require a specialized inquiry beyond a simple "'litmus-paper test' that will separate valid from invalid restrictions." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995) (citation omitted). In such cases, the Supreme Court has "pursued an analytical process," balancing the relative interests of the state and an individual's right to vote and evaluating the extent to which the state's interests necessitated the contested restrictions. Id. (citation omitted).

The Supreme Court has applied the Anderson-Burdick framework to cases governing the "mechanics of the electoral process" rather than election-related speech. McIntyre, 514 U.S. at 345; see also Lerman v. Bd. of Elections in City of New York, 232 F.3d 135, 146 (2d Cir. 2000) ("Restrictions on core political speech so plainly impose a severe burden that application of strict scrutiny clearly will be necessary.") (citing Buckley v. Am. Const. L. Found. Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring)).

Although the Tenth Circuit has applied the Anderson-Burdick framework when deciding

the "constitutionality of a content-neutral regulation of the voting process," it acknowledges that courts must apply strict scrutiny "where the government restricts the overall quantum of speech available to the election or voting process." Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000). Other courts have noted that some laws which govern elections, particularly election-related speech and associations, go beyond the intersection between voting rights and election administration, and veer into the area where the First Amendment "has its fullest and most urgent application." Tenn. State Conf. of NAACP v. Hargett, 420 F. Supp. 3d 683, 701 (M.D. Tenn. 2019) (quoting Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

Likening its challenge to those raised in Meyer v. Grant, 486 U.S. 414 (1988), and Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999), plaintiff argues that the Personalized Application Prohibition regulates its core political speech and association and therefore the Court must apply strict scrutiny. In Meyer, the Supreme Court struck down a Colorado ban on the use of paid petition circulators. 486 U.S. at 428. In Buckley, the Supreme Court struck down three additional Colorado restrictions on petition circulators: "(1) the requirement that initiative-petition circulators be registered voters; (2) the requirement that they wear an identification badge bearing the circulator's name; and (3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator." 525 U.S. at 186 (citations omitted). The Supreme Court reasoned that the regulation of such activities concerned "a limitation on political expression subject to exacting scrutiny." Meyer, 486 U.S. at 420 (citation omitted). Rejecting the state's argument that collecting signatures could be easily separated from the regulation of speech, the Court explained that the "circulation of an initiative petition of necessity involves both the expression

of a desire for political change and a discussion of the merits of the proposed change." Id. at 421. "[T]o guard against undue hindrances to political conversations and the exchange of ideas," the First Amendment "requires us to be vigilant" when states regulate such activities. Buckley, 525 U.S. at 192. Ultimately, the Court held that the prohibitions were unconstitutional because they "significantly inhibit[ed] communication with voters about proposed political change, and [were] not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." Id.

Plaintiff first argues that because defendants concede that its cover letter is core political speech, the Court should apply strict scrutiny to both the cover letter and the personalized mail ballot application because they are "characteristically intertwined." See Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). The Supreme Court has held that where "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). The Court reasoned that such "an endeavor would be both artificial and impractical." Id. In Village of Schaumburg, for example, the Supreme Court held as follows:

> Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation *is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues*, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.

444 U.S. at 632 (emphasis added).

Plaintiff argues that "the entire point of [its] mailer is to convey a message that voting by mail is easy and provide direct assistance and the seamless means for how voters can engage in this manner." Plaintiff Voter Participating Center's Opposition To Defendants' Motion For Summary Judgment (Doc. #156) at 85. Accordingly, although the application itself communicates plaintiff's message, plaintiff includes the cover letter, and other instructional materials, to inform and persuade the recipient that opting to vote by mail is easily done *with the attached personalized application*. Defendants argue that the cover letter would be "wholly unaffected" by the Personalized Application Prohibition. Defendants' Memorandum In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) filed October 28, 2022 at 30. The record, however, does not support defendants' contention. Plaintiff's cover letter explicitly states, for example: "I have sent you the enclosed advance ballot by mail application already filled out with your name and address." Exhibit I (Doc. #151-9) at 2.

