

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

VOTEAMERICA and VOTER  
PARTICIPATION CENTER,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 2:21-CV-2253

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

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## **INTRODUCTION**

Plaintiffs VoteAmerica and Voter Participation Center seek a preliminary injunction against enforcement of two unconstitutional provisions of HB 2332: (i) Section 3(l)(1) (to be codified at Kan. Stat. Ann. § 25-1122) (the “Out-of-State Distributor Ban”), which bars any person or organization not a resident or domiciled in Kansas from mailing or causing to be mailed an advance mail ballot application to a Kansas voter; and (ii) Section 3(k)(2) (to be codified at Kan. Stat. Ann. § 25-1122) (the “Personalized Application Prohibition”), which criminalizes mailing advance mail ballot applications personalized with a voter’s information (together, the “Ballot Application Restrictions”). Voting is a fundamental right. Speech about voting is core political speech. Both the Out-of-State Distributor Ban and the Personalized Application Prohibition violate the First Amendment by banning Plaintiffs’ core political speech and infringing on their associational rights. The Out-of-State Distributor Ban also violates the dormant Commerce Clause by implementing measures affecting interstate commerce that explicitly bar Plaintiffs as non-residents of Kansas from conducting their operations in Kansas, while imposing no such disability on Kansas residents doing exactly the same thing.

Plaintiffs VoteAmerica and Voter Participation Center are nonpartisan civic organizations that advocate for advance mail voting in Kansas. Plaintiffs seek to speak in favor of increased voter participation and advocate for voting by advance mail ballot because doing so provides an important means of democratic participation for all registered voters, including, in particular, those who face difficulties with voting in person due to, for example, work or school obligations, lack of transportation, illness, or disability. To encourage and assist more Kansans in utilizing this method of voting, Plaintiffs provide registered Kansas voters with the necessary application form, both by mail and online, to send to their county election officers to receive their advance mail



ballots. Plaintiffs supply these applications to registered Kansas voters pre-filled with some voter-specific information (either provided directly by the voter or pulled from state-generated voter registration lists), along with a letter advising voters that their vote matters, that mail voting is safe and accessible, and that they should request and cast an advance mail ballot. Plaintiffs also include a postage-paid envelope pre-addressed to the voter's county election office to make applying for an advance mail ballot as seamless for the voter as possible. Plaintiffs plan to continue encouraging and assisting Kansas voters to cast an advance mail ballot by mailing personalized advance mail ballot applications, including after January 1, 2022 and during the 2022 election cycle. Now, with the passage of HB 2332, Plaintiffs are prohibited from—and even subject to criminal sanctions for—providing this assistance to Kansas voters.

Plaintiffs have established the elements of a motion for preliminary injunction:

*First*, Plaintiffs are substantially likely to succeed on the merits of their claims that the Ballot Application Restrictions violate the First Amendment and the dormant Commerce Clause. The Ballot Application Restrictions unconstitutionally curtail Plaintiffs' political speech, infringe on Plaintiffs' associational rights, and are overbroad. Plaintiffs' advance mail voting operations are textbook "core political speech": mailing Kansas voters printed copies of advance mail ballot applications sends a powerful message encouraging all eligible voters—not just those with the ability to vote in-person on election day—to vote by advance mail ballots, reassuring Kansans that voting by mail is safe and secure, and emphasizing the importance of democratic participation by every eligible citizen. Providing Kansas voters with personalized advance mail ballot applications along with pre-addressed and pre-stamped envelopes—rather than simply pointing them to where and how they can access blank forms—is an essential part of Plaintiffs' advocacy and their most

effective means of persuading Kansas voters to engage in the democratic process. These means convey Plaintiffs' message to voters that they should vote by mail and that their votes matter.

Yet, the Ballot Application Restrictions will force Plaintiffs to abandon their advance mail voting operations, unlawfully diminishing protected speech and truncating Plaintiffs' communications, as well as impairing Plaintiffs' ability to associate with voters and other groups that advance Plaintiffs' message. Further, the Ballot Application Restrictions are not narrowly tailored to serve a compelling—let alone legitimate—state interest. Finally, the Ballot Application Restrictions also are unconstitutionally overbroad, sweeping in protected speech for no legitimate purpose.

In addition, Plaintiffs' claim that the Out-of-State Distributor Ban violates the dormant Commerce Clause is substantially likely to succeed on the merits. The dormant Commerce Clause bars states from discriminating against out-of-state activity that substantially affects interstate commerce. Kansas expressly discriminates against out-of-state actors. It bans them, but not in-state entities, from sending advance mail ballot applications. Such explicit discrimination is a *per se* violation of the dormant Commerce Clause. Further, Plaintiffs operate in and substantially affect interstate commerce. They provide valuable services to Kansas residents. They purchase goods and services across state lines. And they use an instrumentality of commerce, the mail, as a principal means of implementing their operations in support of advance mail voting.

*Second*, Plaintiffs will suffer irreparable harm absent an injunction. The law is clear that the loss of First Amendment freedoms—for even minimal periods of time—constitutes irreparable injury. So, too, for Plaintiffs' dormant Commerce Claim because HB 2332 currently obstructs the free flow of the interstate market in which Plaintiffs participate. If enforcement of the Ballot

Application Restrictions is not enjoined, Plaintiffs will miss the fast-approaching window for sending advance mail ballot applications for Kansas's 2022 primary elections.

*Third*, an injunction will not inflict substantial harm on Defendants and will further the public interest. Because HB 2332 does not serve an important state interest, an injunction will harm no one. To the contrary, a preliminary injunction serves the public interest by protecting Plaintiffs' constitutional rights and the ability of Kansans to exercise their right to vote an advance mail ballot.

Accordingly, the Court should enjoin both the Out-of-State Distributor Ban and the Personalized Application Prohibition.

## **BACKGROUND**

### **I. Voting By Advance Mail Ballot in Kansas**

Kansas law permits all eligible citizens to vote by an advance mail voting ballot, instead of voting in person. *See* Kan. Stat. Ann. § 25-1122(a). County election officers administer advance voting locally by, among other things, accepting and processing advance mail voting applications, providing advance mail ballots to eligible citizens, receiving voted ballots, and ultimately accepting or rejecting advance mail voted ballots. *See id.* §§ 25-1122(e)-(j); 25-1123. County election officers are required to prepare and maintain a list of all persons who have filed advance mail voting applications and make that list available to registered voters for inspection upon request. *Id.* § 25-1122(i). Kansas criminalizes voting fraud, including fraud using advance mail voting ballot. *See, e.g., id.* § 25-2431.

Kansas conducted the 2020 elections without evidence of any voting irregularities material to the election. Shortly before the August 2020 primary election, Defendant Schwab stated that the State "ha[d] implemented measures to ensure the security and safety of the August and November

elections.”<sup>1</sup> And, shortly after the November 2020 general election, Defendant Schwab’s office confirmed that “Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems. . . . We are very pleased with how the election has gone up to this point.”<sup>2</sup> Likewise, Defendant Schmidt acknowledged that Kansas elections operated “honestly and by the rules.”<sup>3</sup>

## II. The Challenged Provisions of HB 2332

On May 3, 2021, the Kansas Legislature overrode Governor Kelly’s veto to enact HB 2332, which has an effective date of January 1, 2022. *See* HB 2332 § 11.

