Nos. 18-3133, -3134

In the

United States Court of Appeals

for the

Tenth Circuit

STEVEN WAYNE FISH, *et al.*,

Plaintiffs-Appellees,

– v. –

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

Defendant-Appellant.

CODY KEENER; ALDER CROMWELL,

Plaintiffs,

– and –

PARKER BEDNASEK,

Plaintiff-Appellee,

– v. –

KRIS W. KOBACH, Kansas Secretary of State,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, KANSAS CITY, CIVIL DOCKET
NOS. 2:16-CV-02105-JAR AND 2:15-CV-09300-JAR
(HONORABLE JULIE A. ROBINSON, U.S. DISTRICT JUDGE)

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CORPORATE DISCLOSURE STATEMENT

The League of Women Voters of Kansas (the "League") is a non-profit organization organized under Section 501(c) of the Internal Revenue Code. The League does not issue stock. There are no publicly held corporations that own ten percent or more of the stock of the League.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

STATEMENT OF PRIOR OR RELATED APPEALS x

GLOSSARY xii

COUNTER-STATEMENT OF THE ISSUES 1

COUNTER-STATEMENT OF THE CASE 2

I. BACKGROUND 3

II. PRIOR PROCEEDINGS 4

A. *Fish* Preliminary Injunction Proceedings 5

B. Proceedings Following Remand 7

III. THE DECISION BELOW 8

A. Overall Effect of the Law 8

B. Effect of DPOC Law on Individuals 10

C. Noncitizen Registration 21

D. Alternatives to DPOC 24

E. Final Judgment 26

STANDARD OF REVIEW 26

SUMMARY OF ARGUMENT 27

ARGUMENT 34

I. THE DISTRICT COURT CORRECTLY RULED THAT THE DPOC REQUIREMENT VIOLATES SECTION 5 OF THE NVRA......................34

A. The District Court Correctly Found that Defendant Failed to Satisfy this Court's Two-Part Test to Overcome the Presumption that Section 5 of the NVRA Preempts Kansas' DPOC Requirement..35

1. The District Court Correctly Found that 39 Instances of Successful Noncitizen Registrations Over Nearly 20 Years Was Insufficient to Demonstrate "Substantial Numbers" of Noncitizens Registering in Kansas 36

2. The District Court Correctly Found that Defendant Failed to Satisfy his Burden to Show "Nothing Less" than DPOC Could Address Noncitizen Registration in Kansas 39

B. There is No Basis to Revisit the Prior Panel's Decision....................41

1. *Fish I*'s Legal Ruling as to the Requirements of Section 5 of the NVRA Governs This Appeal..41

2. Defendant's Interpretation of the Statute is Inconsistent with the Plain Text of the NVRA 44

3. Defendant's Argument Based on Section 8 of the NVRA is Waived and Incorrect 51

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE DPOC REQUIREMENT UNDULY BURDENS THE RIGHT TO VOTE IN VIOLATION OF THE FOURTEENTH AMENDMENT............................53

A. Bednasek Has Standing for His Fourteenth Amendment Claim 54

B. The DPOC Law Is Subject to the *Anderson-Burdick* Balancing Test—Not Rational Basis Review 58

C. Based on the Record, the District Court Correctly Found that the DPOC Law is Significantly More Burdensome than the Law

Reviewed in *Crawford*, and is Therefore Subject to Heightened Scrutiny 61

1. Evidence of the Number of Applicants Who Tried to Register But Were Blocked by the DPOC Requirement 61
2. Evidence of Concrete Burdens Caused by the DPOC Law 64
3. Absence of a Post-Election Safety Valve 69
4. Uneven Application and Evidence of Selective Enforcement 73

D. The District Court Correctly Determined That the State's Rationale for the DPOC Law Was Insufficient to Justify Its Burden 78

CONCLUSION 83

STATEMENT ON REQUEST FOR ORAL ARGUMENT 85

CERTIFICATE OF SERVICE 85

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 86

ECF CERTIFICATE OF COMPLIANCE 87

TABLE OF AUTHORITIES

Cases

Am. Association of People with Disabilities v. Herrera,
690 F.Supp.2d 1183, (D.N.M. 2010) 67

Am. Civil Liberties Union of N.M. v. Santillanes,
546 F.3d 1313 (10th Cir. 2008)... *passim*

Anderson v. Celebrezze,
460 U.S. 780 (1983) 53, 67

Arizona Green Party v. Reagan,
838 F.3d 983 (9th Cir. 2016)...59

Arizona v. Inter Tribal Council of Ariz.,
133 S. Ct. 2247 (2013) .... *passim*

Belenky v. Kobach,
No. 2013CV1331 (Shawnee Cty. Dist. Ct. Jan 15, 2016) 49, 75

Brown v. Kobach,
No. 2016CV550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016)...........................49

Burdick v. Takushi,
504 U.S. 428 (1992) 53, 61, 80, 82

Burns v. Fortson,
410 U.S. 686 (1973) 72

City of New Orleans v. Dukes,
427 U.S. 297 (1976) 76

Clapper v. Amnesty International USA,
568 U.S. 398 (2013) 57

Common Cause/Ga. v. Billups,
554 F.3d 1340 (11th Cir. 2009)...57

Conrad v. Phone Directories Co.,
585 F.3d 1376 (10th Cir. 2009) 44

Crawford v. Marion County Election Board,
553 U.S. 181 (2008) .... *passim*

Dunn v. Blumstein,
405 U.S. 330 (1972) 77

Fish v. Kobach,
259 F. Supp. 3d 1218 (D. Kan. 2017) 76

Fish v. Kobach,
304 F. Supp. 3d 1027 (D. Kan. 2018) 38

Fish v. Kobach,
840 F.3d 710 (10th Cir. 2016).. *passim*

Frank v. Walker,
819 F.3d 384 (7th Cir. 2016)...65

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012)...50

Guinn v. United States,
238 U.S. 347 (1915) 77

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 46

Harkless v. Brunner,
545 F.3d 445 (6th Cir. 2008)...50

Harman v. Forssenius,
380 U.S. 528 (1965) 72

Homans v. City of Albuquerque,
366 F.3d 900 (10th Cir. 2004).. 42, 43

Kobach v. U.S. Election Assistance Commission,
772 F.3d 1183 (10th Cir. 2014)... *passim*

Las Vegas Ice & Cold Storage Co. v. Far West Bank,
893 F.2d 1182 (10th Cir. 1990)...27

Lassiter v. Northampton County Board of Elections,
360 U.S. 45 (1959) 77

Le Maire v. United States,
826 F.2d 949 (10th Cir. 1987)...27

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014)...79

League of Women Voters of the U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 64

McIlravy v. Kerr-McGee Coal Corp.,
204 F.3d 1031 (10th Cir. 2000)... 42, 43

Meese v. Keene,
481 U.S. 465 (1987) 57

Ne. Ohio Coalition for Homeless v. Husted,
696 F.3d 580 (6th Cir. 2012)... 59, 70, 71

Network Corp. v. Arrowood Indemnity Co.,
772 F.3d 856 (10th Cir. 2014)... 27, 42

Nova Health Systems v. Gandy,
416 F.3d 1149 (10th Cir. 2005)...58

Obama for Am. v. Husted,
697 F.3d 423 (6th Cir. 2012)... 77, 78

Reynolds v. Sims,
377 U.S. 533 (1964) 59

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 47

Turner Broadcasting System, Inc. v. F.C.C.,
512 U.S. 622 (1994) 82

Unicover World Trade Corp. v. Tri State Mint, Inc.,
24 F.3d 1219 (10th Cir. 1994)...26

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016)....79

Whole Women's Health v. Hellerstedt,
136 S. Ct. 2292 (2016)....79

Young v. Fordice,
520 U.S. 273 (1997)....47

Statutes

52 U.S.C. § 20501.... 50, 51

52 U.S.C. § 20504.... *passim*

52 U.S.C. § 20507....51

A.R.S. § 16-166.... 4, 77

K.A.R. § 7-23-15....3, 4

K.S.A. § 25-2309.... *passim*

K.S.A. § 25-2316c....76

K.S.A. § 25-407....55

K.S.A. § 76-729....55

K.S.A. § 8-234a....56

Constitutional Provisions

Kansas Constitution art. 5, § 1....48

Rules

Fed. R. Civ. P. 15....58

Other Authorities

American Heritage Dictionary of the English Language (3d ed. 1992) 44

Black's Law Dictionary (10th ed. 2014) 44

New Oxford English Dictionary (2d ed. 2005)..44

U.S. Election Assistance Comm'n,
Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form, Jan. 17, 2014...41

Webster's Third New International Dictionary (1961) 44

STATEMENT OF PRIOR OR RELATED APPEALS

Prior Appeals

This is the fifth of six appeals to this Court arising out of District of Kansas case number 2:16-cv-02105-JAR-JPO, and the first appeal arising out of District of Kansas case number 2:15-cv-09300.

The first appeal, *Fish v. Kobach*, No. 16-3147 (10th Cir.), sought review of the District Court's order granting Plaintiffs' motion for a preliminary injunction in this case. This Court's decision affirming the preliminary injunction is reported at 840 F.3d 710 (10th Cir. 2016).

The second appeal, *Fish v. Jordan*, No. 16-3175 (10th Cir.), was brought by the other original defendant in this case. That defendant is no longer a part of this litigation, and this Court granted the defendant's unopposed motion to dismiss the appeal, on August 6, 2018.

The third appeal, *Fish v. Kobach*, No. 17-3161 (10th Cir.), sought review of the District Court's decision permitting a discovery deposition of Defendant Secretary of State Kris Kobach. This Court granted Defendant's motion to dismiss the appeal as moot on August 30, 2017.

The fourth appeal, *Fish v. Kobach*, No. 18-3094 (10th Cir.), sought review of the District Court's interlocutory order finding Defendant Kobach in contempt of court, and was dismissed as premature on May 22, 2018.

The sixth appeal, *Fish v. Kobach*, No. 18-3186 (10th Cir.), seeks review of the District Court's order holding Defendant Kobach in contempt of court and awarding Plaintiffs attorneys' fees and litigation expenses incurred in connection with their motion for contempt.

Related Appeals

In *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014) ("*EAC*"), the Defendant in this case unsuccessfully brought suit against the United States Election Assistance Commission (EAC) to modify the instructions for the federal mail-in voter registration form, prescribed under 52 U.S.C. § 20505, to require applicants residing in Kansas and Arizona to submit proof-of-citizenship documents in order to register to vote. One of the Plaintiffs in this action, the League of Women Voters of Kansas, was an intervenor in *EAC*.

In *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016), a group of plaintiffs, including one of the Plaintiffs in this case, the League of Women Voters of Kansas, successfully obtained preliminary injunctive relief against the Executive Director of the EAC, prohibiting modification of the instructions to the federal mail-in voter registration to require applicants residing in Kansas, Georgia, and Alabama to submit proof-of-citizenship documents in order to register to vote. Defendant was an intervenor in *Newby*.

GLOSSARY

A.R.S.	Arizona Revised Statutes
DHS	The United States Department of Homeland Security
DMV	Department of Motor Vehicles
DOV	Kansas Division of Vehicles
DPOC	Documentary Proof of Citizenship
DPOC law	The DPOC requirement, codified at K.S.A. § 25-2309(*l*)
EAC	United States Election Assistance Commission
ELVIS	Kansas Election Voter Information System
Federal Form	The Federal Mail-In Voter Registration Form promulgated by the United States Election Assistance Commission
Fish I	*Fish v. Kobach*, 840 F.3d 710 (2016).
ITCA	*Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).
JA	The parties' Joint Appendix, Volumes 1-53.
K.S.A.	Kansas Statutes Annotated
K.A.R.	Kansas Administrative Regulations
Kansas League	The League of Women Voters of Kansas
NVRA	National Voter Registration Act
SAVE	The DHS Systematic Alien Verification for Entitlements Program
SOS	Kansas Secretary of State

COUNTER-STATEMENT OF THE ISSUES

1. Whether this Court's prior legal ruling as to the requirements of Section 5 of the National Voter Registration Act (NVRA) governs this appeal, either under the law of the case doctrine or as an otherwise correct interpretation of law.
2. Whether the District Court correctly held that Kansas' documentary proof of citizenship law violates the requirement under Section 5 of the NVRA that states may require "only the minimum amount of information necessary" to assess the eligibility of motor-voter applicants, given evidence that: (a) only 39 noncitizens have registered to vote in Kansas over the past 19 years; and (b) there are ample alternative means to prevent and/or deny noncitizens registering to vote.
3. Whether, in light of the District Court's uncontested factual findings that Kansas' documentary proof of citizenship law significantly burdens voters, including more than 30,000 Kansans whose registrations were blocked by the law, and the absence of evidence that it actually advances legitimate state interests, the Court correctly ruled that the law unduly burdens the right to vote in violation of the Fourteenth Amendment.

COUNTER-STATEMENT OF THE CASE

After a seven-day trial featuring 21 witnesses, the District Court issued a careful 118-page opinion confirming this Court's preliminary determination that Defendant's documentary proof-of-citizenship (DPOC) requirement for voter registration—the only one of its kind in the country—had caused a "mass denial of a fundamental constitutional right." *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("*Fish I*"). The District Court found that, over three years, the DPOC requirement had blocked more than 30,000 Kansans from registering to vote, representing "approximately 12% of the total voter registration applications submitted since the law was implemented in 2013." JA11449. The Court also found that, in comparison, "[a]t most," a total of 39 non-citizens became registered to vote in Kansas over the last 19 years, "largely explained by administrative error, confusion, or mistake." JA11509, JA11520.

Applying the clear legal framework set forth by this Court during preliminary injunction proceedings, the District Court concluded that the DPOC law, as applied to individuals who register to vote at motor-vehicle agencies, violates Section 5 of the National Voter Registration Act ("NVRA"), because it exceeds the "minimum amount of information necessary" to assess the eligibility of such applicants under 52 U.S.C. § 20504(c)(2)(B). It further held that, on the record in this case, the DPOC requirement constitutes an undue burden on the

fundamental right to vote, in violation of the Fourteenth Amendment, and permanently enjoined it. This appeal followed.

