No. 23-3100

In the United States Court of Appeals
for the Tenth Circuit

VOTE AMERICA and VOTER PARTICIPATION CENTER,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Kansas
No. 2:21-cv-2253 (Hon. Kathryn H. Vratil)

BRIEF OF AMICI CURIAE ACLU, ACLU OF KANSAS, ACLU OF COLORADO, ACLU OF NEW MEXICO, ACLU OF OKLAHOMA, ACLU OF UTAH, AND ACLU OF WYOMING IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with approximately 1.6 million members. The ACLU is dedicated to the principles of liberty and equality embodied in the U.S. and state Constitutions and our nation's civil rights laws, including the rights to free speech, expression, association, and the right to cast a meaningful vote.

The ACLU of Kansas, ACLU of Colorado, ACLU of New Mexico, ACLU of Oklahoma, ACLU of Utah, and ACLU of Wyoming are statewide affiliates of the national ACLU and are dedicated to these same principles. The ACLU and its affiliates regularly appear both as counsel and as *amici* in cases aimed at preserving the above-cited rights. They regularly appear before courts throughout this country to vindicate these rights—including before the U.S. Supreme Court in *Allen v. Milligan*, 143 S. Ct. 1487 (2023), and *United States v. Hansen*, 143 S. Ct. 1932 (2023), and before this Court in *C1.G on behalf of C.G. v. Siegfried*, 38 F.4th 1270

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

(10th Cir. 2022), *Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021), and *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

Consistent with their missions, *amici* have an abiding interest in ensuring uninhibited political thought, expression, and advocacy. The decision below, applying rigorous First Amendment scrutiny to a law that stifles political speech, is faithful to these principles. *Amici* thus have a strong interest in seeing that decision affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quotations omitted). Indeed, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs," including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (quotations omitted).

Political speech is not only an end in itself, but also has "a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). Perhaps more than any other kind of speech, speech encouraging others to participate in the political process—by voting, running for office, or otherwise—"is an essential mechanism of democracy," because it "is the means to hold officials accountable to the people," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010), and "to achieve political change," *Meyer*, 486 U.S. at 421. Participating in debate about the political process is thus "integral to the operation of the system of government established by our Constitution." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203-04 (2014) (quotations omitted).

The Supreme Court accordingly has recognized that the First Amendment's protections are at their "zenith" when citizens engage in "core political speech." *Meyer*, 486 U.S. at 420-25; *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *see also Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999). "When a law burdens core political speech," the Court has explained, a reviewing court must "apply

exacting scrutiny," upholding "the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347.

At the same time, the Court has recognized that elections must be "regulat[ed] . . . if they are to be fair and honest and if some sort of order . . . is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, in two seminal cases concerning "election code provisions governing the voting process," the Supreme Court announced a more lenient framework for laws that regulate "the mechanics of the electoral process." *McIntyre*, 514 U.S. at 344-45. That framework—also called *Anderson-Burdick* after *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)—calls on courts to employ the tools used "in ordinary litigation." *Anderson*, 460 U.S. at 789. Under *Anderson-Burdick*, a court must balance the burden on the right "the plaintiff seeks to vindicate" with the state's countervailing interest(s) in the application of its law. *Id.* The rigor of the court's review will depend on the severity of the burden on the plaintiff's rights. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Anderson-Burdick is not implicated here becuase Kansas's Personalized Application Prohibition, codified at Kan. Stat. Ann. § 25-

1122(k)(2), criminalizes political speech. That statute prohibits advocacy organizations like Plaintiff Voter Participation Center (VPC) from encouraging Kansans to vote by mail by prohibiting these organizations from pre-filling any "portion" of an "application for an advance voting ballot," even if the information supplied is truthful and accurate. *Id.*

As the district court correctly concluded, a pre-filled ballot application is not "neutral"; it expresses a *pro*-vote-by-mail message. *VoteAmerica v. Schwab*, __ F. Supp.3d __, 2023 WL 3251009, at *8 (D. Kan. May 4, 2023). "A recipient" of one of VPC's applications "would readily understand" that message, including VPC's position that "advance mail voting is safe, secure and accessible." *Id.* And the record demonstrates "that in the 2020 general election, approximately 69,000 recipients submitted advance voting ballot applications[,] which [VPC] provided, which strongly suggests that Kansans not only understood plaintiff's pro-advance mail voting message but also acted on its encouragement." *Id.*

