



Notice of Study Session
ABILENE PUBLIC LIBRARY
209 NW FOURTH STREET
April 4, 2022 - 4:00 pm

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PURPOSE

The City Commission's study sessions are for the purpose of providing the commission the opportunity to study items in more detail.

OPEN FORUM

This is an opportunity to bring up items to be informally addressed. The Mayor may impose a time limit on open forum.

STUDY ITEMS

1. Airport Spill Prevention Containment and Control (SPCC) Plan
2. City Hall Office remodel
3. UPOC – memorandum
4. Cleaning bids
5. Budget Lodge Inn-Title 8 Housing Presentation





CITY OF ABILENE
Item for City Commission Agenda

Meeting Date:

04/04/2022
04/11/2022

Originating Department

Prepared By:

Approved For Agenda By:
(Office Use Only)

Public Works – Water

AGENDA ITEM HEADING:

Adoption of Airport Spill Prevention Containment and Control (SPCC) plan

BACKGROUND:

The city has two water wells located on airport property. These two wells contribute over 40% of the water supply for the city.

Last year a spill by aerial sprayers caused a large clean up effort by Public Works crews, and highlighted the need for an updated, more secure SPCC plan. In this instance no chemicals reached ground water penetration, however without more oversight and updated requirements for secondary containment, we might not be lucky next time.

Jay Leusman and Michael Blacketer from the Public Works water plant have worked tirelessly to put this plan together. The city had originally hired an outside firm to write the SPCC plan. The final product was generic, not up to current updates and didn't address our concerns unique to our airport (two major city water wells on airport property).

In the drafting of this plan, the two primary goals were to:

1. protect the public water supply
2. and not make the plan so restrictive aerial sprayers couldn't operate

The attached plan has been reviewed several times by the City Manager, Finance Director, Public Works Director and City Engineer. All believe the plan is solid and meets the objectives.

FISCAL NOTE:

Some improvement costs to be addressed in 2023 budget

COMMISSION ACTION:

Adopt SPCC plan for the Airport

SPILL PREVENTION, CONTROL, AND COUNTERMEASURES PLAN FOR AGRICULTURAL CHEMICALS

City of Abilene, Kansas
January 31, 2022



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- J. Spill Reporting and Notification
- K. Agricultural Handling and Briefing Log
- L. Technical Amendment Log

SECTION 1 – Introduction

This Spill Control and Countermeasures Plan (SPCC) contained within this document have been prepared according to the requirements of Kansas State regulations listed in KAR 4-13-25. The purpose of the plan is to prevent and mitigate discharges of agricultural chemicals away from the storage and use facilities. The following issues have been considered during the preparation of this plan and are included as appropriate:

- Practices and procedures devoted to the prevention of spills.
- Procedures for containment should a spill occur.
- Plans for removal and disposal of spilled and/or contaminated materials.

The plan will be amended within six (6) months of a change in facility design or operation which affects the facility's potential for discharge of agricultural chemical products into the environment. This plan shall be reviewed under the supervision of the Public Works Director and Airport manager every five years and amended as appropriate.

In addition to the minimal prevention standards described in this Plan, we have reviewed other applicable requirements for discharge prevention and containment procedures outside of the SPCC requirements to meet any more stringent State rules, regulations, and guidelines.

SECTION 2 – Facility Identification

Facility Name:	City of Abilene Airport
Facility Street Address:	801 S. Washington St., Abilene, KS 67410
Facility Mailing Address:	801 S. Washington St., Abilene, KS 67410
Facility Phone Number:	(785) 263-3970
Latitude/Longitude:	38 deg 54'25 70 97 deg 14'00.00
Owner Name:	City of Abilene, Kansas
Owner Address:	PO Box 519/419 N. Broadway, Abilene, KS 67410
River Drainage Basin:	Mud Creek
Nearest Surface Water Body:	Mud Creek
Distance:	½ mile to the East
Facility Response Coordinator:	Public Works Director or designated P.O.C
Working Hours Phone Number:	(785)263-3510

SECTION 3 – Certification Statement

This Spill Prevention, Control, and Countermeasure Plan (SPCC) for the City of Abilene is fully supported by the management of the City of Abilene. The City of Abilene will implement this plan and amend it as needed due to expansions, modifications, and improvements at the Abilene Airport location. In addition, the management of the City of Abilene commits the manpower, equipment, and materials required to expeditiously control and remove any quantity of agricultural chemicals discharged that may be harmful at the expense of the responsible party.

Public Works Director/designated P.O.C

Date

I believe that the submitted information is true, accurate, and complete.

1. I am familiar with the applicable requirements of K.A.R. 4-13-25
2. I have visited and examined the facility.
3. This Plan was prepared in accordance with accepted and sound industry practices and standards.
4. Procedures for required inspections and testing have been established in accordance with industry inspection and testing standards or recommended practices.
5. I will fully implement the Plan.

I also understand my other obligations relating to the storage of agricultural chemicals at this facility including, among others:

1. To report any releases of discharges in the environment to the appropriate authorities. Notification information is included in this plan.
2. To review and amend this plan whenever there is a material change at the facility that affects the potential for a chemical discharge, and at least once every five years. Reviews and amendments are recorded in an attached log (**Appendix L**).

I certify that I have satisfied the requirement to prepare and implement a Plan under KAR 4-13-25 all the requirements under KAR 4-13-25. I certify that the information contained in this Plan is true.

Signature: _____ Date: _____

Name Printed: _____ Title: _____

Record of Plan Review and Amendments Five Year Review:

Complete a review and evaluation of this SPCC Plan at least once every five years. As a result of the review, amendments to this plan should be done within six months to include more effective prevention and control measures for the facility, if applicable. Implement any SPCC Plan amendment as soon as possible. Document completion of the review and evaluation and complete the log (**Appendix L**).

This SPCC Plan will be amended when there is a change in the facility design, construction, operation, or maintenance that materially affects the potential for a discharge to navigable waters or adjoining shorelines. Examples include adding or removing containers, reconstruction, replacement, or installation of piping systems, changes to secondary containment systems, changes in product stored at this facility, or revisions to standard operating procedures.

Any technical amendments to this Plan will be re-certified in accordance with Section I of this Plan template.

SECTION 4 – Facility Description, Diagram, Drainage, and Agricultural Chemicals Storage Information

1. Facility Description

The City of Abilene Airport (K78) is classified under the primary Standard Industrial Classification (SIC) code of 44581 - Airports, Flying Fields, and Airport Terminals. This municipal airport that has some maintenance and fueling operations and has seasonal crop-dusting operations. The design of the runway would allow no more than 13,000 lbs. single wheel per axle and 16,000 lbs. double wheels per axle. In addition to the current FBO having crop dusting operations, the City of Abilene also leases out predesignated permanent spaces on the airport for crop-dusting operations.

2. Facility Location Map and Diagram

A facility location map and a topographical map is in (**Appendix B**).

Drainage

Impervious areas account for a small percent of the total property area. Facility drainage pathways and control structures are illustrated on the facility diagram in (**Appendix B**) and discussed in various sections of the plan. In general, chemical storage in any amount in areas near drainage must be engineered and controlled through adequate secondary containment to prevent agricultural chemicals and fuels from reaching critical water areas such as drainage paths that would impact City of Abilene water systems or surface waters.

The City of Abilene airport has natural drainage that would flow to the south of the airport property where there

are two direct paths to the city drinking water system. If the drainage would go to the east, it would end up in Mud Creek about 1/2 mile away.

3. Agricultural Chemical Storage Information

The term "bulk agricultural chemicals" means any agricultural chemicals, whether liquid or solid, that is kept at ambient temperature and pressure and is stored, loaded, or unloaded in an individual container of undivided capacity. The facility should be constructed of materials that contain spills, prevent runoff, and avoid leaching of the agricultural chemicals being mixed, loaded, or unloaded. The following are requirements for bulk agricultural chemicals containers:

- a) Each container shall be designed to handle all operating stresses, including static pressure, pressure buildup from pumps and compressors, and any other mechanical stresses. Each container shall be chemically compatible with the agricultural chemicals it holds.
- b) Each bulk agricultural chemical container connection shall be equipped with a shutoff valve accessible and located within the secondary containment.
- c) Except while the agricultural chemicals are being removed from the container, shutoff valves shall be left closed, locked, and secured from access.
- d) Each bulk agricultural chemical container used for storage shall be marked clearly to identify the agricultural chemicals stored in the container.

City of Abilene Airport facility is subject to the requirements of K.A.R. 4-13-25b because one or more of the following conditions have been met.

- a) A cumulative total of 1,000 gallons or more of liquid agricultural chemicals is transferred away from the facility during any consecutive 365-day period.
- b) A total of 1,000 gallons or more of liquid bulk agricultural chemicals is stored, held, or maintained at the facility at any time.
- c) A cumulative total of 3,000 lbs. or more of dry bulk agricultural chemicals is transferred away from the facility during any consecutive 365-day period.
- d) A total of 3,000 lbs. or more of dry bulk agricultural chemicals is stored, held, or maintained at the facility at any time.

SECTION 5 – Spill Prevention

1. Procedures

A. Standard Procedures for Unloading Vendor/Owned Tank Trucks

- 1. Be sure the tank trailer is accurately spotted; brakes are set, and vehicle is turned off.
- 2. All mixing and loading must be completed within secondary containment.
- 3. The driver must remain with the vehicle during the entire unloading.

4. Make sure the tank being filled is vented before connecting the loading line.
5. Read the level indicator or visually inspect the receiving tank to be sure that sufficient space is available to receive material being transferred.
6. Remove the tank trailer hose carefully to prevent spills. Clean all spills/drops promptly.
7. Be sure connections between dispensing and receiving tanks are secured before opening the valves for liquid transfer.
8. Start pump and check to be sure there is no leakage at any of the connections or anywhere along the transfer lines. Routinely check the level gauge on the receiving tank as it is being filled. If a leak is present, immediately stop the pump, shut the valves, and repair the leak.
9. After liquid has been transferred, stop pump, close all valves, disconnect loading line, replace closures on valve lines, inspect the lowermost drain and all outlets of vehicle for leakage and correct as necessary, and release tank truck.

B. Standard Procedures for Airplane Loading

1. Park adjacent to the pump. Set the brakes.
2. All mixing and loading must be completed within secondary containment.
3. Leave enough space to walk between the pump and the aircraft.
4. The truck attendant of the resupply vehicle must always remain with the aircraft and the resupply vehicle.
5. Clean up drips/spills promptly.
6. When you have completed loading, turn off pump, and secure dispenser hose.

C. Standard Procedure for Portable Containers and Drums

1. Place agriculture chemicals as close to the receiving container or reservoir as possible inside secondary containment.
2. Use funnels to prevent minor spills.
3. The container should be closed after adding or removing material from it.
4. Take out of service any container, pump or other equipment that is leaking until repaired or replaced.
5. Wear appropriate PPE. (gloves, safety glasses)
6. Know where the nearest spill kit is located.
7. Clean up any spills/drips promptly.
8. All containers must be labeled of its contents.

2. Routine Inspections and Maintenance

A. Storage

1. Each owner/operator shall inspect the agricultural chemicals storage facility and secondary containment, including all appurtenances, at the beginning of the day's usage, for any defects, including the following: corrosion, leaks, cracks, spills, gaps, tears, cross-contamination, and structural

and equipment defects. The owner/operator shall promptly correct any defect before operation begins.

2. The owner/operator shall make a record of each inspection performed. Including the date, if a defect was found or not, a description of any repairs performed and if a discharge occurred.

B. Storm Water

1. After a storm event, water that has accumulated in secondary containment will be inspected by the Airport Manager.
2. If evidence of a release is not present, the water will be released from containment onto the ground or into the storm water drainage system. Secondary containment shall be dry before operation begins, and all drains are in closed position.
3. If there is a release or spillage is noted, the water will not be released, but will be treated or pumped from the containment into a storage tank for storage until proper disposal is possible.
4. Storm Water Drainage Form in **Appendix E** needs to be completed and filed when the need for draining precipitation from a secondary containment structure. *[Alternatively, storm water bypass records required by an NPDES permit.]*

C. Inspections and Integrity Testing

1. The storage tanks and associated piping shall be inspected weekly when in operation, by the Airport Manager for any damage, leakage, or wear. A visual inspection of seams (including the underside, where possible) shall be included. All field constructed aboveground containers must be evaluated if undergoing repair, alteration, reconstruction or change in service that might affect risk of a discharge or failure due to fracture or other catastrophe. Such evaluation must also be taken when there has been a discharge failure due to fracture or catastrophe.
2. During weekly inspection, inspect for visible discharge which results in a loss of chemical from the containment, including, but not limited to seams, gaskets, piping, pumps, valves, rivets, and bolts. If leak(s) are detected, then the owner/operator of the site and the City of Abilene Public Works Director should be promptly notified, and all operation aerial spraying stopped until all corrective action have been done and approved.
3. Above ground valves, piping, and appurtenances such as flange joints, expansion joints, valve glands and bodies, catch pans, pipeline supports, locking of valves, and metal surfaces are inspected weekly to assess their general condition.
4. The Airport Manager must keep in this SPCC document, comparison records for the tanks, container supports, and foundations used to support containment. These records shall be kept at the Abilene airport facility for the lifespan of the containment system.
5. The airport manager will set an inspection schedule based on his inspection results, but not less than weekly. Bulk container inspection matrix prepared for this facility is found at **Appendix D** for frequency, qualifications, and method of inspection.

3. Facility Security

To prevent a spill or release from being caused by accidental or unknown entry or vandalism, several security measures have been taken as noted below:

1. Adequate lighting for the detection of spills by both facility personnel and the public.
2. Lighting is installed to ensure spills occurring during hours of darkness are discovered, both by operating personnel, if present, and by non-operating personnel (the public, local police, etc.), and to prevent spills occurring through acts of vandalism.
3. Lock all dispensing devices and power is shut off when no employee is at facility.
4. All master flow and drain valves are secured when not in use.

4. Employee Training

- A. Training is required for all employees handling agricultural chemical. These personnel at the facility will be trained in:
1. The laws and regulations regarding spills, releases, and pollution control.
 2. The contents of this SPCC Plan.
 3. The operation and maintenance of equipment to prevent discharges.
 4. General facility operations.
 5. Known discharges or failures and manufacturing components.
 6. Recently developed precautionary measures.
- B. Spill prevention and response training will be conducted at least annually. Informal briefings will be held periodically through the year to update employees on changes in the regulations, laws, or the City of Abilene procedures.
- C. Training records will be maintained with the SPCC Plan in the **Appendix K** for 3 years.

5. Definitions

- A. "Bulk agricultural chemicals container" means any receptacle or device in which any agricultural chemical is stored, mixed, treated, disposed of, or handled in any manner in any quantities wet or dry.
- B. "Discharge" means any spilling, leaking, depositing, pumping, dumping, or emptying, whether accidental or intentional, resulting in the release of an agricultural chemicals or material containing an agricultural chemical.

6. Secondary Containment Requirements

- A. All agricultural chemicals should be stored within secondary containment. The containment capacity shall be at least 110 percent of the capacity of all agricultural chemical container in addition to the displacement of tanks, appurtenances, fixtures, equipment, and material located within the secondary containment. The containment must meet the following requirements:

1. Be constructed of steel, reinforced concrete, or any other materials of sufficient thickness, density, and composition to contain any discharged agricultural chemicals materials.
 2. Be leakproof with cracks, seams, and joints sealed.
 3. For liquids, be capable of withstanding the static pressure resulting from the secondary containment being completely filled with a liquid.
 4. A soil liner shall not be considered adequate. Masonry block, asphalt, earthen materials, clay, and prefabricated bentonite liners shall not be used as secondary containment.
 5. The floor of the containment shall drain to a sump or other specific point of recovery, which should be emptied daily in accordance with K.A.R. 4-13-25 and this SPCC Plan.
 6. Secondary containment shall be constructed to allow the interior and exterior of the walls to be viewed.
 7. A synthetic liner used to line the secondary containment shall be installed and maintained according to the manufacturer.
- B. Sorbent materials, insoluble materials, or mixtures of materials (packaged in forms such as spill pads, pillows, socks, and mats) used to recover liquids through the mechanisms of absorption, adsorption, or both. Used to isolate and contain small drips or leaks until the source of the leak is repaired.
- C. Commonly used material handling equipment, such as valves and pumps. Also used as an active containment measure (or countermeasure) to contain and collect small volume discharges before they reach water ways. Proper use of these materials may require a properly equipped and trained spill response team specifically trained to contain an oil discharge prior to reaching navigable waters or adjoining shorelines.
- D. Drip pans: used to isolate and contain small drips or leaks until the source of the leak is repaired. Drip pans are commonly used with product dispensing containers (usually drums), when uncoupling hoses during bulk transfer operations, and for pumps, valves, and fittings.
- E. Sumps and collection systems: a permanent pit or reservoir and its associated troughs/trenches that collect chemicals. The general secondary containment provision applies to all areas of a facility that have a potential to cause a chemical discharge.

SECTION 6 – Spill Response and Countermeasures

1. Spill Response Actions – See Appendix I

2. Waste Management of Collected Spill Material

- A. Each owner/operator shall recover promptly any discharge. The owner/operator may use the recovered agricultural chemicals for its intended purpose if it can be used according to the labels or labeling. The owner/operator shall dispose of, in accordance with the label, any recovered agricultural chemicals that cannot be used.
- B. The owner/operator shall notify the Airport Manager and the City of Abilene Public Works Director immediately and other necessary Federal, State, and local agencies.

