ORAL ARGUMENT REQUESTED
No. 16-3147

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN WAYNE FISH, *et al*.,

Plaintiffs-Appellees,

v.

KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, NO. 16-cv-2105-JAR-JPO
THE HONORABLE JULIE ROBINSON

BRIEF OF APPELLANT KANSAS SECRETARY OF STATE

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 52 U.S.C. § 20510(b). The district granted Appellees' motion for preliminary injunction on May 17, 2016. Appellant timely filed a notice of appeal on May 23, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292.

ISSUES PRESENTED FOR REVIEW

1. Whether Appellees can establish that they suffer "irreparable harm" when they delayed thirty months and two election cycles before bringing suit, their harm is self-inflicted, and they are not yet qualified voters.
2. Whether the district court erred in interpreting the National Voter Registration Act ("NVRA") to prevent a State from requiring proof of citizenship from registrants who apply at a division of motor vehicles ("DMV") office.
3. Whether the district court erred in concluding that the balancing of equities favored issuance of a preliminary injunction.

STATEMENT OF THE CASE

This case challenges Kansas's 2011 law requiring that all newly-registering voters provide proof of citizenship to register to vote. K.S.A. § 25-2309(l). The law allows applicants to provide any of thirteen potential documents proving their United States citizenship. *Id*. If a Kansas agency already possesses evidence of the applicant's citizenship (e.g., a birth certificate held by the Kansas Department of Health and Environment Office of Vital Statistics ("OVS")), the Secretary of State's Office will obtain the evidence on the applicant's behalf. Also, an applicant can obtain without charge a replacement Kansas birth certificate for voter

registration purposes. K.S.A. § 25-2358. If an applicant does not possess any of the thirteen documents, then the applicant may demonstrate citizenship by presenting other evidence (e.g., an affidavit or school records) to the State election board. K.S.A. § 25-2309(m).

Appellees in this case, four individuals who applied to register to vote at the DMV but declined to provide proof of citizenship, as well as a fifth individual who did not apply to register,[1] argue that the NVRA prohibits a State from requiring proof of citizenship from any person who applies to register to vote at the DMV. Yet, the NVRA does not mention proof of citizenship at all. Moreover, their novel reading of the NVRA effectively creates a special privilege that people who apply to register at the DMV enjoy over people who apply by mail or who apply in person at any other government office–DMV applicants need not provide proof of citizenship, whereas the other applicants must do so, if state law so requires. No Member of Congress ever described the NVRA as having this effect. If the holding of the court below is sustained, it will upset the administration of elections across the country; and it will radically constrain the constitutional authority of States to set and enforce the qualifications for voters guaranteed by Article I, Section 2, of the United States Constitution.

[1] The State's voter registration database shows no record that Mr. Boynton applied to register at the DMV. App. 687.

Appellees filed their complaint on February 18, 2016, and their motion for a preliminary injunction on February 26, 2016. On May 17, 2016, the district court adopted Appellees' novel interpretation of the NVRA and issued a preliminary injunction mandating that the Appellant (hereinafter "the Secretary"), and effectively all 105 Kansas county election officers, register (for federal elections only) every individual who has applied to register to vote at a Kansas DMV office since January 1, 2013, and has not provided proof of citizenship. App. 736.[2] Pursuant to the district court's preliminary injunction, those individuals will be permitted to cast votes only for federal offices in the August 2, 2016, primary election. However, if they provide proof of citizenship they will also be permitted to vote for state and local offices.

The Secretary filed this appeal on May 23, 2016, and moved for expedited review.

I. The National Voter Registration Act

The NVRA, enacted in 1993, 42 U.S.C. § 1973gg, *et seq*., *recodified at* 52 U.S.C. § 20501 *et seq*,[3] "requires States to provide simplified systems for registering to vote in *federal* elections." *Arizona v. Inter Tribal Council of Arizona, Inc*. ("*ITCA*"), 133 S. Ct. 2247, 2251 (2013) (quoting *Young v. Fordice*,

[2] The district court denied a stay pending appeal on May 25, 2016. App. 876.
[3] The Secretary cites to the recodified sections of the NVRA.

520 U.S. 273, 275 (1997) (internal quotations omitted)). The NVRA requires States to permit individuals to apply to register to vote "by any of three methods: simultaneously with a driver's license application, in person, or by mail." *ITCA*, 133 S. Ct. at 2251 (quoting 52 U.S.C.§ 20503(a)). The "by mail" registration can be done through a state-created form or through the Federal Voter Registration Application Form ("Federal Form"). Although the NVRA preempts state laws that conflict with its provisions, such preemption is only with respect to the time, place, and manner of holding elections and only with respect to elections for Federal office. 52 U.S.C. §§ 20502(2) and 30101(3). The NVRA has no preemptive effect as to registration for elections for state offices.

ITCA and *Kobach v. Election Assistance Commission* ("*Kobach*"), 772 F.3d 1183, 1188 (10th Cir. 2014) concerned the NVRA provisions governing mail registration using the Federal Form. That registration method is governed by 52 U.S.C. § 20505, and the contents of the Federal Form are maintained by a federal agency, the Election Assistance Commission ("EAC"), "in consultation with the chief election officers of the States." 52 U.S.C. § 20508(a)(2).

The applicable registration method at issue in this case is the application with a driver's license, codified at 52 U.S.C. § 20504. Under that section, the NVRA requires that "[e]ach State motor vehicle driver's license application... shall serve as an application for voter registration with respect to elections for Federal

office unless the applicant fails to sign the voter registration application." *Id*. at (a)(1). The statute also provides that "[t]he voter registration application portion... may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C))" and "may require only the minimum amount of information necessary to... (i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id*. at (c)(2)(A)-(B). The registration form is required to include "a statement that—(i) states each eligibility requirement (including citizenship); (ii) contains an attestation that the applicant meets each such requirement; and (iii) requires the signature of the applicant, under penalty of perjury[.]" *Id*. at (c)(2)(C). The attestation portion of the voter registration application also must inform applicants of voter eligibility requirements and penalties for submitting a false voter registration application, and it must include statements regarding confidentiality. *Id*. at (c)(2)(D). The NVRA contains no provision prohibiting States from verifying the citizenship of a registration applicant by requiring proof of citizenship and "does not list... all the other information the State may—or may not—provide or request." *Young*, 520 U.S. at 286.

II. The Kansas SAFE Act

In 2011, Kansas enacted the "Secure and Fair Elections Act" ("SAFE Act") which amended various Kansas statutes concerning elections. The SAFE Act was supported by large bipartisan majorities in the Kansas Legislature.[4] The SAFE Act provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." K.S.A. § 25-2309(l). The Act enumerates thirteen different documents that constitute satisfactory evidence of citizenship, enabling Kansas election officials to assess the eligibility of voter registration applicants. *Id*. If a citizen is unable to produce one of the thirteen documents, the individual may establish citizenship by providing other evidence (e.g., affidavits from relatives, school records) to the State Elections Board. K.S.A. 25-2309(m). Additionally, if another Kansas agency already possesses such a document, the Secretary of State may obtain

[4] The House vote was 111-11; the Senate vote was 36-3. The majority of Democrats and virtually all Republicans voted in favor. *See* 2011 Permanent Journal of the Kansas House at 788, available at: http://www.kslegislature.org/li_2012/b2011_12/chamber/documents/final_calendar_house_2011.pdf, and 2011 Permanent Journal of the Kansas Senate at 474, available at: http://www.kslegislature.org/li_2012/b2011_12/chamber/documents/permanent_journal_senate_2011.pdf.

documentary proof of citizenship on the registrant's behalf, such as by obtaining evidence of birth certificates possessed by the Kansas OVS. *Id*. at (t). If a person does not provide adequate proof of citizenship at the time he applies to register to vote, he is placed on a list of incomplete voter registration applicants and is sent notices informing him that proof of citizenship must be provided to complete his voter registration. App. 540.

From the time that the registration provisions of the SAFE Act went into effect on January 1, 2013, through March 28, 2016, 244,699 individuals completed their registrations by providing proof of citizenship. That number represents approximately 94% of all Kansas voter registration applicants during that period. App. 541.

The SAFE Act provisions concerning proof of citizenship were enacted to respond to the persistent problem of noncitizens registering to vote. Despite Kansas's best efforts, noncitizens falsely attesting to United States citizenship were registering in Kansas, making Kansas's registration records inaccurate and diluting the votes of Kansas citizens when noncitizens voted. Indeed, when the SAFE Act was enacted, Kansas identified numerous instances of noncitizens registering to vote. App. 546. The Kansas Legislature also received testimony from the Seward County clerk regarding a concerted attempt by more than fifty noncitizens to register and vote in one election. *Id*. Additionally, in the past few years, the

Sedgwick County Election Office has identified 25 noncitizens who successfully registered to vote before the law was implemented (including aliens who applied at the DMV), or who attempted to register and were *prevented* from doing so as a result of the SAFE Act. App. 901-907.

III. ***Arizona v. Inter Tribal Council of Arizona***

ITCA is a preemption case involving the NVRA's Federal Form registration method, and specifically the meaning of the phrase stating that States must "accept and use" the Federal Form. *ITCA*, 133 S. Ct. at 2257; 52 U.S.C. § 20505(a)(1). The EAC is responsible for approving the contents of the Federal Form. *ITCA*, 133 S. Ct. at 2251-2252. In *ITCA*, the challenged Arizona law required state and county officials to "reject" a completed Federal Form that was not accompanied by documentary proof of citizenship when the Arizona-specific instructions on the Federal Form lacked any documentary proof requirement. *Id*. at 2251. Thus, the Court held, "We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship *not required by the Federal Form* is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Id*. at 2257 (citation omitted) (emphasis added).

The Supreme Court did *not* hold that the NVRA forbade Arizona from requiring proof of citizenship. As long as the State accepted and used the Federal Form, it could also require proof of citizenship if the EAC subsequently modified

the Arizona-specific instructions on the Federal Form. Accordingly, *ITCA* stated that Arizona was free to renew its request that the EAC modify the state-specific instructions of the Federal Form to include Arizona's proof-of-citizenship requirement. *ITCA*, 133 S. Ct. at 2260. In 2016, the EAC modified the state-specific instructions of the Federal Form to permit Kansas, Georgia, and Alabama to require proof-of-citizenship from Federal Form applicants. *See* App. 1041, 1048, 1051, 1052.

IV. ***Kobach v. Election Assistance Commission***

Like *ITCA*, *Kobach* involved the Federal Form, rather than the DMV provisions of the NVRA. 772 F.3d at 1188. The relevant portion of *Kobach* was a review by this Court of the EAC's "informal adjudication" denying Kansas's and Arizona's request to modify the Federal Form. *Id*. at 1197. To prevail, the States had to show that the EAC's decision was "arbitrary and capricious" under a "very deferential" standard of review to the EAC. *Id*. at 1196-97. This Court was limited to reviewing whether the agency decision provided "grounds upon which the agency acted [that were] clearly disclosed in, and sustained by, the record." *Id*. at 1197 (citations omitted). Furthermore, to sustain the agency's decision, this Court only had to find that the agency's decision was "rationally connected" to evidence in the record, in which the agency suggested five alternative methods that the agency *assumed* Kansas could effectively undertake instead of requesting a

modification to the Federal Form. *Id*. In sum, *Kobach* simply held that, based on the record before the agency, the agency could rationally reach its conclusion that proof of citizenship was not necessary to include on the Federal Form.

Kobach did *not* hold that the agency was prohibited from reaching the opposite conclusion. Nor did it hold, or even imply, that a State was forbidden from determining that documentary proof of citizenship was necessary in the State-created DMV application process "to enable State election officials to assess the eligibility of an applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20504(c)(2)(B)(ii). In fact, such a decision by the EAC would have violated the APA, as the EAC has no authority to determine the contents of registration application forms used at the DMV. Under the DMV provisions of the NVRA, the State, not a federal agency, determines what is necessary to enforce the state's registration laws and administer the state election procedures. *Compare* 52 U.S.C. § 20504(c)(1) (States include "a voter registration application") *with* 52 U.S.C. § 20508(a)(2) (the EAC develops the Federal Form).

In the period since *Kobach* was decided, the EAC regained a quorum of commissioners and a duly-appointed Executive Director. The reconstituted EAC was asked again to modify the Kansas-specific instructions of the Federal Form to require proof of citizenship, which it did on January 29, 2016. This time, Kansas provided numerous instances evidencing that an attestation was not sufficient to

prevent non-citizens from registering to vote—including much of the same evidence presented to the district court below. App. 557-562. Finally, Kansas attempted or investigated the "alternative" ways of preventing noncitizens from registering that were suggested in the 2014 EAC decision.[5] Each of these suggested alternatives proved impossible to undertake or ineffective in identifying noncitizens. App. 545-547, 972-976, 979-982, 994-995, 1005-1007.

SUMMARY OF THE ARGUMENT

Appellees have failed to meet the irreparable harm standard for issuance of a preliminary injunction for three reasons. First, they delayed 30 months (through two election cycles) after receiving individualized notice of the law's requirements before bringing suit. Second, their "harms" are self-inflicted, as all of the five Appellees admitted during discovery that they possess birth certificates or are otherwise able to prove their citizenship to complete their registrations. However, they choose not to in order to preserve their standing. Third, under the Kansas Constitution they are not qualified electors until they complete the registration process. So they do not yet possess any legal "right" to cast a ballot.

The Appellees are unlikely to prevail on the merits because their novel interpretation of the NVRA cannot be squared with the text of the law, and it has

[5] For a list of the suggested alternatives, see App. 165.

already been rejected by the Supreme Court in *Young*. Appellees' entire case hangs on the meaning of the phrase "minimum amount of information necessary" in 52 U.S.C. § 20504(c)(2)(B). However, that provision only refers to what information is to be written by the applicant on the DMV form. It does not refer to additional documentation that a State may require outside of the form. *Young*, 520 U.S. at 286. Moreover, the text of the NVRA is silent on the question of whether a State may request documentary proof of citizenship. Nowhere is proof of citizenship even mentioned. The legislative history of the NVRA confirms that States would remain free to require proof of citizenship if they chose to do so. Consequently, the district court violated the "plain statement rule" by finding preemption without a plain statement in the NVRA expressing congressional intent to preempt proof-of-citizenship laws. Finally, the Appellees' theory is an impermissible interpretation of the NVRA because it raises doubt as to the NVRA's constitutionality under Article 1, Section 2, and the Seventeenth Amendment of the United States Constitution.

Additionally, even if one accepts the district court's reading of the phrase "minimum… necessary," the court erroneously applied that phrase. The district court acknowledged that numerous noncitizens had registered in Kansas despite the oath being in place; nevertheless it still found that the oath was sufficient.

The decision below is also erroneous because the district court incorrectly balanced the equities involved. Most notably, the court failed to take into account the confusion caused by telling voters that they can vote in federal, but not state, elections. On top of that confusion is the State's burden of administering a bifurcated election.

ARGUMENT

I. Legal Standard for a Preliminary Injunction

"A preliminary injunction is an 'extraordinary and drastic remedy… it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008)(citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)(citations omitted). A preliminary injunction "should not be issued unless the movant's right to relief is 'clear and unequivocal.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). The hurdle for demonstrating irreparable harm is high. "Irreparable harm is not harm that is 'merely serious or substantial.'" *Heideman*,

348 F.3d at 1189 (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

The type of preliminary injunction sought in this case is disfavored and requires "a heightened showing" before one can be granted. *Attorney General of Oklahoma v. Tyson Foods*, 565 F.3d 769, 776 (10th Cir. 2009). In the Tenth Circuit there are "three types of specifically disfavored preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. University of Colorado*, 427 F.3d 1253, 1259 (10th Cir. 2005). Appellees' requested relief falls into all three categories. Appellees sought a preliminary injunction that altered the status quo and was mandatory in nature, and granted the same relief they would have obtained if they prevailed on final judgment regarding the relevant NVRA claim. The preliminary injunction required the Secretary to drastically rewrite voter registration procedures and to retroactively modify registration records for thousands of individuals who had not provided proof of citizenship. As the District Court for the District of Columbia correctly noted in declining to issue a preliminary injunction in a similar challenge to Kansas's proof-of-citizenship law, "To say the least, this is not the stuff of a typical preliminary injunction; indeed, it is, in effect, a thinly veiled request for the relief normally

accorded in a final judgment." *League of Women Voters v. Newby*, No. 16-236(RJL) slip op. 24 (D.D.C. June 29, 2016). The same may be said here.

In reviewing a grant of a preliminary injunction, this Court "examine[s] the district court's legal determinations de novo, and its underlying factual findings for clear error." *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014)(internal quotations omitted).

II. Appellees Failed to Demonstrate Irreparable Harm

A. Appellees Delayed for Thirty Months, Including Two Elections

A party's delay in bringing an action weighs heavily against any finding of irreparable harm. *RoDa Drilling v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009). Plaintiffs' "delay in filing… vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of Earth*, 434 U.S. 1310, 1313 (1977).

Appellees filed this lawsuit on February 18, 2016. But Kansas's proof-of-citizenship requirement had already been in effect for more than three years (since January 1, 2013), and the act that created the proof-of-citizenship requirement was *enacted nearly five years earlier* (on April 18, 2011). Moreover, each Appellee was given *individualized notice* of the proof-of-citizenship requirement by DMV personnel in the form of a notification document when they applied to register to vote at the DMV. App. 1034. These notices were followed by additional notices

mailed to Appellees. App. 1035-1040. Hutchinson received his first notice when he left the DMV on May 23, 2013. App. 920. He received his second notice, this time from the Johnson County Election Office, on June 18, 2013. *Id*. Thus, taking into account the NVRA's 90-day letter requirement, the first Appellee delayed 55 months after enactment of the proof-of-citizenship requirement and 30 months after receiving individualized notice of the requirement.[6] Importantly, *Appellees allowed the 2014 election cycle to pass without doing anything*. If they truly regarded their "injury" as significant, they could have filed suit as early as July 2011, in order to prevent the proof-of-citizenship requirement from affecting them during the primary election of August 2012 and the general election of November 2012.

Appellees' delay of multiple years is far beyond what Article III courts have permitted when finding irreparable harm. *See GTE Corp*. *v*. *Williams*, 731 F.2d 676, 679 (10th Cir. 1984)(preliminary injunction not justified when plaintiffs delayed three years before filing suit); *Weight Watchers Int'l v. Luigino's* 423 F.3d 137, 144 (2d Cir. 2005)("We have found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm that is essential to the issuance of a preliminary injunction.")(citation omitted).

[6] The 90-day provision requires a plaintiff to notify the State's chief election official of the alleged NVRA violation and to give the official 90 days to correct the violation. 52 U.S.C. § 20510(b)(1)-(2).

Nevertheless, the district court found that this extraordinary delay was excusable because the court believed Appellees thought they were actually registered to vote. App. 728. However, all five Appellees confirmed in their depositions that in 2013 or 2014 (long before this suit was filed) they were fully aware that they still needed to provide proof of citizenship. App. 754-755, 783, 775-776, 759-761, 794-796. And it is undisputed that the State's voter registration database shows that individualized notice was mailed to each Appellee in 2013 or 2014. App. 915, 926, 930, 950, 969. Hutchinson delayed 30 months; and the others delayed 15-30 months. Thus, the delay clock started running at the latest when Hutchinson received direct, individual notice (30 months before filing), if not when the law was enacted (55 months before filing). The district court erred by disregarding this extraordinary delay when Appellees sat on their rights rather than seeking relief.[7] *RoDa Drilling*, 552 F.3d at 1212. This delay alone is sufficient reason to reverse the preliminary injunction.

B. Appellees' "Harm" is Self-Inflicted

[7] The district court also attempted to excuse Appellees' delay by citing K.A.R. § 7-23-15, which took effect on October 1, 2015, only four months before the Appellees filed suit. But that regulation *did not in any way create or alter the proof-of-citizenship requirement*. Indeed, the district court did *not* enjoin it. App. 728.

This Court "will not consider a self-inflicted harm to be irreparable." *Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003). Appellees' alleged injury is entirely self-inflicted. Their claimed "irreparable harm" is that the Secretary is blocking them from exercising their right to vote because Kansas law requires voter registration applicants to provide proof of citizenship before their registration can be completed. But none of Appellants are unable to prove their United States citizenship. In reality, all that is preventing them from being registered to vote is their unwillingness to comply with any method of completing their registrations under K.S.A. § 25-2309(l) or (m), not an inability to comply with the law. Four of the five Appellee—Fish, Boynton, Stricker and Hutchinson—provided birth certificates to the Secretary during discovery. App. 751-753, 771-774, 784-789, 792. Thus, they can become registered to vote immediately by mailing, faxing, emailing, or texting an image of their relevant proof of citizenship document to the appropriate county election office. However, they choose not to do so simply to preserve their standing in this matter. App. 777-779. This litigation-driven, self-inflicted injury is not "irreparable harm" in the Tenth Circuit.

Only Bucci claims that she cannot find her birth certificate. App. 762. She does not allege that she is incapable of obtaining a replacement document, only that she does not wish to pay for one. App. 762-763. Moreover, Bucci can also

prove her citizenship under the alternative process described in K.S.A. § 25-2309(m). She need only contact the Secretary of State's Office, fill out a form, and submit "any evidence" she possesses to demonstrate citizenship under the statutorily described hearing. *Id*. These hearings are typically telephonic and allow the state elections board to ensure that the individual attempting to register is a citizen. App. 977-978. During her deposition, Bucci indicated that she would be interested in availing herself of this procedure and would be able to do so. App. 765-766. She also stated that in light of this procedure, she no longer objected to the Kansas proof-of-citizenship requirement. App. 767-768.

Using either of these methods, no Appellee would even have to leave his or her home to complete the registration process and vote in all elections. Their entire claimed injury would be resolved. Because they can immediately complete their own voter registrations if they so choose, there is no "clear and present need" for the extraordinary intervention of an Article III court to enable them to vote in the next election. *Heideman*, 348 F.3d at 1189. It is only Appellees' choice not to comply with Kansas law that is preventing their registration. *See e.g*. App. 777-779.

In sum, Appellees self-imposed inaction is not irreparable harm as a matter of law. As the *Newby* Court recently observed in declining to find irreparable harm, "mustering the proof of citizenship documents to register to vote is probably

no more difficult than it would be to satisfy the proof of citizenship requirements necessary to obtain a U.S. passport to travel abroad." *Newby*, at 22, n.20. Indeed, emailing or sending in proof of citizenship is far less burdensome than process of obtaining a photo ID from a State—a process approved in the Supreme Court opinion of *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198-99 (2008)("[T]he inconvenience of making a trip to the DMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."). A preliminary injunction was not necessary to cure this self-inflicted harm.