Defendants further argue that unlike in Village of Schaumburg, the Personalized Application Prohibition does not effectively bar plaintiff's conduct. Instead, defendants assert that even if the Personalized Application Prohibition regulates plaintiff's speech, it is a "*de minimus*" regulation. The Supreme Court has, however, "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." Cal. Democratic Party v. Jones, 530 U.S. 567, 581 (2000). Plaintiff has established that the personalized mail ballot application is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." Village of

Schaumburg, 444 U.S. at 632. Defendants have provided no evidence to the contrary. For constitutional purposes, the First Amendment does not countenance slicing and dicing plaintiff's actions. Steen, 732 F.3d at 401 (Davis, J. dissenting).

The Court therefore rejects defendants' invitation to disaggregate the application from the cover letter, which conflicts with the Supreme Court's refusal "to separate component parts of" a communication "from the fully protected whole." Riley, 487 U.S. at 796; see also League of Women Voters, 400 F. Supp. 3d at 720. Because defendants concede that the cover letter, is protected core political speech, the Court applies strict scrutiny. [10]

Even if the Court were to find that it must independently analyze the personalized mail ballot application, the record supports plaintiff's contention that as in Meyer and Buckley, sending personalized applications constitutes "interactive communication concerning political change." Meyer, 486 U.S. at 422. Plaintiff tracks the effectiveness of its communications and from experiences believes that personalizing applications is the most effective way to convey its pro-advance mail voting message. The Personalized Application Prohibition significantly inhibits communication with voters about proposed political change because it effectively eliminates the program which plaintiff believes most effectively delivers its message.

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[10] Although decided under Kansas rather than federal law, the Court notes that the Kansas Court of Appeals recently considered the constitutionality of a ballot collection restriction. See League of Women Voters of Kan. v. Schwab, 525 P.3d 803 (Kan. Ct. App. 2023). It held that under Kansas law, the restriction must withstand strict scrutiny because such scrutiny applies to any infringement of a fundamental right, regardless of the degree of infringement. Id. at 824. The court also emphasized that "other courts have been skeptical of an analytic approach that would separate an advocacy for voting from the collection of ballots or applications themselves" because "[t]his approach allows the government to indirectly burden protected activity." Id. at 830. Finally, the court concluded that the ballot collection limitation statute infringes upon the free speech rights of the ballot collector. Id. at 831.

Ultimately, the Personalized Application Prohibition would reduce the total quantum of speech on this important public issue and deprive plaintiff of its First Amendment right to "select what [it] believe[s] to be the most effective means" of advocating its message, Meyer, 486 U.S. at 424; see also Chandler, 292 F.3d at 1244 (recognizing First Amendment protection for what plaintiff "believes" to be its most effective means of communication).

Defendants' argument that plaintiff remains free to communicate its pro-advance mail voting message through its cover letter misses the point. That plaintiff remains free to employ other speech to disseminate its ideas does not take plaintiff's speech outside the bounds of First Amendment protection. See Meyer, 486 U.S. at 424.

Relying on Voting for America v. Steen, 732 F.3d 382 (5th Cir. 2013), defendants argue that plaintiff's "novel theory would render virtually every feature of a state's electoral regulatory scheme vulnerable to constitutional attack just because such law might stand in the way of an advocacy organization's effort to maximize the success of its operations." Defendants' Response To Plaintiffs' Motion For Summary Judgment (Doc. #155) at 50. Plaintiff correctly responds, however, that it is not advocating for the right to a successful program but for its right to advocate its cause through the means it believes to be most effective. See Meyer, 486 U.S. at 424.

Defendants further argue that ballot applications are merely official state forms, not core political speech. Relying on Doe v. Reed, 561 U.S. 186 (2010), plaintiff responds that by personalizing the applications to a specific voter, it expresses its political view that the recipient whose name has been personalized on the application should complete and submit the application to request an advance mail ballot and participate in the upcoming election. In Reed,

the Supreme Court found that by its very inclusion on a ballot petition form, a signature "expresses the political view [of the signor] that the question should be considered by the whole electorate" and thereby constitutes "the expression of a political view" implicating a First Amendment right. Id. at 195 (quotation marks and citation omitted). Similarly, plaintiff here expresses its political view that the recipient of the personalized mail ballot application should vote by advance mail, and the state—having chosen to tap the energy and the legitimizing power of the democratic process—must accord the participants in that process the First Amendment rights that attach to their roles. Id.

