No. 23-3100

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

VOTEAMERICA, INC. and VOTER PARTICIPATION CENTER,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the District of Kansas in Case No. 2:21-CV-02253-KHV
Before the Honorable Kathryn V. Vratil, District Judge

BRIEF FOR THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

ANASTASIA P. BODEN
THE CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 216-1414
aboden@cato.org

MARK L. HANIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
mark.hanin@wilmerhale.com

NORA Q.E. PASSAMANECK
LEAH FUGERE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street
Suite 2600
Denver, CO 80202
(720) 274-3135
nora.passamaneck@wilmerhale.com
leah.fugere@wilmerhale.com

DAVID P. YIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 663-6000
david.yin@wilmerhale.com

Counsel for Amicus Curiae The Cato Institute

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for amicus states that The Cato Institute is a non-profit organization and has no stock or parent corporation. Accordingly, no traded company or corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. To that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. Cato's interest in this case arises from the manner in which Kansas's Personalized Application Prohibition burdens First Amendment rights through criminal penalties.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Cato certifies that no party's counsel authored this brief in whole or in part, and that no one other than Cato and its counsel made any monetary contribution toward this brief's preparation or submission. All parties to this case have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Kansas law prohibits any person who "solicits" a voter by mail to file an application for an advance voting ballot from enclosing a partially pre-filled application. K.S.A. § 25-1122(k)(1), (2) ("Personalized Application Prohibition"). Each violation is punishable by up to one month in jail and/or criminal fines. *Id.* §§ 25-1122(k)(5); 21-6602(a)(3), (b); App.III 611-¶132. This extraordinarily harsh penalty applies despite no scienter requirement and no distinction between accurate and inaccurate applications. The Personalized Application Prohibition cannot survive constitutional scrutiny because it abridges three independent First Amendment rights and, as the district court correctly held, Appellant (the "State") fails to demonstrate that the Prohibition is narrowly tailored to serve any compelling government interest.

First, the Personalized Application Prohibition burdens Appellee Voter Participation Center's ("VPC" or "Appellee") freedom of speech. Appellee's enclosure of a Partially Pre-Filled Application is both expressive conduct and core political speech. It is expressive because Appellee's pro-mail-in ballot message is self-evident to recipients of a Partially Pre-Filled Application, and that message is unmistakable in the context of Appellee's accompanying materials and the political debate regarding mail-in voting. It is political speech because Appellee's mailer

communication centers on the fundamental political right of voting—specifically, the benefits of mail-in voting.

Second, the Personalized Application Prohibition burdens Appellee's freedom of association. As the Supreme Court explained in *Button* and *Brotherhood of Railroad Trainmen*, assisting and advising others in securing legal rights implicates the right to association. And other courts have held that voter outreach analogous to Appellee's activities here is "intertwined" with the right to association.

Third, the Personalized Application Prohibition burdens Appellee's freedom to petition. That freedom includes Appellee's right to advise, assist, and aid others in their petitions for advance mail-in ballots.

The Personalized Application Prohibition cannot stand because it is not narrowly tailored to serve any of the ostensible interests the State claims, as strict scrutiny requires. For example, the State failed to link Partially Pre-Filled Applications to purported harms (*e.g.*, no link to voter fraud or confusion regarding sender's identity); failed even to demonstrate the existence of certain purported harms (*e.g.*, no evidence of voter fraud); and failed to account for other statutory provisions that already solve for the purported harms (*e.g.*, fraud prohibitions, application cure provisions). The State's *post hoc* justifications crumble under any level of scrutiny, much less the "closest scrutiny" demanded by criminal laws that intrude upon fundamental First Amendment rights.

Lastly, the Supreme Court has long recognized the principle that every citizen should have free access to the law's contents, and therefore the government cannot restrict the use or distribution of legal works such as statutes, regulations, and judicial opinions. Government forms are no different because they are prescribed by statute, are prepared by government entities acting as adjuncts to the legislature, and are vehicles by which citizens can effectuate their legal rights. And because the public enjoys the right to freely use and distribute legal works, such as the application for an advance voting ballot, members of the public also have the right to use such applications to create Partially Pre-Filled Applications and distribute them barring a showing of compelling interest that the State here has not come close to meeting. The State's Personalized Application Prohibition sets a dangerous precedent for circumventing the Supreme Court's government edict doctrine by criminalizing the free distribution and use of government forms.

ARGUMENT

I. CRIMINALIZING DISTRIBUTION OF PARTIALLY PRE-FILLED APPLICATIONS UNCONSTITUTIONALLY BURDENS FREEDOM OF SPEECH

Appellee's distribution of Partially Pre-Filled Applications is expressive conduct and core political speech, both of which enjoy the highest level of constitutional protection. The State's criminalization of that conduct and speech takes aim at the heart of the First Amendment and suppresses constitutionally protected activity.

