IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA AND VOTER PARTICIPATION CENTER, *Plaintiffs*, vs. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County, *Defendants*.	)	Case No. 2:21-cv-2253-KHV-GEB

DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants Scott Schwab, Derek Schmidt, and Stephen Howe, each sued in their official capacities, submit this Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Doc. 31). As explained below, Plaintiffs' opposition ultimately fails to move their causes of action into the plausibility range such that any state a claim upon which relief may be granted. Defendants thus respectfully request that their motion to dismiss be granted.

I. – Plaintiffs Fail to Establish a Justiciable Claim

Plaintiffs counter Defendants' challenges to justiciability by distorting the imminence of liability they allegedly face from H.B. 2332's voter integrity provisions and seeking to distract the Court from the realities of the case. A closer look at the circumstances surrounding Plaintiffs' so-called injuries, and what is actually prohibited under the statute, reveals that no threat of civil or criminal liability is imminent. More importantly, no speech or expressive conduct worthy of First Amendment protection is being chilled.

A. – Plaintiffs Cannot Show an Injury-In Fact for Article III Standing

To establish standing, Plaintiffs principally rely on an alleged threat of prosecution against them *as an organization*, which in turn purportedly chills their protected speech. (Opp. 3, n.1). But Plaintiffs do not face a credible threat of prosecution under H.B. 2332 § 3(k) or (*l*).

First, the Complaint does not allege an actual violation of § 3(k) by Plaintiff VoteAmerica. Indeed, based on its own description of its operations, VoteAmerica's activities do not implicate this statutory subdivision. VoteAmerica alleges 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 the voters a partially completed advance ballot application. (Compl. ¶¶ 17-21). But those kinds of activities do not even violate the statute, which 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." H.B. 2332 § 3(k)(1) (emphasis added). The prohibition against mailing partially completed advance ballot applications in § 3(k)(2) (the so-called "Personalized Application Prohibition"), in turn, explicitly refers to "such mailing," i.e., the solicitation constrained by § 3(k)(1).

Based strictly on the allegations in the Complaint, VoteAmerica is not engaging in "solicitation by mail."[1] The definition of "solicitation" entails approaching another person or entity with a request or plea to take some action. *See* Merriam-Webster's Collegiate Dictionary (11th ed.) (2020). According to the Complaint, the only time VoteAmerica mails out partially completed ballots to voters is when the voters have first affirmatively gone to its website and requested the ballot. That VoteAmerica or one of its partners might have referred the voter to its website is irrelevant. The statute only criminalizes solicitations by mail when the solicitation *includes an*

[1] 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. (Compl. ¶¶ 27-33).

advance ballot application in such mailing, yet the pled facts indicate that VoteAmerica is merely responding to a voter's request. Assuming the truth of these allegations, there is no violation of § 3(k)(2), and thus no credible threat of prosecution.

Second, Defendants Schwab and Howe do not have authority to investigate or prosecute a violation of H.B. 2332 § 3(*l*)(1) (i.e., the so-called "Out-of-State Distributor Ban"). Per the express language of the statute, such authority rests exclusively with Defendant Schmidt. Any alleged threat of enforcement of § 3(*l*)(1), therefore, cannot be traceable to Defendants Schwab and Howe, and Plaintiffs lack standing to bring claims against these two Defendants. *See Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) ("It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.").

Plaintiffs prophesize that there is no question that H.B. 2332 *will be* enforced (Opp. 5), but they fail to support such a bold statement. Plaintiffs assign great weight to the fact that Defendant Schmidt is required to investigate reports of violations of H.B. 2332 § 3(*l*)(1). An informal investigation, however, is not the same thing as a prosecution. Given that the statute does not even take effect until January 1, 2022, there obviously were no active investigations at the time Plaintiffs filed their Complaint. Nor have Defendants made any subsequent threats of prosecution against Plaintiffs. In fact, it would be folly for any law enforcement officials to undertake an investigation at this point inasmuch as future regulations adopted by the Secretary of State, *see id.* § 3(m), may well define the contours of the statutory proscriptions in a way that narrows the scope of impermissible conduct under §§ 3(k) and (*l*)(1).[2] In sum, there is no target on Plaintiffs' backs.

[2] Plaintiffs attach significance to the fact that no regulations were in place at the time they filed their Complaint. (Opp. 5-6). But the statute was not even passed by the Legislature until May 3, 2021, and it was not enrolled until July 1. *See* http://www.kslegislature.org/li/b2021_22/measures/hb2332/. Given

In *Bronson*, the Tenth Circuit referenced the spectrum by which a credible threat exists, with actual clarity prevailing only at the ends. 500 F.3d at 1108. On one end, a "credible threat" lies where "pre-enforcement claims brought after the entity responsible for enforcing the challenged statute actually threatens a particular plaintiff with arrest or even prosecution." No such credible threat is present in this case. On the other end, "no credible threat" exists when "affirmative assurances of non-prosecution from a governmental actor responsible for enforcing the challenged statute prevents a 'threat' of prosecution from maturing into a 'credible' one, even when the plaintiff previously has been arrested under the statute." *Id.*

While Defendants have not made an affirmative vow not to enforce §§ 3(k) and (*l*)(1), the fact that they have not done so hardly means a credible threat exists. As the Tenth Circuit observed, the credible threat spectrum is fluid. *Bronson*, 500 F.3d at 1108. A credible threat finding is not mandated when a case involves circumstances that do not reach the end point of where exact clarity resides. Here, the only factor dipping Plaintiffs' case below the point of no credible threat is the absence of a vow by Defendants, which is unnecessary given the not-yet-operative status of H.B. 2332 and the inchoate, pre-regulatory nature of its prohibitions. Otherwise, all factors push this case towards the no credible threat end of the spectrum.