Finally, defendants argue that unlike the cases which address petition restrictions, the Personalized Application Prohibition "does not restrict anyone from communicating with anyone else and about anything." Defendants' Response To Plaintiffs' Motion For Summary Judgment (Doc. #155) at 69. Defendants oversimply the issue. Like Meyer and Buckley, this case involves more than names and addresses on mail ballot applications or some other matter of election administration regulation. It involves the "direct regulation of communication and political association, among private parties, advocating for a particular change," namely an increase in advance mail voting for underrepresented voters. Hargett, 420 F. Supp. 3d at 704. Like citizen petition circulators, plaintiff uses state-created forms—advance mail ballot applications—to have an effect in the political process and express its political message that voting by mail is a safe alternative, especially for underrepresented and underserved populations. The Personalized Application Prohibition restricts "the overall quantum of speech available to the election or voting process" and must survive strict scrutiny. Campbell, 203 F.3d at 745.

Even if the Court were to find that the Personalized Application Prohibition constitutes a

content-neutral regulation of the voting process, it must apply the Anderson-Burdick balancing framework to determine the appropriate level of scrutiny. This approach would not necessarily change the analysis or the outcome of this case. When the challenged law is "minimally burdensome" on the exercise of constitutional rights, Anderson-Burdick requires a "less-searching examination close to rational basis" review. Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016) (citing Burdick, 504 U.S. at 434). Regulations "imposing severe burdens" on plaintiff's rights, however, "must be narrowly tailored and advance a compelling state interest." Campbell, 203 F.3d at 743 (quoting Timmons, 520 U.S. at 358).

In American Constitutional Law Foundation, Inc. v. Meyer, for example, the Tenth Circuit considered the constitutionality of a provision which provided, in part, that "[n]o petition for any ballot issue shall be of any effect unless filed with the secretary of state within six months from the date that the title, submission clause, and summary have been fixed and determined." 120 F.3d 1092, 1098 (10th Cir. 1997). The Court of Appeals concluded that the six-month deadline was "not a significant burden on the ability of organized proponents to place a measure on a ballot" because "by planning and proper preparation of the ballot, title proponents enjoy ample time to circulate petitions." Id. at 1099. Accordingly, it only considered whether the state's purported interest were "sufficiently weighty to justify the limitation imposed on" plaintiffs' rights.

On the other hand, the Tenth Circuit applied strict scrutiny to the requirement that each petition circulator wear a personal identification badge. Id. at 1101. It rejected the state's invitation to avoid exacting scrutiny because the "First Amendment affords the broadest protection to political expression in order to assure the unfettered interchange of ideas for the

bringing about of political and social changes desired by the people." Id. at 1101–02 (quoting Buckley, 424 U.S. at 14 (quotation marks omitted)). It therefore concluded that the badge requirement chilled petition circulation. Id. at 1102.

Here, even if the Court applied the Anderson-Burdick balancing framework to determine the appropriate level of scrutiny, strict scrutiny would apply. Planning and proper preparation could not remedy plaintiff's loss: its ability to advocate its pro-advance mail voting message to underrepresented voters through the means it believes to be the most effective. The Personalized Application Prohibition criminalizes what plaintiff believes to be the most effective means of speech and association. Plaintiff has established that the Personalized Application Prohibition significantly burdens its speech and association, and as discussed below, defendants have failed to provide much, if any, factual basis to justify that burden. Because the First Amendment affords the broadest protection to political expression like plaintiff's conduct, the Personalized Application Prohibition must survive strict scrutiny even under the Anderson-Burdick framework.

C. Strict Scrutiny

To survive strict scrutiny, defendants must show that the Personalized Application Prohibition is narrowly tailored to serve a compelling state interest. See Yes On Term Limits, 550 F.3d at 1028 (citing Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002)). Defendants assert the following justifications for the Personalized Application Prohibition: (1) enhancement of public confidence in the integrity of the electoral process and avoiding fraud, (2) avoidance of voter confusion and (3) facilitation of orderly and efficient election administration. Defendants' Response To Plaintiff's Motion For Summary Judgment (Doc.