C. In Kansas, One is Not Qualified to Vote Until One is Registered

Appellees' asserted irreparable harm is that they are "qualified" electors who are being prevented from voting until they comply with Kansas's proof-of-citizenship requirement. App. 48. Their asserted harm stems from their belief that they *should not have to comply* with the proof-of-citizenship registration requirement because they believe they are already qualified electors simply because they are United States citizens.[8] However, under Kansas law, a person is

[8] There is an important but subtle distinction here. Appellees' personal alleged harm is not the asserted violation of the NVRA. Their claimed harm is that they

not a qualified elector simply because one has the personal attributes of a qualified elector (i.e., age, citizenship, residency, etc.). *A person must also complete the registration process before one is considered a qualified elector* under Kansas law.

"It is well settled in this state that the legislature may require registration as a prerequisite to the right to vote." *Dunn v. Board of Com'rs of Morton County*, 165 Kan. 314, 327-28 (1948)(citing *State v. Butts*, 31 Kan. 537 (1884)). Qualified electors means "persons who have the constitutional (Const., art. 5, §§ 1, 4) qualifications of an elector *and who are duly and properly registered*." *Id*. at 328 (emphasis added). One is not entitled to vote under Kansas law until one is a qualified elector; and becoming a qualified elector entails not only being a Unites States citizen, but also completing the registration process.

If any of the Appellees were making the argument that they were *incapable* of meeting the proof-of-citizenship registration requirement of K.S.A. § 25-2309, then they would have a different (and stronger) claim of harm. But they do not, and cannot, make that argument. Rather, they are simply arguing that *they choose not to* comply with this registration requirement. By choosing not to comply with a registration requirement, they have chosen not to become qualified electors. And because they are not yet qualified electors, they are not entitled to vote in Kansas.

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are not permitted to vote in spite of the fact that they are qualified electors, in their own estimation. However, they are not qualified electors under Kansas law until Kansas's requirements for registration are met.

In other words, a person who is not yet a qualified elector suffers no "irreparable harm" when that person cannot vote.

The district court failed to even address this point. Indeed, the district court labored under the misconception that the only qualification at issue in this case is citizenship. App. 718. For all of these reasons, Appellees failed to demonstrate irreparable harm.

III. Appellees Are Unlikely to Prevail on the Merits

Appellees' claims are based on a novel and unsustainable reading of the NVRA that is at odds with the plain meaning of the NVRA's text. Not surprisingly, no State has followed Appellees' reading of the NVRA. And until the district court granted a preliminary injunction, no court had adopted such a strained reading of the NVRA. The district court's unsustainable reading also places the NVRA in direct conflict with Article I, Section 2, and the Seventeenth Amendment of the United States Constitution, something the Supreme Court expressly cautioned against. *ITCA*, 133 S. Ct. at 2258-59. If the decision below stands, it will disrupt the administration of elections for years to come and

throughout the nation.[9] This Court reviews the district court's interpretation of the NVRA *de novo*.

The district court's opinion is based entirely on the following NVRA subsection, which simply describes what information persons using DMV voter registration applications can be required to *write on the application form itself*:

> The voter registration application portion… may not require any information that duplicates information required in the driver's license portion (other than a second signature or other information necessary under subparagraph (C)) [and] may require only the minimum amount of information necessary to…
> (i) prevent duplicate voter registrations; and
> (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."

52 U.S.C. § 20504(c)(2)(B). Nowhere is proof of citizenship mentioned. And nowhere is a State prevented from requiring proof of citizenship in addition to the information provided on the form.

A. The District Court Erred by Failing to Recognize That "Minimum Amount of Information Necessary" Refers Only to Information Written by the Applicant on the Form Itself

[9] There are currently four States with proof-of-citizenship laws: Kansas, Arizona, Georgia, and Alabama. The first two have already implemented the laws for one or more election cycles. The last two are beginning implementation in 2016. Other State legislatures (e.g., Indiana) have also considered adopting such laws.

The NVRA text quoted above only places limits on the information that is physically written on the form. The plain meaning of the text is easily discernible. The phrase "may require only the minimum amount of information necessary" comes in the section describing "[t]he voter registration application *portion of an application* for a State motor vehicle driver's license." 52 U.S.C. § 20504(c)(2) (emphasis added). That section describes *what must be written by the applicant on the face of the form*. This is evident in the next clause, which discusses "information required *in* the driver's license portion of the form." *Id*. at (c)(2)(A) (emphasis added). The intent of the NVRA in this section was to avoid compelling the applicant to complete an excessively long or "duplicat[ive]" form. *Id*.[10] It says nothing about whether documentary proof of citizenship, or other documentation, can be required *separate from* the form.

Further underscoring this point is the parenthetical at the end of the same sentence: "(other than a second signature or other information necessary under subparagraph (C))." *Id*. A signature is written "in" the form. The other information described in subparagraph (C) is information "in" the form, specifically a statement of eligibility requirements and an attestation (with signature) that the applicant meets those requirements. *See id*. at (c)(2)(C). One

[10] The NVRA was enacted in 1993, before internet usage and when virtually all DMV applications were on physical paper, rather than on digital screens.

cannot place one's birth certificate or passport "in" the form. The NVRA simply makes it possible to fill out a voter registration application *form* while completing a driver's license application. *See* 52 U.S.C. § 20504(c). The NVRA does not speak to the question of providing a document that is entirely *outside* of the information written in the spaces on the form.

The district court misread the NVRA in this regard. The court declared that "[t]he statute does not distinguish between information required to be provided on the form itself, and information… that must be produced separate from the form." Appx. 705. Indeed, the NVRA does not distinguish between information written on the form and information outside the form—because the NVRA *only addresses information on the form*. The district court offered no explanation for its reasoning. Nor did the court explain how its reasoning could be squared with the remainder of 52 U.S.C. § 20504 which discusses the "portion" of the "application." In reaching its unsupported conclusion, the district court also ignored the Supreme Court's holding that a State may "request" from the applicant "other information" not included on the DMV application form itself. *Young*, 520 U.S. at 286.

The NVRA only describes an "application form" that must be provided by the DMV. The relevant subsection uses the term "application" repeatedly. *See* 52 U.S.C. § 20504(c). The phrasing of the NVRA makes clear that the application form filled out at the DMV only begins the process; it does not complete the

process: "Each State shall include a voter registration *application form* for elections for Federal office as part of an application for a State motor vehicle driver's license." *Id*. at (c)(1) (emphasis added). Indeed, the NVRA recognizes that the next step is transmittal of the application form to a state election official, not automatic registration. *Id*. at (e)(1). Finally, the NVRA's legislative history confirms that Section 20504 was referring to a form, not referring to information outside of the form. S. Rep. No. 103-6, at 14 (1993)(referring to "integration of the voter registration application form" with the driver's license application).

B. The District Court Erred by Failing to Follow *Young v. Fordice*

Of decisive importance in interpreting this statutory language is the Supreme Court's holding in *Young*. Referring to the same DMV section of the NVRA, the Supreme Court held:

> [The NVRA] says that States cannot force drivers' license applications to submit the same information twice (on license applications and again on registration forms). … Nonetheless, implementation of the NVRA is not purely ministerial. The NVRA still leaves room for policy choice. *The NVRA does not list, for example, all the other information the State may—or may not—provide or request*.

520 U.S. at 286 (emphasis added). The *Young* holding could not be clearer: States are permitted to request other documents or information, in addition to the "minimum… necessary" information that the applicant writes on the form itself.

The district court did not follow this controlling Supreme Court precedent. The district court attempted to justify its departure from *Young* by stating: "[T]he Court in *Young* did not say that the States have unfettered discretion under the NVRA to request information…." Appx. 704. But that misses the point. The *Young* Court said that the NVRA contains *no* prohibition concerning "all the other information the State may—or may not—provide or request." 520 U.S. at 286. The *Young* Court held that the NVRA is *silent* on what other information can be requested outside the form. Indeed, the Supreme Court's use of the phrase "all the other information" indicates that there is *no* constraint in the NVRA over what additional documentation a State may request beyond the form itself. *Id*. The district court's cramped reading of *Young* is erroneous.

C. The District Court Erred by Finding Preemption in Congressional Silence

It is a fundamental principle of preemption that the sovereign authority of a State must never be deemed preempted unless Congress clearly and unmistakably indicated its intent to preempt the state laws at issue. The Supreme Court has repeatedly recognized this principle. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989)(internal citation omitted). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The plain statement rule is especially important where the federal statute at issue deals with voter qualifications. "Such power inheres in the State by virtue of its obligation… 'to preserve the basic conception of a political community.' …And this power and responsibility of the State applies …*to the qualifications of voters*…." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citation omitted)(emphasis added). In short, if a federal statute does not unmistakably declare that a specific type of State law is preempted, then a court must interpret the statute so as not to displace the State law.

The Supreme Court in *ITCA* applied this rule in holding that the NVRA's plain statement that States must "accept and use" the Federal Form preempted Arizona's law that required state officials to "reject" Federal Forms unaccompanied by proof of citizenship. 133 S. Ct. at 2254. Although the presumption against preemption does not apply in Elections Clause cases, *id*. at 2256, the requirement that Congress must plainly state its preemptive intent in the text of the statute does. *Id*. at 2257. "[T]he reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive

intent." *Id*. Elections Clause legislation cannot be read to have hidden, implicit intentions; a court must "read Elections Clause legislation simply to mean what it says." *Id*. Thus, the preemptive "scope" of a statute enacted pursuant to Congress's Elections Clause power is limited to its "statutory text." *Id*.

An equally important canon of construction is the principle that congressional silence on a subject cannot be read to create a statutory command. "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341-342 (2005); see also *United States v. Wells*, 519 U.S. 482, 496 (1997)("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.")(citation omitted).[11]

Nowhere in the NVRA did Congress expressly declare that a State may not require proof of citizenship when a voter applies to register at a DMV. Indeed, nowhere in the NVRA is proof of citizenship even mentioned. Such congressional

[11] And when a statute has multiple purposes as the NVRA does, 52 U.S.C. § 20501(b), a court must be even more hesitant in inferring anything from congressional silence. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978)("Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other.").

silence cannot be read to express preemptive intent. In a case remarkably similar to this one, the Sixth Circuit looked at the *same section* of the NVRA to determine if the NVRA prohibited Tennessee from demanding social security numbers from voter registration applicants at the DMV. *McKay v. Thompson*, 226 F.3d 752, 755-756 (6th Cir. 2000). The Sixth Circuit concluded that because the NVRA did not expressly prohibit social security numbers, the State law was not preempted:

> According to McKay, [52 U.S.C. § 20504(c)(2)(B)] permits the state to only "require the minimum amount of information necessary" to prevent duplicate voter registration and determine whether he is eligible to vote. The district court properly rejected McKay's argument. The NVRA does not specifically forbid use of social security numbers.

Id. at 755. Similarly, because the NVRA's text does not specifically forbid documentary proof of citizenship, no such prohibition exists.

Rather than limit itself to the plain statements in the text, the district court inferred an unstated congressional intent to bar proof of citizenship from the phrase "minimum … necessary." *See* App. 703. Doing so violates the plain statement rule and the rule against deriving meaning from congressional silence. Not only did the district court fail to apply these canons of constructions, *the court failed to even mention them*. Instead, the district court drifted into a subjective, fact-bound inquiry weighing registration by non-citizens in Kansas versus the supposed burden that proof of citizenship imposes. App. 710-712. Such an inquiry necessarily varies from state to state, and it depends heavily on the policy

preferences of the judge. This inquiry is exactly what the Supreme Court has insisted *should never occur in preemption cases*. Preemption requires the binary application of prohibitions unambiguously described by Congress. It must be clear what is, and what is not, preempted. *ITCA*, 133 S. Ct. 2257. Otherwise an untethered judicial exploration of congressional objectives, rather than the application of a plain statement in the law, will result. Courts must not engage in "a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011)(*quoting Gade v. National Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992)(Kennedy, J., concurring)). Unfortunately that is exactly what the district court did.

D. The District Court Erred by Defining "Necessary" Subjectively

Even if one accepts the district court's theory that the term "necessary" applies to documents outside of the application form, the court's definition of the word is still flawed. Because the district court selected a subjective rather than objective definition, it launched into an extensive policy discussion of what might be considered a "necessary" state law to enforce the citizenship qualification. App. 710-714. However, within the context of the NVRA, it is possible to define this word either subjectively or objectively:

- The subjective definition: "*Better than all other policy options, and without an adequate substitute policy*."
- The objective definition: "*Required by state law*."

These definitions are quite different. The former is a subjective judgment about good and bad policy choices when attempting to limit registration to citizens, whereas the latter is an objective statement of what state law requires. The objective definition of "necessary" is correct for two reasons. It is a more natural reading of 52 U.S.C. § 20504, and it is more appropriately administered by an Article III court.

First, consider the wording of the statute. The NVRA states that the DMV form "may require only the minimum amount of information necessary to… *enable State election officials* to assess the eligibility of the applicant and *to administer voter registration and other parts of the election process*[.]" 52 U.S.C. § 20504(c)(2)(B)(ii) (emphasis added). The context of the sentence makes clear that whether something is necessary is defined by what the State election official is required to obtain *in order to comply with state law*. That is the natural reading of "administering voter registration and other parts of the election process." Administering a process entails complying with relevant laws. This reading is consistent with the ordinary meaning of "necessary": "needed for some purpose or reason[.]" Black's Law Dictionary (10th ed. 2014), necessary. The purpose or reason is to administer the voter registration laws of the State.

The NVRA expressly requires the States to *design their own* DMV forms, 52 U.S.C. § 20504(c)(1)-(2), to accomplish the purposes of state voter registration laws. 52 U.S.C. § 20504(c)(2)(B)(ii). What is "necessary" is defined by the State and identified in State law. It is a *State* "voter registration" process that is "administer[ed]" by "State election officials." *Id*. If State law requires an applicant to provide documentary proof of citizenship, then it is "necessary" for the State to obtain that documentation and to inform DMV applicants that such documentation is required in addition to the information on the form.

Second, the objective definition of "necessary" is more consistent with the proper role of an Article III court. If the subjective definition is used, then a court must wade into the policy realm and attempt to determine whether the benefit of requiring proof of citizenship outweighs the costs of doing so. That is exactly what the district court did in its preliminary injunction order. App. 706 (opining that the proof-of-citizenship requirement is "burdensome" and "confusing."), 710 (performing a cost-benefit analysis), 42 (weighing efficacy of alternatives), 712 (concluding that there has not been enough election fraud to "justif[y]" the requirement). The district court offered various policy reasons why it disagreed with requiring proof of citizenship. In so doing, the district court assumed the posture of a policy maker and second guessed the policy judgments of the Kansas legislature. These are policy questions on which reasonable people may disagree.

Consequently they are legislative (not legal) in nature and not appropriate for judicial determination. *See Swallow v. United States*, 325 F. 2d 97, 98 (10th Cir. 1963).

E. The District Court Erred in its Reading of the Word "Minimum"

The district court rested its decision, in part, on the fact that the words "minimum… necessary" appears in the DMV section of the NVRA, whereas only the word "necessary" appears in the Federal Form section. *Compare* 52 U.S.C. § 20504(c)(2)(B) *with* 52 U.S.C. § 20508(b)(1). Applying the rule that all words in a statute must have meaning, the district court declared that Congress must have "intended for a stricter standard to apply" in the DMV context. App. 33. However, the district court committed two errors in its interpretation.

First, the district court erred by overlooking the words preceding "necessary" in the Federal Form section of the NVRA. The Federal Form "may require *only such* identifying information… as is necessary[.]" 52 U.S.C. § 20508(b)(1) (emphasis added). In contrast, the motor voter provision form "may require only the minimum amount of information necessary[.]" 52 U.S.C. § 20504(c)(2)(B). The district court did not acknowledge or give weight to the qualifier "only such" in the Federal Form section. The phrases "only such" and "only the minimum amount" mean substantially the same thing. And the Supreme Court has already held that documentary proof of citizenship can be required in the

state-specific instructions of the Federal Form if the EAC chooses to modify those instructions in response to a State's request. *ITCA*, 133 S. Ct. at 2259.

Second, the district court failed to address an important difference in the words following "necessary" in the two sections. In the Federal Form section, the NVRA describes what the EAC should include in the state-specific instructions of the Federal Form. The word "necessary" is followed by one reason something might be necessary: "to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). It is a direction to a federal agency (the EAC) to determine what is required "to administer voter registration" in that State. *Id*.

In contrast, the phrase "minimum... necessary" in the DMV section of the NVRA is followed by *not one, but two reasons*. The second reason is the same, verbatim, as what is stated in the Federal Form section. But the first reason is different. The State is instructed to request on the DMV form the "minimum amount of information necessary" to "prevent duplicate voter registrations." 52 U.S.C. § 20504(c)(2)(B). This explains the use of the word "minimum." What is required to prevent duplicate registrations can vary, depending on how many duplicates a State wishes to eliminate. For example, if the DMV applicant is only required to write on the form the identifiers of name and date of birth, there will be

more duplicates than if the applicant's sex is also required. The number of duplicates will drop further if the applicant's State of birth is required to be written on the form. So too if race is required or if mother's maiden name is required. But adding these information lines on the DMV form would make it much longer and more tedious, perhaps discouraging some from completing it. What information is "necessary" depends on what percentage of duplicates a State seeks to eliminate.[12] That is why Congress included the word "minimum." And that is why Kansas (like most States) requests only the name and date of birth, rather requesting such other information. This duplicate-reduction reason, which appears in the DMV section but not the Federal Form section, fully explains the inclusion of the word "minimum."

The district court's failure to address the text before and after the relevant terms is a significant interpretive mistake. "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016)

[12] The fact that what is "necessary" to prevent duplicates fluctuates according to the desired percentage of duplicates does not mean that it is subjective. The number of duplicates eliminated with each additional piece of information is objectively determinable.

(quoting *Roberts v. Sea-Land Services*, 132 S. Ct. 1350, 1357 (2012)). For this reason as well, Appellees are unlikely to prevail on the merits.

F. The District Court Erred by Discounting Evidence That Noncitizens Have Registered to Vote and Have Voted

Even if this Court were to use the subjective definition of "necessary" applied by the district court and were to accept that the "minimum amount of information necessary" is not limited to information written on the form but includes documents required outside of the form, requiring proof of citizenship *is* necessary in Kansas. Applying the subjective definition of "necessary" begs the question: necessary to accomplish what? What is intended to be accomplished is the prevention of noncitizens from registering to vote. If *any* noncitizens are succeeding in registering to vote in the absence of a proof of citizenship requirement and their registration was not prevented by other measures, then such a requirement is "necessary" to accomplish the objective.

The district court theorized that mere "attestation along with an applicant's signature under penalty of perjury" is enough to prove citizenship. App. 711. Yet the court also acknowledged that the Secretary had shown that not to be the case. App. 711-713. Rather than accept the evidence that a mere oath still allowed many noncitizens to register to vote, the district court instead undertook a cost-benefit policy analysis to determine that there were not enough noncitizens who had

registered to justify the Kansas law. See *id*. The district court also gave no indication of how many noncitizens must be identified before a State could satisfy the district court. *Id*. However, the legal question is not "what is the best policy;" the question is what is "necessary." If mere attestation has been proven to fail repeatedly, then it is not, as the district court assumed, a viable "alternative." *See* App. 711. Stronger proof of citizenship is necessary, by definition. As Justice Scalia, author of the *ITCA* majority opinion, pointed out: "The proof… is simply the statement, 'I'm a citizen.' That is proof?… That is not proof at all… Under oath is not proof at all. It's just a statement." *ITCA*, trans. of oral argument 44. The Secretary in the instant case provided ample evidence the Justice Scalia was correct.

As noted above, in Sedgwick County alone, 25 cases of noncitizens registering to vote or attempting to register were discovered over the span of approximately three years. App. 900-907. An additional 19 cases were also provided to the district court. App. 546. Mere attestation proved utterly in effective in all 44 cases. If multiple noncitizens are successfully defying the existing mechanism for enforcing the citizenship qualification, then that mechanism is *ipso facto* not the "minimum… necessary" to ensure that *only citizens* can successfully register to vote. The Supreme Court stated as much in *ITCA*. The *ITCA* Court was explaining what a State could assert to compel the

EAC to add proof of citizenship to its state-specific instructions on the Federal Form. The Court held that if a "State deems [it] necessary" to require proof of citizenship, and if for some reason the EAC does not comply with that State request, then that State could "establish in a reviewing court *that a mere oath will not suffice* to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include" the requirement. *ITCA*, 133 S. Ct. at 2260 (emphasis added). That is exactly what Kansas has shown in the instant case. Mere oath did not suffice to prevent 25 noncitizens from registering (or attempting to register) in Sedgwick County alone. One case would have been enough to establish that mere oath does not suffice to prevent a noncitizen from registering. Kansas has established it many times over. Thus, even under the subjective definition used by the district court and urged by Appellees, the district court erred. More than a mere attestation and signature are necessary to "enable [a] State election [official] to assess the eligibility of" a voter registration applicant. 52 U.S.C. § 20504(c)(2)(B)(ii).

G. The District Court Erred by Interpreting the NVRA in a Manner that Creates Constitutional Doubt

It is a fundamental rule of statutory construction that an Act of Congress must not be construed in a manner that raises doubts as to its constitutionality.

Clark v. Martinez, 543 U.S. 381 (2005); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The district court's construction of the NVRA would make the NVRA unconstitutional for two reasons.

1. The NVRA Would Override the States' Authority to Enforce Qualifications

The first reason is that the district court's reading interprets the NVRA as overriding the State's constitutional authority to set the qualifications for electors. Article I, Section 4, clause 1, of the U.S. Constitution (the "Elections Clause") gives the States the initial authority to determine the time, places and manner of holding federal elections, but gives Congress the power to alter those regulations. *ITCA*, 133 S. Ct. at 2253. The Supreme Court recognized that "[t]he Election Clause's substantive scope is broad" enough to authorize regulations "relating to" registration. *Id.* at 2253. But the Supreme Court has emphatically limited what Congress can do: "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id.* at 2257 (emphasis in original).

Instead, the Constitution gives the States the exclusive power to determine *who* may vote in federal elections. Article I, Section 2 (the "Qualifications Clause") provides that the electors in each State of members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise, the Seventeenth

Amendment provides that the electors in each State for members of the Senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Interpreting these provisions, *ITCA* concluded, "Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *ITCA*, 133 S. Ct. at 2258 (internal quotations omitted). The Court therefore determined that "[p]rescribing voting qualifications ... 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Id*. (*quoting* The Federalist No. 60, at 371 (A. Hamilton)). Rather, the Court held that these constitutional provisions assign the power of establishing voter qualifications to the States. *ITCA*, 133 S. Ct. at 2258–59.

Importantly, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements," the Court held that the States also possess the exclusive power to *enforce* those voter qualifications. *Id*. at 2258–59. Indeed, all nine justices in *ITCA* agreed that the States have the exclusive power to both establish and enforce voter qualifications for federal elections. *ITCA*, 133 S. Ct. at 2258–59 (majority opinion); *id*. at 2261 (Kennedy, J., concurring); *id*. at 2262-64 (Thomas, J., dissenting); *id*. at 2270-73 (Alito, J., dissenting).

