



provisions collectively as “Ballot Application Restrictions.”

Plaintiffs’ motion for a preliminary injunction, like the underlying lawsuit itself, is flawed on multiple levels. The statutory provision at issue, House Bill 2332, § 3, does not even take effect until January 1, 2022, *see id.* § 11, rendering the case jurisdictionally unripe and clearly unworthy of preliminary injunctive relief.<sup>1</sup> Advance ballot applications for the 2022 primaries cannot even be accepted until April 1, 2022. *See id.* § 3(f)(1). Moreover, the Secretary of State has not yet had an opportunity to develop rules and regulations implementing the challenged provisions – as the statute directs him to do, *id.* § 3(m) – which may obviate part of Plaintiffs’ claims or at least guide the Court’s analysis.

Plaintiffs also have no standing to challenge this new legislation, either in their own right, on behalf of the members they purport to represent, or as conduits for the general public. Even if they did, there still would be no subject matter jurisdiction due to Defendants’ sovereign immunity. And the ongoing state court litigation likewise counsels in favor of this Court’s abstention.

Further, none of Plaintiffs’ causes of action have substantive legal merit. Although dressed up as free speech/association challenges, Plaintiffs’ attacks on the Ballot Application Restrictions are ultimately directed at *non-expressive conduct*, and thus are not entitled to any sort of heightened constitutional protection. Standard rational basis review applies, and the statutes easily pass that highly deferential threshold. The State’s strong regulatory interests in avoiding fraud, minimizing voter confusion, and facilitating an orderly administration of the electoral process all outweigh any minor impact (to the extent there is an impact at all) on the rights of the Plaintiffs and/or the voters they purport to represent. The notion that Plaintiffs are at risk of imminent harm from any of these nondiscriminatory, common-sense measures designed to enhance the public’s confidence in the integrity of our electoral process, an objective “essential to the functioning of our participatory

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<sup>1</sup> A copy of the bill can be found at Exhibit C.

democracy,” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), is groundless.

As for Plaintiffs’ novel dormant Commerce Clause claim, it is textually foreclosed by Art. I, Sec. 4, Cl. 1 of the Constitution, which expressly confers authority upon states to regulate the manner in which elections are conducted. In the context of elections, while Congress may preempt virtually any state law with its own federal legislation, state legislatures otherwise have free reign to enact their own code for congressional elections, subject only to the constraints of the Bill of Rights and other *subsequent* constitutional amendments. But even if dormant Commerce Clause principles could be technically invoked here, the State’s powerful regulatory interests, all of which are entirely disconnected to any economic protectionism objective, would nevertheless allow the Advance Ballot Restrictions to survive. For all of these reasons, Defendants respectfully request that the Court deny Plaintiffs’ motion for a preliminary injunction.

## **II. – Legal Standard Governing Requests for Preliminary Injunction**

“A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief.” *New Mexico Dep’t of Game & Fish v. United States Dep’t of the Interior*, 854 F.3d 1236, 1245-46 (10th Cir. 2017) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (internal quotation marks omitted). This well-established standard requires that a movant meet four separate factors: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs any injury that the opposing party will suffer under the injunction; and (4) the injunction will not be adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). Because this remedy is so extraordinary, it will only be awarded if the movant’s right to relief is clear and unequivocal. *Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

### **III. – Argument**

Injunctive relief is unwarranted here for a variety of reasons. Not only does the Court lack jurisdiction over Plaintiffs’ claims, but even if the jurisdictional impediments could be overcome, abstention would be in order. There is also no conceivable urgency to Plaintiffs’ claims – which lack merit in any event – given that the statutory provisions at issue do not even take effect until January 1, 2022, and implementing regulations have yet to be drafted.

#### ***A. – Plaintiffs’ Claims are Not Justiciable***

Plaintiffs’ claims challenging H.B. 2332 fail to present a justiciable case or controversy sufficient to trigger the Court’s subject matter jurisdiction due to their lack of standing, the unripe nature of the claims, and Defendants’ sovereign immunity. Defendants advanced these identical defenses in their recently-filed Memorandum In Support of Motion to Dismiss (Doc. 27 at pp. 4-12), and those same arguments are now incorporated by reference in this Response.

#### ***B. – The Court Should Abstain From Reviewing Plaintiffs’ Claims***

The *Pullman* abstention doctrine, *see R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941), similarly counsels in favor of this Court refraining from adjudicating Plaintiffs’ claims in light of the ongoing state court litigation involving the identical statute, and the fact that the Secretary of State has not yet even had an opportunity to draft and implement regulations that will help define the contours of the statute. Once again, Defendants addressed this defense in their Memorandum In Support of Motion to Dismiss (Doc. 27 at pp. 12-15), and those same arguments are likewise incorporated by reference herein.

#### ***C. – Restrictions on Solicitation of Advance Ballot Applications Do Not Implicate Plaintiffs’ Core Political Speech Rights***

The thrust of Plaintiffs’ motion is that the Ballot Application Restrictions allegedly “curtail Plaintiffs’ core political speech and associational activities protected by the First Amendment.” (Mem. 11). Plaintiffs suggest that the act of providing voters with personalized advance mail

ballot applications “communicate[s] Plaintiffs’ belief in the power of voting and encourage[s] Kansans to participate in the democratic process” through advance mail voting. (*Id.*). The inclusion of these personalized (i.e., partially completed) advance ballot applications in Plaintiffs’ mailings to Kansas voters is purportedly “critical to making that speech effective.” (*Id.*). Plaintiffs note that their ballot application distribution practices educate voters about both the importance and mechanics of voting via advance ballot, which they claim “necessarily involves the expression of a desire for political change.” (*Id.* at 13). By advocating for advance voting by mail, Plaintiffs maintain that they are “tak[ing] sides on an important and disputed political issue,” which “speech” is in turn “disabled” by the Ballot Application Restrictions. (*Id.* at 14).

1. – Plaintiff VoteAmerica’s Purported Actions Do Not Implicate the Personalized Application Prohibition

Before turning to the substance of Plaintiffs’ legal claims in their motion for a preliminary injunction, we highlight a fundamental deficiency in Plaintiff VoteAmerica’s challenge to the Personalized Application Prohibition in H.B. 2332, § 3(k)(2). VoteAmerica seems to have misread the statute because, based on its own description of its operations, its activities would not even implicate this statutory subdivision. VoteAmerica notes that it provides an “interactive online Absentee and Mail Ballot tool that allows voters to provide their name, address, [and other information],” which it then uses to send a partially completed advance ballot application to the voters. (Mem. 6-7; Compl. ¶¶ 17-21). But those kind of activities do not violate § 3(k)(2). The text of Section 3(k) states as follows:

- (1) Any person *who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing* shall include on the exterior of such mailing, and on each page contained therein, except the application, a clear and conspicuous label in 14-point font or larger that includes:
  - (A) The name of the individual or organization that caused such solicitation to be mailed;

- (B) if an organization, the name of the president, chief executive officer or executive director of such organization;
  - (C) the address of such individual or organization; and
  - (D) the following statement: “Disclosure: This is not a government mailing. It is from a private individual or organization.”
- (2) The *application for an advance voting ballot included in such mailing* shall be the official application for advance ballot by mail provided by the secretary of state. No portion of such application shall be completed prior to mailing such application to the registered voter.
- (3) An application for an advance voting ballot shall include an envelope addressed to the appropriate county election office for the mailing of such application. In no case shall the person who mails the application to the voter direct that the completed application be returned to such person.
- (4) The provisions of this subsection shall not apply to:
- (A) The secretary of state or any election official or county election office;  
or
  - (B) the official protection and advocacy for voting access agency for this state as designated pursuant to the federal help America vote act of 2002, public law 107-252, or any other entity required to provide information concerning elections and voting procedures by federal law.
- (5) A violation of this subsection is a class C nonperson misdemeanor.

H.B. 2332, § 3(k) (emphasis added).

The statutory text in § 3(k)(1) only covers situations in which a person or entity “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.” The prohibition against mailing partially completed ballots in § 3(k)(2), in turn, explicitly refers to “such mailing,” i.e., the solicitation by mail constrained by § 3(k)(1). VoteAmerica, at least based on its own description of its activities, does not appear to be engaging in “solicitation by mail.”<sup>2</sup> Indeed, the definition of “solicitation”

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<sup>2</sup> Plaintiff Voter Participation Center, on the other hand, does engage in conduct targeted by § 3(k). It apparently uses statewide voter registration files to identify certain registered voters and then sends those individuals, via the mail, a partially completed advance ballot application. (Mem. 8-9; Compl. ¶¶ 27-33).

entails approaching another person or entity with a request or plea to take some action. *See Merriam-Webster's Collegiate Dictionary* (11th ed.) (2020). The only time that VoteAmerica says it mails out partially completed ballots to voters is when *voters themselves have first affirmatively gone to its website and requested such a ballot*. That VoteAmerica or one of its partners might have referred the voter to its website is irrelevant since the statute only criminalizes solicitations by mail *that include the advance ballot application in such mailing*.<sup>3</sup> In short, if we are to take VoteAmerica at its word that it is merely responding to a voter's request, there would be no violation of § 3(k)(2).

## 2. – Plaintiffs' Activities Do Not Involve Core Political Speech

Plaintiffs ask the Court, in evaluating their claims, to invoke an “exacting scrutiny” test that the Supreme Court has used when analyzing First Amendment challenges to core political speech (i.e., the so-called *Meyer-Buckley* test). *See Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999). But the restrictions at play in H.B. 2332, § 3(k) and (l) are not focused on core speech at all. It is simply *conduct* – not speech – that is being regulated and election-related restrictions on non-expressive conduct are not exposed to exacting scrutiny.

This case is virtually identical to *Lichtenstein v. Hargett*, 489 F. Supp.3d 742 (M.D. Tenn. 2020), which involved a constitutional challenge (freedom of speech and freedom of association) to a Tennessee statute prohibiting anyone other than an election official from giving an absentee ballot application to any other person. The district court concluded that the ban on distribution of absentee voter applications was in no way a ban on core political speech. *Id.* at 773. The law, the court noted, did “not restrict anyone from interacting with anyone about anything.” *Id.* at 770.

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<sup>3</sup> To be clear, both Plaintiffs, as non-Kansas residents, would be prohibited from mailing, or causing to be mailed, advance ballot applications to Kansas voters by virtue of the constraints imposed by § 3(l)(1).

The court detailed a long list of ways that the plaintiff could encourage a person to vote using the absentee ballot application. *Id.* at 764–65. “[H]owever one slices it,” the statute “prohibits no spoken or written expression whatsoever and also leaves open a very wide swath of conduct, prohibiting just one very discrete kind of act.” *Id.* at 765.

While the First Amendment theoretically protects both speech and certain types of conduct, “only conduct that is ‘inherently expressive’ is entitled to First Amendment protection.” *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006)). In assessing whether particular conduct has “sufficient ‘communicative elements’ to be embraced by the First Amendment, courts look to whether the conduct shows an ‘intent to convey a particular message’ and whether ‘the likelihood was great that the message would be understood by those who viewed it.’” *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Just as was true in *Lichtenstein*, there is no constitutionally protected speech or conduct being impacted by the Ballot Application Restrictions in this case:

[I]f unaware of any words accompanying such distribution, an observer would not have any particular reason to associate any specific message with the action of giving someone an absentee-ballot application. . . . And the observer perhaps could speculate that there is not really any discernable message at all. The Supreme Court has advised that if an observer cannot tell, without accompanying words, that the action conveys the message that plaintiff claims it conveys, then the action is not inherently expressive.

*Lichtenstein*, 489 F. Supp.3d at 768; *see also Voting for Am., Inc. v. Andrale*, 488 F. App’x 890, 898 & n.13 (5th Cir. 2012) (rejecting First Amendment challenge to state statute restricting non-election officials’ distribution of absentee ballots, concluding that the law did not curtail any core speech rights); *League of Women Voters v. Browning*, 575 F. Supp.2d 1298, 1319 (S.D. Fla. 2008) (collection and handling of voter registration applications is not inherently expressive activity).

H.B. 2332 in no way prevents Plaintiffs from publishing or mailing content that educates Kansans on how to vote in person or by mail. Nor does it prohibit Plaintiffs from providing information on where and how to obtain an advance ballot application. It likewise does not impede Plaintiffs from posting or mailing content, or otherwise advocating in favor of the absentee voting process. The number of ways for Plaintiffs to communicate their message to Kansas voters is virtually limitless. The abstract messages they claim to want to convey – encourage all eligible voters to vote by advance mail ballots, reassure all Kansans that voting by mail is safe and secure, and emphasize the importance of democratic participation by every eligible citizen (Mot. 2) – are not hampered whatsoever by the statute. The fact that every avenue of expressive conduct remains available to them to impart those messages to voters totally undercuts their claim that the Ballot Application Restrictions impermissibly restrict or even threaten core speech. While Plaintiffs seek to fit the statutory prohibitions into a free speech box, the reality is that “[c]onduct does not become speech for First Amendment purposes merely because the person engaging in the conduct intends to express an idea.” *Steen*, 732 F.3d 388 (citing *Rumsfeld*, 547 U.S. at 66); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (recognizing that while a person or party may express beliefs or ideas through a ballot, “[b]allots serve primarily to elect candidates, not as forums for political expression.”); *DCCC v. Ziri*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020) (“[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny.”).

Plaintiffs further suggest that personalizing the advance ballot applications represents the most effective means of “communicating their message” and is “crucial to the persuasiveness of their advocacy.” (Mot. 15). But as the Fifth Circuit noted in rejecting this identical argument, Plaintiffs “essentially seek a First Amendment right not just to speak out or engage in ‘expressive

conduct’ but also to succeed in their ultimate goal regardless of any other consideration.” *Steen*, 732 F.3d at 391 (quotation omitted). “Only two possibilities flow from this reasoning. . . . [Either] throwing voter registration forms in the trash would have to be constitutionally protected expressive conduct, [or] “supporting voter registration is the canvasser’s speech, while actually completing the forms is the voter’s speech, and collecting and delivering the forms are merely conduct.” *Id.* at 391-92. In explaining why this theory cannot be squared with First Amendment case law, the Fifth Circuit observed:

One clear principle that can be derived from the long line of election-related speech cases is that the degree of protection afforded under the First Amendment does not vary in accordance with anyone’s regard for the content of the message at issue. Thus, the logic of the Appellees extends to parties who wish to see fewer citizens vote even if it is true that Appellees’ ultimate goal is to have more citizens vote. The prevailing cases also do not extend First Amendment protection to an “anything goes” philosophy that seeks to insulate any conduct that may relate in any way to speech or expression. Here, Appellees offer a novel interpretation of the First Amendment. They contend that expressive activity, the promotion of voter registration in this case, is contingent upon the “success” factor of *actually registering voters*. While the First Amendment protects the right to express political views, nowhere does it guarantee the right to ensure those views come to fruition. To maintain otherwise would mean that a group seeking to discourage voting and voter registration would have the “right” to achieve its expressive goals by throwing the registration cards away.

*Steen*, 732 F.3d at 392 n.5 (emphasis in original) (internal citation omitted); *accord Lichtenstein*, 489 F. Supp.3d at 772 (while “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, . . . this proposition does not mean that the Plaintiffs get to decide what *conduct* they think would be the most effective means of advocating their message and thereby automatically obtain First Amendment protection for such means.”) (emphasis added). The bottom line here is that the distribution of advance ballot applications is simply not protected speech. It is *non-expressive conduct* that the State is free to regulate as part of a legitimate, non-discriminatory election process.

Nearly all the cases Plaintiffs rely on in support of their motion are readily distinguishable. *Meyer*, for example, struck down a Colorado statute prohibiting the payment of circulators of an initiative petition. 486 U.S. at 428. But as the Fifth Circuit pointed out in refusing to apply *Meyer* to a Texas law restricting non-Texas residents from serving as volunteer deputy registrars (i.e., individuals authorized to receive and deliver completed voter registration applications):

Petitions by themselves are protected speech, and unlike a completed voter registration form, they are the circulator’s speech. Assuming a voter registration application is speech, it is the *voter’s* speech indicating his desire to be registered. Soliciting, urging and persuading the citizen to vote are the forms of the canvasser’s speech, but only the voter decides to “speak” by registering. Logically, what the VDR does with the voter’s form *follows* the voter’s completion of the application but is not itself “speech.” One does not “speak” in this context by handling another person’s “speech.” As the state’s brief observes, the voter could refuse to return a registration application to the VDR and say, “I’ll mail it myself.”

*Steen*, 732 F.3d 390. At most, “an intended recipient would understand the distribution to him or her as merely a means to carry out an otherwise-conveyed message (again, something like “vote!” or “voting is important” or “vote absentee” or “Consider voting absentee”) rather than as a means for reiterating or emphasizing, or conveying something new about, that message.” *Lichtenstein*, 489 F. Supp.3d at 767. “In other words, the intended recipient would not in all likelihood understand these messages from the mere act of being offered an absentee-ballot application.” *Id.*

Unlike the case at bar, the Colorado statutes at issue in *Meyer* and *Buckley* also “specifically regulated the process of advocacy itself, dictating who could speak (only unpaid circulators and registered voters) or how to go about speaking (with name badges and subsequent detailed reports),” thereby “reducing the total quantum of speech, the number of voices who will convey [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). By contrast, the Ballot Application Restrictions do not restrict any inherently expressive conduct. For that matter, they do not restrict anyone from communicating with anyone else about anything. The only thing being constrained

is the distribution of partially completed advance ballot applications and the distribution of any such advance ballot applications by non-Kansas entities. Under any reasonable interpretation, those activities are not so “inherently expressive” that they warrant the kind of sanctified constitutional protection and exacting scrutiny that Plaintiffs demand.

