Case No. 23-3100

In the

United States Court of Appeals

for the

Tenth Circuit

VOTEAMERICA and VOTER PARTICIPATION CENTER,
Plaintiffs-Appellees,

v.

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

Appeal from a Decision of the United States District Court for the District of Kansas - Kansas City
Case No. 2:21-CV-02253-KHV · Honorable Kathryn H. Vratil, U.S. District Judge

APPELLEES' BRIEF
[*Oral Argument Requested*]

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a),(b), and/or (c), the undersigned, on behalf of Vote America and Voter Participation Center, certifies that there is no information to disclose pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

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There are no related cases pending in this Court.

INTRODUCTION

In recent years, the country has been engaged in a vigorous debate about the merits of voting by mail. Appellee Voter Participation Center ("VPC") stands strongly in favor. VPC believes that voting by mail (called an advance mail ballot in Kansas) provides greater opportunity for democratic participation for all registered voters, especially for traditionally underrepresented groups. Ultimately, VPC believes that increased mail voting will bring about VPC's desired political change: a more representative government.

VPC exercises its First Amendment rights to advocate for increased mail voting by distributing personalized advance mail ballot applications to specific registered voters, accompanied by an encouraging letter, instructions, and a prepaid envelope for the voter to return their completed application to the county election office. VPC personalizes the application with the voter's name, address, and county of registration pulled from Kansas's voter rolls. By doing so, VPC communicates that the particular recipient should vote by mail, it's easy, and here's how.

Following the 2020 election, the Kansas Legislature overrode a veto to enact House Bill 2332, which restricted the work and speech of nonpartisan voter mobilization organizations. House Bill 2332 included two provisions at issue in this case. It criminally prohibited the unsolicited distribution of advance mail ballot applications with any information prefilled (the "Personalized Application

Prohibition" or the "Prohibition"). And it banned anyone not a resident of, or domiciled in, Kansas from mailing such an application to a Kansas voter (the "Out-of-State Distributor Ban"). Because Appellants consented to a permanent injunction of the Out-of-State Distribution Ban, only the Personalized Application Prohibition is at issue in this appeal.

The Prohibition is subject to, and cannot survive, strict scrutiny. Appellants concede, as they must, that VPC's mailers contain core political speech. Yet, they contend that Kansas can lawfully dictate and curtail the content of those mailers on pain of criminal penalty. It cannot.

Appellants' central argument is that this Court must meticulously disaggregate VPC's mailers into First Amendment protected and unprotected components. But Supreme Court precedent does not allow such fine slicing of First Amendment protected speech. To the contrary, where an activity "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," the First Amendment's protections apply fully. *Village of Shaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). In the context of get-out-the-vote activities, the distribution of the forms necessary to participate in elections is at least as intertwined with voter education and civic engagement persuasion as charitable solicitation for donations is with social

advocacy. *See id.* Just as the Supreme Court and this Court have repeatedly reviewed restrictions on petition signature gathering under strict scrutiny because that activity is intertwined with political persuasion, *see Meyer v. Grant*, 486 U.S. 414 (1988), the district court properly applied strict scrutiny to restrictions on distribution of personalized mail ballot applications sent to persuade Kansas voters to vote by mail.

Appellee VPC's voter engagement communications are core political speech and association protected by the First Amendment. Appellants fail to establish the Personalized Application Prohibition is narrowly tailored to any compelling government interest. The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. § 1983. The district court issued a final judgment on May 4, 2023, and Appellants filed a timely notice of appeal on June 1, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly hold that the Personalized Application Prohibition violates the First Amendment because it abridges core political speech and cannot withstand strict scrutiny?

2. Did the district court correctly hold that the Personalized Application Prohibition violates the First Amendment right to association because it abridges associational activity and cannot withstand strict scrutiny?

3. Did the district court correctly hold that the Personalized Application Prohibition is unconstitutionally overbroad?

STATEMENT OF THE CASE

A. Voter Participation Center

Appellee VPC is a nonprofit, nonpartisan organization whose "core mission is to promote voting among traditionally underserved groups—including young voters, voters of color and unmarried women" to "ensure[] a robust democracy." App.III 632. VPC "believes that mail voting expands participation opportunities among its target voters—some of whom may not have the ability to vote in-person or the resources to navigate the mail voting application process." *Id.* To further this viewpoint, VPC "primarily uses direct mailings to encourage these voters to register and participate in the electoral process." *Id.*

In 2020, VPC's mailings contained four integrated components: an advance mail ballot application, instructions, a letter, and a return envelope. App.III 633-34. The application itself was personalized with the name and address, and county of each recipient selected by VPC. App.III 674-78. The letter in VPC's Kansas mailers "specifically referred to 'the enclosed advance voting application already filled out

with [the voter's] name and address'" in its opening paragraph and went on to "mention[] the personalization in the closing 'P.S.' message: 'We have already filled in your name and address on the enclosed form. Please take a minute to complete the form, sign and date it, and place the form in the pre-addressed, postage-paid envelope.'" App.III 634. On the reverse side of the personalized application, VPC provided step-by-step instructions. *Id*. VPC also included a postage-paid envelope addressed to the voter's county election office. App.III 678, 634, 600-¶¶48-49. As the district court found, "[t]hrough these communications, [VPC] communicates its message that advance mail voting is safe, secure, accessible and beneficial." App.III 633.

VPC's process is data-driven. VPC tracks recipients' responses to its communications while also conducting randomized control trials to evaluate the effectiveness of these communications. App.III 633, 596-¶16. VPC believes that the personalized advance mail ballot applications are its most effective means of "conveying its pro-mail voting message." App.III 633, 596-¶18. Moreover, as VPC President and Chief Executive Officer Thomas Lopach testified, which the district court credited, VPC believes sending personalized applications "increases voter engagement," which Lopach thinks would build "a broad associational base with potential voters in Kansas." App.III 595-¶7.

B. The 2020 Election in Kansas

The 2020 General Election was held "in the middle of a worldwide pandemic" as "[a] national debate [] unfolded about the efficacy and security of mail voting" and "public figures across the country expressed their views on whether voters should or should not vote by mail." App.III 607-¶¶104, 106.

VPC and its sister organization the Center for Voter Information "encourage[d] registered Kansans" to vote by mail in the 2020 Election by sending advance mail ballot application packets to approximately 507,864 Kansas voters. App.III 633, 600-¶47. Approximately "69,000 [] Kansas voters mailed an advance voting ballot application" using the form VPC mailed them. App.III 637, 606-¶ 97. VPC joined other organizations, political campaigns, and Kansas county elections offices who encouraged voting by mail in 2020. Several Kansas counties sent communications to their registered voters regarding the advance mail voting process, and certain counties even distributed prefilled applications to all registered voters. App.III 637.

"Kansas had record turnout" of 70.9% during the 2020 General Election and "a steep increase in advance mail voting" by over 300% compared to 2018. App.III 607-¶103. In connection with the widespread shift to mail voting, some voters expressed concerns to their local election offices about potentially lost applications or mail delays. App.III 637, 608-¶112. A subset of those voters re-submitted their

applications, which at times led to follow-up communications between voters and election officials. App.III 608-¶113.

Despite the "many challenges" of "[c]onducting a high-turnout president election . . . in the middle of a worldwide pandemic," "every ballot that was cast [in Kansas] was accounted for and counted properly." App.III 607-¶104, 609-¶119. By all accounts, "local Kansas election officials deemed it a successful election" with "no evidence of voter fraud." App.III 609-¶¶117-19, 618-¶184. In fact, Appellant Schwab reported that "Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems." App.III 609-¶117. The district court found that Appellants "presented no evidence of voter fraud effectuated through advance mail voting or otherwise." App.III 659.

C. The Kansas Legislature Enacts H.B. 2332

Despite the successes of mail voting in the 2020 election, the Kansas Legislature introduced H.B. 2332, which restricted the distribution of advance mail ballot applications. App.III 629, 609-¶120. On May 3, 2021, the Legislature enacted H.B. 2332 over Governor Laura Kelly's veto. App.III 610-¶124.

Plaintiffs/Appellees challenged two of H.B. 2332's provisions: the Personalized Application Prohibition (H.B. 2332 § 3(k)(2), K.S.A. § 25-112(k)(2)), which is at issue in this appeal, and the Out-of-State Distributor Ban (H.B. 2332 § 3(*l*)(1), K.S.A. § 25-1122). App.III 610-¶125. The Out-of-State Distributor Ban

broadly forbade any non-Kansas resident from "mail[ing] or caus[ing] to be mailed an application for an advance voting ballot." App.III 611-¶130. The Personalized Application Prohibition banned mailing an advance mail ballot application with any information prefilled to a registered Kansas voter, including information drawn from the Kansas voter rolls. K.S.A. § 25-1122(k)(1)-(2); App.III 610-¶126. Any single violation of the Prohibition is a class C misdemeanor, punishable by up to one month in jail and/or fines, and with no scienter requirement. K.S.A. §§ 25-1122(k)(5), 21-6602(a)(3), (b); App.III 611-¶132.