A. Distributing Partially Pre-Filled Applications Is Expressive Conduct

The First Amendment protects "symbolic acts or displays that are sufficiently imbued with elements of communication." *Cressman v. Thompson*, 719 F.3d 1139, 1150-1151 (10th Cir. 2013). To determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play," courts ask (i) whether "[a]n intent to convey a particularized message was present" and (ii) whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

First, Appellee indisputably intends to convey—and does convey—a particularized message. Courts have regularly found that voter registration activities communicate distinct messages. For example, in *American Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010), the district court found that third-party voter registration activities constituted expressive conduct because they were "intended to convey a message that voting is important, that Plaintiffs believe in civic participation, and that Plaintiffs are willing to expend resources to broaden the electorate to include allegedly under-served communities." *Id.* at 1215-1216; *see also League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720, 728 (M.D. Tenn. 2019) (finding voter registration efforts conveyed message of "encouraging citizens to register to vote" (cleaned up)); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1333-1334 (S.D. Fla. 2006) ("collection and

submission of voter registration drives" expressed message "persuad[ing] others to vote … [and] enlist[ed] like-minded citizens in promoting shared … positions"). So, too, here. Appellee believes that sending Partially Pre-Filled Applications conveys "its viewpoint that voting by mail is convenient and a good option … to participate in democracy." App.III 596-¶15.

Second, a person who receives Appellee's Partially Pre-Filled Application, standing alone, would understand Appellee's message that voting is important and that voting by mail is a convenient and good option. The district court here found that a recipient of Appellee's partially filled form "would readily understand that through the personalized mail ballot application, [Appellee] is communicating that advance mail voting is safe, secure and accessible." App.III 643. The court noted that "tens of thousands of Kansans did in fact receive and act on [Appellee's] specific message by completing and submitting an application that it sent." App.III 642. Similarly, other courts have found that conduct like Appellee's is "typically motivated by the desire to positively impact our civil and political landscape" and is perceived as such by recipients. *See Herrera*, 690 F. Supp. 2d at 1216 (explaining voter registration drives are "distinct from a person picking up a registration form [themselves] and changes the manner and setting in which prospective voters register," and "communicates a message that democratic participation is important"). Appellee's message is clear standing alone, as only an organization

that seeks to promote mail-in voting would go to these lengths to facilitate the application process for voters.[2]

Although sending a Partially Pre-Filled Application itself expresses a clear message, the great likelihood that Appellee's message would be understood is enhanced by the accompanying cover letter and the contemporaneous public discussion regarding mail-in ballots. The letter states, for example, that Appellee agrees with Kansas officials who "encourage voters to use mail ballots," and therefore has "sent you the enclosed advanced ballot by mail application already filled out with your name and address." App.III 675. The letter further states that "[v]oting by mail is EASY," such that the voter can "[j]ust sign, date, and complete the application. Drop it in the mail and you will receive a ballot … which you can complete and return without ever leaving your home." *Id.* Moreover, the use of mail-in ballots was, and remains, part of a national conversation. *See, e.g.*, Mitchell et al., *Political Divides, Conspiracy Theories and Divergent News Sources Heading Into 2020 Election*, Pew Res. Ctr. 12-13 (Sept. 16, 2020), https://www.pewresearch.org/journalism/2020/09/16/legitimacy-of-voting-by-mail-politicized-leaving-americans-divided/ ("[M]any states … promot[ed] the expanded

[2] The State's hypotheticals support the Appellee's position. The State asks, rhetorically, "If a travel agency sends out pre-populated passport applications, what is the message? Seemingly nothing." Br. 15. But the obvious message is that the travel agency encourages recipients to obtain passports for international travel and pre-fills applications to make the application process more efficient and convenient.

use of mail-in ballots" and "[m]ost Americans are very aware of discussions about the impact of increased mail-in ballots.").