### A. The Out-of-State Distributor Ban

HB 2332 bans all *out-of-state* persons and organizations from distributing advance mail voting applications to Kansas voters, but does not restrict *in-state* persons and organizations from doing the same. Section 3(l)(1) (to be codified at Kan. Stat. Ann. § 25-1122) provides: “No person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state.” HB 2332 § 3(l)(1) (the “Out-of-State Distributor Ban”). Thus, the Out-of-State Distributor Ban bars a sender from mailing a single advance mail voting application even if in response to a request from an individual Kansas voter. *See id.* Violators must pay \$20 for “[e]ach instance in which a person mails an application for an

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<sup>1</sup> Media Release, Kansas Sec’y of State, Secretary Schwab Responds to November Election Delay Suggestion (July 30, 2020), <https://sos.ks.gov/media-center/media-releases/2020/07-30-20-secretary-schwab-responds-to-november-election-delay-suggestion.html>.

<sup>2</sup> Russel Falcon, *Zero Evidence of Voter Fraud in Any State, Including Kansas Officials Report to NYT*, KSNT (Nov. 11, 2020), <https://www.ksnt.com/news/kansas/zero-evidence-of-voter-fraud-in-any-state-including-kansas-officials-report-to-nyt>.

<sup>3</sup> Press Release, Kansas Att’y Gen., AG Derek Schmidt: Kansas asks U.S. Supreme Court to hear Texas election lawsuit (Dec. 9, 2020), <https://ag.ks.gov/media-center/news-releases/2020/12/09/ag-derek-schmidt-kansas-asks-u.s.-supreme-court-to-hear-texas-election-lawsuit>.

advance voting ballot.” HB 2332 § 3(l)(3). There is no cap on the total liability for violations of HB 2332’s Out-of-State Distributor Ban. *See id.*

### **B. The Personalized Application Prohibition**

Section 3(k)(2) (to be codified at Kan. Stat. Ann. § 25-1122) provides: “No portion of such [advance mail voting application] shall be completed prior to mailing such application to the registered voter.” HB 2332 3(k)(2) (the “Personalized Application Prohibition”). The statutory prohibition applies to “[a]ny person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing.” *Id.* § 3(k)(1). The Personalized Application Prohibition applies if the information comes directly from the State’s voter list, if voters have provided the information themselves and have specifically requested a personalized advance mail ballot application, and even if the pre-filled information is correct. *See id.* A violation of the Personalized Application Prohibition is a class C nonperson misdemeanor. *See id.* § 3(k)(5) ; Kan. Stat. Ann. §§ 21-6602(a)(3), (b). The statute contains no scienter requirement and is punishable by up to one month in jail and/or fines. *See id.*

## **III. Plaintiffs and Their Efforts to Encourage Advance Voting by Mail in Kansas**

### **A. VoteAmerica**

VoteAmerica is a 501(c)(3) nonprofit, nonpartisan organization. Ex. 1, Declaration of Debra Cleaver (“Cleaver Decl.”) ¶ 1. VoteAmerica’s core mission is to persuade and assist eligible American voters to engage in the electoral process, with a particular emphasis on voting by mail. *Id.* ¶ 2. A key component of VoteAmerica’s civic engagement messaging is providing voters with access to trusted election information, open platform technology, and education programs to facilitate their applications for mail and absentee ballots. *Id.* ¶¶ 2-4. VoteAmerica’s primary resource for promoting advance mail voting is an interactive online Absentee and Mail Ballot tool that allows voters to provide their name, address, date of birth, email, and phone number and

receive an official advance mail voting application form—partially prefilled with the information the voter provided—which voters can verify, complete, and send to the appropriate local election official. *Id.* ¶ 5. The tool also permits voters to sign up for communications from VoteAmerica to assist them in voting in that election and future elections, as well as further voter engagement communications from VoteAmerica. *Id.* ¶ 20. The Absentee and Mail Ballot tool is available to potential voters on the VoteAmerica website as well as on the websites of partner organizations. *Id.* ¶¶ 18-19, 21. Partner organizations use VoteAmerica’s Absentee and Mail Ballot tool to engage voters throughout the country. *Id.* ¶ 18.

During the 2020 election cycle, more than one million registered voters nationwide requested a vote-by-mail ballot through VoteAmerica’s online resources. *Id.* ¶ 7. VoteAmerica’s Absentee and Mail Ballot tool emailed advance mail voting applications prefilled with application information provided by voters to at least 7,700 Kansas voters. *Id.* VoteAmerica also offered users of its Absentee and Mail Ballot tool in Texas, Montana, Ohio, and Utah the option to receive those personalized advanced voting applications by mail in addition to or instead of by email. *Id.* ¶ 8. When a voter chooses the mail option, VoteAmerica’s print-and-mail feature sends the personalized application to be printed by a secure third-party printer and mailed first class to the voter, along with instructions, a pre-addressed, postage paid envelope for the voter to submit the application directly to their county election official, and a message encouraging the voter to vote, advising that, “Your vote matters,” and “You have the right to vote.” *Id.* ¶ 10. The print-and-mail feature enables VoteAmerica to reach a broader audience, including low-income and low-propensity voters who may have fewer resources for, and less access to, printing and postage. *Id.* ¶¶ 15, 20. And, an essential element in conveying VoteAmerica’s message is the attached

personalized advance mail ballot application that crystallizes the voters’ right to vote by mail and the ease of doing so. *Id.* ¶ 10, Ex. 1.A; *id.* ¶¶ 15-17.

## **B. Voter Participation Center**

Voter Participation Center (“VPC”) is a 501(c)(3) nonprofit, nonpartisan organization founded in 2003. Ex. 2, Declaration of Tom Lopach (“Lopach Decl.”) ¶ 2. VPC’s core mission is to provide voter registration, early voting, vote by mail, and get-out-the-vote resources and information to traditionally underserved groups, including young voters, voters of color, and unmarried women. *Id.* ¶ 3. VPC encourages these voters to participate in elections through advance mail voting by sending registered voters in its target demographics, among other things, advance mail ballot applications. *Id.* ¶¶ 3-4. VPC uses statewide voter registration files to identify registered voters who have not yet applied for an advance ballot and personalizes the advance mail voting applications with some of the voter’s information obtained from state-generated registration records. *Id.* ¶ 4. Providing young voters, voters of color, and unmarried women—who may have fewer resources for, and less access to, printing and postage—with the necessary applications to vote by advance mail ballot enables VPC to achieve its goal of expanding the electorate in Kansas. *Id.* ¶¶ 6, 17-19.