I. BACKGROUND

Kansas began enforcing a documentary proof of citizenship requirement for voter registration on January 1, 2013. K.S.A. § 25-2309(*l*). It directs that "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship," by presenting one of thirteen forms of documentation, including a passport or birth certificate. JA11438-39. If a registration application is deemed "incomplete" for not having DPOC, it is designated as "in suspense" in the state voter registration system. JA11440. Pursuant to a regulation subsequently promulgated by Defendant—K.A.R. § 7-23-15, effective on October 2, 2015—an application is "canceled" if DPOC is not presented within 90 days of the application; canceled applicants "must submit a new, compliant voter registration application in order to register to vote." JA11440-41.

The Kansas DPOC regime is unique. Only three states have a similar law: Alabama, Arizona, and Georgia. Alabama and Georgia have never enforced their

respective laws and have indicated no definitive plans to do so.[1] Arizona has a less stringent requirement, which can be satisfied with a driver's license number, in lieu of a copy of a document. *See* A.R.S. § 16-166(F)(1).

II. PRIOR PROCEEDINGS

On September 30, 2015, just before K.A.R. § 7-23-15 became effective, *Bednasek v. Kobach* was filed, bringing claims on constitutional grounds and under the NVRA. JA11549, JA11578-97. Plaintiff Parker Bednasek's claim that is the subject of this appeal charges that the DPOC law unduly burdens the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. JA11423.

On February 18, 2016, *Fish v. Kobach* was filed by Plaintiffs Steven Wayne Fish, Donna Bucci, Charles Stricker, Thomas J. Boynton, Douglas Hutchinson, and the League of Women Voters of Kansas ("Kansas League"). They brought various claims, *inter alia*, that the DPOC law is preempted by Section 5 of the NVRA as it applies to "motor voter" applicants—individuals who apply to register to vote at the same time they apply for or renew their driver's license online or at a Kansas Division of Vehicles ("DOV") office. Specifically, Section 5 provides that states may require of such applicants "only the minimum amount of information

[1] Defendant admitted in *League of Women Voters v. Newby* that "neither State is yet enforcing its proof-of-citizenship law." Kobach Resp. to Mot. for a TRO & Prelim. Inj. at 11, No. 1:16-cv-00236 (D.D.C. Feb. 21, 2016), ECF No. 27.

necessary to … enable State election officials to assess the eligibility of the applicant[.]" 52 U.S.C. § 20504(c)(2)(B)(ii). JA11423.

A. *Fish* Preliminary Injunction Proceedings

On February 26, 2016, the *Fish* Plaintiffs moved for a preliminary injunction on their NVRA claim, which the District Court granted on May 17, 2016. In concluding that the *Fish* Plaintiffs demonstrated a likelihood of success that Section 5 "preempts the Kansas DPOC law as it applies to motor voter registrants," JA875, the court found that "the process of submitting DPOC for motor voter applicants is burdensome, confusing, and inconsistently enforced," JA861, and that "[t]he sheer number of people cancelled or held in suspense because of the DPOC requirement" demonstrates "the difficulty of complying with the law as … currently enforced," JA865. It found further that "[t]here 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." JA880.

The court also found that "very few noncitizens in Kansas successfully registered to vote under an attestation regime," JA867, and that the state had other methods at its disposal to prevent noncitizen registration, JA868-69. In light of this record, the court concluded that the *Fish* Plaintiffs "made a strong showing that the information required under the Kansas DPOC [law] exceeds the minimum

amount of information necessary for State election officials to assess citizenship eligibility." JA861.

This Court affirmed, concluding that the DPOC law had caused a "mass denial of a fundamental constitutional right[.]" *Fish I*, 840 F.3d at 755. In light of the NVRA's requirement that a "state motor voter 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,'" *id.* at 716 (quoting 52 U.S.C. § 20504(c)(2)(B)(ii)), this Court articulated a two-part test that Defendant must satisfy to enforce the DPOC law. *First*, the Court held that an attestation under penalty of perjury is "the *presumptive* minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties[,]" and that this presumption can be overcome "only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement." *Id*. at 717. *Second*, even upon such a showing of "substantial numbers" of noncitizen registration, Defendant cannot prevail unless he also demonstrates that "nothing less than DPOC is sufficient to meet th[e State's] duties" to enforce its eligibility requirements for voting. *Id*. at 739 n.14.

In finding that Defendant did not satisfy his burden, the Court pointed to the small number of noncitizens registering to vote in Kansas, and noted that it fell

"well short" of the requisite showing to rebut the attestation presumption. *Id.* at 746-47. The Court held that the *Fish* Plaintiffs had "more than adequately shown a likelihood of success on the merits" under this two-part test on "the record as it stands," and remanded for "[f]urther discovery," inviting Defendant to adduce "evidence … that a substantial number of noncitizens have registered to vote in Kansas during a relevant time period." *Id.* at 750.

B. Proceedings Following Remand

Following this Court's affirmance of the preliminary injunction, discovery was re-opened in the *Fish* case on Defendant's motion, to give him an ample opportunity to attempt to elicit evidence to meet the two-prong standard articulated in *Fish I*. JA11441, 11505.[2] The District Court then held a consolidated 7-day bench trial for both cases on March 6-9, 12-13, and 19, 2018, followed by a hearing on March 20, 2018 on a motion for contempt brought by *Fish* Plaintiffs. The court heard or received testimony from 12 fact witnesses and 9 expert witnesses. On June 18, 2018, the District Court permanently enjoined enforcement of the DPOC requirement in a 118-page ruling detailing the court's findings of fact and conclusions of law. JA11422-11539.

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[2] The District Court declined to certify a class in either case, because "[f]inal injunctive and declaratory relief to the named Plaintiffs in this case will benefit all potential members of the class." JA913-15.

In a separate ruling, the court held Defendant Kobach in civil contempt for disobeying the court's preliminary injunction and a related order. JA11210-34.

III. THE DECISION BELOW

A. Overall Effect of the Law

The DPOC requirement became effective on January 1, 2013, JA11439, and affects any first-time voter registration applicants as of that date, K.S.A. § 25-2309(n), (p). As of March 31, 2016, 30,732 voter registration applicants were denied registration (*i.e.*, were suspended or canceled as of that date) for failure to provide DPOC; approximately 75% (22,888) applied through the DOV. JA11449; JA9037. Overall, these blocked registrations represented "approximately 12% of the total voter registration applications submitted since the law was implemented in 2013." JA11449. Defendant's own expert estimated that "more than 99% of the individuals" whose registration applications were suspended for failure to provide DPOC "are United States citizens;" the District Court found that his estimate as to the number of noncitizens on the suspense list was "statistically indistinguishable from zero." JA11491.

The District Court, crediting the analysis of Plaintiffs' expert Dr. Michael McDonald, found that the number of suspended applications "would have increased further before the 2016 presidential election but for the Court's preliminary injunction order, in part because voter registration activity typically

increases in the months leading up to a presidential election." JA11449. Overall, the court found that "either (1) these applicants lack immediate access to such documents because they were repeatedly notified of the need to produce DPOC in order to register, yet they did not complete the registration process; or (2) these applicants were not well enough informed about the DPOC requirement to locate their DPOC and provide it to the county election office in order to become registered; or (3) these applicants were otherwise unable or unwilling to go through the steps to produce DPOC." JA11457. Viewing this evidence in tandem with the testimony of Marge Ahrens, former co-president of Plaintiff the Kansas League, the court found not only that "tens of thousands of eligible citizens were blocked from registration before this Court's preliminary injunction," but also "that the process of completing the registration process was burdensome for them." JA11459.

The District Court also credited Dr. McDonald's testimony that the DPOC law disproportionately affects the young and those who are not politically affiliated. JA11449. Specifically, the court found that "43.2% of motor voter applicants held in suspense or canceled were between the ages of 18-29, and 53.4% of suspended and canceled motor voter applicants were unaffiliated." JA11449-50. This is largely due to the fact that the law applies only to first-time registrants, who "tend to be young and unaffiliated" voters. JA11450. The Court noted that "there

is a consensus in social science that barriers to voter registration increase the cost of voting and dissuade individuals from participating in the political process," *id.*, and the DPOC law disproportionately affects groups that "have a lower propensity to participate in the political process and are less inclined to shoulder the costs associated with voter registration." *See also id.* (crediting Ahrens' testimony regarding "how difficult it has been … to help register young voters due to the DPOC law").

The District Court found Defendant's experts were "not qualified" to opine on DPOC possession or voter turnout rates, and that their methods were "unreliable and not relevant." JA11431-37, JA11450-52; JA11457-59.

B. Effect of DPOC Law on Individuals

1. Individuals

The District Court found that the experiences of the Individual Plaintiffs illustrated "the barriers to registration after the DPOC law became effective." JA11459.

The experiences of Plaintiffs Bucci and Fish illustrate the tangible burdens that some qualified Kansans face in obtaining DPOC. Bucci does not possess a copy of her birth certificate or a passport. JA11460-61. She works for the Kansas Department of Corrections as a cook in the prison kitchen on the 3:00 a.m. to 12:00

p.m. shift. JA11460. In 2013, Bucci applied to register to vote while renewing her driver's license at the DOV in Sedgwick County, Kansas. The Court found that

> [t]he driver's license examiner did not tell Bucci that she needed to provide proof of citizenship, and did not indicate that she lacked any necessary documentation. When she left the DOV, she believed she had registered to vote. Later, she received a notice in the mail informing her that she needed to show a birth certificate or a passport to become registered to vote.

JA11460-61. The court credited Bucci's testimony that she "cannot afford the cost of a replacement birth certificate from Maryland" because "spending money to obtain one would impact whether she could pay rent." JA11461. Bucci's voter registration application was ultimately canceled, because she was unable to produce her birth certificate. *Id.* As a result, she "could not vote in the 2014 election, but was able to vote in the 2016 election by operation of the preliminary injunction." *Id.*

Fish applied to register to vote while renewing a Kansas driver's license at the DOV in Lawrence, Kansas, in August 2014. JA11459. He too was not informed that he needed a citizenship document to register to vote, and believed that he had registered to vote when he left the DOV. *Id.* He later "received notices … from the Douglas County election office telling him that he needed to provide DPOC in order to become registered. JA11459-60. After unsuccessfully searching for his birth certificate, Fish "attempted to obtain a replacement birth certificate but could not determine how to do so—he was born on a decommissioned Air Force

base in Illinois." JA11460. "[I]t took nearly two years to find it," when, in May 2016, Fish's sister located a copy of his birth certificate, which had been placed in a safe by Fish's deceased mother. *Id.* In the interim, Fish "was unable to vote in the 2014 general election, and his voter registration application was subsequently canceled for failure to provide DPOC under the 90-day rule." *Id.* Due to the preliminary injunction in this case, Fish became registered to vote in June 2016. *Id.*

The District Court further found that barriers to registration and voting imposed by the DPOC requirement are not limited to voters who lack DPOC. Rather, the trial record confirmed the District Court's preliminary findings that the DPOC regime is an "administrative maze" that is "confusing[] and inconsistently enforced[.]" JA866, JA883. As the Court found, Plaintiffs Stricker and Boynton actually *presented DPOC* while applying to register to vote at the DOV, but were nevertheless suspended, cancelled, and ultimately unable to vote in the 2014 election. JA11461-65.

Stricker "applied to register to vote while renewing a Kansas driver's license at the Sedgwick County DOV in October 2014." JA11461. After being told he did not have sufficient documentation, Stricker "rushed home and 'grabbed every single document that [he] could,'" including his birth certificate, and "made it back to the DOV in time to complete his application." JA11461-62. When he

mentioned that he wanted to register to vote, the DOV clerk "told him nothing more was necessary." JA11462. Stricker believed at this point that he was registered to vote. *Id.* However, when he went to vote in the 2014 election, the poll worker "could not find a record of his registration," an experience that left him "confused and embarrassed." *Id.* Stricker "does not recall receiving any notices from Sedgwick County asking him to provide [DPOC]." *Id.* "Election Day was the first time that he learned that he was not registered to vote." *Id.* Although Stricker possessed DPOC, the DPOC law provided no opportunity on or after Election Day for him to present it and have his vote counted. JA11520. Stricker's registration application was canceled in 2015, but reinstated by operation of the preliminary injunction in 2016. JA11462.

Boynton was similarly blocked from registering and voting by the DPOC regime, despite taking the necessary steps to comply. In August 2014, he went to a DOV in Wichita to apply for a Kansas driver's license and responded affirmatively when asked whether he wanted to register to vote. JA11464. He "brought several documents with him that he suspected he might need to obtain a driver's license, including his Illinois birth certificate," produced each of "the documents the clerk[] requested during the transaction," and, "when he left the DOV, Boynton understood he was registered to vote." *Id.* Nevertheless, when Boynton went to vote in November 2014, "the poll worker told him that his name was not on the

rolls and offered him a provisional ballot." *Id.* When he received notices shortly thereafter informing him that he would need to submit DPOC to complete the voter registration, he became "disappointed and irritated" that his ballot was not counted. JA11464-65. Although he subsequently visited the DOV two times in 2015 to obtain replacement driver's licenses, he declined to register to vote both times, because the process did not seem "to be the kind of process that leads to [] being successfully registered." JA11465. In November 2015, Boynton's registration was cancelled due to a lack of DPOC, but later reinstated due to the preliminary injunction. JA11465.

The District Court found that Stricker and Boynton's experiences were part of a pattern of "confusing, evolving and inconsistent enforcement of the DPOC law[] since 2013." JA11528. Additional evidence included:

> incorrect notices sent to applicants, incorrect information about registration status communicated over the phone by State employees, failure to accept DPOC by State employees, failure to meaningfully inform applicants of their responsibilities under the law, and evolving internal efforts to verify citizenship, that have all caused confusion during the 5 years this law has been effective.