Appellant's attempt to "disaggregate[]" the Partially Pre-Filled Application from the accompanying cover letter (Br. 18) is baseless and furthermore wrongly ignores the national conversation concerning mail-in voting. As the Supreme Court explained, conduct should be "combined with the factual context and environment in which it was undertaken" because "the context may give meaning to the symbol." *Spence v. State of Washington*, 418 U.S. 405, 408-410 (1974) (per curiam) (holding that "a flag bearing a peace symbol and displayed upside down today might be interpreted as nothing more than bizarre behavior," but that in context—just after "the invasion of Cambodia and the killings at Kent State"—it was expressive). Likewise, the black armbands in *Tinker* conveyed an unambiguous message not because of a timeless or universal symbolism of black armbands,[3] but because they were donned in the specific context of a "contemporaneous issue of intense public

[3] Worn in other contexts, black armbands convey meanings besides protesting the Vietnam war. *See, e.g.*, *Major General William Tecumseh Sherman Wearing Mourning Armband*, The Metropolitan Museum of Art, https://www.metmuseum.org/art/collection/search/301993 (visited Sept. 14, 2023) (General Sherman wearing black "mourning armband" after Lincoln's assassination); Whitcomb, *Clippers Players Stage Protest After Owner's Alleged Racist Comments*, Reuters (Apr. 27, 2014), https://www.reuters.com/article/us-usa-basketball-clippers/clippers-players-stage-protest-after-owners-alleged-racist-comments-idUSBREA3Q0OS20140427 (athletes wearing black armbands to protest racism).

concern—the Vietnam hostilities." *Id.* at 410 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503 (1969)). Here, the pro-mail-in-voting message of the Partially Pre-Filled Applications was readily understandable standing alone and unmistakable in light of the accompanying cover letter and the contemporaneous public debate about mail-in voting as an "issue of intense public concern." *Id.* The Partially Pre-Filled Applications were, therefore, "sufficiently imbued with elements of communication to fall within the scope of the First … Amendment[]." *Spence*, 418 U.S. at 409.

Appellant's reliance on *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006) ("*FAIR*") is unavailing. In *FAIR*, the Court found that the schools' different treatment of military recruiters compared to other recruiters lacked expressive nature because absent an accompanying statement, the treatment delivered no message that observers could discern from the mere location of the recruitment interviews. *Id.* at 66. In clear contrast, Partially Pre-Filled Applications are inherently expressive, and their pro-voting-by-mail message is understood even in the absence of other speech. *See supra* pp. 5-7. The fact that the message of the Partially Pre-Filled Application is reinforced by a cover letter and public discussions concerning mail-in voting does not detract from the expressive nature of the Partially Pre-Filled Application itself. *See Spence*, 418 U.S. at 409-410.

B. Distributing Partially Pre-Filled Applications Is Political Speech

Appellee's distribution of the Partially Pre-Filled Applications is core political speech and is therefore entitled to First Amendment protection. As the Supreme Court has described, "interactive communication concerning political change … is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-422 (1988) (affirming Tenth Circuit); *see also Buckley v. American Const. L. Found*., *Inc*., 525 U.S. 182, 186-187 (1999) (affirming Tenth Circuit's holding that regulations on petition circulation were "excessively restrictive of political speech"). It is well settled that "First Amendment protection for [political speech] … is 'at its zenith.'" *Buckley*, 525 U.S. at 187.

Sending a Partially Pre-Filled Application with an explanatory letter is core political speech because it is a "communication concerning political change." *Meyer*, 486 U.S. at 421-422; *see also, e.g.*, *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (concluding that efforts to "(1) educate Michigan voters about their options to use and request absent voter ballot applications; [and] (2) distribute absent voter ballot applications … necessarily involve political communication"). Filling out a voter registration form "implicates political thought and expression." *Buckley*, 525 U.S. at 195. The Partially Pre-Filled Application communicates about the "political franchise of voting," which is a "fundamental political right" "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370

(1886). Moreover, the use of mail-in voting is itself a political issue engendering active political debate. *See, e.g.*, *Arizona Republican Party v. Fontes*, No. 22-cv-0388, 2023 WL 193620, at *1 (Ariz. Ct. App. Jan. 17, 2023) (rejecting mail-in voting challenge); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020) (*inter alia*, extending received-by deadline for mail-in ballots); *see also* Mitchell et al., *supra* p. 7, at 12 (Americans "come away with a very different sense of the facts surrounding [mail-in voting]—including whether mail-in ballots bring voter fraud—depending on their party and media diet."). Appellee's distribution of Partially Pre-Filled Applications represents political speech endorsing mail-in voting and is deserving of the highest First Amendment protection.