D. Appellees Bring Suit and Move For Preliminary Injunction

Appellees filed suit on June 2, 2021, asserting that the Personalized Application Prohibition and the Out-of-State Distributor Ban violate their First Amendment rights to free speech (Count I) and association (Count II), and are unconstitutionally overbroad (Count III), and the Out-of-State Distributor Ban violates the Dormant Commerce Clause (Count IV). Shortly thereafter, Plaintiffs moved for a preliminary injunction.

The district court held an in-person evidentiary hearing and heard live testimony from (and cross-examination of) Mr. Lopach as well as co-plaintiff VoteAmerica's Vice President Daniel McCarthy, Kansas Director of Elections Bryan Caskey, Shawnee County Elections Commissioner Andrew Howell, and retired Johnson County Elections Commissioner Connie Schmidt. App.I 98.

In its preliminary injunction decision, the district court applied strict scrutiny to assess the likelihood of success on the merits. App.I 110. The court reasoned that "H.B. 2332 addresses more than the time, place or manner of election administration, and impacts speech in a way that is not minimal." App.I 109. "H.B. 2332 goes beyond invoking the State's constitutional authority to regulate election processes and involves direct regulation of communication among private parties who are advocating for particular change—more voting by mail, especially in under-represented populations." *Id*. The district court found the law "significantly inhibits communication with voters about proposed political change," "eliminates voting advocacy by plaintiffs," and did so "based on the content of their message and the[ir] residency." *Id*.

Appellants argued that H.B. 2332 was justified by a range of state interests, which, the district court reasoned, "boil[ed] down to an issue of administrative efficiency" that had "superficial appeal" but was unsupported by the facts. App.I 111-16.

On November 19, the district court preliminarily enjoined enforcement of both the Out-of-State Distributor Ban and the Personalized Application Prohibition. Defendants did not appeal. App.I 123.

On February 25, 2022, Appellants stipulated to a permanent injunction against the enforcement of the Out-of-State Distributor Ban and declaratory judgment,

conceding that the Ban "violates the First and Fourteenth Amendments, both facially and as-applied to Plaintiffs." App.I 121-25. Appellants also agreed to be permanently enjoined from enforcing the Personalized Application Prohibition against groups, like Plaintiff VoteAmerica, who mail a *solicited* "application for an advance voting ballot to [a] registered voter." *Id*.

After months of depositions and further fact development, the parties cross-moved for summary judgment and subsequently stipulated, following two conferences with the district court, that their briefs would serve as trial briefs for a bench trial on the papers. App.III 628 n.2.

E. The District Court Permanently Enjoins the Personalized Application Prohibition and Enters Judgment

On May 4, 2023, the district court concluded that the Personalized Application Prohibition violates VPC's First Amendment rights of speech and association (Counts I and II) and is unconstitutionally overbroad (Count III), and permanently enjoined its enforcement. App.III 668.

As to Counts I and II, the court held that VPC's distribution of personalized applications is protected under the First Amendment because it constitutes intertwined core political speech, expressive conduct, and associational activity. App.III 668, 648-49, 664-65, 663-64, 655-56. Because the Prohibition abridges VPC's core political speech and association, the court applied strict scrutiny. App.III 654, 656. The court ruled that the Prohibition fails strict scrutiny because

Appellants presented no evidence establishing that it was narrowly tailored to serve their stated interests—(1) preventing voter fraud; (2) preventing voter confusion, and (3) ensuring orderly election administration. App.III 661, 663, 664. Indeed, Appellants "presented no evidence of voter fraud effectuated through advance mail voting," and even if there were such evidence, the Prohibition "does nothing to address the alleged issue." App.III 659. Appellants also "presented minimal evidence of voter confusion and frustration and have not established that the pre-filled applications caused the alleged confusion." App.III 663. Finally, the court found that "the record suggests that on balance, personalizing advance mail ballot applications actually facilitates orderly and efficient election administration." App.III 663-64.

As to Count III, the district court separately held that the Prohibition is facially "unconstitutionally overbroad because it needlessly regulates a substantial amount of protected expression and associations and impermissibly chills plaintiff's speech." App.III 664-65.

The district court therefore held that the Prohibition violates the First Amendment, permanently enjoined the Prohibition and entered judgment for Appellees. App.III 668.

STANDARD OF REVIEW

In an appeal from a bench trial, this Court "reviews the district court's factual findings for clear error, and its legal conclusions *de novo*." *Obeslo v. Great-W. Life & Annuity Ins. Co*, 6 F.4th 1135, 1148 (10th Cir. 2021) (citation omitted). Factual findings are clearly erroneous only if the Court has "the definite and firm conviction that a mistake has been made after reviewing all the evidence" or "they are unsupported in the record." *Id.* (quotations omitted).

Where First Amendment interests are implicated, any "constitutional facts" are reviewed *de novo*, *see Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027 (10th Cir. 2008); and reviewing courts undertake "an independent examination of the whole record" to ensure "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

However, "the special *Bose* rule applies only to 'constitutional facts' and not to the basic historical facts upon which the claim is grounded, which are subject to the usual 'clearly erroneous' standard of review." *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008). *Bose* does not "alter … that reviewing courts cannot overturn factual findings unless 'clearly erroneous.'" *United States v. Wheeler*, 776 F.3d 736, 742 (10th Cir. 2015). "Rather, it simply directs reviewing courts to determine for themselves whether the fact-finder appropriately applied First

Amendment law to the facts." *Id.* As such, "[t]he independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself." *Bose*, 466 U.S. at 514 n.31.

SUMMARY OF THE ARGUMENT

As the district court correctly held, the Personalized Application Prohibition abridges VPC's core political speech and association, cannot survive First Amendment scrutiny, and is unconstitutionally overbroad. App.III 668.

First, by mailing a personalized advance mail ballot application to registered voters, VPC persuades Kansans to vote by mail, assists them in doing so, and takes a position on a contentious political issue—increasing mail voting to achieve a more representative democracy. Personalized applications are central to VPC's mailers, a unified speech package that cannot be disaggregated into components protected and unprotected by the First Amendment. But even viewed in isolation, the distribution of the personalized applications is also expressive conduct, as the district court correctly held, and the personalized applications are themselves speech in the most traditional sense—disseminating information on a page. App.III 645.

Under binding Supreme Court and Tenth Circuit precedent, VPC's distribution of personalized applications, and mailers as a whole, constitute core political speech. The Prohibition criminalizes such speech and eliminates what VPC believes is its most effective means for communicating its pro-mail voting message,

reducing the overall quantum of speech conveying that message. App.III 656. Moreover, the Prohibition is an impermissible content-based regulation and abridges VPC's associational rights. The Prohibition is thus subject to strict scrutiny.

While Appellants contend this Court should apply the *Anderson-Burdick* balancing test instead of strict scrutiny (App. Br. 29-31), *Anderson-Burdick* is inapplicable here because the Prohibition is a content-based restriction on speech and is not challenged as a burden on ballot access. It is instead a restriction on VPC's First Amendment rights to free speech and association, beyond the *Anderson-Burdick* purview. In any event, because the restriction is "severe," as the district court correctly held, strict scrutiny would apply even under *Anderson-Burdick*. App.III 658.

Second, the Prohibition cannot withstand strict scrutiny because it is not narrowly tailored to the State's purported interests of preventing voter confusion, promoting the efficient administration of elections and limiting the risk of voter fraud. The district court properly found that Appellants offered no admissible or reliable evidence supporting that the Prohibition would further any of those interests, App.III 664, which forecloses the possibility that the Prohibition would survive even intermediate scrutiny.

Finally, the district court should be affirmed because the Prohibition impermissibly chills Appellees' speech (and the speech of third parties not before this Court) and thus is unconstitutionally overbroad. App.III 668.

ARGUMENT

I. THE PERSONALIZED APPLICATION PROHIBITION IS SUBJECT TO STRICT SCRUTINY

The Personalized Application Prohibition is subject to strict First Amendment scrutiny for at least three independent reasons: first, the Prohibition abridges VPC's core political speech and eliminates its most effective means of speaking in support of mail voting, reducing the overall quantum of speech on this issue; second, the Prohibition is an improper content-based regulation of speech; and third, the Prohibition infringes on VPC's associational rights.[1] While Appellants argue that lesser scrutiny applies under the *Anderson-Burdick* balancing test, the district court correctly rejected that framework and held that because the Prohibition severely burdens VPC's speech, *Anderson-Burdick* would require strict scrutiny in any event.

A. The Personalized Application Prohibition Abridges VPC's Core Political Speech

As the district court correctly held, the Prohibition is subject to strict scrutiny because it inhibits VPC's core political speech.[2] App.III 668. Whether the

[1] Raised at App.II 236.