B. – Plaintiffs Are Not Injured Because No Speech is Being Chilled

Plaintiffs claim they have standing because of an ongoing chilling effect to their protected speech. For plaintiffs seeking "prospective relief based on a 'chilling effect' on speech," the Tenth Circuit has established a three-part test for demonstrating Article III's injury-in-fact requirement: "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans,

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that Plaintiffs filed their Complaint on *June 2* (before the bill was even enrolled), the Secretary of State obviously had no opportunity to draft regulations by that date. Plus, the regulatory process often takes months and requires notice, comments, and interagency coordination. *See* Kan. Stat. Ann. § 77-415 *et seq.*

to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced." *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 974–75 (10th Cir. 2020). The key component to establishing an injury-in-fact of this nature is legally protected speech or expressive conduct.

As discussed in more detail in Part II, Plaintiffs' actions of mailing an advance mail ballot application to Kansas residents, or populating a portion thereof, simply do not constitute speech or expressive conduct. The act of distributing a pre-filled or blank absentee-ballot application does not equate to engaging in speech, and certainly not speech protected by the First Amendment. *See Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 768 (M.D. Tenn. 2020); *accord Voting for Am., Inc. v. Andrale*, 488 F. App'x 890, 898 & n.13 (5th Cir. 2012) (rejecting First Amendment challenge to statute restricting non-election officials' distribution of absentee ballots and concluding that the law did not curtail core speech rights). While Plaintiffs may be precluded from mailing an official ballot application to Kansas voters, this pure-conduct prohibition does not amount to an injury to Plaintiffs' First Amendment rights absent a contemporaneous restriction – which does not exist at all – on the message that Plaintiffs wish to convey and are perfectly free to communicate.

C. – Plaintiffs' Claims are Not Ripe

Plaintiffs attempt to overcome their ripeness deficiency by noting that this jurisdictional barrier is relaxed in First Amendment cases. (Opp. 8). While the ripeness standard may be somewhat relaxed in First Amendment cases, it cannot be ignored altogether. *Eternal Word Television Network, Inc. v. Sebelius*, 935 F. Supp.2d 1196, 1223–24 (N.D. Ala. 2013) (citing *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir.2005)). Moreover, the relaxed standard applies only when there exists a credible threat of injury or a chilling effect on protected speech, both of which are absent in this case.

As previously discussed, Defendants lack authority to enforce any civil penalty or pursue criminal prosecution against Plaintiffs until January 1, 2022. There is thus no *imminent* threat of injury. Moreover, even if Plaintiffs' proposed conduct constituted protected speech under the First Amendment, a position Defendants dispute, there is nothing stopping Plaintiffs from engaging in those same activities until January 1, 2022. Any *current* chilling effect to Plaintiffs' acts of mailing advance mail voting applications, whether blank or pre-filled, to Kansas residents is subjective and not grounded in reality. Indeed, the deadline to submit advance voting applications to county election officials for the 2021 general election is October 26, 2021, and there is no reason Plaintiffs cannot continue their activities, without any fear of civil or criminal liability, through the end of this year. Meanwhile, voters cannot even submit advance ballot applications for the 2022 primary election until April 1, 2022, *more than seven months hence*, and the deadline for submission isn't until July 26, 2022. *See* Kan. Stat. Ann. § 25-1122(f)(1).

Plaintiffs also argue their challenges to H.B. 2332 are ripe because they turn upon strictly legal issues and require no consideration of facts that have yet to be developed. (Opp. 8). Plaintiffs are confused about the purpose of any forthcoming regulations. While regulations obviously do not take the place of the applicable statute, they often provide additional guidance on the types of conduct or factual circumstances that come within the statute's reach. In so doing, they provide the legal framework for the Court to be able to properly interpret the statute and determine what facts are material to its analysis. Without knowledge of what the regulations entail, the legal issues are not defined and it remains unknown what facts are relevant to the Court's determination.

Plaintiffs seek to box the Defendants in by suggesting that any regulations the Secretary of State might adopt would not shield them from prosecution under H.B. 2332. (Opp. 5-6). But this argument is both premature and misses the mark. It is simply not possible at this point to predict exactly what the regulations will say. The drafting of administrative regulations is an elaborate

process that entails a review and comment period and requires the input of an array of different stakeholders. *See* Kan. Stat. Ann. §§ 77-415 *et seq.* Even if, at some future date, Plaintiffs might be subject to prosecution or civil liability, the exact scope and contours of that exposure likely will turn on those regulations. In their absence, any ruling that the Court might issue would largely amount to an advisory opinion. *See Roman Cath. Diocese of Dallas v. Sebelius*, 927 F. Supp.2d 406, 423 (N.D. Tex. 2013) (Ripeness is . . . "an even closer question" than standing, because "[i]ts resolution is informed by additional circumstances that awaiting [further development of the case] may mitigate if not cure.") (quoting *Brooklyn Union Gas Co. v. F.E.R.C.*, 190 F.3d 369, 374 (5th Cir. 1999)).