The State's argument that it "does not impede [Appellee] from conveying its pro-mail voting message" through other means (Br. 8) is a non sequitur. "The First Amendment protects [Appellee's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. That the State "leaves open more burdensome avenues of communication" by allowing for advocacy through other means "does not relieve its burden on First Amendment expression." *Id.*

Furthermore, the State's Personalized Application Prohibition creates a chilling effect on what the State admits ought to be lawful expressive conduct and speech. Although the State has conceded that VoteAmerica did not violate the

statute (Br. 7 n.3), the statute's vagueness raises concerning questions about its reach. The statute prohibits "solicit[ing] by mail a registered voter to file an application for an advance voting ballot." K.S.A. § 25-1122(k)(1). But the word "solicit" has a broad range of meanings, including (1) "[t]o entreat or petition (a person) for, or to do, something; to urge, importune; to ask earnestly or persistently," *Oxford English Dictionary*, https://www.oed.com/search/dictionary/?scope=Entries&q=solicit (visited Sept. 14, 2023); (2) "to approach with a request or plea," *Webster's Third International Dictionary*, https://www.merriam-webster.com/dictionary/solicit (visited Sept. 14, 2023); and (3) "to ask someone," *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/solicit (visited Sept. 14, 2023). Moreover, the prohibited solicitation is of the voter's act of "fil[ing] an application for an advance voting ballot." K.S.A. § 25-1122(k)(1). Thus, even if a voter *had expressly requested* a pre-filled application, under the language of the statute an organization may be concerned it could still be held liable for "solicit[ing]"—that is, "entreat[ing]," "approach[ing] with a request," or "ask[ing]"—the voter to take the logical next step of "fil[ing]" the advance ballot application once completed. This troubling ambiguity in the statute exacerbates its chilling effect on First Amendment rights. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition."). Thus, the

Personalized Application Prohibition is not only unlawful as to the conduct that it directly prohibits but also the range of conduct that it indirectly inhibits. The fact that the provision raises the specter of criminal prosecution, and even jail time, *see* App.III 628; K.S.A. § 25-1122(k)(5), without any scienter requirement supercharges this chilling effect.

For these reasons, the Personalized Application Prohibition impermissibly suppresses core First Amendment conduct and should be subject to strict scrutiny.

II. CRIMINALIZING DISTRIBUTION OF PARTIALLY PRE-FILLED APPLICATIONS UNCONSTITUTIONALLY BURDENS FREEDOM OF ASSOCIATION

Appellee seeks to associate with Kansas voters to promote its core belief and message that "advance mail voting is safe, secure, accessible, and beneficial." App.III 595-¶12. Appellee's practice of sending Partially Pre-Filled Applications not only informs Kansas voters of Appellee's beliefs but also assists them in vindicating their right to obtain mail-in ballots. In fact, in the 2020 general election, Appellee successfully persuaded over 69,000 Kansas voters to return Appellee's Partially Pre-Filled Applications for mail-in ballots, App.III 606-¶97, thereby joining in a common political endeavor, App.III 648. The State's Prohibition abridges Appellee's freedom to associate with Kansas voters in that common cause.

The First Amendment's freedom of speech and of assembly clauses protect the right "to engage in association for the advance of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). For example, the Supreme

Court has held that the First Amendment right to association protects the rights of union "members who carry out [a] legal aid program" in "assist[ing] and advis[ing]" other members and their families in securing statutory rights. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964). The right to association also protects the rights of NAACP members and lawyers to assist a person "who may or may not be an NAACP member" in seeking legal redress. *NAACP v. Button*, 371 U.S. 415, 420, 427-428 (1963). In a similar vein, the freedom of association is frequently implicated in voter outreach activities. The district court in *League of Women Voters v. Hargett* explained that "the entire voter registration activity implicates the freedom of the plaintiffs to associate with others for the advancement of common beliefs." 400 F. Supp. 3d at 720 (internal quotation marks omitted). That court held that "encouraging and facilitating registration" is "intertwined with … association." *Id.* at 721 (internal quotation marks omitted); *see also Democracy N.C. v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 222-224 (M.D.N.C. 2020) (finding associational right in organizations "completing … absentee ballot request forms" for voters).

The State's ban on Partially Pre-Filled Applications curtails "the freedom to associate" and is "subject to the closest scrutiny." *Patterson*, 357 U.S. at 460-461. As the district court correctly found, Appellee engages in protected association because it seeks to urge a targeted category of Kansas eligible voters—*i.e.*,

"traditionally underserved groups," App.III 594-¶2—to vote and, specifically, to endorse a particular mode of voting—advance mail-in balloting—as secure, safe, and beneficial. App.III 595-¶12, 648-649. Appellee believes that "sending personalized advance mail ballot applications" will create a "broad associational base with potential voters." App.III 632. Appellee's attempt to assist and advise voters about exercising their legal rights is protected association. *See Button*, 371 U.S. at 427-428; *Brotherhood of R.R. Trainmen*, 377 U.S. at 6. In particular, Appellee's encouragement and facilitation of voters registering for advance mail-in ballots is inextricably "intertwined with … association." *Hargett*, 400 F. Supp. 3d at 721; *see also Democracy N.C.*, 476 F. Supp. 3d at 222-224.

