No. 25-3138

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VoteAmerica, et al.,
Plaintiff-Appellees
v.
Scott Schwab, et al.,
Defendants-Appellants,

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

BRIEF OF *AMICI CURIAE* STATES OF OKLAHOMA AND 16 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

Amici curiae the States of Oklahoma ("Oklahoma"), Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Montana, Nebraska, Ohio, South Carolina, Tennessee, Texas, and West Virginia have a compelling interest in defending state sovereignty over election administration. The Constitution grants States primary authority to regulate the "Times, Places and Manner" of elections. U.S. Const. art. I, § 4, cl. 1. This authority encompasses the power to adopt reasonable regulations to ensure election integrity, prevent voter confusion, and facilitate orderly election administration.

Kansas sought to exercise its constitutional authority to protect elections with the enactment of K.S.A. 25-1122(k)(2). This statute prohibits the solicitation, by mail, of a registered voter to file an advanced ballot application with an application partially (or fully) completed prior to mailing. In other words, it prevents entities from sending partially (or fully) completed advanced ballot applications to registered voters to submit themselves.

The district court's decision to enjoin this reasonable restriction undermines States' foundational authority to regulate elections. First, by grounding its "improper purpose" finding on judicially noticed national political events rather than the actual legislative text and record, the decision improperly created a roadmap for invalidating

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[1] The States timely file this brief as permitted by Fed. R. App. P. 29(a)(2).

any election security measure enacted in the wake of contentious elections. Second, by refusing to consider the non-public forum nature of government forms, the decision applied an overly stringent level of scrutiny. Third, by demanding robust empirical proof of specific harms before states may act preventatively, the decision hamstrings states' ability to protect election integrity. Fourth, by second-guessing reasonable legislative judgments, the decision intruded on state sovereignty.

These issues affect all States that seek to regulate election procedures while respecting First Amendment principles. The Amici States file this brief to explain the proper framework for analyzing election regulations under the First Amendment and to defend the deference that must be afforded to state legislatures in this arena.

SUMMARY OF ARGUMENT

The district court employed a flawed methodology in determining the legislative purpose behind the enactment of the Kansas law in question. This Court's recent decision in *Poe v. Drummond*, 149 F.4th 1107 (10th Cir. 2025), explains that courts must focus foremost on what the "statute's text demonstrates" about the statute's legislative purpose, *id.* at 1126, rather than embrace speculation about hidden motives based on national political context. The text of Kansas's statute reveals clear, content-neutral purposes: preventing voter confusion, facilitating efficient election administration, and protecting election integrity. If Kansas truly sought to suppress speech favoring mail voting, the statutory text would not be limited to regulating pre-filled information on official government forms.

Instead of analyzing the text, the district court took judicial notice of national political events—post-2020 election litigation, political rhetoric about mail voting, and the events of January 6, 2021—none of which appeared in the Kansas legislative record. This approach cannot be squared with *Poe*'s holding that "contemporary statements from a few legislators do not persuade us of discriminatory intent" and that courts must presume legislatures "act[] in good faith." 149 F.4th at 1125–26. The district court's methodology would subject virtually any post-2020 election security measure to strict scrutiny based on national political climate rather than actual legislative purpose—a result fundamentally at odds with *Poe* and basic principles of democratic governance.

The district court also erred in refusing to consider whether advanced ballot applications constitute a non-public forum. The nature of the forum directly informs whether and how intermediate scrutiny should be applied. Government forms, including election forms, have long been recognized as non-public fora subject to reasonable content-based restrictions. The Supreme Court's decision in *Vidal v. Elster*, 602 U.S. 286 (2024), confirms that content-based restrictions with deep historical roots—including election regulations—warrant reduced scrutiny even when they affect speech.

The district court imposed an improperly demanding evidentiary burden on Kansas to justify its law. States need not prove their regulatory interests with empirical precision when enacting prophylactic election integrity measures. The Supreme Court has repeatedly held that states may act on common sense, history, and reasonable

concerns, not just on hard data from controlled studies. *See Burson v. Freeman*, 504 U.S. 191, 208–09 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Here, Kansas presented ample evidence of problems with pre-filled applications in 2020: duplicate applications, inaccurate information, and voter confusion. The district court erroneously dismissed this evidence as "minimal" or anecdotal and demanded proof that pre-filled applications specifically caused each problem. The proposed standard is both unworkable and contrary to established precedent. States must have the latitude to confront emerging problems before they develop into systemic failures.