In 2020 alone, VPC sent more than 60 million absentee ballot applications across the country, including nearly 1.2 million advance mail voting applications to Kansas voters. *Id.* ¶ 5. The mailers sent to Kansas voters included a letter encouraging the voter to request and cast an advance ballot; a printed copy of an advance mail voting application obtained directly from the Kansas Secretary of State’s website and personalized with some of the voter’s information obtained from state-generated registration records; and a postage-paid envelope addressed to the voter’s county election office. *Id.* ¶ 7, Ex. 2.A. The cover letter stated: “[i]f you’ve already submitted a request for a ballot by mail for the 2020 General Election, there is no need to submit

another request.” *Id.* To the extent available, VPC also requests updated voter records from state election officials to proactively remove from VPC’s mailing lists voters who have already requested or submitted an advance mail voting application. *Id.* ¶ 8. In the 2020 election cycle, the Kansas Director of Elections confirmed to VPC in writing that its advance mail voting application form and instructions complied with Kansas law and with the forms that the Secretary of State’s office uses. *Id.* ¶ 10. An estimated 69,000 Kansas voters submitted an advance mail voting application provided by VPC to their county election official in the 2020 general election. *Id.* ¶ 6.

VPC’s mailers include messages that reinforce VPC’s advocacy in favor of mail voting. In 2020, for example, these persuasive messages said: “Voting by mail is EASY”; “Voting by mail keeps you healthy and safe”; “County election officials in Kansas encourage voters to use mail ballots in upcoming elections”; and “[t]he best way to protect yourself, your family, and your whole community during this time is to vote by mail.” *Id.* ¶ 7, Ex. 2.A. VPC deliberately intermixes this encouragement with their information about mail voting and the personalized application for eligible Kansans to receive an advance mail ballot because this integrated communication most effectively conveys VPC’s message. *Id.* ¶¶ 18-19.

### **C. The Ballot Application Restrictions’ Impact on Plaintiffs**

Both VoteAmerica and VPC plan to continue the efforts they undertook in 2020: to encourage, persuade and assist Kansas voters to vote by advance mail ballot in the 2022 election cycle. Cleaver Decl. ¶¶ 23-24; Lopach Decl. ¶¶ 21-22. VPC plans to do so by mailing personalized advance mail voting applications to eligible Kansas voters as it has done in past election cycles, Lopach Decl. ¶¶ 21-22, and VoteAmerica plans to do so by offering its print-and-mail feature to eligible Kansas voters, Cleaver Decl. ¶¶ 23-24. In encouraging Kansas citizens to register and vote by an advance mail ballot, Plaintiffs have engaged those citizens in conversations about the importance of voting and civic engagement, and plan to do so again in the 2022 election cycle.



The accompanying personalized advance mail ballot application is essential to their advocacy and effectively getting their message across. Cleaver Decl. ¶¶ 15-16; Lopach Decl. ¶¶ 18-19.

Because Plaintiffs are not domiciled in or residents of Kansas, the Out-of-State-Distributor Ban will prohibit their planned efforts to mail advance mail voting applications to eligible Kansas voters. Cleaver Decl. ¶ 25-26; Lopach Decl. ¶ 23-24. The Personalized Application Prohibition will stop Plaintiffs from engaging in what they believe is the most effective way to activate engagement in the political process. Cleaver Decl. ¶¶ 16, 25; Lopach Decl. ¶¶ 19, 24. These Ballot Application Restrictions have already limited Plaintiffs' vote-by-mail efforts in Kansas. Plaintiffs' planning for the 2022 election cycle is underway, with an eye towards Kansas's gubernatorial and senate primaries. Cleaver Decl. ¶¶ 23-24; Lopach Decl. ¶ 26. VoteAmerica plans to have its Absentee and Mail Ballot tool ready for the 2022 election cycle by November 2021, which is just a few months away. Cleaver Decl. ¶ 24. VPC will begin its vote-by-mail program and define its strategies in the fall of 2021. Lopach Decl. ¶ 26. Both efforts require significant advance planning, organization, and education of voters. Cleaver Decl. ¶ 24; Lopach Decl. ¶ 26. If not for HB 2332, VPC would begin sending out mailers around April 2022. Lopach Decl. ¶ 26.

### **LEGAL STANDARD**

Under Federal Rule of Civil Procedure 65, a plaintiff may obtain a preliminary injunction if it establishes: (1) that it is substantially likely to succeed on the merits; (2) that it will suffer irreparable harm absent a preliminary injunction; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *See Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). The purpose of the injunction is "to preserve the status quo pending the outcome of the case." *Site Rite Constr. Co. v. City of Lansing*, 2019 WL 216844, at \*1 (D. Kan. Jan. 16, 2019) (citation omitted).

## **ARGUMENT**

### **I. Plaintiffs Are Substantially Likely to Succeed on Their First Amendment Claims Against the Ballot Application Restrictions.**

Plaintiffs’ advance mail voting operations constitute protected First Amendment activity. By mailing personalized advance voting applications to registered Kansas voters, Plaintiffs seek to persuade them to participate in the democratic process through advance mail voting. These mailings are core political speech and provide a platform for Plaintiffs to associate with partner civic organizations and potential voters. The Ballot Application Restrictions will force Plaintiffs to abandon their planned advance mail communications, impeding Plaintiffs’ core political speech and associational rights. These restrictions are also content-, speaker- and viewpoint-based constraints on Plaintiffs’ speech. As such, the Ballot Application Restrictions are subject to strict scrutiny. Because they are not appropriately tailored to a legitimate—much less compelling—state interest, these restrictions are unconstitutional. The Ballot Application Restrictions also are unconstitutionally overbroad. Plaintiffs are therefore substantially likely to succeed on the merits of their claims that the Ballot Application Restrictions violate the First Amendment.

#### **A. The Ballot Application Restrictions Prevent Plaintiffs’ Core Political Speech and Associational Activities.**

The Ballot Application Restrictions curtail Plaintiffs’ core political speech and associational activities protected by the First Amendment. Plaintiffs’ advance voting mailers communicate Plaintiffs’ belief in the power of voting and encourage Kansans to participate in the democratic process through the safe and accessible method of advance mail voting. Cleaver Decl. ¶ 15; Lopach Decl. ¶ 19. Plaintiffs’ mailers also assist Kansas voters by informing them of their right to vote by advance mail and providing them with the means to apply for an advance mail ballot. Including personalized advance mail ballot applications in these mailers is not only an essential part of Plaintiffs’ speech, but also critical to making that speech effective.

Both the Supreme Court and the Tenth Circuit have recognized that “interactive communication concerning political change” constitutes core political speech. *Meyer v. Grant*, 486 U.S. 414, 421-23 (1988); *see also id.* at 422 n.5 (recognizing “communication of information, [and] the dissemination . . . of views and ideas” about the electoral process as core political speech); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *Yes On Term Limits, Inc., v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). First Amendment protection for such speech is “at its zenith.” *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (quoting *Meyer*, 486 U.S. at 425).