In addition to the States' qualification power, the Supreme Court has elsewhere held, "States are thus entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (internal quotation omitted). The "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby County*, 133 S. Ct. at 2623. (quotation omitted). "The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Since the States possess the constitutional power to establish and enforce voter qualifications for federal elections, the States' power can be limited only by the Constitution itself.[13]

Importantly for the purposes of the instant case, *ITCA* specifically held that it would raise serious constitutional doubts if the NVRA were interpreted to give the EAC the authority to reject Arizona's request to that agency to include Arizona's proof of citizenship instruction on the state-specific instructions the Federal Form:

[13] Notably, the EAC Decision nowhere suggested that Kansas's or Arizona's proof-of-citizenship laws are unconstitutional; nor has any party made such a claim in this action.

> [W]e think that—by analogy to the rule of statutory interpretation that avoids questionable constitutionality—validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt. That is to say, it is surely permissible if not requisite for the Government to say that necessary information which may be required [by the States] will be required [by the EAC].

ITCA, 133 S. Ct. at 2259. Even more so, it would raise constitutional doubt if the NVRA by its own terms prevented a State from enforcing its proof of citizenship requirement with respect to DMV applicants. The district court completely ignored this central holding of *ITCA*. In so doing, it failed to recognize that it was interpreting the NVRA in a manner that creates doubt as to its constitutionality.

2. Separate State and Federal Voter Qualifications Would Exist

The second reason that the district court's reading of the NVRA raises constitutional doubt is that it creates a situation in which the qualifications for voting in federal elections in Kansas differ from the qualifications for voting in State elections. *It is undeniable that Article I, Section 2, of the United States Constitution prohibits this*. The Constitution is "straightforward" regarding the powers reserved to the States and the powers granted to the federal government with respect to defining the federal electorate. *ITCA*, 133 S. Ct. at 2251. The Qualifications Clause is unambiguous: "the Electors in each State [for congressional elections] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Article I, § 2, cl. 1.

The Legislature of Kansas has exercised its sovereign authority to make registration, and documentary proof of citizenship during the registration process, qualifications for being an elector in state legislative elections. K.S.A. 25-2309(l); *Dunn*., 165 Kan. at 327-328. The standard of documentary proof of citizenship is unquestionably a "standard ... which may be established … by the State itself." The Federalist No. 52, at 326 (Madison). After the State has established its standard, the federal government must accept this standard in defining the qualifications of electors for congressional elections. *See ITCA*, 133 S. Ct. at 2258 ("voting qualifications in federal elections are [not] set by Congress"). There is no other plausible way to interpret the Qualifications Clause.

However, the district court's preliminary injunction has created a situation that clearly violates the Qualifications Clause. The preliminary injunction requires that all DMV applicants on the "incomplete" list or whose records have been canceled be considered fully registered to vote for *federal elections*.[14] However, under Kansas law those applicants remain unqualified to participate in state and local elections. This has caused the creation of two separate lists of voters in the August 2, 2016, primary election: one set that is qualified to vote for the "most numerous Branch of a State's Legislature," and a second set that is not. The

[14] This is because the NVRA only controls registration for "federal elections." *See* 52 U.S.C. § 20503.

second set is those voters who registered through the DMV but have not yet provided proof of citizenship. Under the preliminary injunction they are qualified to vote in federal elections only. And as a result of the preliminary injunction, the constitutional plan of Article 1, Section 2, Clause 2, will be disrupted on August 2, 2016, in Kansas.

That is why it is essential that the NVRA be interpreted so that all qualifications for voting are the same, regardless of the location at which the person applies to register to vote. The Constitution only permits one set of electors to exist, those with "the qualifications requisite for electors of the most numerous branch of the state legislature." Art. I, § 2, Cl. 1. The district court's reading of the NVRA created a direct conflict with Article I, Section 2, Clause 2 (and with the equivalent provision of the Seventeenth Amendment). It also ignored the Supreme Court's admonition in *ITCA* against reading the NVRA so as to create constitutional doubt.

The district court's reliance on Congress' authority to trump State laws setting the time, place, and manner of elections is unavailing. It is true that Congress has the authority to alter the "Times, Places, and Manner" of elections, but only to the extent it does not go beyond that authority and alter elector qualifications, which are set solely by the States. *ITCA*, 131 S. Ct. at 2258 ("[N]othing in these provisions lends itself to the view that voting qualifications in

federal elections are to be set by Congress.")(citations and quotation marks omitted). Nor may Congress interfere with a State's enforcement of those qualifications. *Id*. at 2258-59. If a State requires proof of citizenship prior to registration to be a qualified elector, then Article I, § 2, Cl. 1, and the Seventeenth Amendment command that the federal government must respect the State's decision and acknowledge that the same qualification applies to federal elections.

For these reasons, the district court's interpretation of the NVRA places that statute in direct conflict with the Constitution.

H. The District Court Erred by Disregarding Contrary Legislative Intent

In the district court below, Appellees resorted to quoting the legislative history of the NVRA. Even though the text of the NVRA was silent on the subject, Appellees insist that the bill "was understood by members of Congress as *prohibiting* States from imposing a documentary proof-of-citizenship requirement on applicants…." App. 67 (emphasis in original). This bald claim finds no support in the legislative record.

As explained above, statutory meaning cannot be found in congressional silence. However, even if this canon of construction did not stand in the way of Appellees' argument, the legislative history itself undercuts their claim that

Congress intended to prohibit proof-of-citizenship requirements. The House of Representatives committee report made clear that the States would be permitted to continue verifying citizenship as they saw fit:

> It should be made very clear to any applicant in a driver's license bureau that the application for voter registration is an application which must be reviewed by the appropriate election officials. Only the election officials designated and authorized under State law are charged with the responsibility to enroll eligible voters on the list of voters. *This bill should not be interpreted in any way to supplant that authority*. The Committee is particularly interested in ensuring that *election officials continue to make determinations as to applicant's eligibility, such as citizenship, as are made under current law and practice*. Applications should be sent to the appropriate election official for the applicant's address *in accordance with the regulations and laws of each State*.

H.R. Rep. No. 103-9, 8-9 (1993)(emphasis added). The Senate committee report contains a similar assurance that the determination of an applicant's citizenship would be done according to the laws of each state: "Election officials should continue to make *determinations as to applicant's eligibility, such as citizenship, as are made under current law and practice*. Applications should be sent to the appropriate election official for the applicant's address *in accordance with the regulations and laws of each State*." S. Rep. No. 103-6 (emphasis added). Both committees plainly contemplated that the States would be free to adopt their own laws and practices regarding "determinations as to an applicant's eligibility, such as citizenship…." *Id*. Some States might decide that mere oath was enough, while others like Kansas might demand documentary proof of citizenship.

Appellees attempted to rely on the conference committee's decision to omit a Senate amendment (urged by Senator Alan Simpson) that stated, "nothing in this Act shall prevent a State from requiring presentation of documentation relating to the citizenship of an applicant for voter registration." S. Rep. 103-66 (April 28, 1993) at 23. Appellees attempted to turn this conference committee omission into a prohibition against such requirements. However, Senator Wendell Ford, the Senate Democrat who was the principal sponsor of the bill and who sat on the conference committee, explained exactly why he opposed this provision and why it was subsequently removed: "I say there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship. I think basically this is redundant … there is nothing in there now that would preclude it." Page S2902, Congressional Record, March 16, 1993.

The conference committee report confirmed that Senator Ford's reasoning prevailed. The conference committee report stated essentially three reasons why the Simpson amendment was rejected. First, consistent with Senator Ford's explanation that nothing in the bill prevented a state from requiring proof of citizenship, the report stated, "It is not necessary…." S. Rep. 103-66 at 23. Second, the report stated that the amendment was "not … consistent with the purposes of" the Act. *Id*. In other words, suggesting requirements that a State might adopt was not the purpose of the NVRA. Third, the report stated that the

Simpson amendment might be misinterpreted in a way that could defeat mail registration programs or could supersede the preclearance requirements of the Voting Rights Act. *Id*.

The wording chosen by the conference committee is important. If the NVRA actually prohibited documentary proof of citizenship, then the conference committee report would have said so. It would have simply stated, "Proof of citizenship requirements are *prohibited* by this Act." But the NVRA doesn't prohibit proof of citizenship requirements. So the conference committee instead stated that a clause preserving such requirements was "not necessary or consistent with the purposes of this Act." *Id*. If a prohibition of proof of citizenship existed in the NVRA, then the conference committee report (which was 24 pages long) would have identified it.

Finally, it must be pointed out that the NVRA does contain an *express prohibition* regarding what is not permitted on the Federal Form.[15] This further undermines Appellees' argument. The fact that Congress expressly excluded a requirement in the NVRA shows that it contemplated which requirements to exclude. Yet Congress intentionally did *not* exclude proof of citizenship requirements. And Congress only asserted authority to exclude something with

[15] The NVRA expressly prohibits the inclusion of a "notarization or other formal authentication" requirement on the Federal Form. 52 U.S.C. § 20508(b)(3).

respect to the Federal Form, not with respect to the State Forms used at the DMV. When Congress specifically includes one type of exception, "the proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). Moreover, as already noted, the Supreme Court expressly rejected Appellees' argument in *Young*: "The NVRA does not list, for example, all the other information the State may—or may not—provide or request." 520 U.S. at 286. The legislative history of the NVRA does not create an invisible clause that prohibits proof-of-citizenship laws.

I. The District Court's Reading Yields an Absurd Result

The final reason that the district court's novel interpretation of the NVRA is unsustainable is that it yields an absurd result—specifically, an individual who registers through a DMV office has rights superior to those of an individual who registers by mail, in person, or via the internet. Under the district court's interpretation, a DMV applicant cannot be required to provide documentary proof of citizenship to vote in federal elections, but an applicant using the other methods can. The district court created such a distinction by distorting the phrase "minimum necessary"—a phrase that occurs only in the DMV section of the NVRA—even though that phrase was plainly referring to the information written on the form, not proof-of-citizenship that could be required outside of the form.

See 52 U.S.C. § 20504(c)(2)(B). The phrase was intended to do nothing more than ensure that registering to vote at the DMV could be done without filling out needlessly-lengthy forms.

This nonsensical distinction between DMV applicants and other applicants finds no support in the text of the statute. And no Member of Congress ever mentioned it. Nor does a rational basis exist for such a distinction in the franchise held by voters. Yet the district court nevertheless divined such an implicit intention in the NVRA.

A statutory interpretation cannot be sustained if it yields a plainly absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *see also United States v. American Trucking Assns., Inc.*, 310 U.S., 534, 542–543 (1940). "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the Legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity." *Webster v. City of Bixby*, 509 F. App'x 787, 794 (10th Cir. 2013)(quoting *Town of Eufaula v. Gibson*, 22 Okla. 507 (1908)). In the instant case, the district court could not justify its absurd result based on a literal reading of the text. The phrase "proof of citizenship" does not even appear in the NVRA.

Neither the district court nor Appellees could point to any legislative evidence that the NVRA was intended to provide special immunity against proof-of-citizenship laws to DMV applicants. On the contrary, all evidence of legislative intent suggests the contrary. The most obvious place to begin is the NVRA's own statement of the statute's objectives. The four listed purposes are (1) to "increase the number of eligible citizens who register to vote," (2) to "enhance[] the participation of eligible citizens as voters," (3) to "protect the integrity of the electoral process," and (4) to "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). Nowhere is stated a purpose of barring states from requiring proof of citizenship. Indeed, the purpose of increasing registration numbers is qualified by the caveat that registrants must be "eligible citizens."

Not surprisingly, there is no suggestion in the committee reports regarding the NVRA bill that DMV applicants would be immune from proof of citizenship requirements, while applicants at other places would not. Rather, the reports indicate that the intent was to create a process of registering through the DMV that "mirror[ed]" the other processes:

> Agency-based voter registration provides a useful supplement to motor-voter registration systems, enables more low income and minority citizens to become registered, and is cost effective. Under the provisions of the bill, States will be required to designate agencies to serve as voter registration offices. *The program of registering voters at various agency locations mirrors the registration program of*

> *the "motor-voter" provisions of the bill*, but does not require the same integration of the voter registration application form with the agency forms. The agency-based registration program is designed to reach out to those sectors of the population which are not likely to have driver's licenses or other identification cards issued by a motor vehicle agency.

S. Rep. No. 103-6, at 14 (1993) (emphasis added). This welfare-agency voter registration process is described in a section of the NVRA that requires such agencies to distribute and accept voter registration application forms but does not include the "minimum necessary" language misinterpreted by the district court below. *See* 52 U.S.C. § 20506. It would make no sense for Congress to prohibit States from requiring proof-of-citizenship from DMV applicants but not from welfare agency applicants or mail applicants. But that is exactly the result that the district court's interpretation yields.

With respect to the floor debates on the NVRA, no Member of Congress ever suggested that DMV applicants would possess rights superior to those who register in person or by mail. On the contrary, numerous legislators indicated that the intent was to create a *single*, *uniform standard at all registration locations*. Representative Bradley stated: "The bill… establishes a clear, *uniform registration process*. Every citizen who renews or changes his address on a driver's license will also have the option of registering to vote. …This bill also provides for voter registration at other Government agencies…. The bill also provides for mail-in registration…." 139 Cong. Rec. S2389-2412, at S2404 (March 4, 1993)(emphasis

added). Senator Hatfield used similar language: "We are making voter registration an achievable goal for every American—whether they register at their local department of motor vehicles, through the mail or at a State agency. The *national standard* set in this legislation sends a strong signal to the 70 million eligible Americans who aren't registered to vote…." 139 Cong. Rec. S5739-49, at S5741 (May 11, 1993)(emphasis added); *see also* 139 Cong. Rec. S3036 (March 17, 1993)(statement of Rep. Reigle).

In summary, there is no suggestion whatsoever in the text of the NVRA or in the legislative history that DMV applicants would enjoy a special privilege against proof-of-citizenship requirements while other applicants would enjoy no such privilege. Such a reading of the NVRA is absurd. The district court erred by interpreting the NVRA in this manner.

IV. The Balance of the Harms Weighs Decidedly in Favor of Appellants

A. The State Suffers Extreme Injury

The district court's preliminary injunction harms the State in two significant ways.

1. The Integrity of the Voter Rolls is Compromised

The Secretary has a compelling interest in ensuring fair and honest elections. In particular, the Secretary has a compelling interest in ensuring the integrity of the

voter rolls. The Supreme Court has highlighted the States' interest in ensuring that only eligible voters participate in elections and in increasing confidence in the integrity of elections. *Crawford*, 553 U.S. at 194-97. The Court specifically recognized "the legitimacy [and] importance of the State's interest in counting only the votes of eligible voters," *id*. at 165, and the State's "broad interests in protecting election integrity." *Id*. at 200. To protect the State's interest in the integrity of elections, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Anderson v*. *Celebrezze*, 460 U.S. 780, 788 (1983) (citation omitted). Indeed the NVRA itself states that the law was intended "to ensure that accurate… voter rolls are maintained." 52 U.S. § 20501(b)(4).

The threat of noncitizens registering to vote in Kansas is not hypothetical. As explained above, evidence from just one of Kansas's 105 counties demonstrated that prior to K.S.A. § 25-2309(l) going into effect, eleven noncitizens successfully registered to vote; and after it went into effect another fourteen were prevented from registering. App. 907-907. These 25 cases are just the tip of the iceberg in Sedgwick County.[16] And when all 105 counties are considered, the

[16] Sedgwick is the only county that has been systematically tracking registration by noncitizens.

number of aliens on the voter rolls is likely to be in the hundreds, if not thousands. Every time a noncitizen votes, it effectively cancels out the vote of a citizen.

The preliminary injunction will allow between 17,000 and 50,000 individuals to register without proving their citizenship by the time of the November 8, 2016, presidential election. Given the evidence from Sedgwick County and the high probability that many of the individuals on the "incomplete" list were there because they were noncitizens, it is a certainty that the preliminary injunction has already placed noncitizens on the voter rolls and has severely compromised the integrity of the August 2, 2016, primary election. The preliminary injunction should be reversed as soon as this Court can render a decision, preferably before the integrity of the general election of November 8, 2016, is compromised.

2. The Administrative Burden of Implementing a Bifurcated Election

The district court's preliminary injunction has put in place a separate set of qualifications for voting in federal elections, separate from those for voting in state elections. Not only is this a violation of the Article I, Section 2, of the Constitution, as explained above, it also creates immense administrative costs for the county election officers and confusion for the thousands of volunteer poll workers who must conduct this bifurcated election. The counties will have to

maintain accurate lists of the 17,000-50,000 voters who qualify to vote in federal elections only, pursuant to the preliminary injunction. *See* App. 543-544. Those rolls will have to be maintained alongside the State's principal voter rolls of qualified electors who have proven their citizenship. Volunteer poll workers will have to be trained to check both voter rolls to find voters' names. The probability that poll workers will accidentally place a voter in the wrong category is significant.

B. Appellees will not be Harmed.

Next, this Court must look to injuries Appellees would suffer if the preliminary injunction remains in place, *Nken*, 556 U.S. at 434, and determine whether the injuries to the State outweigh Appellees' injuries. *Heideman*, 348 F.3d at 1190. In balancing those harms, this Court is required to consider in favor of Kansas "[t]he presumption of constitutionality" that attaches to all laws. *Id*. at 1190-91; *Gibbons v*. *Ogden*, 22 U.S. 1, 78 (1824) (a "general *prima facie* presumption in favour of the constitutionality of every act of a State Legislature" exists). In the present case, no evidence in the record shows a preliminary injunction is necessary to prevent any irreparable harm to Appellees (or to other citizens in Kansas).

1. A Preliminary Injunction is Not Necessary for the Individual Appellees to Register to Vote

The extraordinary judicial action of a preliminary injunction was not necessary for any of the individual Appellees' ability to register to vote in Kansas for the upcoming federal elections. As discussed above, all Appellees can comply with K.S.A. §§ 25-2309(l) or (m) and register to vote. *See supra* Section II.B. Thus, all of the individual Appellees have confirmed they could and would register to vote prior to the 2016 elections without any preliminary injunction in place.

2. A Preliminary Injunction Was Not Necessary for Other Applicants to Register to Vote

The district court also considered what effect K.S.A. § 25-2309(l) had on DMV registration applicants not before the court, citing nothing in the record regarding their situations. App. 708-709. Indeed, the only evidence regarding Kansans other than the five named Appellees strongly supports the Secretary's position. A survey of 500 Kansans found that *lack of proof of citizenship did not hinder a single respondent's ability to register or vote*. App. 611, 626. Only one individual queried in that survey stated that he lacked a K.S.A. § 25-2309(l) compliant document, and that individual was already registered to vote. App. 611, 626[17]

[17] Of those respondents contacted who were not registered to vote, every person had documentary proof of citizenship in his or her possession; and none of the respondent stated that the requirement to provide documentary proof of citizenship prevented them from registering to vote. App. 626.

Moreover, Appellees have failed to identify any citizens at all who lack documentary proof of citizenship *and* cannot register to vote under K.S.A. 25-2309(m). Yet, in the absence of any evidence, the district court simply assumed that such a person exists; and the court ordered Kansas to overhaul its entire voter registration procedures based on an entirely hypothetical case. *See* App. 66.

C. The Preliminary Injunction Harms the Public Interest by Creating Unprecedented Voter Confusion

If not reversed, the preliminary injunction will cause great confusion for voters during the November 8, 2016, election. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v*. *Gonzalez*, 549 U.S. 1, 4 (2006)(emphasis added); *see also Veasey v*. *Perry*, 769 F.3d 890, 893 (5th Cir. 2014). Those words could not ring truer in the instant case.

The district court's preliminary injunction has created a confusing new status of half-registered voters who can participate in elections for federal office but not elections for state offices. It is likely that many of the 18,000-50,000 voters in this category will misunderstand the notifications informing them that they are registered to vote in federal elections only, and will instead believe that

they have fully completed their registrations. When they go to the polls they will find that they are permitted to vote for federal offices only. However, if the preliminary injunction is reversed, it will be clear to them (through the multiple notices and telephone calls that they will receive from the county election offices) that they still need to provide proof of citizenship. And as the survey data presented by the Secretary demonstrates, they will easily be able to do so. *See* App. 611. There is a weighty public interest in ensuring that the election process is easily understood, and that voters know whether they are registered or not. The district court's preliminary injunction has severely damaged that public interest by creating a bifurcated election with voters who are registered for federal elections only.

CONCLUSION

For the reasons stated above, the district court's preliminary injunction below should be reversed and this case remanded for adjudication consistent with this Court's order.

Respectfully submitted this 1st day
of July, 2016.

/s/ Kris W. Kobach
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STATEMENT REGARDING ORAL ARGUMENT

Because of the importance and complexity of the issues involved, namely the issues of first impression related to the interpretation of the National Voter Registration Act and that this Court's decision will have immediate impacts on the 2016 elections in Kansas, the Kansas Secretary of State respectfully submits that oral argument is appropriate.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 13,911 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman font.

Date: July 1, 2016

s/ GARRETT ROE
Garrett Roe
Attorney for Kansas Secretary of State

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF OF APPELLANT KANSAS SECRETARY OF STATE, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Symantec Endpoint Protection, Version 12.1.5., last updated on July 1, 2016, and, according to the program, is virus-free.

s/ GARRETT ROE
Garrett Roe
Attorney for Kansas Secretary of State

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 1st day of July, 2016, I electronically filed the foregoing BRIEF OF APPELLANT KANSAS SECRETARY OF STATE with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that I will cause to be served seven paper copies of the same by Federal Express so that it arrives to the Court within two business days and one paper copy to the following counsel of record via Federal Express:

Dale Ho
American Civil Liberties Union, Voting Rights Project
125 Broad St, 18th Floor
New York, NY 10004

s/ GARRETT ROE
Garrett Roe
Attorney for Kansas Secretary of State

ADDENDUM TO BRIEF OF THE KANSAS SECRETARY OF STATE KRIS KOBACH

The National Voter Registration Act of 1993 (excerpts)

52 U.S.C. § 20501. Findings and purposes

(a) Findings. The Congress finds that--

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes. The purposes of this chapter are--

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C.A. § 20502. Definitions

As used in this chapter--

(1) the term "election" has the meaning stated in section 30101(1) of this title;

(2) the term "Federal office" has the meaning stated in section 30101(3) of this title;

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 20506(a)(1) of this title to perform voter registration activities.

52 U.S.C. § 20503. National procedures for voter registration for elections for Federal office

(a) In general. Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office--

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 20504 of this title;

(2) by mail application pursuant to section 20505 of this title; and

(3) by application in person--

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 20506 of this title.

(b) Nonapplicability to certain States. This chapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this chapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

52 U.S.C. § 20504. Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general.

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information. No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures.

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license--

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to--

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that--

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) Change of address. Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) Transmittal deadline.

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

52 U.S.C. § 20505. Mail registration

(a) Form.

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms. The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters.