Plaintiffs also cite prominently to *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) and *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). Both of those cases, however, revolved around restrictions on non-residents’ collection of *initiatives and referendums*. In fundamental contrast to an advance ballot application, a *petition itself* is protected speech and the “circulation and submission of an initiative is closely intertwined with the underlying political ideas put forth by the petition.” *Lichtenstein*, 489 F. Supp.3d at 771 (quoting *Andrade*, 488 F. App’x at 898 n.13). Whereas “the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign,” any possible expressive conduct involved in the distribution of advance-ballot applications (e.g., encouraging democratic participation and voting) “does not implicate a third-party’s right to process the application.” *Id.* (citing *Andrade*, 488 F. App’x at 898 n.13). To the contrary, advance-ballot applications are “individual, not associational, and may be successfully submitted without the aid of another,” which means no actual speech has been limited. *Id.* (citing *Andrade*, 488 F. App’x at 898 n.13).<sup>4</sup> In sum, Plaintiffs’ claims are not properly subjected to exacting scrutiny.

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<sup>4</sup> Plaintiffs oddly point to *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020) in support of their motion. Although it is true that the district judge there found Michigan’s absentee ballot application restrictions triggered First Amendment protections under the *Meyer-Buckley* framework, *id.* at 812, the court later denied the plaintiffs injunctive relief, holding that “the state’s interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are sufficiently related to the limitations and burdens set forth in [the statute] . . . that plaintiffs are unlikely to succe[ed] on their First Amendment challenge to the Absentee Ballot Law.” *Priorities USA v. Nessel*, 487 F. Supp.3d 599, 615 (E.D. Mich. 2020).

### 3. – Proper Standard for Evaluating Plaintiffs’ Claims is *Anderson-Burdick* Test

To the extent the Court even finds that the First Amendment is implicated here, the proper standard to be applied would be what is commonly referred to as the *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).<sup>5</sup> When a state invokes its constitutional authority to regulate elections to ensure that 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*, 892 F.3d at 1077. That is why a 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 that will separate valid from invalid restrictions.” *Id.* The Court instead applies a “more flexible standard.” *Burdick*, 504 U.S. at 434. Under this flexible approach, referred to as *Anderson/Burdick* balancing, 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 (here, the right to vote), its

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<sup>5</sup> If, as appears likely, the First Amendment is not implicated at all, straight rational basis review would apply.

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).

As described above, the burden on Plaintiffs’ advocacy work is minimal. Yet the State’s interests in imposing Ballot Application Restrictions are substantial, outweighing any minor inconveniences that Plaintiffs may experience, particularly when subjected (as they must be) to a highly deferential rational basis review. *See Burdick*, 504 U.S. at 434.

The State’s primary regulatory interests in the Ballot Application Restrictions are the avoidance of confusion and the facilitation of an orderly and efficient administrative process in carrying out the election. Indeed, in 2020, county election officials across the State reported receiving multiple advance ballot applications from many individuals who had themselves received multiple advance ballots application forms (some of which were partially completed, and often incorrectly) from various out-of-state organizations. Voters were calling in to the county clerks’ offices angry and confused, not knowing how to handle the different forms, and frequently feeling compelled to send all of the applications in. The result was chaos that greatly taxed the time and resources of already short-staffed and overworked county election offices. Unsurprisingly, a regulatory interest in orderly election administration was expressly endorsed by the Supreme Court

in *Doe v. Reed*, 561 U.S. 186, 198 (2010).

In addition, having multiple advance ballot applications being sent in by the same individual is an invitation for potential fraud, which the State also has a strong interest in avoiding.<sup>6</sup> As the Supreme Court observed earlier this month, although “every voting rule imposes a burden of some sort,” a “strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021). The risk of voter fraud is particularly acute with mail-in voting. *See, e.g., Crawford*, 553 U.S. at 195-96 (“flagrant examples of [voter] fraud . . . have been documented throughout this Nation’s history by respected historians and journalists, and . . . Indiana’s own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.”); *Richardson*, 978 F.3d at 239 (“Texas’s signature-verification requirement is not designed to stymie voter fraud only in the abstract. It seeks to stop voter fraud where the problem is most acute – in the context of mail-in voting.”); Comm’n on Fed. Elections Reform (“Baker-Carter Commission”),

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<sup>6</sup> Plaintiff implies that the State is somehow restricted to a “voter confusion” regulatory interest because no other interest was explicitly discussed in the Conference Committee Report. (Mem. 19 & n.8). This argument has no merit. Unlike an executive branch agency developing administrative regulations, a legislature is not required to make any sort of record in conjunction with its lawmaking activity. “Under what is a sensible rule – not least because the particular legislative purpose(s) behind a statute often goes unstated by the legislature – a court is not limited to considering the actual purpose behind the statute being challenged; rather it may consider any *plausible state interest*.” *Lichtenstein*, 489 F. Supp.3d at 755 (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993) (“Where there are plausible reasons for Congress’ action, our inquiry is at an end.”)). In fact, the Supreme Court has held explicitly that, “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Beach Commc’ns*, 508 U.S. at 315; *accord Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004).

*Building Confidence in U.S. Elections* 46 (Sept. 2005) (“Absentee ballots remain the largest source of potential voter fraud.”).

The problem is especially acute when out-of-state entities are responsible for sending the duplicate advance ballot applications and potentially engaging in other nefarious activities. It is infinitely more difficult for the State to identify, monitor, and exercise oversight of individuals and organizations not located in Kansas. Although Plaintiffs feign frustration that H.B. 2332, § 3(l)(1) does not reach “Kansas-resident entities [that] may be responsible for errors and repeat mailers” (Mot. 19), Defendants are unaware of any Kansas entities that operate in Plaintiffs’ space on these issues. Not surprisingly, every complaint that legislators responsible for this bill heard from voters and county election officials about duplicate advance ballot applications involved out-of-state organizations. But the critical point here is that, as described in Part III.E., the last thing the State is interested in is providing cover for *any* entity that may be contributing to the electoral chaos that Plaintiffs’ activities generate.

Plaintiffs suggest that existing statutes adequately address any potential problems. (Mot. 20). The statutes they cite – Kan. Stat. Ann. §§ 25-1122(i), 25-2431 – either have nothing at all to do with the problems at issue here (25-2431) or are woefully inadequate to rectify the havoc that is created by a wave of duplicate advance applications inundating county election officials (25-1122(i)). In any event, the idea that election-related criminal proscriptions currently on the books represent a baseline above which a legislature cannot go without justifying to a court why such greater sanction is necessary is fundamentally at odds with the separation of powers among the coordinate branches. A court has no warrant to second-guess legislative activity on that ground.

The same regulatory interests at issue in *Lichtenstein*, which the court there embraced as legitimate measures to enhance election integrity and decrease voter confusion, are at play here:

Among other things, there is a rational basis to believe that by prohibiting everyone (other than election commission employees) from distributing absentee-ballot applications, the State can: (a) increase the integrity of the absentee ballot process by, among other things, better ensuring that an absentee-ballot application is being submitted by someone who truly wants to submit the application, that the applicant does not miss out on voting absentee (and perhaps, as a direct result, voting at all) due to misleading addressing or other information provided by a distributor, and that the applicant is not mistakenly provided by election officials with multiple absentee ballots; and (b) decrease the risk of voter confusion arising from, among other things, voters' receipt of (i) applications mistakenly believed by some recipients to be from election officials, (ii) applications from multiple distributors, or (iii) incorrect addressing or other information from the distributor regarding absentee voting.

*Lichtenstein*, 489 F. Supp.3d at 783-84.

The Ballot Application Restrictions at issue are reasonable, neutral, non-discriminatory prophylactic measures that leave open virtually every conceivable type of written and/or verbal expression except two – the distribution of advance ballot applications by third-parties who are not domiciled in Kansas (whose activities the State has little ability to monitor or regulate) and the distribution of partially completed advance ballot applications. While we question the premise that *any* voters might be negatively affected by the law, even if they are, that would not justify any injunctive relief here, let alone an invalidation of the statute. Not only is there no narrow tailoring requirement under the *Anderson-Burdick* framework, but as the Supreme Court recently explained, a State's "entire system of voting" – not just the impact on a small segment of the electorate – must be examined "when assessing the burden imposed by a challenged provision." *Brnovich*, 141 S. Ct. at 2340. Under those circumstances, Plaintiffs can establish no entitlement to relief.

***D. – Plaintiffs' Overbreadth Claim Is Legally Unsound***

Plaintiffs alternatively predicate their request for injunctive relief on the ground that the Ballot Application Restrictions are allegedly unconstitutionally overbroad. (Mot. 19-20). They raise both facial and as-applied attacks on the statute. (Compl. ¶¶ 107-108). Neither claim stands up to scrutiny.

When making an overbreadth claim pursuant to the First Amendment, the challenger must show that the statute in question “punishes a substantial amount of protected speech, judged in relation to the statute’s plainly legitimate sweep.” *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2004); see also *United States v. Williams*, 553 U.S. 285, 292 (2008) (“In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” (emphasis in original)). In other words, the mere fact that *some* impermissible applications of a law may be conceivable does not render that law unconstitutionally overbroad; there must be a realistic danger that the law will *significantly* compromise recognized First Amendment protections. This is particularly true where, as is the case here, *conduct* and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Court examines both the text of the law and the facts on the ground when undertaking this analysis. *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (citing *Hicks*, 539 U.S. at 122).

The overbreadth doctrine is “strong medicine” and thus must be applied “with hesitation, and then only as a last resort.” *New York v. Ferber*, 458 U.S. 747, 769 (1982). Thus, if a statute is readily susceptible to a narrowing construction that will remedy any constitutional infirmity, the statute will be upheld. *Va. v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988). To the extent a statute is not readily susceptible to a narrowing construction, if the unconstitutional language is severable from the remainder of the statute, “that which is constitutional may stand while that which is unconstitutional will be rejected.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quotations omitted). Moreover, even if a law touches on political 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*, 423 F.3d at 1199 (quoting *Hicks*, 539 U.S. at 119).

#### 1. – H.B. 2332 is Not Overbroad as Applied to Plaintiffs’ Actions

When considering an as-applied overbreadth challenge, courts recognize that the statute in question may be constitutional in many of its applications, but is not so as applied to the plaintiff and his/her applicable circumstances. *See N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010). “A successful as-applied challenge is, thus, a necessary, but not sufficient, ingredient to a successful facial challenge.” *United States v. Streett*, 434 F. Supp. 3d 1125, 1171–72 (D.N.M. 2020).

Plaintiffs allege that their ability to encourage Kansans to engage in the democratic process is burdened because they will not be able to include an advance ballot application in their mailers. Plaintiffs acknowledge, however, that while the new law prohibits them from mailing advance ballot applications, it does not prevent them from mailing any other communication about the political process, candidates, or voting in general. (Compl. ¶ 56). There is no bar to Plaintiffs’ ability to send mailers expressing any of the messages they wish to convey about the importance of voting in general or voting by mail via an advance-ballot, how to vote in person or by mail, or where to access an advance mail voting application. *See* Part III.C.2, *supra*. Indeed, there are an infinite number of ways for Plaintiffs to communicate their message. The only thing being restricted is not speech at all; it is *non-expressive conduct* – i.e., mailing an advance voting application itself directly to a Kansas voter. *See, e.g., Lichtenstein*, 489 F. Supp.3d at 776.

This logistical prohibition was adopted by the Legislature primarily to prevent confusion among voters and help ensure the orderly administration of the electoral process. *See Hearing Testimony on H.B. 2332 Before the House Elections Committee*, 2021 Legis. Sess. (Kan. Feb. 18, 2021) (statement of Deputy Ass’t Sec’y of State Katie Koupal) (Exhibit B). It also was intended

to minimize potential fraud. To suggest that the Ballot Application Restrictions impermissibly regulate a substantial amount of Plaintiffs’ protected speech and associations rings hollow.<sup>7</sup>

## 2. – H.B. 2332 is Not Facially Overbroad

“Facial challenges based on overbreadth are disfavored,” *Clark v. Schmidt*, 493 F. Supp.3d 1018, 1033 (D. Kan. 2020), and the Court must begin its analysis by presuming that the statute is constitutional. *Id.* In this case, Plaintiffs’ inability to satisfy the standards necessary to establish an as-applied challenge is also fatal to their facial overbreadth challenge. As noted, the challenged statute allows for an unlimited array of expressive conduct and core political speech by any person or entity, regardless of whether they are a Kansas resident or not. There is no prohibition at all on communicating with Kansas residents on the importance of voting, or about particular candidates or any political viewpoints. All individuals and organizations may encourage Kansans to vote by using an advance mail-in ballot; they simply cannot send a Kansas resident an advance ballot application if they live out-of-state, and no private party can send a voter an application that has been partially completed. Such limited restrictions do not equate to a substantial impairment to constitutional activity. “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).” *Hicks*, 539 U.S. at 124. Nor have Plaintiffs come close to demonstrating that H.B. 2332 will have a chilling effect on the First Amendment rights of parties not before the court. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000) (requiring the plaintiff to show the existence of a “realistic danger” that will

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<sup>7</sup> Plaintiffs argue that the new criminal provisions in H.B. 2332, § 3(l) are also suspect because they have no scienter requirement. (Mot. 22). Not true. Except for a small category of cases set forth in Kan. Stat. Ann. § 21-5203 – none of which are applicable here – “a criminal intent is an essential element of every crime defined by the criminal code.” *State v. Richardson*, 289 Kan. 118, 121, 209 P.3d 696 (2009); *accord* Kan. Stat. Ann. § 21-5202(d) (“If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.”).

“significantly compromise recognized First Amendment protections of parties not before the court.”). In sum, Plaintiffs are unable to demonstrate a likelihood of success on their overbreadth claim.

***E. – H.B. 2332 Does Not Contravene the Dormant Commerce Clause***

Plaintiffs further challenge the Out-of-State Distributor Ban on the grounds that it violates the dormant Commerce Clause. The Supreme Court has construed the Constitution’s express grant to Congress of the power to “regulate Commerce . . . among the several States,” Art. I, § 8, cl. 3, to encompass “‘a further, negative command, known as the dormant Commerce Clause,’ . . . that ‘create[s] an area of trade free from interference by the States[.]’” *Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005). The dormant Commerce Clause targets state laws that improperly interfere with interstate commerce. “The primary concern is economic protectionism.” *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1135 (10th Cir. 2016). So far as we can tell, this clause has never been invoked to challenge a state election/voting law, and for good reason. There are multiple problems with Plaintiffs’ theory.

**1. – Article I, Section 4 of the Constitution Forecloses Plaintiffs’ Claim**

The Constitution’s Elections Clause, U.S. Const. art. I, § 4, cl. 1, directs that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*” (emphasis added), subject to the directives of Congress. The provision operates as an express grant of constitutional authority for states to regulate the manner in which elections are conducted, *Fish*, 840 F.3d at 727, and vests state legislatures, subject to congressional enactments, with authority “to provide a complete code for congressional elections.” *Smiley v. Holm*, 285 U.S. 355, 366 (1932). This “broad power to prescribe the procedural mechanisms for holding congressional elections,” *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (internal quotation marks omitted), includes authority to enact “the numerous requirements as to

the procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved,” *Smiley*, 285 U.S. at 366; *Cook*, 531 U.S. at 523–24; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (state legislatures may enact election laws in order to ensure that elections are “fair and honest” and that “some sort of order, rather than chaos, is to accompany the democratic process”).

The Elections Clause “functions as a ‘default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.’” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (“*ITCA*”) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). The clause “stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states ‘not what they must do but what they can or cannot do.’” *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (quoting *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir.1995)). As a result, “[s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (citation and internal quotation marks omitted). Thus, “the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.” *Id.*; *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (“[A] state’s discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject.”); *The Federalist No. 57*, at 348 (James Madison) (Clinton Rossiter ed., 1961). Congress’ own Election Clause authority “is paramount, and may be exercised at any time, and to any extent which it deems expedient, and *so far as it is exercised, and no farther*, the regulations affected supersede those of the State which are inconsistent therewith.” *ITCA*, 570

U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880) (emphasis added)). But unless and until Congress so acts, Kansas has extraordinarily broad power, rooted directly in constitutional text, to regulate the manner of its elections.

Plaintiffs do not argue that Congress enacted a federal law under its Elections Clause authority that supersedes the Out-of-State Distributor Ban. Instead, Plaintiffs argue that the Kansas law is invalid under the implied dormant Commerce Clause. However, in light of the Elections Clause's express grant of authority to states to regulate in this area, the Commerce Clause simply does not act as a restraint on states' electoral-related time/place/manner regulatory activity. Indeed, the Supreme Court has explicitly distinguished the preemptive authority under the Elections Clause from Congress' other preemptive authority. *See e.g., ITCA*, 570 U.S. at 14 (presumption against preemption does not apply when Congress acts under its Elections Clause authority).