Plaintiffs’ advance mail voting operations constitute core political speech for two reasons. First, as many courts have recognized in similar contexts, efforts to inform and assist voters in the electoral process through persuasive messaging constitute core political speech. The Supreme Court and Tenth Circuit, for example, have treated civic organizations’ persuasive speech regarding ballot initiative petitions as core political speech. *See Meyer*, 486 U.S. at 422-23; *Buckley*, 525 U.S. at 186, 192; *Chandler*, 292 F.3d at 1241; *Yes On Term Limits*, 550 F.3d at 1028. And, the Tenth Circuit has struck down restrictions similar to the Out-of-State Distributor Ban that barred this speech based on the residence of the speaker. *See Chandler*, 292 F.3d at 1244 (city residency restriction); *Yes On Term Limits*, 550 F.3d at 1031 (state residency restriction). Likewise, persuasive expression concerning voter registration is core political speech because it “communicates a message that democratic participation is important.” *American Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010). Numerous courts have held that communications about “whether or not a person should register to vote . . . inherently ‘implicate[] political thought and expression.’” *League of Women Voters v. Hargett*, 400 F. Supp.

3d 706, 724 (M.D. Tenn. 2019) (quoting *Buckley*, 525 U.S. at 195).<sup>4</sup> As the *Hargett* court recognized, “[i]f anything, a person’s decision to sign up to vote is more central to shared political life than his decision to sign an initiative petition. A petition in support of a ballot initiative might lead to a change in one law or a few laws, but a change in the composition of the electorate can lead to the change of *any* law.” *Id.* at 724 (emphasis in original).

The same reasoning that protected speech at other stages of the electoral process protects Plaintiffs’ advance mail voting activities. By providing voters with personalized advance mail ballot applications, Plaintiffs encourage them to vote by advance mail ballot; persuade them that voting by advance mail ballot is safe, secure, and accessible; educate them about their right to vote by advance mail ballot; and assist them in exercising that right. Cleaver Decl. ¶ 16; Lopach Decl. ¶ 18. Distributing personalized advance mail ballot applications along with Plaintiffs’ persuasive communications thus “necess[arily] involves . . . the expression of a desire for political change” and constitutes “core political speech.” *Meyer*, 486 U.S. at 421-22. Indeed, other courts have held that distributing and “assisting voters in filling out [] request form[s] for an absentee ballot” is core First Amendment activity. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020); *see also Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (holding that distributing absentee ballot applications, among other vote-by-mail operations, “necessarily involve political communication and association”). For example, in *DSCC v. Simon*, the court found that assisting voters in completing their absentee ballots or helping return their absentee ballots to be counted—activities analogous to distributing advance voting ballot

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<sup>4</sup> *See, e.g., Hargett*, 400 F. Supp. 3d at 720 (“Encouraging others to register to vote is pure speech, and because that speech is political nature, it is a core First Amendment activity.” (internal quotation marks omitted)); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006) (“The interactive nature of voter registration drives is obvious: they convey the message that participation in the political process through voting is important to a democratic society.”).

applications and assisting voters in filling them out by pre-filling certain information—was entitled to the same First Amendment protection as circulating ballot petitions and voter registration activities. 2020 WL 4519785, at \*29-30 (Minn. Dist. Ct. July 28, 2020). The Court explained: “the challenged laws do not exclusively involve the ministerial receipt and delivery of ballots, or acting as a mere scrivener . . . it is the discussion of whether to vote absentee and to allow your ballot to be collected . . . that inherently implicates political thought and expression.” *Id.* at \*29.

Second, by speaking in favor of advance mail voting, Plaintiffs also take sides on an important and disputed political issue. Some Kansas politicians, as well as national figures, have publicly discouraged voters from voting by mail.<sup>5</sup> By contrast, the Kansas Secretary of State has sought to reassure voters of the integrity of advance mail voting in Kansas. *See supra* n. 2. Plaintiffs have joined that debate to support advance mail voting because they believe it enables all eligible persons to participate in the democratic process—not just those who can vote in-person. Cleaver Decl. ¶ 17; Lopach Decl. ¶ 16. It expands voting opportunities for voters who cannot access the polls on election day due to work or school obligations, lack of transportation, illness, disability, or other obstacles. *Id.* Plaintiffs’ view, expressed through their advance ballot application communications, is that the participation of all eligible voters in the electoral process is essential to a representative government. *Id.* Plaintiffs’ “advocacy of a politically controversial viewpoint” in favor of mail voting is “the essence of First Amendment expression.” *McIntyre*, 514 U.S. at 347. The Ballot Application Restrictions will disable this political speech and Plaintiffs’ participation in the ongoing debate over advance mail voting.

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<sup>5</sup> See, e.g., Bryan Lowry & Sarah Ritter, *Despite Trump’s attacks, Kansas voters request 2020 mail ballots at historic rate*, The Kansas City Star (May 29, 2020), <https://www.kansascity.com/news/politics-government/article243052656.html>.

Moreover, prohibiting Plaintiffs from conveying personalized advance mail ballot applications abridges their First Amendment right “to select what they believe to be the most effective means” for communicating their message. *Chandler*, 292 F.3d at 1244 (“The First Amendment protects Plaintiffs’ right, not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” (internal quotation marks omitted)). Plaintiffs believe that mailing advance mail voting applications (which the Out-of-State Distribution Ban penalizes) and personalizing those applications to the voter (which the Personalized Application Prohibition criminalizes), is their “most effective means” of communicating their message. *Id.*; Cleaver Decl. ¶ 16; Lopach Decl. ¶ 19. Providing eligible Kansas voters with personalized applications along with pre-addressed and pre-stamped envelopes, rather than simply pointing them to how they can access blank forms, is an essential part of Plaintiffs’ message and crucial to the persuasiveness of their advocacy. Cleaver Decl. ¶ 15; Lopach Decl. ¶ 18.

The Ballot Application Restrictions also abridge Plaintiffs’ associational rights. Plaintiffs leverage their advance voting operations to build a broad associational base with both potential voters and other civic organizations to promote advance mail voting and democratic participation. Cleaver Decl. ¶ 18; Lopach Decl. ¶ 20. Plaintiffs use their effective advance mail voting communications to build a relationship with voters for future collective action. HB 2332 restricts those associational activities. For example, because the Out-of-State Distributor Ban imposes monetary sanctions on “caus[ing]” any advance mail voting application to be mailed, HB 2332 § 3(l)(1), (3), it will prohibit Plaintiffs from recruiting, consulting, and otherwise associating with Kansas-based organizations that also mail advance voting applications. The Personalized Application Ban likewise prohibits VoteAmerica from associating with partner organizations to provide VoteAmerica’s Absentee and Mail Voting tool to Kansas voters because it criminalizes

prefilling applications. Cleaver Decl. ¶ 25; Lopach Decl. ¶ 24. By prohibiting Plaintiffs from continuing their advance mail voting operations, the Ballot Application Restrictions will eliminate these avenues for Plaintiffs to associate with voters and partner organizations.