#155) at 56.

i. Public Confidence and Avoiding Fraud

Defendants argue that the Personalized Application Prohibition is narrowly tailored to achieve its interest in avoiding potential fraud. Preventing voter fraud and preserving election integrity are important state interests. See Timmons, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."). The Supreme Court has observed that the courts do not "require elaborate, empirical verification of the weightiness" of the state's asserted justifications. Id. at 364. "Indeed, the Supreme Court has upheld what is likely a more burdensome regulation, requiring photo identification issued by the government in order to vote in person, even in the face of a record devoid of any evidence of voter fraud occurring in Indiana in its history." Democracy N.C., 476 F. Supp. 3d at 207 (citing Crawford, 553 U.S. at 194–96).

To start, although preventing voter fraud is a potentially compelling state interest, defendants have presented no evidence of voter fraud effectuated through advance mail voting or otherwise. Defendants have presented no evidence of a single instance in which a voter received duplicate mail ballots, and they have presented that every cast ballot was accounted for. Kansas officials publicly declared that the 2020 election was successful, without widespread, systematic issues of voter fraud, intimidation, irregularities or voting problems.

As the Court noted in its order granting plaintiff's motion for preliminary injunction, defendants' argument has superficial appeal but boils down to an issue of administrative efficiency. The real issue seems to be that the process of preventing duplicate ballots takes more time than the process of dealing with requests for initial ballots. See Defendants' Memorandum

In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) at 50 ("While Kansas appears to have avoided any systemic fraud in its recent elections, the surge of inaccurate and duplicate pre-filled advance voting ballot applications in 2020 taxed the ability of overburdened county election offices to timely and efficiently process such applications, which also necessarily increased the opportunity for mistakes to be made both in connection with advance voting ballot applications and election administration in general.").

Even if Kansas had a problem with election fraud, the Personalized Application Prohibition is not narrowly tailored to prevent such fraud. Defendants argue that a surge of "inaccurate and duplicate" advance mail ballot applications decreased the efficiency of county election officials, which in turn increased the "opportunity" for mistakes. Even in a historically unprecedented election, they cite no evidence of a single mistake. Id. Given the overall surge in advance mail ballot applications, the Court does not doubt that some county election offices felt put upon or overburdened. In the 2020 elections, many organizations, campaigns, election offices and even Kansas election officials were encouraging voters to vote by mail. Kansas voters got the message: compared to 2018, three times as many of them voted by mail. Because of the highly contested nature of the election, in addition to the pandemic, many voters were concerned that their mail ballots would not be received and counted, and requested duplicate ballots for peace of mind. Defendants have not demonstrated that in this context, any "surge" of "inaccurate and duplicate" advance mail ballot requests was fairly attributable to activity which the Personalized Application Prohibition seeks to prohibit. In fact, the record suggests that on balance, such activity is more helpful than harmful to overburdened elections officials.

Again, defendants have not presented any evidence of voter fraud effectuated on account

of personalized advance ballot applications or any other reason, or even a single instance in which a voter received or cast duplicate mail ballots. The advance mail voting process includes multiple safeguards against fraud, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications. See, e.g., K.S.A. § 25-2431. These safeguards are extremely effective in preventing fraud in Kansas. Plaintiff persuasively observes that following defendants' logic, "any activity that takes up an election official's time and attention can be criminalized on the basis of potential fraud." Plaintiff Voter Participating Center's Opposition To Defendants' Motion For Summary Judgment (Doc. #156) filed November 4, 2022 at 114.

Even if pre-filled or duplicate applications raised fraud concerns in Kansas, the Personalized Application Prohibition does nothing to address this alleged issue. It does not limit the number of advance mail ballot applications a third party may send to a voter or the number of ballot applications a voter may submit. Moreover, even accepting Block's identification of "hundreds" of purported errors in plaintiff's mailing list, these errors relate to under *three per cent* of plaintiff's records in a general election year that was sui generis, and the record contains no evidence that these errors had any impact on election processes. Block could not connect the alleged errors in plaintiff's mailing list with errors in applications received by election officials.