The district court failed to appreciate the deference owed to state election regulations. Although courts properly police the boundaries of permissible regulation, they must not overstep and substitute their policy judgments for those of elected representatives. The Constitution assigns primary responsibility for election administration to the states, and courts must respect that allocation of authority.

The district court's opinion, though, reads like a legislative veto—second-guessing policy choices, weighing competing interests, and concluding that alternative regulations would better serve state interests. This approach is particularly problematic in the election context, where state legislatures must balance numerous competing concerns and make predictive judgments about what will work best for their citizens.

Courts should intervene only when states clearly exceed constitutional boundaries, not whenever a judge might have written the statute differently.

ARGUMENT

I. The District Court Erred by Relying on Material Outside the Record Rather Than the Statute's Text to Assess Kansas's Purpose.

The threshold question on remand was whether Kansas enacted its law "because of disagreement with the message" that pre-filled applications convey. *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022). If so, strict scrutiny would apply. If not, intermediate scrutiny would govern. *VoteAmerica v. Schwab*, 121 F.4th 822, 851 (10th Cir. 2024) ("*VoteAmerica II*").

The district court held that Kansas enacted the statute "to suppress speech which advocates voting by mail" warranting strict scrutiny. *VoteAmerica v. Schwab*, 790 F. Supp. 3d 1255, 1276 (D. Kan. 2025) ("*VoteAmerica III*"). This finding was error. The court's methodology for detecting improper purpose was flawed in at least three respects.

A. Per *Poe*, a Legislative Purpose Analysis Centers on the Statutory Text.

This Court's recent decision in *Poe* provides guidance on the proper methodology for determining whether a statute was enacted for an improper purpose. There, this Court held that plaintiffs "failed to prove that the [Oklahoma] legislature enacted SB 613 for invidious discriminatory purpose" in significant part because the "statute's text demonstrates" that the "legislature did not enact SB 613 in part because of, not merely

in spite of, its adverse effects upon transgender persons." *Poe*, 149 F.4th at 1126 (citation modified).

This Court, in short, emphasized that a textual analysis provides concrete evidence of legislative purpose. If the statute's text does not align with the alleged improper purpose, the claim becomes implausible. *Id.* As this Court explained in *Poe*, "If the law truly sought to discriminate against transgender persons, the prohibition would not distinguish based on age." *Id.* The text, in other words, revealed the "clear" legislative purpose: "children's welfare." *Id.*

The same principle applies here. The statutory text reveals clear, content-neutral purposes. The statute regulates the format of government forms used for election administration, specifically prohibiting pre-filled information that could lead to inaccurate applications, voter confusion, and administrative inefficiencies. Nothing in the statutory text targets or references mail voting advocacy, pro-mail-voting viewpoints, or protected speech content of any kind.

If Kansas truly sought to suppress speech favoring mail voting, as the district court found, the statutory text would not be limited to regulating pre-filled information on official government forms. The statute would more broadly restrict organizations from advocating for mail voting, distributing information about mail voting, or engaging in get-out-the-vote efforts promoting mail voting. *See id.* Yet, the statute does none of these things. The text demonstrates that Kansas enacted this measure to

address specific administrative concerns with pre-filled applications, not to suppress any particular viewpoint about voting methods.

The district court's failure to ground its purpose analysis in the statutory text represents a fundamental error that *Poe* directly addresses. *Poe* was clear: When determining legislative purpose, courts cannot bypass what the statute actually says and does in favor of speculation about hidden motives and overbroad context.

B. The Proper Inquiry Focuses on Whether the Statute Can Be Justified Without Reference to Speech Content, Not Post-Hoc Political Context.

The Supreme Court has clearly articulated the standard for detecting content-based purpose in a statute. The principal inquiry is whether the government "adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791 (1989). For content neutrality, the government must show that a "law is 'justified without reference to the content of the regulated speech.'" *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). This inquiry focuses on the government's justification for the regulation, not extraneous political circumstances. Here, Kansas offered three content-neutral justifications for its law: (1) minimizing voter confusion; (2) facilitating efficient election administration; and (3) fostering confidence in election integrity. Doc. 20, Appellants' Br. at 11–12. Each justification can be fully articulated without reference to whether voters should vote by mail or the political valence of encouraging mail voting. The state simply wants

applications that are more likely to be accurate, easier to process, and less likely to confuse voters about the source of mailings.

The district court did not dispute that these justifications are facially content-neutral. Instead, the court looked past the stated justifications and relied heavily on national political events that occurred around the time of the statute's enactment—events that appear nowhere in the Kansas legislative record. *VoteAmerica III*, 790 F. Supp. 3d at 1273–75. This approach conflates irrelevant context with purpose.

That an election security measure is enacted during a period of national debate about election procedures does not demonstrate that the measure was adopted to suppress a particular viewpoint. To the contrary, heightened public attention to election administration often prompts needed reforms. The district court's logic would render nearly every post-2020 election security measure presumptively suspect—an untenable result that would chill legitimate state regulation.

C. Legislative Purpose Must Be Assessed Based on the Text and the Legislature Enacting That Text, Not National Events.

When determining legislative purpose, courts generally examine "the statute's stated purposes, the purposes of the statute as advanced by the government in litigation and legislative purposes which the Court can infer when a statute singles out a particular topic." *VoteAmerica III*, 790 F. Supp. 3d at 1271 (citing *McCullen*, 573 U.S. at 480-82). As this Court has repeatedly made clear, "contemporary statements from a few legislators do not persuade us of discriminatory intent" because "[w]hat motivates one

legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Poe*, 149 F.4th at 1125 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968)); *see also Citizens for Const. Integrity v. U.S.*, 57 F.4th 750, 768 (10th Cir. 2023) ("[T]he statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute.").

Logically, then, courts may not impute purpose to a legislature as a whole based on national political events that were not part of the legislative deliberations or on statements by individuals not even part of the legislature. Yet, that is precisely what the district court did here. The court took judicial notice of post-2020 election litigation nationwide, *VoteAmerica III*, 790 F. Supp. 3d at 1273–74, President Trump's statements on January 6, 2021, *id.* at 1274-75, and the events at the U.S. Capitol that occurred the same day, *id.* at 1275. The court then inferred from this national context that Kansas legislators must have been motivated by hostility toward mail-voting advocacy. *Id.*

This approach is obviously problematic. Although the basic occurrence of certain political or legal events may satisfy Rule 201(b)'s requirements as facts that are "generally known" or "accurately and readily determined from sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b), the court's error lay in making unwarranted inferences and conclusions from those facts. The district court effectively took judicial notice not merely of objective facts—that certain litigation occurred, that certain statements were made—but of its own speculative interpretation that these national events motivated Kansas legislators. This impermissible leap transforms

judicial notice from a doctrine about uncontroversial facts into a vehicle for judicial mind-reading about legislative purpose.

Put differently, even accepting that the events of January 6, 2021, occurred and that various post-2020 election litigation efforts took place, nothing about these facts compels—or even suggests—that Kansas legislators were motivated by these national developments rather than by the Kansas-specific administrative problems documented in the legislative record. The noticed facts are simply irrelevant. The court conflated the existence of a national political climate with proof of improper state legislative purpose, which is not the point of judicial notice. The doctrine permits courts to notice facts, not to reach unwarranted conclusions about what those facts mean for a legislature's motivations.

This Court's recent decision in *Poe* makes clear why this inferential leap is legally impermissible. *Poe* instructs that prior legislative actions or national political developments do not establish the current legislature's purpose. This Court held that "legislation not enacted into law does not show discriminatory intent because the legislature's inability to enact that legislation suggests that the legislature and the governor did not agree with it." *Poe*, 149 F.4th at 1125. This Court further "doubt[ed]" that "textually different legislation unrelated to SB 613, especially legislation enacted during prior legislatures, shows discriminatory intent because the legislature would have enacted each separate law for different intents and purposes." *Id.* at 1126. Moreover,

this Court emphasized that "[a] legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith." *Id.* (citation omitted).

The district court's approach here cannot be reconciled with *Poe*. First, it assumed that state legislators are invariably motivated by national political considerations rather than local concerns. *VoteAmerica III*, 790 F. Supp. 3d at 1275. Here, the actual Kansas legislative record focused on problems Kansas officials encountered in 2020: voter confusion, duplicate applications, and administrative burdens. Defendants' Br. at 19-26. These were legitimate Kansas-specific concerns that the statute directly addresses.

Second, the court failed to account for the temporal relationship (or lack thereof) between the events cited and the legislative action taken. In short, the timeline of the Kansas law's enactment undermines an inference of improper motivation based on national events. Although the Kansas legislature began its session on January 11, 2021, five days following the events at the U.S. Capitol on January 6, the legislation at issue here was not introduced until February 10, 2021, over a month later. *VoteAmerica III*, 790 F. Supp. 3d at 1275. The bill then progressed through the normal legislative process, including committee review, amendments, and floor debate, before final enactment in May 2021.[2] To suggest that a comprehensive legislative process spanning several months was primarily motivated by events occurring on a single day 1,100 miles away

[2] https://kslegislature.gov/li_2022/b2021_22/measures/hb2332/.

is implausible, to say the least, absent some compelling or stark indication otherwise. This timeline instead demonstrates legislative deliberation focused on Kansas-specific concerns about election administration that emerged during the 2020 election cycle.

Third, the court below conflated general concerns about election integrity with hostility toward a particular viewpoint. The timeline demonstrates that Kansas legislators were responding to legitimate concerns about election administration—concerns that became more salient due to the unprecedented expansion of mail voting in 2020. As *Poe* instructs, courts must presume that legislators act in good faith and must look to what the statute's text demonstrates about legislative purpose. 149 F.4th at 1126. Rather than analyzing what the text tells us about Kansas's purposes, the district court took judicial notice of national political events and inferred improper motive from external context divorced from the actual legislative process. *VoteAmerica III*, 790 F. Supp. 3d at 1275. This approach cannot be reconciled with *Poe*'s holding that courts must focus on statutory text and the actual legislative record when determining purpose, as opposed to events displaced in time and relevance. For these reasons and more, the district court's finding of improper purpose should be reversed.

II. The District Court Failed to Consider the Non-Public Forum Nature of Government Forms.

The district court's application of intermediate scrutiny failed to properly account for the non-public forum nature of government forms.

A. Government Election Forms Are Non-Public Fora Subject to Reasonable Regulation.

"Not every instrumentality used for communication . . . is a traditional public forum or a public forum by designation." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985). Government forms, in particular, have long been recognized as non-public fora where content-based restrictions may be permissible if reasonable and viewpoint-neutral.

The Supreme Court applied this principle in *Vidal v. Elster*, 602 U.S. 286 (2024), which upheld content-based restrictions on trademark registrations. The Court expressed substantial doubt about whether the federal trademark register is analogous to a limited public forum, noting that "unlike a speaker in a limited public forum, a markholder does not communicate with customers on the register." *Id.* at 309. Rather, as the U.S. Patent and Trademark Office acknowledged in that case, the register "is a way of warning potential infringers that they risk liability if they use the same or confusingly similar marks." *Id.* at 309-10. Trademark registration is thus a government program with specific purposes and limitations. Content-based restrictions are permissible if they are reasonable in light of the program's purposes and do not discriminate based on viewpoint. *Id.* at 300.

The same analysis applies to the advanced ballot applications at issue here. These forms serve a specific governmental purpose: collecting information necessary to administer elections. The forms do not exist to facilitate private expression. They contain discrete data fields for statutorily required information. Kansas has a substantial

interest in ensuring that these forms are completed accurately and in a manner that facilitates efficient processing.

This Court recognized the relevance of this framework in *VoteAmerica II*. This Court noted that "the use of forms by the government inherently requires some content restrictions" and that "the likelihood that the Prohibition's restrictions on what can be done with a government form would impair the free marketplace of ideas is even less than the potential impairment from the somewhat analogous context of content restrictions on the use of government property constituting a nonpublic forum." 121 F.4th at 850-51. This language signals that the non-public forum framework is relevant to the analysis, even if this Court did not formally conduct a forum analysis in *VoteAmerica II*.

B. Historical Regulation of Election Procedures Counsels in Favor of Heightened Deference.

Vidal also teaches that historical regulation of a particular area counsels in favor of reduced scrutiny, even for content-based restrictions. 602 U.S. at 300. History matters when determining the level of scrutiny to apply. *Id.*

Election regulations have an even longer historical pedigree than trademark restrictions. States have regulated the mechanics of voting—including the forms used for absentee voting—for well over a century. App.III 724-25 (documenting Kansas's regulation of absentee voting dating to 1868, with Kansas enacting the nation's first

mail-voting statute for railroad employees in 1901)[3]; Kan. Legis. Rsch. Dep't, *Kansas Voter Registration and Voting Law Changes since 1995*, at 5 (Aug. 1, 2023) (citing 1868 Ch. 36 of the General Statutes, § 45)[4]. The Supreme Court has repeatedly affirmed that states have substantial interests in regulating election procedures and that courts should be cautious about invalidating such regulations. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997) ("States also have a strong interest in the stability of their political systems."); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]here must be a substantial regulation of elections if they are to be fair and honest").

This historical background confirms that content-based restrictions on government election forms should not be subjected to the most stringent form of intermediate scrutiny. Rather, such restrictions should be evaluated with appropriate deference to state judgments about what regulations will best serve state interests. The district court's refusal to even consider this framework—despite this Court's remand for application of different level of scrutiny than initially applied—exemplifies the errors that permeated its analysis. *VoteAmerica III*, 790 F. Supp. 3d at 1281 n.27.

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[3] References to the Appendix include the volume number (e.g., App.III) followed by specific page numbers.

[4] Available at https://www.kslegresearch.org/KLRD-web/Publications/ElectionsEthics/memo_genl_shelley_voting_registration_law_changes_2023update.pdf

III. States Need Not Prove Harms with Empirical Precision When Enacting Prophylactic Election Integrity Measures.

The district court imposed an inappropriately demanding evidentiary burden on Kansas. The court faulted Kansas for offering "minimal" or anecdotal evidence and for failing to prove that pre-filled applications specifically caused the problems Kansas sought to address. *VoteAmerica III*, 790 F. Supp. 3d at 1277–83. This approach contradicts established precedent and creates an unworkable standard for election regulations.

A. Election Regulations Merit a Modified Burden of Proof.

The Constitution assigns states primary responsibility for regulating elections. U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. Within constitutional bounds, states have broad discretion to structure their election systems as they see fit. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8–9 (2013); *Timmons*, 520 U.S. at 366 ("States also have a strong interest in the stability of their political systems."). This discretion is particularly important in the context of emerging challenges to election administration. Voting by mail expanded dramatically in 2020, creating novel issues that states are still working to address. App.III 726–29 & n.8 (describing the challenges accompanying the unprecedented expansion of mail voting in 2020 and resulting legislative responses by Kansas and Georgia in 2021). Different states may reach different conclusions about how best to balance competing concerns. Some may permit pre-filled applications; others may prohibit them.

Given this constitutional framework, the Supreme Court has consistently held that states need not prove their interests with empirical precision when enacting election regulations. In *Burson v. Freeman*, for instance, the Supreme Court upheld a restriction on campaigning near polling places even though the state had not conducted empirical studies demonstrating harm. 504 U.S. at 208–09. The Court noted that requiring such proof would "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)). This was obviously intolerable.

More recently, in *Frank v. Lee*, this Court reiterated that "the Supreme Court has relaxed the demands of the narrow-tailoring inquiry when a state's electioneering regulations are designed to protect voters engaged in the act of voting." 84 F.4th 1119, 1141 (10th Cir. 2023). While that case involved restrictions closer to the polling place, the broader principle applies: States may act preventatively to protect election integrity without waiting for concrete harm to materialize.

The district court acknowledged *Frank* but distinguished it on the ground that advanced ballot applications do not "physically interfere[] with electors attempting to cast their ballots." *VoteAmerica III*, 790 F. Supp. 3d at 1280 n.28 (citation omitted). Among other faults, this distinction misses the point. The relaxed burden of proof applies not just to restrictions at the polling place but to election integrity measures more generally—particularly prophylactic measures designed to prevent problems before they occur.

B. States May Act Preventatively Based on Reasonable Concerns About Election Administration.

The district court's demand for empirical proof was particularly inappropriate given the nature of Kansas's concerns. Kansas was not responding to a single discrete problem but to a constellation of issues that arose during an unprecedented expansion of mail-in voting in 2020.

The record shows that Kansas experienced: (1) a surge in duplicate applications, with some counties receiving more than 300 times more duplicates than in prior elections; (2) numerous applications with inaccurate information; (3) voter confusion about whether applications came from election officials; and (4) increased administrative burdens on election officials. App.III 726–29, 741–49. The district court acknowledged these facts but faulted Kansas for failing to prove that pre-filled applications were the specific cause of each problem. *VoteAmerica III*, 790 F. Supp. 3d at 1277–82.

This evidentiary standard is unworkable. Election administration involves complex, interconnected systems. Problems rarely have single causes, much less indisputably so. When a state experiences a dramatic increase in duplicates, inaccuracies, and confusion during the same election in which third parties mass-mailed pre-filled applications for the first time, it is entirely reasonable for the state to conclude that the pre-filled applications contributed to the problems, even if the state is unable to prove definitively that such applications were the sole cause.

Moreover, the district court's approach would require states to allow problems to continue until they can conduct controlled studies isolating specific causes. This cannot possibly be the standard, and it is particularly problematic for election regulations, where states must act quickly to address emerging issues and cannot afford to wait for an academic certainty that will likely never come.

C. The District Court Improperly Demanded Perfect Empirical Evidence.

The district court's evidentiary approach is problematic in three ways. First, it devalued the testimony of experienced election officials who are uniquely positioned to identify operational problems. Second, it misunderstood the nature of legislative fact-finding by demanding scientific precision rather than reasonable inferences. Third, by requiring Kansas to prove that no countervailing evidence exists, the court substituted judicial policy preferences for legislative judgment in violation of basic separation-of-powers principles.

The evidentiary standard applied by the district court demonstrates the impracticality of its approach. By characterizing sworn testimony from experienced election officials as merely anecdotal and "minimal," *VoteAmerica III*, 790 F. Supp. 3d at 1276–77, the court devalued exactly the kind of evidence that should carry significant weight in evaluating election regulations. County election commissioners and other officials who directly oversee voting processes are uniquely positioned to identify operational challenges and inform legislative responses. Their firsthand accounts of

voter confusion, duplicate applications, and administrative burdens provide concrete evidence of problems warranting legislative attention.

The district court's characterization of such testimony as insufficient reflects a misunderstanding of how legislatures properly assess election administration issues. Unlike laboratory experiments or controlled studies, election administration involves real-world complexities that are best understood through the experiences of those persons *actually administering the system*. To dismiss such evidence as inadequate effectively requires legislatures to ignore executive branch experience and conduct formal empirical studies before addressing election-related problems—a standard inconsistent with established precedent.

Similarly, the district court's criticism that Kansas failed to track precisely how many duplicate applications involved pre-filled forms, *VoteAmerica III*, 790 F. Supp. 3d at 1282, imposes an unreasonable burden that ignores the circumstances under which election officials operated. The 2020 election presented unprecedented challenges: election officials managed a dramatic increase in mail voting while simultaneously navigating pandemic-related disruptions. To require that officials, in the midst of these challenges, track the source of every application before the legislature could respond places an impossible administrative burden on counties and effectively prevents prophylactic legislative action.

This criticism also misunderstands the nature of legislative fact-finding. Legislatures need not prove precise causation with scientific certainty; they may act on

reasonable inferences drawn from observed problems. *See, e.g.*, *Nat'l Ass'n for Rational Sexual Offense L. v. Stein*, 112 F.4th 196, 206 (4th Cir. 2024) ("States are free to legislate 'based on rational speculation unsupported by evidence or empirical data.' . . . So the legislature need not have been motivated by specific evidence" (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). When election officials report receiving unprecedented numbers of duplicate applications during the same period that third parties mass-mailed pre-filled applications for the first time, it is entirely reasonable to conclude that a connection exists—even without detailed tracking data. States do not have to wait until the next election to collect such data before acting.