Id. The District Court also found other irregularities in the implementation of the law, including that Defendant Kobach engaged in a "pattern of picking off Plaintiffs through targeted back-end verifications in an attempt to avoid reaching

the merits of this case," which the court had described in a previous ruling as post-preliminary injunction "gamesmanship." JA2250-54.[3]

The DPOC requirement also prevented Plaintiff Bednasek from registering. Bednasek is a U.S. citizen over the age of 18, who moved to Kansas in August 2014 to attend the University of Kansas as a full-time student. JA11466. Bednasek testified, and the Court found, that Lawrence, Kansas, is his place of habitation and that when he left the state (for example, during breaks between school semesters), he intended to return. JA9339-45. In December 2015, two and a half years after moving to Kansas, Bednasek applied to register to vote in person at the Douglas County Election Office. JA11466. He did not present DPOC because he "did not physically possess DPOC at the time of application." *Id.* "His parents, who live in Texas, possess his Oklahoma birth certificate." *Id.* Bednasek

[3] In Stricker's case, the Sedgwick County Elections Office, headed by Defendant's appointee, County Election Commissioner Tabitha Lehman, sent him a notice stating that although he had not provided DPOC, he had nevertheless "been granted full voter registration status in Kansas" because the office had supposedly "received information … that [he has] a Kansas birth certificate on file" with the Kansas Office of Vital Statistics—even though Stricker was born in *Missouri*, not Kansas. JA11462-63. The court found that this was not an isolated occurrence, and that "Sedgwick County—the second largest county in Kansas—was … sending out erroneous and confusing notices to individuals stating that citizenship was confirmed through the department that maintains Kansas birth certificates, when in fact that was not true." JA11462-64. In Boynton's case, the SOS registered him to vote despite the fact that his registration application had already been canceled, claiming to have "found" his birth certificate "through the DOV web portal after access had been granted in 2016 … likely the birth certificate he took to the DOV that day." JA11465.

testified that it would "take[] some time and effort" to "find it" and "mail it" and for Bednasek to send it back. JA9369-70. Bednasek's application was accepted but deemed incomplete and ultimately cancelled for failure to provide DPOC. JA11466.

2. The League of Women Voters of Kansas

The District Court also found that the experiences of the Kansas League illustrated the barriers to registration imposed by the DPOC law.

The Kansas League is a nonpartisan, nonprofit volunteer organization "active throughout Kansas, with nine local affiliates and more than 800 members." JA11452. It "was established to encourage and assist voters to access the vote, register, and 'participate in the vote' in an informed manner." JA11452-53; *see also* JA11453 ("The biggest passion of the [Kansas L]eague is to engage every possible citizen in the vote."). "To accomplish this mission, the Kansas League provides educational resources"; "holds voter registration drives at various locations including schools, libraries, grocery stores, nursing homes, naturalization ceremonies and community events"; and "performs studies on … public policy issues to inform" membership and advocacy action and "educate its members and the public." JA11453. "The Kansas League assists all prospective voters, but it is particularly committed to engaging individuals who are 'underrepresented in the

vote,' including the first-time voter, the elderly, and individuals with limited resources and time." *Id.*

The Court found that "the DPOC requirement substantially affected the Kansas League's work" and forced the League to devote significant time and resources to combat its effects. First, "the number of individuals the Kansas League could successfully register declined significantly." JA1143-54; *see, e.g.*, *id.* ("In Wichita, the Kansas League estimated that it helped register 4,000 individuals the year before the DPOC became effective. In 2013, after the law became effective, the Kansas League estimated it registered 400."). This occurred because "many individuals do not have the necessary documents at hand, or are not willing to provide such documents to League volunteers, to satisfy the DPOC requirement" and because the DPOC requirement substantially increased the time it took the League to assist a voter registrant from an estimated 3-4 minutes before the law passed, to approximately an hour per applicant. JA11454; *see also* JA11454-55 (describing examples).

Second, the DPOC requirement forced the Kansas League to devote substantial resources to assist voters whose applications are in suspense due to the failure to provide DPOC. The Kansas League "has devoted thousands of hours to contacting the tens of thousands of voters on the suspense list and attempting to help them satisfy the DPOC requirement." These efforts included in-person visits

to "the residences of 115 people whose voter registration applications were on the suspense list with a mobile copy machine." JA11455. Even this effort resulted in only 30 successful registrations, at least half of whom "did not personally possess or were not able to provide DPOC to the Kansas League volunteers and were unable to complete their registrations immediately onsite." *Id.*

"Third, the DPOC requirement has forced the Kansas League to spend a considerable amount of member resources—including volunteer time—and money to educate the public about registering under the DPOC law." *Id.* In fact, the Kansas League engaged in an unprecedented educational campaign involving the creation and distribution of "thousands of informational trifolds" and the development of "a teaching module and an accompanying instructional video to distribute on its website and to universities, community colleges, vocational and technical schools, and high schools throughout the state." JA11455-56.

3. Hearing Alternative

The DPOC law contains an unpublicized provision permitting applicants "to submit another form of citizenship documentation by directly contacting the SOS's Office," and to schedule a hearing before the State Elections Board: a three-member body consisting of the Lieutenant Governor, the Attorney General, and the Secretary of State. JA11439-40. As the District Court found, far from alleviating

the burdens imposed by the DPOC requirement, this process "adds, not subtracts, from the burdensomeness of the law." JA11526.

First, the hearing procedure "is not explained to applicants when they apply to register, nor to applicants who were suspended for lack of DPOC." Neither the small DOV receipt, nor the example notices sent by the counties, contain any language explaining—or even mentioning—the hearing option to applicants. JA11525; *see also* JA11460-61, JA11464. "None of the named Plaintiffs in either case recall this option being mentioned to them." JA11525; *see, e.g.*, JA11461 (Bucci "first learned of the alternative hearing procedure … during her deposition in this case."). The Court concluded that "[t]his explains why only 5 individuals, out of the more than 30,000 individuals on the suspense and cancellation list in March 2016, availed themselves of this option in the 5 years that the law has been in effect." JA11525; *see* JA11466.

Second, navigating the hearing process is "burdensome." JA11525; *see also* JA11526 ("The hearing records reveal that [one] applicant was represented by retained counsel at the hearing, and yet another was required to execute his own affidavit explaining that he had been born on a military base and was therefore a U.S. citizen."). Indeed, the Court found that the testimony of Defendant's own surprise witness, Jo French, undermined Defendant's claim that the DPOC law is not burdensome. JA11466. French, who "lost her birth certificate after moving

several times," faced numerous hurdles during the more than five months it took to complete the process, including having to "pay $8 for the State of Arkansas to search for her birth certificate to prove that it did not exist, even though she already knew [it] did not exist because she had requested it twice before," and having to rely on friends and others "to drive her 40 miles to the hearing" and "collect documents." JA11466-67.[4]

French's experience also underscored Defendant's uneven application of the law. She received direct assistance from then-Deputy Secretary of State Eric Rucker, who "reached out to her friends and cousin to vouch for her citizenship." JA11467. The court found that it was not "coincidental that Mr. Rucker became French's 'friend' during this time period," "the very timeframe when the *Fish* case was filed and the preliminary injunction in that case was being heard and decided." JA11525-26; *see also* JA11466-67 ("Ms. French[] … characterize[d] her relationship with [Mr.] Rucker as a friendship" and "testified that she hoped her testimony would make Defendant 'look good'"). The court found that such "individual attention" from "a high-level government official" was unusual. JA11526.

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[4] French also candidly admitted that she was surprised to have her citizenship questioned because she "[did not] look funny and [did not] talk funny" and had lived in the United States her entire life. JA11467.

C. Noncitizen Registration

Based on the evidence presented at trial, the District Court found that, dating back to 1999, "67 noncitizen individuals registered to vote under the attestation regime, or attempted to register after the DPOC law was passed"—39 who successfully registered, and 28 who attempted to register after the effective date of the DPOC law but were unsuccessful. JA11472. Thus, "the total number of confirmed noncitizens who successfully registered to vote between 1999 and 2013 is .002%" of the 1,762,330 registered voters in Kansas as of January 1, 2013. JA11447, JA11472. "Of the estimated 115,500 adult noncitizens in Kansas, .06% have successfully registered or attempted to register to vote since 1999." JA11472-73. Of the 39 noncitizens who successfully registered to vote since 1999, just 11 voted. JA11468-69, JA11471-72, JA11508. For context, in general elections from 2000 through 2016, a total of more than 9 million votes were recorded for the highest statewide office on the ballot. JA8863.

Just as this Court rejected Defendant's claim that these rare documented incidents of noncitizen registrations were just "the tip of the iceberg" as "pure speculation," *Fish I*, 840 F.3d at 755, the District Court drew the "obvious conclusion that there is no iceberg; only an icicle, largely created by confusion and administrative error." JA11509-10. While acknowledging that "Defendant has limited tools at his disposal to quantify the statewide numbers of noncitizen

registrations," the District Court credited the testimony of Plaintiffs' expert witnesses Dr. Lorraine Minnite and Dr. Eitan Hersh that the "evidence of a small number of noncitizen registration in Kansas … is largely explained by administrative error, confusion, or mistake" and not fraud. JA11508-09; *see also id.* JA11510 ("[M]any confirmed instances of noncitizen registration or attempted registration in Kansas were due to either applicant confusion or mistake, or errors by DOV and county employees, not intentional voter fraud.").

The court credited Dr. Minnite's testimony that "there is no empirical evidence to support Defendant's claims in this case that noncitizen registration and voting in Kansas are largescale problems." JA11477-78. The court further credited her analysis of individual records in the Kansas Election Voter Information System ("ELVIS") statewide voter database indicating that "[o]f the nominal number of noncitizens who have registered and voted [in Kansas], many of these cases reflect isolated instances of avoidable administrative errors on the part of the government employees and/or misunderstanding on the part of applicants," such as cases where, although an "applicant replied 'No' that they were not a United States citizen," a "State employee erroneously completed the voter registration application in the face of clear evidence that the applicant was not qualified." JA11478.

The District Court also credited the testimony of Dr. Hersh, who "explained that the number of purported incidents of noncitizen registration found by Defendant is consistent with the quality of other low-incidence idiosyncrasies in ELVIS and in voter files more generally," such as the 400 individuals in ELVIS whose dates of registration *precede* their dates of birth. *Id.* "In a state with 1.8 million registered voters, issues of this magnitude are generally understood as administrative mistakes, rather than as efforts to corrupt the electoral process." *Id.*

The District Court rejected the contrary testimony of Defendant's proffered experts on fraud, Hans von Spakovsky and Dr. Jesse Richman. Noting that the "record is replete with … Mr. von Spakovsky's bias," JA11476, and that his opinion was "premised on several misleading and unsupported examples of noncitizen voter registration, mostly outside the State of Kansas," the court appropriately gave von Spakovsky's testimony "little weight." JA11474. The court also rejected the testimony of Dr. Richman, finding that his estimates of noncitizen registration or attempted registration in Kansas were not statistically significant; featured "numerous methodological flaws," JA11508, including sample sizes that were too small to be reliable and improper or inconsistent statistical weighting; and were based on erroneous underlying data. JA11479-92. Dr. Richman also employed an arbitrary process in which he "went through the suspense list and determined which names were, in [his] view, foreign." JA11482-

92. "On cross examination, Dr. Richman admitted that he would have coded Carlos Murguia, a United States District Court Judge sitting in th[e District of Kansas], as foreign." JA11492.

D. Alternatives to DPOC

The District Court found that there are several alternatives to the DPOC requirement that Defendant had not fully pursued:

> (1) better training of State employees, particularly at the DOV; (2) DOV list matching; (3) reviewing juror questionnaires; (4) the [U.S. Department of Homeland Security (DHS) Systematic Alien Verification for Entitlements] SAVE program; and (5) prosecution and enforcement of perjury for false attestations.

JA11510; *see id.* JA11492-98.

First, the court found that there were a variety of mistakes committed by DOV clerks, revealing a need for better training. In particular, the court found "that DOV employees sometimes mistakenly offered noncitizens voter registration applications, and that even when applicants denied U.S. citizenship, the application was completed by the clerk, creating an ELVIS file." JA11494; *see id.* (referencing email among state elections officials acknowledging "this problem with DOV registration of obvious noncitizens"). The court also found "DOV and county clerk error in implementing the DPOC law prior to and after the preliminary injunction order became effective in June 2016." JA11511.

At the same time, the court found that relevant training of DOV and county employees was limited: "on average, no more than 30 minutes of training regarding motor voter registration laws," and had no meaningful updates since 2013. JA11494-95. Based on this evidence, the court found that "[t]he SOS's Office could make better, more meaningful efforts toward training DOV employees charged with completing motor voter applications." JA11511.

The District Court also found that various methods to identify and remove potential noncitizens from the voter rolls provide Defendant with other alternatives to the DPOC requirement. These include "compar[ing] the list of individuals on the suspense list to information in the DOV database concerning driver's license holders who presented proof of permanent residency (or "green cards") in the course of applying for a driver's license; "compar[ing] lists of individuals who answered on their jury questionnaires that they were not citizens with the voter registration roll"; and obtaining information that could be used for searches through the U.S. DHS SAVE program, which contains information on noncitizens. JA11492-93, JA11495-97.

Finally, the court found that Defendant's "own office has taken the position that prosecuting" noncitizens for registering to vote "should act as a deterrent to future registrations by noncitizens." JA11514, JA11497. Nevertheless, Defendant, who gained criminal prosecutorial authority over voter fraud offenses in July 2015,

"ha[d] filed zero criminal complaints against a noncitizen for allegedly registering to vote" as of the date of the trial. JA11497. The court thus found that "Defendant has not meaningfully sought to utilize criminal prosecutions, at least when he detects intentional cases of noncitizen registration." JA11515.

E. Final Judgment

The District Court concluded from the evidence adduced at trial that the DPOC requirement violates both Section 5 of the NVRA and the Fourteenth Amendment. The District Court enjoined enforcement of the law and also ordered several "specific compliance measures" in light of Defendant's "well-documented history of avoiding th[e District] Court's Orders[.]" JA11529-30. The court also sanctioned Defendant for repeatedly "flouting disclosure and discovery rules" and ordered him to attend 6 hours of additional CLE education pertaining to rules of civil procedure and evidence. JA11538.

STANDARD OF REVIEW

This Court reviews findings of fact under a clearly erroneous standard. *See Unicover World Trade Corp. v. Tri State Mint, Inc.*, 24 F.3d 1219, 1221-22 (10th Cir. 1994). "A finding of fact is not clearly erroneous unless 'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'" *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir.