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(B) who is provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices. If a notice of the disposition of a mail voter registration application under section 20507(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 20507(d) of this title.

52 U.S.C. § 20508. Federal coordination and regulations

(a) In general. The Election Assistance Commission--

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this chapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this chapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this chapter.

(b) Contents of mail voter registration form. The mail voter registration form developed under subsection (a)(2)--

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that--

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

K.S.A. § 25-2309. Application for registration; registration agencies; limitations on public inspection of registrations; registration citizenship requirements; election board citizenship hearings; unsatisfactory evidence of citizenship; sworn affidavits; rules and regulations

(a) Any person may apply in person, by mail, through a voter registration agency, or by other delivery to a county election officer to be registered. Such application shall be made on: (1) A form approved by the secretary of state, which shall be provided by a county election officer or chief state election official upon request in person, by telephone or in writing; or (2) the national mail voter registration form issued pursuant to federal law. Such application shall be signed by the applicant under penalty of perjury and shall contain the original signature of the applicant or the computerized, electronic or digitized transmitted signature of the applicant. A signature may be made by mark, initials, typewriter, print, stamp, symbol or any other manner if by placing the signature on the document the person intends the signature to be binding. A signature may be made by another person at the voter's direction if the signature reflects such voter's intention.

(b) Applications made under this section shall give voter eligibility requirements and such information as is necessary to prevent duplicative voter registrations and enable the relevant election officer to assess the eligibility of the applicant and to administer voter registration, including, but not limited to, the following data to be kept by the relevant election officer as provided by law:

(1) Name;

(2) place of residence, including specific address or location, and mailing address if the residence address is not a permissible postal address;

(3) date of birth;

(4) sex;

(5) the last four digits of the person's social security number or the person's full driver's license or nondriver's identification card number;

(6) telephone number, if available;

(7) naturalization data (if applicable);

(8) if applicant has previously registered or voted elsewhere, residence at time of last registration or voting;

(9) when present residence established;

(10) name under which applicant last registered or voted, if different from present name;

(11) an attestation that the applicant meets each eligibility requirement;

(12) a statement that the penalty for submission of a false voter registration application is a maximum presumptive sentence of 17 months in prison;

(13) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes;

(14) a statement that if an applicant does register to vote, the office to which a voter registration application is submitted will remain confidential and will be used only for voter registration purposes;

(15) boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States, together with the question "Are you a citizen of the United States of America?";

(16) boxes for the county election officer or chief state election official to check to indicate whether the applicant has provided with the application the information necessary to assess the eligibility of the applicant, including such applicant's United States citizenship;

(17) boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day, together with the question "Will you be 18 years of age on or before election day?";

(18) in reference to paragraphs (15) and (17) the statement "If you checked 'no' in response to either of these questions, do not complete this form.";

(19) a statement that the applicant shall be required to provide identification when voting; and

(20) political party affiliation declaration, if any. An applicant's failure to make a declaration will result in the applicant being registered as an unaffiliated voter.

If the application discloses any previous registration in any other county or state, as indicated by paragraph (8) or (10), or otherwise, the county election officer shall upon the registration of the applicant, give notice to the election

official of the place of former registration, notifying such official of applicant's present residence and registration, and authorizing cancellation of such former registration. This section shall be interpreted and applied in accordance with federal law. No eligible applicant whose qualifications have been assessed shall be denied registration.

(c) Any person who applies for registration through a voter registration agency shall be provided with, in addition to the application under subsection (b), a form which includes:

(1) The question "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(2) a statement that if the applicant declines to register to vote, this decision will remain confidential and be used only for voter registration purposes;

(3) a statement that if the applicant does register to vote, information regarding the office to which the application was submitted will remain confidential and be used only for voter registration purposes; and

(4) if the agency provides public assistance,

(i) the statement "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(ii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote, together with the statement "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iii) the statement "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(iv) the statement "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with the Kansas Secretary of State."

(d) If any person, in writing, declines to register to vote, the voter registration agency shall maintain the form prescribed by subsection (c).

(e) A voter registration agency shall transmit the completed registration application to the county election officer not later than five days after the date of acceptance. Upon receipt of an application for registration, the county election officer shall

send, by nonforwardable mail, a notice of disposition of the application to the applicant at the postal delivery address shown on the application. If a notice of disposition is returned as undeliverable, a confirmation mailing prescribed by K.S.A. 25-2316c, and amendments thereto, shall occur.

(f) If an application is received while registration is closed, such application shall be considered to have been received on the next following day during which registration is open.

(g) A person who completes an application for voter registration shall be considered a registered voter when the county election officer adds the applicant's name to the county voter registration list.

(h) Any registered voter whose residence address is not a permissible postal delivery address shall designate a postal address for registration records. When a county election officer has reason to believe that a voter's registration residence is not a permissible postal delivery address, the county election officer shall attempt to determine a proper mailing address for the voter.

(i) Any registered voter may request that such person's residence address be concealed from public inspection on the voter registration list and on the original voter registration application form. Such request shall be made in writing to the county election officer, and shall specify a clearly unwarranted invasion of personal privacy or a threat to the voter's safety. Upon receipt of such a request, the county election officer shall take appropriate steps to ensure that such person's residence address is not publicly disclosed. Nothing in this subsection shall be construed as requiring or authorizing the secretary of state to include on the voter registration application form a space or other provision on the form that would allow the applicant to request that such applicant's residence address be concealed from public inspection.

(j) No application for voter registration shall be made available for public inspection or copying unless the information required by paragraph (5) of subsection (b) has been removed or otherwise rendered unreadable.

(k) If an applicant fails to answer the question prescribed in paragraph (15) of subsection (b), the county election officer shall send the application to the applicant at the postal delivery address given on the application, by nonforwardable mail, with a notice of incompleteness. The notice shall specify a period of time during which the applicant may complete the application in

accordance with K.S.A. 25-2311, and amendments thereto, and be eligible to vote in the next election.

(l) The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship. Evidence of United States citizenship as required in this section will be satisfied by presenting one of the documents listed in paragraphs (1) through (13) of subsection (l) in person at the time of filing the application for registration or by including a photocopy of one of the following documents with a mailed registration application. After a person has submitted satisfactory evidence of citizenship, the county election officer shall indicate this information in the person's permanent voter file. Evidence of United States citizenship shall be satisfied by providing one of the following, or a legible photocopy of one of the following documents:

(1) The applicant's driver's license or nondriver's identification card issued by the division of vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship;

(2) the applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or secretary of state;

(3) pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport;

(4) the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States bureau of citizenship and immigration services by the county election officer or the secretary of state, pursuant to 8 U.S.C. § 1373(c);

(5) other documents or methods of proof of United States citizenship issued by the federal government pursuant to the immigration and nationality act of 1952, and amendments thereto;

(6) the applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number;

(7) the applicant's consular report of birth abroad of a citizen of the United States of America;

(8) the applicant's certificate of citizenship issued by the United States citizenship and immigration services;

(9) the applicant's certification of report of birth issued by the United States department of state;

(10) the applicant's American Indian card, with KIC classification, issued by the United States department of homeland security;

(11) the applicant's final adoption decree showing the applicant's name and United States birthplace;

(12) the applicant's official United States military record of service showing the applicant's place of birth in the United States; or

(13) an extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

(m) If an applicant is a United States citizen but does not have any of the documentation listed in this section as satisfactory evidence of United States citizenship, such applicant may submit any evidence that such applicant believes demonstrates the applicant's United States citizenship.

(1) Any applicant seeking an assessment of evidence under this subsection may directly contact the elections division of the secretary of state by submitting a voter registration application or form as described by this section and any supporting evidence of United States citizenship. Upon receipt of this information, the secretary of state shall notify the state election board, as established under K.S.A. 25-2203, and amendments thereto, that such application is pending.

(2) The state election board shall give the applicant an opportunity for a hearing and an opportunity to present any additional evidence to the state election board. Notice of such hearing shall be given to the applicant at least five days prior to the hearing date. An applicant shall have the opportunity to be represented by counsel at such hearing.

(3) The state election board shall assess the evidence provided by the applicant to determine whether the applicant has provided satisfactory evidence of United States citizenship. A decision of the state election board shall be determined by a majority vote of the election board.

(4) If an applicant submits an application and any supporting evidence prior to the close of registration for an election cycle, a determination by the state election board shall be issued at least five days before such election date.

(5) If the state election board finds that the evidence presented by such applicant constitutes satisfactory evidence of United States citizenship, such applicant will have met the requirements under this section to provide satisfactory evidence of United States citizenship.

(6) If the state election board finds that the evidence presented by an applicant does not constitute satisfactory evidence of United States citizenship,

such applicant shall have the right to appeal such determination by the state election board by instituting an action under 8 U.S.C. § 1503. Any negative assessment of an applicant's eligibility by the state election board shall be reversed if the applicant obtains a declaratory judgment pursuant to 8 U.S.C. § 1503, demonstrating that such applicant is a national of the United States.

(n) Any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship.

(o) For purposes of this section, proof of voter registration from another state is not satisfactory evidence of United States citizenship.

(p) A registered Kansas voter who moves from one residence to another within the state of Kansas or who modifies such voter's registration records for any other reason shall not be required to submit evidence of United States citizenship.

(q) If evidence of citizenship is deemed to be unsatisfactory due to an inconsistency between the document submitted as evidence and the name or sex provided on the application for registration, such applicant may sign an affidavit:

(1) Stating the inconsistency or inconsistencies related to the name or sex, and the reason therefor; and

(2) swearing under oath that, despite the inconsistency, the applicant is the individual reflected in the document provided as evidence of citizenship. However, there shall be no inconsistency between the date of birth on the document provided as evidence of citizenship and the date of birth provided on the application for registration. If such an affidavit is submitted by the applicant, the county election officer or secretary of state shall assess the eligibility of the applicant without regard to any inconsistency stated in the affidavit.

(r) All documents submitted as evidence of citizenship shall be kept confidential by the county election officer or the secretary of state and maintained as provided by Kansas record retention laws. The provisions of this subsection shall expire on July 1, 2016, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto, prior to July 1, 2016.

(s) The secretary of state may adopt rules and regulations to1 in order to implement the provisions of this section.

(t) Nothing in this section shall prohibit an applicant from providing, or the secretary of state or county election officer from obtaining satisfactory evidence of United States citizenship, as described in subsection (1), at a different time or in a different manner than an application for registration is provided, as long as the applicant's eligibility can be adequately assessed by the secretary of state or county election officer as required by this section.

(u) The proof of citizenship requirements of this section shall not become effective until January 1, 2013.

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, et al.,

Plaintiffs,

v.

KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas, et al.,

Defendants.

Case No. 16-2105-JAR-JPO

MEMORANDUM AND ORDER

This lawsuit challenges the Kansas documentary proof of citizenship requirement as it applies to those who apply to register to vote in federal elections during the driver's license application or renewal process. The individual plaintiffs filed their Complaint on February 18, 2016, on behalf of themselves and others similarly situated, against Kansas Secretary of State Kris Kobach, and Kansas Secretary of Revenue Nick Jordan. The Complaint alleges that the Kansas documentary proof of citizenship requirement and a related regulation are preempted by the National Voter Registration Act of 1993, and violate 42 U.S.C. § 1983 because they are unconstitutional under the Elections Clause and Privileges and Immunities Clause of the United States Constitution.[1] Before the Court is Plaintiffs' Motion for Preliminary Injunction, filed on February 25, 2016 (Doc. 19). Plaintiffs request a preliminary injunction barring Defendants from enforcing K.S.A. § 25-2309(l), which requires voters to provide proof of United States' citizenship when they apply to register to vote at the same time they apply for or renew a driver's license, and K.A.R. § 7-23-15, which allows cancellation of voter registration applications that

[1]Plaintiffs filed an Amended Complaint on March 17, 2016, adding an organizational plaintiff, The League of Women Voters of Kansas. Doc. 39.

are incomplete for more than 90 days after application due to failure to prove United States' citizenship, until the case can be determined on the merits.

The Court allowed the parties to conduct limited, expedited discovery, and heard evidence and argument on the motion on April 14, 2016. At this time, the Court also considers Defendant Secretary of Revenue Nick Jordan's Motion to Dismiss (Doc. 64) to the extent it asserts lack of subject matter jurisdiction. These matters are fully briefed. The Court has considered the parties' briefs, the evidence adduced at the hearing, and the parties' oral arguments, and is prepared to rule. As explained more fully below, Plaintiffs' motion for preliminary injunction is granted in part and denied in part.

I. Background

In 1993, Congress passed the National Voter Registration Act ("NVRA"). The NVRA has four stated purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.[2]

The NVRA seeks to achieve these objectives by creating national registration requirements for federal elections through three methods: simultaneously with a driver's license application ("motor-voter"), by mail using the federal form approved by the Election Assistance Commission ("EAC"), or in person.[3] This case deals with the first option only—applying to register simultaneously when applying for a driver's license.

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[2] 52 U.S.C. § 20501(b).

[3] *Id.* § 20503(a).

Section 5 of the NVRA requires that every application for a driver's license, including license renewals, "shall serve as an application for voter registration with respect to elections for Federal office."[4] Subsection (c) of section 5 provides:

> (1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.
> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
>
> (A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));
>
> (B) may require only the minimum amount of information necessary to—
>
> (i) prevent duplicate voter registrations; and
> (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (C) shall include a statement that—
>
> (i) states each eligibility requirement (including citizenship);
> (ii) contains an attestation that the applicant meets each such requirement; and
> (iii) requires the signature of the applicant, under penalty of perjury;
>
> (D) shall include, in print that is identical to that used in the attestation portion of the application—
>
> (i) the information required in section 20507(a)(5)(A) and (B) of this title;
> (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and
> (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and
>
> (E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.[5]

[4] *Id.* § 20504(a)(1). "Federal office" is further defined in § 20502(2).

[5] *Id.* § 20504(c).

Section 8 of the NVRA provides for the administration of voter registration. Under this section, each State shall

> (1) ensure that any eligible applicant is registered to vote in an election—
>
> (A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election.[6]

Each State shall also:

> (3) provide that the name of a registrant may not be removed from the official list of eligible voters except—
>
> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) as provided under paragraph (4);
>
> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d).[7]

The NVRA was passed after the House and Senate each passed voter registration bills and proceeded to conference committee. The Senate's bill contained several Republican-proposed amendments, referred to as a "core" package of amendments that allowed the bill to pass the Senate.[8] Another amendment to the Senate bill, which was not part of the core amendments, but was in the Senate bill that went to conference, was a rule of construction that

[6] *Id.* § 20507(a)(1)(A).

[7] *Id.* § 20507(a)(3).

[8] *See* 139 Cong. Rec. S5642-01 (daily ed. May 6, 1993) (statement of Sen. Ford).

had been proposed by Senator Simpson ("the Simpson Amendment").[9] That amendment provided "that nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration."[10] At the time the amendment was debated in the Senate, before it went to conference, Senator Ford, who sponsored the legislation, stated that the amendment was redundant because the bill did not preclude States from requiring documentary proof of citizenship.[11] But the conference decided to follow the House bill instead, which did not include this provision. The conference report explains:

> It is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well. In addition, it creates confusion with regard to the relationship of this Act to the Voting Rights Act. Except for this provision, this Act has been carefully drafted to assure that it would not supersede, restrict or limit the application of the Voting Rights Act. These concerns lead the conferees to conclude that this section should be deleted.[12]

When submitting the conference committee report on the Senate floor, Senator Ford discussed the amendment. After citing the same concerns raised in the report, he stated:

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[9] *Id.*; 139 Cong. Rec. S5677-04 (daily ed. May 7, 1993) (statement of Sen. Simpson).

[10] H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).

[11] 139 Cong. Rec. S2902 (daily ed. Mar. 16, 1993) (statement of Sen. Ford), attached as Kobach Ex. 7. Just two weeks before making this statement, however, Senator Ford responded to criticism of the NVRA that it would allow noncitizens to register to vote:

> The safeguards in this bill are just as effective in preventing noncitizens from registering to vote.
>
> Nothing in this legislation changes the requirements of eligibility to vote. You must still meet every requirement of eligibility. In fact, this bill specifically states in three separate places that the application for registration must set forth all the requirements for eligibility including citizenship. The applicant signs this attestation under penalty of perjury.

139 Cong. Rec. S2389-02, 1993 WL 56970 (Mar. 4, 1993) (statement of Sen. Ford).

[12] H.R. Rep. N. 103-66 at 23–24; 139 Cong. Rec. S5642-01 (daily ed. May 6, 1993) (statement of Sen. Ford).

> Mr. President, every State mandates that you must be a citizen of the United States to be eligible to vote. This bill requires that, on every application for registration, the requirements for eligibility must be clearly set forth, including citizenship. And every applicant signs a statement that they meet each and every requirement, and that statement is signed under penalty of perjury.[13]

The NVRA was ultimately passed without the proposed rule of construction amendment.

In 2007, Kansas amended its driver's license statute to require all applicants to provide documentary proof of lawful presence.[14] As part of this requirement, the division of vehicles

> shall require valid documentary evidence that the applicant: (A) Is a citizen or national of the United States; (B) is an alien lawfully admitted for permanent or temporary residence in the United States; (C) has conditional permanent resident status in the United States; (D) has an approved application for asylum in the United States or has entered into the United States in refugee status; (E) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States; (F) has a pending application for asylum in the United States; (G) has a pending or approved application for temporary protected status in the United States; (H) has approved deferred action status; or (I) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.[15]

Under Kansas law, only United States citizens are eligible to register to vote.[16] And legally qualified voters must register in order to be eligible to vote.[17] The Secure and Fair Elections Act ("SAFE Act") became law in 2011. It requires voter registration applicants to submit documentary proof of citizenship ("DPOC") at the time they apply to register to vote:

> (l) The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship. Evidence of United States citizenship as required in this section will be satisfied by presenting one of the documents listed in paragraphs (1) through (13) of subsection (l) in person at the time of filing the application for registration or by

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[13]139 Cong. Rec. S5642-01 (daily ed. May 6, 1993) (statement of Sen. Ford).

[14]K.S.A. § 8-240(b).

[15]*Id.* § 8-240(b)(2).

[16]Kansas Constitution art. 5, § 1.

[17]K.S.A. § 25-2302.

including a photocopy of one of the following documents with a mailed registration application. After a person has submitted satisfactory evidence of citizenship, the county election officer shall indicate this information in the person's permanent voter file. Evidence of United States citizenship shall be satisfied by providing one of the following, or a legible photocopy of one of the following documents:

(1) The applicant's driver's license or nondriver's identification card issued by the division of vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship;
(2) the applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or secretary of state;
(3) pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport;
(4) the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States bureau of citizenship and immigration services by the county election officer or the secretary of state, pursuant to 8 U.S.C. § 1373(c);
(5) other documents or methods of proof of United States citizenship issued by the federal government pursuant to the immigration and nationality act of 1952, and amendments thereto;
(6) the applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number;
(7) the applicant's consular report of birth abroad of a citizen of the United States of America;
(8) the applicant's certificate of citizenship issued by the United States citizenship and immigration services;
(9) the applicant's certification of report of birth issued by the United States department of state;
(10) the applicant's American Indian card, with KIC classification, issued by the United States department of homeland security;
(11) the applicant's final adoption decree showing the applicant's name and United States birthplace;
(12) the applicant's official United States military record of service showing the applicant's place of birth in the United States; or
(13) an extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.[18]

[18]K.S.A. § 25-2309(l).

The DPOC requirement was made effective January 1, 2013.[19] A person already registered to vote before January 1, 2013, is not required to resubmit evidence of citizenship.[20]

If an applicant is a United States citizen but unable to provide one of the thirteen forms of identification listed in subsection (l), the statute allows that applicant to submit another form of citizenship documentation by directly contacting the Secretary of State's Office. In these cases, the state election board shall give the applicant an opportunity for a hearing before assessing the evidence of citizenship to determine whether it is satisfactory.[21] The state election board is comprised of the Secretary of State, the Attorney General, and the Lieutenant Governor.[22] Secretary Kobach represents that this hearing before the election board may be telephonic, that three people have so far availed themselves of this provision, and that all three were approved by the election board. Examples provided by Secretary Kobach of alternative forms of citizenship documentation under subsection (m) include an affidavit from a sibling stating the date and place of birth, school records, or even an applicant's own affidavit. Secretary Kobach stated:

> [H]e can also make the allegation himself, too. He can file his own declaration. . . . I would be willing to bet that the State Election Board would take simply his own declaration as sufficient. The State Election Board has yet to tell anyone no. And that's perfectly fine if a person is willing to make an attestation, a declaration to the State Election Board, "Here are my circumstances, here's why I don't have my document."[23]

The evidence submitted at the hearing on this matter shows that prior to the effective date of the SAFE Act, eleven noncitizens successfully registered to vote in Sedgwick County.[24] Bryan Caskey, Assistant Secretary of State, Elections and Legislative Matters, avers in his

[19] *Id.* § 25-2309(u).

[20] *Id.* § 25-2309(n).

[21] *Id.* § 25-2309(m).

[22] K.S.A. § 25-2203(a).

[23] Doc. 115, Tr. Hrg. at 68:20–69:7.

[24] Kobach Ex. 8, attach.

declaration that his office has identified nineteen other cases of noncitizens registering to vote prior to 2013.[25] Of these thirty noncitizens, the evidence shows that three actually voted, two in 2004 and one 2009.[26] According to Mr. Caskey, the Seward County Clerk provided testimony before the Legislature when it deliberated over the SAFE Act that approximately fifty noncitizens were registered to vote in 1997, in the period preceding a county referendum on a proposed hog-farming operation.[27] According to Caskey, the Clerk testified that these noncitizens voted in the referendum. There is no other evidence about the details of this incident, nor any direct evidence from the Seward County Clerk. Since the effective date of the DPOC requirement, fourteen noncitizens have unsuccessfully attempted to register to vote in Sedgwick County.

Plaintiffs offered the expert testimony of Dr. Lorraine Minnite to controvert Secretary Kobach's argument that there is a widespread problem of noncitizen voter fraud in Kansas. Dr. Minnite is an associate professor of Public Policy and Administration at Rutgers University who specializes in elections; she has extensively researched and studied incidents and effects of voter fraud in American elections. She has reviewed allegations of voter fraud nationally, and Secretary Kobach's allegations of voter fraud in Kansas.[28] She contends that there is no

[25]Kobach Ex. 1 ¶ 28.

[26]Kobach Ex. 8, attach .

[27]Kobach Ex. 1 ¶ 29. Defendants provide no other evidence or citation regarding this testimony. There is no affidavit from the Seward County Clerk, or other direct evidence of her testimony.