Similarly, Plaintiffs cannot show a hardship worthy of invoking this Court's review. Plaintiffs allege that they are executing their communication plans and associated spending in the coming months. (Opp. 7). A claimant's inability to plan for future operations, however, is not enough to overcome Article III's case or controversy requirement. *See, e.g.*, *Persico v. Sebelius*, 919 F. Supp.2d 622, 641 (W.D. Pa. 2013) ("[m]ere economic uncertainty affecting the plaintiff's planning is not sufficient to support pre-mature review."); *Zubik v. Sebelius*, 911 F. Supp.2d 314, 327 (W.D. Pa. 2012) ("There is no doubt that a declaratory judgment would be useful to Plaintiffs and affect their plans of action. However, the mere fact that a declaratory judgment would be useful to assist Plaintiffs in making their upcoming operational decisions is insufficient to overcome the fact that no actual controversy yet exists between the parties."). In sum, Plaintiffs fail to establish that their claims are ripe.

D. – Abstention is Appropriate In this Case

Plaintiffs attempt to distinguish the issues pending before this Court from those currently pending before the Shawnee County District Court, Case No. 2021-CV-000299. But putting aside technicalities between the identities and residencies of the plaintiffs and whether their respective

challenges involve applicability of Sections 3 and 11 of the Kansas Constitution's Bill of Rights or the First Amendment of the U.S. Constitution, the reality is that the plaintiffs in each case seek identical relief when it comes to enjoinment of the Out-of-State Distributor Ban. In both cases, the plaintiffs request the court to interpret H.B. 2332's impact on their rights of freedom of speech and association. In doing so, there is a risk of each court going down divergent paths that will impact not only Kansas residents, but the public at large, because Kansas courts customarily interpret the provisions of the Kansas Constitution to echo provisions in the U.S. Constitution. *See Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 377 (2006) (collecting cases). There is no urgency that requires this Court to venture down this tricky path.

The fact that this case involves only alleged violations of the federal Constitution does not mean that *Pullman* abstention is unwarranted. In *Trump for President, Inc. v. Boockvar*, 481 F. Supp.3d 476, 498 (W.D. Pa. 2020), the court recognized that "*Pullman* abstention is a doctrine 'rooted in basic principles of federalism.' . . . [a]nd under the Constitution, the critical responsibility of administering elections is reserved for the states." *Id.* "States have considerable discretion to conduct elections as they see fit, and federal courts intervene only when the decisions of state officials threaten to infringe the fundamental right to vote or deny citizens the equal protection of law." *Id.* Here, there is no claim that H.B. 2332 infringes on the fundamental right to vote or violates the equal protection clause, and the Court should not accept Plaintiffs' invitation to interpret Kansas' newly enacted election laws in the first instance. "[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." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). Particularly in light of the fact that neither speech nor expressive conduct is at issue in this case, Defendants respectfully submit that the public at large would be best served by the Court abstaining from any ruling on Counts I-

III.

Additionally, because Count IV, Plaintiffs' dormant Commerce Clause claim, is not subject to *Pullman* abstention, Defendants ask that this Court stay the proceedings until the Shawnee County District Court, and any Kansas appellate courts, have had a chance to interpret the Out-of-State Distributor Ban. *See, e.g., Boockvar*, 481 F. Supp.3d at 502 ("[S]taying the entirety of the case, as opposed to proceeding with a speedy hearing on a small subset of claims (only to have to do it again once the state courts have weighed in), is a much more efficient use of judicial resources and the parties' time, effort, and expense. That approach minimizes piecemeal litigation (at least in this Court) and ensures that this Court will know the scope and nature of Plaintiffs' constitutional claims before it decides them.").

II. – Plaintiffs' First Amendment Claims Fail to State a Claim

Turning to the merits, neither of Plaintiffs' First Amendment claims (Counts I-II), which allege violations of their speech and association rights, have any legal foundation. As Defendants explained in detail in their opening motion, the restrictions in H.B. 2332, § 3(k) and (*l*) are focused not on core speech, but *non-expressive conduct*, and thus do not trigger heightened judicial scrutiny. These statutes easily survive rational basis review. But even if exacting scrutiny were applied, the statutes would still withstand Plaintiffs' constitutional attacks.

A. – Restrictions on Solicitation of Advance Ballot Applications Do Not Implicate Plaintiffs' Core Political Speech Rights

Plaintiffs insist that H.B. 2332's limitation on their ability to send advance ballot applications to Kansas voters somehow imperils their right to communicate certain messages – e.g., encouraging voters to vote an advance ballot via mail; educating voters on how to apply for and complete such a ballot; and reinforcing that "electoral participation is essential to a representative government." (Opp. 14). They further claim that their proposed distribution of partially completed advance mail ballot applications is "intertwined" with their advocacy of voting by mail, and that by speaking in favor of this form of voting, they have taken sides in a contested political debate.

(*Id.* at 15). Such distribution, they reason, "inherently conveys Plaintiffs' message and viewpoint: voters should increase their participation in the political process by mail voting, and here is the application to do so." (*Id.* at 15-16).

There are multiple flaws in Plaintiffs' argument. First and foremost, *nothing* in H.B. 2332 precludes Plaintiffs from publishing or mailing content that educates Kansans on how to vote an advance ballot by mail. Nor does the statute prohibit Plaintiffs from providing information on how to obtain and complete an advance ballot application. It similarly does not impede Plaintiffs from electronically posting or mailing content about, or otherwise advocating in favor of, the advance voting process. Indeed, Plaintiffs take no real issue with the fact that the number of ways for them to communicate the messages they wish to convey to Kansas voters is almost limitless. There is, in short, nothing in the challenged statute that restricts Plaintiffs from expressing to Kansans *any* of the messages they wish to impart.