1990) (quoting *Le Maire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)). "Issues of law are reviewed de novo." *Id.*

SUMMARY OF ARGUMENT

Defendant's various arguments boil down to a single assertion: that "state election officials [have] discretion to determine what is necessary" for voter registration applicants to prove their citizenship, Br. 48, unfettered by the National Voter Registration Act (NVRA), and subject to no limitations under the Constitution, unless the state's requirements are "virtually impossible to satisfy," *id.* 40 (internal quotations and citation omitted), or involve "a suspect classification," *id*. at 18. That sweeping assertion has no basis in statute or precedent.

With respect to the NVRA, Defendant provides no sound reason for this Court to revisit its prior holding as to the meaning and requirements of Section 5 of the statute. That ruling was is a "deci[sion concerning] an issue of law[] that should govern all subsequent states of the litigation." *Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856, 864 (10th Cir. 2014). The plain text of Section 5 of the NVRA provides that States "may require only the minimum amount of information necessary to … enable State election officials to assess the eligibility" of motor-voter applicants. 52 U.S.C. § 20504(c)(2)(B). In *Fish I*, this Court held that, under the statute, the "presumptive minimum amount of information necessary for state

election officials to carry out their eligibility-assessment and registration duties" is "a signed attestation under penalty of perjury" as set forth under subsection (c)(2)(C), and that this presumption can be overcome "only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement." *Fish v. Kobach*, 840 F.3d 710, 716-17 (10th Cir. 2016) ("*Fish I*"). It concluded that Defendant's preliminary injunction phase evidence of "thirty noncitizens registered to vote" failed to meet that burden, *id.* at 746, but invited Defendant on remand to adduce "evidence … that a substantial number of noncitizens have registered to vote in Kansas during a relevant time period." *Id.* at 750.

Defendant utterly failed to do so. He makes no effort to show that the trial record—which included 39 instances of noncitizen registration scattered over 19 years, JA11508—is materially different from his preliminary injunction stage showing. As this Court held, "[t]hese numbers fall well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties." *Id.* at 747.

Unable to satisfy the evidentiary burden set by this Court, Defendant focuses instead on recycling various statutory and constitutional arguments that would make states "the final arbiters of what is required under the NVRA." *Id.* at 748.

But this Court has already found that Defendant's statutory arguments contravene the "plain language" of the NVRA, which "evinces Congress's intent to restrain the regulatory discretion of the states over federal elections, not to give them free rein," and "would undo the very purpose for which Congress enacted the NVRA." *Id.* at 743. And it has already rejected Defendant's constitutional arguments as conflating the distinction between a state's authority under the Qualifications Clause to establish that "citizenship is [a] substantive qualification" for voting, and Congress's constitutionally-delegated authority under the Elections Clause to establish that an "attestation … [is] the procedural condition[] for establishing that qualification for registration purposes." *Id.* at 749-50. As at the preliminary injunction phase, this Court "need not engage in a constitutional doubt inquiry," because Defendant's "meager evidence of noncitizens registering to vote" cannot establish that the NVRA has interfered with Kansas' ability to enforce its citizenship qualification for voting. *Id.* at 750.

With respect to the constitutional claim, Defendant relies on Justice Scalia's non-controlling concurrence in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), to misconstrue the *Anderson-Burdick* standard for challenges to regulations on voting as a simple binary, under which restrictions "should only be invalidated" if they are "virtually impossible to satisfy," Br. 40 (quoting 553 U.S. at 205 (Scalia, J., concurring in the judgment)), while "[e]venhanded regulations

… are valid if they satisfy a very deferential weighing of the burdens on voters and the interests of the State," Br. 27. But the Supreme Court has never endorsed Defendant's simplistic bifurcated standard. Rather, "the appropriate test when addressing an Equal Protection challenge to a law affecting a person's right to vote is to 'weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule,'" which this Court has likened to an "intermediate scrutiny standard." *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1320-21 (10th Cir. 2008) (quoting *Crawford*, 553 U.S. at 190).

Under that standard, the trial record in this case is fatal to the DPOC law. In *Crawford*, the plaintiffs had "not introduced evidence of a single, individual Indiana resident who w[as] unable to vote" as a result of the challenged law, and thus, the law was sustained by the articulation of valid state interests, even though the record "contain[ed] no evidence" of those interests. 553 U.S. at 187, 194. This case and the record here, however, could not be more different. *Crawford* concerned a requirement to present a *photo ID* like a driver's license or state ID card at the polls when *voting*; it said nothing about requiring *citizenship documents* like a birth certificate or passport—which, if people possess, they rarely carry with them—for purposes of voter registration.

Four forms of evidence in the record demonstrated that, in practice, the Kansas DPOC requirement is far more burdensome. *First*, a "distinguishing feature between this case and *Crawford*, is that the number of incomplete and canceled registration applications for failure to submit DPOC"—more than 30,000—"provides concrete evidence of the magnitude of the harm." JA11522. *Second*, in *Crawford*, "the record sa[id] virtually nothing about the difficulties faced by" voters under the Indiana identification requirement. 553 U.S. at 201. But here, the District Court heard and credited concrete evidence of the burden imposed on specific voters, including Plaintiff Donna Bucci, who "cannot afford the cost of a replacement birth certificate from Maryland," JA11461, and Plaintiff Steven Fish, for whom it "took nearly two years to find" his original birth certificate in his deceased mother's safe. JA11460. *Third*, the law in *Crawford* featured a safeguard for voters who lack ID to have their ballots counted by signing an affidavit after the election—a feature that the Supreme Court found "mitigated" the burden of the law. *Crawford*, 553 U.S. at 199. But here, there is no such post-election safety net for voters whose registrations were suspended or canceled for lack of DPOC, and Plaintiffs Stricker and Boynton were disenfranchised as a result. JA11461-66.

And *fourth*, while "[r]estrictions that are generally applicable[and] even-handed … are generally … upheld," *Santillanes*, 546 F.3d at 1322, the Kansas

DPOC law is *not* even-handed in its design, effect, or implementation. The District Court found a sustained pattern of "confusing, evolving and inconsistent enforcement of the DPOC law[] since 2013." JA11528. The record was also replete with selective enforcement of the law, including unusual "individual attention" accorded to a "friend" of the Deputy Secretary of State, facilitating a "hearing" to register her without DPOC, JA11526, JA11466; and also a "pattern of picking off Plaintiffs through targeted back-end verifications in an attempt to avoid reaching the merits of this case." JA11500. Moreover, the law's express terms applied only to new registrants, thus ensuring that its burdens fell exclusively on a pool of voters that are disproportionately young and unaffiliated with any political party, and whom the District Court found are particularly sensitive to heightened barriers to participation. JA11449-50.

In light of its findings of widespread, substantial, and uneven burdens imposed by the DPOC requirement, the District Court correctly determined that it was required to carefully consider the evidence of Defendant's interests, rather than credit Defendant's assertions uncritically. It then found that there was only "weak" evidence that the law promoted accurate voter rolls or prevented fraud. JA11520. And, because of the mass disenfranchisement caused by the law, as well as its chaotic implementation and the misinformation disseminated by Defendant and other elections officials, the court found that the DPOC law "erodes

confidence in the electoral system." JA.11528. The District Court therefore concluded that the DPOC law unduly burdens the right to vote in violation of the Fourteenth Amendment.

Defendant's position is that this record is irrelevant. The District Court's extensive factual findings are unchallenged by Defendant, who "asserts only legal error." Br. 21. In his view, the District Court's findings—confirming the "mass denial of a fundamental right," *Fish I*, 840 F.3d at 755; the examples of specific voters disenfranchised by the law; Defendant's inconsistent and arbitrary enforcement of it; and the evidence that the DPOC requirement undermines the state's asserted interests—are of no moment, because neither the NVRA nor the Constitution imposes any limits on the documentation requirements that states may impose on voters to prove their citizenship, unless a state discriminates on a suspect classification or makes it "virtually impossible" to vote. Br. 40 (internal quotations and citation omitted).

But nothing in *Crawford* or this Court's precedents compel such a head-in-the-sand ruling. The District Court's careful decision faithfully followed this Court's ruling in *Fish I*, and hewed closely to *Crawford*'s guidance that "[h]owever slight th[e] burden" imposed by a challenged voting restriction "may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." 553 U.S. at 191 (internal quotation marks and

citation omitted). On this record, the District Court correctly concluded that the DPOC law violated Section 5 of the NVRA as to motor-voter applicants, and unduly burdens the right to vote in violation of the Fourteenth Amendment. Its judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE DPOC REQUIREMENT VIOLATES SECTION 5 OF THE NVRA

The District Court correctly determined, based on this Court's controlling guidance and the trial record, that Section 5 of the NVRA pre-empts Kansas' DPOC requirement. Applying the two-part test this Court articulated in *Fish I*, the court first determined that 39 instances of noncitizen registrations across 19 years did not constitute "empirical evidence that a substantial number of noncitizens successfully registered to vote" in Kansas. JA11508. The District Court further determined that Defendant had not demonstrated that "nothing less" than a DPOC requirement could address noncitizen registration in Kansas because numerous less burdensome alternatives would be sufficient to enforce Kansas' voting qualifications. JA11515.

Defendant does not dispute any of the District Court's factual findings. Instead, he focuses on re-litigating *Fish I*'s controlling statutory analysis. But there is no basis for revisiting the prior panel's decision. *First*, contrary to Defendant's assertions, there is no basis for departing from *Fish I*'s

legal decision interpreting the meaning of Section 5, which should govern this appeal. *Second*, even if this Court were to revisit the prior ruling, it would reach the same result because Defendant's interpretation of the statute is inconsistent with the NVRA's plain text. *Third*, Defendant's novel argument that Section 8 supports his reading of the NVRA—raised for the first time in this appeal—is waived, and is incorrect. The District Court's NVRA ruling should be affirmed.[5]

A. The District Court Correctly Found that Defendant Failed to Satisfy this Court's Two-Part Test to Overcome the Presumption that Section 5 of the NVRA Preempts Kansas' DPOC Requirement

A "state motor voter 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.'" *Fish I*, 840 F.3d at 716 (quoting 52 U.S.C. § 20504(c)(2)(B)(ii)). In affirming the District Court's preliminary injunction, this Court held that, under Section 5 of the NVRA, there is a presumption that an attestation of U.S. citizenship is the "minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties." To overcome this presumption, Defendant is required to satisfy a two-part test. *First*, he must demonstrate that a *substantial* number of noncitizens have successfully registered to vote in Kansas. *Fish I*, 840 F.3d at 717, 739. *Second*, if he is able to satisfy the

[5] Defendant does not challenge the *Fish* Plaintiffs' standing for the NVRA claim.

first prong, he must then also establish that "nothing less" than a DPOC requirement is sufficient to enforce Kansas' citizenship qualification for voting. *Id.* at 738 n.14. The District Court correctly determined that Defendant utterly failed both prongs.

1. The District Court Correctly Found that 39 Instances of Successful Noncitizen Registrations Over Nearly 20 Years Was Insufficient to Demonstrate "Substantial Numbers" of Noncitizens Registering in Kansas

Defendant's assertion that he "presented sufficient evidence to justify" the DPOC law is unavailing. Br. 57. As an initial matter, Defendant's argument that the record included "129 instances of noncitizens seeking to register since 1999," *id.* at 60, ignores the District Court's factual finding that, "looking closely at those records reduces the number to 67 at most," out of which only 39 were noncitizens who successfully registered to vote, and 28 were noncitizens who tried to register after the effective date of the DPOC law. JA11508. The District Court then properly "considered" that number "in relation to the number of registered voters in Kansas as of January 1, 2013," JA11506, JA11508 (citing *Fish I,* 840 F.3d at 733-39, *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2259-60 (2013) ("*ITCA*"), and *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1195-96 (10th Cir. 2014) ("*EAC*")), and calculated that 39 noncitizen registrations amounted to "but .002% of all registered voters in Kansas as of January 1, 2013

(1,762,330)." JA11508. The Court did not err in finding that this fails to meet the threshold of "substantial."[6]

Defendant points to other unavailing evidence, including testimony about a two-decade old incident in Seward County, which the District Court rejected at the preliminary injunction phase as "insufficient to show that noncitizens actually voted," JA867. Defendant also refers to three incidents of noncitizen registration in Illinois as evidence of a "widespread" problem, Br. 58-60, but these incidents are irrelevant to the issue of noncitizen registration in Kansas, and, in a country of more than a hundred million voters, hardly demonstrate that the problem is "widespread."[7]

Given his meager showing, it is unsurprising that Defendant retreats to the position that *any* noncitizen registration could change the outcome of an election, and therefore states should have "discretion to determine whether the problem of

[6] In stating that "[t]he District Court dismissed that number … as statistically insignificant," Br. 60, Defendant mischaracterizes the decision below, which did not describe these specific incidents of noncitizen registration as "statistically insignificant," but rather correctly employed the concept of statistical significance to find that the statistical *estimates* of noncitizen registration offered by Defendant's proffered expert "are not statistically distinguishable from zero," JA11457, a factual finding that Defendant does not challenge on appeal.

[7] Moreover, two of the three incidents involved state employees erroneously registering self-identified noncitizens, *see* Br. 59-60, a problem that would not necessarily be addressed by the DPOC requirement, which, as noted *infra* Argument § II.D., has been inconsistently and erroneously implemented throughout its existence.

unqualified voters becoming registered is 'substantial.'" *Id.* at 57, 61. But this Court has already considered and rejected Defendant's "one is too many" argument: "The NVRA does not require the least amount of information necessary to prevent even a single noncitizen from voting." *Fish I*, 840 F.3d at 748. Congress intended to create a simplified form for registration, which "would be thwarted if" whatever a state deemed "substantial," including "a single noncitizen's registration[,] would be sufficient to cause the reject of the attestation regime." *Id.*

Ultimately, Defendant's evidence is not materially different from the "thirty noncitizens registered to vote" that he presented at the preliminary injunction phase, which this Court found was "well short of the showing necessary." *Fish I*, 840 F.3d at 747. And it is less than what Arizona offered during the *Kobach v. EAC* litigation, which this Court also found "failed to meet [the States'] evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered." *EAC*, 772 F.3d at 1197-98.[8] The District Court thus properly concluded that Defendant had failed to

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[8] In *EAC*, Arizona presented evidence of "208 individuals" who "had their voter registrations cancelled after they swore under oath to the respective jury commissioners that they were not citizens," Br. for Respondents at 55, *EAC*, 772 F.3d (10th Cir. June 30, 2014). *Available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Kobach107.pdf. *See also Fish v. Kobach*, 304 F. Supp. 3d 1027, 1046-47 (D. Kan. 2018) (noting *EAC*

show "substantial numbers" of noncitizen registration under the first prong of *Fish I*'s test.