The State's principal argument—that "[f]reedom of association does not protect connections between complete strangers who are not members of any organized association" (Br. 11, 51-52)—is belied by *Button* and *Brotherhood of Railroad Trainmen*, as well as by the evidentiary record. In *Button*, the NAACP attempted to assist and advise potential litigants, "who may or may not be … NAACP member[s]," with civil rights claims. 371 U.S. at 420. The union in *Brotherhood of Railroad Trainmen* attempted to assist and advise both union members and non-member relatives. 377 U.S. at 4-6 & n.8. These cases demonstrate that the Supreme Court does not require a preexisting or subsequent

relationship between the organization and targets of the associational activity for the organization to have engaged *ex ante* in protected activity.

In any event, the State's assertion that "recipients of pre-filled advance voting applications do not subsequently join in a common endeavor" (Br. 52) with Appellee is contradicted by the record. In the 2018 election, approximately 5,000 Kansans made use of Appellee's advance ballot application (5.6% rate based on around 90,000 applications sent). App.III 606-¶¶93-94. And approximately 69,000 Kansans mailed an advance ballot application provided by VPC in the 2020 general election (5.8% rate based on around 1.2 million applications sent). App.III 606-¶¶96-97. Moreover, as the district court found, Appellee not only "identifies a specific group of voters to target for its associations" but also "continues to associate with these voters by, for example, tracking responses to its personalized applications and sending further get-out-the-vote communications." App.III 648. These deliberate, targeted, ongoing associational activities by the Appellee are readily distinguishable from *City of Dallas v. Stanglin*, where hundreds of teenagers congregated by happenstance in a public dance hall. 490 U.S. 19, 24-25 (1989).

III. CRIMINALIZING DISTRIBUTION OF PARTIALLY PRE-FILLED APPLICATIONS UNCONSTITUTIONALLY BURDENS THE FREEDOM TO PETITION

In submitting an advance ballot application, a Kansas voter petitions the government for relief—specifically, authorization to vote by advance ballot. By criminalizing sending Partially Pre-Filled Applications to eligible Kansas voters, the

State criminalizes Appellee's ability to help Kansas voters prepare and submit petitions for such relief. This prohibition unconstitutionally burdens Kansas voters' right to petition the government and Appellee's First Amendment right to assist voters in exercising that right in regard to a core aspect of democratic self-governance—casting a ballot.

The right to petition the government for redress of grievances is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-525 (2002) (quoting *United Mine Workers of Am. v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). As relevant here, it encompasses the right "to seek administrative … relief." *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2nd Cir. 1994). "[T]he right to petition extends to all departments of the Government," *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), including state and local government, *see, e.g.*, *Van Deelen v. Johnson*, 497 F.3d 1151, 1158 (10th Cir. 2007) (Gorsuch, J.) (county property tax assessment challenge). As this Court explained in *Van Deelen*, the Constitution's Petition Clause "does not pick and choose its causes"; it applies to causes that are "minor and questionable, along with the mighty and consequential," so that "all [causes] are embraced." 497 F.3d at 1156. "[A] private citizen exercises a constitutionally protected First Amendment right *anytime* he or she petitions the government for redress[.]" *Id.*; *see, e.g.*, *Johnson v. Avery*, 393 U.S. 483, 487-489 (1969) (holding

that prohibiting prisoners from assisting other prisoners with habeas applications violates freedom to petition in the absence of the state providing another "regular system of assistance").

In submitting an advance ballot application, a Kansas voter petitions the government for administrative relief consisting of an advance ballot that can be returned by mail. While "[a]ny registered voter [in Kansas] is eligible to vote by advance voting ballot," K.S.A. § 25-1119(a), doing so requires obtaining, completing, and signing the correct application form, *id.* § 25-1122(a); and mailing a completed form to the correct address within a specified time period, *id.*; *id.* § 25-1122(f). Officials verify each application's contents, signature, and accompanying documentation. *Id.* § 25-1122(e). If a voter makes one of many potential mistakes, the mistakes may result in the petition for administrative relief being denied and, in some cases, a provisional ballot being issued instead. *Id.* § 25-1122(e)(1); *see also* App.III 598-¶¶33-37.