Defendants have not established that the Personalized Application Prohibition is narrowly tailored to achieve any alleged interest in preventing voter fraud.

ii. Voter Confusion

Defendants argue that the Personalized Application Prohibition prevents voter confusion because it eliminates the opportunity for mistakes in pre-filled applications and reduces any mistaken belief that the applications originated from election officials. Specifically,

defendants assert that some voters were confused about inaccurately pre-filled and duplicate applications and that this confusion caused disorder, which endangered the integrity of the election. The state's interest in minimizing voter confusion is connected to its broader legitimate interest in protecting election integrity. Fish v. Kobach, 189 F. Supp. 3d 1107, 1148 (D. Kan. 2016); see also Burson v. Freeman, 504 U.S. 191, 199 (1992) (state has "compelling interest in protecting voters from confusion and undue influence").

Although protecting voters from confusion is a compelling interest, the Personalized Application Prohibition is not narrowly tailored to serve that interest. Howell attested that duplicate and inaccurately pre-filled advance mail ballot applications resulted in telephone calls, letters, e-mails and in-office visits from voters. Howell does not believe that voters were confused or frustrated because the applications which they received were pre-filled. Rather, he believes that voters erroneously assumed that the county had mailed the duplicate ballot applications and were frustrated by the purported incompetency of his election office.

Given the record turnout and COVID-19, some voter confusion was perhaps inevitable. Even assuming that receiving duplicate advance ballot applications confused some voters, defendants presented no evidence on how criminalizing the mailing of personalized mail ballot applications would prevent confusion as to the source of the pre-filled advance mail ballot. Furthermore, it is not clear that the state has a compelling interest in protecting the reputations of election officials for administrative efficiency. Even so, defendants have not established that the Personalized Application Prohibition is narrowly tailored to protect their reputational interests. Johnson County officials distributed pre-filled ballot applications because they believed doing so "makes it easier for the voter and reduces mistakes that [officials] then have to work harder to fix

on the backend," Exhibit 9 (Doc. #145-8) at 2, so it appears that the real problem is not pre-filled applications but duplicate applications—which the Personalized Application Prohibition does not attempt to regulate. Defendants presented minimal evidence of voter confusion and frustration and have not established that the pre-filled applications caused the alleged confusion.

On this record, defendants have not established that the Personalized Application Prohibition is narrowly tailored to achieve its alleged interest in preventing voter confusion regarding the source of unsolicited pre-filled applications, or any other electoral issues.

iii. Orderly And Efficient Election Administration

Finally, defendants argue that the Personalized Application Prohibition is necessary to facilitate orderly and efficient administration of elections. Preserving the integrity and administration of the electoral process is a compelling state interest. Fish, 957 F.3d at 1133.

Defendants submitted evidence that if a voter submits an inaccurate or incomplete application, county election officials must contact the voter and "cure" the application. If officials cannot contact the voter, the office will mail a provisional ballot to the voter. Howell and Cox attested that reviewing a duplicate application usually takes more staff time than review of the initially submitted application. Again, the real issue here seems to be duplicate applications, which the Personalized Application Prohibition does not address. Moreover, even if receiving such duplicates hinders efficient election administration, defendants 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.

In fact, the record suggests that on balance, personalizing advance mail ballot

applications actually facilitates orderly and efficient election administration. Cox testified that normally she agrees that at least in some ways, pre-filled information increases the likelihood and the ease with which her office can match information between voter files and applications. Shew testified that if not for budgetary constraints, his office would prefer to personalize applications sent to voters with pre-filled information. Even more, in the 2020 primary and general elections, Johnson County mailed applications to all voters—expending additional resources to personalize applications and actually pre-filling more information than plaintiff. Staff in the Johnson County Election Office chose to pre-fill as much of the voter's information as possible because doing so makes it easier for voters and reduces mistakes that officials have to fix on the back end.

On this record, defendants' contention that the Personalized Application Prohibition is narrowly tailored to facilitate orderly and efficient election administration is not persuasive. The prohibition does nothing to address duplicate application concerns, and defendants have not established that pre-filling advance mail ballot applications hinders election administration.