2. The District Court Correctly Found that Defendant Failed to Satisfy his Burden to Show "Nothing Less" than DPOC Could Address Noncitizen Registration in Kansas

Although Defendant fails *Fish I*'s test based on his deficient evidentiary showing on the first prong, the District Court also evaluated whether Defendant met the second prong necessary to rebut the presumption that an attestation is sufficient. On that score, the District Court correctly concluded that "the evidence at trial showed that a greater effort to pursue several … alternatives [to DPOC], taken together or individually" would be a "sufficient" and "less burdensome" process than DPOC for enforcing Kansas' citizenship qualification. JA11510-11.

First, the District Court determined—and Defendant does not contest—that Defendant had failed to take various steps to prevent or deter noncitizen registration. Based on the uncontroverted trial testimony revealing that instances of successful noncitizen registration were "largely explained by administrative error, confusion, or mistake," JA11509, and that DOV workers received limited and out-of-date training on voter registration requirements, the court properly found that "[t]he SOS's Office could make better, more meaningful efforts toward

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found noncitizen registrations comprising ".007 percent of all registered voters" was insufficient).

training DOV employees charged with completing motor voter applications." JA11511. And, noting that Defendant had not filed a single criminal complaint against a noncitizen for registering to vote, the court also found that "Defendant has not meaningfully sought to utilize criminal prosecutions, at least when he detects intentional cases of noncitizen registration," to deter noncitizen registration. JA11515.

Defendant also does not contest that he failed to utilize multiple other methods at his disposal to identify noncitizens who apply to register and "deny[] registration based on information in their possession establishing the applicant's ineligibility," *ITCA*, 133 S. Ct. at 2257, for instance, by comparing registration information with information on noncitizens from driver's license records, jury lists, and DHS data. JA11492-98. These procedures constitute precisely Defendant's "[t]rust but verify" approach, Br. 21—*i.e.*, "trust[ing]" registration applicants' oaths of citizenship under penalty of perjury, but "verify[ing]" those oaths on the back-end, and denying or removing registrants who fail such verification.

Nevertheless, Defendant declares, without offering any evidence whatsoever, that these alternatives—most of which were described approvingly in

EAC, *see* 772 F.3d at 1199[9]—would be "less-effective" than DPOC. Br. 64. But the District Court found that Defendant had not shown that these less burdensome alternatives, alone or together, would be less effective or insufficient to enforce Kansas' citizenship requirement for voting. That factual finding is uncontested.

B. There is No Basis to Revisit the Prior Panel's Decision

Defendant does not challenge the District Court's factual findings and barely (if at all) challenges the resulting legal conclusions that he has not satisfied this Court's two-part test. Instead, he focuses on asking this Court to revisit the legal framework set forth in *Fish I* during the preliminary injunction stage of this case. Br. 41-57. There is no basis for doing so.

1. *Fish I*'s Legal Ruling as to the Requirements of Section 5 of the NVRA Governs This Appeal

In arguing that the *Fish I* preliminary injunction decision does not govern this appeal, Defendant misconstrues the "law of the case" doctrine. "Under the law

[9] *EAC* approvingly cited a memo by then-EAC Executive Director Alice Miller, which addressed, *inter alia*, methods for preventing noncitizen registration. 772 F.3d at 1189. The EAC found that states can address noncitizen registration by various means, including comparing voter registration lists to information about noncitizens contained in driver's license databases, jury lists, and the DHS SAVE database; and by using criminal prosecutions to deter noncitizen registration. *See* U.S. Election Assistance Comm'n, *Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form*, Jan. 17, 2014, at 36-39. *Available at* https://www.eac.gov/assets/1/28/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf.

of the case doctrine, when a court decides an *issue of law*, that decision should govern all subsequent states of the litigation." *Dish Network Corp.*, 772 F.3d at 864 (emphasis added). "The doctrine is based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided, so avoiding both a wasteful expenditure of resources by courts and litigating parties and the gradual undermining of public confidence in the judiciary." *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) (internal citations and quotation marks omitted).

This Court has recognized only "three exceptionally narrow grounds for departure from th[is] rule of practice: (1) when the evidence in a subsequent trial is substantially different; (2) when the controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *Id.* (internal citations and quotation marks omitted). None of those grounds apply here.

Defendant cites *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004) for the proposition that a motions panel ruling does not bind a court at later proceedings. Br. 41-42. But *Homans* is inapposite. There, a two-judge motions panel ruled "without the benefit of full briefing and oral argument," on an extremely truncated timeframe: "Homans filed his motion on September 4, 2001,

and the City was required to submit its response the next day;" and the Court granted the motion "on the following day…." 366 F.3d at 905 (internal quotation marks and citation omitted). Here, this Court rendered an extensive legal ruling after full briefing and oral argument, and expressly noted its expectation for remand was that "discovery will … ensue" to give Defendant an opportunity to adduce evidence "that a substantial number of noncitizens have registered to vote in Kansas," *Fish I*, 840 F.3d at 750, not to invite re-litigation of the same legal issues that the Court had just decided. Defendant does not suggest that Plaintiffs' initial success at the preliminary injunction stage in *Fish I* precluded him from proceeding and potentially prevailing on a different record at trial; as the District Court found, he simply "failed to do so." JA11509.

There is no basis in logic or precedent for requiring subsequent appellate panels to reinterpret the same statutory provisions from scratch at later stages of a case. If a different panel offered a different statutory interpretation, that could produce yet another remand with more discovery and a new trial—exactly the "wasteful expenditure of resources," *McIlravy*, 204 F.3d at 1035, that the law of the case doctrine is designed to prevent. *Fish I* provided a detailed interpretation of the NVRA for the specific purpose of guiding subsequent proceedings in this case. The law has not changed in the interim, and, as discussed below, Defendant has certainly not demonstrated that *Fish I*'s legal analysis is wrong, much less

clearly erroneous or manifestly unjust. There is no reason to depart from *Fish I* now.

2. Defendant's Interpretation of the Statute is Inconsistent with the Plain Text of the NVRA

Defendant's interpretation of the statute contravenes its plain text. Section 5 requires that each application for a driver's license, including a renewal, "shall serve as an application for voter registration with respect to elections for Federal office." 52 U.S.C. § 20504(a)(1). Under Subsection (c)(2)(B), a State "may require *only* the *minimum* amount of information necessary to … enable State election officials to assess the eligibility" of motor-voter applicants. *Id.* § 20504(c)(2)(B) (emphases added).

"'If the words of the statute have a plain and ordinary meaning, [courts] apply the text as written'" and "'may consult a dictionary to determine the plain meaning of a term.'" *Fish I*, 840 F.3d at 733 (quoting, *inter alia*, *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir. 2009). As *Fish I* noted,

> [d]ictionaries agree on the meaning of "minimum": "Of, consisting of, or representing the lowest possible amount or degree permissible or attainable," *Am. Heritage Dictionary of the English Language* 1150 (3d ed. 1992); "Of, relating to, or constituting the smallest acceptable or possible quantity in a given case," *Black's Law Dictionary* (10th ed. 2014); "smallest or lowest," *New Oxford English Dictionary* 1079 (2d ed. 2005); "of, relating to, or constituting a minimum: least amount possible," *Webster's Third New Int'l Dictionary* 1438 (1961).

Fish I, 840 F.3d at 733.

Thus, the text of Section 5 clearly establishes a "statutory minimum-information principle" that "restrict[s] states' discretion in creating their own DMV voter-registration forms." *Id.* The presumptive "minimum amount" of information a State may demand from a motor-voter applicant to establish citizenship is set forth in Subsection (c)(2)(C). Specifically, a motor-voter registration application

> 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[.]

52 U.S.C. § 20504(c)(2)(C). If the State contends that it needs more information to assess an applicant's citizenship, it has to make a showing that more "information" is "necessary"—which this Court held entails a requisite showing that (1) substantial numbers of noncitizen have registered to vote, and (2) nothing less than DPOC is sufficient to enforce the State's qualifications. *Fish I*, 840 F.3d at 739, 738 n.14.

Defendant's various arguments to the contrary would read the phrase "only the minimum amount of information necessary" out of the statute. *First*, Defendant argues that "[i]f Congress had intended to preclude States from requiring [DPOC], Congress could have excluded proof of citizenship from the form like it demonstrated the ability to do in subsection (c)(2)(A) for duplicative

information, or in (c)(2)(B), paralleling the specific inclusion of citizenship in (c)(2)(C)." Br. 46-47. But this Court correctly rejected a variation on that argument:

> The omission of requirements for, or prohibitions on, other documents that states might require does not suggest that states may require anything that they desire to facilitate the registration process beyond the form itself. To the contrary, it suggests by the negative-implication canon, *expressio unius est exclusio alterius*, that Congress intended that the motor voter form would—at least presumptively—constitute the beginning and the end of the registration process.

Fish I, 840 F.3d at 745.[10]

In any event, Defendant ignores that subsections (c)(2)(A) and (c)(2)(B) serve different functions. Subsection (c)(2)(A) prohibits states from demanding duplicative information already requested on a driver's license application. It does not address the particular types of information that states may or may not seek, but prevents them from requesting the same information *more than once*, to streamline the application process. Subsection (c)(2)(B), on the other hand, sets substantive

[10] As this Court has noted, the NVRA's legislative history confirms that Congress sought to preempt states from imposing a DPOC requirement. "Both houses of Congress debated and voted … and ultimately rejected" an amendment introduced by Senator Simpson (the "Simpson Amendment"), to allow States to require DPOC from NVRA applicants. *EAC*, 772 F.3d at 1195 n.7; S. Rep. No. 103-6, at 23 (Conf. Rep.). Congress thereby made crystal-clear that the NVRA does not permit States to demand DPOC for voter registration. "Congress'[s] rejection of the very language that would have achieved the result [Defendant] urges here weighs heavily against [Defendant's] interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

limits on the *kind* of information that states may request—"only the minimum" that is "necessary" to "assess the eligibility" of motor-voter applicants. In the latter subsection, Congress employed broad language in establishing the "minimum-information" principle, obviating the need to expressly enumerate the myriad requirements that states could impose on motor-voter applicants. *See, e.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (observing that in context of broad remedial statute that the statute's application to "situations not expressly anticipated by Congress" simply demonstrate its "breadth").

Defendant's misinterpretation of *Young v. Fordice*, 520 U.S. 273 (1997) as giving him unfettered discretion to demand DPOC was also correctly rejected by this Court. As *Fish I* noted, "*Young* is not on point" and "under no circumstances can it be read as giving the states carte blanche under the NVRA to fashion registration requirements for their motor voter forms." 840 F.3d at 745-46. Instead, *Young* simply observed that States retain some "policy choice," *id*. at 745, on matters where the NVRA is silent, for example, whether states may *request* voluntary information about an applicant's race. When it comes to what States may *demand* in order to register a motor-voter applicant, the NVRA is *not silent*, expressly limiting States to requiring "only the minimum amount of information necessary[.]" 52 U.S.C. § 20504(c)(2)(B)(ii).

Second, Defendant claims that the word "necessary" "confirms Congress intended to grant state election officials discretion to determine what is necessary for that particular state." Br. 47-48. But his reading would render the phrase "only the minimum amount" a nullity. And the "notion that the NVRA lets the States decide for themselves what information 'is necessary,'" *Fish I*, 840 F.3d at 743 (quoting *ITCA*, 133 S. Ct. at 2274 (Alito, J, dissenting))—was rejected by the Supreme Court when it held in *ITCA* that states must accept a completed federal mail-in voter registration form, whether or not it is accompanied by DPOC. *Fish I*, 840 F.3d at 743 (citing *ITCA*, 133 S. Ct. at 2255-56).

Third, Defendant suggests that the plain meaning of Section 5 raises constitutional concerns that would be avoided by adopting his understanding of the law. Br. 50-52. But Defendant's argument conflates a voter *qualification* (U.S. citizenship, *see* Kan. Const. art. 5, § 1) with the *process* by which a person proves that she is qualified (submitting a piece of paper documenting citizenship). *See EAC*, 772 F.3d. at 1199. There is no conflict because, as this Court has explained, "individual states retain the power to set substantive voter qualifications (*i.e.*, that voters be citizens)," but "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)." *Id.* at 1195. Constitutional concerns would only be raised if Defendant could demonstrate that

the NVRA "precluded [the] State from obtaining the information necessary to enforce its voter qualifications," *ITCA*, 133 S. Ct. at 2258-59—which, as discussed *supra*, he has failed to do. *See Fish I*, 840 F.3d at 748-49.

Fourth, Defendant raises a policy argument, suggesting that the plain meaning of the statute is "anathema" because it would lead to a bifurcated voter registration system, "one for federal elections under federal standards, and one for state elections under state standards." Br. 51. But nothing compels Kansas—or any other state—to enact a labyrinthine dual registration system for federal and state elections—one that state courts have twice declared violates Kansas law. *Belenky v. Kobach*, No. 2013CV1331, at 25 (Shawnee Cty. Dist. Ct. Jan 15, 2016); *Brown v. Kobach*, No. 2016CV550, at 19 (Shawnee Cty. Dist. Ct. Nov. 4, 2016); *see also Fish I*, 840 F.3d at 755 (any bifurcated system would be "of Kansas' own creation"). And in any event, under any sort of dual registration system, the voter qualification (citizenship) would remain the same for both federal and state elections; only the manner and procedural requirement for verifying citizenship would be different. *Cf. EAC*, 772 F.3d at 1195.

Fifth, Defendant argues (for the first time on appeal) that the second part of *Fish I*'s test impermissibly imposes a form of strict scrutiny. Br. 62-64. Defendant confuses ordinary preemption under the Elections Clause with strict scrutiny. *ITCA* confirmed that the Election Clause gives Congress "authority to provide a

complete code for congressional elections" 133 S. Ct. at 2253. The Equal Protection cases on which Defendant relies are inapposite because there are no applicable "tiers of scrutiny" under the Elections Clause. Congress retains "plenary authority" under the NVRA "to conscript states to carry out federal enactments[.]" *Gonzalez v. Arizona*, 677 F.3d 383, 393-4 (9th Cir. 2012) (en banc); *see also Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) ("When it comes to time, place, and manner regulations for federal elections, the Constitution primarily treats states as election administrators rather than sovereign entities.").