Yet Defendants and their *amici* contend that First Amendment speech protections do not apply to Kansas's prohibition because that prohibition regulates the mechanics of the electoral process. They are

mistaken. The law regulates third-party advocacy, not electoral mechanics. A voter who submits a pre-filled ballot application suffers no consequences under the law—there are no criminal penalties nor is the application invalidated. The law's only effect is to punish third parties from encouraging voters to vote by mail. At most, the law is only tangentially related to the electoral process, while it directly burdens political speech. First Amendment speech protections, not *Anderson-Burdick*, apply.

In addition to demonstrating the applicability of First Amendment speech protections, *amici* respond to one *amicus* brief endorsing a view that, if adopted, would upend the law and significantly weaken the Constitution's protections for political speech. *Amicus* Restoring Integrity and Trust in Elections (RITE) suggests that the courts of appeals uniformly apply *Anderson-Burdick* to *all* challenges to state laws relating to electoral mechanics. It dismisses contrary Supreme Court and circuit precedent on the ground that those cases involved "pure speech," whereas this case involves only (in RITE's view) expressive activity. And it then asserts that in applying *Anderson-Burdick*, this Court should evaluate the Kansas statute's burden on the right to vote,

even though the claim in this case is that the statute burdens the right to speech.

Each of these arguments is wrong. The cases cited by RITE in support of its supposed uniform rule do not address the circumstances here—*i.e.*, core political speech many steps removed from the ballot. In large part, they did not involve First Amendment-protected speech at all. Context matters, and RITE ignores critical context to argue that the courts of appeals invariably apply *Anderson-Burdick* to an election law that burdens political speech.

Ultimately, RITE acknowledges that First Amendment speech protections, not *Anderson-Burdick*, apply to restrictions that stifle political speech. But it contends that these cases apply only to regulations of pure speech, not expressive conduct. That is incorrect. RITE equates political speech with pure speech. But they are not one and the same. Yes, speech protections apply to restrictions on pure political speech, like spoken and written word. But political speech is not limited to pure speech. First Amendment speech protections apply equally to expressive activity that communicates the same political message. The Supreme Court has never suggested that core political

speech does not include First Amendment-protected expressive activity, nor would there be a principled reason for it to do so. The Kansas law burdens expressive political activity, so traditional First Amendment principles apply.

Finally, RITE errs even under its preferred framework. It contends that in applying *Anderson-Burdick*, the Court should evaluate the law's burden on the right to vote. But under *Anderson-Burdick*, courts evaluate burdens on the right "that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. Here, VPC seeks to vindicate its First Amendment right to engage in political speech. There is no reason a court evaluating a First Amendment free speech claim should ignore the law's burden on speech, focusing exclusively instead on a different right altogether. But this Court need not even reach this argument because First Amendment speech protections, not *Anderson-Burdick*, apply to laws that burden political speech, like the Kansas law at issue here.

It violates the First Amendment's speech protections for a state to prohibit advocacy organizations from encouraging citizens to vote by mail. The Kansas statute criminalizing such activity cannot withstand First Amendment scrutiny.

For all these reasons, and those set out in VPC's brief, this Court should affirm.

ARGUMENT

I. FIRST AMENDMENT SPEECH PROTECTIONS APPLY TO RESTRICTIONS ON POLITICAL SPEECH.

The Supreme Court and this Court repeatedly have emphasized that the First Amendment's protections apply to laws that burden core political speech. RITE asks this Court to deviate from this precedent on the grounds that federal appellate courts have said in passing that *Anderson-Burdick* covers all challenges to state laws concerning electoral mechanics. But RITE misreads these cases, none of which speaks to state laws that burden political speech many steps removed from the casting of votes. And the Kansas law here does not regulate electoral mechanics—it regulates third-party advocacy, not voters.

RITE also contends that the settled rule for political expression applies only if the message is conveyed through pure speech. RITE erroneously equates political speech with pure speech. Pure speech can be political speech, but there is no basis to exclude from the First

Amendment's protections a political message communicated through expressive conduct or activity.

A. The Courts Of Appeals Do Not Uniformly Apply *Anderson-Burdick* To Every Law That Arguably Relates To Electoral Mechanics.

RITE contends that other circuits "*uniformly*" apply *Anderson-Burdick* to all challenges to state laws that in some way relate to electoral mechanics, arguing that these circuits "would have applied the *Anderson-Burdick* doctrine here." *See* RITE Br. 16-22. RITE is wrong. The cases cited by RITE do not support its argument that any federal appellate court would apply *Anderson-Burdick* in these circumstances. None involved restrictions on political speech many steps removed from the casting of votes.[2]

Indeed, RITE's principal case expressly refutes its claim of decisional uniformity. As the Third Circuit explained less than a year ago, "the Supreme Court has never laid out a clear rule or set of criteria

[2] Moreover, *Anderson-Burdick* and First Amendment speech protections often lead to the same place. As the district court correctly observed, "the difference between strict scrutiny and the *Anderson-Burdick* balancing framework is not necessarily relevant," because "*Anderson-Burdick* leads to strict scrutiny" when the burden imposed by the state election law is "severe." *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 888 (D. Kan. 2021).

to" determine when First Amendment principles apply and when a state law is governed by *Anderson-Burdick*, "nor has any Court of Appeals to our knowledge." *Mazo v. N.J. Sec. of State*, 54 F.4th 124, 137 (3d Cir. 2022); *see also id.* at 132 (recognizing that "the line separating core political speech from the mechanics of the electoral process has proven difficult to ascertain"). The cases cited by RITE thus shed very little light on the question before this Court. RITE's contrary argument relies on quoting snippets from these decisions out of context.

Most of RITE's cases did not involve restrictions on speech or expressive conduct, so courts had no occasion to choose between First Amendment speech principles and *Anderson-Burdick*. In *Richardson v. Texas Secretary of State*, 978 F.3d 220 (5th Cir. 2020), for instance, the Fifth Circuit applied *Anderson-Burdick* to due process claims challenging signature-verification and voter-notification laws. The choice before the Court was between *Anderson-Burdick* and the generalized due process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Richardson*, 978 F.3d at 233-35.

So too in *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021), and *New Georgia Project v. Raffensperger*, 976 F.3d 1278 (11th

Cir. 2020). Both cases rejected the argument that *Mathews* balancing applied to procedural due process claims, and applied *Anderson-Burdick* to claims that the state election law burdened the right to vote, which falls squarely within *Anderson-Burdick*'s ambit. *Hobbs*, 18 F.4th at 1187-90, 1194-95; *Raffensperger*, 976 F.3d at 1280-82. And in *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit rejected the State's contention that rational basis review applied to a state law that burdened the right to vote and applied *Anderson-Burdick* instead. *Id.* at 430-31. Plainly, none of these cases is apposite to the First Amendment speech question here.

Acevedo v. Cook County Officers Electoral Board, 925 F.3d 944 (7th Cir. 2019), and *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), are even farther off point. In *Acevedo*, the Seventh Circuit rejected the plaintiff's argument that a "special rule" applied to ballot-access restrictions whereby a "state always triggers strict scrutiny when it imposes a higher ballot-access requirement for a countywide office than for a statewide office." 925 F.3d at 949. Again, the court's decision had nothing to do with restrictions on First Amendment-protected speech or activity—or whether *Anderson-Burdick* engulfs the First Amendment in

the context of election laws. And *LaRouche* involved a challenge to the Democratic Party's internal rules for allocating its presidential nominating convention delegates where the plaintiff "present[ed]" "an amalgam of" constitutional claims but "suggest[ed] no separate analysis for his First Amendment claims." 152 F.3d at 987. That said, the D.C. Circuit was "not persuaded that the *Burdick* test [wa]s appropriate" for the circumstances there—which did not involve a challenge by a citizen or political party against the application of a state law—even more clearly refuting RITE's position. *Id.* at 994.

Only two of RITE's cases even arguably implicate speech and both are easily distinguishable. In *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018), a political candidate challenged a California law mandating that the ballot list his party preference as "None," when he claimed to be a socialist. *Id.* at 442. He alleged (among other things) that the law violated the First Amendment by discriminating against his viewpoint and compelling speech. *Id.* at 442-43. The Ninth Circuit held that the plaintiff's challenges were "folded into the *Anderson/Burdick* inquiry," noting at the same time that the analysis under *Anderson-Burdick* would dovetail with the First Amendment. *Id.* at 449 n.7; *supra* n.2. Similarly,

in *Mazo*, the Third Circuit held that *Anderson-Burdick* applied to a state law that regulated six-word slogans allowed to appear beside candidates' names on the ballot. 54 F.4th at 138-42.

Both *Soltysik* and *Mazo* implicated candidate speech and involved state action at the inner core of the electoral process: the ballot's text. *See id.* at 143, 145 (noting "the Supreme Court has been skeptical of efforts to assert an unqualified right to speech via the ballot," and that the New Jersey law at issue was governed by *Anderson-Burdick* because it "regulates only the ballot itself—a classic electoral mechanic—and does not regulate core political speech"); *see also Timmons*, 520 U.S. at 363. The Kansas law challenged in this case is markedly different. The law does not regulate the ballot, nor does it affect the validity of a voter's ballot application. Rather than regulating the mechanics of the electoral process, this law impacts third parties, punishing them for encouraging voters to apply to vote by mail through pre-filling ballot applications. And the law burdens political speech, a separate reason not to apply *Anderson-Burdick*.

None of the cases cited by RITE, in other words, informs this case. There is no uniform circuit precedent holding that First Amendment

challenges to state election laws burdening political speech are evaluated under *Anderson-Burdick* and not First Amendment principles.

B. First Amendment Speech Protections Apply To Restrictions On Political Speech.

The Supreme Court and this Court have applied the First Amendment's protections to laws that burden "core political speech," even when those laws arguably relate in some way to the electoral process. *Meyer*, 486 U.S. at 422. Thus, in *Meyer*, the Supreme Court invalidated Colorado's ban on paid petition circulators because it "restrict[ed] political expression." *Id.* A few years later, in *McIntyre*, the Court drew the same distinction to reject Ohio's argument that *Anderson-Burdick* applied to a law that banned the distribution of anonymous campaign literature: "When a law burdens core political speech, we apply 'exacting scrutiny.'" 514 U.S. at 347 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978)); *see also Mazo*, 54 F.4th at 137 (noting that in *McIntyre* and *Meyer*, the Court "decline[d] to apply *Anderson-Burdick*'s balancing test and … reverted instead to a traditional First Amendment analysis").

This Court has reached the same conclusion, applying strict scrutiny to regulations that implicate "core political speech." *Yes On*

Term Limits v. Savage, 550 F.3d 1023, 1028 (10th Cir. 2008) (citing *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002)); *see also Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) ("strict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process," and noting that *Anderson-Burdick* applies when "deciding the constitutionality of content-neutral regulation of the voting process").[3]

As these cases and those above illustrate, *Anderson-Burdick* applies to laws that regulate electoral mechanics but only where those laws do not implicate political speech. The Kansas law here, by contrast, does not regulate electoral mechanics and does implicate political speech. And courts "apply a traditional—and often quite stringent—First Amendment analysis to state election laws that implicate core political speech outside of the voting process." *Mazo*, 54 F.4th at 131.

RITE divides the world differently. In its view, the critical feature distinguishing First Amendment speech cases from *Anderson-Burdick* cases is whether the law burdens "*pure speech*," as opposed to expressive

[3] As *Campbell* makes clear, *Anderson-Burdick* also does not apply to content-based restrictions on speech. *See* 203 F.3d at 745.

conduct. RITE Br. 19 (quoting *McIntyre*, 514 U.S. at 345). It follows, RITE contends, that because "[p]re-filling ballot applications is *conduct*, and not even arguably 'pure speech,'" *Anderson-Burdick* must apply. *Id.* As VPC explains, RITE errs in attempting to disaggregate VPC's speech from its conduct. VPC Br. 20-22.[4] But its more fundamental error is in strictly equating pure speech with political speech. *See, e.g.*, RITE Br. 25 (incorrectly equating "pure" and "core political" speech). It is *political* speech that triggers heightened First Amendment protection, regardless of whether the message is conveyed through pure speech or expressive conduct.

"Core political speech occupies the highest, most protected position" in the "hierarchy" of "constitutional protection." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). The Supreme Court has never suggested that conduct that expresses a political message

[4] No one disputes that VPC's cover letter is pure political speech. *Infra* at 22. And the pre-filled ballot application and accompanying letter are "characteristically intertwined." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Where "the component parts of a single speech are inextricably intertwined," the court "cannot parcel out the speech, applying" different tests to different aspects. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

somehow falls outside the category of core political speech under the First Amendment, as RITE appears to assume. On the contrary, the Supreme Court repeatedly has indicated that expressive conduct *can* be political speech—depending, of course, on whether it conveys a political message.

In *Doe v. Reed*, 561 U.S. 186 (2010), for instance, the Supreme Court held that the "expressive activity" of signing a referendum petition "expresses a view on a political matter," and applied traditional "exacting scrutiny" for "First Amendment challenges to disclosure requirements in the electoral context." *Id.* at 194-97. This was so even though the signatory did not say (or write) in so many words "that the law subject to the petition should be overturned" or that the law "should be considered by the whole electorate." *Id.* (quotations omitted). The act of affixing one's signature to a referendum petition expressing that message alone triggered "review under the First Amendment." *Id.*; *see Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (recognizing that the "inherently expressive act" in *Reed* involved "core political speech"

(quoting *Meyer*, 486 U.S. at 421-22)); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (act of burning a cross may be "core political speech").[5]

Reed also indicated that *Anderson-Burdick* would apply "[t]o the extent a regulation concerns the legal effect of a particular activity" in the electoral process. 561 U.S. at 195. But that caveat does not apply to the Kansas law here. That law does *not* regulate the legal effect of a pre-filled ballot application in the electoral process. Instead, the Kansas law aims directly and exclusively at third-party advocacy. *See Meyer*, 486 U.S. at 417; *Buckley*, 525 U.S. at 186. Its only effect is to criminalize the act of filling out the ballot application, stifling such advocacy. *See* Kan. Stat. Ann. § 25-1122(k)(5); *see also supra* at 14.

For this reason, RITE also errs in asserting that the Kansas law merely regulates the "mechanics of the electoral process." RITE Br. 18 (quoting *McIntyre*, 514 U.S. at 345)). The law can hardly be traditional electoral-mechanics regulation when it *does not regulate voters, or would-*

[5] *Reed* likewise rejects Appellants' suggestion that First Amendment speech protections do not apply because the Kansas law regulates "a state-created form" on which certain information must be included for "the form to be accepted." Appellants' Br. 17; *see Reed*, 561 U.S. at 195 ("Petition signing remains expressive even when it has legal effect in the electoral process.").

be voters, or even candidates. Instead, it attaches consequences exclusively to non-voting third parties. Put differently, the law does not establish the time, place, or manner of election administration, *see* VPC Br. 36, unlike the ballot-speech cases discussed above, *cf. Mazo*, 54 F.4th at 142 ("speech that relates to an election but occurs nowhere near the ballot or any other electoral mechanism is treated as core political speech entitled to the fullest First Amendment protection"). In addition, the Kansas law stifles core political speech, so First Amendment speech protections apply, even if *Anderson-Burdick*'s threshold condition were satisfied.

On that score, RITE's argument that First Amendment speech protections apply only to pure speech, not expressive political conduct, (again) takes case law out of context. RITE quotes *McIntyre* to support its argument. RITE Br. 19. But *McIntyre* did not hold that pure speech was necessary for First Amendment speech protections to apply. Instead, *McIntyre*'s observation that the case involved "a regulation of pure speech" described the law and speech at issue in that particular case. 514 U.S. at 345. *McIntyre* went on to explain that *Anderson-Burdick* did not apply because "the category of speech regulated by the Ohio statute"—

namely, "core political speech"—"occupie[d] the core of protection afforded by the First Amendment." *Id.* at 346-47. In other words, the law in *McIntyre* was no "ordinary election restriction" subject to *Anderson-Burdick* because it imposed "a limitation on political expression subject to exacting scrutiny." *Id.* at 345-46 (quotations omitted).

Nor was there any principled reason for *McIntyre* to draw the distinction between pure speech and expressive activity that RITE attributes to it. "[T]he First Amendment protects symbolic conduct as well as pure speech." *Virginia*, 538 U.S. at 360 n.2. And a message is no less "a matter of societal concern" simply because of how it is conveyed. *Meyer*, 486 U.S. at 421. Take this case. Encouraging would-be voters to vote by mail is political speech, plain and simple, as everyone agrees. *Infra* at 22. That is true regardless of whether that message is communicated by word or by deed. VPC's voter-engagement efforts involve "interactive communication[s] concerning political change" on a critically important issue "that [all] have a right to discuss publicly without risking criminal sanctions." *Meyer*, 486 U.S. at 421-22.

Beyond that, tens of thousands of Kansans responded to VPC's message by submitting vote-by-mail applications. As such, it is substantially more likely that those individuals—who took concrete action to ensure they could vote—would engage publicly with the issues of the day in advance of voting. *Cf. Meyer*, 486 U.S. at 422-23 (restriction on paid petition circulators restricted political expression by making it less likely that initiatives would be placed on the ballot and thus become "the focus of statewide discussion"). And "defendants concede that the letter" expressing the same pro-mail-voting message "is protected core political speech." *VoteAmerica*, 2023 WL 3251009, at *13; *see also* Appellants' Br. 8 ("cover letter accompanying the pre-filled application in VPC's mailings is indisputably protected speech"). They can scarcely contend that the *same message* is not political speech merely because of how that message is conveyed.[6]

[6] VPC's pre-filled advance ballot applications convey this message regardless of whether they were accompanied by the cover letter, which is one reason why *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), is inapplicable. There, the conduct was expressive "only because" it was "accompanied [by] speech" explaining it. *Id.* at 66. Not so here. And VPC's expressive activity does not *lose* First Amendment protection simply because it was accompanied by *more* speech.

In short, this case is governed by First Amendment speech principles because the Kansas law does not regulate electoral mechanics and because it stifles core political speech. The decision below should be affirmed.

II. UNDER *ANDERSON-BURDICK*, THE COURT WOULD EVALUATE THE BURDEN ON EXPRESSION, NOT THE BURDEN ON THE RIGHT TO VOTE.

The principal claim at issue in this case arises under the First Amendment's guarantee of free speech. VPC does not claim that the Kansas statute burdens Kansas voters' right to vote. Yet RITE asks this Court to evaluate the statute's "burden on the right to vote" in its application of the *Anderson-Burdick* framework. RITE Br. 29. In RITE's view, once a claim comes within *Anderson-Burdick*'s ambit, it is automatically converted into a right-to-vote claim that is measured by the law's impact on voting. Indeed, RITE goes so far as to fault the district court for evaluating the burden on speech in its alternative *Anderson-Burdick* holding. RITE Br. 30-31. Here, too, RITE is mistaken. *Anderson-Burdick* does not apply. *See* Part I, *supra*. But under that

framework, courts evaluate the burden on the right asserted, which in this case is the First Amendment right to speech.

Anderson itself makes this point abundantly clear. The "first" step under its framework, the Supreme Court explained, is for a court to "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments *that the plaintiff seeks to vindicate*." *Anderson*, 460 U.S. at 789 (emphasis added). The court must then consider the "legitimacy and strength" of the state's interest in its election law, and "the extent to which those interests make it necessary to burden the plaintiff's rights," which in context clearly means the rights the plaintiff seeks to vindicate. *Id.*

So when a plaintiff claims that a state law impermissibly burdens the right to vote, a court applying *Anderson-Burdick* must evaluate that burden. But when a plaintiff claims that a state law impermissibly burdens the right to speak, a court applying *Anderson-Burdick* must evaluate the law's impact on speech. And so on. That is, after all, the "process" of "ordinary litigation." *Id.* When a plaintiff claims that a right is infringed, a court evaluates the degree of *that* infringement (not some

other infringement) and whether it is justified by some countervailing consideration.

Consider the Court's decision in *Timmons*. There, a political party alleged that Minnesota's "antifusion" law prohibiting candidates from appearing on the ballot as the candidate of more than one political party "violated the party's associational rights under the First and Fourteenth Amendments." 520 U.S. at 354-55. A political party's rights invariably "affect[] not only the party's rights, but also the First Amendment rights of voters," *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006), because voters' choices are shaped by whether and how a party's candidates appear on the ballot. Yet the Supreme Court did not restrict its analysis to the Minnesota law's burdens on the right to vote. Instead, the Court focused almost exclusively on the burden on the *party's* associational and speech rights, *Timmons*, 520 U.S. at 358-64, consistent with *Anderson*'s charge that courts applying its framework must evaluate the burden on the rights asserted.

The cases cited by RITE likewise illustrate the point. Take *Mazo*, which applied the *Anderson-Burdick* framework to candidate speech on the ballot. In undertaking the first step under *Anderson-Burdick*, the

court did not evaluate the speech restriction's burden on the right to vote; the court evaluated the burden on speech. *See* 54 F.4th at 146-53 (evaluating "severity" of law's "burdens [on] the expressive rights of candidates").

The Ninth Circuit made a similar point in *Soltysik*, instructing the district court on remand to consider the extent to which California's limitation on ballot text "improperly discriminate[d] on the basis of viewpoint or compel[led] candidate speech" when assessing the "burden . . . on candidates" under the *Anderson-Burdick* framework. 910 F.3d at 449 n.7. Lest there be any doubt, the court cited prior Ninth Circuit precedent evaluating the burden on the right to speech when applying the *Anderson-Burdick* framework. *See Chamness v. Bowen*, 722 F.3d 1110, 1116-18 (9th Cir. 2013); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1017 (9th Cir. 2002) ("This is not a case where the right to vote or access to the ballot is at issue.").

By contrast, RITE cites no case holding that a court evaluating a free speech claim through the lens of *Anderson-Burdick* should consider the burden on the right to vote, not the challenged burden on speech. RITE relies primarily on *Crawford v. Marion County Election Board*, 553

U.S. 181 (2008) (plurality opinion), but that case is unilluminating. "The complaints" there "allege[d] that the new [voter-ID] law substantially burden[ed] the right to vote," so of course the Court evaluated that burden. *Id*. at 187; *see also Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020).

RITE also cites this Court's decision in *Campbell*, but that case, if anything, hurts RITE's position. *Campbell* involved a challenge to Colorado law regulating the submission of ballot initiatives—Colorado's so-called "title setting" scheme. 203 F.3d at 741-42. In applying *Anderson-Burdick*, this Court did not evaluate its burden on the general public's "right to vote;" it instead appeared to assess the burden on initiative proponents' interest in participating in the electoral and legislative process by placing initiatives on the ballot. *Id*. at 747.

Stepping back, RITE's argument makes even less sense. RITE's position seems to be that an election law restricting speech should pass First Amendment muster so long as it does not unduly burden the right to vote, no matter its burden on speech. That does not follow. Nor does it follow that a court considering a free speech claim under any framework would ignore the law's burden on speech. RITE's position

would convert VPC's First Amendment speech claim, asserting its own *speech* rights, into a third-party standing claim asserting the *voting* rights of others. But there is no legal or logical principle that would warrant that result. Certainly, RITE offers none. Under *Anderson-Burdick*, a court faced with a claim that an election law impermissibly burdens speech must evaluate that law's burden on speech.

CONCLUSION

For all the foregoing reasons, as well as those stated in VPC's brief, this Court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Circuit Rule 32(c). The brief contains 5,378 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in New Century Schoolbook 14-point font.

Date: September 14, 2023

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I hereby certify that with respect to the foregoing brief:

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Date: September 14, 2023 */s/ Richard B. Goetz*
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CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on September 14, 2023, I electronically filed the foregoing Amicus Brief Supporting Appellee via ECF, and service was accomplished on counsel of record by that means.

Date: September 14, 2023 */s/ Richard B. Goetz*
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