Defendants have not established that the Personalized Application Prohibition is narrowly tailored to achieve the state's alleged interests in the enhancement of public confidence in the integrity of the electoral process and avoiding fraud, the avoidance of voter confusion or the facilitation of orderly and efficient election administration. The Personalized Application Prohibition cannot withstand strict scrutiny and is therefore an unconstitutional infringement on plaintiff's First Amendment rights to speech and association.

II. Count III

Count III asserts that the Personalized Application Prohibition is unconstitutionally

overbroad because it needlessly regulates a substantial amount of protected expression and associations and impermissibly chills plaintiff's speech. Plaintiff brings both as-applied and facial overbreadth challenges.

Facial challenges and as-applied challenges can overlap conceptually. See Reed, 561 U.S. at 194. Where the "claim and the relief that would follow . . . reach beyond the particular circumstances of the[] plaintiffs," "they must satisfy th[e] standards for a facial challenge to the extent of that reach." Id.; see also United States v. Sup. Ct. of N.M., 839 F.3d 888, 913 (10th Cir. 2016) (same). In Reed, for example, the Supreme Court held that because plaintiffs sought "an injunction barring the secretary of state from making referendum petitions available to the public," not just an injunction barring the public disclosure of the referendum petition involving them, plaintiffs must satisfy the "standards for a facial challenge to the extent of that reach." 561 U.S. at 194. Here, plaintiff's claim for relief reaches beyond its particular circumstances, and the Court therefore analyzes plaintiff's claims under the heightened facial challenge standard. Id.

A statute is "facially overbroad if it criminalizes 'a *substantial amount* of protected speech.'" United States v. Hernandez-Cavillo, 39 F.4th 1297, 1309 (10th Cir. 2022) (quoting United States v. Williams, 553 U.S. 285, 292 (2008) (emphasis added)). That is, "a substantial number of instances must exist in which [the Personalized Application Prohibition] cannot be applied constitutionally." Id. (quoting N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988)). That number must be substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Williams, 553 U.S. at 292. Accordingly, the Court must compare the Personalized Application Prohibition's "legitimate and illegitimate applications." Harmon v. City of Norman, 981 F.3d 1141, 1153 (10th Cir. 2020) (citation

omitted). The Court may invalidate the Personalized Application Prohibition as overbroad "only if this comparison reveals 'a realistic danger that [it] . . . will significantly compromise recognized First Amendment protections'" of parties not before the Court. Hernandez-Cavillo, 39 F.4th at 1309 (quoting N.Y. State Club Ass'n, 487 U.S. at 11). The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial" in both absolute and relative terms. Williams, 553 U.S. at 292. "Application of the overbreadth doctrine . . . is, manifestly, strong medicine" which courts employ "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

Defendants assert that the Personalized Application Prohibition has three legitimate purposes: eliminating voter fraud, preventing voter confusion and preserving limited resources to maintain orderly administration of the electoral process. See Defendants' Memorandum In Support Of Motion For Summary Judgment Regarding Counts I-III (Doc. #151) at 55. Plaintiff argues that the Personalized Application Prohibition is facially overbroad because it punishes all advance mail ballot application personalization with the potential of criminal penalties.

The record reflects that the Personalized Application Prohibition criminalizes a substantial amount of protected speech and that any legitimate applications are hypothetical or rare. Defendants offer little support for the claim that inaccurately personalized mail ballot applications are a significant problem and no evidence that fraudulent applications are a problem in Kansas. Even more, "other statutes independently—and more narrowly—proscribe" the creation or submission of fraudulent advance mail ballot applications. Hernandez-Cavillo, 39 F.4th at 1309; see e.g., K.S.A. § 25-2431. "The availability of these alternative prosecutorial tools dilutes the force" of the Personalized Application Prohibition's legitimate application. Id.

at 1310. Further, defendants have presented minimal evidence of voter confusion and frustration and have not established that the pre-filled applications caused the alleged confusion. The record also suggests that on balance, personalizing advance mail ballot applications is more helpful than harmful to overburdened elections officials.