It is beyond cavil that the Bill of Rights, which was ratified in 1791, several years after the original text of the Constitution took force, applies fully to a state's electoral regulatory activity. So, too, do any other subsequent amendments (e.g., the Civil War Amendments and the 24th and 26th Amendments). The specific and positive grant of authority in the Elections Clause, however, takes precedence over any general language in the Commerce Clause, especially an implied restraint like the the dormant Commerce Clause. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989) ("The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized . . . standard."); *City of Tulsa v. S.W. Bell Tel. Co.*, 75 F.2d 343, 351 (10th Cir. 1935) ("It is a well-settled rule of construction that where there is, in an act or Constitution, a specific provision relating to a particular subject, such provision will govern in respect to that subject as against general provisions in the act or Constitution, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates.")

To be sure, the Supreme Court has held that the dormant Commerce Clause can apply to situations in which a state has engaged in *economic protectionism* under the guise of some other grant of constitutional authority. For example, in *Tennessee Wine and Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019), the Court held that the dormant Commerce Clause served to limit a state’s ability to impose a durational residency requirement for retail alcohol licenses, despite the Twenty-First Amendment’s language seemingly giving states latitude to legislate in this area. But the Court reached this conclusion only after explaining that the developments culminating in the adoption of the amendment made clear that its aim “was not to give States a free hand to restrict the importation of alcohol for *purely protectionist purposes*.” *Id.* at 2469 (emphasis added). The Court pointedly noted that the constraints on out-of-state distributors could be justified “as a public health or safety measure or on some other legitimate nonprotectionist ground,” but that Tennessee had mounted no such defense and there was simply no evidence that the challenged statute had any connection to those permissible regulatory interests. *Id.* at 2474.

In direct contrast, the Kansas legislature adopted H.B. 2332, § 3(*l*) solely for the purpose of safeguarding the integrity of the election process, minimizing voter confusion, and helping to ensure orderly electoral administration. There was no intent whatsoever to engage in economic protectionism. While it is impossible to say for certain how this provision will be implemented until such time as the Secretary of State has an opportunity to draft regulations defining its scope – making Plaintiffs’ plea for a premature advisory opinion intended to tie the Secretary’s hands in that drafting process especially inappropriate here – the fact is that the advance ballot application havoc generated in 2020 seemed to be attributable entirely to out-of-state entities like the Plaintiffs. In the event that Kansas-domiciled entities opt to enter this space in the future and contribute to the chaos from duplicative advance voting applications, they will be much easier for the Kansas Attorney General (to whom all enforcement is entrusted under § 3(*l*)(2) of the new law) to identify,

monitor, and exercise enforcement authority over than out-of-state organizations. As described in this Response, time and again, the Supreme Court has recognized this sort of interest as completely legitimate.

Furthermore, unlike the Twenty-First Amendment, one will search in vain for any history of federal courts imposing dormant Commerce Clause constraints on a state's legislative activity regulating the time, place, and manner of elections. The counter-history in the context of alcohol regulation was critical to the Supreme Court's holding that economic protectionism-grounded state laws involving liquor licenses were not fully insulated from the dormant Commerce Clause. *See Thomas*, 139 S. Ct. at 2463-69. With no such historical limits on state legislative authority under the Elections Clause, the textual argument for finding the dormant Commerce Clause altogether inapplicable is even stronger. In short, there is no constitutional basis for holding that the dormant Commerce Clause can displace a State's Election Clause authority.

2. – Kansas' Non-Economic Interests Behind H.B. 2332, § 3(l) Defeat Plaintiffs' Dormant Commerce Clause Claim

Even putting aside Kansas' textually rooted Election Clause authority to adopt the Out-of-State Distributor Ban, Plaintiffs' dormant Clause Commerce claim does not warrant any injunctive relief in light of the State's compelling regulatory interests that were neither motivated by, nor connected to, any concerns over economic protectionism. There is no intent whatsoever to favor in-state businesses to the detriment of out-of-state businesses. Indeed, Defendant Schwab's office would prefer that no Kansas resident return an advance mail voting application from any unofficial third party, whether it be domiciled in Kansas or elsewhere. To the contrary, his office desires that a Kansas voter only request and obtain an advance ballot application from either the Secretary of State's Office or a county election office. *See Ex. B.*

The primary thrust behind the Supreme Court's finding an implied, dormant component in the Commerce Clause is the avoidance of economic Balkinization. *See C&A Carbone, Inc. v.*

*Town of Clarkston*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”) (citations omitted). But there is no economic component to a state’s own election ballots. The issues involved on a ballot are, by necessity, peculiar to that jurisdiction and entirely local in nature. A state thus has every right to regulate such an internal matter unfettered by foreign state interference.

It is true that, under dormant Commerce Clause jurisprudence, “[u]nless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a ‘discriminatory law is virtually per se invalid.’” *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012), *aff’d*, 569 U.S. 221 (2013). However, a facially discriminatory statute is not necessarily unconstitutional if it is not designed for economic protectionism. *See e.g., Maine v. Taylor*, 477 U.S. 131, 148-49 (1986) (state law prohibiting importation of baitfish did not violate Commerce Clause because it served legitimate local purpose, i.e., protecting native fisheries from parasitic infection and adulteration by non-native species, that could not be served as well by available nondiscriminatory means). In fact, “[a]bsent discrimination for the forbidden purpose [i.e., economic protectionism], . . . the law ‘will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). While H.B. 2332 § 3(l)(1) may appear to be facially discriminatory as written – and we again emphasize that the true contours of the statute will not be known until after regulations are adopted by the Secretary of State – the purpose behind the law is in no way to protect Kansas businesses or any other forbidden purpose. Thus, the Court must apply the balancing test announced in *Pike*.

“Used in the absence of ‘discrimination for the forbidden purpose,’ *Pike* balancing requires courts to consider ‘whether the state law[ ] unjustifiably . . . burden[s] the interstate flow of articles of commerce.’” *McBurney*, 667 F.3d at 468 (quotation marks and citation omitted). Under *Pike*, the regulatory measure at issue is not subject to strict scrutiny and “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. at 142. “State laws frequently survive this *Pike* scrutiny[.]” *Davis*, 553 U.S. at 338–39.

Kansas has an indisputably legitimate interest in enacting legislation aimed at minimizing voter confusion, eliminating potential voter fraud, and preserving limited resources from having to be expended on rectifying problems flowing from the same, including having to wade through duplicative advance mail voting applications. See *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (“Avoiding voter confusion is also a compelling state interest.”); *Const. Party of Kan. v. Biggs*, 813 F. Supp. 2d 1274, 1279 (D. Kan. 2011), *aff’d sub nom. Const. Party of Kan. v. Kobach*, 695 F.3d 1140 (10th Cir. 2012) (“The state has a legitimate interest in avoiding voter confusion, deception, or other election process frustrations without presenting empirical evidence that the contested measure in fact reduces those risks.”). The Supreme Court has made “clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons*, 520 U.S. at 358.

Furthermore, the actual burden on interstate commerce here, if there is any, is *de minimis*. Plaintiffs may continue their voting outreach efforts virtually unabated. They may continue to communicate with Kansans about advance voting by almost any means, other than sending an advance voting ballot application itself. It is hard to see how such a minor restriction, when countered by the State’s overwhelming regulatory interest, fails to survive *Pike*’s balancing test.

Although strict scrutiny is not applicable here, Kansas could easily satisfy such a standard. “Common sense, as well as constitutional law, compels the conclusion that government must play

an active role in structuring elections; ‘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 processes.’” *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730). By requiring a person to be a Kansas resident if he/she desires to mail an advance mail voting application to a Kansas voter, the State not only greatly avoids the possibility of voters receiving duplicative advance voting applications, but it also ensures the State’s ability to verify the accuracy of the sender’s disclosures through Kansas records. (That is why, incidentally, the statute requires any in-state sender to provide a host of identifying information about itself. *See* H.B. 2332, § 3(k)(1).) Both interests are legitimate concerns that cannot be served through nondiscriminatory alternatives, and both are essential to ensuring a smooth and orderly election process.

### 3. – Kansas’s Status as a Market Participant in its Election Regulatory Process Further Undermines Plaintiffs’ Dormant Commerce Clause Claim

Moreover, the State, through Defendant Schwab’s office and local election offices, desires to be the only entity in Kansas distributing advance mail voting applications to Kansas residents. The State is thus a market participant, which serves as still another basis for defeating Plaintiffs’ dormant Commerce Clause claim.

The “market-participant exception reflects a basic distinction . . . between States as market participants and States as market regulators, . . . [t]here [being] no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” *Davis*, 553 U.S. at 339 (internal quotations omitted). “State and local governments that provide public goods and services on their own, unlike private businesses, are ‘vested with the responsibility of protecting the health, safety, and welfare of [their] citizens,’ . . . and laws favoring such States and their subdivisions may ‘be directed toward any number of legitimate goals unrelated to protectionism[.]’” *Id.* at 340 (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)).

The purpose of the Out-of-State Distributor Ban is not at all to promote Kansas businesses to the disadvantage of out-of-state businesses. Instead, the State favors its own Secretary of State's Office and local election offices to serve the legitimate goals of preventing voter confusion, avoiding potential fraud, and preserving the resources of its election offices by preventing them from having to sift through duplicative advance mail voting applications. Indeed, virtually every county in the State was confronted with sizable numbers of duplicative advance ballot applications in the 2020 general election due to a plethora of out-of-state companies sending multiple such applications to the same voters. This State goal is wholly unrelated to protectionism.

As previously noted, the Legislature was focused on facilitating Defendant Schwab's goal of allowing the State and counties to shoulder the burden of mailing advance mail voting applications to Kansas residents, as opposed to shifting the burden to private third-parties. This position is the exact opposite of a discriminatory intent. *See United Haulers Ass'n, Inc.*, 550 U.S. at 345 ("Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."). In sum, Plaintiffs' claim alleging a violation of the dormant Commerce Clause fails on every level, and there is no basis for granting injunctive relief.

***F. – Remaining Factors Governing Preliminary Injunction Motions Counsel Against Awarding Plaintiffs Any Relief***

In addition to Plaintiffs being unable to show a likelihood of success on the merits, none of the remaining factors governing motions for preliminary injunctions justify relief either. Given that the challenged statute does not even take effect until the beginning of 2022, and advance ballot will cannot be accepted until April 1, 2022, there is little chance that Plaintiffs will suffer any harm, let alone imminent and substantial harm, from a denial of preliminary injunctive relief at this stage. The State, on the other hand, would be injured. "[A]ny time a State is enjoined by a

court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quotation omitted); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (“a ruling of unconstitutionality frustrates the intent of the elected representatives of the people”). A court that too easily invalidates a statute that has made its way fully through the legislative process risks undermining public confidence in a government whose power was intended to flow from the citizenry itself. That is why a movant takes on a heightened burden when it requests temporary injunctive relief in the form of a facial challenge to a law enacted through the democratic process. The balancing this Court must undertake militates strongly in favor of denying Plaintiffs the relief they seek.

#### **IV. – Conclusion**

The unripe nature of the claims being litigated, the Plaintiffs lack of standing to pursue those claims in any event, the Defendants’ entitlement to sovereign immunity, the pendency of the ongoing state court lawsuit, and the lack of substantive merit of Plaintiff’s causes of action all dictate that Plaintiffs’ motion should be denied. Defendants request that the Court so rule.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that on July 22, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list, including counsel for the Plaintiff.

By: /s/ Bradley J. Schlozman

## Exhibit A (Shawnee County Case Petition)

ELECTRONICALLY FILED  
2021 Jun 01 PM 5:17  
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CASE NUMBER: 2021-CV-000299

**IN THE STATE COURT OF KANSAS  
DISTRICT COURT OF SHAWNEE COUNTY**

LEAGUE OF WOMEN VOTERS OF KANSAS,  
LOUD LIGHT, KANSAS APPLESEED  
CENTER FOR LAW AND JUSTICE, INC., and  
TOPEKA INDEPENDENT LIVING RESOURCE  
CENTER,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity as  
Kansas Secretary of State, and DEREK  
SCHMIDT, in his official capacity as Kansas  
Attorney General,

Defendants.

Original Action No. \_\_\_\_\_

**PETITION**

**INTRODUCTION**

1. Kansas voters turned out to vote in record-setting numbers in the 2020 general election. Over 1.3 million voters—nearly 72 percent of all registered voters—cast a ballot, making the election one of the highest statewide turnouts Kansas has ever seen. Over 450,000 voted by mail using an advance voting ballot, with another 370,000 submitting advance voting ballots in person—the largest number of advance voters in Kansas in its 25-year history of offering advance voting.

2. Not only did Kansas experience record voter participation in the 2020 election, the election went incredibly smoothly. The Deputy Assistant Secretary of State told the *New York Times* that “Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems,” and the Secretary of State’s office was “very pleased with how the election has gone.” The Secretary later reiterated this directly to the Kansas

State Legislature in testimony in January, in which he stressed that “[he didn’t] know how Kansas could do it better.” Kansas County election officers agreed. The Johnson County Election Commissioner credited the state’s advance voting system for making the election a “historic” success. And the Shawnee County Election Commissioner stated that he was “very happy with the way election day went with the public,” noting specifically that “the public’s made it pretty clear to us that they’re happy with it.”

3. The only people who seemed unhappy with the broad participation of the electorate in the 2020 election were the Republican majority in the Kansas State Legislature. Despite widespread and well-founded objections from voters, local churches, voter education organizations, and civil rights groups, the Legislature quickly moved forward with sweeping legislation—House Bill 2183 (“HB 2183”) and House Bill 2332 (“HB 2332”)—that is intended to and will have the effect of making it *harder* for lawful Kansas voters to participate in the state’s elections.

4. Together, HB 2183 and HB 2332 (which were enacted over the Governor’s veto), impose a myriad of unjustifiable and needlessly oppressive roadblocks (the “Challenged Provisions”) that will burden not only voters, elections officials, and organizers, but even good Samaritan friends and neighbors who want to assist their fellow citizens in effectively exercising their most fundamental right. Among other things:

- The Legislature has now made it a crime to assist and educate voters where the assistance could be subjectively perceived as assistance coming from an election official (the “Voter Education Restriction”). Specifically, the Legislature has empowered the State to criminally prosecute anyone who gives assistance to or educates a voter where the person providing assistance knows that their conduct

may “give[] the appearance of being an election official,” or “would cause another person to believe [the] person” is an election official. HB 2183, New Sec. 3. Notably, the law does not require that the person giving the assistance or engaging in the voter education *intends* to impersonate an election official. It is enough that it raises the possibility that another might come to this conclusion. As organizers well know, sometimes, even when they explicitly state that they are not elections officials, voters nevertheless come to the erroneous conclusion. This new criminal provision leaves Kansas citizens and organizers alike to guess as to when and whether their voter assistance and education activities might potentially be misperceived and, if they do not choose to abstain entirely from such activities, undertake them at their own risk. This threatens an enormous range of entirely innocent get-out-the-vote and voter education and assistance measures, without adequate specificity or justification.

- The Legislature has banned all people and organizations, including non-partisan organizations, who are not residents of Kansas from mailing “or caus[ing] to be mailed” mailers that include an application to sign up for an advance voting ballot (the “Advocacy Ban”). HB 2332, Sec. 3(1)(1). Specifically, the Legislature has imposed a penalty of \$20 *per advance voting application* that is sent from out of state, meaning that any nonresident organization or individual who encourages Kansas voters to sign up for advance voting by including applications in mailers would amass crippling fines for this act of advocacy. Additionally, without any justification, organizations within Kansas will be barred from partnering with

printing and mailing services located outside of the state if they wish to engage in this type of advocacy.

- The Legislature has imposed a new, nonuniform, and standardless statewide signature matching requirement for advance voting ballots sent by mail that ensures the arbitrary disenfranchisement of lawful Kansas voters based on the inexpert and error-prone evaluation of signatures by elections officials, ill-equipped to accurately identify true signature “mismatches” (the “Signature Rejection Requirement”). Even if the requirement that ballots with purportedly mismatched signatures were justified by any legitimate purpose, without any standards for enforcement, it guarantees that ballots across the state will be judged on highly differing standards. The requirement is all but certain to lead to higher rates of disenfranchisement of voters who are elderly, disabled, suffer from poor health, are young, or are non-native English speakers, populations who are particularly likely to have greater signature variability and therefore are especially likely to have their properly cast ballots rejected.
- The Legislature has made it a crime to help more than 10 voters deliver their advance voting ballots, suddenly closing off a relied-upon method that countless Kansas voters previously used to ensure their ballots were delivered to elections officials in time to be counted, despite there being no evidence whatsoever that this method has led to the casting or counting of fraudulent ballots (the “Delivery Assistance Ban”). This restriction—which applies even when voters identify and authorize a specific individual to return their ballot—imposes an arbitrary and unjustified restriction on populations who are more likely to rely on such critical

assistance, including but not limited to voters with disabilities, voters in group living situations, voters living in rural areas, Native voters on tribal lands, voters with limited access to transportation, and voters who have prohibitive work commitments, school schedules, or family care responsibilities. It also limits, if not altogether wipes out, the ability of organizations to engage in advocacy for voters who rely on their delivery assistance services, infringing on core political speech rights.