**B. Strict Scrutiny Applies to the Ballot Application Restrictions.**

Strict scrutiny applies for three independent reasons: (1) the Ballot Application Restrictions abridge Plaintiffs’ core political speech; (2) they limit speech based on its content, speaker identity, and viewpoint expressed; and (3) they restrict Plaintiffs’ right to associate with others to persuade them to engage in political action.<sup>6</sup>

First, the Tenth Circuit has held that where “the government restricts the overall quantum of speech available to the election or voting process,” “strict scrutiny applies.” *Yes On Term Limits*, 550 F.3d at 1028; *see also Chandler*, 292 F.3d at 1242. As noted, the Out-of-State Distributor Ban reduces the quantum of speech by banning an entire class of speakers—non-residents—and the Personalized Application Prohibition reduces the quantum of speech by banning an entire method of communication—sending personalized applications. *See Meyer*, 486 U.S. at 422-23; *see also supra* I.A. Accordingly, strict scrutiny applies because the Ballot Application Restrictions “reduc[e] the total quantum of speech on a public issue” by limiting “the number of voices who will convey [Plaintiffs’] message” and “the size of the audience they can reach.” *Meyer*, 486 U.S. at 422-23.

Moreover, the Ballot Application Restrictions each bar Plaintiffs from using “what they believe to be the most effective means” for conveying their pro-advance-mail-voting message:

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<sup>6</sup> Any argument that the *Anderson-Burdick* balancing test applies rather than strict scrutiny is contrary to Tenth Circuit precedent. *Yes On Term Limits*, 550 F.3d at 1028; *Chandler*, 292 F.3d at 1241-42 (applying *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000)). Here, however, the level of scrutiny would remain the same even under that balancing standard because severe speech burdens receive strict scrutiny. *Buckley*, 525 U.S. at 207-08 (Thomas, J., concurring); *Hargett*, 400 F. Supp. 3d at 725 & n.9. The burdens of the Restrictions on Plaintiffs’ speech are severe because they effectively prevent Plaintiffs from engaging in election-related speech in Kansas. Cleaver Decl. ¶ 25; Lopach Decl. ¶ 24.

mailing personalized applications to voters. *Chandler*, 292 F.3d at 1244 (quoting *Meyer*, 486 U.S. at 424). The Restrictions impose criminal and civil penalties for mailing and personalizing the application, both of which are necessary components of Plaintiffs’ most effective method of persuasion. Cleaver Decl. ¶ 16; Lopach Decl. ¶ 19. Strict scrutiny applies to these limits on the overall quantum of speech and Plaintiffs’ most effective means of speaking. *See Yes On Term Limits*, 550 F.3d at 1028.

Second, strict scrutiny separately applies because the Ballot Application Restrictions constitute content-, speaker-, and viewpoint-based discrimination. A restriction is content-based and warrants strict scrutiny if it “applies to particular speech because of the topic discussed,” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), or if it defines the “category of covered documents . . . by their content,” *McIntyre*, 514 U.S. at 345. HB 2332’s restrictions apply only because Plaintiffs advocate for advance mail voting, and it defines the category of covered documents as applications to do so. No similar encumbrances apply to similar topics, such as Plaintiffs’ voter registration communications. *See Buckley*, 525 U.S. at 209 (Thomas, J., concurring) (finding a restriction was content-based when it limited initiative petitions but not candidate petitions). The Out-of-State Distributor Ban also discriminates on the basis of Plaintiffs’ identities as out-of-state speakers, *see Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010), and their viewpoints; it “plainly targets [Plaintiffs’ positive] views about” advance mail voting (which are necessarily intertwined with sending applications to vote by advance mail ballot) but leaves untouched negative communications that would, of course, not include sending out advance mail ballot applications, *see ALDF v. Kelly*, 434 F. Supp. 3d 974, 1000-01 (D. Kan. 2020) (Vratil, J.).<sup>7</sup> Such

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<sup>7</sup> Although “[p]laintiffs do not bring an equal protection claim[.] . . . when a statute allows some people to speak but not others, the principles of equal protection and free speech are intertwined” and such classifications “are subject to the most exacting scrutiny.” *Am. Const. L. Found., Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997) (citation omitted), *aff’d sub nom. Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182 (1999).



content-, identity-, and viewpoint-based restrictions are subject to—and fail—strict scrutiny. *See id.* at 1001-02 (collecting cases).

Lastly, strict scrutiny applies because the Ballot Application Restrictions abridge Plaintiffs’ ability “to engage in association for the advancement of beliefs and ideas” to “persuade [their audience] to action.” *NAACP v. Button*, 371 U.S. 415, 430, 437 (1963). Both provisions restrict Plaintiffs’ associational rights to work with partner groups and persuade voters to participate in the democratic process using advance mail voting by preventing Plaintiffs from supplying their associational base with the tools necessary to act on that message. Cleaver Decl. ¶ 18; Lopach Decl. ¶ 20. Strict scrutiny applies to this limit on Plaintiffs’ associational activity seeking to persuade others to political action. *See Button*, 371 U.S. at 438-39.

**C. The Ballot Application Restrictions Are Not Appropriately Tailored to Any State Interest.**

The Ballot Application Restrictions cannot withstand strict scrutiny—or any lesser level—because they do not bear the requisite relation to a compelling, or even legitimate, government interest. Restrictions on political speech receive *Meyer-Buckley* scrutiny that “is well-nigh insurmountable,” *Meyer*, 486 U.S. at 425, and content-discriminatory laws “are presumptively unconstitutional,” *Reed*, 576 U.S. at 163. The State can overcome these high burdens only by establishing the restrictions are “narrowly tailored to serve a compelling state interest.” *Yes On Term Limits*, 550 F.3d at 1028. To be narrowly tailored, the speech restriction must: (i) be the least restrictive means available to achieve the compelling interest (*i.e.*, must not be overinclusive by burdening any more speech than necessary), *see Verlo v. Martinez*, 820 F.3d 1113, 1134 (10th Cir. 2016); and (ii) not be underinclusive by having “a loose fit between its means and the [government]’s interest,” *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1077 (10th Cir. 2020); *accord ALDF*, 434 F. Supp. 3d at 1002 (Vratil, J.). Neither provision meets this test.

### 1. The Out-of-State Distributor Ban Fails Strict Scrutiny.

The Out-of-State Distributor Ban is not narrowly tailored to a compelling state interest. The legislative history for this provision reflects the State’s concerns about “voter confusion” and “certain voters receiving multiple applications[.]”<sup>8</sup> But no “voter confusion” facts before the legislature could support a putative compelling interest in banning all out-of-state distributors. *See Yes on Term Limits*, 550 F.3d at 1029-31 (applying *Meyer* and *Buckley* to support taking a class-wide view). The First Amendment “prevents the government from too readily sacrific[ing] speech for efficiency,” *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citations and quotations omitted), and the fear that confused voters “might make an ill-advised choice does not provide the State with a compelling justification for limiting speech,” *Meyer*, 486 U.S. at 426 n.7 (citation omitted); *see also Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228-29 & nn.18-19 (1989) (rejecting voter confusion and fraud interests). Kansas has insufficient evidence to support any claim that its interest in this complete ban is compelling.