Appellee prepares and sends Partially Pre-Filled Applications to Kansas voters to assist them in exercising their right to petition the government for administrative relief in an accurate, efficient, and timely manner. Appellee renders this assistance by pre-filling advance ballot applications with a voter's name and address, enclosing a postage-paid envelope, and pre-addressing that envelope to the proper county official. App.III 600-¶¶47-49. But-for receiving Appellee's Partially

Pre-Filled Applications, some Kansas voters may never have sought this relief, which was especially salient during the global COVID-19 pandemic. App.III 606-¶95 ("In 2020, VPC anticipated that the pandemic would result in many voters voting by mail for the first time.") That is especially true for certain categories of voters that Appellee hopes to reach, including underprivileged voters who may have no ability to print electronic forms at home, particularly during a global pandemic. *See* App.III 595-¶6 (describing Appellee's belief that a "key" way of "effectively advocating its message" is to transmit partially pre-filled forms to voters "who may have fewer resources for, and less access to, printing and postage"); *see also id.* at 607-¶105 (Kansas county elections director describing some voters as being "frightened" and "in their homes" due to the COVID-19 pandemic and requesting advance mail ballots on that basis).

By imposing a blanket criminal prohibition on sending Partially Pre-Filled Applications, Kansas banned VPC's preferred way of helping Kansas voters prepare and file petitions for administrative relief via an advance ballot application. As the Supreme Court has made clear, First Amendment rights would be "a hollow promise" if the government were at liberty to "erode" constitutional guarantees using "indirect restraints." *United Mine Workers*, 389 U.S. at 222. By criminalizing transmittal of Partially Pre-Filled Applications, Kansas has "erode[d]" and burdened its voters' First Amendment freedom to petition the government. Kansas has

likewise eroded Appellee's First Amendment freedom to assist Kansans in petitioning the government. *See Avery*, 393 U.S. at 488-490 (striking down prohibition on advising, assisting, and/or aiding prisoners to prepare habeas petitions); *Hargett*, 400 F. Supp. 3d at 725-735 (granting preliminary injunction on First Amendment grounds to organizations challenging law restricting ability to assist voters with filing registration applications); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700-709 (N.D. Ohio 2006) (same for Ohio law); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389 (5th Cir. 2013) (agreeing that "'helping' voters to fill out their [voter registration] forms" "involve[s] [First Amendment] speech," as conceded by Texas). Moreover, the Kansas law unconstitutionally burdens the freedom to petition in the context of casting a ballot, which is central to "'[t]he very idea of government, republican in form.'" *BE & K Constr. Co.*, 536 U.S. at 525. For these independent reasons, this Court should affirm the district court's ruling striking down the Personalized Application Prohibition as unconstitutional.

IV. THE STATE LACKS SUFFICIENT INTERESTS TO PROHIBIT PARTIALLY PRE-FILLED APPLICATIONS, AND ITS LINK TO "VOTER FRAUD" IS BASELESS

Because the Personalized Application Prohibition burdens expressive conduct and political speech, the freedom of association, and the freedom to petition, it must be narrowly tailored to serve an overriding state interest in order to survive scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Grant v. Meyer*, 828 F.2d 1446, 1452 (10th Cir. 1987) (holding that a state's restraints on expressive

conduct and political communication "are suspect and subject to strict scrutiny"), *aff'd*, 486 U.S. 414 (1998); *Patterson*, 357 U.S. at 460-461 (holding that burdens on the freedom of association are "subject to the closest scrutiny"). The State's purported interest in preventing fraud tilts at windmills and fails to identify an overriding state interest sufficient to sustain the Personalized Application Prohibition.

For one, the State does not present evidence that sending Partially Pre-Filled Applications is "so inherently conducive to fraud" or other purported harms "as to justify its prohibition." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-638 n.11 (1980). The State presented no evidence of voter fraud in Kansas in 2020—and has conceded that there is no such evidence, App.III 660-661—much less showed that Partially Pre-Filled Applications contributed to voter fraud. The State instead argues that it has "every right to take other states' issues into consideration when passing its own legislation." Br. 46. Yet there is no evidence of voter fraud in other states, or any fraud related to Partially Pre-Filled Applications. *See, e.g.*, Olson, *"Lost, Not Stolen": Prominent Conservatives Refute 2020 Election Myths*, Cato Inst. (July 21, 2022) (finding "no credible evidence that fraud changed the outcome [of the 2020 election] even in a single precinct, let alone in any state"), https://www.cato.org/blog/lost-not-stolen-prominent-conservatives-refute-2020-election-myths. This absence of evidence undercuts the State's position

as to *both Village of Schaumburg* prongs: (i) its asserted "overriding" interest is unsubstantiated by any evidence, and (ii) the Kansas provision could not be narrowly tailored to advance this interest because there was never a demonstrated problem of, or an explained linkage to, fraud in the first place. *McIntyre*, 514 U.S. at 347. And even if a state need not "'sustain some level of damage before the legislature can take corrective action'" (Op. Br. 47), its grounds for satisfying strict scrutiny are uncompelling where its "interests" are rooted in unsubstantiated conjecture and are logically disconnected from the targeted conduct. Moreover, the provision has no scienter requirement, meaning that the State does not need to prove the sender or recipient of a Partially Pre-Filled Application intends to commit fraud, mislead, or cause any other ostensible harm.