[2] Raised at App.II 237.

distribution of personalized advance mail ballot applications is assessed together with the rest of VPC's mailer or in isolation, VPC engages in core political speech. VPC persuades voters that mail voting is safe, secure, and accessible; educates them about their right to vote by mail; and urges them individually to exercise that right. This is textbook core political speech: "communication concerning political change." *Meyer*, 486 U.S. at 421-23. The Prohibition criminalizes each such communication, even if inadvertent, under threat of jail time and fines. K.S.A. §§ 25-1122(k)(2)-(5), 21-6602(a)(3), (b).

The Supreme Court and the Tenth Circuit have repeatedly held that analogous civic engagement activities are core political speech. In *Meyer*, the Supreme Court held that initiative petition signature gathering was core political speech because the activity "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421. It also represented the "communication of information [and] the dissemination . . . of views and ideas" about the electoral process. *Id.* at 422 n.5 (quoting *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980)). The Court in *Buckley v. American Constitutional Law Foundation, Inc.* similarly held that a subsequent set of petition circulator restrictions unlawfully "inhibit[ed] communication with voters about proposed political change." 525 U.S. 182, 192 (1999). And in *McIntyre v. Ohio Elections Commission*, the Court held that distributing anonymous "leaflets"

advocating a political issue was core political speech. 514 U.S. 334, 347 (1995). As the Tenth Circuit has reinforced, First Amendment protection for core political speech under the *Meyer-Buckley* framework is "at its zenith." *Chandler v. City of Arvada, Colo.*, 292 F.3d 1236, 1241 (10th Cir. 2002) (quoting *Buckley*, 525 U.S. at 187); *Yes On Term Limits*, 550 F.3d at 1028.

While Appellants contend that VPC's activities are distinguishable from petition circulating because distributing personalized advance mail ballot applications by mail "involves no personal interactions," App. Br. 10, 34, the *Meyer-Buckley* core political speech doctrine protects expression even if it does not elicit a personal, direct interaction. *See McIntyre*, 514 U.S. at 343 (protecting right to *anonymous* leafletting because the First Amendment "embrace[s] a respected tradition of anonymity in the advocacy of political causes," apart from subsequent interaction). Indeed, neither *Meyer* nor *Buckley* suggest that constitutional protection depended on whether the petition circulators' audience chose to engage with the petition.

Moreover, Appellants do not appear to dispute, nor could they, that speech generally expressed through direct mail is protected, regardless of whether the recipient solicited the communication or responded to it. *See, e.g.*, *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 532, 535 (1980) (a ban on the unsolicited "inclusion in monthly electric bills of inserts discussing

controversial issues of public policy" was a "prohibition of discussion of controversial issues [that] strikes at the heart of the freedom to speak"); *accord Bolger v. Youngs Drug Prod. Corp.,* 463 U.S. 60, 69 (1983); *Revo v. Disciplinary Bd. of the Supreme Ct. for N.M.*, 106 F.3d 929, 933 (10th Cir. 1997). Thus, "the use of the mails is almost as much a part of free speech as the right to use our tongues." *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 305 (1965) (quotation omitted).

In any event, VPC's mailers are inherently interactive communication about mail voting to their audience. 69,000 advance mail ballot applications VPC distributed in Kansas were submitted to election offices, and VPC was able to track their submission because those voters used the pre-paid envelopes from VPC's mailers. App.III 606, 637. VPC also sends follow-up communications with voters throughout the electoral process to continue their engagement. App.III 606. Meanwhile, other Kansans responded to VPC's mailers by saying they opposed VPC's pro-mail voting stance and wished to unsubscribe, further reinforcing the expressive and interactive nature of VPC's communications. App.III 648, 715. Thus, like in *Meyer*, VPC directly contacts voters to encourage their participation in the political process, and like in *McIntyre*, VPC's mailers reach voters apart from individual, face-to-face interaction. In any event, they are core political speech.

Courts nationwide have also repeatedly confirmed that core political speech under *Meyer-Buckley* is "not limited to the circulation of initiative petitions" but

covers a range of voter mobilization efforts and communications urging electoral participation. *See, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 723 (M.D. Tenn. 2019). The *Hargett* court held that "a person's decision to sign up to vote is more central to shared political life than his decision to sign an initiative petition" and "the creation of a new voter *is* a political change" that "inherently 'implicates political thought and expression.'" *Id.* at 724 (quoting *Buckley*, 525 U.S. at 195). Even the Fifth Circuit's opinion in *Voting for America, Inc. v. Steen*, on which Appellants rely (App. Br. 25-27, 32-33), "accepted" that "urging citizens to register; distributing voter registration forms, [and] helping voters to fill out their forms" are constitutionally protected speech. 732 F.3d 382, 389 (5th Cir. 2013) (internal quotations omitted); *see also id.* at 390 (observing that "voter registration drives involve core protected speech" and noting that "soliciting, urging and persuading the citizen to vote are the forms of the canvasser's speech"). Such hallmarks of core political speech are present in VPC's mail voting advocacy and assistance. *See also* App.III 645-46 (district court reciting additional mail voting cases); App.I 86 (same).

Moreover, both VPC's distribution of personalized applications and mailers as a whole convey a position in the national debate regarding the benefits of mail voting. App.III 607-¶106. VPC's position—the only position consistent with the resources VPC expends to distribute personalized applications—is that more voters

(particularly underrepresented groups) should participate in elections and do so through mail voting. App.III 632. Such "advocacy of a politically controversial viewpoint [] is the essence of First Amendment expression" and "[n]o form of speech is entitled to greater constitutional protection." *McIntyre*, 514 U.S. at 347.

1. The District Court Correctly Held That Distribution of Advance Mail Ballot Applications Is Core Political Speech, Not Non-Expressive Conduct

Appellants' primary argument is that VPC's distribution of personalized advance mail ballot applications is not core political speech because it is not speech at all but merely non-expressive conduct. The district court thoroughly rejected this argument. App.III 640-48; App.I 84-88, 98-110. VPC's mailers include an application, instructions for how to complete the application, a pre-paid return envelope, and a persuasive cover letter. The personalized applications are inextricably intertwined with the persuasive letter, which Appellants concede is core political speech. And, even if this Court were to consider VPC's distribution of personalized applications apart from the other components of the mailer as Appellants contend, distributing personalized applications is expressive conduct and the dissemination of targeted, informational speech.

a. VPC's Mailers Are An Intertwined Package of Speech

Appellants concede that the cover letter included as part of VPC's mailer is "indisputably" core political speech. App. Br. 18; App.III 654. Yet Appellants

argue that the personalized application must be "disaggregated" from the rest of VPC's mailer and subject to separate (and lesser) scrutiny because they believe the remaining parts "can exist and be sent" separately. *Id.*[3] But, as the district court held, "the First Amendment does not countenance slicing and dicing" of speech because that would "conflict[] with the Supreme Court's refusal 'to separate component parts of' a communication 'from the fully protected whole.'" App.III 654 (quoting *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988)).

Where the parts of a speech package "are inextricably intertwined," courts "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley*, 487 U.S. at 796. Instead, the First Amendment requires "due regard for the reality that" VPC's personalized application "is characteristically intertwined with informative and . . . persuasive speech" in their mailer packages. *Id.*

Here, VPC views its mailers "as one package and part of our speech as an organization." Supp. App. 81. As the district court concluded, the Prohibition would impair not just the message communicated by the personalized application, but also VPC's cover letter—the undisputed core political speech. App.III 652. Indeed, the

[3] This position is not easily reconciled with Appellants' consent to a stipulated order that the Out-of-State Distribution Ban on advance mail ballot applications violates the First and Fourteenth Amendments. App.I 123.

whole point of the cover letter is to encourage VPC's selected recipient to apply to vote by mail using the enclosed personalized application. The cover letter states, for example, "I have sent you the enclosed advance ballot application already filled out with your name and address." App.III 675. Including the personalized application is how VPC conveys its central message to the specific recipient that "voting by mail is EASY." *Id.* Likewise, the instructions on the back of the application further encourage the voter that because mail voting is "as easy as 1-2-3," all they have to do to apply is simply further complete, sign, and return the already personalized application. App.III 677. This integration across VPC's communication demonstrate that VPC's mailers are a unified package of speech. And the district court found that Appellants "provided no evidence" to challenge that conclusion. App.III 654.

b. Providing Personalized Applications Is Expressive Conduct

In addition to holding that VPC's personalized applications cannot be disaggregated from the rest of its mailers, the district court also correctly concluded that the distribution of personalized applications, standing alone, constitutes expressive conduct. App.III 641-45.

The First Amendment protects conduct that, based on context, is "sufficiently imbued with elements of communication." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). Conduct is sufficiently expressive to warrant First Amendment

protection if it (1) was "intended to be communicative;" and (2) "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Appellants agree with this basic framework and do not dispute that VPC intended their distribution of personalized applications to be communicative. App. Br. 8, 12-13, 15.