Second, H.B. 2332 is both content neutral and non-discriminatory. While Plaintiffs claim that their distribution of advance mail ballot applications "takes sides in a contested political debate" and that the statute targets them in a viewpoint discriminatory manner, (Opp. 15), this argument has no basis. "Government regulation of speech is content-based if it restricts speech based on the topic it discusses or the idea or message it expresses." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Nothing in the statute looks in any way to the content of Plaintiffs' purported message or takes sides in any public debate. H.B. 2332 neither encourages nor discourages advance mail voting. The only thing it does, and was intended to do, is to help minimize the chaos, confusion, anger, and potential fraud that arose in recent elections when voters in seemingly every county in the State received multiple (i.e., duplicate) advance ballot applications from out-of-state vendors.

Third, H.B. 2332 in no way curtails Plaintiffs' right to associate with any voters. The Supreme Court has recognized a right under the First Amendment "to associate for the purpose of speaking," which it characterizes as a "right of expressive association." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (quoting *Boy Scouts of Am. v.*

Dale, 530 U.S. 640, 644 (2000)). This right is rooted in the fact that the "right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). But as described above, there is no impairment whatsoever of Plaintiffs' speech. H.B. 2332 does not limit Plaintiffs' ability to speak with anyone about anything at any time. Its reach is strictly targeted at, and confined to, *non-expressive conduct*.

The specific actions regarding advance ballot distribution in which Plaintiffs wish to engage constitute neither core political speech nor constitutionally-protected expressive conduct. As the Supreme Court noted in rejecting a political third-party's claim that Minnesota's ban on so-called "fusion" candidates (i.e., individuals appearing on a ballot as the candidate of more than one party) contravened the party's First Amendment rights, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Moreover, "completing a ballot request for another voter . . . do[es] not communicate any particular message." *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020). Such an action is "not expressive, and [is] not subject to strict scrutiny." *Id.*; *accord Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389-93 (5th Cir. 2013); *Lichtenstein*, 489 F. Supp.3d at 764-77.

While the First Amendment protects conduct that is "inherently expressive," the Supreme Court has "rejected the view that 'conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.'" *Rumsfeld*, 547 U.S. at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Plaintiffs seek to cloak their activities in the refuge of the First Amendment by noting that their mailings not only send advance ballot applications, but also "include additional words that encourage voters to submit, and inform them about, the enclosed applications." (Opp. 16). This point fails to move the needle. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66. Under Plaintiffs' theory, virtually every voter integrity measure adopted by a state could be vulnerable to a First

Amendment challenge simply by some advocacy organization communicating to voters as part of its opposition campaign. The law compels no such result. Notwithstanding Plaintiffs' recitation of as many "magic words" from the Supreme Court's expressive conduct jurisprudence as they can in order to try to fit their activities within a First Amendment box, the bottom line is that there is simply nothing "inherently expressive" about sending a voter an advance ballot application. On the other hand, the actual *speech* that Plaintiffs undertake – i.e., encouraging individuals to vote by advance mail ballot, explaining exactly how to do so, and underscoring the importance of their participation in the electoral process – is in no way impeded by H.B. 2332.

Plaintiffs contend that mailing advance ballot applications to voters amounts to expressive conduct because many Kansans necessarily "understood Plaintiffs' message" when such voters "successfully submitted the advance mail ballot application received from VPC [Plaintiff Voter Participation Center]." (Opp. 16). One does not flow from the other. What Plaintiffs are suggesting – in a theory rejected by the Fifth Circuit – is that their successful attainment of an objective that motivated their conduct automatically insulates that conduct under the First Amendment. That kind of circular reasoning is tantamount to a principle that "saying it makes it so." The law is to the contrary. The success (or failure) of particular conduct does *not* render it expressive in nature. *Steen*, 732 F.3d at 392 n.5.

Plaintiffs additionally argue that the fact that the advance mail ballot applications they send to Kansas voters are partially completed with the voter's information converts their conduct into expressive activity that is constitutionally safeguarded. (Opp. 16). Defendants strongly dispute the premise that the act of sending a voter such an application constitutes any type of speech at all, let alone core political speech. But if there is any "speech" flowing from the ballot applications themselves, it is not attributable to *the Plaintiffs*; rather, it emanates solely from *the voters*. *See Steen*, 732 F.3d at 390 ("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."). H.B. 2332's restrictions on distribution of advance ballot applications, in other words, do not impact

Plaintiffs' First Amendment rights.

There is likewise no traction to be gained from Plaintiffs' suggestion that H.B. 2332 "targets certain speakers and their messages for disfavored treatment." (Opp. 19). While it is true that the categorical prohibition on sending advance mail ballots to Kansas voters only applies to out-of-state entities, neither the *speech nor expressive conduct* of those out-of-state entities is at all curtailed. And as discussed in Part II.B. below, the State has sound reason for distinguishing between in-state and out-of-state entities regulating the conduct at issue under the statute.