[28]The Court confines its analysis of Dr. Minnite's report to incidents of noncitizen voter fraud in Kansas, and specifically, to the incidents of voter fraud identified by Defendants in response to this motion. Defendants do not raise or rely upon the vast majority of evidence that Dr. Minnite impeaches in her report, thus the Court finds her general discussion of voter fraud is not relevant. The Court acknowledges that the district court in *N.C. State Conference of the NAACP v. McCrory*, –F. Supp. 3d–, 2016 WL 1650774, at 97–98 (M.D.N.C. Apr. 25, 2016), recently rejected Dr. Minnite's conclusion that there is no voter impersonation fraud in North Carolina, and her conclusion that the North Carolina photo-ID law did not serve a legitimate State interest in reducing the risk of voter impersonation fraud. These findings have little bearing on the case at hand. This case considers an NVRA challenge to a registration requirement that applicants provide DPOC, not to a law requiring registered voters to present photo-ID at the polls. Further, the *McCrory* case considers constitutional and Voting Rights Act challenges to the State's photo-ID statute, claims not at issue in this case.

evidence of a persistent problem of noncitizens fraudulently voting in Kansas. With respect to the details of the Seward County incident, Dr. Minnite points to Secretary Kobach's discussion of the incident before the United States House of Representatives Committee on Oversight and Government Reform on February 12, 2015.[29] There, Secretary Kobach characterized this as "[t]he most notorious case of aliens voting in Kansas."[30] The county referendum would have prohibited large hog farming operations in Seward County. Investors in a proposed hog farming operation hoped to raise hogs in a Kansas plant and render them at a processing plant in Oklahoma.

> More than 50 employees of the Guyman, Oklahoma, hog processing plant sent in voter registration applications in a single envelope addressed to the county clerk's office in Seward County, Kansas. Many of the registration forms contained made-up addresses in Seward County. However, the clerk had no legal authority to reject the registration applications.[31]

Secretary Kobach then told the House Subcommittee that these Oklahoma workers were bussed in to Seward County on Election Day to vote. "The county clerk strongly believed that the registrants were non-citizens."[32] He lamented that the county was powerless to disqualify the voters.[33]

Mr. Caskey testified at the hearing, and submitted a lengthy declaration documenting the administration of motor-voter registration in Kansas.[34] As part of his duties, Mr. Caskey administers the Kansas Election Voter Information System ("ELVIS") database and works with

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[29] *Hearing on "The President's Executive Actions on Immigration and Their Impact on State and Local Elections" Before the Subcomm. on Nat'l Sec. and Subcomm. on Health Care, Benefits, and Admin. Rules*, 114th Cong. (2015) (statement of Kris W. Kobach, Kansas Secretary of State), https://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

[30] *Id.* at 2.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Kobach Ex. 1.

the individual counties to manage voter registration. The ELVIS system is a statewide list of every registered voter, every voter registration applicant, and everyone who used to be a registered voter but was subsequently cancelled. All 105 county election offices are "plugged in" to the system. Mr. Caskey provides instruction to the counties for handling elections. He discussed in his declaration, during his deposition, and at the hearing the procedure for assessing citizenship eligibility for those who apply at the DMV. The Kansas DMV clerks are instructed to ask each driver's license applicant, whether it is an initial application or a renewal, if that person wants to register to vote. If the applicant says yes, the DMV clerk is prompted to ask questions about the applicant's eligibility to vote, including asking whether the person is a United States citizen.

Mr. Caskey describes the relationship between the Department of Revenue and the Secretary of State's Office as follows:

> The Secretary of State's Office and the DMV have established an interagency practice whereby the DMV sends verification of documentary proof of citizenship to the relevant county election official. In instances where it is learned that the DMV has failed to forward such information to the county election official, the Secretary of State's Office obtains the relevant documentation from the DMV and instructs the county election officer to complete the registration of the individual.[35]

But the evidence at the hearing establishes that the DMV clerks do not request DPOC from driver's license renewal applicants. They request proof of lawful presence for initial applicants only, which often constitutes proof of citizenship. When this documentation is provided by initial applicants, the DMV clerk makes an annotation in the DMV database about the type of documentation provided by the applicant. But the Department of Revenue has made a policy

[35] *Id.* ¶ 24.

decision not to request DPOC from renewal applicants, claiming it lacks the administrative capacity to undertake that effort.

At the end of the motor voter application process, the applicants sign a digital form that includes the NVRA-required attestation clause that what they are signing is true and correct, and that they are a United States citizen. Once that is complete, the applicants are handed a receipt that apparently includes a statement about the DPOC requirement and that instructs the applicants that if they have not already provided proof of citizenship, they must do so before they will be registered.[36] Mr. Kobach characterized this receipt at the hearing as an applicant's "first notice."

The DMV database information about each voter registration application is uploaded nightly in batch format into the state-wide ELVIS system, which then disseminates the information to the 105 county election offices based on the applicant's address. For each voter registration application, there is electronic data, and a separate certification from the DMV stating whether acceptable DPOC was provided to the DMV at the time of registration. Once the county election official opens the batch, the county begins creating individual records.

If an applicant has not provided DPOC, or if the application is otherwise missing required information, the record is designated as "in suspense" or "incomplete" in the ELVIS system until the applicant provides the remaining information. Secretary Kobach promulgated K.A.R. § 7-23-15 to become effective on October 2, 2015. The regulation provides that applications deemed "incomplete" are to be "cancelled" from the State's list of applicants if the applicant does not

[36]This receipt was not offered into the record with the briefs or at the hearing. The testimony suggested that this is a transaction receipt. There was no evidence about where the DPOC requirement appears or how conspicuous it may or may not be.

produce DPOC within 90 days of application.[37] When an application is cancelled due to lack of DPOC, that record is not removed from the ELVIS database; there remains a record of all cancelled applications.

The county election offices populate the ELVIS system with new registration records, and maintain records of the notices sent to applicants deemed incomplete for failure to provide DPOC or for some other reason. The first mailed notice is sent within one or two weeks of application. The counties are advised to send out a third notice after about thirty days, and a fourth notice before cancellation. Thus, the counties have been instructed by the Secretary of State's Office to send three written notices and to make one telephone call to applicants on the incomplete list before cancelling their applications.[38] Each written and oral communication is to be entered into the ELVIS database.

A person who receives notice of an incomplete voter registration application due to failure to provide DPOC can provide their DPOC in person at the county election office for inspection, by mailing a copy of the document to the county election officer or to the Secretary of State's Office, or by faxing, emailing, and in some counties, texting a copy of the documents. In addition, the Secretary of State's office checks approximately monthly with the Kansas Department of Vital Statistics ("KDHE") to see if individuals missing DPOC were born in the State of Kansas, and will complete those registrations if so. Almost half of the voter registration applications on the suspense list have had citizenship confirmed through these monthly checks; many others submit their DPOC after receiving notice.

[37]The parties use different language to describe the applicant's status under this regulation. Plaintiffs refer to a cancelled application as a "purged" application. Because cancelled is the word used in the regulation and database, the Court uses that term throughout this opinion.

[38]No example of a written notice was offered into the record with the briefs or at the hearing.

If information is provided to the Kansas Secretary of State's Office suggesting that an initial applicant presented DPOC to the DMV at the time of application, but that information was not conveyed into the ELVIS system, Mr. Caskey will confirm whether or not the DMV has in its possession a proof of citizenship record for the applicant. Given the DMV policy not to request DPOC for renewal applicants, this confirmation process would never occur with renewal applicants. Also, Mr. Caskey avers that the Kansas Secretary of State's Office contacts other States to verify that a birth certificate exists confirming citizenship, and contacts voters by telephone or in person to determine eligibility.

Many registered voters in Kansas have registered to vote at DMV offices—between January 1, 2006 and March 23, 2016, 43.7% of Kansas voters registered at a DMV office. The individual Plaintiffs and the proposed class they represent are Kansas residents and citizens who are "motor-voter registrants": that is, they submitted voter registration applications at DMV offices in Kansas. These Plaintiffs were not registered to vote because they failed to meet the documentary proof-of-citizenship requirement imposed under K.S.A. § 25-2309(l). Some of these voters' applications are considered "in suspense" in the ELVIS system, while others have been cancelled under K.A.R. § 7-23-15.

Soon after the original complaint was filed, the originally-named plaintiffs moved for class certification. That motion is not yet fully briefed, and a hearing has been scheduled on that motion on June 16, 2016.

Plaintiff Steven Wayne Fish is a United States citizen who currently resides in Lawrence, Kansas. He first moved to Kansas as a young person, obtaining his first Kansas driver's license in 1995. He has continuously possessed a Kansas driver's license since then. On August 21, 2014, Mr. Fish went to the driver's license office in Lawrence to renew his driver's license. The

DMV clerk asked him at that time if he wanted to register to vote. He had never registered before, but decided to register at this time. The clerk did not ask Mr. Fish for DPOC and did not tell Mr. Fish that Kansas law requires DPOC. Soon after applying to register, on August 27, 2014, Fish received a postcard from the Douglas County, Kansas County Clerk, informing him that his name had not been entered onto the voter rolls and that he needed to submit DPOC in order to complete the registration process. Mr. Fish searched his records but could not find any documents that would be sufficient to prove his citizenship under § 25-2309(l). Mr. Fish was born on an Air Force Base in Chanute, Kansas that was decommissioned and closed in 1993; at the time he received notice of his incomplete registration, he did not know how to obtain a copy of his birth certificate. Mr. Fish has a modest income and could not afford to obtain a copy of his birth certificate. He was unable to vote in the 2014 election. Mr. Fish's original affidavit stated that his application was in suspense, but the ELVIS records appear to show that his application was cancelled. On May 11, 2016, Mr. Fish submitted a supplemental declaration attesting that he recently found his birth certificate in a safe in his stepfather's house.[39] Nonetheless, Fish will not be able to vote in the upcoming primary or general elections of 2016 unless he reapplies to register and submits this document.[40]

Plaintiff Donna Bucci is a United States citizen who currently resides in Wichita, Kansas. She has lived in Kansas for about five years. On August 14, 2013, Ms. Bucci went to the driver's license office in Wichita, Kansas to renew her driver's license. The DMV clerk asked her at that time if she wanted to register to vote. Bucci wanted to register in order to vote in the next election cycle. The clerk did not ask Ms. Bucci for DPOC and did not tell Ms. Bucci that Kansas law requires DPOC. Ms. Bucci left the driver's license office believing that she had

[39]Doc. 121.

[40]Pls. Ex. 2; Kobach Ex. 1 ¶ 34; Kobach Ex. 9 at 1–8.

successfully registered to vote. Ms. Bucci states in her declaration that she did not learn that she was not registered to vote until six or seven months later when she received a notice in the mail telling her that she needed to show proof of citizenship in order to be a registered voter. The ELVIS records show that Ms. Bucci was sent two notifications that proof of citizenship was required—the first on August 16, 2013, and a "final notice" on September 28, 2015. There is also a notation in the database from September 25, 2013: "Will get information to us on POC when she gets items unpacked."[41] Ms. Bucci does not have any documents that would be sufficient to prove her citizenship under § 25-2309(l). Obtaining a copy of her Maryland birth certificate would cost $24, and this would be a financial burden for her. Ms. Bucci's application was cancelled on October 15, 2015 pursuant to K.A.R. § 7-23-15. Ms. Bucci will not be able to vote in the upcoming primary or general elections of 2016. And she stated that this experience discourages her from attempting to register to vote in the future.[42]

Plaintiff William Stricker, III is a United States citizen who currently resides in Wichita, Kansas. Mr. Stricker was a Kansas resident from 2006–08, resided in Chicago from 2008–13, and moved back to Kansas in 2013. He previously voted in the 2010 and 2012 mid-term and Presidential elections. Mr. Stricker went to the DMV office in October 2014 to obtain a driver's license and register to vote. He was told that he had insufficient documentation to obtain a driver's license and was sent home to obtain his social security card.[43] Mr. Stricker returned to the DMV with his out-of-state driver's license, social security card, and utility bills to show proof of lawful presence. The DMV clerk asked him at that time if he wanted to register to vote, and he said yes. The clerk did not ask Mr. Stricker for DPOC and did not tell him that he lacked

[41]Kobach Ex. 9 at 22.

[42]Pls. Ex. 4; Kobach Ex. 1 ¶ 36; Kobach Ex. 9 at 15–22.

[43]Plaintiffs claim in the Reply brief that Mr. Stricker was treated as a renewal applicant at the DMV since he previously resided in Kansas and held a Kansas license at that time.

the necessary documentation to register to vote. Mr. Stricker left the driver's license office believing that he had successfully registered to vote. On Election Day in November 2014, Mr. Stricker went to his polling place and provided his Kansas driver's license to the polling place volunteer. The volunteer could not find Mr. Stricker's name on the voting roll; he was given a provisional ballot. Several weeks after the election, Mr. Stricker received a notice in the mail telling him that he was not registered because he lacked sufficient proof of citizenship. The ELVIS database shows that Mr. Stricker was sent notices on October 21, 2014, December 5, 2014, and a final notice on September 25, 2015, and that he was called regarding his suspense status on February 27, 2015. Due to his schedule, he was unable to submit the necessary documentation to county election officials. His voter registration application was cancelled on November 6, 2015, pursuant to K.A.R. § 7-23-15.[44]

Plaintiff Thomas Boynton is a United States citizen who currently resides in Wichita, Kansas. He first moved to Kansas in July 2014. In early August 2014, Mr. Boynton went to a driver's license office in Wichita, Kansas to exchange a valid out-of-state driver's license for a Kansas license, and to register to vote. The DMV clerk asked him at that time if he wanted to register to vote, and he said yes. Mr. Boynton brought several documents with him to the DMV office that day: his out-of-state license, social security card, original birth certificate, utility bill, bank statement, and house lease. He does not recall which of these documents the DMV clerk asked to see, but he provided the clerk with each document as she requested it. He left the DMV believing he was registered to vote. On Election Day in November 2014, Mr. Boynton went to his polling place to vote but the poll volunteer did not find him on the voter roll. The volunteer told Mr. Boynton that this was common and told him he could cast a provisional ballot instead

[44]Pls. Ex. 5; Kobach Ex. 1 ¶ 37; Kobach Ex. 9 at 23–42.

that would be counted once his voter registration was validated. Mr. Boynton cast a provisional ballot and assumed it would be counted. In early 2015, Mr. Boynton received a notice from the Sedgwick County Board of Elections informing him that he needed to provide DPOC in order to register to vote.

Other than the cases of Mr. Stricker and Mr. Boynton, there is no evidence that provisional ballots have been offered to accommodate motor voter registrants that lack DPOC. And unless DPOC is provided at least one day before the election by applicants on the suspense list, they are ineligible to vote.

The ELVIS database shows no record of Mr. Boynton applying to register at a DMV office in August 2014. The database shows that Mr. Boynton tried to register in person at his polling station on November 4, 2014, Election Day. He was sent two written notices that proof of citizenship was required on December 5, 2014, and on September 28, 2015. There is also a record that he was called regarding his suspense status on February 27, 2015. His voter registration application was cancelled on November 5, 2015 pursuant to K.A.R. § 7-23-15.[45]

[redacted][46]

[45]Pls. Ex. 6; Kobach Ex. 1 ¶ 38; Kobach Ex. 9 at 42–48.

[46]Kobach. Ex. 6; Doc. 115, Hrg. Tr. at 155:10–16.

Plaintiff Douglas Hutchinson is a United States citizen who currently resides in Mission, Kansas. He has lived in Kansas since infancy. He first obtained a Kansas driver's license in the mid-1980's and has continuously possessed a Kansas driver's license since then. Mr. Hutchinson first registered to vote in 1987, but stopped voting many years ago. About two years ago, he decided he wanted to vote again. Mr. Hutchinson went to the DMV office in Mission, Kansas in the spring of 2013 to renew his license and told the clerk he wished to register to vote. The DMV clerk did not require him to provide DPOC. In late 2014 or early 2015, he received a telephone call from a volunteer with the League of Women Voters advising him that his name was not registered to vote because he had not provided DPOC. He attests that he never received prior notice from any government office advising him that his registration was incomplete. Mr. Hutchinson obtained a passport, and in the summer of 2015 attempted to take a copy of his passport to the DMV office. The clerk at the DMV office told him that he had done all that was necessary to complete his voter registration.[47] He received another call later from the League of Women Voters, advising him that his voter registration was still incomplete. He has not had time to present the necessary documentation to complete his application. The ELVIS database shows that notices were sent to Mr. Hutchinson on June 24, 2013, and on December 11, 2015. It reflects that his application was cancelled pursuant to K.A.R. § 7-23-15.[48]

Between January 1, 2013 and March 28, 2016, there were 244,699 voter registration applications completed in Kansas. According to Plaintiffs' expert analysis of the ELVIS data, between January 1, 2013 and March 23, 2016, there were 12,717 motor voter registration

[47]Included in the ELVIS record is a screen shot of what appears to be a scanned hard copy of Stricker's Kansas Voter Registration Application that is date stamped June 30, 2015, and was signed on June 28, 2015. It includes an attestation above his signature that he is a United States Citizen. Kobach Ex. 9 at 56. There is no indication in the record that the county election officials received notice that he had provided a passport to a DMV clerk.

[48]Pls. Ex. 7; Kobach Ex. 1 ¶ 39; Kobach Ex. 9 at 49–59.

applications cancelled under K.A.R. § 7-23-15 for failure to provide DPOC.[49] As of March 28, 2016, there are 5655 motor voter applications that are in "incomplete" status due to failure to provide DPOC.[50]

Kansas's voter participation rate in the November 2012 presidential election was 66.8%; in the 2014 midterm election it was 50.8%. Kansas was one of fourteen states that increased voter turnout from 2010 to 2014. The next statewide election is the primary election of August 2, 2016. Advanced voting for this election begins on July 13, 2016. This ballot will include federal, state, county, township, and precinct offices. The registration deadline for this election is twenty-one days prior to election day; however, DPOC may be provided by an applicant on the suspense list up to one day before the election, August 1, 2016.[51]

Plaintiffs' Amended Complaint alleges claims under: (1) NVRA § 5 because it preempts the Kansas DPOC law; (2) NVRA § 8 because Defendants fail to ensure that voter registration applicants who completed and submitted a valid voter registration form with their driver's license application are registered to vote; (3) NVRA § 8 because the regulation allowing applicants to be cancelled in the ELVIS system removes otherwise eligible voters from the voting rolls; (4) NVRA § 10 for failure to coordinate the State's responsibilities under the Act; (5) 42 U.S.C. § 1983, based on violations of the Elections Clause in Article I, § 4, cl. 1; and (6) 42 U.S.C. § 1983, based on violations of the Privileges and Immunities Clauses. Plaintiffs seek a declaratory judgment that the DPOC law and K.A.R. § 7-23-15 are invalid with respect to motor-voter registrants, and preempted by the NVRA. They also seek injunctive relief that:

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[49]Plaintiffs Ex. 15 at 8. Mr. Caskey asserts that 16,319 applicants have been cancelled since the regulation went into effect for lack of DPOC, but his declaration did not isolate motor voter applicants. *See* Kobach Ex. 1 ¶ 10.

[50]Kobach Ex. 1 ¶ 15.

[51]K.S.A. § 25-2311(e); K.A.R. § 7-23-14 (providing factors for elections officials to consider when assessing documents submitted as evidence of United States citizenship, and allowing voter registration applicants to submit documentation on the day before Election Day).

requires Defendants to register for federal elections Plaintiffs and all similarly situated motor voter registrants who are otherwise eligible to vote but have been either cancelled or held in suspense due to the DPOC law; enjoins Defendants from enforcing the DPOC law and K.A.R. § 7-23-15 with respect to motor voter registrants who are otherwise eligible to vote in federal elections; and that orders Defendants to verify DPOC on file with other state agencies in the same manner as they work with the KDHE to confirm citizenship of suspended voters. Plaintiffs seek attorneys' fees and costs.

In their motion for preliminary injunctive relief, Plaintiffs ask the Court to require the Secretary of State to identify and register all otherwise eligible voters on the incomplete and cancellation lists in ELVIS for federal elections, and to enjoin Defendants from enforcing K.S.A. § 25-2309(l) and K.A.R. § 7-23-15, until the case can be determined on the merits.

II. Subject Matter Jurisdiction

Defendants each raise subject matter jurisdiction challenges in their responses to the motion for preliminary injunction. Secretary Jordan challenges subject matter jurisdiction based on: (1) lack of standing; and (2) Eleventh Amendment immunity. Secretary Kobach argues that Plaintiffs lack standing to raise the duplication of information component of the § 5 violation in Count I because no named plaintiff has alleged injury associated with that claim. Federal courts are courts of limited jurisdiction and, as such, must have a statutory or constitutional basis to exercise jurisdiction.[52] A court lacking jurisdiction must dismiss the case, regardless of the stage

[52]*Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); *see United States v. Hardage*, 58 F.3d 569, 574 (10th Cir. 1995) ("Federal courts have limited jurisdiction, and they are not omnipotent. They draw their jurisdiction from the powers specifically granted by Congress, and the Constitution, Article III, Section 2, Clause 1.") (internal citations omitted).

of the proceeding, when it becomes apparent that jurisdiction is lacking.[53] The party who seeks to invoke federal jurisdiction bears the burden of establishing that such jurisdiction is proper.[54] "Thus, plaintiff bears the burden of showing why the case should not be dismissed."[55] Mere conclusory allegations of jurisdiction are not enough.[56]

A. Eleventh Amendment Immunity

Secretary Jordan first argues that the claims against him are barred under the doctrine of sovereign immunity. Under the Eleventh Amendment, States and State agencies are immune from private suits unless they consent to suit, or Congress validly abrogates the States' immunity.[57] A narrow exception to sovereign immunity has been carved out under the *Ex parte Young* doctrine, which holds that private litigants may seek prospective injunctive relief against a state official for ongoing violations of federal law in federal court.[58] The Supreme Court has explained that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."[59] Under a straightforward analysis, the Amended Complaint alleges ongoing violations of the NVRA and 42 U.S.C. § 1983 and ongoing constitutional violations. To the extent the Amended Complaint seeks prospective declaratory and injunctive relief barring

[53] *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). The Court defers ruling on the remainder of Secretary Jordan's motion to dismiss, based on failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).

[54] *Montoya*, 296 F.3d at 955.

[55] *Harms v. IRS*, 146 F. Supp. 2d 1128, 1130 (D. Kan. 2001).

[56] *United States ex rel. Hafter, D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999).

[57] *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Hill v. Kemp*, 478 F.3d 1236, 1255–56 (10th Cir. 2007).

[58] *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167–68 (10th Cir. 2012) .

[59] *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

enforcement of the Kansas DPOC law and a related regulation promulgated by the Secretary of State, the *Ex parte Young* doctrine therefore applies under the straightforward analysis required by Supreme Court precedent.