Accordingly, the only issue presented is whether a personalized application would reasonably be understood to be communicative. The Supreme Court has held that "a narrow, succinctly articulable message is not a condition of constitutional protection," and the First Amendment is not "confined to expressions conveying a 'particularized message.'" *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995). And before *Hurley*, this Court held that conduct "falls within the free speech guarantee of the First Amendment," if it is "*reasonably perceived* to convey *a message*"—without requiring a specific one. *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987) (emphases added).[4]

The district court properly found that recipients of VPC's personalized applications would receive a message. They "would readily understand that through the personalized mail ballot application, plaintiff is communicating that advance

[4] The Tenth Circuit has not squarely addressed how *Hurley* reinforces the lack of a "particularized message" requirement. App.III 641-42 n.7. However, resolving that question is unnecessary here because, as explained below, VPC's communications satisfy "even the more stringent particularized message standard." *Id.*

mail voting is safe, secure and accessible." App.III 643. And reasonable recipients would understand that no organization would expend the resources to personalize applications if not to advance the cause of mail voting. App.III 644. Moreover, VPC's personalized applications must be viewed "in context"—they were mailed to specific registered voters in the run-up to a national election. *See Clark*, 468 U.S. at 294; *Cressman*, 798 F.3d at 953 (emphasizing "context-driven nature of the inquiry"). VPC's pro-vote-by-mail message is particularly clear during the national debate about the efficacy and security of mail voting.

In fact, as discussed *supra*, over 69,000 voters received VPC's message and submitted an application. This, the district court found, "strongly suggests that Kansans not only understood plaintiff's pro-advance mail voting message but also acted on its encouragement." App.III 643. Appellants do not dispute these facts on appeal. App. Br. 12-18.[5]

The district court's decision that VPC's personalized applications convey a reasonably understandable message is consistent with *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47 (2006) ("*FAIR*"), on which Appellants

[5] Instead, Appellants raise three hypotheticals—none of which implicate political speech. App. Br. 15. But even these hypotheticals communicate a message: a recipient of a tax form from H&R Block prefilled with the recipient's name and address would reasonably understand H&R Block's message that the recipient should file their taxes (and H&R Block is available to assist).

principally rely. App. Br. 18. In *FAIR*, the Supreme Court addressed a First Amendment challenge to a law that withheld federal funds from schools that denied equal access to military recruiters. 547 U.S. at 52. The plaintiffs argued that they "expressed their disagreement with the military by" limiting military recruiters' use of campus facilities. *Id.* at 66. The Court rejected that argument because a school's refusal to allow military recruiters on campus was "expressive *only because* the [schools] accompanied their conduct with speech explaining it." *Id.* (emphasis added). Here, even standing alone, VPC's distribution of personalized advance mail ballot applications is expressive. Moreover, *FAIR* reaffirmed *Hurley*'s holding that expressive conduct must be considered in light of the context of the speech. *See* 515 U.S. at 568-69. The message of VPC's personalized applications is enhanced by their distribution in the context of a contested nationwide election.[6]

The district court also properly rejected the other out-of-circuit district court decisions on which Appellants rely. App. Br. 19-21 (citing *Lichtenstein v. Hargett*, 489 F. Supp. 3d 753 (M.D. Tenn. 2020); *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d 1341 (N.D. Ga. 2022)). The *Lichtenstein* decision, which is pending appeal,

[6] Even if this Court were to require that VPC's message must be "overwhelming apparent" under *FAIR* (which it should not), 547 U.S. at 66, the district court correctly determined that "it is overwhelmingly apparent to someone who receives plaintiff's application that plaintiff is expressing a pro-advance mail voting message." App.III 644.

involves blank applications unlike the distribution of personalized applications here that conveys VPC's message that a particular, carefully identified recipient should vote by mail. App.III 645, 652-53. *Lichtenstein* likewise reasons that a recipient of a blank application would somehow take the senders' message to mean "please throw [the application] away," a conclusion that is both improbable and misapplies the expressive conduct standard. 489 F. Supp. 3d at 768. The *Raffensperger* decision is also unpersuasive because it takes the incorrect view—contrary to that court's own compelled speech ruling and even Appellants' concession here—that nothing in VPC's activity is expressive. 609 F. Supp. 3d at 1356-58.

c. Disseminating Information in Personalized Advance Mail Voting Applications Is Protected Speech.

The creation and distribution of personalized applications is itself speech.[7] The First Amendment protects "creation and dissemination of information"—including factual information. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *accord Meyer*, 486 U.S. at 422 n.5. The First Amendment safeguards "targeted speech" that collects and disseminates information to produce "speech tailored to a particular audience." *U.S. W., Inc. v. F.C.C.*, 182 F.3d 1224, 1232 (10th Cir. 1999); *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 793 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes

[7] Appellants raised this issue on appeal (App. Br. 16), and it is properly before the Court. *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1270 (10th Cir. 1998).

no difference."); *accord Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021).

In *Sorrell*, the Supreme Court struck down a law that prohibited pharmacies from disseminating doctors' prescribing records. 564 U.S. at 557, 580. The Court rejected the argument that the challenged law regulated "conduct, not speech." *Id.* at 570. Rather, the Court concluded that there is "a strong argument that prescriber-identifying information is speech" and disseminating "facts, after all, are the beginning point for much of the speech." *Id.*

VPC's activity—creating and disseminating information about mail voting to a targeted audience through its personalized applications—is materially similar. VPC obtains voter information, uses it to personalize their applications, and distributes those applications to certain voters selected by VPC. App.III 595-96. The applications include words chosen by VPC—specific voters' names, associated addresses, and counties—written on a page. Creating and disseminating personalized applications is critical to expressing VPC's message. *See supra* Parts I.A.1.a.-b. Like in *Sorrell*, VPC's activity amounts to "the creation and dissemination of information" for voters to use on their application. 564 U.S. at 570. And, as in *Sorrell*, the Prohibition abridges VPC's "right to speak" in this manner because the "information [VPC] possesses is subjected to restraints on the way in

which the information might be used or disseminated." *Id.* at 568. (citations omitted).

The Prohibition is also akin to the unlawful restriction in *U.S. West v. FCC*, which limited a speaker's ability to use recipient information in a database to target direct mail. 182 F.3d 1224, 1228-30 (10th Cir. 1999). This Court rejected the government's argument that restricting the method of "target[ing]" the speaker's message did "not prevent [the speaker] from communicating with its customers or limit anything that it might say to them" because the "existence of alternative channels of communication . . . does not eliminate the fact that the [challenged laws] restrict speech." *Id*. at 1232. The same is true of VPC's use of specific voter information to target its pro-mail voting communications, which as core political speech warrants even greater protection than the commercial speech in *U.S. West*. *See McIntyre*, 514 U.S. at 347.

Appellants concede that, under *Sorrell*, "factual information can constitute speech under the First Amendment," but they attempt to distinguish *Sorrell* in four ways. App. Br. 16. None has merit.

First, Appellants argue that disseminating targeted factual speech is only protected if it "convey[s] data likely unknown to the recipient or other consumers." *Id.* But First Amendment protection does not change based on the novelty of the information conveyed or the recipient's knowledge. In any event, here, "many

Kansans were voting by advance mail ballot for the first time," and VPC's personalized applications were critical to providing key information for voters to successfully apply to vote by mail by matching the voter's details to the voter file. App.III 608.

Second, Appellants argue that conveying information "freely available to everyone" is not protected speech. App. Br. 17. But that includes almost all information about the political process—polling site locations, instructions on how to vote, and even the text of ballot initiatives. Conveying information does not lose its First Amendment protection because it is available on Google.

Third, Appellants claim that "to the extent there is any speech, it is the applicant's," not VPC's. App. Br. 16. But applicants do not have an opportunity to express an opinion until after they receive VPC's expressive communication. And a recipient's expression in deciding whether to act on VPC's persuasion does not defeat the expressive nature of VPC's initiating communication. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313 (2023) (applying *Hurley*, 515 U.S. at 569).

Finally, Appellants argue that a personalized application cannot be protected by the First Amendment because under that "logic, every piece of written text, irrespective of context, is protected speech." App. Br. 17-18.[8] But the context of

[8] Along similar lines, Appellants claim that because a *ballot* could not be deemed a "forum" for speech, neither could *applications*. App. Br. 17 (citing *Timmons v. Twin*

VPC's speech is relevant. Indeed, the electoral context helps concretize the expressive nature of VPC's communications. And such electoral speech requires vigilant First Amendment application "to guard against undue hindrances to political conversations and the exchange of ideas." *Meyer*, 486 U.S. at 421. Such speech concerning the electoral process is interpreted broadly because "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs[,]" which "of course includes . . . all such matters relating to political processes." *Brown v. Hartlage*, 456 U.S. 45, 52-62 (1982).