Ultimately, Defendant's view is that there is no limit on the information or documents that a state can require when making an eligibility determination about motor-voter applicants. That not only contravenes the text of the statute, it would eviscerate its protections. In enacting the NVRA, Congress intended "to ensure that whatever else the states do, 'simple means of registering to vote in federal elections will be available.'" *Fish I*, 840 F.3d at 748 (quoting *ITCA*, 133 S. Ct. at 2255). If, as Defendant argues, states are permitted to reject motor-voter applications based on any state-imposed restrictions, motor-voter registration would "cease[] to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *ITCA*, 133 S. Ct. at 2256 (alternation in original) (quoting 52 U.S.C. § 20501(b) (formerly 42 U.S.C. § 1973gg(b))). *See also* 52 U.S.C.

§ 20501(a)(3) (finding that "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").

3. Defendant's Argument Based on Section 8 of the NVRA is Waived and Incorrect

For the first time in this almost three-year-old case, Defendant argues that "Section 8 of the NVRA, 52 U.S.C. § 20507, provides an additional textual basis" to revisit *Fish I*'s ruling that the NVRA limits States' ability to demand DPOC from applicants. Br. 53. As an initial matter, that argument—which was never raised previously (including on prior appeal to this Court, at summary judgment, or in post-trial briefing)—was waived and should be disregarded. *See Fish I*, 840 F.3d at 729 ("[T]he failure to argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court." (internal quotation marks and citation omitted)).

Further, Defendant's belated Section 8 argument both ignores Section 5's statutory language—"only the minimum amount of information necessary"—and gets Section 8 precisely backwards. Section 8 requires that States "ensure that any eligible applicant is registered to vote … if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority" within a specified period of time. 52 U.S.C. § 20507(a)(1)(A). It plainly requires that

States must register any eligible motor-voter applicant who submits a valid registration *form*—the form that "enable[s] State election officials to assess the eligibility of the applicant," 52 U.S.C. § 20504(c)(2)(B)(ii), and whose substance is governed by the strictures of 52 U.S.C. § 20504(c)(2)(B) & (C).

As this Court explained in describing the relationship between Sections 5 and 8, "[o]nce a valid motor voter registration form is submitted to a state, the state is required to ensure registration so long as the form is submitted within" a specified time period by an eligible voter. *Fish I*, 840 F.3d at 722. *See also id.* ("[W]hen an eligible voter avails herself of one of the mandated means of registration and submits to the state a valid *form*, ordinarily the state must register that person." (emphasis added)). As such, Section 8 confirms Congress's intent to create a single, straightforward, and streamlined process to ensure motor-voter applicants are registered using the integrated motor-voter application form.[11]

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[11] Defendant notes that Kansas currently requires new driver's license applicants (but not renewal applicants, *see* JA11441-44) to present proof of lawful presence in the U.S. Br. 55. But rather than demonstrating the reasonability of the DPOC requirement, this fact constitutes another reason that it is unlawful—it runs afoul of the NVRA's provision that a state "may not require information that duplicates information required in the driver's license portion of the form." 52 U.S.C. § 20504(c)(2)(A). Section 5 provides for "[s]imultaneous" voter registration in conjunction with a driver's license application in a single integrated application. It does not permit states to require voters to engage in additional steps after the motor-voter process, let alone that they submit documentation to different state agencies on separate occasions.

In sum, nothing in Section 8 permits states to do what Section 5 prohibits. Rather, Section 8 simply confirms that states must register eligible applicants who submit a valid voter registration form in accordance with the various means of registration prescribed under the statute, including the motor-voter process under Section 5. Because the DPOC law exceeds the amount of information that may be required under Section 5, it is unlawful as to motor-voter applicants.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE DPOC REQUIREMENT UNDULY BURDENS THE RIGHT TO VOTE IN VIOLATION OF THE FOURTEENTH AMENDMENT

On appeal, Defendant does not challenge the District Court's extensive factual findings that the DPOC law blocked more than 30,000 citizens from registering to vote, to address a problem of, at most, 39 noncitizen registrations scattered across 19, largely the result of administrative errors. Instead, Defendant argues that the DPOC requirement is automatically constitutional under the Supreme Court's decision in *Crawford*. But *Crawford* is not a rubber stamp, and Defendant misapprehends the sliding-scale balancing test governing challenges to laws that burden the right to vote, as set forth in the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) (the "*Anderson-Burdick* test"). That test requires courts to "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule," and make a "hard

judgment" as to whether the law is justified under a "balancing approach." *Crawford*, 553 U.S. at 190.

Unlike in *Crawford*, here, the District Court was presented with an extensive record and made detailed factual findings that tens of thousands of Kansans have been disenfranchised; that these include specific voters who faced substantial burdens in attempting to comply with the DPOC law; that there is no adequate safeguard for these voters; and that the DPOC requirement is arbitrarily and unevenly applied. Given that record, the District Court appropriately considered the evidence of Defendant's proffered justifications for the DPOC requirement, and found that the DPOC law actively *undermines* the State interests identified by Defendant. Its constitutional ruling should be affirmed.

A. Bednasek Has Standing for His Fourteenth Amendment Claim

The District Court correctly found that Bednasek has standing. He is a Kansas resident whose registration application was rejected because he did not have DPOC when he applied. *See* JA11466, JA13352-53. This is sufficient for standing. *See Santillanes*, 546 F.3d at 1319 (finding standing because "individual Plaintiffs will … be required to present photo identification that must be accepted if they vote in-person"). Defendant's arguments to the contrary are unavailing.

First, Defendant incorrectly argues that Bednasek is not a Kansas resident, conflating distinct residency tests from three different contexts: residency for

purposes of (1) obtaining a Kansas drivers' license, (2) qualifying for in-state tuition, and (3) registering to vote. Residency for purposes of voter registration is the only relevant inquiry in this case. JA11823-24. The Kansas election code defines "residence" as "the place adopted by a person as such person's place of habitation, and to which, whenever such person is absent, such person has the intention of returning." K.S.A. § 25-407. The statute makes clear that this definition governs residency for voter registration: Election officials "shall be governed by this section," and, by inference, shall not be governed by any other provision of Kansas law. *Id.* Bednasek testified without contradiction that, as a full-time university student, Kansas was his "place of habitation" and that when he left the state (for example, during school breaks), he intended to return. JA9339-45. The District Court therefore correctly determined that Bednasek met the applicable residency test under K.S.A. § 25-407.

The fact that Bednasek's car is registered and insured in Texas is irrelevant. Defendant's own Election Standards provide that "[f]or voter registration purposes, residency is not related to or affected by vehicle registration …" JA11825. Defendant also references the fact that Bednasek pays out-of-state tuition at the University of Kansas ("KU") and has a Texas driver's license, but the statutes governing in-state tuition, K.S.A. § 76-729 (imposing requirements including a 12-month period of enrollment), and whether a person is a resident for Kansas drivers'

license purposes, K.S.A. § 8-234a(a)(2), impose different standards for residence than the voter registration statute.[12]

Second, Defendant incorrectly contends that Bednasek's injury was "self-inflicted" because he "could have complied with the Kansas law." Br. 23-24. This Court already rejected this theory in *Fish I* when it held that injury is not "self-inflicted" simply because a person possesses a birth certificate that they could potentially locate and produce: "[A] finding of self-inflicted harm results from either misconduct or something akin to entering a freely negotiated contractual arrangement, not from a failure to comply with an allegedly unlawful regime." 840 F.3d at 753; *see also id*. at 716 n.5 (finding Defendant's self-inflicted harm theory "without merit" and that *Fish* Plaintiffs "have standing to sue").

Furthermore, Defendant is wrong because Bednasek *does not have* his birth certificate. His parents have it and they live in another state. JA11466. Bednasek testified that it would "take[] some time and effort" to "find it" and "mail it" and

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[12] Moreover, Kansas' driver's license statute, K.S.A. § 8-234a(a)(2) deems a person "a resident" for purposes of obtaining a license if they "rent[] or lease[] real estate in Kansas" (which Bednasek did as a KU student, JA9340-41) and "register[] to vote in Kansas." But Bednasek was prevented from registering *because* of the DPOC requirement, the very voter registration requirement that has prevented him from availing himself of one of the means of becoming a Kansas resident for driver's license purposes.

for Bednasek to send it back. JA9369-70.[13] The need to engage in such efforts is sufficient for standing. *Cf. Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("[R]egistered voters who do not possess an acceptable photo identification" had standing to challenge ID law, even if they "could … obtain [it]"); *see also Meese v. Keene*, 481 U.S. 465, 475 (1987) (noting "the need to take such affirmative steps to avoid the risk of harm … constitutes a cognizable injury"). An injury need not be insurmountable or reach any particular threshold of severity to confer standing: "[s]tanding is not a proxy for ruling on the merits" of whether the DPOC law ultimately imposes an undue burden on the right to vote. *Santillanes*, 546 F.3d at 1319.

The authority Defendant cites does nothing to support his challenge to Bednasek's standing. *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) held that plaintiffs concerned about potential surveillance could not acquire standing "by choosing to make expenditures [to prevent] hypothetical future harm[.]" *Id*. at 402, 418. Bednasek's injury was not hypothetical, nor did he make any anticipatory expenditures. State officials told him unequivocally that he would not be registered unless he presented DPOC; his application was rejected for this

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[13] Contrary to Defendant's suggestion, Bednasek's "disagree[ment] with" the DPOC law, Br. 16, is not the basis for his standing. The District Court correctly found that his standing arose not from his disapproval of the law but from the fact that "he did not possess DPOC at the time he registered to vote." JA13353.

reason. JA9349. Likewise, *Nova Health Systems v. Gandy* makes clear that "[s]tanding is defeated *only if* it is concluded that [an] injury is so completely due to the plaintiff's own fault as to break the causal chain." 416 F.3d 1149, 1156 n.8 (10th Cir. 2005) (citation omitted) (emphasis added). The District Court correctly found that Bednasek's injury is not his fault because his "cancelled status was not initiated by his own conduct. His injury was due to the DPOC requirement alone." JA11827; *see also Fish I*, 840 F.3d at 753.[14]

B. The DPOC Law Is Subject to the *Anderson-Burdick* Balancing Test—Not Rational Basis Review

The District Court applied the correct legal standard for challenges to election regulations that burden the right to vote: the *Anderson-Burdick* sliding-scale balancing test. In *Santillanes*, this Court explained that "the appropriate test when addressing an Equal Protection challenge to a law affecting a person's right

[14] Plaintiffs also note that there can be no dispute that the Kansas League, which has been injured due to the effect of the DPOC law on voters generally, *see supra* Background, § III.B.2, also has standing for this Fourteenth Amendment claim—but, because the *Fish* and *Bednasek* cases were effectively consolidated at trial, there was no need for them to formally amend their complaint to include it. If Defendant's challenge to Bednasek's standing were valid—and it is not—the League could simply seek leave to amend its complaint to assert this claim. *See* Fed. R. Civ. P. 15(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue."). Defendant's challenge to Bednasek's standing is therefore, as a practical matter, futile. *See Crawford*, 553 U.S. at 189 n.7 (unnecessary to evaluate standing for all plaintiffs as long as one has standing for injunctive relief).

to vote is to 'weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Santillanes*, 546 F.3d at 1320 (quoting *Crawford*, 553 U.S. at 190). *Santillanes* referred to this analysis as an "intermediate scrutiny standard established in *Burdick*[.]" *Id.* at 1321.[15]

This review is not subject to "any 'litmus test,'" *Crawford*, 553 U.S. at 190, but rather is a "sliding scale test, where the more severe the burden, the more compelling the state's interest must be[.]" *Arizona Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016). Thus, (1) "a rational basis standard applies to state regulations that do not burden" voting rights, while (2) "strict scrutiny applies … [to] 'severe' burdens," and (3) "the 'flexible' *Anderson*/*Burdick* balancing test" applies "[f]or the majority of cases falling between these extremes." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) ("*NEOCH*") (citation omitted). Because the level of scrutiny hinges on the magnitude and degree of the actual burden on voters, "concrete evidence of the burden imposed" is of central importance to the analysis. *Crawford*, 553 U.S. at 201; *see also*

[15] The proper level of scrutiny for laws that materially burden the right to vote exceeds rational basis review because the right to vote enjoys special protection as "a fundamental political right" and "any alleged infringement of the right … must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Santillanes, 546 F.3d at 1321 (noting courts have interpreted *Crawford* as requiring "specific proof of how a burden imposed by a regulation actually impacts a given class of voters").

Defendant, however, fundamentally misinterprets the controlling legal standard. Relying principally on Justice Scalia's non-controlling concurrence in *Crawford*, Defendant misconstrues the *Anderson-Burdick* test as a binary in which "[b]urdens on the right to vote should only be invalidated if they are 'severe,' meaning they … are 'so burdensome [that they are] virtually impossible to satisfy,'" Br. 40 (quoting *Crawford*, 553 U.S. at 205 (Scalia, J., concurring)), while "[e]venhanded regulations" are subject to "very deferential weighing[.]" *Id.* at 26-27. But as this Court has held, "Justice Stevens's plurality opinion [in *Crawford*] controls," *Santillanes*, 546 F.3d at 1321, and that opinion expressly rejected this two-track approach, emphasizing that "*Burdick* surely did not create a novel 'deferential important regulatory interests standard.'" *Crawford*, 553 U.S. at 190 n.8. In light of the record of widespread, substantial, and uneven burdens on voters, the District Court appropriately considered the evidence of the state's asserted rationales, and made the "hard judgment" required by *Crawford*, 553 U.S. at 190.

C. Based on the Record, the District Court Correctly Found that the DPOC Law is Significantly More Burdensome than the Law Reviewed in *Crawford*, and is Therefore Subject to Heightened Scrutiny

The District Court made factual findings that the DPOC law imposes widespread, significant, and arbitrary burdens on voters and therefore warrants close scrutiny, including: (1) the "magnitude of the burden," *Crawford*, 553 U.S. at 200, manifested in the tens of thousands of voters barred from registering; (2) the "character" of the burdens, *Burdick*, 504 U.S. at 434, evidenced by the substantial hardships imposed on voters in a broad array of circumstances; (3) the absence of a functioning safeguard that meaningfully "mitigate[s]" these burdens, *Crawford*, 553 U.S. at 199; and (4) the law's uneven, inconsistent, and arbitrary application and enforcement.