Secretary Jordan argues that *Ex parte Young* does not apply to him because his agency does not enforce the NVRA, citing cases where the exception did not apply to a defendant without the power to enforce the law in question. These cases are easily distinguishable. In *Peterson v. Martinez*, the Tenth Circuit explained that the State official "must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party,"[60] and that "state officials must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty."[61] In *Klein v. University of Kansas Medical Center*, the plaintiff-employee sought reinstatement, but because the individual defendant lacked the power to provide him with that relief, the *Ex parte Young* doctrine did not overcome the Eleventh Amendment's jurisdictional bar.[62] Finally, in *National Coalition for Students with Disabilities Education & Legal Defense Fund v. Taft*, the Southern District of Ohio determined that because Ohio law delegated the power to enforce the NVRA to the Secretary of State, the Governor of Ohio had no connection to its enforcement.[63]

The NVRA provision at issue in this case addresses motor voter registration only, requiring a simultaneous application process for registering to vote when applying for or renewing a driver's license.[64] Section 5 of the NVRA provides for transmittal of all voter

[60]707 F.3d 1197, 1205 (10th Cir. 2013) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)).

[61]*Id.* (quoting *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007)).

[62]975 F. Supp. 1408, 1417 (D. Kan. 1997).

[63]No. C2-00-1300, 2001 WL 1681115, at *4 (S.D. Ohio Sept. 24, 2001).

[64]52 U.S.C. § 20504.

registration applications accepted at "a State motor vehicle authority" "to the appropriate State election official."[65] The DMV is a division of the Department of Revenue,[66] led by Secretary Jordan, which governs driver's license administration in Kansas.[67] The parties have submitted evidence that the Secretary of State's Office and the DMV have established an interagency system for registering motor voters in Kansas in compliance with the NVRA.[68] The Election Manual submitted with Plaintiffs' response explicitly provides that state agencies other than county election officials play a role in collecting DPOC under the Kansas law.[69] It provides that DMV workers will collect DPOC from motor voter applicants.[70] And Mr. Caskey testified at length about the batches of information submitted by the DMV to the ELVIS database each day, which are used by county election officials to create voter registration records. Plaintiffs allege NVRA violations in part stemming from this interagency arrangement. Unlike in *Peterson*, there is evidence that the Kansas Department of Revenue has both a duty to enforce the motor voter provisions of the NVRA, and has demonstrated a willingness to exercise that duty.[71]

B. Standing

Article III of the Constitution gives federal courts the power to exercise jurisdiction only over "Cases" and "Controversies." As the Supreme Court has explained, "[i]n limiting the

[65] *Id.* § 20504(e).

[66] K.S.A. § 75-5110 (it is now called the Division of Vehicles; the Court refers to it by "DMV," the name that many Kansans have come to refer to the Division, as it used to be called Division of Motor Vehicles).

[67] *Id.* § 75-5101

[68] Doc. 95, Ex. A at 14 ("These programs were established by the Secretary of State and DMV in a cooperative effort"); Kobach Ex. 1 ¶ 24.

[69] Doc. 95, Ex. A at 11–14.

[70] *Id.* at 14.

[71] Secretary Jordan complains that the Court cannot consider matters outside the pleadings on a motion to dismiss. While that is the general rule for motions to dismiss brought under Fed. R. Civ. P. 12(b)(6), on a Rule 12(b)(1) motion to dismiss, the Court has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action."[72]

One of several doctrines reflecting Article III's case-or-controversy limitation on the judicial power is the doctrine of standing. That doctrine requires federal courts, before considering the merits of an action, to "satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [the plaintiff's] invocation of federal-court jurisdiction.'"[73]

Plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing each element of standing "with the manner and degree of evidence required at the successive stages of the litigation."[74] Standing is evaluated based on the facts as they exist at the time the Complaint is filed.[75] At the pleading stage, the Court "'presume[s] that general allegations embrace those specific facts that are necessary to support the claim,'"[76] and "general factual allegations of injury resulting from the defendant's conduct may suffice.'"[77] Nonetheless, the Court is "not bound by conclusory allegations, unwarranted inferences, or legal conclusions."[78]

The Supreme Court has found the "irreducible constitutional minimum of standing" to

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[72]*Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

[73]*Id.* at 493 (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)).

[74]*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004).

[75]*Tandy*, 380 F.3d at 1284.

[76]*Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

[77]*Id.*

[78]*Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (citations omitted).

contain three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[79]

To establish standing for prospective injunctive relief, "a plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future."[80]

1. Secretary Jordan

Secretary Jordan argues that Plaintiffs lack standing to challenge any action taken by the Department of Revenue in this case because their claims are not redressable by his agency. This argument is similar to his immunity argument—that his agency is not tasked with enforcing the NVRA so any relief sought by Plaintiffs must be directed instead to the Secretary of State's office, which has exclusive authority to enforce the NVRA as the State's chief election officer. It is true that there is no evidence that the DMV plays a role in determining voter eligibility after the applications leave the DMV database. But as already described, the DMV and Secretary of State's Office are engaged in a cooperative effort to process motor voter registration applications. And § 5 of the NVRA specifically tasks the DMV with transmittal of voter registration applications to the chief election official for the State.[81] As explained later in this opinion, the evidence demonstrates confusing enforcement efforts with respect to the DPOC law

[79] *Lujan* , 504 U.S. at 560–61 (internal quotation marks and citations omitted).

[80] *Tandy*, 380 F.3d at 1283.

[81] *See Harkness v. Brunner*, 545 F.3d 445, 455 (6th Cir. 2008) (finding Director of the Department of Job and Family Services for the State of Ohio could be sued under the NVRA, along with Secretary of State, because that department was subject to the requirements of the NVRA as a Voter Registration Agency).

in Kansas, both at the time of application at the DMV, and after the records shift to the Secretary of State and county election officials. The evidence suggests that the DMV transmits DPOC for initial driver's license applicants to the extent the documentation is submitted as proof of lawful presence required to obtain a driver's license, but the DMV apparently has declined to request DPOC from driver's license renewal applicants seeking to register to vote for the first time. Therefore, if the Court grants Plaintiffs' requested injunctive relief prohibiting enforcement of the DPOC law to motor voter registration applications, it will certainly be redressable in part by the DMV: DMV clerks will no longer be required to transmit DPOC to the ELVIS system along with the nightly batches of motor voter registration applications, at least insofar as those applicants seek to register to vote for federal offices. To the extent those clerks are already requesting proof of lawful presence from initial applicants, that practice will not be affected by the requested injunction. There is no retrospective injunctive relief requested of the Department of Revenue. Accordingly, Plaintiffs have suffered an ongoing injury that is redressable by prospective injunctive relief directed at Secretary Jordan.

2. Section 5 Duplication Claim

Under § 5(c)(2)(A), the voter registration portion of the simultaneous motor voter application "may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C))."[82] Plaintiffs' duplication challenge to the Kansas DPOC law is two-fold: (1) two of the named Plaintiffs were required to submit DPOC twice—once at the DMV and again to a county election official; and (2) a Kansas statute explicitly authorizes requests for duplicative information. Secretary Kobach argues that Plaintiffs lack standing to raise this claim

[82]52 U.S.C. § 20504(c)(2)(A).

because none of the named Plaintiffs provided DPOC at the time they applied to register at the DMV.

The Court agrees with Plaintiffs that they have standing to raise the duplication claim. Kansas law explicitly provides that it may require duplicate information on each portion of the application, which Plaintiffs argue is in direct conflict with the NVRA provision prohibiting such. Because Plaintiffs claim that Kansas law requires every initial and renewal applicant to provide proof of lawful presence, which is the same for United States citizens as the DPOC required on the voter application, every motor voter applicant would have standing to raise the claim.[83] Moreover, Plaintiffs allege that Mr. Boynton attempted to register to vote at the DMV, provided DPOC, was not registered and was required to resubmit DPOC in order to complete his voter application. While the Court recognizes that there is a question of fact regarding this Plaintiff—[redacted]—the Court must evaluate standing at the time the Complaint is filed, and presumes as true Plaintiff Boynton's allegations that he attempted to register to vote, that he provided a copy of his birth certificate to the DMV clerk, and that he was nonetheless not registered and required to resubmit DPOC in order to become registered after he applied. He has alleged injury in the form of disenfranchisement, which is a continuing injury that is redressable if Plaintiffs obtain the relief they seek in this case. Plaintiffs therefore have fulfilled their burden of establishing standing to challenge the DPOC law under § 5 of the NVRA under a duplicate information theory.

[83] Although Kansas has apparently waived the proof of lawful presence requirement for renewals for the time being, it is still statutorily required. *See* K.S.A. §§ 8-240(b)(2), 8-247(d)(1).

C. Notice to Secretary Jordan under the NVRA

The NVRA requires a person aggrieved by the Act to "provide written notice of the violation to the chief election official of the State involved."[84] If no corrective action is taken within 90 days of receipt, the aggrieved person may file a civil action as to the violations specified in the notice. Here, Plaintiffs provided written notice on November 20, 2015, to Secretary Kobach. Plaintiffs copied Kansas Attorney General Derek Schmidt and Secretary Jordan on that notice. Secretary Jordan complains that he was entitled to separate notice under the NVRA. The Court disagrees. The plain language of the statute requires notice only to the chief election official. The Secretary of State is the designated chief election official in the State of Kansas.[85] Moreover, the purpose of the requirement is "to give the state the opportunity to remedy NVRA violations."[86] Here, the State of Kansas was placed on notice of the alleged NVRA violations. The notice was directed to the chief election official, and Secretary Jordan was provided with a copy of this notice. The notice was sufficient under the statute.

III. Preliminary Injunction Standard

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[87] The moving party must meet a heightened standard when requesting one of three types of disfavored injunctions:

> The three types of disfavored injunctions are "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary

[84] 52 U.S.C. § 20510(b).

[85] K.S.A. §§ 25-2504, 25-2355.

[86] *Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014).

[87] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

> injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." When a preliminary injunction falls into one of these categories, it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." A district court may not grant a preliminary injunction unless the moving party "make[s] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms."[88]

The parties dispute whether the requested preliminary injunction is a disfavored injunction, requiring application of the heightened standard. Defendants argue that the injunction would alter the status quo—enforcement of the SAFE Act and regulation—and that it would require both agencies to take specific action. Defendants also suggest that the requested injunction would provide all of the relief sought by Plaintiffs in their Amended Complaint. Plaintiffs disagree, arguing that they do not seek a disfavored injunction because they seek merely to preserve the status quo before the law went into effect, that the injunction would not require Defendants to act affirmatively, and that the relief sought in this case exceeds what is sought by the preliminary injunction because the First Amended Complaint seeks declaratory relief and a permanent injunction as to the law.

The Court need not resolve this dispute because, as described in this opinion, under the heightened standard, Plaintiffs have made a strong showing on both likelihood of success on the merits, and on the balance of harms as to their § 5 claim.

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[88] *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048–49 (10th Cir. 2007), *rev'd on other grounds*, 555 U.S. 460 (2009) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)).

IV. Preliminary Injunction Analysis

A. Likelihood of Success on the Merits

1. Section 5 of the NVRA

Plaintiffs allege that the SAFE Act violates § 5 of the NVRA in two ways: (1) it demands more than the "minimum amount of information necessary" to assess an applicant's citizenship eligibility; and (2) it duplicates the proof of lawful presence documentation required by the driver's license portion of the application.

a. Minimum Amount of Information Necessary to Enable State Election Officials to Assess the Eligibility of the Applicant and to Administer Voter Registration

The word "minimum" is not defined in the NVRA. Plaintiffs urge that the minimum amount of information necessary to assess United States citizenship eligibility is defined by subsection (a)(2)(C), which requires that the registration application include an attestation, signed under penalty of perjury, that the applicant meets each eligibility requirement, including citizenship. Plaintiffs argue that the plain meaning of the statute, coupled with Congress' failure to include the Simpson Amendment in the final bill, supports this interpretation. Plaintiffs further argue that the Supreme Court's decision in *Arizona v. InterTribal Council of Arizona, Inc.(ITCA)*,[89] and the Tenth Circuit Court of Appeals' decision in *Kobach v. U.S. Election Assistance Commission*,[90] support their interpretation of the statute. Defendants argue that states are permitted under the NVRA to design their own application forms for motor voter registration; there is no "federal form" that requires approval by the EAC as there is with registration by mail. Defendants urge that State law informs the analysis of what is necessary

[89]133 S. Ct. 2247 (2013).

[90]772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

under § 5. Second, Defendants contend that the Supreme Court in *Young v. Fordice*[91] rejected the argument that the States cannot require more information than the sworn attestation. Finally, Defendants contest Plaintiffs' interpretation of the *ITCA* and *Kobach* decisions, and challenge the significance of the legislative history cited by Plaintiffs.

The Court must begin its analysis with the plain language of the statute, reading "the words of the statute in their context and with a view to their place in the overall statutory scheme."[92] If the words in the statute are clear, the Court's analysis ends and the plain meaning controls.[93] If, instead, the Court finds that the words in the statute are ambiguous, the Court can look beyond the terms of the statute to determine legislative intent and statutory construction.[94] "A statute is ambiguous if 'it is capable of being understood by reasonably well-informed persons in two or more different senses.'"[95]

Plaintiffs urge that the term "minimum" in § 5(c)(2)(B) has an ordinary meaning that is readily understood. The Court agrees. Black's Law Dictionary defines "minimum" as: "Of, relating to, or constituting the smallest acceptable or possible quantity in a given case."[96] Similarly, Merriam Webster defines "minimum" as "the least quantity assignable, admissible, or possible."[97] Section 5 of the NVRA pertains to motor voter registration only. Section 6 pertains to registration by mail, which is the form of registration dealt with in *ITCA* and *Kobach*. Under § 6, the states may develop their own voter registration application that meets all of the criteria

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[91]520 U.S. 273 (1997).

[92]*Thomas v. Metro. Life Ins. Co*., 631 F.3d 1153, 1161 (10th Cir. 2011) (quoting *Wright v. Fed. Bureau of Prisons,* 451 F.3d 1231, 1234 (10th Cir. 2006)).

[93]*Id.*

[94]*Id.*

[95]*Id.* (quoting *United States v. Hinckley*, 550 F.3d 926, 932 (10th Cir.2008)).

[96]Black's Law Dictionary 1010 (7th ed. 1999).

[97]Merriam Webster's Collegiate Dictionary 741 (10th ed. 1996).

stated in § 9(b). Section 9(b) contains similar, but not identical, provisions for the contents of the state form for mail-in voter registration as it does for motor voter registration in § 5:

> The mail voter registration form developed under subsection (a)(2)--
> (1*)* may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process . . . .[98]

In contrast, the motor voter provision is that a state "may require only the *minimum amount of* information necessary to . . . enable State election officials to assess the eligibility of the applicant."[99] Plaintiffs argue that the absence of "minimum amount of" from § 9(b) is evidence that, of the three registration methods provided for in the NVRA, Congress intended for motor voter registration to involve the least possible barriers.

Secretary Kobach does not argue that the term "minimum" is susceptible to more than one meaning. Instead, he urges the Court to focus on the phrase "necessary to enable State election officials to assess the eligibility of the applicant" in § 5, and claims that State election officials may require any information they deem necessary to assess citizenship eligibility. While the "necessary" phrase is identical in §§ 5 and 9 of the NVRA, in both sections it is preceded by words that must be given some meaning; the word "minimum" appears in § 5, but not in § 9, which suggests that Congress intended for a stricter standard to apply in § 5. "It is a cardinal principle of statutory construction that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[100] To read the "information necessary to enable State election officials to assess the eligibility of the applicant" phrase in § 5(c)(2)(B) as controlling would effectively read out of the statute the preceding qualifier: "only the minimum

[98]52 U.S.C. § 20508(b) .

[99]*Id.* § 20504(c)(2)(B).

[100]*Rajala v. Gardner*, 709 F.3d 1031, 1038 (2013) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

amount of." The ordinary meaning of the term "minimum" is that the State may require only the least possible amount of information necessary to enable State election officials to assess whether the applicant is a United States Citizen.

The plain meaning of a statute should be given meaning unless it "will produce a result demonstrably at odds with the intentions of its drafters."[101] Secretary Kobach suggests that Plaintiffs' reading of the statute would create an absurd result by allowing different standards to apply depending on the method of registration. He argues that Plaintiffs' reading would create a "special path" to registration through motor voter registration that is easier than other forms of registration, and suggests that this would be contrary to Congress' intent. But Defendants point the Court to no evidence that Congress intended the three forms of registration to be uniform; indeed, Congress made separate provisions for each of the three forms. The legislative history of the NVRA suggests that Congress intended to simplify the registration process for voting in federal elections, and to increase voter participation in federal elections by eliminating barriers to voting.[102] Giving meaning to the word "minimum" in § 5, which does not appear in other provisions of the statute, is consistent with the statute's stated purpose because it acts to remove barriers to voting and increase voter participation in federal elections.[103]

Secretary Kobach argues that his interpretation of § 5, that the States have wide discretion to determine how to enforce eligibility requirements, is mandated by the Supreme

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[101] *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

[102] 52 U.S.C. § 20501(a)–(b) (providing Congressional findings and purposes of NVRA); *Young v. Fordice*, 520 U.S. 273, 275 (1997) ("The NVRA requires States to provide simplified systems for registering to vote in federal elections . . . . The States must provide a system for voter registration by mail . . . a system for voter registration at various state offices . . . , and, particularly important, a system for voter registration on a driver's license application."); *see also Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1028–29 (D. Neb. 2000) (analyzing Congressional intent of the NVRA).

[103] The Court need not wade into the significance of Congress' failure to include Simpson Amendment in the final bill because the plain meaning of the statute controls the analysis. *See Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011).

Court's holding in *Young v. Fordice*.[104] In *Young*, the Court considered whether § 5 of the Voting Rights Act ("VRA") required preclearance of Mississippi's voting registration procedures that were implemented in order to comply with the NVRA.[105] The Court considered the types of voter registration changes that require preclearance under the VRA, noting that even minor changes required preclearance.[106] The Court discussed the changes to Mississippi's registration practices, noting "[i]nsofar as they embody discretionary decisions that have a potential for discriminatory impact, they are appropriate matters for review under § 5's preclearance process."[107] Secretary Kobach relies upon the following language from *Young* to support his interpretation of § 5 of the NVRA:

> In saying this, we recognize that the NVRA imposes certain mandates on States, describing those mandates in detail. The NVRA says, for example, that the state driver's license applications must also serve as voter registration applications and that a decision not to register will remain confidential. It says that States cannot force driver's license applications to submit the same information twice (on license applications and again on registration forms). Nonetheless, implementation of the NVRA is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may—or may not—provide or request. And a decision about that other information—say, whether or not to tell the applicant that registration counts only for federal elections—makes Mississippi's changes to the New System the kind of discretionary, nonministerial changes that call for federal VRA review. Hence, Mississippi must preclear those changes.[108]

The Court does not read *Young* as broadly as Secretary Kobach. Although it is certainly true that implementation of the NVRA is not ministerial and that it involves some policy choice, the Court in *Young* did not say that the States have unfettered discretion under the NVRA to request information in conjunction with a motor voter registration application. Instead, *Young*

[104]520 U.S. 273 (1997).

[105]*Id.* at 275.

[106]*Id.* at 284–85 (collecting cases).

[107]*Id.* at 285.

[108]*Id.* at 286 (citations omitted).

observed that the NVRA imposes certain mandates on the States. Indeed, § 5 of the NVRA specifically addresses several items that the State may and may not require on the motor voter registration application. One of those provisions is directly at issue in this case—the meaning of "may require only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant."[109] While the Court did state in the above-quoted passage that the "NVRA does not list, for example, all the other information the State may—or may not—provide or request," the operative word in this sentence is "other." As Plaintiffs correctly note, the NVRA is silent as to some information that a State may or may not require in conjunction with a voter registration application, such as demographic information.[110] But the NVRA is not silent about information needed by State officials to assess eligibility on the motor voter application. As to that information, the NVRA explicitly provides that a State may require "only the minimum amount of information necessary."

Likewise, the Court does not find reasonable Secretary Kobach's reading of *Young* and § 5 as placing no ceiling on information a State may require, so long as it is *in addition to* the application form itself. The statute refers to "[t]he voter registration application portion of an application for a State motor vehicle driver's license."[111] The statute does not distinguish between information required to be provided on the form itself, and information required by the application form that must be produced separate from the form. As Secretary Kobach states, the application is required to include certain information necessary for county election officials to

[109]52 U.S.C. § 20504(c)(2)(B).

[110]The example provided by the *Young* Court—that States may decide whether or not to tell an applicant that the registration only counts for federal elections—is not a topic specifically addressed in § 5(c)(2). In contrast, information necessary to assess eligibility requirements is specifically addressed by the statute.

[111]§ 20504(c)(2).

ascertain whether an applicant is eligible to register to vote. As already explained, the NVRA governs the amount of information the States can require of applicants for this purpose.[112]

b. Whether the Kansas DPOC Law Constitutes the "Minimum" Amount of Information Necessary for State Election Officials to Assess Citizenship Eligibility

Having determined that the word "minimum" in the NVRA should be given its ordinary meaning of "least possible" to quantify the information necessary for State election officials to assess an applicant's citizenship eligibility, the Court must determine whether the Kansas DPOC law conflicts with this NVRA mandate, and if so whether the NVRA preempts. The NVRA requires each motor voter application to include a list of the eligibility requirements, including citizenship, and an attestation that the applicant meets each requirement.[113] It also requires a signature of the applicant, under penalty of perjury.[114] Secretary Kobach contends that a signature executed under penalty of perjury, in conjunction with an attestation of United States citizenship is insufficient to allow State election officials to assess citizenship eligibility. He essentially contends that K.S.A. § 25-2309(l) and (m) require the "least possible" amount of information necessary to properly assess an applicant's citizenship eligibility. The Court finds that Plaintiffs have made a strong showing that the information required under the Kansas DPOC exceeds the minimum amount of information necessary for State election officials to assess citizenship eligibility.

First, Plaintiffs have made a strong showing that the process of submitting DPOC for motor voter applicants is burdensome, confusing, and inconsistently enforced. The law provides

[112] *See Arizona v. ITCA*, 133 S. Ct. 2247, 2257 (2013) ("while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from denying registration based on information in their possession establishing the applicant's ineligibility." (quotation omitted)).

[113] *Id.* § 20504(c)(2)(C)(i)–(ii).

[114] *Id.* § 20504(c)(2)(C)(iii).

for thirteen forms of acceptable identification to show citizenship, including a birth certificate or passport. In practice, an applicant is only required to submit proof of lawful presence for new driver's license applications. Usually, proof of lawful presence for citizens who apply for a new driver's license will suffice as DPOC on the voter registration application.[115] But the DMV has decided not to require proof of lawful presence if an applicant is renewing a driver's license. The DMV has also decided not to request nor inform voter registration applicants that DPOC is required to complete the registration process if the applicant is renewing a driver's license. The evidence establishes that renewal applicants that also apply to register to vote are automatically forwarded to the ELVIS system without proof of citizenship, and are therefore guaranteed to be in "suspense" at the outset. Defendants rely upon a receipt that registrants are apparently provided at the DMV at the conclusion of their application process that advises them of the proof of citizenship requirements. But that notice is not part of the record, and none of the named Plaintiffs were made aware of this information; they believed they had successfully registered to vote when they left the DMV office.