5. Together, the Challenged Provisions will make it more difficult for Kansans to vote, targeting in particular the precise voting method—advance voting—that helped Kansas achieve its historic participation in 2020, as well as the critical assistance that organizations like the League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., the Topeka Independent Living Resource Center and numerous other churches, community organizations, and concerned citizens provided to ensure that every Kansan knew how to safely and effectively cast their ballot. These burdens will not fall equally on all Kansas voters. Instead, they will make it far harder for specific communities, namely Kansas’s senior citizens, minorities, young voters, disabled individuals, and rural residents, to cast their ballots.

6. As Governor Kelly explained when vetoing HB 2183 and HB 2332, they “are a solution to a problem that doesn’t exist.” There is no significant evidence of voter fraud in Kansas elections, and these laws achieve no legitimate, much less compelling, state interest. Instead, they erect needlessly complicated and confusing restrictions within the Kansas election code such that certain voters will be unable to cast a ballot and organizations will be deterred from exercising their freedom of speech and association rights. The Kansas Constitution provides broad protections for its citizens’ rights, forbidding precisely these types of infringements on the most fundamental

of rights. The Challenged Provisions should be declared invalid and enjoined.

### **JURISDICTION AND VENUE**

7. This is an action for declaratory and injunctive relief authorized by K.S.A. 60-1701, 60-1703 (declaratory relief) and K.S.A. 60-901, 60-902 (injunctive relief). This court has jurisdiction pursuant to K.S.A. 20-301.

8. This Court has personal jurisdiction over Defendants Secretary of State Scott Schwab and Attorney General Derek Schmidt because they are state government officials sued in their official capacity. *See Merriman v. Crompton Corp.*, 146 P.3d 162, 168 (Kan. 2006); *see also* K.S.A. 60-308.

9. Venue is proper before this Court under K.S.A. 60-602(2) because this action seeks an injunction regarding “act[s] done or threatened to be done” by Defendants where they hold official office.

### **PARTIES**

10. Plaintiff League of Women Voters of Kansas (the “League”) is a nonpartisan nonprofit membership organization formed under section 501(c)(4) and section 501(c)(3) of the Internal Revenue Code that encourages informed and active participation in the political process as part of its mission. It is also a non-profit corporation, incorporated under the laws of Kansas.

11. From its roots in the suffragist movement, the League has promoted civic engagement through voting for more than a century in Kansas. It does this by registering thousands of Kansas voters each election cycle, educating Kansans about the voting process—including how to apply for an advance voting ballot and how to advance vote—and providing critical non-partisan information about candidates as well as ballot questions. In most election cycles, these voter engagements are primarily done through in-person interactions such as tabling at local fairs, grocery stores, or through providing civics instructional programs at Kansas high schools where,

among other things, the League encourages 16- and 17-year-old students to register to vote on their 18th birthdays. In addition, League members regularly assist voters by collecting and delivering their advance voting ballots. Through these activities, the League and its members interact directly with voters, encouraging them to participate in elections, conveying their message of political and civic participation, and assuaging any concerns that voters may have about voting.

12. Due to the pandemic, in 2020 the League's voter engagements turned largely virtual or, if done in person, at a social distance. For example, the League worked diligently to engage voters by organizing caravans of decorated cars to parade through communities of under-represented voters honking horns and waving banners encouraging these citizens to vote. Those caravans would promote the League of Women Voters' Education Fund website [Vote411.org](http://Vote411.org), which provides a wealth of information to guide voters through the voting process, as well as [KSVotes.org](http://KSVotes.org), a website managed by an independent nonprofit which allows voters to register and sign up to vote by mail as well as housing educational materials about ballot issues, candidates, and other matters to be decided by popular vote.

13. Based on its tracking of local League organizations and website traffic, the League conservatively estimates that it helped to register more than 2,000 Kansas voters in the 2020 election cycle. Because of the pandemic, the League also redoubled its efforts to get Kansas voters to request and then return their advance ballots. And as mentioned elsewhere, Kansas saw an unprecedented surge in the use of advance ballots, reaching its highest usage in the nearly three decades of use in Kansas. Many of these voters were using advance ballots for the first time and were unfamiliar with how to vote successfully using this method. The League and other organizations' work to help educate them and assist them through this process was critical to ensuring that they were not disenfranchised along the way as they familiarized themselves with a

new method of voting.

14. Several League members also provided direct assistance to voters who were unable to safely return their advance voting ballot by collecting and delivering advance voting ballots. For example, member Charley Crabtree helped nursing home residents in his hometown of Lawrence, Kansas deliver their completed advance voting ballots, collecting and delivering approximately 75 ballots for senior voters in at least ten different nursing homes. The League's and its members' efforts were a critical part of safeguarding Kansans' right to vote during a global pandemic and their actions ensured that, even under such circumstances, the League was able to fulfill its mission of advocating for full civic participation in Kansas.

15. The Challenged Provisions will make it harder, and in some cases impossible, for the League to achieve its mission moving forward. The Voter Education Restriction directly hinders the League's ability to engage in voter education and outreach as activities such as registering voters, educating them about the voting process, or even educating them about candidates, as these may also be activities that election officials engage in and individuals might mistakenly believe that they are election officials when they engage in these activities. Given the risk of heavy criminal penalties, the Voter Education Restriction threatens to significantly chill the League's and its members' engagement with voters in any of these ways, diminishing their ability to fulfill their mission and to fully exercise their free speech and association rights.

16. The Signature Rejection Requirement is also harmful to the League's members, many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature. The League is also extremely concerned about the impact the Signature Rejection Requirement will have on the broader Kansas electorate, countless of whom will be disenfranchised as the result of inexpert and arbitrary decisions by elections officials ill-

suited, ill-equipped, and untrained to be signature matching at all. Study after study has shown that not only are non-experts particularly bad at accurately “matching” signatures (something that is nearly impossible for even an expert to do accurately under the conditions that signatures are “matched” in elections), but that they overwhelmingly misidentify valid signatures as “mismatches.” Here, the consequences of that could mean total disenfranchisement.

17. Finally, the League’s members have, in multiple instances, collected and returned dozens of advance ballots—well above the ten-ballot limit. The Delivery Assistance Ban directly impedes their ability to continue to do this, limiting the number of voters they may interact with in this way, and also meaning that they will have to enlist other members, friends, or volunteers to ensure that the same number of ballots are collected in future elections

18. The League brings this suit on behalf of itself as well as its members across Kansas, many of whom will find it more difficult, if not impossible, to cast their ballots and participate in the democratic process if the Challenged Provisions stand.

19. Plaintiff Loud Light is a nonpartisan nonprofit organization formed under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code operating in Kansas whose mission is to engage, educate, and empower individuals from underrepresented populations, and in particular, young voters, to become active in the political process. Loud Light achieves these goals by hosting events on social media, direct person-to-person contact with potential voters, presentations in classrooms on college campuses and online, and sending educational mailers to voters. Loud Light and its members proceed from the fundamental belief that less voter turnout means fewer needs are met within the community. As a result, it focuses on strategies to increase turnout among Kansas’s young voters, who have traditionally suffered lower turnout rates. To achieve this goal, Loud Light also runs young voter registration drives, creates informative videos and other multi-

media content about how to participate in elections, builds coalitions within the community to advocate for positive policy changes for youth, and educates Kansans about how to engage the government.

20. For example, in 2020 and in previous election cycles, Loud Light's more than two-dozen student paid fellows, including eight Spanish-speaking fellows, and numerous volunteers encouraged voters to register to vote by implementing direct voter registration tabling on college campuses and in other locations, as well as running phone banking, canvassing, text banking, and other in-person events. In 2020 alone, Loud Light helped to register 9,621 voters, made 12,508 phone calls, sent 466,680 text messages, and mailed 115,775 pieces of mail. Loud Light also worked tirelessly to encourage voters to sign up for advance voting and to educate them on the process. For example, Loud Light produced a widely shared educational video about the advance voting process, "Mail Voting Explained 2020," which was viewed more than 220,000 times online. Loud Light also used its social media platforms to combat misinformation and provide updates to Kansans on rules, deadlines, and other information about the voting process. Loud Light also organizes ballot cure programs, contacting voters whose ballots are challenged by county election officers, including for mismatched signatures, and educating them on how to cure their ballots. Much of Loud Light's efforts focus on voters who election officials have been unable to contact, and many of these voters would not have known about their rejected ballot if it had not been for Loud Lights' contact. All of these efforts are aimed at ensuring that voters are able to register to vote, to cast their ballot, and, most importantly, have it counted. They are critical to Loud Light's ability to achieve its mission and also for it to interact with voters and convey its message of political and civic participation.

21. The Challenged Provisions will make it extraordinarily difficult for Loud Light to

continue its voter engagement efforts in the future. The Voter Education Restriction and its threat of criminal penalties will have a chilling effect on Loud Light's dozens of student fellows and hundreds of volunteers' political speech, as almost all of the activities discussed above could potentially lend themselves to being mistaken for the kinds of activity that an election official may engage in. Indeed, the President of Loud Light, Davis Hammet, has himself been mistaken for an election officer in the past, *not* because he has represented himself as an election officer, but because voters frequently and innocently mistake people who are knowledgeable about voter registration and election procedures as election officials.

22. The Advocacy Ban likewise significantly infringes on Loud Light's ability to exercise its free speech and association, as it limits the ways that it can engage with voters by dictating where the companies it can use to send mailers to voters must be located. As Hammet testified before the Legislature, Loud Light and other organizations will now be unable to engage with out-of-state organizations and companies of their choice to develop and send informational mailers that include advance voting applications in the future. Given the success of advance voting in the 2020 general election, Loud Light would like to be able to send advance ballot applications in future elections using mail vendors who are out of state. The Advocacy Ban prevents them from doing so.

23. Additionally, Loud Light will be significantly burdened by the standardless Signature Rejection Requirement. Because of the provision, Loud Light will have to expend greater resources educating the public about the lack of standards for signatures, and recruiting and training more staff and volunteers to help cure the disenfranchising effects of county election officials rejecting purportedly mismatched signatures.

24. Loud Light brings this suit on its own behalf and on behalf of its constituents across

Kansas, many of whom will find it more difficult, if not impossible, to cast their ballots and participate in the democratic process if the Challenged Provisions stand.

25. Plaintiff Kansas Appleseed Center for Law and Justice, Inc. (“Kansas Appleseed”) is a statewide 501(c)(3) nonprofit, nonpartisan advocacy organization dedicated to the belief that Kansans, working together, can build a state full of thriving, inclusive, and just communities. It is also a non-profit corporation incorporated under the laws of Kansas. To accomplish its mission, Kansas Appleseed works with community partners to understand the root causes of problems, support strong grassroots coalitions, advocates for comprehensive solutions so all Kansans can reach their full potential, and educates and engages voters across the state. In particular, Kansas Appleseed’s voter engagement work focuses on voter education and turnout in Southwest and Southeast Kansas where underrepresented populations, including voters experiencing food insecurity, immigrants, and minorities, are not afforded the same access to the ballot as others in Kansas. Kansas Appleseed seeks to increase voter engagement by organizing these communities and educating voters about candidates, issues on the ballot, and ways to vote through direct mailers, posting and amplifying social media content, text banking, as well as hosting in-person and virtual community relationship-building events. Kansas Appleseed also assists voters in remote and rural areas with returning their completed and sealed advance voting ballots to county election offices that would otherwise be inaccessible to the voter.

26. In 2020, Kansas Appleseed conveyed its message of civic and political participation by interacting with more than 13,000 voters through direct mail, digital communication, text banking, and virtual and in-person training and relationship-building events. It encouraged voters to sign up for advance voting as a means of helping to increase turnout among underrepresented and underserved populations, and sent mailers, including letters educating voters on how to register

to vote and about polling locations. Because of these efforts, turnout among Kansas Appleseed's target audience rose by 12 percent in the 2020 elections as compared to the 2016 election. Kansas Appleseed utilized companies in New York and Missouri to develop and send its mailers.

27. The Challenged Provisions burden Kansas Appleseed's efforts to educate and support voters, by interfering with their mission and chilling their ability to engage in political speech. the Voter Education Restriction directly hinders Kansas Appleseed's ability to engage in its voter education and outreach as activities without risking criminal penalties, because they have no way of knowing whether a voter may mistakenly presume they are elections officials given that many of the activities in which they regularly engage may also be the types of activities carried out by elections officials. Given the risk of heavy criminal penalties, Kansas Appleseed is chilled from engaging with voters in any of these ways, diminishing its ability to fulfill its mission and to fully exercise its free speech and association rights.

28. Similarly, Kansas Appleseed is also concerned about the Advocacy Ban, which places Kansas Appleseed at risk of being charged with criminal penalties if it mails absentee applications to voters and it continues to use the same out-of-state vendors it currently uses to send them, diminishing their ability to engage in this form of speech and associate with their constituencies in this way.

29. The Delivery Assistance Restriction directly impedes Kansas Appleseed's ability to continue to collect and deliver ballots, by limiting the number of voters they may interact with in this way, and effectively requiring them to enlist far more volunteers to ensure that the same number of ballots are collected in future elections.

30. Kansas Appleseed also brings this suit on its own behalf and on behalf of its members and constituencies across Kansas, many of whom will find it more difficult, if not

impossible, to cast their ballots and participate in the democratic process if the Challenged Provisions stand. Many of the individuals that Kansas Appleseed serves have relied on delivery assistance from the organization to cast their ballot. And the constituencies that Kansas Appleseed serves, as described above, are far more likely to have their ballot rejected due to purportedly mismatched signatures under the Signature Rejection Requirement.

31. Plaintiff Topeka Independent Living Resource Center, Inc. (the “Center”), is a federally-recognized not-for-profit Center for Independent Living operated and governed by people who themselves have disabilities. Its mission is to advocate for justice, equality and essential services for a fully accessible and integrated society for all people with disabilities. Additionally, the federal enacting legislation for the Center requires that it provide services aimed at achieving equal access for individuals with significant disabilities, such as voter registration, voter education, voter support, and voter advocacy. *See* 29 U.S.C. § 796f-4(c)(8)(E). For over 40 years, every single public event the Center has hosted has included voter registration and education. The Center recognizes that access to absentee ballots, permanent absentee ballots, and advance balloting options are critical to increasing voter turnout among individuals with disabilities. As a result, it promotes these forms of voting through its voter education programs and collects and delivers ballots for individuals with disabilities. In fact, in 2020, multiple volunteers affiliated with the Center collected more than 10 ballots in a single election thereby helping numerous Kansans with disabilities effectively cast their ballots and, but for the new laws enacted by the Legislature, would continue to provide this critical assistance to protect the enfranchisement of these voters in the future.

32. The Challenged Provisions will make it harder, and in some cases impossible, for the Center to achieve its mission moving forward. In particular, the Voter Education Restriction

directly hinders the Center's ability to engage in its voter education and outreach given the significant threat of criminal prosecution for doing so. The Center, its employees, and its volunteers are chilled from engaging with voters in any number of the ways that they have historically done so, diminishing their ability to fulfill their mission and to fully exercise their free speech and association rights.

33. Similarly, the Signature Rejection Requirement is also harmful to the Center's constituency, who are more likely to vote by advance ballot and, as a result, are more likely to be put at risk of signature mismatch and also to face substantial burdens in attempting to cure such a mismatch due to challenges with transportation.

34. Finally, the Center collects and returns dozens of advance ballots—well above the new ten-ballot limit. The Delivery Assistance Ban directly impedes its ability to continue to do this, limiting the number of voters that the Center may interact with in this way, while at the same time requiring that the Center expend more resources by enlisting additional volunteers in order to attempt to reach and serve the same number of disabled voters who require this type of assistance in future elections.

35. Defendant, Scott Schwab, is the Secretary of State of Kansas (the "Secretary"). The Secretary is the chief election official of the state and is responsible for carrying out the state's election laws. K.S.A. 25-204. He has a mandatory duty to train and provide instruction "for complying with federal and state laws and regulations" to county election officers. K.S.A. 25-124. The Secretary also has specific responsibilities flowing from the Challenged Provisions. He is charged with prosecuting election crimes, including offenses created by those laws. K.S.A. 25-2435(a)(3). He is further responsible for standardizing and providing county election officers with affirmation forms for advance ballots which voters, and anyone who assists them, must sign under

penalty of perjury. K.S.A. 25-1122d. He may be served at the Kansas Secretary of State's Office, Memorial Hall, 1st Floor, 120 S.W. 10th Avenue, Topeka, KS 66612-1594.

36. Defendant, Derek Schmidt, is the Attorney General of Kansas. He is responsible for defending the state's laws against constitutional challenges. K.S.A. 75-702. Like the Secretary, the Attorney General is authorized to investigate and prosecute election crimes. K.S.A. 25-2435(a)(2). The Attorney General also has specific responsibilities flowing from HB 2332's Advocacy Ban. HB 2332 mandates that the Attorney General "shall" investigate complaints filed by any individual regarding alleged violations of the Advocacy Ban, and may bring an action against any person he determines has violated the provision. HB 2332, Sec. 3(1)(2). He may be served at the Kansas Attorney General's Office, Memorial Hall, 2nd Floor, 120 S.W. 10th Avenue, Topeka, Kansas 66612-1594.

## STATEMENT OF FACTS

### **I. Kansas's 2020 general election was widely regarded as a resounding success.**

37. Despite the significant challenges presented by the COVID-19 pandemic, Kansas saw one of the highest rates of voter participation in its history, with nearly 72 percent of registered voters casting their ballots and making their voices heard.