Even if the purported interests were sufficient, the Out-of-State Distributor Ban is not narrowly tailored. The ban on out-of-state distributors is overinclusive because it bars nonresident entities that engage in legitimate First Amendment conduct to improve voter participation without causing confusion or errors.<sup>9</sup> It is underinclusive because Kansas-resident entities may be responsible for errors and repeat mailers that purportedly cause confusion, but HB 2332 leaves them untouched. For example, under HB 2332, a Kansas-based political party could send a voter 100 unwanted advance mail ballot applications without penalty, while Plaintiffs are prohibited

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<sup>8</sup> *See* Conference Comm. Report Brief House Bill No. 2332, S. 2021-2332, at 7 (Kan. 2021), [http://www.kslegislature.org/li/b2021\\_22/measures/documents/ccrb\\_hb2332\\_01\\_0000](http://www.kslegislature.org/li/b2021_22/measures/documents/ccrb_hb2332_01_0000). Plaintiffs reserve all rights to challenge other purported State interests on Reply.

<sup>9</sup> Even if a non-resident plaintiff itself legitimately is the focus of the restriction, as in *Yes On Term Limits*, “[t]hat evidence alone, however, does not support the inference that, *as a class*, non-resident [entities] are more likely to engage” in the type of misconduct the restrictions seek to prevent. 550 F.3d at 1029 (emphasis in original).

from sending even one communication with an advance mail voting application that is proven to help Kansans exercise their rights. This is true even if the voter specifically requested the mailer, and even though groups, such as VPC in 2020, have conducted due diligence to proactively remove outdated mailer recipients using updated voter records, provide a seamless unsubscribe process, and expressly tell their audience not to submit duplicate applications. Lopach Decl. ¶¶ 7-8. Thus, Plaintiffs’ work actively counteracts any risk of “voter confusion” or concerns of administrative burdens.

Further, existing law requires local election officials to maintain and make available for inspection a list of every voter who requested an advance mail ballot application. *See* Kan. Stat. Ann. § 25-1122(i). Kansas also criminally prohibits fraudulent activity concerning advance mail ballot applications. *See* Kan. Stat. Ann. § 25-2431. These existing processes in state law already address any need for the Out-of-State Distributor Ban that the State may assert. *See Buckley*, 525 U.S. at 204-05; *Meyer*, 486 U.S. at 427. Thus, the Out-of-State Distributor Ban fails strict scrutiny.

## **2. The Personalized Application Prohibition Fails Strict Scrutiny.**

The Personalized Application Prohibition is not narrowly tailored to a compelling state interest. The legislative history is silent regarding the state interest the prohibition is designed to serve. To the extent the State’s asserted interests lie in the integrity of the advance mail ballot application process, the Secretary of State himself admitted that no such integrity problem existed in the 2020 general election. *See supra* n. 2. Indeed, an estimated 69,000 Kansas voters requested advance mail ballots in the 2020 general election using personalized applications provided by Plaintiff VPC, with no reported issues concerning election integrity. Lopach Decl. ¶ 6. Moreover, the prohibition is not narrowly tailored because other provisions of Kansas law address any concern with advance balloting integrity adequately and much more directly. For example, local election officials already identify potential anomalies by matching the voter’s signature on the

application to the one in county voter registration records (with a notice and cure process) and by verifying the driver’s license or ID number on the application and/or a copy of their photo ID. Kan. Stat. Ann. § 25-1122(e)(1)-(2). Existing laws also criminalize creation or submission of fraudulent advance mail ballot applications. *See, e.g.*, Kan. Stat. Ann. § 25-2431. These preexisting laws sufficiently address any purported State interest, particularly given the admitted lack of fraud in the last election. *See Buckley*, 525 U.S. at 204-05; *Meyer*, 486 U.S. at 426-27.

In sum, the Ballot Application Restrictions are insufficiently tailored to serve any compelling—or even legitimate—government interest. As such, these restrictions cannot withstand constitutional scrutiny, and Plaintiffs are likely to succeed on their First Amendment claims.

#### **D. The Ballot Application Restrictions Are Unconstitutionally Overbroad.**

The Court should strike down the Ballot Application Restrictions as unconstitutional for the independent reason that they are overbroad. “[A] statute is facially invalid if it prohibits a substantial amount of protected speech . . . relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 553 U.S. 285, 292 (2008); *see also United States v. Stevens*, 559 U.S. 460, 473 (2010). Courts have also struck down statutes as unconstitutionally overbroad where “rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Here, the Ballot Application Restrictions are unconstitutional both as applied to Plaintiffs, and as to “others not before the court” who “desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution[.]” *Bd. of Airport Comm’rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (citation omitted). As explained above, the Ballot Application Restrictions proscribe a substantial amount of constitutionally protected speech, as well as associational activities, and are not narrowly tailored to serve a compelling state

interest. HB 2332 sweepingly bans *all* out-of-state speakers from distributing advance mail voting applications and bans *any* distribution of personalized applications, even if requested.

The Out-of-State Distributor Ban also imposes harsh, uncapped fines for “caus[ing]” an advance voting application to be mailed—an open-ended term. HB 2332 3(l)(1), (3). This broad language risks penalizing “innocent associations” and communications, *Broadrick*, 413 U.S. at 612, including efforts to consult with and aid local Kansas-based organizations that distribute advance voting applications. The sweeping, undefined reach of the Out-of-State Distributor Ban will thus chill civic organizations’ free speech and association. Likewise, the chilling effect of the Personalized Application Prohibition is “especially” severe because “the overbroad statute imposes criminal sanctions” without a scienter requirement, and many innocent actors “will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (internal citations omitted). Plaintiffs thus are likely to succeed on their overbreadth claim.

## **II. Plaintiffs Are Substantially Likely to Succeed on Their Dormant Commerce Clause Claim Against the Out-of-State Distributor Ban.**

The Out-of-State Distributor Ban facially discriminates against interstate commerce in violation of the dormant Commerce Clause. The Supreme Court has “long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). “[I]n all but the narrowest circumstances, state laws violate the [dormant] Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 99 (1994)).

The Out-of-State Distributor Ban bars all organizations not “resident[s] of this state or [] otherwise domiciled in this state” from mailing advance ballot applications to individuals in Kansas. HB 2332 § 3(l)(1). It also prohibits out-of-state vendors from contracting with Kansas-based entities to print or mail advance voting applications, as doing so would “cause” an advance voting application “to be mailed.” *Id.* The statute contains no similar ban against organizations or vendors residing in Kansas. This facial discrimination against interstate commerce violates the dormant Commerce Clause per se.<sup>10</sup>

**A. The Out-of-State Distributor Ban Restricts Plaintiffs’ Activities in Interstate Commerce.**

Plaintiffs engage in and substantially affect interstate commerce, warranting dormant Commerce Clause protection. Any entity subject to federal regulation under the Commerce Clause because its activities, like Plaintiffs’, substantially affect interstate commerce is also protected by the dormant Commerce Clause against discriminatory state regulation. *See Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979). This protection applies even if the State’s claimed reason for the regulation is administrative, political, or otherwise non-economic. “[W]hatever [the State’s] ultimate purpose, it may not be accomplished by discriminating against” interstate commerce. *City of Phila. v N.J.*, 437 U.S. 617, 626-27 (1978).