Therefore, a person who applies to register to vote at a Kansas DMV office will have a different application process depending on whether they are renewing their driver's license, or applying for a new license, which is illustrated by several of the named Plaintiffs' experiences. Ms. Bucci and Mr. Hutchinson both applied for renewal driver's licenses and were asked if they wanted to register to vote. Both Plaintiffs said "yes," and believed they had completed the application process. Mr. Hutchinson learned about the DPOC law after he attempted to register at the DMV without DPOC; he then tried to return to the DMV and provide his passport. He was told by the DMV clerk that he had successfully registered when in fact he was on the suspense

[115] *See* K.S.A. 8-240(b)(2) (requiring "valid documentary evidence" of lawful presence, which may be valid documentary evidence of United States citizenship).

list. In contrast, those applying for new licenses are required to provide proof of lawful presence. Mr. Stricker's experience underscores how confusing this process is. He went home to retrieve a social security card because he did not bring sufficient proof of lawful presence with him. Again, he told the DMV clerk that he wanted to register to vote and was not advised that he lacked the necessary documentation to complete that process. He left the DMV believing that he was registered and unsuccessfully attempted to vote in the November 2014 election.

The named Plaintiffs' experiences also illustrate the difficulty faced by citizens in obtaining the proof of citizenship documents itemized in K.S.A. § 25-2309(l). Lost birth certificates are difficult to obtain and often cost a not-insignificant amount of money to replace, as Ms. Bucci and Mr. Fish attest. Passports involve a lengthy application process, as evidenced by Mr. Hutchinson's experience applying for a passport upon learning of his suspense status, and then several months later attempting to provide that passport to the DMV. It is true that the Supreme Court in *Crawford v. Marion County Election Board*, concluded that "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[116] But this case represents burdens that go beyond the inconvenience of obtaining a photo-ID by adding another layer onto the procedure already required at the DMV for motor voters. Moreover, in *Crawford*, the Court was persuaded that curative provisions in the challenged Indiana law mitigated the inconvenience to the most burdened voters.[117] Those who live in an elder residential facility could vote without photo-ID, and people without photo-ID could cast provisional ballots that would be counted if a photo-ID was either presented to the circuit court clerk's office within ten

[116] 553 U.S. 181, 198 (2008).

[117] *Id.* at 199–200.

days of election, or if a voter is indigent, that voter could execute an appropriate affidavit before the circuit court clerk within ten days of the election.[118]

Mr. Caskey and Mr. Kobach referred to standard guidelines the Secretary of State's Office has established for counties to provide notice to applicants on the suspense list that they must submit DPOC. The counties have been trained to send three written notices, and ideally contact the applicant by phone, before cancelling the application under K.A.R. § 7-23-15. Mr. Caskey testified that the first notice should be sent immediately after the county processes the application record, and that another notice should be sent thirty days later. He said a final notice should be sent before cancellation. But the ELVIS records do not show consistent application of these noticing efforts. Mr. Fish's ELVIS records show that a single notice was sent to him by Douglas County within a week of applying to register. He was cancelled more than two years later and there is no evidence that a final notice was sent to him. Ms. Bucci was sent two notices by Sedgwick County almost two years apart, with notes about one phone call the month after the first notice was sent in August 2013. Mr. Stricker was sent three notices over the course of eleven months by Sedgwick County, and election officials made one attempt to call him about his suspense status. Mr. Boynton received two notices over a ten month period of time from Sedgwick County and election officials attempted one phone call. Mr. Hutchinson appears to have been sent two notices from Johnson County, more than two years apart, before his application was cancelled. Importantly, the ELVIS records show only notations that these notices were sent. There is no evidence in the record that they were actually received. Plaintiffs' declarations assert that many of these notices were not received. Some Plaintiffs admit to

[118] *Id.* at 186.

receiving one notice, but others did not learn that they were not registered until they either attempted to vote, or received notice of their suspense status from a third party.

The sheer number of people cancelled or held in suspense because of the DPOC requirement since October 2015 evidences the difficulty of complying with the law as it is currently enforced. Between January 1, 2013 and March 28, 2016, there were 244,699 voter registration applications completed. Defendants assert that between January 1, 2013 and March 23, 2016, there were 16,319 voter registration applications cancelled under K.A.R. § 7-23-15 for failure to provide DPOC. 12,717 of these cancellations were from motor voter applicants. Since K.A.R. § 7-23-15 did not go into effect until October 2015, the cancellation figure actually involves cancellations between October 1, 2015 and March 23, 2016—over an almost six-month period of time. As of March 28, 2016, there are 5655 motor voter applications that are in "incomplete" status due to failure to provide DPOC. Secretary Kobach touts this figure as a 94% success rate. But 18,372 motor voter applications have been held in suspense or cancelled due to the DPOC law. There is no evidence that these applications are incomplete for any other reason. Therefore, as a direct result of the DPOC law and enforcement scheme, over 18,000 otherwise eligible motor voter applicants in Kansas have been prohibited from registering to vote. Eight percent of all voter registration applications is not an insignificant amount.

When asked at the hearing about the bureaucratic barriers that obtaining DPOC can present, Secretary Kobach assured the Court that where individuals lack DPOC, subsection (m) could provide a safety net. Under that provision, if a person cannot obtain a birth certificate, passport, hospital record, or one of the other forms of identification listed in the statute, the person can simply call the Secretary of State's office to submit some alternative form of DPOC, and arrange for a telephonic hearing to determine the sufficiency of that alternative. Secretary

Kobach characterized this process as quite easy, giving examples of the types of alternative forms of citizenship documentation and emphasizing that the hearing can be telephonic. But the state election board is comprised of three members: the lieutenant governor, the secretary of state, and the attorney general—three of the highest Kansas state officials. A person wishing to utilize this procedure would be required to (a) learn about the existence of the procedure; (b) divine and then generate some alternative form of proof of citizenship; (c) contact the Secretary of State's Office; and then (d) obtain a hearing date with three very busy high-level state officials. Unsurprisingly to the Court, only three Kansas citizens have availed themselves of this procedure in the more than three years that the statute has been in effect. Certainly, the current administrative maze that greets motor voter registrants at the DMV office, and then follows them long after that application is completed, is not a requirement that constitutes the "minimum" amount of information necessary to enable state officials to assess citizenship eligibility.

Second, Plaintiffs have made a strong showing that there is at least one less burdensome alternative to assessing United States citizenship—an attestation along with an applicant's signature under penalty of perjury. The NVRA requires that the attestation and signature under penalty of perjury be included on every motor voter application. It also requires that the application include all eligibility requirements, including citizenship. And the State can prosecute noncitizens who register to vote under K.S.A. § 25-2416.

The evidence shows that the DMV clerks currently ask applicants if they are United States citizens, and they check a box if the applicant responds affirmatively. This was the method Kansas used to assess citizenship eligibility prior to the effective date of the SAFE Act in 2013. Between January 1, 2006 (seven years before the DPOC law became effective), and March 23, 2016, 860,604 people registered to vote in the State of Kansas. Between April 16,

2003, and the effective date of the DPOC law in 2013, there is evidence that thirty noncitizens registered to vote, about three noncitizens per year. Of those thirty people, there is evidence that three actually cast votes under the mistaken belief that they were entitled to vote. The evidence submitted by Defendants in support of the 1997 Seward County hog farming referendum incident is insufficient to show that noncitizens actually voted in that referendum. In fact, the only evidence submitted at all is Mr. Caskey's affidavit referring to the testimony of a witness before the Legislature as it was deliberating over the SAFE Act. There is no direct evidence of her testimony, nor is there any evidence in the Court's record to support her opinion that noncitizens voted in that election.[119]

This evidence supports the conclusion that very few noncitizens in Kansas successfully registered to vote under an attestation regime. Importantly, there is no evidence that under that regime, thousands of otherwise eligible applicants were cancelled or held in suspense for failure to establish eligibility requirements. On this record, Plaintiffs make a strong showing that the DPOC law cannot be justified as the minimum amount of information necessary to assess citizenship eligibility, where the rates of noncitizen voter fraud prior to the Act's passage are at best nominal.

Since the effective date of the SAFE Act, there is evidence that fourteen noncitizens attempted to register to vote in Sedgwick County, Kansas. Defendants submit Tabitha Lehman's affidavit, who is the Sedgwick County election official charged with maintaining that county's

[119]The Court acknowledges that there is some evidence of noncitizen voter fraud outside of Kansas. *See* Doc. 80, Ex. A. The Court further acknowledges that in *Crawford*, when discussing the State's interest in preventing voter fraud, the Court considered evidence of voter impersonation fraud in other parts of the country. 553 U.S. at 195 & nn. 11–12. But this analysis was in the context of an equal protection challenge to the Indiana law at issue; the Court was called upon to assess the State's legitimate interest in counting only the votes of eligible voters, balanced against the burden of Indiana's law on voters. *Id.* at 189. Here, the Court must determine whether the State of Kansas has required the minimum amount of information necessary to assess a motor voter applicant's eligibility to vote under the NVRA—a different inquiry.

voter rolls.[120] Ms. Lehman generated a spreadsheet of noncitizens in that county that either registered to vote before January 1, 2013, or attempted to register after that date. The fourteen individuals who attempted to register after the DPOC law was passed fall into two categories: (1) applicants who applied to register at a voter registration drive after a naturalization ceremony and were discovered to have already attempted to register prior to naturalization; and (2) applicants who responded to the county's written notice that they must provide DPOC in order to complete their voter registration application that they were not in fact citizens. Of these fourteen applicants, twelve applied in person or online through the DMV. None of these instances appear to involve deliberate fraudulent conduct, but instead, involve mistaken understandings of the eligibility requirements. So this evidence presents yet another less burdensome option for the State of Kansas: provide better training to DMV workers who are charged with asking applicants if they are United States citizens, and with advising applicants that they are signing an attestation of citizenship under penalty of perjury. One thing is clear from the evidentiary hearing on this matter: the coordination between the Secretary of State's office and the Department of Revenue is lacking. Although Secretary Kobach has publicly identified human error by DMV workers as one of the reasons the DPOC law is necessary in Kansas,[121] there is no evidence that better training was attempted with the old law, and it appears that little has been done to train DMV employees to comply with the new law. The Court also notes that, despite having prosecutorial power to enforce the citizenship requirement under Kansas law, there is no evidence that county attorneys prosecuted the individuals suspected of voter fraud in the 1997 hog farming incident,

[120]Kobach Ex. 8.

[121]Doc. 19, Ex. 10; Sari Horwitz, *Want to vote in this state? You have to have a passport or dig up a birth certificate*, Wash. Post, Feb. 19, 2016, available at https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/.

or in any case since. Secretary of State Kobach admitted at the hearing that his office has not prosecuted any cases of noncitizen voter fraud.

Secretary Kobach himself made a strong case that an attestation of United States citizenship is the minimum amount of information necessary for Kansas election officials to assess an applicant's citizenship. As an example of an acceptable form of DPOC under subsection (m) of the law, which may be triggered when an applicant is unable to obtain one of the thirteen forms of DPOC listed in subsection (l), Mr. Kobach suggested that a person's own declaration of citizenship would satisfy the state election board.[122] Aside from the sheer number of steps an applicant must go through to get to the point of the process where the state election board could make this determination, the Court sees little difference between this method of proving citizenship and an attestation clause on the application form itself.

c. Preemption

The Court determines that because the Kansas DPOC law conflicts with § 5(c)(2)(B) of the NVRA, federal law preempts the Kansas DPOC law under the Elections Clause of the United States Constitution as to registrations for federal elections. The Court further determines that the NVRA motor voter application requirements do not run afoul of the States' right to establish voting qualifications for federal office. Under the Elections Clause, Congress may preempt state laws governing "Times, Places and Manner" of holding congressional elections.[123] Its scope is broad.[124] "Time, Places and Manner" "are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . regulations

[122]Doc. 115, Hrg. Tr. at 68:20–69:7.

[123]U.S. Const. art. I, § 4, cl. 1.

[124]*Arizona v. ITCA*, 133 S. Ct. 2247, 2253 (2013).

relating to 'registration.'"[125] Where Congress regulates under the Elections Clause, such laws "supersede those of the State which are inconsistent therewith."[126] As described above, the Kansas DPOC law, which governs the voter registration process and is thus a regulation relating to registration, conflicts with § 5 of the NVRA because it requires more than the minimum amount of information necessary to allow Kansas election officials to assess an applicant's citizenship eligibility. Under the Elections Clause, the NVRA preempts the Kansas DPOC law.

Secretary Kobach insists that preemption of the DPOC law would infringe on Kansas's right under the Qualifications Clause to regulate who may vote in federal elections. Indeed, the Constitution provides that voting qualifications are to be set by the States: "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[127] The Supreme Court's decision in *ITCA* dealt with the uniform federal form that the NVRA requires States to "accept and use" to register voters for federal elections by mail.[128] The federal form is developed by the EAC and requires an averment under penalty of perjury that the applicant is a United States citizen.[129] The Arizona law in question required voter registration officials to reject any application that is not accompanied by DPOC. The Supreme Court considered whether this DPOC requirement, as applied to federal form applicants, is preempted by the NVRA's requirement that States "accept and use" the federal form.[130] The Court found that Arizona's registration law could not be reconciled with the NVRA

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[125] *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also Ass'n of Comm'y Org. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) ("the "Manner" of holding elections has been held to embrace the system for registering voters.").

[126] *Id.* at 2254 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

[127] U.S. Const. art. I, § 2, cl. 1; *see also* Art. II, § 1, cl. 2 (presidential electors); amend. 17 (senatorial electors).

[128] 52 U.S.C. § 20505(a)(1).

[129] *Id.* § 20508(b).

[130] 133 S. Ct. at 2251.

requirement that states accept and use the federal form, and found that under the Elections Clause, the NVRA preempted the Arizona law.[131]

But the Supreme Court in *ITCA* admitted that the power to establish voting qualifications under the Qualifications Clause would be of little value without the power to enforce them—if a federal law precluded a State from "obtaining the information necessary to enforce its voter qualifications," "it would raise serious constitutional doubts."[132] The Court was able to avoid a constitutional conflict under the Qualifications Clause because the NVRA provided a way for Arizona to obtain the information it deemed necessary to enforce its citizenship requirement. Arizona was permitted under the NVRA to request that the EAC alter the state-specific instructions on the federal form to require applicants to submit DPOC, and the State may challenge any rejection of that request under the Administrative Procedures Act ("APA").[133] If the EAC did not act on Arizona's request, Arizona could establish in a reviewing court "that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form."[134]

In *Kobach v. U.S. Election Assistance Commission*,[135] Arizona and Kansas and their secretaries of state brought suit under the APA against the EAC, its acting executive director, and its chief operating officer, and sought a writ of mandamus to order defendants to modify the state-specific instructions on the federal mail voter registration form to require applicants to submit DPOC in accordance with state law. The district court determined that the EAC had a

[131] *Id.* at 2257.

[132] *Id.* at 2258–59.

[133] *Id.* at 2259.

[134] *Id.* at 2260.

[135] 772 F.3d 1183 (10th Cir. 2014).

nondiscretionary duty to grant their requests, but the Tenth Circuit reversed.[136] Reviewing the EAC's decision under the APA, the Tenth Circuit determined that the States "failed to advance proof that registration fraud in the use of the Federal Form prevented Arizona and Kansas from enforcing their voter qualifications."[137] The court held that the EAC is not required to approve state-specific changes to the Federal Form, largely relying on the *ITCA* decision, and that the EAC's decision was not arbitrary and capricious, nor unconstitutional under the Qualifications Clause.[138]

The Tenth Circuit explained the difference between authority under the Elections Clause and the Qualifications Clause as follows: "the United States has authority under the Elections Clause to set procedural requirements for registering to vote in federal elections (i.e., that documentary evidence of citizenship may not be required), . . . [and] individual states retain the power to set substantive voter qualifications (i.e., that voters be citizens)."[139] In dismissing the States' Qualifications Clause challenge, the Tenth Circuit considered *ITCA* and explained that the States' Qualifications Clause powers do not "trump" Congress' Elections Clause powers governing "Times, Places, and Manner" of federal elections, "including voter registration laws."[140] The court did not credit the States' argument that the EAC's decision as to the federal form "unconstitutionally precludes them from enforcing their laws intended to prevent noncitizen voting. As discussed . . . , there are at least five alternate means available to the states

[136] *Id.* at 1188.

[137] *Id.*

[138] *Id.* at 1188–99. After this decision, the EAC regained a quorum of commissioners and an Executive Director was appointed. Kansas again asked the EAC to modify the state-specific instructions to the federal form, and this time, the EAC agreed. *See* Kobach Ex. 4. That decision is being challenged under the APA in a case now pending before the United States District Court for the District of Columbia. *League of Women Voters of the United States v. Newby*, No. 16-236-RJL, Doc. 1 (D.D.C. Feb. 12, 2016).

[139] *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014).

[140] *Id.* at 1199.

to enforce their laws, and they have not provided substantial evidence of noncitizens registering to vote using the Federal Form."[141]

Here, the substantive qualification is that voters must be United States citizens. Plaintiffs do not dispute the States' power to set this qualification. The NVRA's "minimum amount of information necessary" requirement for motor voter registration does not implicate the Qualifications Clause because it does not alter the citizenship qualification set by the State of Kansas, nor does it make it impossible for the State to enforce that qualification.[142] The Court has determined that at least one less burdensome alternative exists—an attestation of citizenship coupled with the applicant's signature under penalty of perjury—and that there is scant evidence this less burdensome alternative leads to any significant number of noncitizens voting. Plaintiffs have made a strong showing that, while there may be a handful of isolated cases of noncitizens voting without the DPOC law, Kansas can enforce its citizenship requirement without the DPOC law, thereby permitting approximately 18,000 otherwise eligible voters to be registered to vote in state or federal elections.

Secretary Kobach argues that Plaintiffs' position is unconstitutional because it would allow two sets of electors to exist, one for federal and one for state elections, despite the Qualification Clause's reference to one set of electors. He argues that it creates an untenable situation where the qualifications are different in Kansas depending on whether an registrant is voting in state or federal elections. First, as described above, there is no dispute that Kansas has properly deemed United States citizenship a qualification for voter registration. That qualification applies regardless of whether the applicant seeks to vote in federal or state elections. The only difference is that in order to meet that qualification, motor voter applicants

[141] *Id.*

[142] *See Ass'n of Comm'y Org. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794–95 (7th Cir. 1995).

would not be required to submit DPOC to be registered to vote in federal elections, while those who wish to register in state elections would be required to submit DPOC.

Second, Secretary Kobach's argument was considered and rejected by *ITCA*, as evidenced by Justice Thomas and Justice Alito's dissents in that case. Justice Thomas disputed the majority's holding that the Elections Clause provides Congress with the authority to set rules for voter registration in federal elections.[143] He urged that the Elections Clause instead governs "regulating the casting of ballots and related activities,"[144] and the States have the exclusive authority to determine voting qualifications, "which includes the corresponding power to verify that those qualifications have been met."[145] Justice Alito argued that "[w]e could avoid this nonsensical result by holding that the Act lets the States decide for themselves what information 'is necessary . . . to assess the eligibility of the applicant'—both by designing their own forms and by requiring that federal form applicants provide supplemental information when appropriate."[146] But in the majority opinion, Justice Scalia explained that while the NVRA's requirement that the States "accept and use" the federal form gives States the flexibility to develop their own registration application form, the Federal Form "provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."[147] The Court sees little constitutional difference between the two-tiered system permitted for registration by mail in *ITCA*, and the two-tiered system that would result if Plaintiffs prevailed on the merits of their challenge to the motor voter provision in this case. Here too, the NVRA guarantees that to vote

[143] 133 S. Ct. at 2262–63 (Thomas, J., dissenting).

[144] *Id.* at 2268 (Thomas, J., dissenting).

[145] *Id.* at 2270 (Thomas, J., dissenting).

[146] *Id.* at 2274 (Alito, J., dissenting).

[147] *Id.* at 2255 (footnote omitted).

in federal elections, only the minimum amount of information may be required by the State to assess an applicant's eligibility. This is in keeping with the stated purpose of the Act to increase the number of eligible citizens who register to vote in federal elections.[148] The NVRA does not prohibit States from requiring more than the minimum amount of information necessary to assess eligibility to vote in state elections. The two-tiered system that results is of the State's own making; it is neither unprecedented,[149] nor required by the NVRA.

In sum, the Court finds that Plaintiffs have made a strong showing that they are likely to succeed on their claim that the NVRA preempts the Kansas DPOC law as it applies to motor voter registrants under § 5. Plaintiffs have also made a strong showing that preemption under the Elections Clause would not violate the State's power under the Qualifications Clause to set and enforce its citizenship requirement for elections to federal office. The State is not precluded from enforcing its citizenship requirement. It simply must do so by requiring the "minimum amount of information necessary" to assess whether the citizenship requirement has been met. Plaintiffs have made a strong showing that the Kansas DPOC law as enforced does not meet this standard.

b. Duplication

Plaintiffs allege that the DPOC law further violates § 5 as to initial driver's license applicants because they are required to provide duplicate information on the driver's license application and the voter registration application: the same documentation serves to establish proof of lawful presence at the DMV and DPOC by county election officials. The Court cannot

[148]*See id.*; 52 U.S.C. § 20501(b)(1).

[149]Prior to the EAC's January 29, 2016 decision to modify the state-specific rules for the Kansas Federal Form, the State was required to conduct a two-tiered system for those who registered by mail. Under *Kobach*, the EAC's earlier decision to reject the state-specific instructions requiring DPOC was upheld, but the State form continued to require DPOC.

find on this record that Plaintiffs have made a strong showing that they are substantially likely to succeed on the merits of this theory of relief. Based on the current record, it appears DMV clerks are recording in the DMV database whether DPOC has been submitted at the time of application when such documents also meet the proof of lawful presence requirement. To the extent this is not happening, it appears to be in error rather than an enforcement policy. The only Plaintiff that applied for an initial driver's license is Mr. Boynton. Although it does appear that he was required to provide DPOC at the DMV, and again to county election officials, there is a strong factual dispute about whether Mr. Boynton affirmatively told the DMV clerk that he wanted to register to vote. [redacted] His application was cancelled when he failed to provide DPOC after receiving two written notices in the mail and one phone call. Moreover, Defendants have submitted evidence that as to initial applications for driver's licenses, the DMV accepts DPOC to the extent it is duplicative of the proof of lawful presence required obtain a driver's license. On the occasions when the Secretary of State's Office is made aware that the DMV has not properly logged these documents at the time of application, the Secretary of State's Office will contact the DMV to confirm that this documentation was submitted.

Plaintiffs further point to the language in K.S.A. § 25-2352(b)(1) that explicitly conflicts with § 8 of the NVRA by providing that the voter registration section of the application

> [m]ay require a second signature or other information that duplicates, or is in addition to, information in the driver's license or nondriver's identification card section of the application to prevent duplicate voter registrations, and to enable Kansas election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

Although Plaintiffs make a strong argument that this provision is at odds with § 5 of the NVRA, they have not made a strong showing for the purposes of this preliminary injunction motion, that the DPOC law, as enforced, requires duplicate submissions of DPOC for initial driver's license applicants.