Kansas already has "an arsenal of safeguards," *Buckley*, 525 U.S. at 205, designed to prevent and punish fraud, prevent voter confusion, and otherwise address the purported harms the State raises, further reinforcing the conclusion that the Personalized Application Prohibition is not narrowly tailored. Kansas has general fraud statutes to prosecute any alleged voter fraud. *See, e.g.*, K.S.A. § 21-5824 (providing that "[m]aking false information" as to "some material matter" "with the intent to," among other things, "induce official action," is a felony). In the voting context, the State criminalizes the "[f]alse impersonation of a voter," making it a felony to "represent[] oneself as another person, whether real or fictitious, and

thereby voting or attempting to vote." *Id.* § 25-2431. And Kansas has robust safeguards to ensure the integrity of elections, including signature and driver's license verification, *id.* § 25-1122(e)(1)-(2), and the strict maintenance of lists of voters who file advance ballot and other election applications, *see id.* § 25-1122(i). Notably, Kansas already screens for errors on applications for advance ballots by requiring election officials to contact the voter, *id.* § 25-1122, and there is no evidence that screening is ineffective to prevent fraud in such applications.

As to the State's alleged interest in reducing errors, the evidentiary record is insufficient to meet the most exacting constitutional standard. Appellee's expert witness, Dr. Hersh, offered unrebutted testimony that Appellee's data "are accurate compared to reasonable benchmarks," App.III 605-¶87, and that limited errors in the Partially Pre-Filled Applications are "nothing out of the ordinary," App.III 605-¶86. Indeed, Kansas's *own* elections officials mailed pre-filled advance ballot applications precisely because doing so "'*reduces mistakes* that we then have to work harder to fix on the back end,'" App.III 600-¶46 (emphasis added), while the two most common errors in Douglas County requiring "curing"—a missing signature or signature that did not match prior records, App.III 604-¶81—pertain to application contents that the voter must provide, and is not pre-filled.

The State's argument that the Partially Pre-Filled Applications cause voter confusion and diminish confidence in election officials is similarly unpersuasive; the

law *already requires* the clear disclosure of the sender's identity and a disclaimer that the mailing does not come from the government. *Id.* § 25-1122(k)(1)(A)-(D). Thus, the State "has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech." *McIntyre*, 514 U.S. at 357. While the State is entitled to "punish fraud directly," it may not "punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id.*

Any non-speculative risk of fraud here is, at best, *de minimis*. But even if that risk were more tangible (and it is not), "our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357. Any legitimate interest in preventing fraud, avoiding voter confusion, and facilitating orderly elections, as the State asserts, App.III 543, is "better served by measures less intrusive than a direct prohibition," *Village of Schaumburg*, 444 U.S. at 637. The First Amendment concerns implicated by the Personalized Application Prohibition are grave and insurmountable for the State. The provision thus fails strict scrutiny.

V. THE PUBLIC HAS A RIGHT TO DISSEMINATE GOVERNMENT FORMS, INCLUDING PARTIALLY PRE-FILLED APPLICATIONS

It is axiomatic that every citizen should have free access to the law. "'Every citizen is presumed to know the law,' and 'it needs no argument to show … that all

should have free access' to its contents." *Georgia v. Public.Resource.Org, Inc*., 140 S. Ct. 1498, 1507 (2020) (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886) ("It can hardly be contended that it would be within the constitutional power of the legislature to enact that … statutes and opinions should not be made known to the public.")). Accordingly, the Supreme Court in *Public.Resource.Org* rejected Georgia's attempt to restrict a non-profit entity's free public dissemination of Georgia's annotated statutes because the annotations were prepared by a state commission acting as "an adjunct to the legislature … in the course of its legislative responsibilities." 140 S. Ct. at 1507-1509. "Because [the commission's] officials are generally empowered to make and interpret law, their 'whole work' is deemed part of the 'authentic exposition and interpretation of the law' and must be 'free for publication to all.'" *Id.* at 1507.[4]