Insisting that their mailing of advance mail ballot applications "encourages and facilitates [their] pro-mail voting advocacy in a way 'characteristically intertwined' with that message," Plaintiffs maintain that H.B. 2332 interferes with their "First Amendment right to select what they believe to be the most effective means for communicating their message." (Opp. 17). Once again, Plaintiffs have put the cart before the horse. Although "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." *Lichtenstein*, 489 F. Supp.3d at 773 (emphasis added). Moreover, the Supreme Court has regularly upheld modest restraints (far more intrusive than H.B. 2332) on a party's ability to interact with its targeted audience. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 727-28 (2000) (rejecting challenge to statute restricting individuals' ability to knowingly approach within eight feet of another person, without consent, for the purpose of distributing leaflets or otherwise engaging in oral protest with that person); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding state fair regulation that required religious organization desiring to distribute literature to conduct that activity only at an assigned location).

The cases Plaintiffs predominantly cite to support their argument to the contrary – *Meyer v. Grant*, 486 U.S. 414 (1988), and *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002) – both revolved around restrictions on non-residents' collection of *initiatives and referendums*. In

contrast to an advance mail ballot application, however, an initiative petition is *itself* protected speech. Indeed, 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); *accord Steen*, 732 F.3d at 390. Whereas "the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign," advance mail ballot applications are "individual, not associational, and may be successfully submitted without the aid of another," which means no actual speech has been limited. *Lichtenstein*, 489 F. Supp.3d at 771 (citing *Andrade*, 488 F. App'x at 898 n.13).[3]

Plaintiffs' further reliance on *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (Opp. 18), is equally misplaced. *McIntyre* involved a total prohibition on the distribution of anonymous campaign literature, which represents "the essence of First Amendment expression." 514 U.S. at 347. H.B. 2332's benign effort to protect the integrity of the electoral process by restricting certain non-expressive conduct that had contributed to substantial confusion and chaos in prior elections is a world apart from the constraints at issue in *McIntyre*. As for *Buckley*, its holding focused on Colorado's

[3] Plaintiffs also reference several district court opinions holding that *voter registration activities* implicate the First Amendment. (Opp. 15). The Fifth Circuit persuasively held that such activities do not call for heightened scrutiny because they involve neither speech nor expressive conduct. *See Steen*, 732 F.3d at 389-92. In holding to the contrary, one of the district courts that Plaintiffs cite embraces a theory of expressive conduct so extraordinarily broad as to be virtually limitless. *See League of Women Voters v. Hargett*, 400 F. Supp.3d 706, 723-24 (M.D. Tenn. 2019) ("[I]f anything, a person's decision to sign up to vote is more central to shared political life than his decision to sign an initiative petition. A petition in support of a ballot initiative might lead to a change in one law or a few laws, but a change in the composition of an electorate can lead to the change of *any* law."). Another court held that a state's mere imposition of a deadline on returning voter registration applications violated the First Amendment, *see League of Women Voters v. Cobb*, 447 F. Supp.2d 1314, 1331-40 (S.D. Fla. 2006), a conclusion that it is difficult to fathom today's Supreme Court accepting. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) ("This Court has long recognized that a State's reasonable deadlines for registering to vote, submitting absentee ballots, and voting in person generally raise no federal constitutional issues under the traditional *Anderson-Burdick* balancing test.") (Kavanaugh, J., concurring in denial of application to vacate stay). The third case Plaintiffs cite, *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp.2d 1183 (D.N.M. 2010), held that, while the state's onerous constraints on voter registration activities triggered the First Amendment, heightened scrutiny was inappropriate. *Id.* at 1212-14. Whatever one might think about these non-binding decisions, they are all immaterial to this case because, even if registering to vote is somehow more expressive than signing a referendum, the mere act of mailing an advance ballot application (where the vote has not yet even been exercised) is surely not "inherently expressive."

restrictions on initiative and referendum petitions, which entail, by their very nature, one-on-one communicative elements and are thus themselves protected speech. 525 U.S. at 215 (O'Connor, J., concurring in judgment and dissenting in part). The same cannot possibly be said of the mere mailing of an advance mail ballot application. Moreover, the absence of similar restrictions on voter registration applications hardly renders H.B. 2332 a limitation on content-based speech, as Plaintiffs suggest. (Opp. 18). Neither are so inherently expressive as to implicate First Amendment protections, and the State is obviously not obligated to paint with the broadest possible brush when restraining non-expressive conduct.

As is true of so many issues in the heavily litigated election law space, there are lower court opinions on both sides of the legal dispute over the level of scrutiny to apply to restrictions on distribution of absentee ballots to prospective voters. Plaintiffs cite several in their response brief. (Opp. 14). Ironically, though, neither of the two federal district court decisions that they reference are particularly helpful to them.[4] For example, in *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020), although the district judge held that a Michigan law prohibiting third-parties from sending out absentee voter ballot applications 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).

[4] Plaintiffs also cite to a state trial court decision from Minnesota. *DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785 (Ramsey County Dist. Ct. July 28, 2020). That case focused on a state statute that "limit[ed] the number of voters which an individual can assist to complete their in-person or absentee ballots or help return their absentee ballots to be counted." *Id.* at *2. The trial court casually rejected the Fifth Circuit's reasoning in *Steen* and concluded that the discussion of whether to vote absentee "inherently implicates thoughts and expression." *Id.* at *29. The import of this decision is fairly minimal, however, given that the U.S. Supreme Court recently turned away a challenge to a much more restrictive ballot-harvesting law in Arizona. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

Likewise, in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp.3d 158, 176-77 (M.D.N.C. 2020), the plaintiffs mounted a First Amendment challenge to a North Carolina statute that effectively prohibited third-parties from marking another voter's absentee ballot or being in the presence of another voter when he/she marked the ballot. The court held that, while "assisting voters in filling out ballot request forms is subject to the First Amendment," *Anderson-Burdick* balancing – not strict scrutiny – applies to such laws and "the burdens on Plaintiffs' First Amendments speech and association rights are justified by the State's interest in preventing fraud." *Id.* at 224.

In sum, H.B. 2332's restrictions on the distribution of advance mail ballots do not proscribe any core political speech. Nor is the conduct that Plaintiffs wish to undertake so "inherently expressive" as to activate the First Amendment. There is, accordingly, no foundation for finding any violation of Plaintiffs' speech or associational rights.

B. – Plaintiffs' Attacks on H.B. 2332 Are Subject to Deferential Review

Notwithstanding Plaintiffs' insistence that the Court must evaluate each of their claims under a strict scrutiny standard, (Opp. 17), the proper standard of review is much more deferential. As described at length above, H.B. 2332's restrictions do not target, and Plaintiffs' desired distribution of advance mail ballots to Kansans does not involve, the kind of speech or expressive conduct necessary to implicate heightened scrutiny under the *Meyer-Buckley* framework.

Given that neither core speech nor expressive conduct is at issue with H.B. 2332, the proper standard for evaluating Plaintiffs' claims is *rational basis* review. Whether this review is part of the *Anderson-Burdick* formula – merely because the challenged statute is part of an election-related regulation – or a standalone deferential inquiry, is not entirely clear in this somewhat muddled area of jurisprudence. *See Daunt v. Benson*, 999 F.3d 299, 325-32 (6th Cir. 2021) (Readler, J., concurring) (criticizing expansion of *Anderson-Burdick* methodology beyond ballot access restrictions). The distinction, however, is one without a difference in this context because both approaches get the Court to the exact same place. *Compare Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the

First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)), *with City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (Absent classification based on a suspect class, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *id.* ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.")

The State's primary regulatory interests in the advance ballot distribution restrictions are the avoidance of confusion and the facilitation of an orderly and efficient administrative process in carrying out the election. (Defs.' Mem. Supp. MTD 19-20). Plaintiffs take Defendants to task for relying on "unsupported assertions" regarding the strength of governmental interests at stake. (Opp. 22). But no more is required, particularly in a facial constitutional challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the [statute] would be valid, i.e., that the law is unconstitutional in all of its applications."); *id.* at 450-51 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (articulating why facial challenges are heavily disfavored). Indeed, on rational basis review, a statute comes before the Court with a presumption of validity, "and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). Furthermore, because the court "never require[s] 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." *Id.* at 315. "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." *Id.*

Plaintiffs also argue that H.B. 2332 is not narrowly tailored "because there is no reason that out-of-state entities as a class create any more difficulties than in-state, or that a personalized application creates more difficulties than a blank one." (Opp. 22). Given that the First Amendment is not implicated here, there is no requirement that the statute be narrowly tailored in the first place. But even assuming that First Amendment protections have been triggered, H.B. 2332 survives the requisite scrutiny in this facial challenge. A content-neutral regulation may be narrowly tailored "even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726. This test is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Eliminating the root cause of confusion and chaos that plagued election officials across the State in the last two election cycles – which caused them to lobby for this legislation – is unequivocally a legitimate governmental interest.

The problem is especially acute when out-of-state entities are the ones responsible for sending the duplicate advance mail ballot applications to Kansas voters. It is infinitely more difficult for the State to identify, monitor, and exercise oversight of individuals and organizations not located in Kansas. In fact, Defendants are unaware of any Kansas entity that even operates in Plaintiffs' space on these issues. H.B. 2332, § 3(k)(1) does mandate that in-state solicitors of advance mail ballot applications (to the extent they now exist or come into being) include certain information about themselves in the solicitation – facilitating the State's ability to verify the accuracy of the sender's disclosures through Kansas records – but that requirement is unlikely to be effective with out-of-state players. Indeed, those that violate the statute's proscriptions will be almost impossible to locate and, even if they can be found, hauling them into a Kansas court – especially on a time-sensitive basis – could be a monumentally difficult task. A state surely is not required to roll the dice with the integrity and orderly administration of its electoral processes just

to allow out-of-state entities to engage in non-expressive conduct impacting the same.

The State's desire to avoid potential voter fraud is likewise a compelling interest. In an ideal world, no voter who submits multiple advance mail ballot applications would receive multiple advance ballots. No doubt, election officials identify many of the duplicate submissions from the list of applicants they must maintain. *See* Kan. Stat. Ann. § 25-1122(i). But in a state with 105 counties, many of whose election offices are substantially understaffed and overworked, it is inevitable that duplicates will fall through the cracks. And the more that entities are allowed to inundate Kansas voters with duplicate applications (rather than simply advising such voters how to obtain them), the greater the potential for problems and abuse. "Fraud is a real risk that accompanies mail-in voting even if [a state has] had the good fortune to avoid it." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). More importantly, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.*; *accord Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *id.* ("a State's political system [need not] sustain some level of damage before the legislature [can] take corrective action.").

The key takeaway here, then, is that Plaintiffs' First Amendment challenges to H.B. 2332 are properly judged under a highly deferential review. But even if Plaintiffs' proposed activities are somehow adjudged to constitute the type of expressive conduct that warrants protection under the First Amendment, the State's powerful interest in, and critical right to, regulate its electoral process would still necessitate the rejection of Plaintiffs' constitutional challenges to the statute.