3. Spill Kit Locations and Contents

- A. Each owner/operator will provide and have in their possession an approved spill kit when at the Abilene Airport.
- B. Approved Spill Kit Minimum Contents/Inventory, more maybe required:
 - 1. 10' Absorbent Socks
 - 2. 50 lbs. Bagged Absorbent
 - 3. 12" X 12" Absorbent Pads
 - 4. Unused 5-gallon Buckets
 - 5. Broom and Dustpan
 - 6. Disposal Bag

4. Spill Reporting and Notification – See Appendix J

SECTION 7 – Facility Agricultural Chemicals Spill History

Description of Event	Date	Approximate Volume Released	Released into? (Ground, Storm Water Pond, Storm Water Catch Basin, etc.)
Loading operation of seasonal crop duster - inadequate secondary containment for loading of airplane caused liquids on runway area where they were storing chemicals. Public Works cleaned it up and removed the soil that was near the release.	May 2021	Unknown	Ground – clean up occurred within hours of discovery and 1' of topsoil was removed for over 20' and will be properly disposed of.

SECTION 8 – Revisions

1. Changes to Facility or Operations

- A. This SPCC Plan is to be amended whenever there is a change in facility design, construction, operation, or maintenance procedure that materially affects the potential for a spill. Examples of these types of changes that may require an amendment of the SPCC Plan include:

1. Commissioning or decommissioning tanks.
 2. Replacement, reconstruction, or installation of agricultural chemicals containers.
 3. Construction or demolition that might alter secondary containment structures.
 4. Revision of standard operating or maintenance procedures.
- B. Both technical and non-technical amendments must be documented in the attached SPCC Review Plan Log. All amendments to this SPCC Plan will be signed and certified by owner/operator.
- C. This SPCC Plan is to be amended within 6 months of a change and implemented within 6 months following preparation of the amendment.

2. Changes to Facility or Operations

- A. In any case, this SPCC Plan will be reviewed and evaluated once every 5 years by the City of Abilene and Airport Manager. The review will be documented and noted on the attached SPCC Review Plan Log. If required, the SPCC Plan will be amended within 6 months of the review as described above, and any changes will be implemented within 6 months of the amendment.

SECTION 9 – Appendixes

- A. Observations and Recommendations
- B. Facility Location Map/Diagram
- C. Agricultural Chemicals Storage Information Table
- D. Agricultural Chemicals Storage Equipment Inspection Form
- E. Storm Water Drainage Form
- F. Integrity Testing Form
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- L. Technical Amendment Log

Appendix A

Observations and Recommendations

This section presents physical upgrades or procedural changes that are not fully operational but are called for in the plan.

Physical Upgrades

The City of Abilene requires all bulk storage locations have secondary containment. Bulk storage is 1-gallon containers or larger should be augmented with secondary containment that can contain spills.

RECOMMENDATIONS:

All aerial sprayers are required to provide diagrams, plans and specifications of the permanent operation site including all secondary containment designs and release procedures 90-days before operation is to commence for approval by the Public Works Director and or City Engineer.

All aerial sprayers must have mixed and loading secondary containment that will contain at least 110 percent of the capacity of the container or tank including the entire loading area of the airplane.

All mixing and loading operations must be completed over secondary containment of at least 110 percent of the capacity.

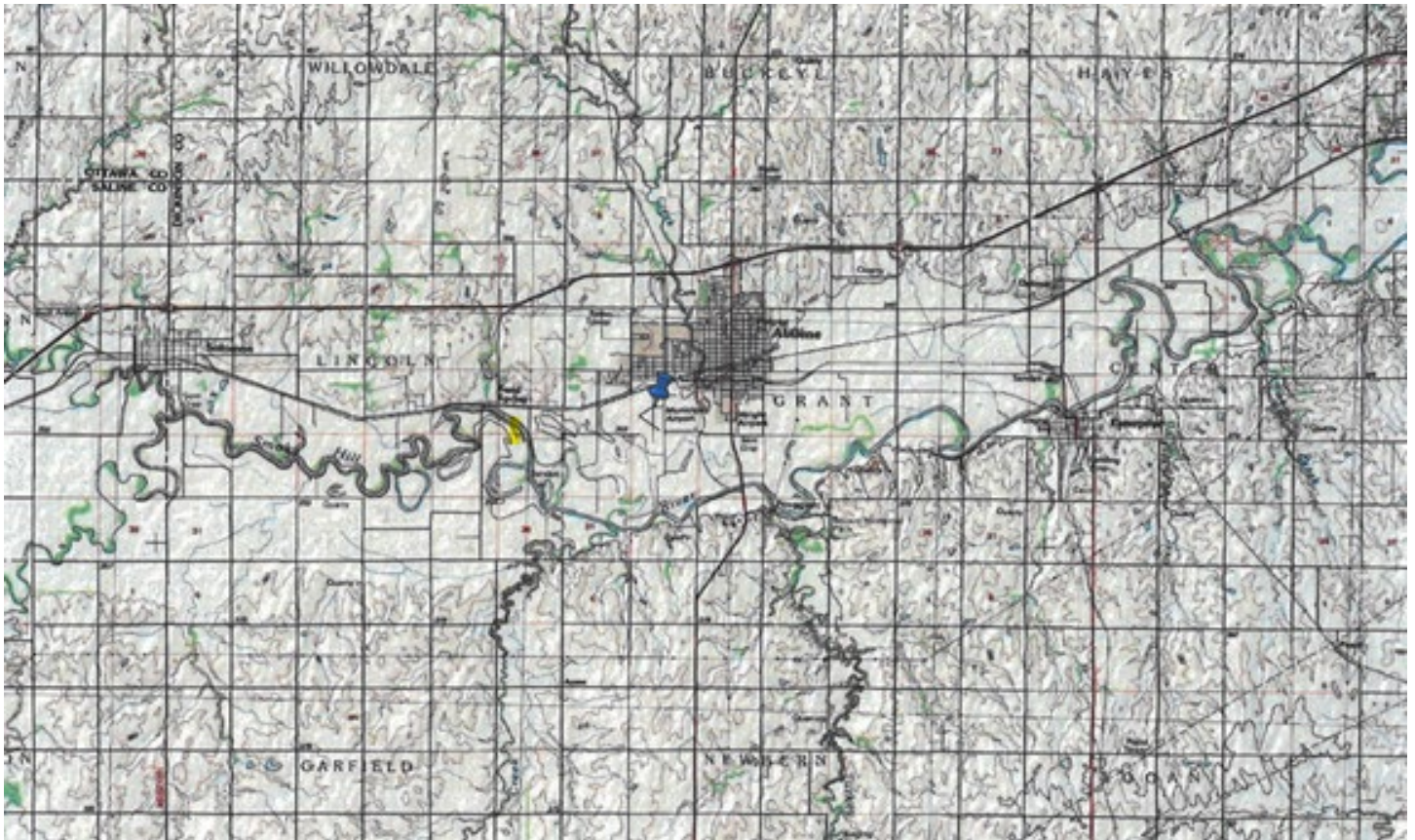
Appendix B

Facility Location Aerial Photo and Topographical Map

Aerial Photo



Topographical Map



Appendix C

Agricultural Chemicals Storage Information

This table includes a complete list of all agricultural chemical storage containers (above ground containers and completely buried tanks) with capacity of 1 U.S. gallons or more, unless otherwise exempt from the rule. For mobile/portable containers, an estimated number of containers, types of chemicals), and anticipated capacities are provided.

Tank Description	Type of failure (Discharge Scenario)	Potential discharge volume (Gallons)	Direction of flow for uncontained discharge	Secondary containment method	Secondary containment capacity (Gallons)
Bulk Storage Portable Containers (1 Gallon or Greater Capacity)					
Product Transfer Areas:					

Appendix D

Agricultural Chemicals Storage Equipment Inspection Form

Inspection Conducted By: _____ Date: _____

Inspection of agricultural chemical storage equipment shall be done by an independent third party on a yearly basis and record of the inspection shall be kept in the SPCC plan. The inspection shall consider the following:

1. Inspect outside of the storage container for signs of deterioration or discharge.
2. Visually inspect seams, gaskets, piping, pumps, valves, rivets, and/or bolts where applicable.
3. Inspect secondary containment structures for signs of deterioration, discharge, or accumulation of chemicals in the containment area.
4. Inspect liquid level equipment to ensure proper functioning (observe reading of level gauge, etc.)
5. Does the secondary containment have any water accumulation? (*Use the "Storm Water Drainage Form" – Appendix E or documentation from site Storm Water Permit Requirements.)
6. Maintenance notified?

Container Number/Identification	1	2	3	4	5	6	Comments

Appendix E

Storm Water Drainage Form

Date of Release	Person Releasing Water	Quantity Released to Drainage	Area Released to	If Treated, Describe Treatment	Supervisor's Initials

Appendix F

Schedule of Integrity Testing for Chemical Storage Containers

Tank Number/ Identification	Diameter (Feet)	Height (Feet)	Capacity (Gallons)	Contents	Schedule for Integrity Testing/Date of Last Test	Method of Integrity Testing*

**Note: When determining the method and frequency of integrity testing, consider items such as the manufacturer's recommended method and frequency, the standards to which the tank was constructed, the current age of the tank, the material stored, and the conditions of material stored. (E.g. temperature*

Appendix G

Locations of SPCC Required Documents

SPCC Required Record	Location Record is Maintained
Spill Notifications	
Inspection Worksheets	
Integrity Testing Results	
Repair Records	
Training Records	

Appendix H

Spill, Release, Fire or Environmental Incident Report

Note: Complete this form for any spills 1 gallon or greater.

Type of Event: (check all that apply)	
Liquid spill/release ____	Excess air release or air control device breakdown ____
Solid material spill/release ____	Explosion ____
Inside containment/pavement/indoors ____	Fire ____
Entered storm system (ditch, drain, etc.) ____	Near miss spill of any above (close call) ____
Entered sanitary or septic sewer lines or system ____	
Elsewhere off site ____	
Near miss spill of any above (close call) ____	

Incident Information	
Reported by:	Date of Event:
What was released?	Time of Event:
Where did it release to? Air ____ Surface Water ____ Sanitary Sewer ____ Storm Sewer ____ In Containment Structure ____ Gravel/pavement/asphalt/etc. ____ Inside building ____	How much released? Source of release? Location of release? Affected area size?
Full description of the event:	
Immediate action taken and/or clean-up actions:	

If this was a **spill**: RQ Release? Yes ____ No ____

If this spill was **reportable to external agencies**, please attach names of agencies called, names of people, times, etc. Attachment? Yes ____ No ____

What was the final disposal of material?

INVESTIGATION, ROOT CAUSE ANALYSIS AND CORRECTIVE ACTIONS

Date Investigation Started:

Date Investigation Completed:

Investigation Team Members:

Maintenance:

Environmental:

Familiar with process:

Familiar with release event:

Other:

Other:

Other:

Other:

Root cause descriptions:

Corrective Actions- which temporarily and permanently remedy the root causes listed above.
(Add additional sheet with more corrective actions as needed.)

Responsible Party:

Due Date:

Responsible Party:

Due Date:

Responsible Party:

Due Date:

Appendix I

Spill Response and Clean-up

This describes the response and cleanup, countermeasures, and actions, to be taken in the event of an agricultural chemical spill to prevent discharge that leaves the property. The uncontrolled discharge of chemicals to groundwater, surface water, or soil is prohibited. Immediate action must be taken to prevent, control, contain, and recover spilled chemicals before it is discharged offsite to the environment.

If safe to do so, the following general steps are to be taken:

- Eliminate potential sources of ignition.
- Identify and shut down the source of the discharge to stop the flow if possible and safe.
- Contain the spill with sorbents, berms, trenches, etc.
- Contact the Public Works Director or Airport Manager.
- Contact regulatory authorities and response organizations as necessary and needed for proper containment and cleanup. Andas advised by the Spill Coordinator.
- Collect and dispose of recovered products according to applicable regulations.

To establish appropriate response procedures, this plan classifies spills as either "minor" or "major", depending on the volume and characteristics of the material released.

MINOR SPILL RESPONSE & CLEANUP

A "minor" spill is defined as one that poses no significant threat to human health and safety or to the environment and can be cleaned up by facility personnel. Minor spills are generally those where:

- The quantity of spilled product is 10 gallons or less and inside secondary containment.
- Spilled material is easily stopped and controlled at the time of the spill.
- The spill is localized near the source.
- Spilled material is not likely to reach water.
- There is little risk to human health or safety.
- There is little risk of fire or explosion.

The following actions are required:

1. Immediately notify the Public Works Director or Airport Manager.
2. Immediately begin the process of containing the spill and reducing hazards by:
 - a. Eliminating potential sources of ignition.
 - b. Identifying and shutting down the source of the spill to stop the flow if possible.
3. Containing the spill with sorbents, berms, trenches, etc.
4. Under the direction of the Public Works Director or Airport Manager, contain and clean-

- up the spill using additional materials and equipment as required.
5. Place resulting waste in properly labeled, appropriate, impervious containers (e.g., bags, drums, buckets).
 6. The Public Works Director or Airport Manager will complete a copy of the notification form in **Appendix J** and keep it with this plan.
 7. A company official will characterize the waste material for proper disposal and ensure it is removed from the site in a timely manner.

MAJOR SPILL RESPONSE & CLEANUP

A "major" spill is defined as one that cannot be safely controlled or cleaned up by facility Personnel, such as when:

- The spill is large enough to or has spread beyond the facility confines and is now a "discharge".
- The spilled material enters water as a "discharge".
- The spill requires special equipment or training to clean up.
- The spilled material poses a hazard to human health or safety.
- There is a danger of fire or explosion.

The following actions are required:

1. Immediately notify the Public Works Director and Airport Manager.
2. Unless safety considerations dictate otherwise, efforts should be made to:
 - a) Eliminate potential sources of ignition.
 - b) Identify and shut down the source of the discharge to stop the flow if possible.

Appendix J

Spill Reporting and Notification

If a spill reaches navigable water, a city or county's storm water system, sanitary sewer, or other drainage devices, the Public Works Director or Airport Manager will notify all applicable agencies (e.g., City Public Works, the State Response Center, local police and fire departments, appropriate EPA Region, National Response Center).

The Public Works Director or Airport Manager will be prepared to provide the following information:

- The exact address of the facility:
- Telephone number of the facility:
- The date and time of the spill/discharge.
- The type of fluid spilled/discharged.
- A reasonable estimate of the quantity of the fluid spilled/discharged.
- The source of the spill/discharge (e.g., tote, tank, truck).
- The media to which the spill/discharge is located (soil, street, storm sewer).
- The cause of the spill (e.g., punctured drum or storage tank).
- List of damages or injuries caused by the spill.
- List of actions being taken to contain or reduce the spill/discharge.
- Whether an evacuation may be needed
- The names of individuals and /or organizations who have also been contacted.

A follow-up written report will be submitted within 60 days if the spill exceeds 1 gallon or more or occurs within a year of a previous reportable spill. The written report will contain, at a minimum, the following information:

- Name and location of the facility.
- Name of owner/operator.
- Date and year of initial facility operation.
- Maximum agricultural chemical storage or handling capacity of the facility and normal daily throughput.
- Facility description including layout, flow diagrams, and topographical maps.
- SPCC Plan and failure analysis.
- Cause of spill with failure analysis.
- Corrective action taken with description of equipment repairs and replacements.
- Additional preventive measures taken or contemplated to minimize the possibility of recurrence.
- Other pertinent information requested by the regional administrator.

Procedure: If spill is other than a small spill, report spills, leaks and overfills to your manager, Public Works Director or Airport Manager. If the spill cannot be safely contained properly call:

ON-SITE SPILL RESPONSE:	
Airport Manager	(785) 263-3970
Public Works Director / P.O.C	(785) 263-3510

Should a reportable spill occur, the Public Works Director and Airport Manager or in their absence, a member of the Spill Response Team will notify the following agencies:

National Response Center (NRC)	(800) 424-8802
EPA Region 7 24-Hour Spill Hotline	(913) 281-0991
Abilene Police Department	911
Abilene Fire Department	911
Dickinson County LEPC Reporting Spills	(785) 263-3608
Hazard Response	(800) 229-5252

Appendix K

Agricultural Chemicals Handling Personnel Training and Briefing Log

Appendix L

Technical Amendment Log

Review Date	Description of Technical Amendment	Name and Signature of Person Certifying the Technical Amendment



City of Abilene
Item for City Commission Agenda

Meeting Date: 4/4/22

Originating Department

Administration

Prepared By:

Approved for Agenda By:
(Office Use Only)

AGENDA ITEM HEADING:

Office remodel in City Hall

BACKGROUND:

With the recent addition of an Administrative Assistant and relocation of the City Inspector during the upstairs remodel, we are proposing an addition of two offices where the conference space is currently located in city hall. This will be a temporary solution until the city hall first floor renovation project is viable in the future. We plan to utilize space in the current police department for a conference room area. The PD will also have extra office furniture after moving upstairs that we can utilize for the new office spaces.

Creating two office spaces and removing a partial wall that was temporarily installed in the recent past will open up the area. This space will also allow the reworking flow of the current copier/mail room space.

Initial investment costs have been explored and will be well below \$10,000. Floor to ceiling wood framed walls will be installed with drywall. Painting, trim and doors will be completed as well. Electrical outlets will be placed in the new walls to adequately allow the function of office equipment.