Tellingly, the district court found that some evidence actually supported pre-filling applications. For example, one election official testified that pre-filled information can make processing easier in some respects. *VoteAmerica III*, 790 F. Supp. 3d at 1268, 1277. But the existence of some countervailing evidence does not defeat Kansas's interest in regulating, and what's good for the goose should have been good for the gander. That is to say, the quality and type of evidence was the same as that largely discarded by the court when it was put forth in favor of Kansas. Regardless, that some evidence goes either way does not prevent a legislature from legislating.

Election administration requires balancing competing values—convenience versus accuracy, ease of processing versus voter autonomy. These are quintessentially legislative judgments. Courts reviewing such judgments must not substitute their policy preferences for legislative determinations. The constitutional inquiry asks whether the

State has articulated legitimate interests and whether the regulation reasonably advances those interests—not whether the court would have reached a different policy conclusion. *Evans v. Sandy City*, 944 F.3d 847, 856–57 (10th Cir. 2019).

Here, the district court committed this error in multiple ways. First, by demanding that Kansas prove no countervailing evidence exists, the court ignored that policy decisions necessarily involve tradeoffs—there will always be some evidence supporting alternative approaches. Second, by identifying what it viewed as less restrictive alternatives, *VoteAmerica III*, 790 F. Supp. 3d at 1277–79, the court engaged in precisely the policy analysis reserved for legislatures. Perhaps disclosure requirements alone would address voter confusion; perhaps Kansas reasonably concluded they would not. Perhaps limiting application numbers would prevent duplication; perhaps Kansas determined pre-filling itself created the core problem. These are legislative judgments about effectiveness that courts cannot second-guess. The district court's analysis violates the principle that constitutional validity "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Evans*, 944 F.3d at 856–57.

The cumulative effect of the district court's evidentiary requirements fundamentally alters the nature of intermediate scrutiny. Under the district court's approach, states must: (1) identify significant interests; (2) demonstrate narrow tailoring; (3) prove interests with empirical precision; (4) establish specific causation for identified

harms; and (5) show that no evidence supports alternative approaches. This roughly five-part test far exceeds the traditional intermediate scrutiny framework and, in demanding empirical proof of causation and absence of countervailing evidence, actually imposes a more rigorous standard than many applications of strict scrutiny.

Intermediate scrutiny, properly understood, requires that restrictions be substantially related to important governmental interests—not that they be supported by incontrovertible empirical proof or be *the* demonstrably optimal approach. This more flexible standard appropriately recognizes that legislatures must make predictive judgments based on incomplete information and balance competing considerations. The district court's approach undermines this legislative prerogative and effectively transfers election policy decisions from state legislatures to federal courts.

This approach violates fundamental principles of federalism. If states must prove their regulatory choices with empirical certainty and may not adopt measures that judges think could be improved, courts become super-legislatures making policy choices under constitutional guise. States are laboratories of democracy that must have room to experiment with different approaches to election administration. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The district court's decision, if affirmed, would chill state election reform efforts nationwide by deterring prophylactic measures that cannot satisfy impossible evidentiary demands. This would ultimately harm the election integrity and voter confidence that states seek to protect.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that Kansas operated with an improper purpose here. The district court transformed intermediate scrutiny into a roving commission to invalidate state election laws based on speculation about hidden motives. Rather than examine statutory text—as this Court required in *Poe*, 149 F.4th at 1125–26—the court took judicial notice of national political events having nothing to do with Kansas's legislative process.

The district court's methodology would render states powerless to respond to problems in election administration without first allowing their electoral systems to sustain damage. No state could enact reforms after a contentious election without risking invalidation based on national political context. This Court should reject that approach.

Kansas's statute imposes only a small burden, leaves ample alternatives available, serves substantial state interests, and is carefully tailored to address real problems documented in the record. It satisfies intermediate scrutiny by any measure. This Court should reverse.

November 14, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the typeface requirements of Fed. R. App. P. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point) using Microsoft Word 2016. The document complies with the type-volume limitation of Fed. R. App. P. 27, because it contains 5,542 words, excluding the parts exempted.

s/ *Garry M. Gaskins, II*
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CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Additionally, this filing was scanned with Crowdstrike antivirus updated November 2025.

s/ *Garry M. Gaskins, II*
GARRY M. GASKINS, II

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will served by the appellate CM/ECF system.

s/ *Garry M. Gaskins, II*
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