B. The Personalized Application Prohibition Abridges VPC's Core Political Speech by Eliminating Its Most Effective Means of Speaking and Reducing the Overall Quantum of Speech

The Prohibition abridges VPC's core political speech under the *Meyer-Buckley* framework.[9] Accordingly, as in *Meyer and Buckley*, and as the district court held, strict scrutiny applies. App.III 655. As in *Meyer*, the Prohibition infringes VPC's core political speech in two primary ways.

Cities Area New Party, 520 U.S. 351, 363 (1997)). But the exchange between third parties of applications—which provide key information about and facilitate political participation apart from the government—are distinct from ballots, which are meant to be secret, exchanged only with the government, and serve the quintessential voting process function. In any event, Appellants misread *Timmons*, as subsequent cases have clarified. *See Gralike v. Cook*, 191 F.3d 911, 917 (8th Cir. 1999) (ruling that ballots themselves can have speech elements), *aff'd on other grounds*, 531 U.S. 510 (2001); *see also Doe v. Reed*, 561 U.S. 186, 194 (2010) (holding that a signature on a petition is speech).

[9] Raised at App.II 231.

First, the Prohibition criminally bars VPC's ability "*to select what they believe* to be the most effective means" of advocating its pro-mail voting message. *See Chandler*, 292 F.3d at 1244 (quoting *Meyer*, 486 U.S. at 424) (emphasis added). Here, it is undisputed that VPC believes that distributing personalized applications is the most effective means of conveying its pro-advance mail voting message and direct mailing a package of speech centered on *personalized* applications—and expending more resources to do so—is the most effective way to reach, persuade, and assist their audience. App.III 594-¶3, 596-¶18, 632-33; Supp.App. 81. It is also undisputed that the Prohibition is a complete and criminally enforced ban on VPC's distribution of personalized applications. App.III 596-¶18, 609-¶118, 633.

While Appellants complain that the record does not prove that personalized applications are *in fact objectively* more effective than blank ones (App. Br. 32), that is not the test. It is VPC's subjective belief that matters under *Meyer-Buckley*. *Meyer*, 486 U.S. at 424. And that belief is grounded in VPC's decades of experience designing and operating nationwide voter mobilization programs, internal studies, testing and tracking the effectiveness of its mailers, and advice from expert consultants. App.III 596-¶18. This belief is also informed by Kansas election officials' preference to distribute personalized applications themselves and proof that 69,000 Kansans did in fact act on VPC's advocacy. App.III 606-¶97, 607-¶103-608-¶110, 632-33.

Second, as the district court held, the Prohibition would "reduce[] the total quantum of speech on this important public issue." App.III 655. Appellants primarily argue that the Prohibition "does not restrict anyone from communicating with anyone else about anything" because VPC can still send blank applications or engage in "personal interactions" to help voters complete an application. App. Br. 10, 29, 33. But as the district court recognized, that "misses the point." App.III 655. The Supreme Court has repeatedly held that a speaker remaining "free to employ other means to disseminate their ideas" does not take their speech "outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424.

Appellants' contrary suggestion that VPC avoids the Prohibition by sending only a cover letter is misplaced. App. Br. 8. The First Amendment does not permit the government to ban some avenues of speech (VPC's personalized application package) so long as it allows others (general cover letters advocating mail voting). *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) (courts cannot "overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired"). That VPC hypothetically could separately speak through a *different* cover letter is irrelevant.

Additionally, by suggesting that VPC simply go door-to-door to persuade and assist voters with their advance mail ballot applications in person, Appellants demonstrate that the Prohibition would reduce the overall quantum of speech. App.

Br. 25-27. VPC, together with its sister organization, distributed advance mail voting application packets to over 500,000 Kansas voters in 2020, over 69,000 of which were completed and returned. App.III 600-¶47, 606-¶97. Even assuming VPC had the infrastructure to contact voters one-by-one in person, persuade them to vote by mail, and help them accurately complete their applications, its reach would be substantially diminished. As in *Meyer*, the Prohibition would limit the size of the audience VPC can reach and make it less likely that VPC will gather support for its cause. 486 U.S. at 422-23.

Appellants' attempt to distinguish *Meyer* overlook how the factual and legal circumstances apply here. The *Meyer* plaintiffs were proponents of an initiative on "whether the trucking industry should be deregulated" who wished to use paid petition circulators. 486 U.S. at 421. The Supreme Court held that the ban on paid circulators was unconstitutional because restricting *how* proponents chose to convey their message—using paid circulators to promote the petition and collect signatures—"reduc[ed] the total quantum of speech" and violated their "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 423-24. The question before the *Meyer* Court was not whether paying circulators or collecting signatures was speech, but whether barring a speaker's most effective means of delivering their message violated the First Amendment. *Id.* The Court held that it did *Id.* at 427. The *Meyer* Court also

rejected arguments that the availability of other means for petition circulators to convey their message obviated any constitutional challenge, such as using volunteer circulators, *cf. id.* at 419, or encouraging support for the petition without collecting signatures. *Id.*

Here, the Prohibition even more directly strains VPC's expression than in *Meyer* because VPC cannot distribute its personalized applications at all. A more apt comparison would be if the law in *Meyer* allowed initiative advocates to knock on doors but barred them from circulating the actual petition. Such an analogous law would be unconstitutional, and here, VPC's advocacy concerning mail voting warrants at least the same exacting scrutiny protection as speech about trucking deregulation. *See id.* at 421.

C. The Personalized Application Prohibition Is Content-Based Discrimination

The Prohibition is also subject to strict scrutiny because it discriminates against speech based on content.[10] A restriction is content-based and warrants strict scrutiny "if it applies to particular speech because of the topic discussed or the idea or message expressed[,]" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (citation omitted), or if it defines the "category of

[10] Raised at App.III 239. At trial, the district court did not hold that the Prohibition is subject to strict scrutiny because it is content-based, but suggested it would be. App.III 649-55; App. Br. 36.

documents . . . by their content," *McIntyre*, 514 U.S. at 345; *see also Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

The Prohibition prohibits certain content on its face: the information necessary to complete any portion of an advance mail ballot application. *See* App.III 610-¶126; K.S.A. § 25-112(k)(2) ("No portion of such application shall be completed prior to mailing such application to the registered voter."). This content—voters' names, addresses, and counties of registration—is what VPC uses to convey its message that mail voting is easy and the selected recipient should do so. The Prohibition also "singles out [this] specific subject matter for differential treatment," by proscribing the content that may appear on advance mail ballot applications and not on other forms, like voter registrations. *See Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); App.III 610-¶¶126-29; K.S.A. §§ 25-1122(k)(1)-(2). Thus, the Prohibition is subject to strict scrutiny and "presumptively unconstitutional." *Reed*, 576 U.S. at 163.

Appellants' reliance on *City of Austin* and *McCullen v. Coakley*, 573 U.S. 464 (2014), is misplaced. App. Br. 38-39. Both cases addressed place-based restrictions on speech. In *City of Austin*, the regulation applied different rules to signs based on where they were located—on-premises or offsite. 142 S. Ct. at 1471. The *McCullen* Court ruled that a buffer-zone regulation around an abortion clinic was content neutral because it was a location-oriented restriction unrelated to abortion-based

speech. 573 U.S. at 479. Here, however, the Prohibition is not a time, place, or manner restriction on VPC's speech; it is a criminal prohibition of core political speech that would convey a message about mail voting (and not any other topic). And it completely, criminally bars a certain type of speech (personalized applications) based on content (only advance mail voting applications) at all times.

Separately, the Prohibition is also content-based because it unconstitutionally "singles out" certain speech based on viewpoint or speaker. *Reed*, 576 U.S. at 171.

First, the Prohibition restricts the pro-vote-by-mail viewpoint conveyed through distributing personalized applications. The Prohibition applies solely to views *advocating* for mail voting because only those communications would include a personalized application; it imposes no limit on mailers *against* mail voting, which would not do so. *See, e.g.*, *S.D. Voice v. Noem*, 432 F. Supp. 3d 991, 996 (D.S.D. 2020) (holding a law viewpoint-discriminatory because it "specifically applies a burden to the speech of those who 'solicit' others to sign ballot measure petitions, but not those who solicit them not to do so").

While Appellants argue that "there is no conceivable counterpoint to be written on the form" (App. Br. 36), an anti-vote-by-mail organization could express a contrary view consistent with the Prohibition by, for example, sending unsolicited applications watermarked with red, bolded letters, "DO NOT VOTE BY MAIL," to advocate for in-person voting only.

Second, the Prohibition discriminates based on the speaker because it explicitly permits the government to choose some speakers who can personalize applications will banning others from doing so. *See*, *e.g.*, *Sorrell*, 564 U.S. at 571. Appellants' claim that the Prohibition does not dictate who can speak is incorrect. App. Br. 32. The Prohibition exempts Kansas's designated Protection and Advocacy for Voting Accessibility (PAVA) non-profit under federal law, *see* 52 U.S.C. § 21061, allowing only that third-party civic organization to continue speaking through personalized applications. K.S.A. § 25-1122(k)(4) ("provisions of this subsection shall not apply to" the PAVA-designated organization). But it bars all other civic organizations, such as VPC, from speaking in the same manner. That is unlawful facial speaker-based discrimination.