III. – Plaintiffs' Overbreadth Claim Fails to State a Claim

Plaintiffs' overbreadth cause of action fares no better than their other First Amendment claims. When making an overbreadth claim, a party 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). 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 overbreadth doctrine is "strong medicine" and must be applied "with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982). Thus, if a statute is readily susceptible to a narrowing construction that will remedy any constitutional infirmity, the statute will be upheld. *Virginia. 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 v. City and Cty. of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119).

As an initial matter, for all the reasons described in Part II above, the restrictions in H.B. 2332 do not reach any core speech or expressive conduct protected by the First Amendment. Rather, the prohibition on the distribution of advance mail ballot applications is simply *non-*

expressive conduct. Moreover, even assuming the First Amendment is implicated, the limitations on Plaintiffs' expressive conduct are hardly significant. While the law prohibits out-of-state entities from mailing advance ballot applications to Kansas voters, it does not prevent them from communicating anything about the importance of voting in general or voting via an advance mail ballot, how to vote in person or by mail, or where to access an advance mail ballot application. Nor are such entities constrained from mailing or otherwise communicating any message at all about the political process, candidates, or voting in general. Plaintiffs have an infinite number of ways to convey the messages they wish to impart to voters. *See, e.g.*, *Lichtenstein*, 489 F. Supp.3d at 776.

As noted in Defendants' original motion, the statute was adopted primarily for the purpose of preventing voter confusion and ensuring the orderly administration of the electoral process. (Mem. Supp. MTD 24). Plaintiffs now argue that their *own conduct* is neither confusing nor a potential contributor to electoral chaos because their mailers advise Kansans not to submit multiple advance mail ballot requests and provide voters with an "unsubscribe" option to avoid repeat communications. (Opp. 23). But the fact that so many voters throughout the State sent in duplicate advance mail ballot applications in the last two election cycles underscores that Plaintiffs' suggestion was either not understood or not followed. Either way, Defendants cannot be expected to allow third parties to wreak havoc on the orderly administration of the State's electoral processes and then hide behind unheeded warnings that, based on historical practice, are ineffective.

Citing a *New York Times* article that quoted Defendant Schwab saying that Kansas had "not experience[d] any widespread, systematic issues with voter fraud, intimidation, irregularities, or voting problems" in the November 2020 election, Plaintiffs insist that H.B. 2332's proscriptions are attacking a non-existent problem. (Opp. 23-24). This is complete non-sequitur. An out-of-context quote to a reporter hardly classifies as evidence, and Secretary Schwab never remotely

suggested that voters and county election officials alike had not been deeply frustrated by the proliferation of advance mail ballot applications floating throughout the State. The problem with duplicate applications was acute and pervasive. Indeed, Deputy Assistant Secretary of State Katie Koupal testified to the Legislature about the need for this kind of rule. *See Hearing Testimony on H.B. 2332 Before the House Elections Committee*, 2021 Legis. Sess. (Feb. 18, 2021) (testimony attached as Exhibit B to Doc. 29 – Defs.' Resp. to Pls.' Mtn. for Prelim. Inj.). The fact that these duplicate applications did not likely affect the actual outcome or legitimacy of any election in the State certainly does not mean that there is no problem worth addressing. Moreover, it is the Legislature – not the Secretary of State – that is ultimately responsible for establishing the State's statutory rules governing elections. And as noted above, the State does not have to wait for the problem to metastasize before taking corrective action. See *Brnovich*, 141 S. Ct. at 2348; *Munro*, 479 U.S. at 195.

Referencing H.B. 2332, § 3(*l*)(1)'s "cause to be mailed" language, Plaintiffs recite several hypothetical scenarios (some farfetched) that they claim might be captured by the statutory prohibition. (Opp. 24). The Supreme Court has made clear, however, that the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *United States v. Williams*, 553 U.S. 285, 303 (2008) (quotation omitted). The prevention of voter confusion (as well as potential voter fraud) and the facilitation of an orderly electoral process are indisputably legitimate and important State interests that easily counterbalance any possible *de minimis* impacts on First Amendment rights here. Furthermore, because the requisite substantial overbreadth must be shown both "from the text of [the law] *and from actual fact*," *Hicks*, 539 U.S. at 113 (emphasis added), and "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Members of City Council of Los Angeles v. Taxpayers for Vincent*,

466 U.S. 789, 801 (1984) (emphasis added), Plaintiffs' argument also underscores why it is so critical for the Court to stay its hand while the Secretary of State carries out the Legislature's directive to him to develop regulations defining the contours of this statutory provision. *See* H.B. 2332, § 3(m).

With respect to § 3(k)(2)'s prohibition on non-election officials' distribution of advance ballot applications that have been partially completed, Plaintiffs aver the statute is unconstitutionally overbroad because VoteAmerica allegedly only sends applications upon a voter's request, and VPC purportedly "uses information from state-generated voter registration lists." (Opp. 24). There are multiple problems with this argument. First, as Defendants noted in their Response to Plaintiffs' Motion for a Preliminary Injunction (Doc. 29 at 5-7), VoteAmerica's activities – at least based on its self-described actions in the Complaint – do not even violate this statutory provision. Second, even if VPC relies *exclusively* on statewide voter registration files – and there is no indication in the Complaint that it does – that still does nothing to mitigate the voter confusion and disruption of orderly election administration that flow from recipients feeling compelled to send in multiple advance mail ballot applications (received from multiple private vendors), in light of the applications' partially completed status. Third, there is no guarantee that the partially completed advance ballot applications that VPC sends out are still accurate at the time they are sent. Indeed, the State's voter registration database (i.e., the "Election Voter Information System," or "ELVIS") is updated in real time, making it entirely conceivable (and perhaps not uncommon) that the information changed between the time a third-party receives the information from election officials and the time the ballot application is received by the voter. Relatedly, there is no assurance that third-parties like VPC do not also supplement the data received from ELVIS with other information gleaned from other sources, the accuracy of which is uncertain. This may help explain

why election clerks across the State complained of receiving advance ballot applications that contained inaccurate information in the last two election cycles. The Secretary of State's Office can only verify the accuracy of the information in ELVIS at the time of the request; it has no knowledge of the accuracy at any time thereafter.