The dormant Commerce Clause applies to nonprofits to the same extent as it applies to for-profit entities. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584-86 (1997); *see also United States v. Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001) (“[T]he Commerce Clause applies to charitable and non-profit entities.”); *United States v. Tush*, 151 F. Supp. 2d 1246,

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<sup>10</sup> Given its explicit discrimination against out-of-state entities, the Out-of-State Distributor Ban is not the type of “even-handed” regulation with an “incidental” burden on interstate commerce that would trigger the *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) balancing test. Even if Defendants tried to squeeze it into this category, the burdens it imposes are “clearly excessive in relation to the putative local benefits” and thus breach the dormant Commerce Clause. *Id.*; *see ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999).

1252 (D. Kan. 2001) (same). As the Supreme Court held in *Camps Newfound*—involving a religious camp—an entity that “does not make a profit” can still be “engaged in commerce” by, among other ways, (1) acting “as a provider of goods and services,” (2) “hav[ing] a substantial effect on commerce” as a purchaser and fundraiser, or (3) employing the instrumentalities of interstate commerce. 520 U.S. at 573-74, 583; *see also Edwards v. California*, 314 U.S. 160, 173 (1941) (discussing instrumentality); *Grassie*, 237 F.3d at 1209 (discussing fundraising). Plaintiffs engage in interstate commerce in all three ways.

First, Plaintiffs engage in interstate commerce as “provider[s] of goods and services” to voters. *See Camps*, 520 U.S. at 573. In Kansas, Plaintiffs provide voters with a valuable service across state lines: assistance to successfully request an advance mail ballot. Mailing advance voting applications to voters is the most effective and widely used part of this service. *See Cleaver Decl.* ¶¶ 15-16 ; *Lopach Decl.* ¶¶ 18-19. During the 2020 election, approximately 69,000 Kansans took advantage of VPC’s services by submitting an advance voting application from VPC. *Lopach Decl.* ¶ 6. Likewise, in 2020 over 7,700 Kansans used VoteAmerica’s services to request a personalized advance voting application. *Cleaver Decl.* ¶ 7. And, in the lead up to the 2022 elections, VoteAmerica plans to offer the print-and-mail feature of their Absentee and Mail Ballot Tool to Kansas voters, given the high demand for that service by voters in other states. *Cleaver Decl.* ¶¶ 8-9. If Plaintiffs charged for these services, they clearly would operate in interstate commerce. That Plaintiffs, as nonprofit enterprises, do not charge does not exclude them from the coverage of the dormant Commerce Clause. *See Camps*, 520 U.S. at 584-85.

Second, HB 2332 discriminatorily restricts Plaintiffs’ activities as purchasers and fundraisers that have a “substantial effect on [interstate] commerce.” *See id.* at 574; *see also Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (explaining that activity not directly “regarded as

commerce, . . . may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”). “[N]on-profit entities” such as Plaintiffs substantially affect interstate commerce because they “are major participants in interstate markets for goods and services, use . . . interstate communications and transportation, rais[e] and distribut[e] revenues (including voluntary revenues) interstate, and so on.” *Grassie*, 237 F.3d at 1209 (citing *Camps*, 520 U.S. at 583-86); *see also Grassie*, 237 F.3d at 1209 n.7 (describing nonprofits’ effects on the stream of commerce).

To provide the services they offer to Kansans, Plaintiffs purchase physical mailer materials, rent Post Office boxes, and buy intangible goods such as voter data from vendors throughout the country. Cleaver Decl. ¶ 12; Lopach Decl. ¶ 12. Plaintiffs also purchase various services, including but not limited to data aggregation, web hosting, consulting, printing, and mailing from multi-state vendors. *Id.* Because HB 2332 will force Plaintiffs to shut down distribution of advance mail voting applications in Kansas and all associated commercial activity, HB 2332 will restrict the interstate commerce that Plaintiffs substantially affect as “purchasers.” *Camps*, 520 U.S. at 573-74 (finding nonprofit “unquestionably engaged in commerce” as a purchaser); *accord Conservation Force, Inc. v. Manning*, 301 F.3d 985, 994 (9th Cir. 2002) (concluding that restrictions on non-commercial activity affecting “the interstate flow of people” and “goods in commercial markets” violated the dormant Commerce Clause). Likewise, HB 2332 will affect Plaintiffs’ ability to “rais[e] . . . voluntary revenues,” *Grassie*, 237 F.3d at 1209, (*i.e.*, fundraise), because they are less likely to showcase advance mail voting activities in Kansas if those efforts are less effective, Cleaver Decl. ¶ 28; Lopach Decl. ¶ 28. Indeed, in setting the restrictive example for “not one, but many or every, State” to also “adopt[] similar legislation,” Kansas threatens to dramatically shrink Plaintiffs’ fundraising and purchasing capacity and imperils their operations.



*See Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). Thus, HB 2332 discriminates against Plaintiffs’ commercial activities substantially affecting interstate commerce.

Third, HB 2332 discriminates against Plaintiffs’ use of the instrumentalities of commerce by restricting interstate mail—a dominant feature of Plaintiffs’ operations and an aspect of interstate commerce that Congress exclusively controls. *See, e.g., United States v. Ferguson*, 844 F. Supp. 2d 810, 824 (E.D. Mich. 2012) (collecting cases). Because Congress regulates this instrumentality, the dormant Commerce Clause prevents discriminatory state restrictions on its use, *see Camps*, 520 U.S. at 574 (citing *Hughes*, 441 U.S. at 326 n.2), and “[i]t is immaterial whether or not the [use of the instrumentality] is commercial in character,” *Edwards*, 314 U.S. at 172 n.1. In sum, HB 2332 restricts the interstate commerce involved in Plaintiffs’ operations in three distinct ways, any one of which sufficiently supports their dormant Commerce Clause claim.

**B. The Out-Of-State Distributor Ban Facially Discriminates Against Interstate Commerce and Is Per Se Unconstitutional.**

HB 2332 facially discriminates against interstate commerce because it explicitly disadvantages entities that are not “resident[s] . . . or [] otherwise domiciled in” Kansas. HB 2332 § 3(l)(1). A statute that “on its face” mandates differential treatment of in-state and out-of-state entities by “explicitly identifying geographical distinctions” is a per se violation of the dormant Commerce Clause. *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1141 (10th Cir. 2016) (collecting cases); *see also Granholm*, 544 U.S. at 467, 472; *Or. Waste*, 511 U.S. at 99.

For example, in *Granholm v. Heald*, New York required wineries to “establish a distribution operation in New York in order to gain the privilege of direct shipment.” 544 U.S. at 474. The Court had “no difficulty concluding” that the law facially “discriminat[ed] against interstate commerce” because “[s]tates cannot require an out-of-state firm to become a resident in

order to compete on equal terms.” *Id.* at 475-76 (quotations omitted). This conclusion applies with even greater force here. Rather than simply requiring out-of-state organizations to “establish a branch office” in the state, which itself “drive[s] up” costs, *see id.* at 474-75, HB 2332 forces organizations to establish Kansas *residency* to engage in the covered activities, *see* HB 2332 § 3(l)(1). As in *Granholm*, this imposition “mandate[s] ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” 544 U.S. at 472. Thus, HB 2332’s residency-based ban facially “discriminates against interstate commerce” and is *per se* unconstitutional. *Id.* at 476.<sup>11</sup>

While courts have “generally struck [discriminatory laws] down without further inquiry,” *see id.* at 487 (citation omitted), “[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives,” *Hughes*, 441 U.S. at 337. “[T]he burden falls on the State to justify” the interference with interstate commerce, *id.* at 336, and justifications based simply on the out-of-state “origin” of “articles of commerce” do not pass constitutional muster, *see Philadelphia*, 437 U.S. at 626-27.

Here, the State has no legitimate justification for treating the activity of in-state and out-of-state advance mail ballot application distributors differently. Nothing in the record before the legislature indicated that out-of-state distributors behave differently from in-state distributors. There is no reason to believe that, because of their location, out-of-state distributors are more likely to send mailers that purportedly cause voter confusion. Thus, there is simply no “plausible nexus,” much less narrow tailoring, “between the exclusion of nonresident [entities]” and any purported state objective. *Glazer’s Wholesale Drug Co. v. Kansas*, 145 F. Supp. 2d 1234, 1242 (D. Kan.

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<sup>11</sup> Even if HB 2332 were not facially discriminatory, it violates the dormant Commerce Clause because it discriminates in “practical effect” by imposing distinct burdens on out-of-state participants in the market. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994).

2001). Moreover, “nondiscriminatory alternatives” are available to the State, *see Hughes*, 441 U.S. at 337, such as implementing reasonable procedures for both in-state and out-of-state entities to prevent any voter confusion. In short, because the State lacks a legitimate interest in discriminating against out-of-state participants in the interstate market, and because there are “less restrictive alternatives to the current statutory scheme,” *Glazer’s*, 145 F. Supp. 2d at 1243, the Out-of-State Distributor Ban cannot survive strict scrutiny. Plaintiffs’ claim that HB 2332’s Out-of-State Distributor Ban violates the dormant Commerce Clause is thus likely to succeed.

### **III. Plaintiffs Will Suffer Irreparable Harm from the Absentee Ballot Restrictions.**

Absent an injunction, Plaintiffs suffer irreparable harm. Both the Supreme Court and the Tenth Circuit have made clear that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Verlo*, 820 F.3d at 1127 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (collecting cases). Additionally, the “[v]iolation of Commerce Clause rights is itself an irreparable injury.” *Biogonic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1185 (D. Colo. 2001) (citing *Johnson*, 194 F.3d at 1163). “When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Fish*, 840 F.3d at 752 (internal quotations and citations omitted).

Here, Plaintiffs have expressed a desire and intent to encourage, persuade, and assist Kansas voters to vote by advance mail ballot in the upcoming 2022 election cycle by mailing eligible Kansas voters personalized advance mail voting applications. Cleaver Decl. ¶¶ 9, 15-16, 23; Lopach Decl. ¶ 21. The Out-of-State Distributor Ban and Personalized Application Prohibition stand in their way. If Plaintiffs cannot engage in this constitutionally protected expression, they will “be unalterably excluded from the [] Election[s]—a result that money damages could not redress.” *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1259 (D. Utah 2017). “This injury

cannot be compensated for, either by money, or after a final determination on the merits, which is unlikely to occur before the [2022 primary and gubernatorial] elections take place.” *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1145 (D. Kan. 2016).

Moreover, by foreclosing Plaintiffs’ activities in interstate commerce, the Out-of-State Distributor Ban “constitutes irreparable injury” to their “rights guaranteed under the Commerce Clause.” *Johnson*, 194 F.3d at 1163 (quoting *Am. Librs. Ass’n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997)). The Ballot Application Restrictions dam the free flow of the interstate market, restricting Plaintiffs’ participation in commerce and cutting off the economic activity they generate. This current obstruction can only be unblocked with an injunction.

These injuries from the Ballot Application Restrictions are far from “speculative”—in fact, the Restrictions have already limited Plaintiffs’ advance mail ballot activities in Kansas. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Plaintiffs’ planning for the 2022 election cycle is underway, with an eye towards Kansas’s 2022 gubernatorial and senate primaries. Cleaver Decl. ¶¶ 23-25; Lopach Decl. ¶ 26. Both Plaintiffs are scheduled to further define their strategies, programs and tools in just a few short months. Cleaver Decl. ¶ 24; Lopach Decl. ¶ 26. Plaintiffs’ inability to plan and to execute their plan is currently impacting, and will continue to impact, the effectiveness of Plaintiffs’ advance mail voting activities. With the January 1, 2022 effective date for HB 2332 and the 2022 elections not far behind, Plaintiffs and others will be irreparably harmed absent an injunction.

#### **IV. The Balance of Equities Weighs in Plaintiffs’ Favor and a Preliminary Injunction Is Not Adverse to the Public Interest.**

Any harm imposed on Defendants by an injunction is greatly outweighed by the substantial harm to Plaintiffs, as well as the voting public who wish to vote advance mail ballots in Kansas elections. The extensive “threatened injury to Plaintiffs’ constitutionally protected speech” and

commercial activity described above “outweighs whatever damage the preliminary injunction may cause Defendants’ inability to enforce . . . an unconstitutional statute.” *Johnson*, 194 F.3d at 1163. Moreover, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Verlo*, 820 F.3d at 1127. Indeed, issuing a preliminary injunction serves the public interest by allowing full adjudication of important constitutional issues presented by Plaintiffs’ Complaint without sacrificing Plaintiffs’ constitutional rights.

On the other side of the balance are the State’s purported harms from delayed implementation or administrative burdens. Neither is sufficiently weighty because “[d]elayed implementation of a [governmental] measure that does not appear to address any immediate problem will generally not cause material harm, even if the measure were eventually found to be constitutional and enforceable,” *id.* (citation omitted), and “administrative convenience” cannot justify practices that infringe fundamental rights, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975). Moreover, denying the injunction would not meaningfully serve the State’s purported interests because the underinclusive Out-of-State Distributor Ban does not place any restrictions on in-state distributors. *See supra* I.C, II.B. Thus, “[t]here is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens,” if any, at issue here. *Fish*, 840 F.3d at 755. The balance of equities and the public interest strongly favor Plaintiffs.

### **CONCLUSION**

Because the Ballot Application Restrictions infringe on Plaintiffs’ First Amendment rights and violate the dormant Commerce Clause, Plaintiffs respectfully request that this Court preliminarily enjoin both of the provisions challenged by Plaintiffs, and grant all such preliminary relief that this Court deems just and proper.

Date: July 8, 2021

By: /s/ Mark P. Johnson

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on this 8th day of July 2021, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Mark P. Johnson

Mark P. Johnson