D. The Personalized Application Prohibition Abridges VPC's Associational Rights

The Prohibition is subject to strict scrutiny because prohibiting VPC from distributing personalized applications abridges its associational rights.[11] As the district court correctly held, VPC's mailers constitute protected associational activities which lie "at the heart of the First Amendment." App.III 646 (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)).

[11] Raised at App.II 241.

"The First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). It guards the associational right "to engage in association for the advancement of beliefs and ideas" by persuading an organization's target audience to take action through its chosen "means for achieving" its desired change. *Button*, 371 U.S. at 429-31, 437. Moreover, courts "give deference to an association's view of what would impair its expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

The district court correctly held that VPC's distribution of personalized applications is protected associational activity. App.III 664. It found that the goal of VPC's activity is to target "underrepresented members of the electorate" to "urge[] them to vote," App.III 595-96, 648-49, and further credited testimony that VPC believes "sending personalized advance mail ballot applications 'increases voter engagement,' which [VPC] thinks would [build] a broad associational base with potential voters in Kansas"—including the 69,000 voters who responded positively to VPC's outreach. App.III 632, 634. Courts have routinely recognized that this type of civic engagement activity "bears directly on the expressive and associational aspects" at the core of get-out-to-vote work. *Hargett*, 400 F. Supp. 3d at 720-24; *see also Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1202 (D.N.M. 2010).

Appellants raise three arguments against VPC's associational claims. App. Br. 50-52. None has merit.[12]

First, Appellants argue VPC's activity does not implicate associational rights because VPC has "no prior connection" to the recipient. App. Br. 50. But First Amendment protection of associational interests is not predicated on the existence of a preexisting relationship. For example, in *Button*, the Supreme Court held that efforts to solicit then-unassociated individuals to participate in litigation was protected as the means to begin an association. 371 U.S. at 429-32, 437. Similarly, in *Healy v. James*, the Court held that the First Amendment protected a student group's "use of campus bulletin boards and the school newspaper" to reach "new students" and create further associations to "remain a viable entity in a campus community[.]" 408 U.S. 169, 181 (1972).

Second, Appellants argue that VPC's mailers are a "unilateral act that can be ignored by the would-be associate," and applications "may be successfully submitted without the aid of another." App. Br. 50 (citing *Voting for Am., Inc. v.*

[12] Appellants erroneously assert that "it is undisputed that many individuals who used a VPC-provided envelope thought that the application had come from the county." App. Br. 50. The record does not suggest that recipients of VPC mailers did not understand the mailers came from VPC. Two election officials attested that "voters told" them that they thought prefilled applications came from county election offices. App.III 616-¶171. What the "voters told" election officials is inadmissible hearsay; and in any event, no witness has connected any alleged misunderstanding to VPC's communications.

Andrade, 488 F. App'x 890, 898 n.13 (5th Cir. 2012)). But the First Amendment protects the right to associational outreach to would-be associates, even if those would-be associates can ignore the message or act without it. Again, litigation solicitations in *Button* and the student bulletin in *Healy* were both unilateral acts that could be ignored by the recipient. Appellants' comparison to the out-of-circuit, unpublished opinion in *Andrade* is unhelpful because that case considered restrictions on *collecting and returning* already completed applications, which the Fifth Circuit "perceive[d] [as] significant[ly] distinct[]" from "activity that urges citizens to vote," such as VPC's communications here. 488 F. App'x at 898.

Finally, Appellants argue that *Button* is inapplicable because VPC and Kansas voters do not share a "common interest" or "goal[.]" App. Br. 52. But the common goal, which VPC successfully achieved in 2020, is increasing electoral engagement through mail voting. VPC's association with selected voters to promote its mission is wholly dissimilar from the activity in *City of Dallas v. Stanglin*, where the plaintiffs were merely "patrons of the same business establishment" that admitted "all who are willing to pay the admission fee[,]" who expressed no shared views nor joint activity, and who engaged in no articulated associational outreach. 490 U.S. 19, 24-25 (1989). Rather, as the district court found, VPC's efforts to persuade and help specific people apply to vote by mail "attempt to broaden the base of public participation in and support for its activities" that is "undeniably central to the

exercise of the right of association." App.III 646-47 (collecting cases). That 69,000 voters submitted VPC's applications demonstrates that these recipients shared VPC's goal. App.III 648.

The Prohibition's "restraints on political association and communication . . . are suspect and subject to strict scrutiny." *See Grant v. Meyer*, 828 F.2d 1446, 1452 (10th Cir. 1987); *accord Button*, 371 U.S. at 438.[13] And VPC's associational rights are "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference[]" on their "means of communicating" to further their associations. *Healy*, 408 U.S. at 181-83.

E. *Anderson-Burdick* Does Not Apply And Would Require Strict Scrutiny In Any Event

Appellants contend that, should this Court find that the Prohibition implicates VPC's First Amendment rights, the proper standard of review is decided under the *Anderson-Burdick* balancing test. App. Br. 29-31 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)). But as the district

[13] Appellants argue, for the first time on appeal, that the Prohibition is not a restriction in a public forum and thus is subjected to a lower scrutiny. App. Br. 51 (citing *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010)). This argument is "waived for purposes of appeal." *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013). Regardless, this argument makes no sense with respect to core political speech. The *Martinez* Court was concerned with the "anomalous" result where different standards would apply to the freedom to speak and the freedom to associate. 561 U.S. at 681. Here, both VPC's core political speech and its expressive association advocating for mail voting are subject to strict scrutiny. *Grant*, 828 F.2d at 1452.

court correctly held, *Anderson-Burdick* is inapplicable here and would require strict scrutiny in any event. App.III 658.[14]

First, the *Anderson-Burdick* balancing framework is inapplicable because it applies only to "content-neutral regulations of the voting process," *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000),[15] in cases challenging ballot access burdens on candidates or voters, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (discussing that *Anderson-Burdick* applies to a content-neutral ballot access "burden that a state law imposes on a political party, an individual voter, or a discrete class of voters[]"); *see also Fish v. Schwab*, 957 F.3d 1105, 1121 (10th Cir. 2020).

Anderson-Burdick is inapplicable here because the Prohibition is content-based, *supra* Part I.C., and because Appellees' case does not derive from "the individual's right to vote," *cf.* App. Br. 29, but from a civic organization's right to advocate for political change. *McIntyre*, 514 U.S. at 345 (holding that *Anderson-Burdick* is inapplicable to restrictions on the "content of speech").

[14] Raised at App.II 241.

[15] The *Campbell* court applied *Anderson-Burdick* instead of *Meyer-Buckley* to the restrictions at issue because, unlike here, they were content-neutral and "ballot access controls" that did not affect "the overall quantum of speech available to the election or voting process." 203 F.3d at 745-47 (quoting *Buckley*, 525 U.S. at 205).

VPC's challenge is not predicated on a claim that the Prohibition limits access to the ballot or restricts candidates or voters. The Prohibition is aimed at third parties who engage in voting-related advocacy: those "who solicit[] by mail a registered voter to file an application for an advance voting ballot." App.III 610-¶127. It targets communications that encourage voters to trust and use vote-by-mail in the first place, and VPC does not challenge that the law impacts the candidate and voter rights within the *Anderson-Burdick* purview.[16]

Second, as the district court held, strict scrutiny would still apply under *Anderson-Burdick* balancing. App.III 658. The *Anderson-Burdick* framework measures the character and magnitude of the injury to the plaintiff's rights against the State interests that purportedly justify the burden imposed. *Crawford*, 553 U.S. at 190. When the burden is "severe," the restriction must be "narrowly drawn" to a "state interest compelling importance." *Id.* Burdens on core political speech are per se severe. *Buckley*, 525 U.S. at 207 (Thomas, J., concurring).

[16] Thus, *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022) is distinct. *Cf.* App. Br. 34, 39. *Mazo* involved the regulation of candidates' slogans on a ballot. The state regulation of candidates' access to the ballot and what can be printed on ballots—exchanged only between the State and the voter—is subject to *Anderson-Burdick* review. 54 F.4th at 144. The Restriction here, is "aim[ed] at regulating political speech" among private parties "subject to a traditional First Amendment analysis." *Id*. at 140.

Moreover, the Prohibition is not a regulation that merely requires VPC undertake additional planning or preparation to engage in its First Amendment activities as intended. App.III 657. Rather, it is a severe burden on VPC's First Amendment rights because it completely bans—through threat of criminal prosecution—the core of VPC's communications and what VPC believes is its most effective means of advocating for its cause. *See supra* Parts I.B, I.D; App.III 566.