38. Kansas's Deputy Assistant Secretary of State confirmed, "Kansas voters just did a tremendous job in exercising their right to vote" in 2020, with Kansas boasting "a record number of ballots cast, a record number of registered voters, [and] a record number of advance by mail ballots—both sent and returned."

39. Likewise, over 450,000 Kansans—the largest number since the state enacted advance voting 25 years ago—voted by mailing an advance ballot, and over 350,000 voted advance ballots in person.

40. Kansas's success in 2020 was not by chance. As the Secretary explained to the

Kansas House of Representatives, “Unlike many states which struggled to implement mail balloting for the first time, Kansas’s election system has 25 years of experience with mail ballots and has developed the institutional knowledge, procedures, and infrastructure to securely process the anticipated increase in mail ballot use at the general election. The Kansas election system’s ability to handle the surge in mail ballots in the 2020 election demonstrates the election system’s capabilities.”

41. Moreover, advocates and organizers from organizations like the League, Loud Light, Kansas Appleseed, the Center, and numerous other churches, community organizations, and concerned citizens worked tirelessly to educate Kansas voters on how to register to vote, apply for and vote by advance ballot, vote in person, and cure any ballots that were rejected for signature issues, as well as to assist them with collection and delivery of their voted, sealed advance ballots. These efforts reached thousands of voters who would otherwise have been disenfranchised and contributed to Kansas’ historic voter turnout.

42. The result was not just tremendous voter participation, election officials uniformly agree it was also a safe and secure election free from fraud.

43. The Secretary has confirmed that “Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems” to multiple newspapers.

44. And after the state completed its post-election audit of every ballot in all 105 counties, the Kansas State Board of Canvassers reported that “all votes have been accounted for and foul play, of any kind, was not found.”

45. As the Secretary explained to the Legislature in January: “I don’t know how Kansas could do it better.” “We don’t need a drastic change in our election law.”

**II. Without justification, the Legislature passed a sweeping set of voting restrictions that will impede access to the franchise and chill critical voter assistance.**

46. Nevertheless, as soon as the 2021 legislative session convened, Republicans in the Legislature moved swiftly to introduce several bills that severely restrict access to the franchise and chill voter education and assistance in myriad ways.

47. The justifications for these revisions to Kansas's elections laws after they had just resulted in record-setting voter participation in an election that was lauded as extremely secure were few and far between.

48. In most instances, the Legislature relied on little more than vague references to concerns about elections integrity or fraud that was rumored to have occurred in other states. Yet, no legislator pointed to even a *single* instance of fraud precipitating the need for these drastic changes.

49. As Democratic Senator Ethan Corson put it, “we keep hearing these vague things of I heard this there, somebody whispered in my ear this, somebody told me that they were concerned about that.” Yet “we don't have any actual proof.”

50. Even those who supported the bill admitted as much. For instance, Republican Senator Larry Alley conceded, the Challenged Provisions were concerned with “not what did happen, the issue is what *could* happen.”

51. Throughout the consideration of the suppressive bills, the Republicans seeking to move the legislation repeatedly acknowledged and agreed that Kansas elections are “fair, safe and secure,” that Kansas “ha[s] good election laws, and there are no “serious problems within Kansas.”

52. Given the lack of justifications, it is no surprise that the procedures that the legislators used to pass the Challenged Provisions were abnormal, allowing the Legislature to avoid serious substantive debate and study on the bills by engaging in a chaotic scramble to

consolidate a barrage of restrictive proposals that were raised and defeated as individual bills in the normal course into the laws now at issue here.

53. These procedures were a far cry from the type of thoughtful tailoring that is usually required when affecting fundamental rights.

**A. HB 2183's chaotic path to passage.**

54. HB 2183 was initially introduced in the House on January 28, 2021 as a measure to restrict the authority of the executive and judicial branches to modify election procedures. At that time, the bill prohibited the Governor and judiciary from altering election laws and prohibited the Secretary from negotiating election-related lawsuit settlements without approval from the Legislature.

55. In this form, the bill passed the House by a vote of 84 to 39 and was transmitted to the Senate for consideration on March 4.

56. HB 2183 quickly became unrecognizable in the Senate where the Senate Federal and State Affairs Committee began an effort to use last-minute amendments and procedural maneuvers to remake HB 2183 into new, omnibus election legislation.

57. After voting to advance the bill in its nearly-original form, the Committee performed a “gut-and-go,” stripping the bill of the original House language and inserting entirely different proposals, many of which had previously failed or stalled when the legislation was considered in the House, or when similar legislation was considered in previous legislative sessions.

58. Republican Mike Senator Peterson was candid about what was going on, explaining that: “We’re trying to put [other proposals that were previously introduced in the Senate] in a House bill [that has already passed] so it can get to Conference [Committee].”

59. Once the bill was reconfigured, the original contents of HB 2183 and another bill

were then inserted into HB 2332, the other law at issue here.

60. Republican Senators openly acknowledged that this was an unusual procedural maneuver. Senator Jeff Longbine conceded, “We have not passed out the three bills individually. What we’re going to do is place three bills into one bill and then pass that bill out favorably.” He admitted that this meant that the legislature was, “now voting for all three of these bills instead of individually.”

61. Ultimately, the final form of HB 2183 included provisions from several other bills as well as largely unvetted floor amendments that skirted the committee process, all of which had been met with opposition and were supported by little justification. The pertinent Challenged Provisions of HB 2183 are discussed below.

62. ***Voter Education Restriction.*** Added to HB 2183 as a floor amendment during a meeting of the Committee of the Whole on March 31, the Voter Education Restriction creates a new level 7, nonperson felony offense called “false representation of an election official.” Sec. 3(a).

63. While the name of the crime appears reasonable enough, the definition of the crime is anything but.

64. HB 2183 sets forth a sweeping definition of false representation, providing not only that anyone who knowingly “[r]epresent[s] oneself as an election official” is subject to prosecution, but also that anyone who “(2) engag[es] in conduct that *gives the appearance of being an election official*; or (3) engag[es] in conduct that would *cause another person to believe a person engaging in such conduct* is an election official,” is also subject to criminal penalties. Sec. 3(a)(1)-(3).

65. It defines election official as “the secretary of state, or any employee thereof, any

county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office.” Sec. 3(c).

66. No Senator provided any examples of election official impersonation necessitating the creation of the new crime, nor was any definition or limiting language provided to curb the expansive reach of the offending conduct.

67. Likewise, no Senator indicated why Kansas’s existing crime for “false impersonation” of a government official, which is carefully limited to “representing oneself to be a public officer” or “public employee,” with “knowledge that such representation is false,” K.S.A. 21-5917, and carries only a misdemeanor penalty, was not sufficient to address the targeted conduct. *Id.*

68. ***Signature Rejection Requirement.*** The newly configured HB 2183 also provides that no county election officer shall count “an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter’s signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter’s registration form.” Sec. 5(h).

69. The law specifies that “[s]ignature verification may occur by electronic device or by human inspection,” *id.*, leaving the method and standard for verification up to the discretion each of the 105 Kansas counties.

70. Ironically, Senators justified passing the Signature Matching Requirement due to a need for uniformity amongst counties, some of which had already been engaging in signature matching of advance ballots and others which had not.

71. But no one provided any evidence of fraud or other issues that would support requiring signature matching in *any* of the counties, much less statewide. In fact, as Senator Brenda Dietrich explained in Committee, the very individuals most likely to know if there were problems related to signatures (i.e., county election officers), “[didn’t have] an opportunity to weigh in,” on the bill.

72. Moreover, the Legislature expressly recognized that the standard for determining a “match” was entirely up to the counties, in stark contradiction to any professed need for uniformity. Specifically, when Senator Ware asked during a Federal and State Affairs Committee hearing about the definition of “match,” a staff attorney confirmed for her and the Committee that “there is no statutory definition for a match and so it would fall to common usage and be up to the discretion of the county election officer.”

73. ***Delivery Assistance Ban.*** The final version of HB 2183 also includes a ban on assisting voters with the collection and delivery of their advance ballots. It incorporates language from an earlier Senate bill (SB 292) that was introduced this year to revive a similar House Bill that died in the House Elections Committee during 2020 session (HB 2684) in response to the same concerns that Plaintiffs and others have raised about the impact of restrictions on delivery assistance.

74. Specifically, HB 2183 provides that “[n]o person shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, unless the person submits a written statement accompanying the ballot at the time of ballot delivery to the county election officer or polling place as provided in this section. Any written statement shall be signed by both the voter and the person delivering such ballot and shall be delivered only by such person. The statement shall be on a form prescribed by the secretary

of state.” HB 2183, New Sec. 2(a).

75. The bill further imposes an across the board quantitative ban, declaring that, “No person shall deliver more than ten advance voting ballots on behalf of other voters during an election.”<sup>1</sup> This ban applies regardless of whether the written statement described above is obtained from the voter and submitted when the ballots are delivered.

76. Public opposition to any limitations on ballot collection and delivery—a service that numerous voters used, and several organizations provided in 2020—was overwhelming, and the justification for the Ban were few.

77. When questioned about the Delivery Assistance Ban on the floor, the Republican Chair of the Federal and State Affairs Committee Senator Alley said that it was needed because there had been “allegations of ballot harvesting” in other states. Crucially, he was not willing to assert that this was an actual problem, just rumor: “I’m not saying they were true, but there were allegations. What we want to do is not have those type of allegations here in Kansas.”

78. Repeatedly, Senator Alley (and others) confirmed that they were not aware of any such problems in Kansas. The best he was able to offer was that, “we’ve always heard that some guy found a box of ballots here in the janitor’s closet,” but even then he immediately admitted, “I don’t have any details. We have heard of it happening, we don’t know if it happened in Kansas.”

79. The same was true of the other Challenged Provisions. Over and over again it was made clear that the laws were not being revised because of actual problems, but simply mere rumors of problems. Rumors, that apparently the legislative majority felt were sufficient to justify making it harder for countless lawful Kansas voters to successfully cast their ballots.

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<sup>1</sup> The final version of HB 2183 that passed the Senate limited ballot collection to just five ballots; however, in conference committee, a representative from the House proposed changing the five-ballot limit to ten, and it is the ten-ballot limit that was ultimately enacted.

80. Having been fully remade, HB 2183, including the Challenged Provisions, passed during a floor session on March 31, 2021.

**B. HB 2332's unusual path to passage.**

81. HB 2332 was initially introduced in the House on February 10, 2021. In its original form, it was deemed a “disclosure bill” by its sponsor, simply specifying certain new necessary requirements and qualifications for organizations and individuals who mail advance ballot application materials to voters in an effort to address “voter confusion” by voters who had received multiple third-party mailers in 2020.<sup>2</sup>

82. The bill was assigned to the House Elections Committee on February 10, and at the last minute before the House moved it out of Committee, Committee Chair, Republican Representative Blake Carpenter, moved to add new language to HB 2332 to introduce the Advocacy Ban, which would prohibit all nonresidents from “mail[ing] or caus[ing] to be mailed an application for an advance voting ballot.” Sec. 3(l)(1).

83. This Advocacy Ban immediately caused confusion in the Elections Committee. Legislators professed to different interpretations of the provision and expressed their confusion about whether the provision would apply to an organization that uses out-of-state printers.

84. Ultimately, no answers were provided, and the Committee advanced the bill with the Advocacy Ban intact.

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<sup>2</sup> Specifically, the new requirements imposed by HB 2332 state that “[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 shall include on the exterior of such mailing, and on each page contained therein, except the application, a clear and conspicuous label in 14-point font or larger that includes: (A) The name of the individual or organization that caused such solicitation to be mailed; (B) if an organization, the name of the president, chief executive officer or executive director of such organization; (C) the address of such individual or organization; and (D) the following statement: ‘Disclosure: This is not a government mailing. It is from a private individual or organization.’” Sec. 3(k).

85. The bill passed in the House without further discussion by a vote of 86 to 38 on March 3 and was transmitted to the Senate.

86. HB 2332 was introduced in the Federal and State Affairs Committee on March 16, with the House sponsor explaining that the Advocacy Ban was added to ensure out-of-state organizations and individuals are altogether “prohibited from, basically, getting involved in Kansas’s elections and trying to mail advance voter applications.”

87. During the Committee hearing, Kansas organizations, including most Plaintiffs, raised concerns about the Ban. For example, the President of Loud Light, questioned whether the Ban was, “even constitutional? Because, essentially, what it is doing is it blocks Kansas citizens from legally engaging with business with out of state mailing vendors. So, if [an organization] wanted to hire an Oklahoma City vendor to send out this mailer, right now this appears to be illegal and [it] could amass huge fines for that.” He urged Senators to recognize the Advocacy Ban is not a “carefully crafted” solution.

88. Advocacy organizations were not the only ones to caution the Legislature on this issue. In fact, as early as January the Secretary “caution[ed] that the issue was complex and that if [the House Elections Committee] chooses to address the topic it should do so through an interim committee that can fully explore the issue.” No such exploration took place.

89. Instead, HB 2332 was quickly workshopped on March 25 and 26, when the Senate Committee proceeded to engage in another “gut and go” maneuver, adding several other restrictions to the bill before it took its final form.

90. HB 2332 and its Advocacy Ban passed in the Senate by a vote of 28 to 12 on March 31, 2021.

**C. Legislative override of the Governor’s veto.**

91. After passage, the Challenged Provisions proceeded to Conference Committee on

April 8, where they were reconciled, reported out of conference, and approved by both chambers that same day.

92. Both the House and Senate passed the final version of HB 2183 along a nearly party line vote, with all but four of the present Republican Representatives voting for the bill for a final vote of 80 to 42, and all present Republican Senators voting for the bill for a final vote of 27 to 11.

93. The final vote on HB 2332 was similarly party line, with all present Republican Representatives voting yes for a final vote of 83 to 38, and all present Senate Republicans voting in favor of the bill for a final vote of 27 to 11.

94. Both bills were sent to Governor Kelly for her signature.

95. Recognizing the unconstitutional burdens they imposed as well as the lack of any justification given the historic success of Kansas's elections, the Governor exercised her authority under Article 2, Section 14(a) of the Constitution to veto each of the bills on April 23, 2021.

96. She explained: "Although Kansans have cast millions of ballots over the last decade, there remains no evidence of significant voter fraud in Kansas. This bill is a solution to a problem that doesn't exist. It is designed to disenfranchise Kansans, making it difficult for them to participate in the democratic process, not to stop voter fraud."

97. The Legislature returned to Topeka on May 3, 2021 and voted to override the Governor's vetoes. The laws will take effect on July 1, 2021.

### **III. The Challenged Provisions burden the right to vote and chill free speech and association rights.**

#### **A. *Voter Education Restriction***

98. The Voter Education Restriction's broad prohibition on "engaging in conduct that gives the appearance of being an election official" or "engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official," and its

corresponding criminal penalties (which are punishable by up to 15-17 months in prison), burden Plaintiffs' ability to engage in nearly all voter education and engagement work.

99. These efforts are key pieces to accomplishing Plaintiffs' missions and are the primary mediums through which Plaintiffs communicate their beliefs in the power and importance of participating in democratic elections, including to the very voters who they communicated with successfully in 2020.

100. Plaintiffs engage in protected political speech and association when they interact with Kansas voters to persuade them to cast their ballots and assist them in registering to vote, obtaining an advance ballot application, submitting an advance ballot, and educating voters on where and how to vote in person. Encouraging voters to participate in the democratic process through this assistance are forms of political speech and expressive conduct inherently tied to Plaintiffs' missions.

101. For example, in 2020, Plaintiff Kansas Appleseed engaged with nearly 14,000 eligible voters to educate them on voter registration, ballot initiatives, and generally encourage and advise them on how and where to cast a ballot. This work had a marked effect on Kansas' 2020 elections: Among the voters that Plaintiffs targeted, turnout rose by 12 percent compared to the 2016 election.

102. Likewise, Plaintiffs Loud Light, the League, and the Center and their members and volunteers have regularly expended significant resources encouraging voters to participate in elections, educating them on how to vote, and registering them to vote.

103. All of these activities directly allowed Plaintiffs to interact with voters and convey their core message of political participation and civic engagement, a message that would have been diminished or wholly stifled if it had not been able to engage with voters in this way.

104. The Voter Education Restriction unduly hinders Plaintiffs from engaging in virtually all of this activity. This is because the definition of “false representation of an election official” is inherently subjective, as there is no way to know whether a voter who interacts with Plaintiffs will mistakenly believe that they are communicating with election officials. Especially when many of Plaintiffs’ activities overlap with actions that election officials may take, such as educating and encouraging eligible voters to register to vote and working to expand voter turnout through direct voter engagement.

105. For example, Johnson County advertises its voting and election-related speaking events, works with students to advance civic engagement, and holds “[f]airs and events to promote the engagement of citizens.” Plaintiffs, too, engage with young voters, hold events to expand political engagement, and generally educate and work to advance civic engagement and increase representation, especially through voter registration and direct voter engagement.

106. And though HB 2138 requires an actor to “knowingly” misrepresent themselves as an election official, the law places the burden on Plaintiffs to convince law enforcement that they have not “knowingly” *appeared* to be election officials or “knowingly” caused *another* to believe they are election officials.

107. Thus, the threat of criminal penalties for virtually any and all of the activities that Plaintiffs engage in deters Plaintiffs, their members, and volunteers from engaging in even the most basic voter education activities for fear of prosecution, stifling their voice, limiting their ability to freely communicate their message and associate with voters, and preventing them from accomplishing their missions.