Judged under the proper standard governing such claims, Plaintiffs' overbreadth cause of action fails to state a claim and must be dismissed.

IV. – Plaintiffs' Dormant Commerce Clause Cause of Action Fails to State a Claim

Turning, finally, to the dormant Commerce Clause claim (Count IV), Plaintiffs' cause of action fails as a matter of law.

A. – Article I, Section 4 of the Constitution Forecloses Plaintiffs' Claim

As an initial matter, Defendants incorporate the arguments advanced in their Response to Plaintiffs' Motion for a Preliminary Injunction (Doc. 29 at 21-25), underscoring that Plaintiffs' dormant Commerce Clause cause of action is textually foreclosed by Article I, Section 4, Clause 1 of the Constitution. Defendants are aware, of course, that arguments raised for the first time in a reply brief are not considered by the Court due to the unfair prejudice it might have on the non-movant. In this case, however, Plaintiffs had a full opportunity to respond to Defendants' argument on this purely legal issue in their Reply brief submitted in support of their motion for a preliminary injunction (Doc. 33 at 25-27). All parties will also have a full opportunity to argue this legal issue at the upcoming hearing on Plaintiffs' motion for a preliminary injunction. There is, accordingly, no conceivable prejudice from the Court's consideration of this issue in this motion to dismiss. Where the parties have otherwise had a full opportunity to address a legal issue raised for the first time in a reply brief, and there is no prejudice flowing therefrom, the Court is well within its rights to take up the issue. *See In re Syngenta AG MIR 162 Corn Litigation*, 131 F. Supp.3d 1177, 1194 n.9 (D. Kan. 2015) ("The Court would not ordinarily consider an argument raised for the first time in a reply, but plaintiffs had the opportunity to address the argument in its [their] sur-reply or at oral argument on the motions.").

B. – H.B. 2332, § 3(l)(1) Has No Connection to Economic Protectionism

Putting aside the fact that the Elections Clause of the Constitution expressly empowers the State, through a positive grant of authority, to enact regulations concerning federal elections, thus trumping the default provisions of the Commerce Clause deemed to be dormant, Plaintiffs' claim that the Out-of-State Distributor Ban violates the dormant Commerce Clause must still fail. There is simply no basis to find that H.B. 2332, § 3(*l*)(1) is linked to economic protectionism. Plaintiffs argue that the absence of a motive based on economic protectionism is irrelevant; however, such position is inconsistent with governing authority. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("[The] 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *accord Maine v. Taylor*, 477 U.S. 131, 148–49 (1986). The driving force behind the dormant Commerce Clause is prohibiting economic protectionism, and a facially discriminatory statute is not, contrary to Plaintiffs' suggestion, always unconstitutional if it is unrelated to economic protectionism. *See id.* ("[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism . . . .") (internal citations omitted).

Here, Plaintiffs cite *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), for the proposition that a state's purpose is irrelevant to this Court's analysis of whether the Out-of-State Distributor Ban is unconstitutional. (Opp. 26). But the Supreme Court subsequently considered economic protectionism, or actually the absence thereof, in *Taylor* when it concluded that "there [was] little reason . . . to believe that the legitimate justifications the State [of Maine] ha[d] put forward for its statute [were] merely a sham or a 'post hoc rationalization." 477 U.S. at 148–49. Indeed, the lack of any legitimate showing of economic protectionism driving the Out-of-State Distributor Ban undermines Plaintiffs' claim, regardless of whether the statute is facially discriminatory or neutral

as written.

There is simply no basis to conclude that the State was motivated, outwardly or secretly, by economic protectionism. Moreover, Plaintiffs' attempts to downplay the importance of the State's regulations and protection of its voters from voter fraud and needless confusion should be rejected. The State has authority to regulate the manner in which it holds elections and a duty to preserve the integrity of the votes of Kansas residents. "[I]t is . . . 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. In short, Plaintiffs' dormant Commerce Clause fails and Count IV must be dismissed.

V. – Conclusion

Plaintiffs are attacking valid procedural safeguards that the Kansas Legislature has adopted in order to mitigate voter confusion, prevent potential voter fraud, and ensure the orderly administration of the State's election process. Their protestations notwithstanding, Plaintiffs are not constrained from engaging in any core political speech or other expressive conduct. The Court must review the challenged statutes, therefore, under a highly deferential review, which the State is easily able to satisfy.

As for Plaintiffs' dormant Commerce Clause claim, the statutes are insulated from such an attack by virtue of the Constitution's Election Clause. And even if that shield was not available to the State, the complete absence of any economic protectionism objective underlying the statute would necessitate the defeat of Plaintiffs' cause of action. Accordingly, Defendants respectfully request that the Court grant their motion to dismiss.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 20, 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