II. THE PERSONALIZED APPLICATION PROHIBITION DOES NOT SURVIVE STRICT SCRUTINY

Under strict scrutiny, the Court may uphold a "restriction only if it is narrowly tailored to serve an overriding state interest."[17] *McIntyre*, 514 U.S. at 347. Because the Personalized Application Prohibition abridges VPC's core political speech and association, First Amendment protection is "at its zenith" and the burden Appellants "must overcome to justify this criminal law is well-nigh insurmountable." *Meyer*, 486 U.S. at 425. And the content-based nature of the Prohibition makes it "presumptively unconstitutional[.]" *Reed*, 576 U.S. at 163-64.

Appellants assert the following state interests: (i) minimizing voter confusion, enhancing public confidence, and effectuating orderly and efficient election administration; and (ii) avoiding voter fraud. App. Br. 41, 47. But, in applying strict scrutiny, a court must look to the "actual considerations that provided the essential

[17] Raised at App.II 246.

basis for the [decision-making], not post hoc justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189-90 (2017). Mere conjecture or assumptions are insufficient. *See Yes On Term Limits*, 550 F.3d at 1029.

Here, as a threshold matter, the legislative record for the Prohibition is silent regarding the purported state interests. *See* App.III 611-¶138. While the district court acknowledged that Appellants' asserted state interests could be compelling in the abstract, it found they were unsupported by the facts and not advanced by the Prohibition. App.III 629. Rather, the district court correctly determined that Appellants (i) only demonstrated a concern by election officials about the number of duplicate applications received, *not* the personalization of applications; and (ii) otherwise failed to establish that personalizing applications hinders election administration or leads to fraud. App.III 659, 663. It further found that Appellants "presented no evidence of voter fraud effectuated through advance mail voting or otherwise" and "minimal evidence of voter confusion and frustration," and "the record suggests that on balance, personalizing advance mail ballot applications actually facilitates orderly and efficient election administration." *Id.* Contrary to Appellants' contention (App. Br. 12), the district court's factual findings must be upheld absent clear error. *See supra* Standard of Review. There was no clear error here.

A. The Prohibition Is Not Narrowly Tailored to Combat Voter Confusion or Promote Efficient Election Administration

The district court correctly rejected Appellants' claimed confusion and election administration interests, finding that Appellants "failed to establish that inaccurately pre-filled applications caused voter confusion or that the Personalized Application Prohibition facilitates orderly election administration." App.III 668. Appellants' same arguments on appeal (App. Br. 41) fail for similar reasons.[18]

First, the First Amendment "does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795; *accord Buckley*, 525 U.S. at 192 (rejecting administrative convenience rationale). While a state may "take administrative and financial considerations into account" in developing election laws, the "possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing [others'] First Amendment rights." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986). It "must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495. Appellants fail to do so.

Second, the evidence does not support Appellants' vague characterization that VPC's personalized applications "often contained" errors. App. Br. 10. Appellants

[18] Raised at App.II 247.

assert just three sources of support: (i) their claimed expert purports to have identified 400 applications sent to recipients with cancelled registrations; (ii) their expert identified purported errors in less than 3% of the voter records VPC used to personalize applications; and (iii) the personalized applications VPC sent nationwide included an erroneous middle initial or an incorrect suffix in roughly 5% and 3%, respectively, of applications sent in two of VPC's five waves of mailers. App. Br. 41-43. The remainder of Appellants' assertions require this Court to find new facts that do not appear in the record and draw different factual inferences than the district court. But this Court must "view the evidence in the light most favorable to the District Court's ruling," not in the light most favorable to Appellants. *See Mathis v. Huff & Puff Tracking, Inc.*, 787 F.3d 1297, 1305 (10th Cir. 2015).

In any event, the district court properly found that Appellants failed to connect the mailing of purportedly inaccurately prefilled applications to voters with errors in applications actually received by election officials, undermining their claim that the personalized applications affected the orderly administration of elections. App.III 663-64. In so finding, the district court appropriately afforded not much, if any, weight to Shawnee County Election Commissioner Howell's affidavit, cited by Appellants (App. Br. 4-5), which was submitted after his deposition and not subject to cross-examination. App.III 611-¶139. At most, the record shows about fifty inaccurate personalized applications were submitted out of the 69,000 VPC

applications returned. *See* App.III 680-736. Moreover, Appellants' own witnesses testified that the types of errors in a small fraction of VPC's communications—middle initials and suffixes—are easily remedied by either the voter prior to submitting the application or the election official upon receiving it.[19]

Similarly, the district court found that Appellants failed to establish that prefilled applications, inaccurate or otherwise, caused any voter confusion. App.III 661, 663, 668. The district court examined both Mr. Howell's deposition testimony and his affidavit of and determined that, while his affidavit stated that his office was contacted by voters who received inaccurately prefilled applications, his deposition showed that he did not believe that voters were confused or frustrated because the applications were prefilled instead, but instead believed that voters were confused because they thought duplicate applications were being sent by Mr. Howell's office. App.III 662. That Appellants interpret one phrase from Mr. Howell's testimony differently from the district court (App. Br. 11, 34-35), which weighed the evidence and made a reasonable determination regarding Mr. Howell's testimony, establishes no clear error.

[19] Mr. Howell testified that if a voter crossed out a prefilled suffix, and the remaining information on the application was correct, it would probably be accepted. App.III 612-¶145. Ms. Schmidt, the now-retired Johnson County Elections Commissioner, testified that an application with a missing middle initial would still be processed if the remaining information on the application was correct. App.III 612-¶146.

While Appellants claim that the district court failed to credit facts in the record establishing that voters were actually complaining about the personalized applications—not just the duplicate applications—they do not point to any facts the district court failed to consider (or any specific facts at all). *See* App. Br. 43-44. And, regardless, the First Amendment "may not be withdrawn even if it creates [a] minor nuisance for a community[.]" *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943).

Ultimately, the district court found that distributing personalized, as opposed to blank, advance mail ballot applications actually facilitates orderly and efficient election administration. App.III 663-64. It credited testimony from election officials who themselves distributed prefilled applications and testified that doing so "makes it easier for the voters and reduces mistakes that [officials] then have to work harder to fix on the backend." App.III 639. Even assuming there was voter confusion or hindrance to the orderly administration of the 2020 election, based on the evidence in the record, the district court found it was due to the number of duplicate applications voters and election administrators received in an "unprecedented election" with "record turnout" "during a global pandemic."[20]

[20] Appellants claim that VPC's personalization of applications caused the submission of duplicate applications because voters purportedly thought they were obligated to submit "any and all" prefilled applications. App. Br. 44. This argument finds no support in the record and should be disregarded; especially because VPC's

App.III 661-664. But the Prohibition does nothing to prevent the mailing of multiple applications to voters, nor voters' sending duplicate applications to their county election offices. *Id.*

Finally, to the extent that avoidance of voter confusion as to whether county officials sent the applications is deemed a compelling state interest, a separate, unchallenged part of H.B. 2332 requires that unsolicited applications include a prominent disclosure. K.S.A. § 25-112(k)(1). Given this less restrictive way to address any confusion, Appellants fail to meet their "heavy burden of demonstrating that [the] restriction is the least restrictive means among available, effective alternatives[.]" *Peck v. McCann*, 43 F.4th 1116, 1135 (10th Cir. 2022) (quotations and citation omitted). Accordingly, the Prohibition is not narrowly tailored to any interest in preventing voter confusion and ensuring orderly election administration. App.III 663-64.

B. The Prohibition Is Not Narrowly Tailored To Preventing Voter Fraud

Appellants' argument that the Prohibition is narrowly tailored to preventing voter fraud is also without merit.[21] *See* App. Br. Part III.D.2. Despite their

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mailers contained a prominent warning—inserted at the request of the Kansas Secretary of State after VPC's outreach—that recipients had already submitted an application, they need not submit another. App.III 675.

[21] Raised at App.II 249.

conclusory arguments about voter fraud, "it does not follow like the night the day" that the Prohibition does anything about fraud. *Buckley*, 525 U.S. at 204 n.23. Rather, to justify the Prohibition on this basis, the State must "satisfy its burden of demonstrating that fraud is real, rather than a conjectural, problem." *Id.* at 210 (Thomas, J., concurring). Appellants fail to do so.

While Appellants concede that Kansas has avoided any major voting fraud from advance mail ballot applications (and mail voting generally), they argue that Kansas can adopt prophylactic measures to prevent voter fraud. App. Br. 47-48. But the relevant inquiry is not Kansas's ability to adopt any anti-voter fraud protections. Instead, it is whether the purported anti-voter fraud protection—the Personalized Application Prohibition—is narrowly tailored to the fraud the State attests it is trying to prevent. *See supra* Part II.B. The State "cannot impose a prophylactic rule" abridging speech "even where misleading statements are not made[;]" to be narrowly tailored, it instead "can assess liability for specific instances of deliberate deception." *Riley*, 487 U.S. at 803 (Scalia, J., concurring). It is undisputed that other Kansas laws directly criminalize false impersonation of a voter and otherwise adequately prevent mail voting fraud. K.S.A. §§ 25-2431, 25-1122(i), 25-1122(e)(1)-(2); App.III 631, 667. These existing protections already address any concerns about fraud. *See Buckley*, 525 U.S. at 204-05; *Meyer*, 486 U.S. at 427. The State "cannot impose a prophylactic rule" abridging speech "even where misleading

statements are not made[;]" to be narrowly tailored, it instead "can assess liability for specific instances of deliberate deception." *Riley*, 487 U.S. at 803 (Scalia, J., concurring).