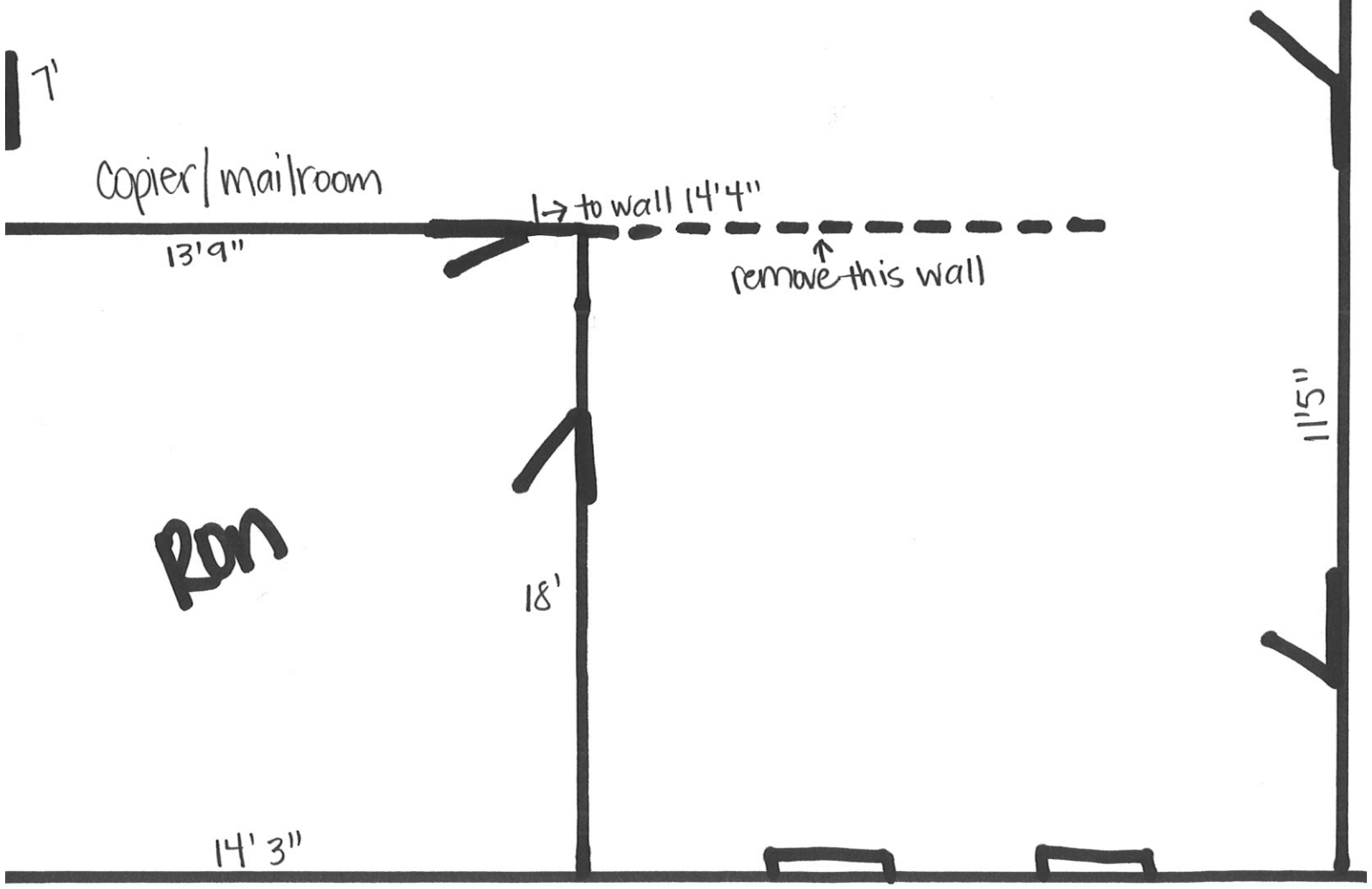
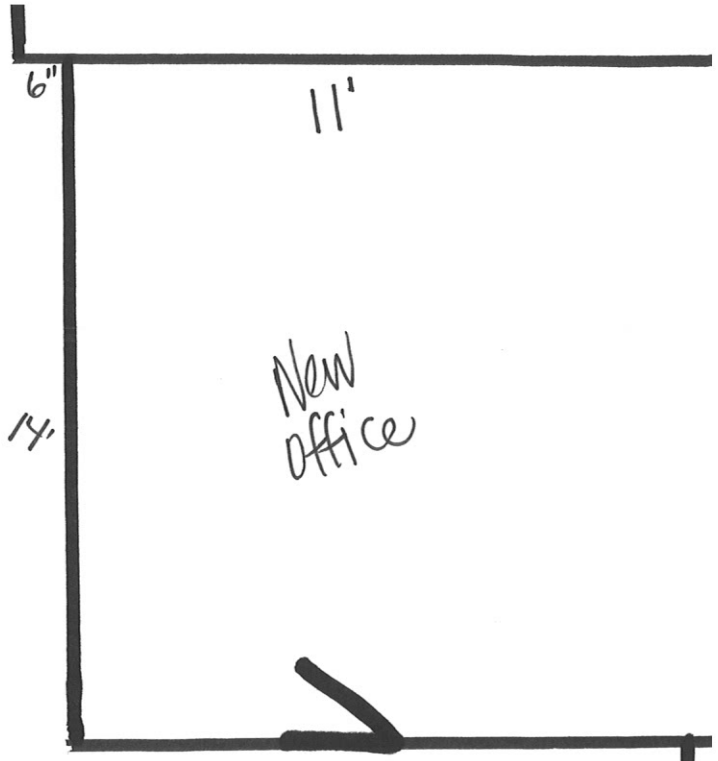
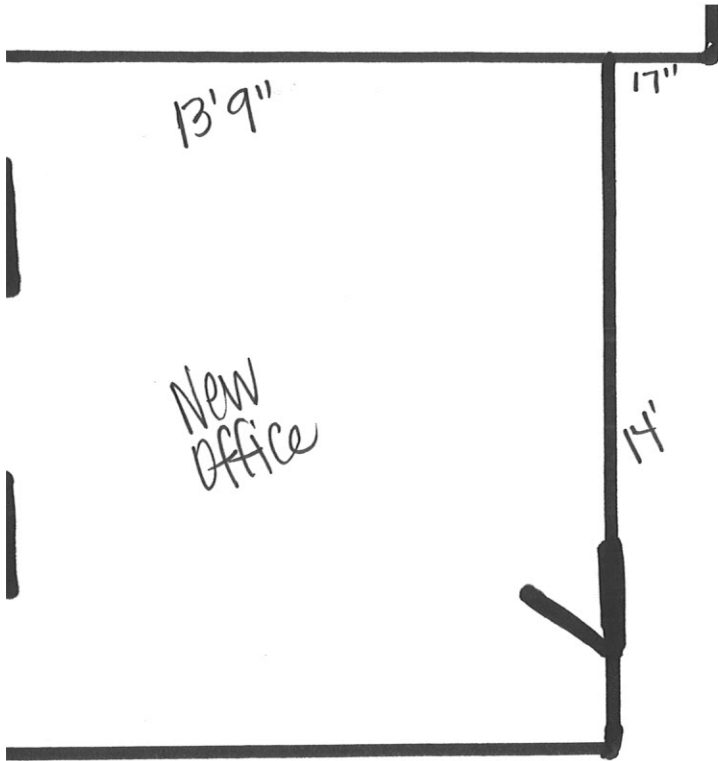
This temporary office structure will not damage or destroy the historical character of the building. This addition will allow all department heads within city hall to be centrally located to improve workflow and communication. The administrative positions will all be located in the front water department offices to provide customer service coverage.

FISCAL NOTE:

< \$10.000

COMMISSION ACTION:

Direct staff on how to proceed with this project.



MEMORANDUM

TO: RON MARSH; ABILENE CITY COMMISSION; AARON MARTIN

FROM: DUSTIN MULLIN, ABILENE CITY PROSECUTOR

SUBJECT: UPOC SECTION 7.5-DISTRIBUTION OF UNATTRIBUTED APPLICATIONS
FOR ADVANCE VOTING BALLOTS

DATE: MARCH 22, 2022

On February 7, 2022, City Attorney Aaron Martin received the enclosed letter, via email, from legal counsel representing VOTEAMERICA and Voter Participation Center, regarding the City of Abilene's adoption of Section 7.5(a)(2) in the 37th Edition of the Uniform Public Offense Code ("UPOC"). The Abilene City Commission adopted the 37th Edition of the UPOC on September 13, 2021, by approving Ordinance No. 21-3403.

Article 7 of the 37th Edition of the UPOC relates to "Offenses Affecting Government Functions". Section 7.5 covers mailings that solicit voters to file an application for an advance voting ballot and the requirements for such mailings. Specifically, Section 7.5(a)(2) states:

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

As written, Section 7.5(a)(2) criminalizes the act of distributing personalized advance ballot applications. The City of Abilene's adoption of the 37th Edition of the UPOC included Section 7.5(a)(2), without modification or exclusion.

UPOC 7.2(a)(2) incorporates House Bill 2332, section 3(k)(2), which was enacted during the 2021 Kansas Legislative session. House Bill 2332 established an effective date of January 1, 2022. After the Kansas Legislature passed this legislation, VOTEAMERICA and Voter Participation Center filed a challenge to House Bill 2332 in the United States Federal District Court for the District of Kansas, against the Secretary of State, Attorney General, and the Johnson County District Attorney seeking, among other things, injunctive relief from certain provisions of the House Bill. VOTEAMERICA and Voter Participation Group, the plaintiffs in the lawsuit, allege that the legislation constitutes an unlawful infringement on First Amendment speech.

On November 19, 2021, Senior District Court Judge Kathryn H. Vratil granted injunctive relief prohibiting enforcement of section 3(k)(2) of House Bill 2332 during the pendency of the federal lawsuit. The injunction order was later modified and filed on December 15, 2021. Currently, the matter is set for trial on May 1, 2023. Accordingly, the letter received by Mr. Martin

from legal counsel for VOTEAMERICA and Voter Participation Center advises that UPOC Section 7.5(a)(2) "cannot be enforced in the state of Kansas."

VOTEAMERICA and Voter Participation Group have demanded that Abilene and all other Kansas jurisdictions that have adopted Section 7.5(a)(2) of the UPOC repeal such adoption or issue a formal declaration that the City will not enforce this provision.

As the City Prosecutor for the City of Abilene, I am declaring that I will not enforce UPOC Section 7.5(a)(2) in its current form in compliance with the injunction entered by Senior Judge Vratil. Mr. Martin and I will continue to monitor the pending litigation and will report any status change to the City Manager and City Commission.

Sincerely,



Dustin Mullin, Abilene City Prosecutor

Encl: Letter dated February 7, 2022



February 7, 2022

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City of Westwood Hills
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Westwood Hills, KS
66205clerk@westwoodhillsks.gov

By Email

Dear Ms. Stanley, Mr. Bengtson, Mr. Waters, Mr. Denk, Mr. Schwartz, Mr. Robinson, Mr. Chubb, Mr. Jenkins, Mr. DeJarnett, Mr. Martin, Mr. Duckers, Mr. Nye, Mr. Koehn, and Mr. Orr:

We write on behalf of our clients, VoteAmerica and Voter Participation Center, regarding Section 7.5(a)(2) of the Uniform Public Offense Code, 37th Edition ("UPOC") published by the League of Kansas Municipalities. UPOC section 7.5(a)(2) incorporates a recently enacted provision of HB 2332, section 3(k)(2) (the "Personalized Application Prohibition"), which criminalizes the mailing of any

advance mail ballot application that has been personalized with a voter's information. *See* Ex. A (HB 2332). It is our understanding that the jurisdictions you represent have adopted the UPOC, including the Personalized Application Prohibition.

We write to inform you that UPOC section 7.5(a)(2) is unconstitutional and cannot be enforced. Our clients have challenged the constitutionality of the Personalized Application Prohibition in a case pending before the U.S. District Court for the District of Kansas. *VoteAmerica v. Schwab*, No. 2:21-cv-02253 (D. Kan.). On November 19, 2021, before HB 2332 was set to take effect, U.S. District Judge Kathryn Vratil granted our clients' preliminary injunction motion, finding that they were likely to succeed on their First Amendment speech claim and enjoining enforcement of the Personalized Application Prohibition during the pendency of the case. *See* Ex. B (Mem. & Order *Nunc Pro Tunc*). Accordingly, such provision cannot be enforced in the state of Kansas. We demand that your clients (and all jurisdictions that have adopted UPOC section 7.5(a)(2)),¹ repeal this provision. Absent immediate action, our clients reserve the right to take legal action against each municipality that has adopted UPOC section 7.5(a)(2) to preserve our clients' First Amendment rights.

I. The Personalized Application Prohibition and UPOC Section 7.5(a)(2)

On May 3, 2021, the Kansas Legislature overrode Governor Kelly's veto to enact various restrictions on advance mail voting in HB 2332, which became effective on January 1, 2022. Ex. A § 11. Our clients challenged HB 2332 section 3(k)(2),² which provides in relevant part: "No portion of [an advance mail voting application] shall be completed prior to mailing such application to the registered voter." *Id.* § 3(k)(2). This Personalized Application Prohibition applies to "[a]ny person who solicits by mail a registered voter to file an application for an advance voting ballot and includes an application for an advance voting ballot in such mailing." *Id.* § 3(k)(1). The prohibition applies even when the information comes directly from the State's public voter list. *See id.* A violation of the prohibition is a class C nonperson misdemeanor. *See id.* § 3(k)(5); Kan. Stat. Ann. §§ 21-6602(a)(3), (b). The statute contains no scienter requirement and is punishable by up to one month in jail and/or fines. *See id.*

UPOC section 7.5 replicates HB 2332 section 3(k) verbatim, including the challenged Personalized Application Prohibition. *Compare* UPOC § 7.5(a)(2) *with* HB 2332 § 3(k)(5).

¹ We note that this letter is likely under-inclusive in identifying the jurisdictions that have adopted the UPOC section 7.5(a)(2). We have written directly to the League of Kansas Municipalities requesting removal of this provision from the UPOC, a complete list of jurisdictions that have adopted this provision, and further action to inform municipalities of the federal injunction and our clients' demand for repeal of this provision from all municipal codes. A copy of our letter to the League is enclosed. Ex. C.

² *VoteAmerica* and VPC also challenged section 3(l)(1) of HB 2332 (the "Out-of-State Distributor Ban"), which bars any person or organization not a resident or domiciled in Kansas from mailing or causing to be mailed an advance ballot application to a Kansas voter. The Out-of-State Distributor Ban, unlike the Personalized Application Prohibition, is not found in the UPOC.

II. The Personalized Application Prohibition in UPOC Section 7.5(a)(2) Unconstitutionally Restricts First Amendment Activity and Cannot Be Enforced.

The Personalized Application Prohibition in UPOC Section 7.5(a)(2) restricts our clients' rights to free speech and association and is overbroad in violation of the First Amendment. VoteAmerica and Voter Participation Center ("VPC") regularly communicate with Kansas voters by sending advance mail ballot applications personalized with voters' information. Providing personalized applications, rather than blank forms, is an essential part of their advocacy and the most effective means of persuading Kansas voters to participate in the democratic process. As Judge Vratil held, HB 2332's ban on such communications restricts core political speech and association protected the First Amendment and cannot survive unless it is narrowly tailored to serve a compelling state interest. *See* Ex. B at 10-14, 32-36.³

The Personalized Application Prohibition does not satisfy strict scrutiny. Judge Vratil found that the State "failed to prove that HB 2332 is narrowly tailored to achieve any of the State's allegedly compelling interests," including preventing voter fraud, and ensuring orderly administration of elections. *Id.* at 42. Indeed, during the preliminary injunction proceedings, the State "presented no evidence on how limiting . . . mailing of personalized ballot applications would serve to prevent [voter] confusion." *Id.* at 40. The State could not point to a single instance of fraud in advance mail voting or demonstrate any burden on election administration. *Id.* at 37-42. To the contrary, the State officials are on record declaring the 2020 election a resounding success, without "any widespread, systematic issues [of] voter fraud, intimidation, irregularities, or voting problems." *Id.* at 42. The Personalized Application Prohibition is therefore a solution in search of a problem and cannot justify the "significant burdens" it imposes on protected speech and association. *Id.* at 36.

For similar reasons, the Personalized Application Prohibition is also unconstitutionally overbroad in that it reaches substantial First Amendment activity and chills speech.⁴ Under the prohibition, "[n]o portion" of an advance mail ballot application may be personalized before mailing. Ex. A § 3(k)(2). The prohibition applies even when the personalized information is correct and drawn from the State's own voter information database. The threat of criminal sanctions chills

³ *See also Meyer v. Grant*, 486 U.S. 414, 421-23 (1988); *id.* at 422 n.5 (recognizing "communication of information, [and] the dissemination . . . of views and ideas" about the electoral process as core political speech); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Yes On Term Limits, Inc., v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008).

⁴ *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (holding that a law is facially invalid when it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973)); *Broadrick*, 413 U.S. at 612 (noting that a statute may also be unconstitutional when its "broad sweep" "burdens innocent associations").

constitutionally protected speech and association not only of our clients but of any individual or entity seeking to engage Kansas voters with personalized advance ballot applications.⁵ *See* Ex. B at 15-19 (denying the State’s motion to dismiss our clients’ overbreadth claim).

Finding probable success on the merits, Judge Vratil “enjoin[ed] enforcement of Section[] 3(k)(2) of HB 2332 . . . effective until the conclusion of the case.” *Id.* at 46. The Personalized Application Prohibition referenced in the UPOC is therefore not enforceable in Kansas, at least during the pendency of our clients’ lawsuit.

III. Demand

As explained above, we call on all Kansas jurisdictions that have adopted Section 7.5(a)(2) of the UPOC—including your clients—to repeal such adoptions or, at minimum, issue a formal declaration that the provision will not be enforced pursuant to Judge Vratil’s order. Any jurisdiction that fails to do so may face further legal action and bear the substantial expense of such action, including an award of attorneys’ fees. Our clients and other voter engagement organizations in Kansas simply cannot be expected operate their First Amendment activities under threat of unlawful criminal prosecution.