1. Evidence of the Number of Applicants Who Tried to Register But Were Blocked by the DPOC Requirement

Unlike in *Crawford*, where "it [was] not possible to quantify" the number of voters burdened by the challenged law, 553 U.S. at 200, here, the District Court heard and credited "evidence of the number of voters who were unable to register to vote due to lack of DPOC," which "provides concrete evidence of the magnitude of the harm." JA11522, JA11526. As of March 31, 2016, shortly before the preliminary injunction was entered in this case, 30,732 applicants were prevented from registering, a number that the Court found would have risen had the law not

been preliminarily enjoined as to motor-voter applicants before the 2016 presidential election. JA11449. The fact that 12% of voter registrations have been blocked since the law took effect, *id.*, indicates that the burdens imposed by the law are at least very serious—if not severe.

Defendant suggests that the number of blocked registrations is irrelevant because *Crawford* supposedly "found no constitutional concern" with 43,000 Indiana voters lacking photo ID. Br. 32. Leaving aside Defendant's remarkable indifference to what this Court has already deemed a "mass denial of a fundamental constitutional right," *Fish I*, 840 F.3d at 755, he misstates *Crawford*. There, the District Court rejected as "'utterly incredible and unreliable'" plaintiffs' expert's report as to the number of registered voters in Indiana without a driver's license or other acceptable photo identification; and then, based in part on extra-record internet research, "estimated" that 43,000 eligible voters in Indiana "lacked a state-issued driver's license or identification card." 553 U.S. at 187-88.[16] *Crawford* described this estimate as "[s]upposition based on extensive Internet research," which "is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication." *Id.* at 202 n.20. *Crawford*

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[16] *See also Crawford*, 553 U.S. at 218 (Souter, J. dissenting) (explaining that the District Court arrived at its 43,000 estimate "by comparing" data from the plaintiffs' expert "with U.S. Census Bureau figures for Indiana's voting-age population in 2004").

further noted that "the record d[id] not provide us with the number of *registered voters* without photo identification," *id.* at 200 (emphasis added), and noted that the estimate was likely out-of-date insofar because it did not account for "the availability of free photo identification" since the time of the law's effective date. *Id*. at 203 n.6.

By contrast, the number of blocked registrations in this case is not an untested pre-enforcement estimate of voters who could potentially be affected by the challenged law. Rather, it is a factual finding after an extensive trial, based on a concrete measure of how the DPOC law has actually functioned in practice over three years: "individual-level data" of affected voters—the files of the 30,732 Kansans who affirmatively "sought to register to vote but were blocked by the DPOC requirement," JA11451, JA11522—which the District Court did not err in accepting as a "gold standard" for evaluating the law's impact. JA11451. No such comparable evidence—for example, of "how many people were unable to vote based on the photo-ID requirement," JA11522—was presented in *Crawford*. Defendant suggests that there is no way to know how many "applicants were … unable (as opposed to just unwilling)" to obtain DPOC. Br. 32. But "[i]t does not matter whether … [voters] lack access to the requisite documentary proof or simply because the process of obtaining that proof is so onerous that they give up … The outcome is the same—the abridgment of the right to vote." *League of*

Women Voters of the U.S. v. Newby, 838 F.3d 1, 13 (D.C. Cir. 2016).

2. Evidence of Concrete Burdens Caused by the DPOC Law

Unlike in *Crawford*, where "the record sa[id] virtually nothing about the difficulties faced by" voters, here, the District Court found "concrete evidence of the burden imposed on" particular voters across a wide range of backgrounds and circumstances. 553 U.S. at 201. For instance, the Court credited testimony from Plaintiffs Fish and Bucci that they were disenfranchised in the 2014 election because they did not have and could not obtain their birth certificates. Bucci—who was born out-of-state—"credibly testified that spending money to obtain [a replacement Maryland birth certificate] would impact whether she could pay rent." JA11461. This is quite different from *Crawford*, where the required ID was provided by Indiana for free. 553 U.S. at 198 ("The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, *would not save the statute* under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." (emphasis added)). Here, the burden crosses a line identified in *Crawford* and *Harper* as "invidious" for voters who cannot pay. *Id.* at 189.

Meanwhile, Fish testified that he did not know whether it was even possible to obtain a replacement document, because he was born on an Illinois Air Force base that had been decommissioned long ago. JA11459-60. Though Fish's sister

later discovered that their deceased mother had stored Fish's birth certificate in a safe, it took two years for his DPOC to be located; in the interim, Fish was disenfranchised in the 2014 election. JA11460. Ultimately, for Bucci and Fish, the DPOC law made it "virtually impossible" for them to vote. Br. 40 (internal quotation marks and citation omitted). The imposition on them greatly exceeded the speculative evidence of burdens in *Crawford*, which the Court likened to the "usual burdens of voting." 553 U.S. at 198. Even if other voters can obtain or locate their DPOC more easily, that is of cold comfort: "The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).

The District Court also credited testimony regarding the burden the law imposes even on *people who have DPOC*, who did everything asked of them under the DPOC law. Stricker and Boynton presented DPOC when they tried to register to vote and were *told* that they would be registered, and yet they were still disenfranchised due to the "failure to accept DPOC by State employees." JA11462-65; JA11521, JA11528. The District Court further found that "incorrect notices," "incorrect information about registration status," and "failure to meaningfully inform applicants of their responsibilities under the law" had caused widespread, disenfranchising burdens on voters. JA11528. Defendant cites *Santillanes* for the proposition that the "confusing" application of a law should not

render it unconstitutional, but that was "in the absence of any indication that any voters would be or were confused[.]" 546 F.3d at 1322. Here, the Court made factual findings based on copious uncontested evidence that voters *have been confused and disenfranchised* by the DPOC requirement, including even those who possess DPOC. [17]

In addition, the District Court heard and credited Ahrens' testimony that the DPOC law was "absolutely a blow" to voter registration drives. JA11521-23. The number of registration applications processed by the Kansas League's Wichita chapter *dropped by 90%* after the DPOC law went into effect, while the time to assist a voter with an application soared from a few minutes to an hour. JA11454. At one university, less than one-fifth of students who attempted to register to vote through a Kansas League voter registration drive successfully completed the registration process. JA11454-55.[18]

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[17] Defendant contends briefly that "the remedy" for the DPOC law's confusing and inconsistent enforcement "is not to strike down the entire law." Br. 33. But the District Court found an unbroken pattern of "confusing, evolving, and inconsistent enforcement of the DPOC laws since [implementation in] 2013." JA11528. There was no evidence to the contrary, and Defendant did not challenge the scope of relief in his "Statement of the Issues," Br. 3, nor does he suggest what lesser remedy might have been appropriate.

[18] In addition to the serious burden on prospective voters, the DPOC law burdens the expressive and associational rights of voter registration organizations. *See Am. Ass'n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1216 (D.N.M.

Defendant asserts that that this record is irrelevant. According to Defendant, *Crawford* held that any costs or burdens associated with obtaining DPOC are *per se* constitutional, because *Crawford* upheld a photo ID requirement for voting, and obtaining ID in Indiana "required voters to produce a birth certificate or some other document." Br. 29. That is incorrect for at least two reasons.

First, *Crawford* did not imply, let alone expressly confer, categorical immunity from constitutional challenges. Rather, *Crawford* made clear that there is no "litmus test" for restrictions on voting. 553 U.S. at 189-90. *See also Anderson*, 460 U.S. at 789 ("The results of [*Anderson*/*Burdick*] evaluation will not be automatic[.]"). Indeed, in rejecting a "broad attack on the constitutionality" of the Indiana identification law, *Crawford* emphasized that its decision was limited to "the record … made in this litigation," thus indicating that a different record would be balanced differently. 553 U.S. at 200, 202.[19] In contrast to the record in *Crawford*, the record of burdens here is no mere "assum[ption]" that "a limited number of persons … may have difficulty obtaining a birth certificate." *Id.* at 199. Rather, the record contains extensive evidence as to the specific difficulties that particular individuals have faced trying to satisfy the DPOC requirement, which

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2010) ("[V]oter registration is expressive conduct worthy of First-Amendment protection.").

[19] *See also Crawford*, 553 U.S. at 208 (Scalia, J., concurring) (referring to the "lead opinion's record-based resolution of these cases").

amply sustains the court's factual findings that the DPOC law is more burdensome than the ID requirement in *Crawford*.

Second, *Crawford* solely addressed a requirement of photo ID for purposes of voting. It did not address requiring citizenship documents like a birth certificate or passport—which, if people possess, they rarely carry with them—for purposes of voter registration. The District Court made factual findings that "many individuals do not have the necessary documents at hand, or are not willing to provide such documents to League volunteers." JA11454. Bednasek for, instance, testified that his birth certificate is kept by his parents in Texas while he attends college in Kansas. JA11466. The effort of "locating it from a family member or separately obtaining" a DPOC is therefore significantly greater than simply flashing a photo ID at a polling place. JA11522. And the District Court credited expert testimony that the likelihood that citizens will register decreases as the "cost" of voting increases in terms of logistical difficulties and bureaucratic hurdles that must be overcome. *Id.*[20] The disenfranchisement of Plaintiffs Fish, Bucci, Stricker, and Boynton is proof positive of the substantial burdens imposed by the DPOC law.

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[20] Defendant's expert, Dr. Richman agreed with this consensus view that "electoral rules that increase the costs of voting are expected to diminish voter participation." JA10445-48.

3. Absence of a Post-Election Safety Valve

Unlike in *Crawford*, where the "severity of th[e] burden" was "mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted," by "travel[ing] to the circuit court clerk's office within 10 days to execute the required affidavit," 553 U.S. at 199, there is no meaningful failsafe for voters burdened by the DPOC requirement. *Crawford* recognized that, despite the fact that Indiana provided photo ID for free, some eligible voters could still face serious financial or religious obstacles preventing them from obtaining it—and the post-election safeguard was a critical component of its ruling. This is yet another element distinguishing the DPOC requirement from *Crawford* and the photo ID law upheld in *Santillanes*, which had a comparable provisional ballot and "affidavit of identity" alternative. 546 F.3d at 1324. In those cases, voters who cast ballots without photo ID could return to a government office at a later time, and ensure that their votes would be counted.

Here, however, there is no such post-election safety valve—a fact that, as the District Court found, had caused eligible voters like Stricker and Boynton to be disenfranchised. They only learned that they were not registered at the polls on Election Day, and had no opportunity to return at a later time with DPOC to establish their eligibility and have their votes counted. JA11520-21. Without such a post-election safety valve, there is no room for error, which is particularly

relevant given the District Court's factual findings concerning misinformation, mistakes, and conflicting directives issued by state employees administering the DPOC requirement. JA11528. A law that disenfranchises the voter for errors made by the State—with no opportunity for cure—is highly burdensome. *See NEOCH*, 696 F.3d at 595.

Defendant argues that the DPOC law actually has a safety valve because applications that are suspended for lack of DPOC remain incomplete for 90 days before they are canceled. Br. 31. But this suspension period provides no protection for voters like Stricker and Boynton who were never informed that they were not registered; nor Fish, who could not locate his birth certificate for two years; nor Bucci, who still cannot afford one. And, as a practical matter, the 90-day period made little difference to most applicants: the Court found that 70.9%, or 22,814 of individuals who were suspended as of September 25, 2015 remained suspended as of December 11, 2015. JA11448. "As of March 28, 2016, 16,319 individuals had their applications canceled" altogether, despite the 90-day rule. JA11447.

Defendant also suggests that the DPOC law's "hearing procedure that allows an applicant to submit alternative proof of citizenship" provides "a more robust safety valve" than that in *Crawford*. Br. 31; *see* K.S.A. § 25-2309(m). But the Court made factual findings—uncontested on appeal and well-supported by the

evidentiary record—that "this alternative procedure adds, not subtracts, from the burdensomeness of the law," for several reasons. JA11526. *First*, though the alternative appears in the text of Kansas' statute, the District Court found that there is no evidence that applicants are ever advised that the hearing procedure exists. "This explains why only 5 individuals, out of the more than 30,000 individuals on the suspense and cancellation list in March 2016, availed themselves of this option in the 5 years that the law has been in effect." JA11525. *Cf. NEOCH*, 696 F.3d at 595 (affirming *Anderson*/*Burdick* violation where election regulation "requires voters" to have "omniscience" or "greater knowledge … than poll workers").

Second, the District Court made factual findings based on testimony from Defendant's own witness that the hearing procedure is extremely burdensome. Among other things, Ms. French had to (1) learn of the hearing procedure by becoming a "friend" of the Deputy SOS; (2) pay $8 for the State of Arkansas to confirm that, as she already knew, her birth certificate did not exist; (3) coordinate with friends and relatives to find her decades-old baptismal and school records; (4) request that a friend drive her 40 miles to the hearing; and (5) attend a half hour "hearing" with Defendant, the Lieutenant Governor, and a representative from the Kansas Attorney General's office. JA11466-67. This labyrinthine process took Ms. French roughly five months to complete, JA11467; the time alone raises

serious constitutional concerns. *See Burns v. Fortson*, 410 U.S. 686, 687 (1973) (a "50-day registration period approaches the outer constitutional limits in this area").

Third, the District Court found that Defendant offers prospective registrants no guidance as to what "evidence" would be sufficient to prove that that they are citizens. JA11440. This absence of standards sharply contrasts to the clear criteria for the affidavit alternative in *Crawford*. *See* 553 U.S. at 186 n.2. Indeed, one of the five individuals who participated in a hearing took the burdensome step of retaining a lawyer for the proceeding. JA11467. While it should go without saying that any voter registration process that requires hiring counsel is unduly burdensome, that is precisely what Defendant blithely recommends: that applicants who lack DPOC should apply for a hearing and similarly "make the[ir] case, with counsel." Br. 56.[21]

In light of these findings, the District Court was plainly correct in finding that the hearing procedure is not a meaningful failsafe but instead an additional layer of burdensome complexity for voters trying to register. *Cf. Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965) (State cannot enact what is "plainly a cumbersome procedure" to circumvent prohibition on poll taxes).