108. Because HB 2183’s Voter Education Restriction significantly inhibits their protected speech and association rights, it can only be upheld if it is narrowly tailored to serve a

compelling state interest. *Buckley v. American Cont'l Law Found., Inc.*, 525 U.S. 182, 192 n.12 (1999). But Kansas has not provided *any* state interest to justify HB 2183's burdens on core political speech and association.

109. Indeed, this challenged provision was added by Senator Tyson immediately before the final vote as a floor amendment without explanation or debate, eliminating any chance for proponents or opponents to testify on the matter.

110. Even if the Legislature had a justification for enacting the Voter Education Restriction, the provision is not narrowly tailored to any interest, as it attempts to encompass *any kind of action* that Plaintiffs might adopt to engage with and educate voters.

111. This is in stark contrast from the existing crime of "false impersonation" of a government official, which is carefully limited "representing oneself to be a public officer" or "public employee," with "knowledge that such representation is false," K.S.A. 21-5917, and carries only a misdemeanor penalty. *Id.*

112. Thus, under the regime created by HB 2183, a person who might be mistaken for an election official would be liable for a felony, while a person who intentionally represents any other government official is guilty of a misdemeanor. Such criminal penalties no doubt chill core political speech of Plaintiffs, and any other organizations whose mission is to educate voters and encourage them to vote.

**B. *The Advocacy Ban***

113. The Advocacy Ban limits Plaintiffs' political speech by prohibiting them from engaging with out-of-state vendors to mail advance voting ballot applications to eligible voters. HB 2332 Sec. 3(1)(1) ("[n]o 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").

114. Violating this provision carries heavy liability. Under the new law, any individual

may file a complaint in writing with the attorney general alleging a violation of the Advocacy Ban, and the law specifies that the attorney general must investigate and may file an action against any person found to have violated this subsection.

115. The law also specifies that any person who violates this provision is subject to a civil penalty of \$20, and that each instance in which a person mails an application for an advance voting ballot in violation of this section constitutes a separate violation. Where hundreds of mailers are sent out, this fine can quickly multiply and become substantial.

116. Plaintiffs regularly engage with voters and out-of-state vendors by providing application materials to help voters register to vote by mail. For example, Plaintiff Kansas Appleseed contracts with vendors in Pennsylvania and Missouri to develop and mail postcards to eligible voters in Kansas to start a dialogue about the importance of voting and educate voters on where to find their polling places. Likewise, Plaintiff Loud Light regularly contracts with out-of-state vendors for similar mailers.

117. In doing so, Plaintiffs are able to interact with significantly more voters and to fully express their core message of political and civic engagement. Given the increase in advance voting, Plaintiffs view mailing advance voting applications as an important way to engage with their voters in the future but will be prohibited from doing so by the Advocacy Ban if they use the same cost-effective out-of-state mail vendors that they currently use for other advance ballot mailings.

118. The Advocacy Ban will therefore not only hinder out-of-state organizations from directly engaging in Kansas, it also inhibits Kansas organizations from contracting with out-of-state vendors to engage with Kansas voters when educate them on applying for advance voting.

119. When these very concerns were raised by Loud Light during committee hearings, *see supra* Section II, B, no one could assure them otherwise.

120. HB 2332 restricts Plaintiffs' core political speech and can only be upheld if it is narrowly tailored to a compelling government interest. *Buckley*, 525 U.S. at 192 n.12; *Meyer v. Grant*, 486 U.S. 414, 421 (1988). Much like the Voter Education Restriction, there is no interest supporting the Advocacy Ban, which was offered with no explanation, other than to keep out-of-state organizations from sending mail to Kansas.

121. Moreover, the Advocacy Ban is not narrowly tailored because it does not include exceptions for Plaintiffs, who must engage in activities prohibited by this provision to accomplish their goals.

### **C. *Signature Rejection Requirement***

122. HB 2183 imposes a statewide Signature Rejection Requirement that by its very terms endorses the use of standardless, nonuniform signature matching procedures across Kansas's 105 counties.

123. The Signature Rejection Requirement is certain to disenfranchise lawful Kansas voters—including many of the senior citizens, minority, and young voters who relied on advance voting in the 2020 general election, as well as Plaintiffs' members and constituents—and subject others to needless additional steps simply to ensure their lawfully cast ballot is counted.

124. Pursuant to the law, county election officials statewide are now required to reject any advance ballot transmitted by mail where the county official determines that the signature does not match the signature on file for the voter's registration records.

125. The law states that signature matching "may occur by electronic device or by human inspection." HB 2183, Sec. 5(h). No other standards are provided, leaving Kansas's 105 county election officials to choose for themselves the method and process of verification they will use.

126. But signature verification by laypersons is inherently unreliable, and non-experts

are significantly more likely to misidentify authentic signatures as forgeries.

127. In one study, for example, laypersons falsely declared authentic signatures to be inauthentic at least 26 percent of the time, despite having access to six authentic reference signatures for comparison. K. Gummadidala, *Signature authentication by forensic document examiners*, J. Forensic Sci. 46(4), 884-88 (2001).

128. Accurate signature matching is particularly difficult because it is common for handwriting to change. Age, illness, injury, medication, eyesight, alcohol, and drugs; mechanical factors, such as pen type, ink, writing surface and position, and paper quality; and psychological state of mind all can affect a person's handwriting and cause an untrained layperson to misjudge a signature. *See, e.g.,* Tomislav Fotak, et al., *Handwritten Signature Identification Using Basic Concepts of Graph Theory*, 7 WSEAS Transactions on Signal Processing 145 (2011).

129. As one Senator explained on the floor, even she experiences significant fluctuation in her handwriting due to metal plates in her wrist that were inserted after an accident years ago.

130. Voters who are elderly, disabled, suffer from poor health, are young, or are non-native English speakers are particularly likely to have greater signature variability and therefore are especially likely to have their properly cast ballots rejected under Kansas's standardless Signature Rejection Requirements. *See* Michael P. Caligiuri, et al., *Kinematics of Signature Writing in Healthy Aging*, 59 J. Forensic Sci. 59(4), 1020 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4077921/> (concluding that the "advanced age of a writer likely contributes to uncertainty and reduced reliability in the document examiner's judgment of authenticity").

131. It is therefore inevitable that Kansas election officials who choose to inspect signatures by hand will erroneously determine voters' signatures are mismatched, leading to

wrongful rejection of legitimate ballots and the disenfranchisement hundreds of eligible voters, as well as disparate rates of disenfranchisement across counties.

132. As a result, organizations like Loud Light, who regularly assist voters in curing problems with their advance voting ballots will have to expend more resources to do so to ensure that they reach the increased number of individuals whose ballots are all but certain to be rejected.

133. Moreover, the option for machine verification of signatures does not solve this problem. Rather, it only reinforces the variability of signature matching across counties as there is simply no guarantee that cash-strapped counties will employ this expensive equipment.

134. And even the best machines may, in some instances, require human inspection where they are unable to confirm a match, placing voters back in the position of having their signature mismatched by untrained human eyes and their vote discarded.

135. As one federal court found, the absence of any standards or training to differentiate between natural signature variation and signature mismatches—much less the express endorsement of differing standards in Kansas—results in “a crazy quilt of enforcement of the requirement from county to county.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019).

136. While it is true that the law provides that voters with a disability that would prevent them from having a signature consistent with their registration are exempt from the Rejection Requirement, HB 2183, Sec. 5(h), this does not sufficiently ameliorate the burdens imposed by the Signature Rejection Requirement on disabled voters.

137. Advance voting is crucial to many voters with disabilities, particularly those with ambulatory disabilities, making them more likely than the general population to be subject to the Signature Rejection Requirement.

138. Indeed, in 2020, more than 51 percent of voters with disabilities voted by mail, compared to 44 percent of voters who have no disability. Lisa Schur & Douglas Kruse, U.S. Election Assistance Commission, *Disability and Voting in the 2020 Elections: Final Report on Survey Results* tbl. 5 (Feb. 16 2021), <https://www.eac.gov/election-officials/us-election-assistance-commission-study-disability-and-voting-accessibility-2020>.

139. And even well before the pandemic, when all people were more likely to vote by mail, more than 40 percent of individuals with disabilities voted by advanced or absentee ballot, often out of necessity. Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 *McGeorge L. Rev.* 1015, 1017 (2007); *see also*, e.g., Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 *Stan. L. Rev.* 1491, 1509 (June 2016).

140. While some voters may have a disability that exempts them because it is expressly related to their ability to sign the advance ballot, many others will have disabilities that are unrelated to their handwriting. Nevertheless, just like any other voter, their handwriting may be inconsistent with their registration form for the myriad of reasons noted above, making them subject to a signature mismatch determination. This is especially true where registration signatures may have been obtained years earlier and where counties also rely on inconsistent sources for the signatures to match against.

141. Further, the law does not provide any way for county election officials to know for certain if someone has a disability preventing the voter from having a signature consistent with their registration form outside of their being listed on the Permanent Advance Voter List, but as the Director of Policy and Advocacy for the Disability Rights Center of Kansas explained to the Legislature while they were considering the provision, “You can’t just assume everyone on the

Permanent Advanced List is all the people with disabilities.”

142. And the fact of the matter is that the handwriting of *any* individual can be inconsistent with their registration form.

143. Likewise, it is of little help that the law purports to provide voters with an opportunity to cure any perceived signature mismatches. The law suggests that, when a county election official believes that the signature on a voter’s advanced ballot does not match a signature in the voter’s registration file, that county election officials should attempt to contact and the voter and allow them the opportunity to correct the deficiency before the commencement of the final county canvass.

144. But there is no guarantee that such voters will be actually contacted, and even when they are, virtually every aspect of that contact and any opportunity to cure are left to the discretion of county election officials. County election officials determine how much time voters have to cure perceived mismatches. *See* K.S.A. 25-1124(b), 25-3104 (allowing voters to cure a purported signature mismatch signature until the commencement of the county canvass, which is in the discretion of the county election officer). Also left to their discretion is the manner by which they attempt to notify the voter, and aggressively they attempt do so (*e.g.*, by mail, phone, or email; only once or several times).

145. In other words, whether and how a voter is actually notified, and how long they will have to address an erroneously flagged signature “mismatch” (or even how they may “cure” it), are all subject to significant variance depending on the voter’s place of residence, and how that jurisdiction manages the process. This only ensures that the rates of signature mismatches will be disparate as voters in some counties will be granted far more time to cure than others.

146. As Loud Light’s ballot cure program in past elections demonstrates, election

officials in counties that have previously engaged in signature matching have often failed to contact voters, let alone contact them with sufficient time for those voters to cure any perceived signature mismatch. Such a scheme leaves the fate of many people’s votes to depend on the availability of volunteers who work to help track down voters who would otherwise be disenfranchised.

147. Recognizing these grave issues, courts across the country have struck down Signature Rejection Requirements just like Kansas’s for these same reasons. *See, e.g., Lee*, 915 F.3d at 1320 (“[E]ven if election officials uniformly and expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures.”); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018) (“As will become evident, this signature-matching process is fundamentally flawed.”); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339–40 (N.D. Ga. 2018) (enjoining signature match scheme because it violated due process guarantees); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at \*7 (N.D. Fla. Oct. 16, 2016) (ballot rejection rules “ha[ve] categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time”); *LULAC v. Pate*, No. CVCV056403, 2019 WL 6358335, at \*15–17 (Iowa Dist. Ct. Sept. 30, 2019) (rejecting signature match scheme as violation of due process and equal protection).

**D. Delivery Assistance Ban**

148. The collection and delivery of advance voting ballots was critical to ensuring that Kansans could exercise their right to vote in the 2020 general election.

149. In particular, many of Kansas’s most vulnerable citizens needed ballot collection and delivery assistance. Those citizens include seniors, minority voters, rural voters in western Kansas where mailboxes are often centrally located in communities far away from individual homes, Native voters living on tribal lands who may have to travel for hours on unpaved roads to

access mail services or election offices, and Kansans with limited access to transportation, work commitments, school schedules, and family care responsibilities that would otherwise prevent them from voting.

150. Similarly, Kansas voters who needed to return an advance ballot by mail but could not because there was not enough time for the ballot to arrive in the mail to the county election official before the deadline also utilized such assistance.

151. As the Executive Director of the Disability Rights Center of Kansas testified before the House Elections Committee: “[m]any Kansans with disabilities also have cognitive or other impairments that may make it difficult for them to remember to mail back their advanced ballot so that it arrives at the election office on time,” and restricting ballot collection would “disproportionately harm Kansans with disabilities.”

152. All of these voters voluntarily chose to provide trusted representatives of community organizations like Kansas Appleseed, League members, churches, campaigns, or friends and neighbors with their sealed advance ballots to return to county election offices or other drop-off sites.

153. HB 2183’s ten-ballot limit on returning advance voting ballots and corresponding threat of criminal penalties up to six months of jail and a \$1,000 fine will create barriers for these voters.

154. Indeed, for representatives from organizations like Kansas Appleseed and the Center, as well as members of the League who engage in ballot collection and delivery assistance, they will be limited to collecting just 10 ballots per representative, meaning that they will have to recruit substantially more volunteers to assist voters and, in some cases, may not be able to recruit enough, effectively chilling them and organizations or individuals like them from providing any

ballot collection services at all.

155. Likewise, the threat of criminal penalties also dissuades and discourage volunteers from collecting any ballots at all.

156. As a result, voters will have significantly reduced options for returning their ballots and some, particularly those without access to reliable mail or transportation, may not be able to return them at all.

157. The testimony in opposition to placing restrictions on ballot collection made this clear. Nuns who live in group homes in Kansas explained to the Senate Committee considering an earlier version of this bill that “many of our sisters who are perfectly capable of voting but would find it very hard to take their own ballot to the Court House or even to a drop box.”

158. Another voter who lives in a group living environment explained that “[t]here are several of these homes in Concordia. [The Delivery Assistance Ban] would impact several hundred of us without considering that our population is made up of good, kind neighbors who know and love each other.”

159. Rabbi Moti Rieber told the Legislatures that the Delivery Assistance Ban “is a particular concern for communities of faith, because they often collect and deliver ballots from shut-ins, the elderly, the disabled, and others who are restricted in their movements. This bill would therefore prevent communities of faith from fulfilling a vital part of their community support role.”

160. For minority voters, ballot collection is also a way to directly counteract the effects of systemic discrimination that have resulted in burdens disproportionately carried by minority communities. As Glenda Overstreet Vaughn of the Kansas State Conference of the NAACP submitted in testimony opposing the Delivery Assistance Ban, “[m]any of the voters that are disabled, elderly, and disadvantaged depend on the NAACP, church members, neighbors, friends

and family to assist them in turning in their ballots to the election office because they are untrusting of the establishment.”

161. Moreover, the Delivery Assistance Ban imposes this 10-ballot limit for no discernable reason as HB 2183 also provided for the inclusion of a signed, written statements by both the voter and the person collecting the ballot swearing that the voter authorized the person providing assistance to deliver their ballot and that the voter has not been not unduly influenced. Accordingly, any concerns about fraud are already addressed by that statement, and there is simply no reason for a corresponding limit on the number of ballots that can be collected.

162. Accordingly, there is little question the Delivery Assistance Ban will severely burden Kansas voters and organizations alike and will do so for no reason.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### *Violations of Freedom of Speech, Association* (Kan. Const. Bill of Rights §§ 3,11)

163. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

164. Section 3 of the Bill of Rights of the Kansas Constitution promises Kansans “the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances.”

165. Section 11 of the Bill of Rights states that “all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights.”

166. The Kansas Supreme Court has recognized that these freedom of speech rights are “secured against abridgment” by the state Constitution. *Unified Sch. Dist. No. 503 v. McKinney*,

236 Kan. 224, 234 (Kan. 1984). These “are among the most fundamental personal rights and liberties of the people.” *Id.*

167. The Kansas Supreme Court “customarily interpret[s]” the provisions of the Kansas Constitution “to echo federal standards.” *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920 (2006). As such, Kansas courts have understood these freedom of speech provisions of the state Constitution as analogous to the U.S. Constitution. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (Kan. 1980); *see also, e.g., State v. Smith*, 57 Kan. App. 2d 312, 317–18 (2019).

168. Under the First Amendment, an activity aimed at encouraging voters to participate in the political process is considered constitutionally protected “core political speech” because it involves “interactive communication concerning political change.” *Buckley*, 525 U.S. at 186; *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

169. Relying on these cases, the Kansas Supreme Court has recognized that communication aimed at “effect[ing] political change” is “political speech” that is “entitled to the highest level of constitutional protection.” *In re Comfort*, 284 Kan. 183, 205 (2007) (internal quotation marks omitted).

170. Restrictions involving limitations on core political expression are subject to exacting scrutiny and are valid only if they are “narrowly tailored to serve an overriding state interest.” *Buckley*, 525 U.S. at 186; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

171. Plaintiffs’ efforts to engage Kansas voters and encourage them to participate in the political process by registering them to vote; educating them on how to vote in Kansas; assisting them with applying for and voting by advance ballot, voting in-person, and assisting in the collection and delivery of their completed advance ballots, as well as the conversations and interactions between volunteers and voters surrounding these activities, are the types of interactive

communications concerning political change that are properly understood as core political speech. *Meyer*, 486 U.S. at 421.