Thank you for your attention to this important matter. Please notify us by February 21, 2022 of your clients’ planned course of action to remedy this unconstitutional action. If you have any questions or concerns, please do not hesitate to contact us by phone or email as listed below. We look forward to your response.

Best,
Danielle M. Lang

Danielle M. Lang
Robert N. Weiner
Alice C.C. Huling
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Hayden Johnson
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⁵ *Hicks*, 539 U.S. at 119 (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”).

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*Attorneys for Voter Participation Center &
VoteAmerica*

CC: John Goodyear, General Counsel, League of Kansas Municipalities

Exhibit A

HOUSE BILL No. 2332

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(l) (1) *No person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state.*

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

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

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

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

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

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

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

(4) *knowingly producing false vote totals.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HOUSE adopted
Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE
as amended _____

SENATE adopted
Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.

Exhibit B

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

VOTEAMERICA and VOTER PARTICIPATION CENTER,	)	
	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 21-2253-KHV
SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE in his official capacity as District Attorney of Johnson County,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER NUNC PRO TUNC

VoteAmerica and Voter Participation Center bring suit for declaratory and injunctive relief against Scott Schwab in his official capacity as Kansas Secretary of State, Derek Schmidt in his official capacity as Kansas Attorney General and Stephen M. Howe in his official capacity as District Attorney of Johnson County. Complaint For Declaratory And Injunctive Relief (Doc. #1) filed June 2, 2021. Plaintiffs allege that defendants violated their First and Fourteenth Amendment rights and breached the Dormant Commerce Clause. Plaintiffs seek a preliminary injunction against enforcement of two provisions of HB 2332, which will be codified as K.S.A. § 25–1122: (1) Section 3(l)(1), which bars persons and organizations that are not residents of or domiciled in Kansas from mailing or causing to be mailed advance mail ballot applications to Kansas voters and (2) Section 3(k)(2), which criminalizes mailing personalized advance ballot applications.

On September 8, 2021, the Court held an evidentiary hearing on plaintiffs’ motion for preliminary injunction. This matter is before the Court on Defendants’ Motion To Dismiss

Plaintiffs' Complaint (Doc. #26) filed July 9, 2021¹ and Plaintiffs' Motion For Preliminary Injunction (Doc. #24) filed July 8, 2021.

I. Motion To Dismiss

In ruling on a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court assumes as true all well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible—not merely conceivable—on its face. Id. at 679–80; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To determine whether a complaint states a plausible claim for relief, the Court draws on its judicial experience and common sense. Iqbal, 556 U.S. at 679.

The Court need not accept as true those allegations which state only legal conclusions. See id. at 678. Plaintiffs make a facially plausible claim when they plead factual content from which the Court can reasonably infer that defendants are liable for the misconduct alleged. Id. However, plaintiffs must show more than a sheer possibility that defendants have acted unlawfully—it is not enough to plead facts that are “merely consistent with” defendants’ liability. Id. (quoting Twombly, 550 U.S. at 557). A pleading which offers labels and conclusions, a formulaic recitation of the elements of a cause of action or naked assertions devoid of further factual enhancement will not stand. Id. Similarly, where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not “shown”—that the pleaders are entitled to relief. Id. at 679. The degree of specificity

¹ On August 27, 2021, the Court overruled Defendants' Motion To Dismiss (Doc. #26) in part, finding that plaintiffs’ complaint was not subject to dismissal for lack of subject matter jurisdiction. The Court reserved ruling on defendants’ arguments with regard to failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P.

necessary to establish plausibility and fair notice depends on context; what constitutes fair notice under Fed. R. Civ. P. 8(a)(2) depends on the type of case. Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008).

When ruling on a Rule 12(b)(6) motion, the Court does not analyze potential evidence that the parties might produce or resolve factual disputes. Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002). A motion to dismiss does not ask the Court to analyze plaintiffs' likelihood of success on the merits; rather, the Court must find only a reason to believe that plaintiffs have a "reasonable likelihood of mustering factual support for the claims," Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007), and that their claims are "plausible." Twombly, 550 U.S. at 570.

Highly summarized, plaintiffs' complaint alleges as follows:²

A. Voting In Kansas

Kansas law permits any eligible voter to cast an advance ballot. Kansas has two types of advance voting: advance voting in person (i.e., early voting) and advance mail voting.³ Advance voting requires a voter to apply to a county election officer for a mail-in ballot. The Secretary of State coordinates advance voting statewide by creating uniform procedures and forms. County election officers administer voting locally by accepting and processing applications, providing ballots to eligible voters, receiving ballots that have been cast and ultimately accepting or rejecting ballots. County election officers also prepare and maintain lists of persons who have filed advance voting applications. During the 2020 election cycle, the advance voting application form was

² The Court assumes that the reader is familiar with the allegations of plaintiffs' complaint and does not attempt to recite them in their entirety.

³ All references to advance voting are references to advance voting by mail. This case does not involve early voting in person.

publicly available on the web sites of the Kansas Secretary of State, local election offices and various third parties.

To apply for an advance mail ballot, a voter must provide a Kansas driver's license number, a Kansas nondriver's ID card number or another specified form of identification. A county election officer must verify that the voter's signature matches the signature on file in voter registration records. Voters may cast advance ballots on or before Election Day, either by mailing completed ballots or dropping off their ballots at a local election office.

In 2020, Kansas voters of all political persuasions turned out in historic numbers. Particularly given COVID-19, Kansas also saw a steep increase in advance mail voting. More than 1.3 million Kansans voted in the 2020 general election, nearly six per cent more than in 2016. More Kansans voted by advance mail ballot in November of 2020 than the elections in 2016 and 2018 combined. Shortly after the 2020 election, the Secretary of State's office stated that "Kansas did not experience any widespread, systematic issues with voter fraud intimidation, irregularities or voting problems. . . . We are very pleased with how the election has gone up to this point."

In March of 2021, the Kansas Legislature introduced HB 2332 to regulate the advance ballot application process. Governor Laura Kelly vetoed the bill on April 23, 2021. On May 3, 2021, the Kansas Senate and House overrode the Governor's veto, and HB 2332 will become effective on January 1, 2022. HB 2332, § 11.

HB 2332 contains two provisions (collectively, "Ballot Application Restrictions") that are at issue in this action.

1. Out-of-State Distributor Ban

HB 2332 bans any person from mailing an advance voting application or causing an application to be mailed, unless the sender is a resident of Kansas or domiciled in Kansas.

HB 2332, § 3(l)(1) (the “Out-of-State Distributor Ban”). This ban applies whether the sender is mailing a single application in response to a request from an individual Kansas voter or is engaged in mass mailing of unsolicited applications.

The legislation imposes a civil penalty of \$20.00 for “[e]ach instance in which a person mails an application for an advance voting ballot.” HB 2332, § 3(l)(3). Anybody can file a complaint alleging a violation of the Out-of-State Distributor Ban, and the attorney general must investigate all complaints. HB 2332, § 3(l)(2). The attorney general may also file suit against anyone who violates this provision.

2. Personalized Application Prohibition

The “Personalized Application Prohibition” prohibits the mailing of any advance mail ballot application that has been personalized with a voter’s information, even where the voter has personally provided that information. The Prohibition applies to any person who by mail solicits a registered voter to apply for an advance voting ballot and includes in such mailing an application for an advance voting ballot. HB 2332, § 3(k)(1).

Personalized application violations are class C nonperson misdemeanors, which are punishable by up to one month in jail and/or fines. HB 2332, § 3(k)(5); K.S.A. § 21-6602(a)(3). The Personalized Application Prohibition does not apply to state or county election officials or to entities which must provide information about elections under federal law. HB 2332, § 3(k)(4).

B. Parties

Plaintiffs are out-of-state, nonpartisan organizations which provide voter information, applications and forms to facilitate political engagement by voters, including advance mail ballot applications. Such organizations have long played a vital role in democracy by persuading citizens to engage with the political process.

VoteAmerica is a California-based 501(c)(3) nonprofit, nonpartisan organization. Its core mission is to help eligible voters engage in the electoral process, emphasizing voting by mail. VoteAmerica believes that voting by mail is the most effective way to ensure the broadest participation in elections. To empower voters to exercise their votes, VoteAmerica provides access to trusted election information, open platform technology and education programs. The VoteAmerica web site provides extensive guides and tools for voter registration, absentee, mail and advance voting and voting in person in all 50 states, including Kansas. Its resources for advance voting in Kansas include a guide to advance voting rules, deadlines, links to local election offices, instructions and other relevant resources.

VoteAmerica engages voters by pairing tools and resources on its web site with other modes of speech to help voters in the voting process. These communications guide voters to its on line tools and resources and facilitate further communications with Kansas voters about the political process. To amplify its message, VoteAmerica shares graphics, messaging and other communications products with partners.

VoteAmerica's primary resource for promoting advance voting in Kansas is an interactive Absentee and Mail Ballot request tool. The tool allows voters to provide their names, addresses, dates of birth, emails and phone numbers, and populate the ballot application forms with that information. Voters receive the application forms with the voter-provided information pre-completed. Voters then sign and complete the forms and send them to their local election officials. The tool automatically signs up voters for follow-up communications from VoteAmerica to help them vote in future elections. In addition to the VoteAmerica web site, the Absentee Mail Ballot request tool is available on the web sites of partner organizations of VoteAmerica.

During the 2020 election cycle, the tool delivered personalized advance voting applications

to Kansas voters by email. In four other states, voters have the option to receive a pre-printed personalized application by mail. VoteAmerica is actively planning to offer this personalized print-and-mail feature service to Kansas voters.

With its preprinted applications, VoteAmerica sends blank advance mail voting application forms and pre-addressed, postage-paid envelopes. Expanding the print-and-mail feature will enable VoteAmerica to reach a broader audience, including low-income and low propensity voters with fewer resources and decreased access to postage and printing.

During the 2020 election cycle, at least 7,700 Kansas voters used the VoteAmerica tool to receive a personalized ballot application. VoteAmerica helped more than 6,000 Kansans register to vote, and at least 28,500 Kansas voters currently subscribe to VoteAmerica's educational emails and reminder text messages. VoteAmerica is invested in scaling its technology and outreach programs to meet anticipated demand and plans to continue communicating educational messages, assistance and reminders about voting.

Before the Legislature enacted HB 2332, VoteAmerica planned to keep offering its tool to Kansas voters after January 1, 2022. Upon request, it also planned to use its print-and-mail feature to mail advance mail voting applications to Kansas voters.

Voter Participation Center ("VPC") is a Washington, D.C.-based 501(c)(3) nonprofit, nonpartisan organization. Its mission is to provide voter registration, early voting, vote by mail and get-out-to-vote resources and information to traditionally underserved groups, including young voters, voters of color and unmarried women.

VPC has implemented direct mail programs to send mass mailers to its target demographic. These mass mailers contain resources for eligible voters to submit voter registrations and absentee ballot applications. VPC believes that direct mail is the most effective form of communicating

with and helping Kansas voters. The mail campaign encourages advance voting. VPC uses Kansas' statewide voter registration files to identify registered voters who have not requested an advance ballot application, and in 2020, it sent nearly 1.2 million advance voting applications to Kansas voters. To facilitate these efforts, VPC has partnered with a 501(c)(4) organization called the Center for Voter Information. VPC requests updated voter records from state election officials to proactively remove voters who have already requested or submitted advance voting applications.

VPC mailers include a cover letter encouraging voters to request and cast advance ballots; printed copies of an advance ballot application from the Kansas Secretary of State web site; and pre-addressed, postage-paid envelopes addressed to the county election offices. VPC personalizes the voter's application with the information from the state-generated registration records. The cover letter clearly instructs the voter not to submit more than one request. The mailers encourage voting by mail and help voters do so. Mailers sent to Kansans during the 2020 election cycle included messages such as: "County election officials in Kansas encourage voters to use mail ballots in upcoming elections," "Voting by mail is EASY" and "You can even research the candidates as you vote." In the 2020 election cycle, an estimated 69,577 Kansas voters submitted VPC-provided advance voting applications to their county election officials.

Before the Legislature enacted HB 2332, VPC planned to continue communicating and helping Kansas voters by mailing personalized advance mail voting applications after January 1, 2022, and during the 2022 election cycle.

Scott Schwab is the Kansas Secretary of State. As the State's chief elections official, Schwab oversees all Kansas elections and administers the State's election laws and regulations. He also issues guidance and instructions to county election officers.

Derek Schmidt is the Kansas Attorney General. As the State's chief law enforcement officer, Schmidt has the authority and discretion to investigate and prosecute violations of State law, including criminal violations. HB 2332 requires Schmidt to investigate complaints alleging violations of the Out-of-State Distributor Ban and permits him to prosecute such civil violations.

Stephen Howe is the District Attorney of Johnson County. Howe is responsible for investigating and prosecuting all criminal violations of state law in Johnson County. Because HB 2332's Personalized Application Prohibition violations are class C nonperson misdemeanors, Howe will prosecute these violations in Johnson County.

On June 2, 2021, plaintiffs filed suit against defendants in their official capacities, alleging violations of the First and Fourteenth Amendments and the Dormant Commerce Clause. Specifically, Count 1 alleges that the Ballot Application Restrictions violate the First Amendment by targeting plaintiffs' core political speech, i.e. their advocacy for advance mail voting, communicated through mailing of advance ballot application packets. Count 2 alleges that the Ballot Application Restrictions inhibit plaintiffs' First Amendment right to associate with others to encourage and help Kansas voters to vote by mail. Count 3 alleges that the Ballot Application Restrictions are overly broad, regulating and chilling a substantial amount of plaintiffs' constitutionally protected speech and associations. Finally, Count 4 alleges that the Out-of-State Distributor Ban violates the Dormant Commerce Clause by facially discriminating against non-Kansas residents, including plaintiffs, in restricting them from mailing advance voting applications to Kansas residents.

C. Analysis

As noted, plaintiffs bring four claims: (1) HB 2332 violates their First Amendment rights to freedom of speech (Count 1); (2) HB 2332 violates their First Amendment rights to freedom to

associate (Count 2); (3) HB 2332 is overbroad (Count 3); and (4) the Out-of-State Distributor Ban of HB 2332 violates the Dormant Commerce Clause (Count 4). Pursuant to Rule 12(b)(6), defendants ask the Court to dismiss plaintiffs’ complaint for failure to state a claim on which relief may be granted.

As to Count 1, defendants argue that the Ballot Application Restrictions apply only to non-expressive conduct, not to any form of speech, and that as a matter of law, they do not violate the First Amendment. As to Count 2, defendants argue that when a state invokes its constitutional authority to regulate elections, the restrictions on individual rights to associate—which will inevitably ensue—do not violate the First Amendment. As to Count 3, defendants argue that as a matter of law, the restrictions in question are not overly broad in violation of the First Amendment. Finally, as to Count 4, defendants argue that the Dormant Commerce Clause does not apply to the restrictions aimed at minimizing voter confusion, eliminating voter fraud and preserving the limited resources of state election offices.

The Court considers each claim in turn.

1. First Amendment Freedom of Speech Claim (Count 1)

Plaintiffs allege that the Ballot Application Restrictions violate their freedom of speech because they restrict their right to send packets which contain advance voting applications to Kansas voters and thus target core political speech. Complaint (Doc. #1), ¶ 55. Plaintiffs argue that in violation of the First Amendment, the Out-of-State Distributor Ban is content-based, viewpoint-based and speaker-based, and targets only non-resident speakers and pro-mail voting messages. Id., ¶¶ 82, 84. Plaintiffs also argue that the Personalized Application Prohibition singles out personalized advanced voting applications, without prohibiting other forms of speech. Id., ¶¶ 89–91.

Defendants ask the Court to dismiss Count 1 because HB 2332 “prohibits no spoken or written expression whatsoever” and applies to non-expressive conduct, not to speech—and most certainly not to core political speech. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) filed July 9, 2021 at 17, 20. Accordingly, the Court first analyzes whether HB 2332 regulates speech—that is, whether the First Amendment even applies to plaintiffs’ application packets and personalized ballot applications.

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The First Amendment “literally forbids the abridgement only of speech,” but its protection is not limited to just spoken or written words. Texas v. Johnson, 491 U.S. 397, 404 (1989). Conduct that is “sufficiently imbued with elements of communication”—known as “inherently expressive” conduct—falls within the scope of the First and Fourteenth Amendments. Id.; Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006). In deciding whether particular conduct is “inherently expressive,” courts look to whether the conduct shows “an intent to convey a particular message” and whether “the likelihood was great that the message would be understood by those who viewed it.” Voting for Am., Inc. v. Steen, 732 F.3d 382, 388 (5th Cir. 2013) (quoting Johnson, 491 U.S. at 404).

Citing Lichtenstein v. Hargett, 489 F. Supp. 3d 742 (M.D. Tenn. 2020), defendants argue that in mailing application packets and distributing personalized ballot applications, plaintiffs are not engaging in speech or expressive conduct. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 16–17. Lichtenstein involved First Amendment challenges to a Tennessee statute which prohibited anyone except election officials from providing applications for absentee ballots. 489 F. Supp. 3d at 748. The district court held that the law did not prohibit

spoken or written expression, and therefore did not restrict expressive conduct. Id. at 773. Plaintiffs correctly respond that Lichtenstein is not germane because their application packets include speech that communicates a pro-mail voting message. Furthermore, mailing the application packets is inherently expressive conduct that the First Amendment embraces. See League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); see also Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158 (M.D. N.C. 2020); Priorities USA v. Nessel, 462 F. Supp. 3d 792 (E.D. Mich. 2020).

Accepting their factual allegations as true, plaintiffs have sufficiently alleged that HB 2332 violates their First Amendment rights to engage in free speech and expressive conduct. In other words, defendants are not entitled to dismissal of Count 1 on the theory that HB 2332 exclusively regulates conduct, not speech.

2. First Amendment Freedom Of Association Claim (Count 2)

Count 2 alleges that the Ballot Application Restrictions chill plaintiffs’ associational rights under the First Amendment because they impede plaintiffs’ ability to engage and broaden their network and association base for political change. Complaint (Doc. #1), ¶¶ 51, 60, 98–99; see also supra Section I.C.1. Defendants do not dispute that the restrictions hinder plaintiffs’ right to associate but argue that as a matter of law, the State may do so in exercising its constitutional authority to regulate elections. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 18.

The right to associate to advance beliefs and ideas is at the heart of the First Amendment. NAACP v. Button, 371 U.S. 415, 430 (1963). An organization’s attempt to broaden the base of public participation in and support for its activities is conduct “undeniably central to the exercise of the right of association.” Am. Ass’n of People with Disabilities v. Herrera, 690 F. Supp. 2d

1183, 1202 (D.N.M. 2010), on reconsideration in part, No. CIV-08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 214–15 (1986)). The “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); see Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973).

The freedom of association encompasses not only the right to associate with others but also the right to choose how one associates with others. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”). Public endeavors which “assist people with voter registration are intended to convey a message that voting is important,” and which expend resources “to broaden the electorate to include allegedly under-served communities,” qualify as expressive conduct which implicates the First Amendment freedom of association. Democracy N.C., 476 F. Supp. 3d at 223 (quoting Am. Ass’n of People with Disabilities, 690 F. Supp. 2d at 1215–16).

Here, plaintiffs allege that the Out-of-State Distributor Ban prevents them from “recruiting, consulting, and otherwise associating with Kansas organizations that distribute [advance mail voting] applications.” Complaint (Doc. #1), ¶¶ 60, 98. Working with these Kansas organizations allows them to increase the number of voices which share the message that voters are entitled to and should participate in the democratic process. Id., ¶¶ 6, 10, 20. Plaintiffs allege that the Personalized Application Prohibition interferes with their associational rights by prohibiting them from working with Kansas organizations to provide the Absentee and Mail Voting tool and limits their ability to “associate for the purposes of assisting persons” in requesting an application for an

advance ballot. Id., ¶¶ 99–100.

Defendants have a legitimate interest in regulating elections. Utah Republican Party v. Cox, 892 F.3d 1066, 1084 (10th Cir. 2018); see Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (describing state interest generally as interest in “protecting the integrity and reliability of the electoral process”); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) (“States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.”). Defendants, however, do not contest that plaintiffs have an associational interest in engaging with Kansas residents about advance mail voting. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 18.

In Am. Ass’n of People with Disabilities v. Herrera, supra, nonprofit organizations engaged in voter-registration activities challenged a New Mexico law that allegedly burdened their right to expressive association. 690 F. Supp. 2d at 1190. Like defendants here, defendants in that case conceded that the statute restricted plaintiffs’ ability to associate, but argued that the burdens imposed by the challenged laws were non-existent when weighed against the State’s substantial interest in regulating elections. Id. at 1220. On a motion to dismiss, however, the district court properly refused to weigh the relative burdens of the restrictions. Id.

Accepting plaintiffs’ allegations as true—as the Court must do in addressing a motion to dismiss—plaintiffs in this case have sufficiently alleged that HB 2332 violates their First Amendment rights to engage in free association. Defendants are not entitled to dismissal of Count 2 on the theory that HB 2332 only minimally burdens plaintiffs’ right to associate, because on this record the Court cannot weigh the relative burdens of plaintiffs’ First Amendment rights against the State’s professed interest in regulating elections. Therefore the Court overrules defendants’ motion to dismiss Count 2.

3. Overbreadth Claim (Count 3)

Count 3 alleges that the Ballot Application Restrictions are unconstitutionally overbroad, in violation of the First Amendment, because they “needlessly regulate a substantial amount of constitutionally protected expression and associations,” and “impermissibly chill [p]laintiffs’ protected speech.” Complaint (Doc. #1), ¶¶ 106–08. Plaintiffs bring both as-applied and facial overbreadth challenges. Plaintiffs argue that as applied to them, the restrictions are overbroad because (1) HB 2332 reaches a substantial amount of constitutionally protected activity in delivering their pro-mail voting message; (2) they cannot financially partner with other organizations to encourage Kansas voters to vote by mail; and (3) the threat of criminal and civil penalties impermissibly chills their speech. Id., ¶¶ 52–54, 59, 65, 109. For largely the same reasons, plaintiffs also raise a facial attack that HB 2332 necessarily chills the speech of others not before the Court. Id., ¶¶ 52, 73, 93, 108. Plaintiffs argue that HB 2332 reaches a substantial amount of constitutionally protected expression and exceeds any legitimate state interest in avoiding fraud, minimizing voter confusion and facilitating an orderly administration of the electoral process, and that they sufficiently state a claim under Rule 12(b)(6).

Defendants seek dismissal on the theory that as a matter of law, because plaintiffs may communicate their messages in other ways, the restrictions do not substantially impair their constitutional activity, as required to state a valid overbreadth claim. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 25.

Facial challenges and as-applied challenges can overlap conceptually. See Doe v. Reed, 561 U.S. 186, 194 (2010). Where the “claim and the relief that would follow . . . reach beyond the particular circumstances of the[] plaintiffs,” “they must satisfy th[e] standards for a facial challenge to the extent of that reach.” Id. Therefore, to determine whether plaintiffs have stated

a valid claim upon which relief may be granted, the Court analyzes their claims under the heightened facial challenge standard. Id.; see United States v. Stevens, 559 U.S. 460, 472–73 (2010).

In general, to succeed in a typical facial attack, plaintiffs must establish that “no set of circumstances exists [in] which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.” Stevens, 559 U.S. at 473 (citations omitted). Generally, facial challenges are strongly disfavored, but overbreadth challenges under the First Amendment are an exception to that rule because the “statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); see Virginia v. Hicks, 539 U.S. 113, 118 (2003) (First Amendment overbreadth doctrine exception to normal rule for facial challenges). The Supreme Court has cautioned, however, that the concept of substantial overbreadth is not readily reduced to an exact definition. Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

A court should address an overbreadth challenge when the law may chill the free speech rights of parties not before the court, especially when the statute imposes criminal sanctions. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1367 (10th Cir. 2000); see also Hicks, 539 U.S. at 118–20. To succeed on an overbreadth challenge, plaintiffs must show that the “potential chilling effect on protected expression is both real and substantial.” United States v. Brune, 767 F.3d 1009, 1018 (10th Cir. 2014) (quoting Jordan v. Pugh, 425 F.3d 820, 828 (10th Cir. 2005)). At the motion to dismiss stage, the Court need not determine whether the illegitimate applications of the statute substantially outweigh the legitimate applications of the statute. Animal Legal Def. Fund v. Reynolds, No. 419CV00124JEGHCA, 2019 WL 8301668, at *12 (S.D. Iowa Dec. 2, 2019). At this stage of the litigation, plaintiffs need only allege “a claim to relief that is plausible

on its face,” describing instances of arguable overbreadth of HB 2332. Twombly, 550 U.S. at 570; Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008).

a. Substantial Impairment Of Plaintiffs’ Constitutionally Protected Rights

As noted above, plaintiffs allege that the Out-of-State Distributor Ban reaches a substantial amount of their constitutionally protected activity in delivering their pro-mail voting messages. HB 2332 bars plaintiffs from mailing application packets that contain applications for advance mail ballots to Kansas voters and also prohibits them from even “causing” such applications to be mailed. Complaint (Doc. #1), ¶¶ 52, 59, 109; HB 2332, § 3(l)(1). HB 2332 also prevents plaintiffs from extending financial support and encouragement to partner organizations who work to mail applications to Kansas voters or Kansas residents who mail applications to Kansas-based families. Complaint (Doc. #1), ¶¶ 52, 60. Under the Personalized Application Prohibition, plaintiffs cannot distribute applications for advance ballots which contain personalized information from the State’s voter database or the voter himself. Id., ¶¶ 29, 45. Plaintiffs allege that the penalties associated with both restrictions will chill their speech and associational rights, as they will be deterred from engaging in constitutionally protected speech.

b. Substantial Impairment Of Rights Of Other Parties

Plaintiffs allege that HB 2332 substantially impairs and chills not only their speech, but the speech of others not before the Court. Specifically, plaintiffs allege that it will prevent out-of-state organizations from extending financial support and encouragement to Kansas partner organizations and residents who mail advance ballot applications to Kansas voters, and substantially impair the ability of Kansas-based organizations to advocate for voting by mail. Plaintiffs allege that HB 2332 authorizes penalties which, when applied to all out-of-state entities, will deprive society of an “uninhibited marketplace of ideas.” Taxpayers for Vincent, 466 U.S.

at 800, n.19.

As noted, the Court has determined that plaintiffs asserted a plausible claim that HB 2332 implicates protected speech. Defendants counter that plaintiffs' examples are "hypothetical scenarios" and argue that the statute has several legitimate applications; plaintiffs, however, allege more than a single "discrete application of the statute that may be problematic." Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 733 (E.D. Pa. 2010), aff'd in part, vacated in part, remanded sub nom. Free Speech Coal., Inc. v. Att'y Gen. of U.S., 677 F.3d 519 (3d Cir. 2012).

c. Weighing The Legitimate State Interests

For a statute to be overly broad, the overbreadth must not only be real, but substantial, judged in relation to the statute's plainly legitimate sweep. New York v. Ferber, 458 U.S. 747, 771 (1982). Defendants put forward three alleged interests in enacting HB 2332: avoiding fraud, minimizing voter confusion and facilitating an orderly administration of the electoral process. On a motion to dismiss, the Court does not determine whether potentially illegitimate applications substantially outweigh any legitimate applications of the statute.⁴ Reynolds, 2019 WL 8301668, at *12. To state a plausible claim, plaintiffs need only allege a meaningful number of illegitimate applications. Id.; see also People for Ethical Treatment of Animals v. Hinckley, 526 F. Supp. 3d 218, 239 (S.D. Tex. 2021).

HB 2332 has clearly legitimate purposes: eliminating voter fraud, preventing voter confusion and preserving limited resources to maintain orderly administration of the electoral process. Plaintiffs, however, raise significant issues whether protected expression will fall prey to

⁴ The Court recognizes that on a motion for summary judgment or at trial, it would consider evidence on the statute's limiting construction when determining what constitutes an illegitimate application of the statute. See West v. Derby Unified School Dist. No. 260, 23 F. Supp. 2d 1223, 1234 (D. Kan. 1998), aff'd, 206 F.3d 1358 (10th Cir. 2000).

the statute. See Ferber, 458 U.S. at 773. Accepting plaintiffs’ allegations as true, they allege a “realistic chilling effect” on their First Amendment rights and those not before the Court. See Faustin v. City and Cnty. Of Denver, Colo., 423 F.3d 1192, 1199–1200 (10th Cir. 2005); see also West, 206 F.3d at 1367. Plaintiffs plausibly allege that the First Amendment protects their pro-mail voting advocacy speech, and that HB 2332 prohibits the exercise of their First Amendment rights. Plaintiffs are not “brainstorming hypotheticals.” See Nat’l Press Photographers Ass’n v. McCraw, 504 F. Supp. 3d 568, 586–87 (W.D. Tex. 2020).

Defendants are not entitled to dismissal of Count 3 on the ground that as a matter of law, HB 2332 does not substantially impair constitutional activities and is not overbroad.

4. Dormant Commerce Clause Claim (Count 4)

Plaintiffs allege that because HB 2332 restricts non-Kansas residents from mailing advance voting applications to Kansas residents, it violates the Dormant Commerce Clause by discriminating against and unjustifiably burdening interstate commerce. U.S. Const. art. I, § 8, cl.3; Complaint (Doc. #1), ¶¶ 115, 118; Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Motion To Dismiss (Doc. #31) filed July 30, 2021 at 25–26. Defendants argue that plaintiffs have not stated an actionable claim because the State has legitimate purposes of eliminating potential voter fraud, minimizing voter confusion and preserving limited resources, and that the State’s right to regulate elections is beyond the reach of the Dormant Commerce Clause. Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 27–28; Defendants’ Reply To Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Motion To Dismiss (Doc. #41) filed August 20, 2021 at 24. Defendants also argue that the State is exempt from the Dormant Commerce Clause because it is a market participant.

Plaintiffs respond that a statute which mandates differential treatment of in-state and out-

of-state entities is *per se* invalid under the Dormant Commerce Clause; that the State’s right to regulate elections is not exempt from scrutiny under the Dormant Commerce Clause; and that the State cannot show that nondiscriminatory alternatives would be insufficient to protect its alleged interests.

The Commerce Clause provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States.” U.S. Const. art. I, § 8, cl. 3. While the Commerce Clause is more frequently invoked as authority for federal legislation, the so-called Dormant Commerce Clause limits state legislation which adversely effects interstate commerce. See Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). The focus of a Dormant Commerce Clause challenge is whether a state law improperly interferes with interstate commerce. Direct Mktg. Ass’n v. Brohl, 814 F.3d 1129, 1135 (10th Cir. 2016); see W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994) (“Th[e] negative aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors”) (internal citations omitted).

Under the Dormant Commerce Clause, the Court must first analyze whether the statute “regulates evenhandedly with only ‘incidental’ effects on interstate commerce or discriminates against interstate commerce.” Or. Waste Sys., Inc. v. Dept. of Env’t Quality of Or., 511 U.S. 93, 99 (1994) (quoting Hughes, 441 U.S. at 336). Discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Id. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. Id. (citing Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6 (1992)). A state regulation that discriminates against interstate commerce will survive constitutional challenge only if the state shows “it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory

alternatives.” Direct Mktg. Ass’n, 814 F.3d at 1136 (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).

Defendants do not deny that plaintiffs are engaged in interstate commerce or that HB 2332 restricts non-Kansas residents from mailing advance voting applications to Kansans.⁵ Defendants’ Memorandum In Support Of Motion To Dismiss (Doc. #27) at 27. On this record, HB 2332 is not an even-handed regulation which only incidentally discriminates against non-residents such as plaintiffs. Accordingly, to survive constitutional challenge, defendants must show that HB 2332 advances legitimate local purposes that cannot be adequately served by reasonable, nondiscriminatory alternatives. In attempting to do so, defendants cite three goals of HB 2332: to “minimize voter confusion, eliminate potential voter fraud, and preserve limited resources from being expended on rectifying problems flowing from the same, including having to wade through duplicative advance mail voting applications.” Id. at 27–28. Defendants argue that HB 2332 “limits the amount of advance mail voting applications a voter receives” and ensures the State’s ability to verify the accuracy of the sender’s disclosures through Kansas records. Id. at 28. Lastly, defendants argue that the goal of the Out-of-State Distributor Ban is not economic protectionism, and in fact, defendants would prefer that no third-party organizations be allowed to distribute advance voting applications. Id. at 29. Plaintiffs respond that the State’s “legitimate interests” do not justify discrimination against non-residents because the restrictions (1) do not combat voter

⁵ Defendants attempt to argue that under the Elections Clause, Article I, Section 4, Clause 1 of the Constitution, States may prescribe the “Times, Places, and Manner of holding Elections,” and that this authority forecloses plaintiffs’ cause of action. Defendants raise this argument for the first time in their reply brief, Defendants’ Reply To Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Motion To Dismiss (Doc. #41) at 24 and therefore the Court does not consider it. See United States v. Gurule, 461 F.3d 1238, 1248 (10th Cir. 2006) (courts generally do not consider arguments raised for the first time in reply brief); see also Novosteel SA v. U.S., Bethlehem Steel Corp., 284 F.3d 1261, 1274 (Fed. Cir. 2002) (reply brief does not provide moving party new opportunity to present yet another issue for court consideration).

confusion or fraud, or preserve resources; (2) the Ban does not limit the number of advance voting applications a Kansas voter may receive; (3) voters may still receive and submit duplicate applications; and (4) defendants have no evidence that out-of-state distributors as a class behave differently from in-state distributors. Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Motion To Dismiss (Doc. #31) at 27–28. Defendants do not persuasively refute these points or establish why their legitimate local objectives could not be achieved by reasonable, nondiscriminatory alternatives.

Plaintiffs sufficiently allege that the Out-of-State Distributor Ban is *per se* illegal, as it prevents out-of-state, but not in-state, residents from mailing advance ballot applications. Accepting plaintiffs’ allegations and giving them the benefit of all favorable inferences, they sufficiently plead that the State’s legitimate interests in regulating elections do not justify the discriminatory restrictions.

As noted, defendants also argue that the Dormant Commerce Clause does not apply to the State because it is a market participant. This exception “covers States that go beyond regulation and themselves participate in the market so as to exercise the right to favor their own citizens over others.” Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (internal citations omitted). This exception reflects “a basic distinction between States as market participants and States as market regulators.” Id. (internal citations omitted). In arguing that the state is a market participant, defendants go beyond the allegations of the complaint. See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (court must exclude outside material unless motion converted to one for summary judgment under Rule 56). The Court does not consider this argument in deciding defendants’ motion to dismiss.

Defendants are also not entitled to dismissal of Count 4 on the theory that as a matter of

law the State has legitimate interests which cannot be served by reasonable, nondiscriminatory alternatives. On a motion to dismiss, the Court confines its inquiry to the allegations of plaintiffs' complaint and cannot evaluate the sufficiency or weight of interests which defendants invoke to defeat those allegations. Therefore, the Court overrules defendants' motion to dismiss Count 4.

II. Preliminary Injunction

Plaintiffs seek to preliminarily enjoin enforcement of HB 2332 because (1) they are substantially likely to succeed on the merit of their claims that the Ballot Application Restrictions violate the First Amendment and/or the Dormant Commerce Clause; (2) violation of First Amendment rights constitutes irreparable harm; (3) the injunction would not inflict substantial harm on defendants because HB 2332 does not serve important state interests; and (4) an injunction would further the public interest. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) filed July 8, 2021 at 2–4.

Defendants oppose plaintiffs' motion. Defendants assert that plaintiffs' motion is flawed because (1) plaintiffs' claims have no substantive legal merit; (2) the State's regulatory interests outweigh any minor impact on the rights of plaintiffs and voters whom they represent; (3) plaintiffs have shown no risk of imminent harm to democracy; and (4) a preliminary injunction is not necessary because HB 2332 will not take effect until January 1, 2022 and advance ballot applications for the primaries in 2022 cannot be accepted until April 1, 2022. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) filed July 22, 2021 at 2–3; HB 2332, § 3, 11.

The purpose of a preliminary injunction is “to preserve the status quo pending the outcome of the case.” Tri-State Generation & Transmission Ass’n Inc. v. Shoshone River Power Inc., 805 F.2d 351, 355 (10th Cir. 1986). A preliminary injunction is a drastic and extraordinary remedy,

and courts do not grant it as a matter of right. Paul’s Beauty Coll. v. United States, 885 F. Supp. 1468, 1471 (D. Kan. 1995); see Nova Health Sys. v. Edmondson, 460 F.3d 1295, 1298 (10th Cir. 2006) (preliminary injunction is extraordinary remedy, and right to relief must be clear and unequivocal). To obtain a preliminary injunction, plaintiffs must establish (1) a substantial likelihood that they will eventually prevail on the merits; (2) irreparable injury unless a preliminary injunction issues; (3) that the threatened injury outweighs whatever damage the proposed preliminary injunction may cause to defendants; and (4) that, if issued, a preliminary injunction, will not be contrary to the public interest. Tri-State Generation, 805 F.2d at 355. If the moving parties demonstrate that the second, third and fourth factors “tip strongly” in their favor, the test is modified and the moving parties “may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue for litigation and deserving of more deliberate investigation.” Okla. ex rel. Okla. Tax Comm’n v. Int’l Registration Plan, Inc., 455 F.3d 1107, 1113 (10th Cir. 2006).

A. Findings Of Fact

As noted, the Court conducted an evidentiary hearing on September 8, 2021. As witnesses, plaintiffs called Daniel McCarthy, Vice President of Finance and Operations for VoteAmerica and Thomas Lopach, President and Chief Executive Officer for VPC. Defendants called Bryan Caskey, Kansas Director of Elections; Andrew Howell, Shawnee County Elections Commissioner; and Connie Schmidt, retired Johnson County Elections Commissioner. Based on the evidence received at that hearing, the Court makes the following findings of fact:

Plaintiffs are out-of-state, nonpartisan organizations whose mission is to persuade citizens to engage with the political process, with a focus on advance mail voting.

VoteAmerica’s mission is to “see an electorate where all voters are informed and

participate time after time in our elections.” It specifically seeks to engage low propensity voters who are usually “neglected by partisan efforts and partisan turnout.” Transcript Of Preliminary Injunction Motion Hearing Before The Honorable Kathryn H. Vratil, United States Senior District Judge (Doc. #45) filed September 14, 2021 at 7–8. VoteAmerica provides a range of services to potential voters, including a database of election laws for each state, municipality and county; voter registration verification; mail-in ballot request tools; and election reminders. Id. at 8–9. These services require VoteAmerica to work directly with secretaries of state and local election officials and administrators. Id. at 23.

VoteAmerica offers a vote by mail service, which allows citizens to go to its web site and fill out advance mail ballot request forms which contain their personal information (name, address, driver’s license, etc.). Id. at 9. VoteAmerica then prints and mails the ballot request form to the voter. Id. VoteAmerica’s goal is to encourage safe voting, especially for populations who may be disabled, who lack the technology to print and mail a ballot request form or who need to work on election day, and thus expand participation in the electoral process. Id. By November of 2021, VoteAmerica plans to fully develop the Kansas tool for advance mail voting services. Id. at 10, 12. Its goal is to offer the tool for the 2022 election cycle, as it has done in other states. Id. at 10, 12. To be successful, the mail ballot request tool requires significant planning and financial expense. Id. at 10–12. Other web sites with similar voting missions may embed VoteAmerica’s tool on their platforms. Id. at 12. Such partnerships align with VoteAmerica’s mission because as more voices share the pro-mail voting message, voters are more likely to listen. Id. at 12–13.

When voters request advance mail voting application packets, they receive personalized absentee ballot forms; blank absentee ballot forms; instruction forms that are personalized with local election office information; pro-voting messages such as “Your vote matters. Get this in on

time;” and a free hotline number for nonpartisan advice. Id. at 13–16. VoteAmerica includes a blank absentee form so a voter can correct any errors in the personalized information or give the blank application to another voter. Id. at 17–18. VoteAmerica includes an envelope addressed to the local election office with pre-paid postage. Id. at 18. The personalized ballot application reduces the voter’s burden in accessing the right to vote and increases the likelihood that the voter will submit the ballot application. Id. at 16–17. Mr. McCarthy believes that without the personalized ballot application, VoteAmerica will have lower response rates, especially among low-income and low-resource voters, and that its mission will suffer.⁶ Id. at 20. The entire packet is vital to VoteAmerica’s mission and serves to communicate and persuade voters to participate in the electoral process. Id. at 28.

VoteAmerica plans to offer vote by mail services to Kansans in the 2022 election cycle. Though it did not offer the personalized request tool in 2020, about 7,700 Kansans requested advance voting application packets from VoteAmerica. Id. at 22. According to Mr. McCarthy, the Out-of-State Distributor Ban would end VoteAmerica’s efforts in Kansas, as it could cost around \$100,000 to become a resident of Kansas. Id. at 19. The ban on personalized ballot applications would detract from VoteAmerica’s mission, as it would become more complicated for low-income, low-resource voters to access ballot applications. Id. at 20. The ban would also create coding issues, as VoteAmerica would need to hire an engineer to create a specific exception on its web site for Kansas residents. Id. Mr. McCarthy testified that overall, the most significant issue would be the isolation of Kansas residents; they would “always [have] an asterisk,” lowering the potential impact of its communications. Id. at 21, 27.

⁶ VoteAmerica monitors response rates by tracking “voter files” during an election cycle to see whether voters have returned their ballot applications to their local election offices. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 29.

Like VoteAmerica, VPC's mission is to engage low propensity voting groups (people of color, unmarried women and young people) at levels equal to their actual representation in the population. Id. at 39. VPC uses direct mail and digital means to achieve this mission. Ninety per cent of VPC's work is focused on direct mail programs, "bring[ing] democracy to people's doors." Id. at 40. In 2020, because that election cycle drastically increased VPC's digital footprint, VPC also partnered with a non-profit organization called the Center for Voter Information. Id. at 42. Moving forward, VPC plans to operate separately from the Center for Voter Information. Id.

VPC mailers include a cover letter which explains and encourages voting by mail; reminds the voter to submit only one ballot application request; identifies a web site to check the status of an application; includes a personalized ballot application obtained on a form from the Kansas Secretary of State; and includes a photocopy of a pre-paid return envelope to the election office. Id. at 42–45. To ensure the accuracy of the personalized information, VPC communicates with both the Kansas Secretary of State and the county election administrators. Id. at 47–48; Plaintiffs' Exhibits In Support Of Their Motion For Preliminary Injunction (Doc. #43-2 Exhibit 6 Emails). Mr. Lopach testified that these communications involve (1) checking to make sure VPC has used the proper forms and (2) letting election offices know how many forms VPC plans to mail to each county. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 52, 76–78. At the suggestion of election administrators from various states, VPC added the reminder to submit only one ballot application. Id. at 42.

Like Mr. McCarthy, Mr. Lopach testified that response rates significantly increase with the inclusion of personalized ballot applications and pre-paid postage mailers. Id. at 45–46. Many voters do not own printers or may not be able to access the internet, and in mailing their application

packets, such voters rely heavily on VPC resources. Id. at 50. VPC highlights each personalized ballot application to draw a voter's attention to (1) providing additional information where necessary, (2) verifying that personalized information is accurate and (3) the importance of submitting only one ballot application. Id. at 50, 57. By keeping up-to-date internal records on who has requested ballot applications, VPC tries to prevent voters from sending multiple ballot applications. Id. at 48.

For the 2022 election cycle, VPC plans to send voter registration mailings to roughly 70,000 Kansans, communicating with these voters every three to four months before the November election. Id. at 49. In 2020, VPC sent 371 million pieces of mail nationwide (voter registration applications, vote by mail applications and election day information pamphlets). Id. at 58. In 2022, these communications will include reminders to vote and information necessary to make an informed decision about voting in person on election day or in advance by mail. Id. at 49. Mr. Lopach testified that HB 2332 will inhibit VPC's ability to effectively engage with Kansans. Id. It will prevent VPC from mailing personalized ballot applications, thus reducing response rates and increasing the potential number of errors. Id. at 49, 60. The ban on out-of-state distributors will likely limit all of VPC's mail programs in Kansas, because VPC is not a Kansas resident and it cannot afford to become one. Id. at 49–50, 61.

Since February of 2015, Mr. Caskey has been responsible for overseeing Kansas elections at the national and state levels and for assisting 105 county election offices at the local level. Id. at 62–63. He has been in the state election office since February of 1998. Id. at 63. Mr. Caskey testified that since 1996, any Kansas voter may vote before election day for any reason, either by mail or in person. Id. “Unlike many states which struggle to implement mail balloting for the first time, Kansas . . . has 25 years of experience with mail ballots.” Id. at 84. To vote by mail, a voter

must complete an advance mail ballot application, which is available on line, in person, by mail or by email. Id. at 63–64. The process in each county is a little different. Id. at 64. Before 2020, a handful of counties sent advance mail voting applications to all registered voters. Id. In 2020, approximately 50 per cent of counties did so. Id.

In the primary election cycle in 2020, Mr. Caskey’s office received twice as many phone calls compared to the 2016 election from all parts of the State. Id. at 66–68. Voters submitted three times as many advance ballot applications, compared to 2016, and more than 90 per cent of those voters submitted ballots. Id. at 75, 85. The added phone calls increased his office’s workload. Id. at 67. The phone calls did not pertain to novel questions, but remained “consistent with previous elections.” The only new questions had to do with COVID-19. Id. at 68. According to Mr. Caskey, the 2020 elections “were successful and . . . were conducted according to Kansas law, and . . . voters were allowed to vote privately, securely, accurately and had their vote counted for who they intended to vote for.” Id. at 81–82; Plaintiffs’ Exhibits In Support Of Their Motion For Preliminary Injunction (Doc. #43-2 Exhibit 7 11.16.20 Letter from Sec. of State).

Mr. Caskey testified that duplicate advance ballot applications impact the integrity of the election process because they take more time. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 69. He testified that while it typically takes one to three minutes to process an initial ballot application, a duplicate application “dramatically” increases the amount of time needed. Id. The Election Voter Information System (“ELVIS”) tracks registered voters in Kansas in real time. Id. at 71. Outside organizations may request this information from Mr. Caskey’s office. Id. As it gets closer to the election, however, more requests come in and it takes more time to update ELVIS. Id. at 72.

Mr. Caskey testified that his office will work with the “appropriate stakeholders” to

determine what regulations under HB 2332 will look like. Id. at 74. The goal is for regulations to take effect before the primary election in August of 2022, which will require at least three or four months of processing time. Id.

Mr. Howell, Shawnee County Elections Commissioner, testified that before 2020, Shawnee County did not proactively mail advance ballot applications to all registered voters, but voters could use the election web site to retrieve applications. Id. at 89. In 2020, Shawnee County proactively mailed a blank application to each registered voter. Id. at 90. Because ELVIS updated the voter database every day, Shawnee County did not pre-populate the ballot application forms with personalized information. Id. at 92.

In 2020, Shawnee County received 24,699 advance mail ballot applications, of which 2,955 were duplicates. Shawnee County had a budget overrun of \$400,000 for the 2020 election, with around \$20,000 due to duplicate ballot applications. Id. at 96. Every ballot application is tracked against ELVIS to ensure that no voter receives more than one mail ballot. If ELVIS indicates that a voter may be submitting a duplicate ballot application, a local election official must verify that the name, address and signature match the voter record on file and check identifying information, such as driver's license number and date of birth. Id. at 96–97. If the ballot application is not a duplicate, the official must process the application and mail a ballot to the voter within 48 hours. Id. at 104. A voter often has legitimate reasons to submit more than one ballot application, such as changes in personal information or mailing addresses. Id. at 102. If the ballot application is a true duplicate, the election official engages what is called a “cure process.” Id. at 98. The first stage of the cure process is to contact the voter, either by email, mail or phone call, to make certain “that we know who the person is, we know who we’re sending it to, and that it’s handled correctly.” Id. at 98–99. This process may take anywhere from five to ten minutes on average but may take

up to 30 minutes if it is not easily resolved. Id. at 99. The cure process is not just limited to duplicate ballot applications; some applications enter the process because the application is missing information, a voter forgot to sign the application, a voter failed to include a driver's license number or other reasons. Id. at 102. In 2020, the Shawnee County election office hired 25 to 30 people to handle cure processes and process applications within the required 48 hours. Id. at 100–01. Mr. Howell's office did not anticipate receiving as many mail ballot applications as it did. Id. at 101.

Ms. Schmidt served as the Johnson County Election Commissioner for 11 years, first from 1995 to 2005 and then again in 2020. Id. at 111. In 2020, Johnson County mailed more than 165,000 mail ballot applications and processed a little more than 200,000 applications. Id. at 112. Before 2020, Johnson County did not proactively send out actual advance mail voting applications to all registered voters. In 2020, it changed its policy. Id. at 113. In 2020, Johnson County received well more than three times as many ballot applications, compared to typical presidential election years. Id. at 112–13. Before 2020, Johnson County received some duplicate ballot applications, but not as many as it did in 2020. Id. at 113. The processing time for each duplicate application ranged from five to ten minutes. Id. at 114. After the 2020 election, Ms. Schmidt tweeted that the Kansas general election was both “historic and successful.” Id. at 118.

B. Likelihood Of Success On The Merits

Plaintiffs contend that they are likely to succeed on the merits of their constitutional claims that HB 2332 violates their rights under the First and Fourteenth Amendments and the Dormant Commerce Clause. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) at 11, 22; see also supra Section I.C.1–4. Defendants argue that plaintiffs are unlikely to succeed on the merits because their activities do not involve speech under the First

Amendment (let alone core political speech), and the restrictions do not contravene the Dormant Commerce Clause. Defendants also argue that even if the restrictions implicate the First Amendment, they must be reviewed under the Anderson-Burdick test, Anderson-Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992), and that because HB 2332 imposes “reasonable, neutral, non-discriminatory prophylactic measures,” plaintiffs will not be entitled to relief. Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 16–17.

As noted above, plaintiffs sufficiently allege that HB 2332 violates their rights to engage in protected speech and expressive conduct under the First Amendment. The Court therefore addresses the likelihood that plaintiffs will eventually prevail on those claims.

1. What Level Of Scrutiny Is Warranted?

To determine the likelihood of plaintiffs’ eventual success on the merits, the Court must determine which level of scrutiny applies: strict scrutiny or the Anderson-Burdick balancing test. See Chandler v. City of Arvada, Colo., 292 F.3d 1236, 1241 (10th Cir. 2002); Citizens for Responsible Gov’t State Pol. Action Comm. v. Davidson, 236 F.3d 1174, 1196 (10th Cir. 2000). Federal courts often disagree on what level of scrutiny applies to state election and voter registration laws. Plaintiffs argue that the Ballot Application Restrictions are subject to strict or “exacting scrutiny” because they restrict plaintiffs’ ability to engage in core political speech.⁷ Defendants argue that because the restrictions do not target speech, the Court should analyze them under the more flexible Anderson-Burdick balancing test. Defendants’ Response To Plaintiffs’

⁷ Specifically, plaintiffs argue that strict scrutiny applies because HB 2332 (1) abridges their core political speech, (2) limits their speech based on content, viewpoint and speaker identity and (3) curbs the overall quantum of speech available to the election or voting process. Complaint (Doc. #1), ¶¶ 60–61, 69–72, 80–82, 88–89.

Motion For A Preliminary Injunction (Doc. #29) at 13; see Anderson, 460 U.S. at 789; Burdick, 504 U.S. at 433–34.

Although voting is of the “most fundamental significance under our constitutional structure,” the right to vote in any manner and the right to associate for political purposes through the ballot is not absolute. Utah Republican Party, 892 F.3d at 1076–77 (quoting Burdick, 504 U.S. at 433). The Constitution grants states the authority to regulate the “Times, Places, and Manner” of elections. Id. at 1076 (citing Tashjian, 479 U.S. at 217); U.S. Const. art. 1, § 4, cl.1. When a state invokes its constitutional authority to regulate elections, an individual’s right to vote and associate with others may be affected. Anderson, 460 U.S. at 788; see Timmons, 520 U.S. at 358 (“States may, and inevitably must, enact reasonable regulations of parties, elections and ballots to reduce election- and campaign-related disorder”). An example of permissible regulation is a decision to close the polls at 7:00 pm instead of 8:00 pm. Utah Republican Party, 892 F.3d at 1077. In evaluating the validity of a state election regulation under Anderson-Burdick, a Court applies a flexible standard, “weigh[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against the precise interests which the State advances to justify the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden plaintiffs’ rights. Fish v. Schwab, 957 F.3d 1105, 1122 (10th Cir. 2020) (citing Burdick, 504 U.S. at 434). The degree of scrutiny “will wax and wane with the severity of the burden imposed on the right to vote in any given case; heavier burdens will require closer scrutiny; lighter burdens will be approved more easily.” Fish, 957 F.3d at 1124 (quoting Burdick, 504 U.S. at 434).

The Supreme Court has declined to apply Anderson-Burdick to cases which govern election-related speech rather than the “mechanics of the electoral process.” McIntyre v. Ohio

Elections Comm’n, 514 U.S. 334, 345 (1995); see also Lerman v. Bd. of Elections in City of New York, 232 F.3d 135, 146 (2d Cir. 2000) (“Restrictions on core political speech so plainly impose a severe burden that application of strict scrutiny clearly will be necessary”) (citing Buckley v. Am. Const. L. Found. Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring)). Strict scrutiny applies to restrictions on core First Amendment activities. See Yes On Term Limits, Inc. v. Savage, 550 F.3d 1023, 1028–29 (10th Cir. 2008). Under strict scrutiny, a state must assert a significant and compelling government interest which is sufficiently narrowly tailored to serve that interest. See Perry Educ. Ass’n. v. Perry Loc. Educators’ Ass’n, 460 U.S. 37, 45 (1983); see also Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009) (“If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest.”).

The Tenth Circuit has applied the Anderson-Burdick test, which it has characterized as a “highly fact specific inquiry,” when deciding the “constitutionality of content-neutral regulation of the voting process.” Libertarian Party of N.M. v. Herrera, 506 F.3d 1303, 1308 (10th Cir. 2007); Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000). It acknowledges that strict scrutiny must be applied, however, “where the government restricts the overall quantum of speech available to the election or voting process.” Campbell, 203 F.3d at 745. In fact, the Tenth Circuit has expressly identified circumstances which merit strict scrutiny: restrictions on campaign expenditures, the available pool of political petition circulators or other supporters of an initiative or candidate, or the anonymity of such supporters. Id. Other courts have noted that some laws which govern elections, particularly election-related speech and associations, go beyond the intersection between voting rights and election administration, and veer into the area where “the First Amendment ‘has its fullest and most urgent application.’” Tennessee State Conf. of NAACP

v. Hargett, 420 F. Supp. 3d 683, 701 (M.D. Tenn. 2019) (quoting Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

HB 2332 addresses more than the time, place or manner of election administration, and impacts speech in a way that is not minimal. See Utah Republican Party, 892 F.3d at 1076–77. The Ballot Application Restrictions regulate First Amendment-protected activity in ways that are not merely incidental; in effect, they limit “the overall quantum of speech available.” Campbell, 203 F.3d at 745; see McCullen v. Coakley, 573 U.S. 464, 489 (2014) (“Commenting on matters of public concern [is] classic form[] of speech that lie[s] at the heart of the First Amendment. When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.”) (quoting Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 377 (1997)). HB 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. HB 2332 significantly inhibits communication with voters about proposed political change and eliminates voting advocacy by plaintiffs and other out-of-state entities, based on the content of their message and the residency of the advocate. Accordingly, the Court applies strict scrutiny to evaluate plaintiffs’ likelihood of success on the merits. Campbell, 203 F.3d at 745; McIntyre, 514 U.S. at 346 (limitations on political expression subject to strict scrutiny) (citing Meyer v. Grant, 486 U.S. 414, 420 (1988)).

Before the Court addresses plaintiffs’ likelihood of success under the strict scrutiny standard, it notes that on this record, the difference between strict scrutiny and the Anderson-Burdick balancing framework is not necessarily relevant. Anderson-Burdick falls back to a “less-searching examination closer to rational basis” when the challenged law is “minimally

burdensome” on the exercise of constitutional rights. Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016) (citing Burdick, 504 U.S. at 434). If the burden is “severe,” however, Anderson-Burdick leads to strict scrutiny, with restrictions failing unless they are narrowly tailored to advance compelling state interests. Id. (citing Burdick, 504 U.S. at 434); Yes On Term Limits, 550 F.3d at 1028 (citing Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002)); Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019) (“The first, most critical step is to consider the severity of the restriction” and if law imposes severe burdens on plaintiffs’ rights, apply strict scrutiny).

Plaintiffs have produced evidence of significant burdens associated with HB 2332, and defendants have provided almost no factual basis for disputing plaintiffs’ claims that HB 2332 will drastically limit the number of voices advocating for the politically controversial topic of voting by mail, limit the audience which proponents can reach and make it less likely that proponents will gather the necessary support to continue sharing their message. See Chandler, 233 F. Supp. 2d at 1311 (citing Meyer, 486 U.S. at 422; Meyer, 120 F.3d at 1099). HB 2332 will have the inevitable effect of reducing the total quantum of speech on an important public issue. Plaintiffs have shown a sufficiently heavy burden on First Amendment rights to justify a significantly more demanding standard of review than the “rational basis” standard which defendants seek to satisfy under Anderson-Burdick. For this reason, on this record, plaintiffs’ likelihood of success on the merits does not depend on whether the Court applies the Anderson-Burdick balancing test.

2. Strict Scrutiny Analysis

To survive strict scrutiny, defendants must show that the restrictions of HB 2332 are narrowly tailored to serve a compelling state interest. Yes On Term Limits, 550 F.3d at 1028 (citing Republican Party of Minn., 536 U.S. at 774–75). Here, defendants identify three

government interests at issue: “avoiding fraud, minimizing voter confusion, and facilitating an orderly administration of the electoral process.” Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 2. The Court analyzes each government interest in turn.

a. Preventing Voter Fraud

Defendants argue that HB 2332 prevents voter fraud because it limits the number of advance ballot applications that each Kansas voter may receive. Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 15. They argue that when a voter receives more than one ballot application, it invites fraud, which the State has a strong interest in avoiding. Id. Fraud may affect the outcome of a close election, dilute the right of citizens to cast ballots that carry the appropriate weight and undermine public confidence in the fairness of elections and legitimacy of the announced outcome. Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2340 (2021); see also Crawford, 553 U.S. at 191.

Defendants’ argument has superficial appeal, but it actually boils down to an issue of administrative efficiency. The state employs a rigorous process to make sure that no voter can receive a duplicate mail ballot. Apparently, these procedures are highly effective.⁸ The real issue seems to be that the process of preventing duplicate ballots takes more time than the process of

⁸ Defendants presented no evidence of any voter fraud effectuated through advance voting by mail, or a single instance in which a voter received duplicate mail ballots. On October 8, 2021, when the Court asked defense counsel about what evidence supported the legislature’s rationale for HB 2332, he responded that the State had no legal duty to present evidence of its rationale, citing FCC v. Beach Commc’ns, Inc., 508 U.S. 307 (1993). In Beach Commc’ns, the Supreme Court held that a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a rational basis for the classification. Id. at 313–14. It also held that “for purposes of rational-basis review,” equal protection does not demand that the legislature or governing decisionmaker articulate the purpose or rationale for the classification. Id. at 315. This case is distinguishable, however, from Beach Commc’ns. This is not an Equal Protection case and the Ballot Application Restrictions are not subject to rational-basis review under Anderson-Burdick or any other test.

dealing with requests for initial ballots.

While preventing voter fraud is a potentially compelling state interest, HB 2332 is not narrowly tailored to prevent voter fraud. HB 2332 does not limit the potential number of applications a voter may receive, because in-state residents may mail Kansas voters any number of advance ballot applications. In-state residents must disclose their name, address and (if the sender is an organization) the name of its president, chief executive officer, or executive director. HB 2332, § 3(k)(1). It seems unlikely that such information deters voter fraud, but the record contains no evidence on that point. If such information does deter voter fraud, the State could allow out-of-state entities to exercise their First Amendment rights after they provide the same information. See Yes On Term Limits, 550 F.3d at 1030; see also Chandler, 292 F.3d at 1242–44. The record contains no evidence that duplicate ballot applications disproportionately originate with out-of-state organizations. When plaintiffs challenge a content-based speech restriction, the State must prove that proposed alternatives would not be as effective as the challenged statute. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004). Defendants have not met that burden in this case.

In Yes On Term Limits, *supra*, Oklahoma residents challenged a law that created a residency requirement for initiative petition circulators. 2007 WL 2670178 at *1. Initially, the district court found that the state’s restriction on non-resident petition circulation was narrowly tailored to serve the compelling state interest of promoting the integrity of the electoral system, with an emphasis on eliminating fraud. *Id.* at *7–8. The state’s main evidence consisted of the allegedly fraudulent practices of a “handful of non-resident circulators.” Yes On Term Limits, 550 F.3d at 1030–31. The Tenth Circuit overturned the district court’s ruling, finding that the evidence did not support a finding that as a class, non-resident circulators were more likely than resident circulators to engage in fraud. *Id.* at 1031. It therefore held that Oklahoma had failed to

prove that banning all non-resident circulators was a narrowly tailored means to prevent fraud. Id. at 1029, 1031.

On this record, defendants have not shown that HB 2332 is narrowly tailored to prevent voting fraud. The record contains no evidence that out-of-state entities are more likely than in-state entities to encourage voter fraud or that HB 2332 is necessary to prevent Kansas voters from receiving duplicate mail ballots. Plaintiffs will likely demonstrate that HB 2332 impermissibly restricts their ability to engage in protected First Amendment activity and that it is not narrowly tailored to serve the admittedly compelling state interest of preventing voter fraud.

b. Minimizing Voter Confusion

Defendants argue that HB 2332 prevents voter confusion, as it limits the number of advance ballot applications that a Kansas voter may receive and reduces any mistaken belief that the applications originated from election officials. Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 17. The State’s interest in minimizing voter confusion is connected to its broader legitimate interest in protecting election integrity. Fish v. Kobach, 189 F. Supp. 3d 1107, 1148 (D. Kan. 2016), aff’d, 840 F.3d 710 (10th Cir. 2016).

With respect to voter confusion, Mr. Caskey testified that local election offices received more phone calls in 2020 than in 2016—an increase which he attributed to voter confusion. Mr. Howell also testified that “after talking with voters,” it became clear that plaintiffs and similar entities caused the duplicate ballot applications.⁹

Although minimizing voter confusion is a compelling interest, HB 2332 is not narrowly tailored to serve that interest. Local election offices received more phone calls in 2020, but other

⁹ Defendants did not call any witness who claimed to be a “confused voter” or who received numerous ballot applications. Transcript Of Oral Arguments Re: Preliminary Injunction Before The Honorable Kathryn H. Vratil, United States Senior District Judge at 45.

than calls about COVID-19, the questions received “were consistent with previous elections.” Id. at 68. The 2020 election had the highest return rate of ballot applications and a record number of advance ballot votes; in fact, the number of mail-in ballots tripled. Id. at 85. Such evidence of voter confusion is not persuasive, given the record turnout and the fact that other than COVID-19, voter questions were not different from in previous elections. Id. at 68. Furthermore, even if some voters were confused about receiving duplicate ballot applications, defendants presented no evidence on how limiting participation by out-of-state speakers or mailing of personalized ballot applications would serve to prevent that confusion.

In short, defendants have not shown that HB 2332 is narrowly tailored to alleviate voter confusion. Plaintiffs are likely to demonstrate that HB 2332 restricts their ability to engage in protected First Amendment activity and is not narrowly tailored to serve a compelling state interest.

c. Ensuring Orderly Administration Of Elections

Defendants argue that HB 2332 ensures orderly administration of elections because it prevents local election offices from spending limited resources to wade through duplicate applications for mail ballots. Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 27. Preserving the integrity and administration of the electoral process is a compelling state interest. Fish, 957 F.3d at 1133.

As noted, defendant’s witnesses testified about the amount of time which they require to process a ballot application and ensure it is not a duplicate. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 96–99. When a ballot application is received, the election official has 48 hours to confirm that the application is not a duplicate, process it and mail a ballot to the voter. Id. at 104. Local election officials employ ELVIS to ensure that no voter who submits more

than one ballot application receives more than one ballot. An official takes one to three minutes to process an initial application. Id. at 69. If ELVIS indicates that a voter has already submitted an application, the process may take on average five to ten minutes (up to 30 minutes) to determine whether the application is a true duplicate. Id. at 99, 114. As noted above, in 2020, both the Shawnee County and Johnson County election offices received duplicate ballot applications. Shawnee County hired 25 to 30 people to handle ballot applications and because its office did not anticipate so many advance applications, Shawnee County went \$20,000 over budget in handling duplicate applications. Id. at 96, 100–01. Duplicate ballot applications significantly slowed down the Johnson County election office work flow, even with the additional 30 to 40 “temps” hired to help manage the applications. Id. at 114–15.

While orderly administration of elections is an important government interest, HB 2332 is not narrowly tailored to serve that interest. Defendants argue that HB 2332 will limit the number of duplicate ballot applications which the local election offices receive, and in turn decrease the amount of resources required to process the applications. On this record, however, it is not clear that out-of-state entities contribute to duplicate applications in any meaningful way. The 2020 election cycle presented historic challenges defendants have not tied to advance mail ballot applications that originated with out-of-state residents. Id. at 95–97. Before 2020, few local election offices mailed advance ballot applications to all registered voters. In 2020, for the first time, both Shawnee County and Johnson County proactively did so. Id. at 89, 113. Approximately 50 per cent of all counties in Kansas did so. Id. at 64. The record contains no evidence about the source of duplicate ballot applications or whether voters submitted duplicate requests because of COVID-19, anticipated delays in postal delivery service or increased interest in voting itself. The 2020 election cycle had a record number of Kansans register to vote, cast votes in advance, cast

votes by mail and return their actual ballots. Id. at 85. The 2020 election cycle was not similar to the election cycles in 2008, 2012 or 2016 and the record does not address the obvious reasons for the lack of similarity. Accordingly, while defendants’ evidence is credible, it is not persuasive.

Kansas officials publicly declared that the 2020 election was successful, without “any widespread, systematic issues [of] voter fraud, intimidation, irregularities, or voting problems.” Secretary Schwab Responds to November Election Delay Suggestion, Kansas Secretary of State (July 30, 2020), <https://sos.ks.gov/media-center/media-releases/2020/07-30-20-secretary-schwab-responds-to-november-election-delay-suggestion.html>; Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 118. Mr. Caskey testified that the Kansas elections system has 25 years of experience with mail ballot applications, developing institutional knowledge, procedures and infrastructure to “securely process the anticipated increase in mail ballots.” Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 83–84. Both statements refute any compelling need to enact HB 2332, and defendants have not shown that HB 2332 is narrowly tailored to ensure the orderly administration of elections. Plaintiffs will likely demonstrate that HB 2332 restricts their ability to engage in protected First Amendment activity and that it is not narrowly tailored to serve a compelling state interest.

Defendants have therefore failed to prove that HB 2332 is narrowly tailored to achieve any of the State’s allegedly compelling interests. Given the evidence before the Court, plaintiffs have shown that they are likely to succeed on the merits of their freedom of speech First Amendment claim (Count 1).

For purposes of preliminary injunctive relief, the Court need not inquire into the likely merit of plaintiffs’ other three claims.

C. Likelihood Of Irreparable Harm

Because they are likely to prevail on the merits of their First Amendment freedom of speech claim, plaintiffs argue that absent an injunction, they will suffer irreparable harm. Defendants argue that plaintiffs will not suffer any harm at all because the statute does not take effect until early 2022, and the election offices cannot accept applications until April 1, 2022.

The Supreme Court and the Tenth Circuit have instructed that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Verlo v. Martinez, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)); Heideman v. S. Salt Lake City, 348 F.3d 1182, 1190 (10th Cir. 2003); see also Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012) (“[W]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”).

Precedent dictates that the Court must treat alleged First Amendment harms “gingerly.” Heideman, 348 F.3d at 1190. Plaintiffs have sufficiently pled that unless enjoined, HB 2332 will limit Kansas voters in navigating the path to ballot access and interfere with plaintiffs’ First Amendment rights. See Verlo, 820 F.3d at 1127. Such losses are ones that money damages cannot redress, so this factor weighs strongly in favor of an injunction. See United Utah Party v. Cox, 268 F. Supp. 3d 1227, 1259 (D. Utah 2017).

D. Balance Of The Equities

Plaintiffs argue that the prospect of substantial harm to them dramatically outweighs any harm which an injunction would impose on defendants. Plaintiffs’ Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) at 29. Defendants argue that plaintiffs will suffer no harm, especially compared to the harm which the State will suffer if an injunction is granted because whenever a State is “enjoined by a court from effectuating statutes enacted by

representatives of its people, it suffers a form of irreparable injury.” Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 29–30 (citing Maryland v. King, 567 U.S. 1301, 1303 (2012)).

Injury to plaintiffs who are deprived of First Amendment rights almost always outweighs the potential harm to the government if an injunction is granted. Verlo v. City & Cnty. of Denver, Co., 124 F. Supp. 3d 1083, 1095 (D. Colo. 2015), aff’d sub nom. Verlo v. Martinez, 820 F.3d 1113 (10th Cir. 2016). Here, the restrictions would substantially impair, if not effectively eliminate, plaintiffs’ ability to convey their message to their target audience in a timely and effective manner. For VoteAmerica, including the personalized ballot application in their communications packet is the most “effective way to communicate that you find it important for someone to do something.” Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 16. For VPC, these distributions increased the voters’ likelihood of returning the ballot applications to their local Kansas election offices. Id. at 46–47. The response rate would drop significantly without these packets, as most of VPC’s targeted audience do not own printers or cannot access the internet to secure an advance ballot application. Id. at 50.

In countering these injuries, the State has not provided evidence that any potential injury from an injunction is fairly traceable to plaintiffs or other out-of-state organizations. See Verlo, 820 F.3d at 1127. At the evidentiary hearing and at oral argument, defendants cited no evidence that duplicate ballot applications disproportionately originate with out-of-state speakers or that voter confusion results from plaintiffs’ mailings, as opposed to mailings by in-state organizations or topics that have nothing to do with voting by mail. Mr. Caskey stated that county officials received ballot applications with improper information but did not tie those incorrect applications

to plaintiffs or to other out-of-state organizations.¹⁰ Defendants also failed to present evidence that the time required to process duplicate applications in 2020 exceeded processing times in 2008, 2012 or 2016 on account of specific problems which HB 2332 purports to address. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 75, 85. Defendants posited no numbers which showed anything more than “light administrative burdens,” which might not even be solved by an out-of-state ban, since Kansans may still solicit applications by mail from in-state residents. See Fish, 840 F.3d at 754–55.

HB 2332 does not appear to address any immediate problem and delayed implementation is not likely to cause material harm, even if it is eventually found to be constitutional and enforceable. Awad, 670 F.3d at 1132. In weighing the balance of equities, the substantial denial of fundamental constitutional rights clearly outweighs the prospect of demonstrated administrative burdens on the Kansas Secretary of State and local election offices. See Fish, 840 F.3d at 755.

Plaintiffs make a strong showing that their threatened injury outweighs any potential harm to defendants in granting this injunction.

E. The Public Interest

Plaintiffs argue that implementation of HB 2332 will also harm the public and that it is always in the public interest to prevent a violation of a party’s constitutional rights. Plaintiffs’ Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) at 30; see also Verlo, 820 F.3d at 1127. Defendants argue that public confidence in government will be undermined if the Court invalidates a statute that has made its way through the legislative process. Defendants’ Response To Plaintiffs’ Motion For A Preliminary Injunction (Doc. #29) at 30.

¹⁰ Such a connection is theoretical at best, because in 2020 out-of-state organizations mailed ballot applications and “approximately 50 percent of the counties sent out an application to every registered voter.” Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 64.

The Tenth Circuit repeatedly acknowledges the strong public interest in protecting First Amendment rights. Awad, 670 F.3d at 1132; Verlo, 820 F.3d at 1127–28 (citing Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1237 (10th Cir. 2005)); Am. C.L. Union v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999). With the other three factors leaning in favor of granting the preliminary injunction and the critical constitutional issues which still need to be decided, the public interest factor also leans in favor of granting the preliminary injunction.

IT IS THEREFORE ORDERED that Defendants’ Motion To Dismiss Plaintiffs’ Complaint (Doc. #26) filed July 9, 2021 is **OVERRULED**.

IT IS FURTHERED ORDERED that Plaintiffs’ Motion For Preliminary Injunction (Doc. #24) filed July 8, 2021 is **SUSTAINED**. The Court hereby enjoins enforcement of Sections 3(k)(2) and 3(1)(1) of HB 2332. Pending further order of the Court, this Order shall remain effective until the conclusion of the case.

Dated this 19th day of November, 2021 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

Exhibit C



February 7, 2022

League of Kansas Municipalities
John Goodyear, General Counsel
300 SW 8th Avenue
Topeka, KS 66603-3951
(785) 354-9565
jgoodyear@lkm.org

By Email

Dear Mr. Goodyear:

We write on behalf of our clients, VoteAmerica and Voter Participation Center, regarding Section 7.5(a)(2) of the Uniform Public Offense Code, 37th Edition (“UPOC”) published by the League of Kansas Municipalities (the “League”). UPOC section 7.5(a)(2) incorporates a recently enacted provision of HB 2332, section 3(k)(2) (the “Personalized Application Prohibition”), which criminalizes the mailing of any advance mail ballot application that has been personalized with a voter’s information. *See* Ex. A (HB 2332). It is our understanding that many jurisdictions, including your members, have adopted the UPOC, including the Personalized Application Prohibition.

We write to inform you that UPOC section 7.5(a)(2) is unconstitutional and cannot be enforced. Our clients have challenged the constitutionality of the Personalized Application Prohibition in a case pending before the U.S. District Court for the District of Kansas. *VoteAmerica v. Schwab*, No. 2:21-cv-02253 (D. Kan.). On November 19, 2021, before HB 2332 was set to take effect, U.S. District Judge Kathryn Vratil granted our clients’ preliminary injunction motion, finding that they were likely to succeed on their First Amendment speech claim and enjoining enforcement of the Personalized Application Prohibition during the pendency of the case. *See* Ex. B (Mem. & Order Nunc Pro Tunc). Accordingly, such provision cannot be enforced in the state of Kansas.

We have written a letter to fifteen cities that we know have adopted UPOC section 7.5(a)(2)¹ calling for repeal of the provision and informing these cities of our intent to take any legal action necessary to preserve our clients' First Amendment rights.² But the total number of jurisdictions that have adopted the UPOC is likely far greater than fifteen.

Accordingly, we write to request your assistance to ensure that all Kansas jurisdictions are aware of the federal injunction and have the information necessary to comply with the U.S. Constitution and avoid legal action. We specifically request that the League:

- (1) Promptly remove the unconstitutional, and now enjoined, language in section 7.5(a)(2) from the UPOC;
- (2) Provide a complete list of jurisdictions that have adopted UPOC section 7.5(a)(2), including the names and contact information for those jurisdictions' legal counsel; and
- (3) Inform your full membership of the federal injunction and our clients' demand for repeal of UPOC section 7.5(a)(2) from all municipal codes.

These actions will not only protect the First Amendment rights of our clients and others who seek to engage Kansas voters in the upcoming elections but also help your members avoid the substantial expense of litigation, including a potential award of attorneys' fees. If you have any questions or concerns, please do not hesitate to contact us by phone or email as listed below. Thank you for your attention to this matter, and we look forward to your response.

Best,
Danielle M. Lang

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¹ These jurisdictions include Topeka, Salina, Leavenworth, Gardner, Arkansas City, Lansing, Merriam, Independence, Spring Hill, Wellington, Abilene, Edwardsville, North Newton, Sublette, and Westwood Hills.

² The letter, enclosed here as Ex. C, also explains in further detail why UPOC section 7.5(a)(2) unconstitutionally restricts First Amendment activity and cannot be enforced.

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CITY OF ABILENE
Item for City Commission Agenda

Meeting Date:

4/4/22
4/11/22

Originating Department

Prepared By:

Approved For Agenda By:
(Office Use Only)

Administration

Shayla Mohr, City Clerk

AGENDA ITEM HEADING:

Cleaning Bids – City Hall Administration office (included Police Department and Inspection Department), CVB and Sr. Center

BACKGROUND:

We recently sent out proposals for bids for cleaning services for the City Hall Administration offices, Convention and Visitors Bureau and the Senior Center.

Bids were received from the following:

CooperClean

City Hall Administration offices	\$1,000 per month	
Abilene CVB	\$ 800 per month	
Abilene Senior Center	\$ 900 per month	Total \$2,700.00 per month

IServe Facilities

City Hall Administration offices	\$1,797 per month	
Abilene CVB	\$1,474 per month	
Abilene Senior Center	\$2,595 per month	Total \$5,866.00 per month

The Garson Group

City Hall Administration offices	\$1,500.00 per month	
Abilene CVB	\$2,500.00 per month	
Abilene Senior Center	\$1,500.00 per month	Total \$5,500.00 per month

FISCAL NOTE:

We currently pay CooperClean a total of \$2,100 per month for all three locations. We have not reviewed this contract since 2007 and felt it needed to be looked at again especially with the new remodel of the Police Department.

COMMISSION ACTION:

Approve the bid in the amount of \$2,700 for cleaning services for City Hall Administration, CVB and Senior Center with CooperClean.



The City of Abilene is seeking proposals for Cleaning Services for each of the following locations:

1. Abilene City Hall Building – 419 N. Broadway

Administration offices – City Administration, Police Department, Community Development, and Inspection Departments.

2. Abilene Senior Citizens Center – 100 N. Elm

3. Abilene Convention and Visitor's Bureau – 201 NW 2nd

Details regarding services requested/required at each location are attached.

Please submit proposals for each location separately. Proposals can be made on one or all three locations. Please submit the proposal as a **monthly cost** for services.

Please submit sealed proposals to:

Shayla Mohr, City Clerk
419 N. Broadway
PO Box 519
Abilene, KS 67410

Proposals need to be received by Tuesday, March 15, 2022, at 10:00 a.m.

Proposal opening will take place on Tuesday, March 15, 2022, at 10:01 a.m.

Service will begin May 1, 2022

Proposal for monthly cleaning costs (per specifications) of Administration Department: \$ 1000⁰⁰

Proposal for monthly cleaning costs (per specifications) of Convention and Visitors Bureau: \$ 800⁰⁰

Proposal for monthly cleaning costs (per specifications) for Senior Citizens Center: \$ 900⁰⁰

Cosper Clean



20 N Broadway
Herington KS 67449
785.258.6075

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Proposal for monthly cleaning costs (per specifications) of Administration Department: \$	1,797
Proposal for monthly cleaning costs (per specifications) of Convention and Visitors Bureau: \$	1,474
Proposal for monthly cleaning costs (per specifications) for Senior Citizens Center: \$	2,595



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Service will begin May 1, 2022

Proposal for monthly cleaning costs (per specifications) of Administration Department: **\$1,500.00**

Proposal for monthly cleaning costs (per specifications) of Convention and Visitors Bureau: **\$2,500.00**

Proposal for monthly cleaning costs (per specifications) for Senior Citizens Center: **\$1,500.00**

The Garsen Group



AGREEMENT FOR JANITORIAL SERVICE

THIS AGREEMENT is made and entered into this 11th day of April 2022, by and between the CITY OF ABILENE, KANSAS ("Owner"), and KELLY COOPER d/b/a COOPERCLEAN, Abilene, Kansas ("Contractor").

IN CONSIDERATION OF the mutual promises herein contained, the parties agree as follows:

1. **SCOPE OF WORK:** The Contractor shall supply janitorial services for Abilene City Hall, the Abilene Convention and Visitors Bureau, and the Abilene Senior Center, as specified in the "Task Schedule for Cleaning" attached hereto, for the period of May 1, 2022 to April 30, 2024. The Contractor shall provide the janitorial services in a good, substantial and workman-like manner, and in compliance with the attached "Task Schedule for Cleaning".

2. **PAYMENT:** As consideration for such janitorial services, the Owner shall pay the Contractor the sum of \$1,000.00 per month for Abilene City Hall, \$800.00 per month for the Abilene Convention and Visitors Bureau and \$900.00 per month for the Abilene Senior Center for a total of \$2,700.00 per month. The Contractor shall submit each month, an invoice reflecting the sum owed for work done during the immediately preceding month. The City shall make prompt payment therefore in accordance with its established procedures for contract payments.

3. **DAMAGE TO OR LOSS OF OWNER'S PROPERTY:** The Contractor shall promptly reimburse the Owner for all loss or damage to its property, caused wholly or partially by the negligence or wrongful acts of the Contractor or its agents or employees in the performance of this Agreement.

4. **CONDITIONS:** This Agreement may be terminated by the Owner if the Contractor does not, in the opinion of the Owner, satisfactorily perform the services as indicated in the attached "Task Schedule for Cleaning," or if the Contractor otherwise fails to comply with the terms and conditions of this Agreement. The notice of termination will be in written form to the Contractor. In addition, either party may terminate this Agreement, without cause, by giving a thirty (30) day written notice to the other party by registered mail.

5. **CONFIDENTIALITY:** The parties recognize that certain services provided for in this Agreement, such as cleaning desks, may result in the Contractor or its employees and agents having access to confidential data or documents. The Contractor agrees that Contractor, and its employees and agents, will not reveal the contents of any such data or documents to anyone without prior written permission of the City Manager.

6. **BINDING EFFECT:** This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.

7. NON-ASSIGNABLE; SUBCONTRACTING. Due to the unique qualifications and capabilities of the Contractor, neither the rights nor responsibilities provided for under this Agreement shall be assigned or subcontracted, either in whole or in part, without the City's prior written consent.

8. NON-APPROPRIATION. The Owner is subject to Kansas budget and cash basis laws, and operates on a calendar fiscal year. In the event that this Agreement involves financial obligations spanning multiple fiscal years for the Owner, it is subject to annual appropriation by the Owner's governing body for future fiscal years. If the governing body does not appropriate the funds necessary to fulfill the Owner's financial obligations pursuant to this Agreement, the City shall so notify the other parties to this Agreement and this Agreement shall be null and void for purposes of the fiscal year(s) affected by the decision of the governing body not to appropriate.

9. INDEPENDENT CONTRACTOR. The Contractor is an independent contractor and nothing in this Agreement shall confer city employee status on the Contractor, his agents or employees. Neither the Contractor, his agents nor employees shall be entitled to receive employee pay or benefits from the Owner by virtue of this Agreement. The Contractor shall be responsible for providing all health insurance, workman's compensation insurance and liability insurance for himself and his agents and employees. The Contractor shall also be responsible to pay his agents and employees and withhold payroll taxes from such pay as required by law. The Contractor agrees to hold the Owner harmless from liability to himself, his agents and employees for pay, payroll withholding, and claims for injuries to his agents and employees, or their property, incurred by them in the course of their duties and employment by the Contractor.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed the day and year dated below.

OWNER

THE CITY OF ABILENE, KANSAS

Date

By:_____
Ronald Marsh, City Manager

CONTRACTOR

KELLY COOPER,
d/b/a COOPERCLEAN

Date

Kelly Cooper



Task Schedule for Cleaning – Abilene Senior Center

The following indicates what is requested to be done by the janitorial service:

Daily cleaning and weekends as needed.

The Abilene Senior Center manager will provide a daily, weekly, and monthly schedule for service. A copy of the checklist will be hung in janitor's closet.

Cleaning supplies will be supplied by the City of Abilene.

DAILY

1. Clean bathrooms (sinks, toilets, floors, mirrors, handles, stalls as needed)
2. Check or replace toilet paper and paper towels
3. Clean all entrances (sweep and vacuum rugs)
4. Vacuum carpets and sweep all floors. Spot mop where needed.
5. Empty all trash cans and replace trash bags.
6. Make sure all exterior doors and office doors are locked.

WEEKLY

1. Pour bleach in bathroom drain
2. Clean all windows
3. Dust lounge area, tables, shelves, all window sills, baseboards
4. Mop entire floor

MONTHLY

1. Clean walls where needed, especially around door frames
2. Clean visible vents

TWICE PER YEAR

1. Wipe down all chairs in dining area

*And all other duties as assigned by Senior Center Manager.

*Service provider will be notified of any weekend rentals, as well as evening rentals during the week. Evening rentals during the week will need to be worked around.

*Name and phone number of person cleaning will be provided to Senior Center Manager.

Services will begin on: May 1, 2022



Task Schedule for Cleaning-Administration

Administration offices – City Administration, Police Department, Community Development, and Inspection Departments.

Requested services include, but not limited to the following:

Services	Mon.	Thurs.	Weekly	Monthly	Semi-annual	Annual
Empty all trash cans and replace liners.	X	X				
Clean and sanitize drinking fountain.	X	X				
Dust all surfaces to 70" height including windowsills, shelves, picture frames, file cabinets, radiators, baseboards, etc....			X			
Clean all exterior doors			X			
Clean entire interior glass doors and windows	X	X				
Remove fingerprints from doors, frames, light switches, hand railings, etc....			X			
Vacuum office chairs and conference room chairs			X			
Clean all desks – dust around papers or clean entire desk if cleared off-move fixtures such as pen/business card holders, files to dust	X	X				
Clean plexi-glass barrier on desks	X	X				
Clean behind computer monitors				X		
Clean and sanitize all fixtures including toilets and sinks in restrooms & break rooms	X	X				
Clean & polish chrome fixtures and mirrors	X	X				
Remove spots, stains from walls				X		
Refill all paper towel, soap, and sanitizer dispensers	X	X				
Vacuum all carpeted areas	X	X				

Services	Mon.	Thurs.	Weekly	Monthly	Semi-Annual	Annual
Sweep all tile floors-front and back entrance, hallways, bathrooms, stairs	X	X				
Mop all tile floors-front and back entrance, hallways, bathroom, stairs			X			
Strip and wax floors						X
Wash walls – touch up soiled areas as needed						X
Other duties as assigned				X		

Cleaning supplies will be supplied by the City of Abilene.

Services will begin on: May 1, 2022



Task Schedule for Cleaning-Abilene Convention and Visitors Bureau

Requested service includes, but is not limited to:

Services	Daily	Weekly	Monthly	Semi-Annually	Annually	As Needed
Clean all bathrooms, including mopping floors, replacing towels, toilet paper, soap and deodorizer (Travel Information Center – 2; CVB offices – 1)	X					
Vacuum all entrances and mop Travel Information Center hallway	X					
Clean all glass doors	X					
Vacuum and mop floors		X				
Empty all trashcans and replace liners	X					
Clean all surfaces above 70" height including shelves, ducts, heating outlets, etc.			X			
Clean walls						X
Mop freight room			X			
Clean refrigerators and stove						X
All other duties assigned by the CVB Director						

Services will begin May 1, 2022.



CITY OF ABILENE
Item for City Commission Agenda

Meeting Date:

04/04/2022
04/11/2022

Originating Department

Prepared By:

Approved For Agenda By:
(Office Use Only)

Administration

AGENDA ITEM HEADING:

Budget Lodge/Low Income Housing

BACKGROUND:

The owners of the Budget Lodge have approached the city about converting their property/buildings into low-income housing, specifically Section 8 housing.

In order for that to occur the property would need to be rezoned. A rezoning would need to go through the Planning Commission, then the City Commission. Before we proceeded with the task of rezoning, staff wanted to see if the City Commission had a desire for that location to convert to that type of use.

The owners said they would attend the meeting to present their plan and answer your questions.

FISCAL NOTE:

COMMISSION ACTION:

Review and direct staff