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[21] Meanwhile, another hearing participant established citizenship solely on the basis of an attestation—which this Court previously held "undermines the … assertion that a written attestation … is insufficient …" *Fish I*, 840 F.3d at 747.

4. Uneven Application and Evidence of Selective Enforcement

Close scrutiny of the DPOC law is justified by an additional important factor: the DPOC requirement is not generally applicable—not as written, in impact, or as-applied—which further distinguishes it from the "evenhanded" photo ID law in *Crawford*. 553 U.S. at 189. The Supreme Court has applied less searching scrutiny under the *Anderson*/*Burdick* balancing test for "reasonable, *nondiscriminatory* restrictions" on the right to vote. *Crawford*, 553 U.S. at 190 (emphasis added) (citation omitted). But the DPOC law is decidedly *not* evenhanded or nondiscriminatory. Indeed, Justice Scalia's concurring opinion in *Crawford* clarifies precisely how the DPOC requirement differs from Indiana's photo ID law in this regard:

> [There is a] single burden that the [Indiana] law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications … [n]or are voters who already have photo identifications exempted from the burden, since those voters must maintain the accuracy of the information displayed on the identifications, renew them before they expire, and replace them if they are lost.

Crawford, 553 U.S. at 205 (Scalia, J., concurring). None of this is true for the DPOC requirement.

Arbitrary and Selective Enforcement: Since its inception, the DPOC law has been enforced arbitrarily. As discussed *supra*, Argument § II.C.2, its chaotic application has disenfranchised people who should have been seamlessly

registered, such as Plaintiffs Stricker and Boynton, who were blocked by the law *even though they presented DPOC* when applying to register.

The District Court also found instances of favorable treatment under the law for apparently illicit purposes. It found, with respect to Deputy SOS Eric Rucker's "friend" Jo French, that "the State was motivated to help this applicant navigate the system and become registered through the hearing process" under K.S.A. § 25-2309(m); in return, she testified at trial in the hopes that it would, in her own words, make Defendant Kobach "look good." JA11526, JA11466. A system in which a "friend" of the SOS office receives such an unusual "level of individual attention" can hardly be described as "evenhanded."

The Court also found that there had been a "pattern of picking off Plaintiffs" by selectively exempting them from the law, "in an attempt to avoid reaching the merits of this case." JA11500. After remand, Defendant unilaterally deemed Plaintiffs Stricker, Boynton, and Hutchinson as having satisfied the DPOC requirement and thus fully "registered"—even though their applications had already been canceled for lack of DPOC pursuant to Defendant's own regulations, and, under the terms of the DPOC law, they should have been required to submit new registration applications altogether. JA11524. In a prior ruling, the District Court observed that the "evidence does not suggest that in the normal course of administering the DPOC law, Defendant located and verified these Plaintiffs'

DPOC, leading to their completed registrations." JA2252.[22]

Uneven Application: As the District Court noted, "the fact that the law affects only new applicants means that it disproportionately affects certain demographic groups." JA11450. The DPOC law's burdens are placed solely on first-time applicants—who are "disproportionately … young and unaffiliated" with a political party, groups that the District Court found, based on uncontested expert testimony, already "have a lower propensity to participate in the political process, and are among the most sensitive to increased barriers to the right to vote, in part because they have not yet developed familiarity and habits associated with voting. JA11522.

This is not merely a "disparate impact," as Defendant describes it, Br. 40, but rather a direct consequence of distinctions drawn in the text of the statute, which permanently exempts those registered prior to 2013 from ever having to produce DPOC. *See* K.S.A. § 25-2309(n) (previously registered voters are "deemed to have provided satisfactory evidence of citizenship and shall not be

[22] Similarly, "approximately one week after" two other plaintiffs filed suit, Defendant registered them in order to moot their claims. JA11818. The lawsuit prompted Defendant to search for and obtain the DPOC of plaintiffs Alder Cromwell and Cody Keener, even though their registration applications had been trapped in suspense for more than half a year until they sued. JA11817-18. *See also Belenky*, No. 2013CV1331 at 3 (referencing "unsolicited steps taken by the Secretary of State in response to this suit" which mooted plaintiffs' claims).

required to resubmit"). This is, in essence, a grandfather clause—voters who registered before 2013 remain forever exempt from the DPOC requirement even if they move to a new county, or even if they move to another state and then return to Kansas, and must, under Kansas law, submit *a new* voter registration application. S*ee* K.S.A. § 25-2309(p); K.S.A. § 25-2316c(b); JA1505.

There is no basis—and Defendant presented no evidence—to suggest that new applicants are more likely to be noncitizens than existing registrants, particularly since the DPOC law was enacted based on unsubstantiated fears that noncitizens had *already* "been able to register to vote in Kansas." Br. 58. Rather, the state's justification for the grandfather clause is to "protect[] the reliance interests of those who had already registered to vote when the law was passed." *Fish v. Kobach*, 259 F. Supp. 3d 1218, 1239 (D. Kan. 2017). While this is a legitimate state interest—and one that the District Court held on partial summary judgment was sufficient to survive rational basis review—it only underscores that complying with the DPOC requirement is a significant obstacle for new registration applicants.[23]

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[23] While legislatures may employ grandfather clauses to protect individuals' valid "reliance interests," the Supreme Court has cautioned that judicial deference ends when a grandfather clause has a "classification [that] trammels fundamental personal rights." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 305 (1976). In the specific context of voting, the Supreme Court has closely scrutinized grandfather clauses where they exempt portions of the electorate from burdensome

In sum, unlike in *Crawford*, where the challenged photo ID law occasioned "different impacts of [a] single burden that the law uniformly imposes on all voters," *Crawford*, 553 U.S. at 205 (Scalia, J., concurring), here, the terms of the statute expressly require uneven treatment, providing that only *new* voter registration applicants bear its burdens. And the record establishes that it has always been enforced in a chaotic and arbitrary manner, with some applicants disenfranchised despite doing everything asked of them, while others are exempted despite non-compliance. The law's uneven application and burdens—which flow both from the face of the statute and the uncontested record of its enforcement—provide additional bases for applying heightened scrutiny and for affirming the decision below. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citizens have "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"); *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) ("*OFA*") (election regulation subject to heightened scrutiny where

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restrictions. *See Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (striking down literacy test in light of grandfather clause exemption); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 48-49 (1959) (upholding literacy test in light of state supreme court ruling voiding grandfather clause and making requirement generally applicable). A state does not necessarily have to "de-register" all voters if it changes registration requirements. But Kansas' grandfather clause bizarrely exempts previously registered voters prospectively forever, even if they move to another state and become de-registered, and subsequently move back to Kansas and submit new registration applications. *Compare with* A.R.S. § 16-166 (all new applications subject to same standard).

it "is not generally applicable to all").

D. The District Court Correctly Determined That the State's Rationale for the DPOC Law Was Insufficient to Justify Its Burden

Given the uncontested findings of widespread, substantial and uneven burdens imposed by the DPOC law, the District Court correctly determined that careful consideration of the evidence of the State's proffered interests is appropriate. Thus, while *Crawford* sustained the Indiana voter ID law against broad constitutional attack even though the record "contain[ed] no evidence" that the law would actually prevent "in-person voter impersonation at polling places," 553 U.S. at 194, here, the mere articulation of a valid interest is insufficient. In light of the uncontested findings that the DPOC law burdens voters, Defendant was required to submit actual evidence that the law is justified by his proffered rationales. *See OFA*, 697 F.3d at 433-34 (striking down limitations on early in-person voting where the "burden on non-military Ohio voters is not severe, but neither is it slight," because there was no "evidence" to support the State's "vague interest").

Defendant contends that the District Court "only superficially considered" the State's interests in conducting the *Anderson-Burdick* balancing test. Br. 33. But as explained below, the District Court, while agreeing that the interests offered by Defendant are legitimate, carefully considered the extensive trial record, and appropriately found that the DPOC law does not actually advance these interests.

In fact, it is Defendant who superficially recites boilerplate interests without regard to the actual record in this case. But a valid interest in preventing fraud is not a talisman permitting a State to prevail automatically. "[A]s the Supreme Court recently reminded, that a state interest is legitimate does not necessarily mean courts should ignore evidence of whether a specific law advances that interest or imposes needless burdens." *Veasey v. Abbott*, 830 F.3d 216, 275 n.3 (5th Cir. 2016) (citing *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)). *Cf. Veasey*, 830 F.3d at 274-75 (holding that while "*Crawford* established that preventing voter fraud and safeguarding voter confidence are legitimate and important state interests," nevertheless "it does not follow that assertion of those interests immunizes a voter ID law from all challenges"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) (same). The balancing of interests depends upon the actual evidence in a given case.

Accuracy of Voter Rolls: The District Court made a factual determination—uncontested here—that the DPOC law caused the registration applications of tens of thousands of eligible citizens to become suspended or canceled, blocking them from becoming registered. Defendant's own expert opined that "more than 99% of the individuals" whose registration applications were suspended were in fact U.S. citizens, and his estimate as to the number of noncitizens on the suspense list was "statistically indistinguishable from zero." JA11491-92. The District Court found

that, in comparison, "[a]t most, 39 noncitizens have found their way onto the Kansas voter rolls in the last 19 years," which is unremarkable "given th[at] almost 2 million individuals [are] on the Kansas voter rolls, [and] some administrative anomalies are expected." JA11520. Given these uncontested facts, the DPOC requirement *reduced* the accuracy of the voter rolls.

And while one goal of the NVRA is to remove ineligible persons from States' voter rolls, the Supreme Court observed in *ITCA* that there is a less burdensome method for doing so: States retain the ability to "deny[] registration based on information in their possession establishing the applicant's ineligibility," 133 S. Ct. at 2257, including driver's license and jury lists, JA11527. It is therefore not "necessary to burden the plaintiff's rights" so heavily by blocking tens of thousands of eligible citizens from registering in pursuit of this goal. *Burdick*, 504 U.S. at 434.

Safeguarding Voter Confidence: The District Court made a factual determination—again, uncontested here—that the DPOC law harms voters' confidence in the integrity of representative government. That is because it disenfranchised large numbers of eligible citizens, was enforced in a "confusing, evolving and inconsistent" manner throughout its existence, and was marred by "incorrect notices," "incorrect information," "failure to accept DPOC by State employees, failure to meaningfully inform applicants of their responsibilities under

the law, and evolving internal efforts to verify citizenship," all of which "caused confusion during the 5 years this law has been effective." JA11528.

For example, Fish, Bucci, Stricker, and Boynton were all told when they submitted their registration applications that they had been registered to vote. They later learned that this was not true—and Stricker and Boynton only learned at the polls on Election Day, when it was too late. Stricker was left "confused and embarrassed" while Boynton gave up on trying to register altogether. JA11462, JA11465. As the District Court concluded:

> If Kansans who try to register to vote cannot be sure if they are in fact registered, particularly after they have been led to believe they complied with all registration laws, it erodes confidence in the electoral system. If Kansans receive misinformation from State officials about whether they are registered to vote, it erodes confidence in the electoral system. If eligible Kansans' votes are not counted despite believing they are registered to vote, it erodes confidence in the electoral system.

JA11528. The District Court's findings in this regard were not clearly erroneous; indeed, Defendant offered no contrary evidence at trial to show that the DPOC law actually promotes voter confidence.

Protecting Integrity of the Electoral Process and Preventing Voter Fraud: The evidence demonstrates that "the DPOC law disproportionately impacts duly qualified registration applicants, while only nominally preventing noncitizen voter registration." JA11528. Defendant asserts that noncitizen registration would be substantial "if even 0.1% of registered voters are noncitizens," Br. 61, but the

record reveals *one-fiftieth* of that number: "[a]t most, 39" instances of noncitizens who successfully registered to vote in Kansas over 19 years, amounting to only "0.002% of all registered voters in Kansas as of January 1, 2013 (1,762,330)." JA11508, JA11520.

After years of litigation, across multiple cases, Defendant has offered only a handful of isolated incidents to prop up the risk of fraud, which is perhaps why he notes that numerous elections in Kansas have been "decided by ten votes or [fewer]." Br. 61. But that only underscores the incredible damage wrought by a law that has disenfranchised more than 30,000. His paltry showing of noncitizen registration cannot outweigh the concrete evidence of tens of thousands of voters denied registration, and the confusion and difficulties imposed on all who must comply with the law. A State "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (emphasis added) (citation omitted).

Furthermore, the many alternatives available to the State in combatting voter fraud, discussed *supra* Argument § I.A.2., demonstrate that it is not "necessary to burden the plaintiff's rights" with the DPOC requirement when there are so many other avenues to achieve the same interests and objectives. *Burdick*, 504 U.S. at

434. Defendant failed to address administrative errors, failed to provide sufficient training for DOV staff, and failed exercise his prosecutorial powers—which Defendant described as a deterrent—to combat the risk of fraud. He also can use various means at his disposal to detect and deny noncitizens' applications submitted due to rare mistakes that could happen under any system.

CONCLUSION

Defendant asserts that "Kansas is not unique." Br. 58. That is true—but only because the District's Court's decision returned Kansas to the mainstream, by striking down its one-of-a-kind DPOC requirement, a disastrous experiment that wrought exceptional damage to the state's voter rolls, disenfranchised tens of thousands, and eroded confidence in the state's elections. The judgment below should be affirmed.

Dated this 29th day of November, 2018.

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STATEMENT ON REQUEST FOR ORAL ARGUMENT

Plaintiffs concur with Defendant that oral argument will materially assist the Court in resolving the issues presented in this case.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 29th day of November, 2018, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Dale E. Ho
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

I hereby certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32 and this Court's Order dated October 25, 2018, providing that "appellees may file a joint response brief of no more than 19,500 words," because it contains 19,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced font in Microsoft Word 2010 using 14-point Times New Roman.

/s/ Dale E. Ho

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ECF CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the required privacy redactions. I further certify that any hard copies submitted of this filing will be exactly the same as the electronic copy. Finally, I certify that this document was scanned for viruses with *Metadata Assistant 4*, which is continually updated. According to the virus scan, this file is free of viruses.

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