172. Whether a voter should register, vote, and ultimately participate in an election is a “matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking criminal sanctions.” *Id.* at 421; *see also Buckley*, 525 U.S. at 186-87.

173. The Voter Education Restriction, Advocacy Ban, and Delivery Assistance Ban all impose severe burdens on Plaintiffs’ core political speech, diminishing their ability to convey their message and further it by engaging more individuals in the political process without any compelling state interest to justify these burdens in violation of Kansas’s Bill of Rights.

174. ***Voter Education Restriction.*** The Voter Education Restriction’s threat of criminal prosecution for “engaging in conduct that gives the appearance of being an election official” or “engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official,” H.B. 2183 New Sec. 3(a)-(b), is a severe burden on Plaintiffs’ free speech and association rights under the Kansas Bill of Rights, as it prevents Plaintiffs from engaging in virtually all forms of political speech, less they risk criminal prosecution and penalties.

175. There is no compelling state interest to justify this burden. Plaintiffs, their members, volunteers, and others like them have engaged in this type of activity without incident for decades, including the election immediately preceding the passage of this restriction.

176. To the extent the state can articulate an interest in the Voter Education Restriction, the language of the provision is not the type of narrowly tailored restriction that can withstand constitutional scrutiny.

177. ***Advocacy Ban.*** The Advocacy Ban’s prohibition of non-Kansas residents sending Kansas voters an advance ballot application is a severe burden on Plaintiffs’ free speech and

association rights under the Kansas Bill of Rights, as it diminishes their ability to engage in core political speech by encouraging their participation in the democratic process, less they risk criminal penalties.

178. There is no compelling state interest to justify this burden. Plaintiffs, their members, volunteers, and others like them have engaged in this type of activity without incident for decades, including the election immediately preceding the passage of this restriction.

179. To the extent the state can articulate an interest in the Advocacy Ban, the language of the provision is not the type of narrowly tailored restriction that can withstand constitutional scrutiny.

180. *Delivery Assistance Ban.* The Delivery Assistance Ban's criminal prohibition of the delivery of more than ten advance ballots directly restricts Plaintiffs' core political speech and expressive conduct by severely diminishing their capacity and ability to carry out these activities. This limitation requires Plaintiffs to recruit more volunteers, putting stress on their limited resources and, in some instances, preventing them from effectively carrying out their missions altogether.

181. The threat of criminal penalties for delivering more than ten completed advance ballots is a severe burden on Plaintiffs' free speech and association rights under the Kansas Bill of Rights as it chills volunteer collection and delivery of ballots, further diminishing Plaintiffs' ability to engage in the protected activity and straining their resources.

182. There is no compelling state interest to justify this burden. Plaintiffs, their members, volunteers and others like them have engaged in this type of activity without incident for decades, including the election immediately preceding the passage of this restriction.

183. And the law already includes other protections—specifically, a signed, written

statement by both the voter and the person assisting them, swearing that the voter has requested assistance and that they have not been unduly influenced—which protects against any perceived fraud.

184. To the extent the state can articulate an interest in placing a criminal prohibition on the delivery of more than ten completed advance ballots, the Delivery Assistance Ban is not the type of “narrowly tailored” restriction on core political speech that is required to withstand exacting scrutiny.

## **SECOND CLAIM FOR RELIEF**

### *Violations of the Right to Vote* (Kan. Const. art. 5, § 1; Bill of Rights §§ 1, 2)

185. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

186. Article 5, Section 1 of the Kansas Constitution guarantees all Kansans a right to vote in the state’s elections.

187. Section 2 of the Bill of Rights of the Kansas Constitution states that “[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.”

188. Section 1 of the Bill of Rights of the Kansas Constitution guarantees equal rights to all Kansans, stating that “[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

189. As the Kansas Supreme Court recently concluded, “section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against

governmental action that does not meet constitutional standards.” *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 624 (2019). Nonetheless, the Kansas Supreme Court does look to federal law as a baseline when interpreting these provisions. *See, e.g., Estes v. Thornburgh*, No. 04-C-813, 2004 WL 1557930, at \*4 (Kan. Dist. Ct. July 7, 2004) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)).

190. Under the federal *Anderson-Burdick* balancing test, which applies to constitutional challenges to the right to vote under the First and Fourteenth Amendments to the U.S. Constitution, a court considering a challenge to a state election law must carefully balance the character and magnitude of injury to the rights that the plaintiff seeks to vindicate against the justifications put forward by the State for the burdens imposed by the rule. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). “However slight th[e] burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling opinion) (internal quotation marks omitted).

191. The Signature Rejection Requirement and Delivery Assistance Ban severely burden the rights of Kansas voters without any legitimate state interest.

192. ***Signature Rejection Requirement.*** Here, the Signature Rejection Requirement imposes a severe burden—disenfranchisement—on the right to vote, and it does so disparately, as different voters are subjected to different standards based solely upon where they live.

193. As a result of the Requirement, numerous lawful Kansas voters will be disenfranchised, including Plaintiffs’ members and constituents, or will have to undergo additional steps to ensure that their vote will count.

194. This burden is not outweighed by any legitimate, much less compelling, state

interest in the law. There is no indication of any fraud necessitating such a requirement. Moreover, despite the fact, the Legislature recognized that uniformity was a key justification of the statute, the Requirement rejects any uniform standard, ensuring that countless eligible, registered Kansas voters will suffer direct and irreparable injury if the Signature Rejection Requirement is in place.

195. ***Delivery Assistance Ban.*** The Delivery Assistance Ban severely burdens the right to vote by significantly limiting the pool of individuals who can assist voters in delivering their completed ballots to election officials. As fewer people are available to collect and deliver Kansans ballots, Kansas will face greater obstacles casting them and some may not be able to cast them at all, including Plaintiffs' members and constituents.

196. The Delivery Assistance Ban imposes a particularly severe burden on senior citizens, minority voters, disabled voters, rural voters in western Kansas, Native voters living on tribal land, Kansans with limited access to transportation, those with work commitments, school schedules, and family care responsibilities who face greater obstacles to casting their ballot and who rely on such assistance to exercise their fundamental right to vote. The Delivery Assistance Ban also imposes a severe burden on voters who need to return an advance ballot by mail but cannot return it because there may not be enough time for the ballot to arrive in the mail to the county election official before the deadline.

197. The Delivery Assistance Ban is unconstitutional because there is no State interest sufficiently compelling to justify the severe restrictions imposed by a criminal prohibition on the delivery of more than ten completed ballots. Indeed, the Legislative record did not reflect any instances of voter fraud, and Legislators admitted that there were no problems with collection of any kind in Kansas. *Supra* Section II, A.

198. To the extent the State can articulate a compelling interest in placing a criminal

prohibition on the delivery of more than ten completed ballots, it is not sufficiently tailored to justify the arbitrary limitation imposed by the Delivery Assistance Ban.

### **THIRD CLAIM FOR RELIEF**

#### *Violation of Equal Protection*

(Kan. Const. art. 5 § 1; Kan. Const. Bill of Rights §§ 1-2)

199. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

200. Article 5, Section 1 of the Kansas Constitution guarantees all Kansans a right to vote in the state's elections.

201. Section 2 of the Bill of Rights of the Kansas Constitution states that “[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.”

202. Section 1 of the Bill of Rights of the Kansas Constitution guarantees equal rights to all Kansans, stating that “[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” As the Kansas Supreme Court recently concluded, “section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards.” *Hodes & Nauser, MDs, P.A.*, 309 Kan. at 624. Nonetheless, the Kansas Supreme Court does look to federal law as a baseline when interpreting these provisions. *See, e.g., Estes*, No. 04-C-813, 2004 WL 1557930, at \*4.

203. Federal principles of equal protection ensure “the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). Among other things, this requires “specific rules designed to ensure uniform treatment” in order to prevent

“arbitrary and disparate treatment to voters” based on which county or local jurisdiction they live in. *Id.* at 106-07.

204. The Signature Rejection Requirement explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state’s 105 counties at differing risks of disenfranchisement. By permitting counties to verify signatures “by electronic device or by human inspection,” HB 2183, Sec. 5(h), the law accepts differing treatment of ballots. Not only that, but additionally, once a county chooses between an electronic device or human inspection, the law fails to provide any guidance for the implementation of those processes. Accordingly, different counties will have different procedures for verifying signatures that will result unequal treatment of ballots across the state.

205. The Signature Rejection Requirement also fails to define which signatures must be rejected. The Requirement mandates that when the signature on a ballot does not “match” the signature in a voter’s registration records, the ballot must be rejected. But there is no statutory definition for “match,” and so counties must exercise their individual discretion in determining whether a ballot must be rejected. Because counties will interpret “match” in distinct ways, some counties will apply stringent standards for signature verification, while other apply less stringent standards. As a result, a ballot that will be accepted in one county, would be rejected in another om violation of Kansas’s Equal Protection provisions.

#### **FOURTH CLAIM FOR RELIEF**

##### *Overbreadth* (Kan. Const. Bill of Rights §§ 3, 11)

206. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

207. An overbroad statute makes conduct punishable which under some circumstances

is constitutionally protected from criminal sanctions. *State v. Huffman*, 228 Kan. 186, 189 (1980). A successful overbreadth challenge can be made under the Kansas Constitution when (1) a protected activity is a significant part of a law's target, and (2) there exists no satisfactory method of severing that law's constitutionality from its unconstitutional applications. *Id.*

208. Efforts to register, educate, and encourage Kansas voters to participate in the political process, including assisting in the collection and delivery of their completed advance ballots, as well as the conversations and interactions between volunteers and voters surrounding the submission of ballots, are properly understood as core political speech.

209. As a result, the Voter Education Restriction and Advocacy Ban are both unconstitutionally overbroad as they place an arbitrary restriction on a substantial amount of Plaintiffs' constitutionally protected expression.

210. ***Voter Education Restriction.*** The sweeping language of the Voter Education Restriction would ban virtually all voter assistance, education, and encouragement activities that Plaintiffs engage in, and there is no way to separate out which activities are constitutional from those that are unconstitutional.

211. ***Advocacy Ban.*** Though the Advocacy Ban purports to ban out-of-state vendors from mailing absentee applications to Kansans, its sweeping language would also prohibit Plaintiffs from engaging out-of-state vendors from mailing applications, limiting their protected political expression, and there is no way to determine what, if any, of these contracts would be constitutional from those that are unconstitutional.

#### **FIFTH CLAIM FOR RELIEF**

*Void for Vagueness*  
(Kan. Const. Bill of Rts. § 18)

212. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this

Complaint and the paragraphs below as though fully set forth herein.

213. Statutes challenged on vagueness grounds “must clear two distinct hurdles. (1) whether the ordinance gives fair warning to those persons potentially subject to it, and (2) whether the ordinance adequately guards against arbitrary and discriminatory enforcement.” *City of Wichita v. Wallace*, 246 Kan. 253, 259, 788 P.2d 270 (1990). Regarding the first hurdle, a law may not leave persons of common intelligence to guess at its meaning. Regarding the second hurdle, the law must provide explicit standards for those who apply them. *State v. Harris*, 311 Kan. 816, 822 (2020).

214. The Voter Education Restriction and Advocacy Ban are both void for vagueness.

215. ***Voter Education Restriction***. The Voter Education Restriction fails to provide adequate notice to persons potentially subject to it, including Plaintiffs and other individuals who engage in conduct that may “give the appearance of being an election official” or “would cause another person to believe a person engaging in such conduct is an election official.” HB 2183, New Sec. 3(a)(2)-(3).

216. Indeed, it is wholly unclear which activities that Plaintiffs, their members, and volunteers would be subject to for prosecution and criminal penalties under the Restriction.

217. Likewise, the Voter Education Restriction’s broad language gives arbitrary discretion to enforcement officials in determining what constitutes conduct that may “give the appearance of being an election official” or “would cause another person to believe a person engaging in such conduct is an election official,” HB 2183, New Sec. 3(a)(2)-(3), and provides no standards to determine what such broad language means.

218. The risk of arbitrary enforcement is further exacerbated by the expansive definition of “election official,” which includes “any county election commissioner or county clerk, or any

employee thereof, or any other person employed by any county election office.” HB 2183, New Sec. 3(c).

219. **Advocacy Ban.** The Advocacy Ban fails to provide adequate notice to persons potentially subject to it, including Plaintiffs and other individuals who contract with out-of-state companies for advance voting application mailings.

220. Indeed, even the Legislators enacting the provision were confused about what it meant and could not answer even the most basic questions about the extent of its application.

221. Moreover, the provision includes no standards regarding enforcement, opening the door for arbitrary and discretionary enforcement of the provision.

### **SIXTH CLAIM FOR RELIEF**

#### *Violation of Due Process* (Kan. Const. Bill of Rts. § 18)

222. Plaintiffs hereby re-allege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

223. “The [Kansas] Bill of Rights protects the basic liberties which inure to each person at birth.” *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 636 (2019) (quoting *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 341, 757 P.2d 251 (1988) (recognizing that courts have power to ensure due process protections against violations of rights enshrined in the Kansas Bill of Rights)). “[T]he Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution.” *Id.*

224. To determine whether a plaintiff has been denied procedural due process in violation of the Due Process Clause of the Fourteenth Amendment, a court asks first whether a constitutionally protected liberty interest is at stake; if one is, the court then determines whether the procedural protections provided are sufficient by examining “[f]irst, the private interest that

will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *In re Marriage of Hutchison & Wray*, 47 Kan. App. 2d 851, 855 (2012) (same).

225. The nature of the interest at stake in this case—the right to vote and to have that vote counted—is the most precious liberty interest of all because it is preservative of all other basic civil and political rights. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”); *see* Kan. Const. Bill of Rts. § 2 (“All political power is inherent in the people . . .”).

226. Yet, Kansas's standardless Signature Rejection Requirement threatens to erroneously and arbitrarily deprive Kansans of that right. Due process requires that Kansans' advance votes be protected by additional procedures and standards that would help safeguard their right to vote.

227. The Signature Rejection Requirement fails to provide any standard by which county election officials are to evaluate a voter's ballot. Without uniform standards for rejecting or accepting signatures, the law guarantees that voters will be denied their right their due process rights in violation of the Kansas Bill of Rights.

### **PRAYER FOR RELIEF**

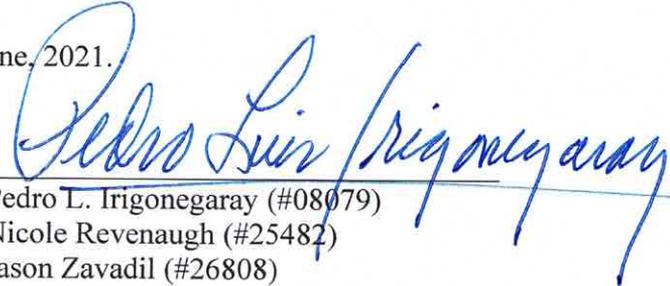
WHEREFORE, this Court should:

- A. Declare that the Voter Education Restriction, HB 2183, New Sec. 3(a)(2)-(3), infringes on Plaintiffs' fundamental rights to free speech and association in violation of the Kansas Bill of Rights, Sections 3 and 11, is void for vagueness, and is unconstitutionally overbroad, and enjoin Defendants, their respective

agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Voter Education Restriction;

- B. Declare that the Advocacy Ban, HB 2332, Sec. 3(l)(1), infringes on Plaintiffs' fundamental rights to free speech and association in violation of the Kansas Bill of Rights, Sections 3 and 11, is void for vagueness, and is unconstitutionally overbroad, and enjoin Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Advocacy Ban;
- C. Declare that Kansas's standardless Signature Rejection Requirement, HB 2183, Sec. 5(h), violates Plaintiffs' fundamental right to vote under the Kansas Constitution, Article 5, Section 1, and the Kansas Bill of Rights, Sections 1 and 2, and Plaintiffs' right to due process under the Kansas Constitution, or, alternatively, declare that HB 2183 violates Plaintiffs' right to equal protection under the Kansas Constitution and enjoin the Secretary, his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Signature Rejection Requirement;
- D. Declare that the Delivery Assistance Ban, HB 2183, New Sec. 2(a)(B) & (c), infringes on Plaintiffs' free speech and association rights in violation of the Kansas Bill of Rights, Sections 3 and 11, and violates Plaintiffs' fundamental right to vote under the Kansas Constitution, Article 5, Section 1, and the Kansas Bill of Rights, Sections 1 and 2, and enjoin the Delivery Assistance Ban.
- E. Award Plaintiffs their costs, expenses, and reasonable attorneys' fees; and
- F. Grant such other and further relief as the Court deems just, proper and equitable.

Respectfully submitted, this 1st day of June, 2021.



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Exhibit B (Testimony of Deputy Assistant  
Secretary of State Katie Koupal)

**SCOTT SCHWAB**  
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## STATE OF KANSAS

**Testimony: HB2332 (NEUTRAL)**  
House Elections Committee  
Thursday, February 18, 2021

Chairman Carpenter and members of the Committee:

HB2332 would require third parties who send voters an advance by mail ballot application to make it clear it is from a third-party and not a government document. As with most other bills not introduced by our office, we are neutral on this legislation but believe it nicely addresses growing concerns with voter information in Kansas.

It is not uncommon for third parties to engage in voter outreach efforts, especially in a major election year. In 2020, Kansas experienced a noticeable increase in third party voter engagement efforts. Although nothing in state law currently prevents these entities from engaging in such efforts, our office aggressively encouraged Kansans to not participate, particularly with third party advance by mail ballot applications.