On the other hand, the illegitimate applications are far broader. The Personalized Application Prohibition criminalizes *all* personalization, which "may cause others not before the court to refrain from constitutionally protected speech or expression." Hernandez-Cavillo, 39 F.4th at 1302 n.6. The Personalized Application Prohibition does not include a scienter requirement, which creates "a real danger that the statute will chill First Amendment expression." Id. at 1300. Further, the Personalized Application Prohibition excludes only a subset of state and county election officials, who are permitted to mail pre-filled advance mail ballot applications. H.B. 2332 § 3(k)(4); cf. United States v. Stevens, 559 U.S. 460, 477–78 (2010) (federal statute criminalizing animal-cruelty depictions unconstitutionally overbroad even though it excluded speech having "serious religious, political, scientific, educational, journalistic, historical, or artistic value" (quoting 18 U.S.C. § 48 (2010))).

Ultimately, the comparison of the Personalized Application Prohibition's legitimate and illegitimate applications is one-sided. Because other statutes proscribe voter fraud, the Personalized Application Prohibition would not deprive the government of "a critical enforcement tool or leave wide swaths of criminal conduct unpunished." Hernandez-Cavillo, 39 F.4th at 1313; see also Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 609 (1967) ("The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (citation omitted)); cf. Younger v. Harris, 401 U.S. 37, 51

(1971) ("[I]t is well settled that [a] statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."). Defendants have also failed to establish that inaccurately pre-filled applications caused voter confusion or that the Personalized Application Prohibition facilitates orderly election administration.

By proscribing all advance mail ballot application personalization, the Personalized Application prohibition criminalizes a substantial amount of protected speech and association. Even if a person drew directly from ELVIS to instantaneously personalize and deliver an application, the Personalized Application Prohibition prohibits that practice. Simply put, regardless of source or timing, the Personalized Application Prohibition would prohibit all personalization—meaning that "many of [the Personalized Application Prohibition's] potential applications involve protected speech." Hernandez-Cavillo, 39 F.4th at 1311. The Court therefore finds that facially, the Personalized Application Prohibition is unconstitutionally overbroad.

IT IS THEREFORE ORDERED that the Clerk of the Court enter judgment in favor of plaintiff. Because the second sentence of K.S.A. § 25-1122(k)(2) restricts plaintiff's core political speech and association and it cannot withstand strict scrutiny, it is an unconstitutional infringement on plaintiff's First Amendment rights to speech and association. Because plaintiff has established that the second sentence of K.S.A. § 25-1122(k)(2) criminalizes a substantial amount of protected speech, the prohibition is also unconstitutionally overbroad. Defendants are enjoined from enforcing the second sentence of K.S.A. § 25-1122(k)(2).

Dated this 4th day of May, 2023 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

ATTACHMENT 2

Judgment of the Court

(May 4, 2023)

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*; **KRIS KOBACH,** *in his official capacity as Attorney General of the State of Kansas*; **and STEPHEN M. HOWE** *in his official capacity as District Attorney of Johnson County*, **Defendants.**	**CIVIL ACTION** **No. 21-cv-02253-KHV**

JUDGMENT IN A CIVIL CASE

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **DECISION BY THE COURT.** This action came to decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order (Doc. 183) filed on May 4, 2023 and the Stipulated Order for Permanent Injunction and Declaratory Judgment (Doc. 73) filed February 25, 2022, judgment is granted in favor of plaintiffs VoteAmerica and Voter Participation Center against defendants Scott Schawb, in his official capacity as Secretary of State of the State of Kansas, Kris Kobach, in his official capacity as Attorney General of the State of Kansas, and Stephen M. Howe, in his official capacity as District Attorney of Johnson County, on plaintiffs' claims, plus costs. Kansas Statutes Annotated § 25-1122(*l*)(1) is unconstitutional, facially and as-applied to VoteAmerica and Voter Participation Center. The second sentence of Kansas Statutes Annotated § 25-1122(k)(2) is unconstitutional, facially and as-applied to Voter Participation Center. Defendants are enjoined from enforcing such provisions.

Dated: 5/4/2023

SKYLER B. O'HARA, CLERK

s/ Audra Harper
Deputy Clerk