Appellants propose that a misaddressed application raises the possibility that it could be submitted fraudulently by someone other than the intended recipient. App. Br. 48. But Appellants' hypothetical strains credulity. The unintended recipient would need to know and fill out the intended recipient's birthdate and driver's license number (or nondriver's identification card number) and apply the intended recipient's signature. It is doubtful that someone so committed to perpetrating voter fraud—who knows all of this additional, much more personal information for a specific voter—would only submit a fraudulent application in that voter's name upon receipt of an application from VPC prefilled with that voter's name and address, when the application is freely available on the Secretary of State's website. App. Br. 7. In any event, Appellants provide no evidence that this supposed possibility of fraud is anything more than conjecture and it must be rejected. *See Yes On Term Limits*, 550 F.3d at 1029 (finding an Oklahoma law insufficiently tailored where the asserted state interest relied on an assumption that non-resident circulators lead to an increased prevalence of fraudulent activity than resident circulators for which the State "provided no data").

Appellants additionally argue that the "surge" of "inaccurate and duplicate prefilled" applications county election officials received in 2020 increased administrative burdens, allegedly "testing the limits" of the State's safeguards against fraud. App. Br. 48. But Appellants have not demonstrated that any such surge was "fairly attributable to activity which the Personalized Application Prohibition seeks to prohibit," App.III 660, especially in light of more plausible explanations, such as the significant shift to mail voting, concerns about mail delivery during the pandemic, and the fact that the 2020 election was highly contested. Moreover, it is uncontested that there was no systemic fraud in the 2020 election, and Appellants point to nothing beyond their own *ipse dixit* to posit that any such "surge" increased the risk of fraud. *See* App.III 609-¶119. In any event, the district court correctly rejected Appellants' logic that any activity that increases work for elections offices could be criminalized to protect against potential fraud. App.III 661.

III. WHILE INTERMEDIATE SCRUTINY IS INAPPLICABLE, THE PROHIBITION WOULD NOT SURVIVE IT

Appellants argue in passing that "at worst" the Prohibition would be subject to intermediate scrutiny.[22] App. Br. 40. Laws are subject to intermediate scrutiny under *O'Brien* in either of two circumstances: (1) when a content-neutral law

[22] Raised at App.II 443.

regulates non-core political speech, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); or (2) when a law regulates "'speech' and 'nonspeech' elements [that] are combined in the same course of conduct," *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Neither applies here. *See supra* Parts I.A, I.C-D. However, even if the Court finds that VPC's personalized applications are not speech (which it should not), they are indisputably part of the "same course of conduct" as VPC's cover letters—which Appellants *concede* are protected speech. App. Br. 19. Thus, at the very least, the Prohibition is subject to intermediate scrutiny and the Prohibition fails even this more lenient test.

Under intermediate scrutiny, the State must demonstrate that the challenged restriction serves a "substantial governmental interest[.]" *O'Brien*, 391 U.S. at 377.[23] The State must also "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *accord Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1287 (10th Cir. 2002) ("[U]nder *O'Brien* . . . [t]he city must also prove that its chosen weapon against these secondary

[23] To survive scrutiny under *O'Brien*, Appellants must also establish that the restriction is "no greater than is essential to the furtherance of that interest." App. Br. 40. Here, the Prohibition is facially overbroad. *See infra* Part IV.

effects will further its mission."). "It is the burden of [the State] to prove satisfaction of each of these elements." *Essence*, 285 F.3d at 1283. Appellants fail to do so.

Based on the trial record, the district court found that Appellants presented no evidence that the Prohibition would alleviate the purported harms. App.III 659-61. These evidentiary findings cannot be disturbed because this Court "will not overturn the district court's evidentiary decision unless we are firmly convinced that it made a clear error of judgment." *Essence*, 285 F.3d at 1288 (deferring to the trial court's factual findings under *O'Brien*). The district court made no such clear error here as to any of the State's asserted interests.

First, Appellants claim that that prohibiting prefilled applications prevents voter confusion and enhances efficient election administration. App. Br. Part III.D.1. But, as noted *supra* Part II.A., the district court correctly rejected this argument and determined that "on balance, personalizing advance mail ballot applications actually *facilitates* orderly and efficient election administration." App.III 662-64 (emphasis added).

Second, Appellants below failed to carry their burden in establishing that voter fraud through mail-in ballot applications was "real" and "not merely conjectural." *Turner*, 512 U.S. at 664; *see* App. Br. Part III.D.2. As the district court found, Appellants "presented no evidence of voter fraud effectuated through advance mail voting or otherwise[,]" and "presented no evidence of a single instance

in which a voter received duplicate mail ballots." App.III 659; *see supra* Part II.B. And they similarly fail to establish that the Prohibition would "alleviate these harms." *Turner*, 512 U.S. at 664.

At bottom, Appellants fail to carry their burden of proof under *O'Brien* that their proffered interests "are real, not merely conjectural" or that the Prohibition would further them "in a direct and material way." *Id.*; *see Essence*, 285 F.3d at 1283. Accordingly, the Restriction cannot survive intermediate scrutiny.

IV. THE PROHIBITION IS UNCONSTITUTIONALLY OVERBROAD

As the district court properly ruled, the Prohibition is unconstitutionally overbroad because it overregulates a substantial amount of protected expression and impermissibly chills the speech of both VPC and others not before the court.[24] *See* App.III 664-68; *see also United States v. Williams*, 553 U.S. 285, 292 (2008) ("a statute is facially invalid if it prohibits a substantial amount of protected speech").

"Establishing substantial over-breadth [] requires a comparison between the legitimate and illegitimate applications of the law." *Harmon v. City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020) (citation and quotations omitted). While Appellants point to the State's purported interests—preventing voter fraud and voter confusion and maintaining orderly election administration—as legitimate, they make no attempt to connect these interests to the application of the Restriction. App.

[24] Raised at App.II 245.

Br. 10. Moreover, as the district court held, Appellants "offer little support for the claim that inaccurately personalized mail ballot applications are a significant problem and no evidence that fraudulent applications are a problem in Kansas." App.III 666.

In any event, even crediting the State's purported interests, the Prohibition's legitimate sweep would be exceedingly narrow: only prohibiting incorrectly personalized applications that potentially lead to confusion or fraud. But the Prohibition criminalizes *all* personalized applications regardless of accuracy, the sender's intent, or the result. K.S.A. §§ 25-1122(k)(2)-(5). And to the extent that the distribution of personalized applications, whether correctly prefilled or not, has any connection to voter fraud (which Appellants have not and cannot explain), "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609 (1967) (citation and quotations omitted). Here, it is undisputed that other Kansas laws already prevent mail voting fraud, *supra* Part II.B., and as the district court properly noted, other laws would accomplish this purpose without impeding on First Amendment protections or chilling speech, App.III 667.

Meanwhile, the illegitimate applications of the Prohibition far exceed any potential legitimate applications. Of the hundreds of thousands of personalized

applications VPC mailed to Kansas voters, the undisputed evidence shows that—at most—VPC's mailers experienced single-digit error rates. App.III 602-¶¶64-65; *see supra* at 46-47 (summarizing Appellants' purported evidence of errors). Given the lack of any evidenced errors with over 90% of VPC's (or with any other group's) personalization of applications, the Prohibition prohibits a significant amount of speech that does not implicate any of Appellants' stated interests.

Moreover, the consequence of violating the Prohibition is both civil and criminal penalties, including possible jail time, without any scienter requirement. K.S.A. §§ 25-1122(k)(2)-(5), 21-6602(a)(3); App.III 609-¶118. Where, as here, the law "imposes criminal sanctions" for even inadvertent violations, it effectively "chill[s] the free speech rights of parties not before the court[.]" App.I 90.

The district court correctly determined that, upon a "comparison of the Prohibition's legitimate and illegitimate applications," the law is ultimately "one-sided" and unconstitutionally overbroad on its face and as-applied. App.III 667.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

STATEMENT REGARDING ORAL ARGUMENT

In accordance with 10th Circuit Rule 28.2(C)(2), Appellees respectfully request that this case be heard at oral argument. This appeal presents fundamental constitutional questions that bear serious consequences for VPC. Counsel believe that oral presentation would aid this Court's disposition of the case.

Dated: September 7, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, this BRIEF FOR PLAINTIFFS/APPELLEES:

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of September, 2023, an electronic copy of the foregoing BRIEF FOR PLAINTIFFS/APPELLEES was served on Defendants/Appellants and all counsel of record via the Court's CM/ECF system.

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