Many third parties have sincere intent to encourage voter participation. However, their mailings may not collect information required by federal or state law, resulting in incomplete mail ballot applications. For instance, state law requires a government issued identification number or a copy of a government issued ID with advance by mail ballot applications. In addition, a voter signature is required for those who wish to request an advance by mail ballot. If a voter does not provide that information, their application is incomplete.

Leading up to the 2020 general election, state and county election offices 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 officers were preparing for a high turnout, statewide election, in the middle of a pandemic.

State law does not prohibit third parties from retaining personal information for data collection purposes. In 2020, thousands of Kansas voters received multiple mailings from the Center for Voter Information based out of Springfield, Missouri. The mailings started as advance by mail ballot applications and then shifted to candidate endorsements. Some of the mailers had the local election office as the return recipient but many had the Springfield office as the return address. Again, this caused widespread confusion among voters who continued to receive these mailings in September and October of last year.

Our office appreciates the committee's consideration of this issue. We look forward to continuing to work with elected officials throughout Kansas, encouraging voters to not provide information to third parties and, instead, request an advance by mail ballot application with our office or local election offices.

Respectfully submitted,

Katie Koupal  
Deputy Assistant Secretary of State  
Communications & Policy

## Exhibit C (House Bill No. 2332)

## HOUSE BILL No. 2332

AN ACT concerning elections; relating to the conduct of elections; providing for the appointment and duties of certain elected officials; amending K.S.A. 73-213, 73-214, 73-215, 73-218 and 73-219 and K.S.A. 2020 Supp. 25-1122 and 25-2423 and repealing the existing sections.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. (a) The governor shall not have any authority to modify election laws or procedures by issuance of an executive order.

(b) Except as provided in subsection (c), neither the executive branch nor the judicial branch of state government shall have any authority to modify the state election laws.

(c) The secretary of state shall not enter into any consent decree or other agreement with any state or federal court regarding the enforcement of any election law or the alteration of any election procedure without specific approval of such consent decree by the legislative coordinating council.

(d) Nothing in this section shall be construed to limit or otherwise restrict the judicial branch of state government in the exercise of any powers granted by article 3 of the constitution of the state of Kansas.

(e) If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions or applications of the section that can be given effect without the invalid provision or application, and, to this end, the provisions of this section are severable.

New Sec. 2. The county election officer shall record and maintain a residential address and a mailing address for each registered voter if the mailing address is different from the residential address. The residential address of a registered voter shall correspond to a physical location where the registered voter resides and shall not be a post office box or other address that does not correspond to a physical location that can be occupied and, if not, the person shall not be considered a validly registered voter. The county election officer shall record such information in any electronic database.

Sec. 3. K.S.A. 2020 Supp. 25-1122 is hereby amended to read as follows: 25-1122. (a) Any registered voter may file with the county election officer where the person is a resident, or where the person is authorized by law to vote as a former precinct resident, an application for an advance voting ballot. The signed application shall be transmitted only to the county election officer by personal delivery, mail, facsimile or as otherwise provided by law.

(b) If the registered voter is applying for an advance voting ballot to be transmitted in person, the voter shall provide identification pursuant to K.S.A. 25-2908, and amendments thereto.

(c) If the registered voter is applying for an advance voting ballot to be transmitted by mail, the voter shall provide with the application for an advance voting ballot the voter's current and valid Kansas driver's license number, nondriver's identification card number or a photocopy of any other identification provided by K.S.A. 25-2908, and amendments thereto.

(d) A voter may vote a provisional ballot according to K.S.A. 25-409, and amendments thereto, if:

(1) The voter is unable or refuses to provide current and valid identification; or

(2) the name and address of the voter provided on the application for an advance voting ballot do not match the voter's name and address on the registration book. The voter shall provide a valid form of identification as defined in K.S.A. 25-2908, and amendments thereto, to the county election officer in person or provide a copy by mail or electronic means before the meeting of the county board of canvassers. At the meeting of the county board of canvassers the county election officer shall present copies of identification received from provisional voters and the corresponding provisional ballots. If the county board of canvassers determines that a voter's identification is valid and the provisional ballot was properly cast, the ballot shall be counted.

(e) No county election officer shall provide an advance voting

## HOUSE BILL No. 2332—page 2

ballot to a person who is requesting an advance voting ballot to be transmitted by mail unless:

(1) The county election official verifies that the signature of the person matches that on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person who is requesting an advance voting ballot does not match that on file, the county election officer shall attempt to contact the person and shall offer the person another opportunity to provide the person's signature for the purposes of verifying the person's identity. If the county election officer is unable to reach the person, the county election officer may transmit a provisional ballot, however, such provisional ballot may not be counted unless a signature is included therewith that can be verified; and

(2) the person provides such person's full Kansas driver's license number, Kansas nondriver's identification card number issued by the division of vehicles, or submits such person's application for an advance voting ballot and a copy of identification provided by K.S.A. 25-2908, and amendments thereto, to the county election officer for verification. If a person applies for an advance voting ballot to be transmitted by mail but fails to provide identification pursuant to this subsection or the identification of the person cannot be verified by the county election officer, the county election officer shall provide information to the person regarding the voter rights provisions of subsection (d) and shall provide the person an opportunity to provide identification pursuant to this subsection. For the purposes of this act, Kansas state offices and offices of any subdivision of the state will allow any person seeking to vote by an advance voting ballot the use of a photocopying device to make one photocopy of an identification document at no cost.

(f) Applications for advance voting ballots to be transmitted to the voter by mail shall be filed only at the following times:

(1) For the primary election occurring on the first Tuesday in August in both even-numbered and odd-numbered years, between April 1 of such year and the Tuesday of the week preceding such primary election.

(2) For the general election occurring on the Tuesday following the first Monday in November in both even-numbered and odd-numbered years, between 90 days prior to such election and the Tuesday of the week preceding such general election.

(3) For question submitted elections occurring on the date of a primary or general election, the same as is provided for ballots for election of officers at such election.

(4) For question submitted elections not occurring on the date of a primary or general election, between the time of the first published notice thereof and the Tuesday of the week preceding such question submitted election, except that if the question submitted election is held on a day other than a Tuesday, the final date for mailing of advance voting ballots shall be one week before such election.

(5) For any special election of officers, at such time as is specified by the secretary of state.

The county election officer of any county may receive applications prior to the time specified in this subsection and hold such applications until the beginning of the prescribed application period. Such applications shall be treated as filed on that date.

(g) Unless an earlier date is designated by the county election office, applications for advance voting ballots transmitted to the voter in person in the office of the county election officer shall be filed on the Tuesday next preceding the election and on each subsequent business day until no later than 12 noon on the day preceding such election. If the county election officer so provides, applications for advance voting ballots transmitted to the voter in person in the office of the county election officer also may be filed on the Saturday preceding the

## HOUSE BILL No. 2332—page 3

election. Upon receipt of any such properly executed application, the county election officer shall deliver to the voter such ballots and instructions as are provided for in this act.

An application for an advance voting ballot filed by a voter who has a temporary illness or disability or who is not proficient in reading the English language or by a person rendering assistance to such voter may be filed during the regular advance ballot application periods until the close of the polls on election day.

The county election officer may designate places other than the central county election office as satellite advance voting sites. At any satellite advance voting site, a registered voter may obtain an application for advance voting ballots. Ballots and instructions shall be delivered to the voter in the same manner and subject to the same limitations as otherwise provided by this subsection.

(h) Any person having a permanent disability or an illness that has been diagnosed as a permanent illness is hereby authorized to make an application for permanent advance voting status. Applications for permanent advance voting status shall be in the form and contain such information as is required for application for advance voting ballots and also shall contain information that establishes the voter's right to permanent advance voting status.

(i) On receipt of any application filed under the provisions of this section, the county election officer shall prepare and maintain in such officer's office a list of the names of all persons who have filed such applications, together with their correct post office address and the precinct, ward, township or voting area in which the persons claim to be registered voters or to be authorized by law to vote as former precinct residents and the present resident address of each applicant. Names and addresses shall remain so listed until the day of such election. The county election officer shall maintain a separate listing of the names and addresses of persons qualifying for permanent advance voting status. All such lists shall be available for inspection upon request in compliance with this subsection by any registered voter during regular business hours. The county election officer upon receipt of the applications shall enter upon a record kept by such officer the name and address of each applicant, which record shall conform to the list above required. Before inspection of any advance voting ballot application list, the person desiring to make the inspection shall provide to the county election officer identification in the form of driver's license or other reliable identification and shall sign a log book or application form maintained by the officer stating the person's name and address and showing the date and time of inspection. All records made by the county election officer shall be subject to public inspection, except that the voter identification information required by subsections (b) and (c) and the identifying number on ballots and ballot envelopes and records of such numbers shall not be made public.

(j) If a person on the permanent advance voting list fails to vote in four consecutive general elections held on the Tuesday succeeding the first Monday in November of each even-numbered and odd-numbered year, the county election officer may mail a notice to such voter. The notice shall inform the voter that the voter's name will be removed from the permanent advance voting list unless the voter renews the application for permanent advance voting status within 30 days after the notice is mailed. If the voter fails to renew such application, the county election officer shall remove the voter's name from the permanent advance voting list. Failure to renew the application for permanent advance voting status shall not result in removal of the voter's name from the voter registration list.

(k) *(1) Any person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing shall include on the exterior of such mailing, and on each page contained therein, except the application, a clear and conspicuous label in 14-point font or larger that includes:*

## HOUSE BILL No. 2332—page 4

(A) *The name of the individual or organization that caused such solicitation to be mailed;*

(B) *if an organization, the name of the president, chief executive officer or executive director of such organization;*

(C) *the address of such individual or organization; and*

(D) *the following statement: "Disclosure: This is not a government mailing. It is from a private individual or organization."*

(2) *The application for an advance voting ballot included in such mailing shall be the official application for advance ballot by mail provided by the secretary of state. No portion of such application shall be completed prior to mailing such application to the registered voter.*

(3) *An application for an advance voting ballot shall include an envelope addressed to the appropriate county election office for the mailing of such application. In no case shall the person who mails the application to the voter direct that the completed application be returned to such person.*

(4) *The provisions of this subsection shall not apply to:*

(A) *The secretary of state or any election official or county election office; or*

(B) *the official protection and advocacy for voting access agency for this state as designated pursuant to the federal help America vote act of 2002, public law 107-252, or any other entity required to provide information concerning elections and voting procedures by federal law.*

(5) *A violation of this subsection is a class C nonperson misdemeanor:*

(l) (1) *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.*

(2) *Any individual may file a complaint in writing with the attorney general alleging a violation of this subsection. Such complaint shall include the name of the person alleged to have violated this subsection and any other information as required by the attorney general. Upon receipt of a complaint, the attorney general shall investigate and may file an action against any person found to have violated this subsection.*

(3) *Any person who violates the provisions of this subsection is subject to a civil penalty of \$20. Each instance in which a person mails an application for an advance voting ballot in violation of this section shall constitute a separate violation.*

(m) *The secretary of state may adopt rules and regulations in order to implement the provisions of this section and to define valid forms of identification.*

Sec. 4. K.S.A. 2020 Supp. 25-2423 is hereby amended to read as follows: 25-2423. (a) Election tampering is:

(1) ~~While being charged with no election duty, Making or changing any election record unless the person is lawfully carrying out an election duty;~~

(2) *changing or attempting to change, alter, destroy or conceal any vote cast by paper ballot, election machine or computer;*

(3) *changing or attempting to change any vote by manipulating computer hardware, computer software, election machine, wireless or cellular transmission or vote tabulation methods; or*

(4) *knowingly producing false vote totals.*

(b) Election tampering is a severity level 7, nonperson felony.

Sec. 5. K.S.A. 73-213 is hereby amended to read as follows: 73-213. For the purposes of this act, ~~the following terms shall have the meanings ascribed to them by this section, unless the context clearly requires otherwise:~~

(a) ~~"Officer" means any officer or employee of the state of Kansas or any political subdivision thereof~~ "Act" means K.S.A. 73-213 through 73-219, and amendments thereto.

(b) *"Appointive authority" means the person, board, commission or other authority vested by law with power to appoint a successor for an officer when a vacancy occurs in the office or position held by such*

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*officer. If no person, board, commission, or other authority is vested by law with power to appoint a successor for an officer when a vacancy occurs then "appointive authority" means the governor of the state of Kansas.*

~~(b)(c) "Military service" means active service in the army, navy, or marine corps, air force, coast guard, space force, Kansas army or air national guard or any branch of the military reserves of the United States or any compulsory service rendered in any capacity to the federal government for the purpose of national defense.~~

~~(e)(d) "Appointive authority" means the person, board, commission, or other authority vested by law with power to appoint a successor for an officer upon the happening of a vacancy in the office or position held by such officer; but if no person, board, commission, or other authority is vested by law with power to appoint a successor for an officer upon the happening of such a vacancy, then "appointive authority" shall mean the governor of the state of Kansas. "Officer" means any officer or employee of the state of Kansas or any political subdivision thereof.~~

~~(d)(e) "Temporary vacancy" means a vacancy in an office or position caused by the absence in military service of the officer elected or appointed thereto. If the officer was originally elected or appointed for a definite term such, "temporary vacancy" shall mean means the period of time beginning with the day such officer shall enter the enters military service and ending either with the day he shall return such officer returns from military service; or with the expiration of the appointed or elected term for which he was elected or appointed, whichever period of time is the shorter. If the officer was originally appointed to his the office or position for an indefinite term or for a term expiring at the pleasure of the appointive authority, such "temporary vacancy" shall mean means the period of time beginning with the day such officer shall enter the enters military service and ending either with the day he such officer shall return from military service, or with the expiration of the appointive power of the original appointive authority, whichever period of time is the shorter.~~

Sec. 6. K.S.A. 73-214 is hereby amended to read as follows: 73-214. The absence of any officer from ~~his~~ an office or position caused by ~~his being in the~~ military service shall not create a forfeiture of; or vacancy in the office or position to which such officer was elected or appointed but shall be construed to ~~merely~~ create a temporary vacancy. Wherever the terms "forfeiture of office" or "vacancy in office" or other words of ~~similar import~~ like effect are used in any law of this state in relation to an officer such as defined in this act, ~~the same such terms or words~~ shall be construed in accordance with the provisions of this section and shall not be construed to apply to any absence of such officer who is absent from ~~his~~ an office or position by reason of ~~his being in the~~ military service.

Sec. 7. K.S.A. 73-215 is hereby amended to read as follows: 73-215. (a) (1) *If an officer's military service creates a temporary vacancy that is determined by such officer to require a temporary appointment, such officer shall submit an approved form to the designated office as set out in paragraph (2).*

*(2) (A) If the officer is an elected state official, the form shall be approved by and filed with the secretary of state.*

*(B) If the officer is an elected official of a political subdivision, the form shall be filed with the county clerk of the county containing the largest portion of the territory of the political subdivision.*

*(C) If the officer is an employee who is not an elected official, the form shall be approved by and filed with the employee's human resources department or other official as determined by such officer's employer.*

*(3) The officer shall also submit an approved form to the designated office upon return from military service.*

~~(b) In case~~ *If an officer's military service creates a temporary vacancy is or has been created in any office or position by reason of the*

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~~absence of the officer in the military service; in an office or position and the form prescribed in (a) has been filed:~~

~~(1) The appointive authority for a partisan elective office shall appoint a person to temporarily fill such office or position using the procedures in K.S.A. 25-3901 et seq., and amendments there to; and~~

~~(2) The appointive authority shall for an elective office that is nonpartisan and for an employee who is not an elected official may appoint some a person to temporarily fill the such office or position to which such officer was elected or appointed.~~

~~(c) All such appointees shall hold the office or position which they are temporarily to fill during the such temporary vacancy caused by the absence of the officer in the military service.~~

Sec. 8. K.S.A. 73-218 is hereby amended to read as follows: 73-218. An officer who ~~shall be~~ *is* absent from ~~his an~~ office or position ~~and~~ while in the military service shall not be entitled to any compensation as such officer during such absence; ~~but upon his return,~~ *If he return the officer returns* before the expiration of the period of the temporary vacancy created by ~~his the officer's~~ absence, ~~he such officer~~ shall be entitled to immediate possession of ~~the such~~ office or position ~~from which he was absent~~ and, upon reassuming the duties of the office, to receive the compensation for the remainder of the term to which the holder thereof is entitled, subject to removal from office according to law.

Sec. 9. K.S.A. 73-219 is hereby amended to read as follows: 73-219. *The provisions of this act are declared to be severable and if any section, subsection, paragraph, be unconstitutional or provision of this act or its application to any person or circumstance is held invalid for any reason, it shall be presumed that this act would have been passed by the legislature without such invalid section, subsection, paragraph, sentence, provision, clause or phrase, and such decision shall not in any way affect the remainder of such invalidity shall not affect the other provisions or applications of this act.*

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Sec. 10. K.S.A. 73-213, 73-214, 73-215, 73-218 and 73-219 and K.S.A. 2020 Supp. 25-1122 and 25-2423 are hereby repealed.

Sec. 11. This act shall take effect and be in force from and after January 1, 2022, and its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and was adopted by that body

\_\_\_\_\_

HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

Passed the SENATE  
as amended \_\_\_\_\_

SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*