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[4] Although the state in *Public.Resource.Org* attempted to restrict access to its annotated statutes based on copyright law, the "animating principle" behind *Public.Resource.Org*—that "no one can own the law" and, therefore, no state can restrain the free dissemination of the law, 140 S. Ct. at 1507—extends beyond copyright. *First*, the Court recognized in *Public.Resource.Org* that it was "giv[ing] effect" to a broader principle "in the copyright context." *Id.* Indeed, long-standing Supreme Court precedent confirms that copyright law's government edict doctrine did not originate from the Copyright Act, but rather emanates from the "public policy" that work of government officials constituting "the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." *Banks v. Manchester*, 128 U.S. 244, 253 (1888). *Banks*'s "public policy" interpretation draws further support from the Constitution, as it can be considered one of "copyright law['s]" many "built-in First Amendment accommodations." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (The First Amendment "prohibit[s] government

The "animating principle" underlying *Public.Resource.Org* applies with equal force to government forms. If statutes are the means by which the public understands its legal rights and responsibilities, government forms are the vehicles through which the public actually avails itself of the rights, powers, and entitlements the law affords. *See Allen v. Clackamas Cnty. Jail*, 21 F.3d 1111 (9th Cir. 1994) (finding denial of "legal forms" to prisoners violated First Amendment right of access and right to petition). Here, Kansas law entitles "[a]ny registered voter" to "vote by advance voting ballot" and to return completed ballots by mail. K.S.A. § 25-1119(a); *accord id.* § 25-1124(a). But to vindicate their right to advance voting by mail, Kansans must "file … an application for an advance voting ballot." *Id.* § 25-1122(b). Just like the annotated statutes in Georgia, Kansas's advance ballot application was created by the legislature and a governmental body operating as "an adjunct" to the legislature "in the course of its legislative responsibilities." *Public.Resource.Org*, 140 S. Ct. at 1509; *see* K.S.A. § 25-1122d (legislature dictating certain portions of application); § 25-1122(n) (legislature empowering Kansas secretary of state with authority to "adopt rules and regulations" for

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from limiting the stock of information from which members of the public may draw."). *Second*, the concern in *Public.Resource.Org* that the public could be forced to "cease all copying, distribution, and display" of "official legal works" or "risk … potentially criminal penalties," 140 S. Ct. at 1513, is not limited to copyright actions. It would be incongruous if a state could circumvent *Public.Resource.Org* simply by enacting a criminal penalty for distributing official legal works.

implementing application). Just as a state cannot prevent dissemination of its statutes, so too must a state be barred from blocking dissemination of government forms enabling its citizens to make use of the rights afforded by statute. Under the principle articulated in *Public.Resource.Org* and *Banks*, Kansas's application for an advance voting ballot must be equally "free for publication to all." 140 S. Ct. at 1507-1509.

Although the forms at issue in this case are pre-filled rather than blank, the same principle animating *Public.Resource.Org* and *Banks* applies. Just as the State cannot prevent "copying, distribution, and display" of official legal works, *Public.Resource.Org*, 140 S. Ct. at 1513, it also presumptively cannot prevent Appellee from freely "using official legal works," *id.*—the original application for an advance voting ballot—in creating and mailing a Partially Pre-Filled Application. Put another way, the holding of *Public.Resource.Org* also blocks the State from banning the creation and distribution of derivative works—*e.g.*, Partially Pre-Filled Applications—that use "'the preexisting material employed in the'" original application. 140 S. Ct. at 1518 (Thomas, J., dissenting).

Anything less would create a dangerous and harmful precedent for the government to suppress the public's exercise of legal rights by limiting access to or preventing private dissemination and use of government forms. For example, criminalizing the distribution of government benefit forms—blank or pre-filled—

would frustrate the work of charitable groups helping people obtain public benefits to which they are entitled. Criminalizing the distribution of court forms—blank or pre-filled—would burden the ability of litigants and prisoners to access justice.

To be sure, a state could exercise some control over the contents and distribution of government forms. For instance, Kansas law already prohibits the distribution of counterfeit applications for advance ballots. *See* K.S.A. § 25-1122(k)(2). A state may also have an interest in preventing fraud and could prohibit the knowing distribution of forms containing false information. But the Kansas law here operates as a blunt instrument criminalizing third-party completion of any "portion" of official advance ballot applications—including with accurate information—while failing to demonstrate that the prohibition is tailored to serving any legitimate state purpose.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Nora Q.E. Passamaneck

ANASTASIA P. BODEN
THE CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 216-1414

NORA Q.E. PASSAMANECK
LEAH FUGERE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street
Suite 2600
Denver, CO 80202
(720) 274-3135

MARK L. HANIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

DAVID P. YIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 663-6000

Counsel for Amicus Curiae The Cato Institute

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Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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/s/ Nora Q.E. Passamaneck
NORA Q.E. PASSAMANECK

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Pursuant to the Court's CM/ECF User's Manual, the undersigned hereby certifies the following:

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of September, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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September 14, 2023