In sum, the Court finds close factual questions about the extent to which the State requires duplicate proof of citizenship information from initial driver's license applicants on the driver's license and voter registration application forms.

2. Section 8 of the NVRA

Plaintiffs allege that K.A.R. § 7-23-15 violates § 8 of the NVRA by removing otherwise eligible voters from the State's ELVIS system for failure to provide DPOC. Plaintiffs assert that in September 2015, more than 32,000 applicants were trapped "in limbo" on the suspense list, and that the regulation was designed by Defendants to "automatically remove registrants from the State's voter rolls." Plaintiffs urge that § 8 sets forth the exclusive grounds for removing a registrant from the voter list, and that failure to provide DPOC is not one of them. Secretary Kobach responds that § 8 does not apply here because none of the individuals deemed "incomplete" in ELVIS are "registrants" since those applications have not yet been accepted by county election officials. Defendant further notes that there are other reasons, such as a missing signature, why a person's application would be deemed "incomplete," so there is no way to assert that these people are all otherwise eligible to register.

Plaintiffs admit in the reply brief that the viability of this claim hinges on the success of their § 5 claim—if the Court determines that Plaintiffs' are likely to succeed in showing that the DPOC law runs afoul of § 5, then applicants that were cancelled or placed in suspense solely based on their failure to provide DPOC are otherwise eligible voters that should have been

registered to vote. Cancelling the applications of eligible voters is enough to constitute removal of registrants from the system, according to Plaintiffs.

The Court does not agree that Plaintiffs' likelihood of success on the § 5 claim necessarily means they are likely to succeed on the § 8 claim challenging the regulation. The record reflects that an applicant is not "purged" from the voter rolls in the manner described by Plaintiffs. Instead, applicants who lack DPOC are placed in an incomplete status for a period of time to allow them to submit their DPOC, or to allow the State to confirm the applicants' citizenship by other means. Under the regulation, if an applicant has not submitted DPOC within 90 days of the application, the applicant's record is "cancelled," which does not mean that the applicant is removed from the database. Instead, cancellation means the applicant must repeat the application process in its entirety, including providing DPOC, before registration can be completed. Mr. Caskey attests that voter records in the ELVIS system may be changed from "incomplete" or "cancelled," to "active," which would reflect the designation of a fully registered voter.

Giving credence to Mr. Caskey's declaration and testimony, Plaintiffs have not made a strong enough showing that they are substantially likely to succeed on their § 8 claim because § 8 only governs the removal of "a registrant" from the State's official list of eligible voters.[150] None of the applicants on the suspense list, nor those cancelled under the regulation, were ever registered to vote, so they are arguably not "registrants" on the State's official list of eligible voters. To be sure, there are other reasons an application may be deemed incomplete, such as a failure to sign the application. To the extent an application is deemed incomplete or cancelled

[150] *Compare U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382–83 (6th Cir. 2008) (holding federal and not state law defines the term "registrant"), *with Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1273 (D. Colo. 2010) (discussing *Land* and finding its holding that federal law governs the term "registrant" "bafflingly circular.").

due to lawful eligibility determinations, Plaintiffs have not challenged the regulation. But regardless of whether Plaintiffs can make a strong showing of success on their § 8 claim, the record makes clear that Mr. Caskey can easily determine which applicants have been deemed incomplete or cancelled solely due to their failure to provide DPOC. Therefore, it is unnecessary for Plaintiffs to succeed on their challenge to K.AR. § 7-23-15 in order to obtain injunctive relief stemming from enforcement of the DPOC law itself. The ELVIS database can assist the State in determining which voters have been wrongfully denied registration in federal elections solely due to the DPOC law. And going forward, only applicants that have otherwise deficient applications may be deemed incomplete or cancelled under the regulation.

B. Irreparable Harm

To constitute irreparable harm, the injury "must be both certain and great."[151] It "is often suffered when 'the injury can[not] be adequately atoned for in money,' or when 'the district court cannot remedy [the injury] following a final determination on the merits.'"[152] The Supreme Court has consistently held that "all qualified voters have a constitutionally protected right to vote, and to have their votes counted."[153] "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."[154]

The Court finds that Plaintiffs have made a strong showing of irreparable harm. There is uncontroverted evidence that thousands of qualified Kansas motor voter registration applicants have not been registered to vote by county elections officials solely based on their failure to

[151] *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[152] *Id.* (quoting *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (1980)).

[153] *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)).

[154] *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995)); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury.").

submit DPOC. Several named Plaintiffs averred that they registered in 2013 and 2014 in order to vote in the 2014 elections, and that they desire to vote in the 2016 elections. Plaintiffs Stricker and Boynton both attempted to provide DPOC at DMV offices, believed they had successfully registered, tried to vote in the 2014 election, but were only allowed to cast provisional ballots that were not counted. Between January 1, 2013 and March 23, 2016, there were 12,717 motor voter registration applications cancelled under K.A.R. § 7-23-15 for failure to provide DPOC. As of March 28, 2016, there are 5655 motor voter applications that are in "incomplete" status due to failure to provide DPOC. Certainly, many of the applicants that were cancelled lost the opportunity to vote in the 2014 elections. All of these otherwise qualified applicants run the risk of losing the right to vote for federal offices in the 2016 primary and general election. Early voting for the August primary begins on July 13, 2016—less than two months from now. This injury cannot be compensated for, either by money, or after a final determination on the merits, which is unlikely to occur before the 2016 elections take place. And the harm is not speculative—the applicants in "incomplete" or "cancelled" statuses in ELVIS will not be allowed to vote in the upcoming election without injunctive relief. Those votes cannot be recast in the event that the Plaintiffs later prevail on the merits. There is also evidence that the DPOC law has caused a chilling effect, dissuading those who try and fail at navigating the motor voter registration process from reapplying in the future.[155]

Secretary Kobach suggests that Plaintiffs' harm is reparable because each has the ability to submit DPOC and become registered before the next election. In fact, his position is that it is Plaintiffs' fault entirely that their applications have been placed in incomplete or cancelled

[155]Plaintiff Bucci stated that she was discouraged from trying again to register to vote based on her experience. And Plaintiff submitted the expert opinion of Michael McDonald, who concludes that applicants who are denied registration due to the DPOC requirement are less likely to participate in the electoral process going forward. Plaintiffs Ex. 1 at 19; Ex. 15 at 1.

status. He argues that the DPOC was well advertised, and that Plaintiffs received notice of their deficient applications. He attempts to distinguish this case from others where plaintiffs were entirely precluded from registering to vote.[156] But, as the Court has already determined, Plaintiffs have presented strong evidence that otherwise eligible voters in Kansas have been entirely precluded from registering to vote based solely on the DPOC law. As far as advertising goes, there is no evidence in the record about the State's efforts to educate voters about the change in law. And there is no evidence in the record to support the State's contention that Plaintiffs actually received all of the notices recorded in the ELVIS system in a timely manner. Mr. Boynton and Mr. Stricker, for example, did not receive notice of their incomplete status until after the 2014 election. Mr. Hutchinson did not receive notice of his incomplete status until late 2015, within a few months of the effective date of K.A.R. § 7-23-15.

Moreover, Ms. Bucci attested that she does not have DPOC and that it would be a hardship for her to obtain it. Plaintiffs have demonstrated a financial and administrative burden to obtaining the two most common forms of DPOC. The cost of obtaining a birth certificate or passport is often prohibitive; both Ms. Bucci and Mr. Fish attested to this financial burden. And simply navigating the administrative landscape to replace a lost birth certificate, or to apply for a passport, requires time and diligence.

In *Crawford*, the Supreme Court considered the burden on voters associated with obtaining photo-ID that state law required be presented at the polling place for in-person voting.[157] In considering whether there was an equal protection violation, the Court weighed the

[156]*See Husted*, 697 F.3d at 436 (challenging law that would preclude in-person early voting for non-military voters); *Williams v. Salerno*, 792 F.2d 323, 325 (2d Cir. 1986) (challenging state residency requirement that precluded students from registering to vote); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004) (challenging state's practice of rejecting registrations by mail under the NVRA).

[157]553 U.S. 181 (2008).

burden on voters against the State's interest in protecting the integrity and reliability of the electoral system. It determined that the evidence in the record was insufficient "to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."[158] The Court does not find that *Crawford* controls under the facts of this case. First, in *Crawford*, the Court found that the severity of the burden of obtaining a photo-ID was mitigated by the fact that Indiana allowed voters to cast a provisional ballot that would be counted after the election if the voter later obtained a photo-ID.[159] There is no such safe harbor provision under the Kansas statute because the DPOC law prevents qualified voters from being registered in the first instance. Second, there is evidence of the magnitude of the harm here. There are 18,372 motor voter applicants that have been denied registration due to the DPOC law.

Secretary Kobach's reliance on subsection (m) as safety net for those individuals who lack one of the thirteen forms of DPOC required under the statute is overstated. As already described, that procedure is but one additional burdensome layer in the Kansas enforcement scheme that an applicant must navigate in order to become registered when all else fails. It requires knowledge that the exception exists, and of how to obtain some alternate form of documentation. Although Secretary Kobach states in the brief that this method would not require the applicant to even leave his or her house, the examples of acceptable documentation provided during the hearing (such as affidavits or old school records) invariably require some additional step to obtain. There are no directions or suggested alternatives provided in the statute, so the applicant must divine that a sibling's affidavit, for example, is acceptable, and then determine how to draft and execute such a document. Moreover, the applicant then must obtain

[158] *Id.* at 200–01.

[159] *Id.* at 199.

a hearing, by phone or otherwise, with three State executive officials, including Defendant Kobach. The fact that only three individuals in more than three years have availed themselves of this procedure, out of the thousands of applicants rejected for lack of DPOC, is evidence that the average voter does not view this as an easy and obvious choice when they otherwise lack DPOC.

Secretary Kobach insists that Plaintiffs cannot show irreparable injury because they delayed filing this action to vindicate their rights. It is true that delay is one factor that sometimes "cuts against finding irreparable injury."[160] But where the delay is due to the plaintiff's attempts to negotiate before bringing a claim, or to document the harm, delay is not fatal.[161] The named Plaintiffs in this action all attempted to register to vote in 2013 and 2014; the latest application was made in October 2014 by Mr. Stricker. However, the record demonstrates that many of these Plaintiffs believed they had successfully registered at the time of their application, and did not learn until much later that they were not in fact registered. As described earlier in this opinion, motor voter applicants were faced with a confusing and inconsistently-enforced maze of requirements under the new DPOC law. And the regulation that changes their applications from "incomplete" to "cancelled," and therefore requires them to resubmit their voter applications, did not become effective until October 31, 2015, approximately three and one-half months before the original Complaint was filed. Soon after the regulation became effective, Plaintiffs provided the State with the statutorily-mandated 90-day notice, and then promptly filed suit.[162] The Court disagrees that Plaintiffs were required to file suit earlier in order to prove they suffered irreparable harm. Any delay is attributable to the lengthy

[160] *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *see also Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011) ("a delay in filing is not a proper basis for denial of a preliminary injunction.").

[161] *RoDa Drilling*, 552 F.3d at 1211.

[162] 52 U.S.C. § 20510(b).

application scheme in place after the law changed, the passage of the 2015 regulation, and the lack of notice among the Plaintiffs that they had not successfully registered to vote.

Secretary Kobach argues that the Court should not consider classwide harm, and argues that the Court is without power to fashion injunctive relief that applies beyond the named Plaintiffs in this lawsuit. To be sure, the Court has not yet considered Plaintiffs' pending motion for class certification. That motion is set for hearing on June 16, 2016. But Plaintiffs allege that the Kansas DPOC law, on its face and as enforced, is preempted by the NVRA, and that its enforcement has resulted in thousands of otherwise qualified voters in Kansas being kept off the voter rolls. While the named Plaintiffs' individual experiences are each slightly different, the Court has explained that they are illustrative of the burdensome enforcement scheme necessitated by the Kansas DPOC law. The injunctive relief in this case does not require individualized remedies. Moreover, case law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion.[163]

In sum, the Court finds Plaintiffs have made a strong showing that they will suffer irreparable harm without a preliminary injunction.

C. Balance of Harms

Under this factor, the Court must "balance the competing claims of injury and consider the effect of granting or withholding the requested relief" on both parties.[164] Here, the Court must weigh the degree to which individual voters will suffer the irreparable harm of disenfranchisement, as discussed above, against the State's interest in precluding ineligible

[163] *See, e.g.*, *Rodriguez v. Providence Comm'y Corr., Inc.*, –F. Supp. 3d–, 2015 WL 9239821, at *6 (M.D. Tenn. Dec. 17, 2015); *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013). *See generally* Newberg on Class Actions § 4:30 (5th ed. 2015) ("Rule 23(b)(2) authorizes certification of a class solely for the purpose of final injunctive or declaratory relief. Hence, a case seeking only a provisional remedy like a preliminary injunction cannot be certified under Rule 23(b)(2) on that basis alone.").

[164] *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 9 (2008).

noncitizens from voting in federal elections, and the administrative burden on the State if the injunction issues.

As an initial matter, the Court finds no distinct burden associated with the Department of Revenue's compliance with the proposed injunction. The injunction appears to require nothing more than the status quo enforcement efforts by DMV employees, who currently do not affirmatively request DPOC from motor voter registration applicants. The competing burdens associated with the preliminary injunction are all associated with the Secretary of State's enforcement of the DPOC law.

The Secretary of State first urges that the State has an interest in preventing noncitizen registration, in preserving its own laws, and in ensuring voters in Kansas are not confused, which they would be by changing the law again. The Court recognizes "the legitimacy [and] importance of the State's interest in counting only the votes of eligible voters,"[165] and the State's "broad interests in protecting election integrity."[166] But on this record, the Court cannot find that the State's interest in preventing noncitizens from voting in Kansas outweighs the risk of disenfranchising thousands of qualified voters. There is evidence of only three instances where noncitizens actually voted in a federal election between 1995 and 2013. And while there is evidence that about fourteen noncitizens attempted to register to vote during that time, this number pales in comparison to the number of people not registered as a result of the DPOC law. Approximately 18,000 otherwise qualified motor voter applicants have not been processed solely because they have failed to produce DPOC.

The Court is unpersuaded that the State's interest in ensuring that Kansas voters are not confused is strong enough to counterbalance the irreparable harm that thousands of

[165] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008).

[166] *Id.* at 200.

disenfranchised voters will suffer if the DPOC prevents them from voting in federal elections. As discussed in detail earlier in this opinion, the record suggests that Kansas motor voters are already confused about the current DPOC law and how to meet its requirements. To the extent the State has a strong interest in preventing voter confusion, the Court cannot find that the status quo enforcement efforts further that State interest.

Mr. Kobach concedes that it is possible for it to comply with a preliminary injunction, but argues that the State would suffer severe administrative burdens due to: (1) changing voter registration records, including providing notice, for those applicants on the "incomplete" list or in cancelled status; (2) administering a two-tiered election with a large number of federal-only voters; and (3) contacting voters on the incomplete list who no longer reside at their last known addresses.

As to the first administrative burden identified by the State, Mr. Caskey testified that he could fashion reports in the ELVIS system to identify all motor voter applicants who have been classified as incomplete or cancelled based on the DPOC requirement. He testified that these two reports would take about thirty minutes each to run. Once these lists are generated, the State would be required to change those applicants' statuses back to active, and send them a notice that their registration is complete. The Court cannot find that the State's time spent changing applicants' statuses back to active is unduly burdensome. It is a wholly automated process. Further, the Court cannot find that the cost to the State to notify voters of their completed registrations is unduly burdensome. As compared to the many notices the State would otherwise send to voters who lack DPOC, the burden is substantially less. For those applicants who are newly on the incomplete list, for example, this may end up saving the State money otherwise

spent repeatedly contacting the applicants to notify them that their applications are incomplete and directing them to submit DPOC.

Next, the Secretary of State complains that the proposed injunction would create a two-tiered election regime in Kansas that would create separate requirements for registering to vote for federal and state elections. But, as previously discussed, the Court agrees with Plaintiffs that this two-tiered system is a problem of the State's own making.[167] If the State wishes to change voter registration laws that directly contradict the provisions of the NVRA, it does so at its own risk. To the extent such laws are preempted by the NVRA, they may not apply to registration for federal elections. Moreover, this two-tiered system is not without precedent. In 2014, the State was required to administer a statewide election in which 383 voters who used the federal mail registration form and did not provide DPOC were registered to vote for federal offices only.[168] While the Court finds that the scale of voters affected by the instant injunction is substantially higher—the State estimates that about 10,000 voters would be affected—there is no evidence of significant administrative burdens with the 2016 election stemming from the dual forms of registration that would outweigh Plaintiffs' irreparable harm.[169]

Finally, Defendants point to the administrative burden of locating applicants who have moved since the time of application. But as Plaintiffs point out, this burden is largely unnecessary because Kansas law does not prohibit a registrant from voting because they have

[167]The Court notes that this two-tiered registration procedure has been challenged under State law in *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cnty. Dist. Ct). The district court granted summary judgment to the plaintiffs in that case, holding that the Secretary of State lacks legal authority under Kansas law "to compromise or limit 'Federal Form' registrants, such as Plaintiffs, right to register and vote in Kansas elections." *Id.*, Mem. Op. & Order at 25 (Jan. 15, 2016). The Secretary of State's Motion for Relief from Judgment or Order is pending in that matter.

[168]*See Arizona v. ITCA*, 133 S. Ct. 2247, 2255 (2013).

[169]The only evidence of administrative burden is Mr. Caskey's conclusory assertion in his declaration that "[t]he administrative burdens on the State and counties in conducting a two-tier election would be severe." Kobach Ex. 1 ¶ 23.

moved.[170] Instead, the registrant can vote at the precinct assigned to their old address and submit a new voter registration form at the time of voting. Moreover, because the Court is not enjoining at this time enforcement of the regulation, county officials are not prohibited from cancelling applications that have been incomplete for more than 90 days for reasons other than lack of DPOC. The survey conducted by the State shows that in a sample of the oldest applications in a single county, approximately 30% of the applicants had moved.[171] But this list only surveyed the oldest applications on the suspense list, which would of course be more likely to include applicants that have moved. There is no indication that these results could be extrapolated statewide.

In sum, while the Court acknowledges the Secretary of State will assume some administrative burdens in ceasing enforcement of the DPOC law as to federal elections, it simply cannot find that these burdens outweigh the real and imminent threat of disenfranchisement that Plaintiffs and those similarly situated will suffer without an injunction.[172]

D. Public Interest

Defendants argue that the public interest is best served by enforcing duly enacted Kansas law. Plaintiffs urge that the public interest is best served by enfranchisement, and by enforcement of federal voter registration requirements under the NVRA. The Court agrees that the public interest in enforcing State law must give way under these circumstances to the federal interests outlined in the NVRA and described in detail earlier in this opinion. As the Sixth Circuit has succinctly explained:

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[170] *See* K.S.A. § 25-2316c(b).

[171] Kobach Ex. 8

[172] *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (balancing the harm to the State in enjoining an election law, and noting that the State had not shown that "local boards will be unable to cope with three extra days of in-person voting).

> While states have "a strong interest in their ability to enforce state election law requirements," the public has a "strong interest in exercising the 'fundamental political right' to vote." "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful."[173]

This conclusion is bolstered in this case by the Court's earlier analysis that even if instances of noncitizens voting cause indirect voter disenfranchisement by diluting the votes of citizens, such instances pale in comparison to the number of qualified citizens who have been disenfranchised by this law. Accordingly, the Court finds granting injunctive relief would be in the public interest.

E. Security

Secretary Jordan asks that the Court require Plaintiffs to post a security bond if it issues a preliminary injunction in this matter. Defendant Kobach does not argue that a bond is required. Fed. R. Civ. P. 65(c) provides that "[t]he Court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Court may exercise its discretion and determine a bond is unnecessary "if there is an absence of proof showing a likelihood of harm."[174] Given the Court's finding of constitutional preemption and the strong public interest in allowing qualified individuals to register to vote that outweighs any purely administrative burdens to the State, the Court waives the bond requirement.

V. Conclusion

Under the heightened preliminary injunction standard, Plaintiffs have sustained their burden of making a strong showing that they are likely to succeed on the merits of their claim

[173] *Id.* 697 F.3d 423, 436–37 (6th Cir. 2012) (quoting *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2012); *Purcell v. Gonzalez*, 549 U.S. 1, 4, (2006)).

[174] *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

that the Kansas DPOC law violates the NVRA provision that a motor voter registration application can require only the minimum amount of information necessary to enable state officials to assess an applicant's eligibility to vote, and that they will suffer irreparable harm without an injunction. Without the injunction, approximately 18,000 Kansas motor voter registration applicants will be precluded from registering to vote solely based on their failure to provide DPOC. The record in this case suggests that there is a less burdensome way for the State to assess whether applicants meet the citizenship eligibility requirement; namely, by asking applicants to complete an attestation of citizenship under penalty of perjury.

The injunction requires the Secretary of State to register to vote those applicants whose only infirmity was not having the opportunity to produce DPOC contemporaneously with their driver's license applications, or later because of lack of consistent notice or reasonable opportunity to cure that infirmity. Although the Court is cognizant that the injunction will cause some administrative burden to the State, it is a burden that is outweighed by the risk of thousands of otherwise eligible voters being disenfranchised in upcoming federal elections. On balance, the public interest in the enfranchisement of otherwise eligible voters, the irreparable harm to prospective voters, the balance of harms, and Plaintiffs' strong showing that they are likely to succeed on their claim that the DPOC law is preempted by NVRA § 5's provision that the State only require the minimum amount of information necessary for the State to assess citizenship of the applicant, justifies entry of this preliminary injunction.

VI. Stay

Under Fed. R. Civ. P. 62(c), during pendency of an appeal from an interlocutory order that grants an injunction, "the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Given the administrative

challenges to the State that will be necessitated by the Court's injunction, the Court will grant a short stay of this preliminary injunction in order to allow the State time to coordinate enforcement efforts, and to file any appeal to the Tenth Circuit Court of Appeals and obtain emergency relief from that Court, if desired. The injunction will therefore go into effect at midnight on May 31, 2016.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiffs' Motion for Preliminary Injunction (Doc. 19) is **granted in part and denied in part**. Defendants are hereby enjoined from enforcing K.S.A. § 25-2309(l) as to individuals who apply to register to vote in federal elections at the same time they apply for or renew a driver's license. The Secretary of State is directed to register for federal elections all otherwise eligible motor voter registration applicants that have been cancelled or are in suspense due solely to their failure to provide DPOC. Plaintiff's motion to enjoin enforcement of K.A.R. § 7-23-15 is denied.

IT IS SO ORDERED.

Dated: May 17, 2016

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE