

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

STEVEN WAYNE FISH, RALPH ORTIZ,)
DONNA BUCCI, CHARLES STRICKER,)
THOMAS J. BOYNTON, AND DOUGLAS)
HUTCHINSON on behalf of themselves and)
all others similarly situated,)

Case No. 2:16-cv-02105

Plaintiffs,)

v.)

KRIS KOBACH, in his official capacity as)
Secretary of State for the State of Kansas;)
NICK JORDAN, in his official capacity as)
Secretary of Revenue for the State of Kansas,)

Defendants.)

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs respectfully request that this Court enjoin Defendants from blocking tens of thousands of Kansans from registering to vote in violation of the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (the “NVRA”). Since its passage, the NVRA—commonly known as the “Motor-Voter Law”—has become synonymous with simplified voter registration at State motor vehicle agencies. The NVRA mandates that individuals may register for federal elections at a motor vehicle authority by providing only the minimum amount of information necessary to evaluate voter eligibility, including a sworn attestation of citizenship.

Plaintiffs and the proposed class they represent are Kansas residents and citizens who are “motor-voter registrants”: that is, they submitted valid and complete voter registration applications at offices of the Kansas Division of Vehicles (“DMVs”). But Plaintiffs have been obstructed from voting in federal elections by Defendants’ unlawful application of a documentary proof-of-citizenship requirement imposed under State law, Kan. Stat. Ann. § 25-2309(*l*) (“DPOC law” or “DPOC requirement”). Pursuant to this requirement, Defendants have improperly refused to register Kansans who do not or cannot submit documents proving their United States citizenship, such as a birth certificate or passport, when they apply to obtain or renew driver’s licenses at DMVs. Furthermore, under a recently promulgated administrative rule, Kan. Admin. Regs. § 7-23-15 (“90-Day Purge Rule”), individuals who have provided valid registration applications are purged from the State voting list entirely if they do not produce documentary proof of citizenship within 90 days of the date of their voter registration applications.

The DPOC law has had a devastating effect on voter registration in Kansas since it went into effect in 2013. Before 2013, Kansas voters could register at DMVs by signing a sworn attestation of citizenship provided under penalty of perjury. Since 2013, tens of thousands of

eligible Kansas citizens have been disenfranchised and prevented from exercising their fundamental right to vote due to the documentary proof requirement.

By preventing voter registration for individuals without documentary proof of citizenship and increasing the time, expense, and burdens on those who do have such documentation, the DPOC law violates federal law and runs afoul of Supreme Court and Tenth Circuit precedent. The NVRA was designed with the express purpose of removing barriers to voter registration and increasing the number of citizens registered to vote in federal elections. When it enacted the NVRA, Congress specifically considered whether to permit States to require documentary proof of citizenship as a condition of registration and rejected such a requirement as “not necessary or consistent with the purposes of this Act.” H.R. Conf. Rep. No. 103-66, at 23 (1993). Instead, Congress deemed a sworn attestation the only requirement necessary to assess a registrant’s citizenship.

Defendants’ policies impose precisely the barriers to voter registration that the NVRA was designed to eliminate. Members of the public do not ordinarily carry documents such as a birth certificate with them when renewing a driver’s license at the DMV and, for many citizens, such documents are not readily available or they are costly to obtain. Forcing citizens to surmount unnecessary hurdles dissuades many would-be voters from pursuing registration and pushes them to abandon the process altogether. Such obstacles directly undermine the NVRA’s express statutory purpose of increasing the number of Americans who are registered to vote in federal elections and its goal of making voter registration at DMVs simple and accessible. The disruptive impact of Defendants’ policies is already clear: Since Defendants began requiring documentary proof of citizenship, more than 35,000 registrants have been suspended or purged entirely from Kansas’s voter lists due to the purported failure to provide proof of citizenship.

The DPOC law and 90-Day Purge Rule impermissibly conflict with the voter registration procedures established by the NVRA. The Supreme Court and the Tenth Circuit have already rejected comparable efforts by Kansas to impose a documentary proof-of-citizenship requirement on registrants using the NVRA’s federal mail-in form (“Federal Form”). Defendants’ attempts to impose precisely the same registration barriers for DMV registrants is at odds with the federal registration system established by Congress and is preempted by the Elections Clause of the Constitution.

A preliminary injunction is warranted because Defendants have caused and, if not enjoined, will continue to cause Plaintiffs and the proposed class irreparable harm by interfering with their fundamental right to vote. Because Plaintiffs are likely to succeed on the merits of their claims, and because they satisfy the remaining injunction factors, Plaintiffs seek a preliminary injunction barring Defendants from enforcing the unlawful DPOC requirement and 90-Day Purge Rule with respect to motor-voter registrants while the Court determines the ultimate merits of their claims.

BACKGROUND

I. The National Voter Registration Act of 1993

The NVRA establishes several national procedures for voter registration in federal elections. Congress enacted the statute in 1993 based on findings that the right to vote “is a fundamental right”; that State governments have a “duty . . . to promote the exercise of that right”; and that “unfair registration laws and procedures can have a direct and damaging effect on voter participation.” 52 U.S.C. § 20501(a). Express goals of the legislation include “increas[ing] the number of eligible citizens who register to vote in elections for Federal office,” and “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office.” 52 U.S.C. § 20501(b).

In order to accomplish these goals, the NVRA establishes certain national registration requirements and directs that States provide and maintain at least three separate channels for voter registration. 52 U.S.C. § 20503(a). These three methods are: (1) “by application made simultaneously with an application for a motor vehicle driver’s license”; (2) “by mail application” using a Federal Form prescribed by the Election Assistance Commission (EAC); and (3) “by application in person” at various State offices including those that provide public assistance and those that provide services to people with disabilities. *Id.* States must “establish procedures to register” voters through all three methods “notwithstanding any other Federal or State law” and “in addition to any other method of voter registration provided for under State law.” *Id.*

The NVRA is frequently referred to as the “Motor-Voter Law” because of its well-known provision linking voter registration to driver’s license applications. Under Section 5 of the NVRA, States must provide a combined driver’s license and voter registration application form (the “Motor-Voter Form”) at DMVs pursuant to criteria set out in the statute. 52 U.S.C. § 20504. The NVRA requires that every application for a driver’s license, including license renewals, “shall serve as an application for voter registration with respect to elections for Federal office.” 52 U.S.C. § 20504(a)(1). Submitting an application at a DMV is now the most popular form of registration in Kansas and across the country.¹

The NVRA places strict limits on the information the Motor-Voter Form may demand in order for an applicant to register to vote. The form “may require only the minimum amount of

¹ Almost half of all Kansas voters, approximately 45.2%, registered at DMVs, making it by far the most popular form of voter registration in the State. *See* U.S. Election Assistance Commission, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report: A Report to the 114th Congress*, June 30, 2015 at 80, http://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf. Similarly, at the national level, the plurality of voters register to vote at DMVs. *See id.*

information necessary to . . . enable State election officials to assess the eligibility of the applicant.” 52 U.S.C. § 20504(c)(2)(B). Furthermore, the statute prohibits requiring duplicative information, stating that the voter registration form for driver’s license applicants “may not require any information that duplicates information required in the driver’s license portion of the form” other than a signature. 52 U.S.C. § 20504(c)(2)(A).

Section 5 outlines information that may be included on the voter registration application to assess the eligibility of applicants:

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

(C) shall include a statement that--

- (i) states each eligibility requirement (including citizenship);
- (ii) contains an attestation that the applicant meets each such requirement; and
- (iii) requires the signature of the applicant, under penalty of perjury.

52 U.S.C. § 20504(c)(2)(C). The statute does not provide for or authorize any other method of determining the voting eligibility of motor-voter registrants at the time of registration.

Section 8 of the NVRA mandates procedures for States to maintain the list of voters on its registration rolls. This section provides “that the name of a registrant may not be removed from the official list of eligible voters except” under limited circumstances set forth by the statute, including: “(A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity”; and through a general program that makes a reasonable effort to remove ineligible voters by reason of “(A) death of the registrant; or (B) a change in the residence of the registrant.” 52 U.S.C. § 20507(a)(3)–(4). Section 8 does not authorize the removal of qualified voters due to failure to provide documentary proof of citizenship.

A. Kansas's Documentary Proof-of-Citizenship Requirement

Prior to 2013, voter registration in Kansas was simple and straightforward. Qualified voters could apply for registration through a variety of sources: (1) a State form approved by the Secretary of State; (2) the NVRA's Federal Form for mail-in registration; (3) an application made simultaneously with an application for a driver's license; (4) an in-person application at a State agency that provides public assistance or other benefits, *see* Kan. Stat. Ann. § 25-2309(a); or (5) for persons in federal services, a Federal Services Post Card Application ("FSPCA"). *See* Kan. Stat. Ann. § 25-1215. These registration forms contained an attestation to the applicant's age of majority and U.S. citizenship, and were required to be signed by the applicant under penalty of perjury. *See* Kan. Stat. Ann. § 25-2309(b). Kansas did not require any further proof of citizenship for eligible voters to register.

On March 29, 2011, the Kansas State Legislature passed an omnibus elections reform bill H.B. 2067, the "Secure and Fair Elections Act" ("SAFE Act") which was signed into law by the Kansas Governor on April 18, 2011. The SAFE Act was codified as Kan. Stat. Ann. §§ 25-2309(l)-(u), most of which became effective January 1, 2012. Subsection 2309(l), which became effective January 1, 2013, requires county election officers, or the Secretary of State's office, to accept any completed application for registration, but directs that "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." To satisfy the "evidence of citizenship" requirement, an applicant must present one of several forms of documentation, including a passport, birth certificate, or federal immigration documents, before the registration deadline. Kan. Stat. Ann. § 25-2309(l).

During legislative deliberations over the SAFE Act, Defendant Secretary Kobach marshaled data he contended supported the notion that voter fraud was a problem in Kansas. His office released a report in January 2011 that showed a total of sixteen alleged instances of

noncitizens registering to vote, and five alleged cases of noncitizen voting between 1997 and 2010.² None of these allegations appear to have resulted in a finding by a court of fraudulent activity.

Since the evidence of citizenship requirement became effective, tens of thousands of qualified voters who have attested to their eligibility to vote under penalty of perjury remain on a “suspense list” and are prohibited from exercising their fundamental right to vote.

Over the last three years, over 35,000 would-be Kansas voters—more than 14% of all new registrants in Kansas—have been placed on a “suspense list” solely because they purportedly did not submit documentary proof of citizenship. *See* Expert Report of Dr. Michael P. McDonald, at 2-3, attached to Decl. of Attorney R. Orion Danjuma, filed concurrently herewith, as Ex. 1.

Among these individuals are many motor-voter registrants, including the Plaintiffs bringing this action:

- Wayne Fish, who lacks documentary proof of citizenship and does not know how to obtain his birth certificate, because he was born on a U.S. military base in Illinois that has been closed for decades, *see* Decl. of Steven Wayne Fish, Feb. 12, 2016, ¶¶ 9-10, attached to Danjuma Decl. as Ex. 2;
- Ralph Ortiz, a 13-year veteran of the United States Air Force, who did not bring documentary proof of citizenship with him when he went to the DMV to renew his driver’s license, because Kansas does not require such documentation for driver’s license renewals, *see* Decl. of Ralph Ortiz, Feb. 8, 2016, ¶¶ 4, 10-12, attached to Danjuma Decl. as Ex. 3;
- Donna Bucci, who does not possess a copy of her birth certificate, and for whom the fee required to retrieve one from the State of Maryland, where she was born, poses a significant financial burden, *see* Decl. of Donna Bucci, Feb. 7, 2016, ¶¶ 1, 3, 11, 13, attached to Danjuma Decl. as Ex. 4;

² Office of the Kansas Secretary of State, *Known Reported Incidents of Election Crimes, 1997 – 2010*, Feb. 9, 2011, http://aclu.org/files/votingrights/kselection_crimes_reporting.pdf. Defendant Secretary Kobach has cited to the report at this website in his own published work. *See* Kris W. Kobach, “Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put—People Want Secure and Fair Elections,” 62 *Syracuse L. Rev.* 1, 5 n.27 (2012).

- Tad Stricker, who made multiple trips to the DMV to complete his driver’s license application, but who still ended up on the suspense list, and whose ballot in the 2014 general election was apparently not counted due to his purported failure to provide documentary proof of citizenship, *see* Decl. of Charles William Stricker III, Jan. 30, 2016, ¶¶ 7, 12-14, 16, attached to Danjuma Decl. as Ex. 5;
- T.J. Boynton, who also tried to vote in the 2014 general election but was similarly stymied due to his purported failure to provide documentary proof of citizenship, *see* Decl. of Thomas J. Boynton, Feb. 8, 2016, ¶¶ 7-11, attached to Danjuma Decl. as Ex. 6; and
- Douglas Hutchinson, who made multiple trips to the DMV to complete his driver’s license application and his voter registration, and who was advised that he had done all that was necessary to complete his voter registration, only to learn that he was on the suspense list for purported failure to provide documentary proof of citizenship, *see* Decl. of Douglas Hutchinson, Feb. 12, 2016, ¶¶ 10, 14-15, attached to Danjuma Decl. as Ex. 7;

Each of the Plaintiffs is a United States citizen, an eligible Kansas voter, and a motor-voter registrant who submitted a voter registration application that was full and complete pursuant to Section 5 of the NVRA. Nevertheless, their registrations—along with those of thousands of other similarly-situated Kansans—were placed on the suspense list through no fault of their own.

Ironically, many of these voters on the suspense list due to their purported failure to submit documentary proof of citizenship *actually provided such documentation to the State*. In Kansas, first-time driver’s license applicants are required to submit documentary proof of legal presence in order to obtain a license; they cannot obtain a license without submitting such documents.³ For any U.S. citizen, such documentation will invariably constitute proof of citizenship. And yet many motor-voter registrants who have actually submitted such citizenship documentation to the DMV in order to obtain their driver’s licenses—including Plaintiffs Boynton and Hutchinson, *see* Ex. 6, Boynton Decl. ¶ 6; Ex. 7, Hutchinson Decl. ¶ 14—have

³ *See* Kan. Department of Revenue, *Driver’s License Proof of Identity*, <http://ksrevenue.org/dmvproof.html>; *see also* Kan. Stat. Ann. § 8-240(b)(1)–(b)(3).

nevertheless found themselves on the suspense list due to their purported failure to submit documentary proof of citizenship in registering to vote. This is because Kansas has required many motor-voter registrants to submit citizenship documents to the State not once but *twice* in order to become registered: once at the DMV, and then again to an elections official.

B. Kansas's 90-Day Purge Rule

The huge number of suspended registrants has caused Kansas significant embarrassment and consternation. In the summer of 2015, Defendant Kobach took action to reduce the number of suspended registrants—in most cases by purging them from the voter list altogether. On June 25, 2015, Defendant Kobach proposed an administrative rule providing that, if a voter registration applicant fails to provide documentary proof of United States citizenship or other “required information” within 90 days of receipt of the registration application, then the “application shall be deemed insufficient . . . [and] the voter registration application [will be] canceled.” Kan. Admin. Regs. § 7-23-15.

The 90-Day Purge Rule went into effect on October 2, 2015. *Id.* More than 12,000 individuals who were on the suspense list due to purported failure to submit documentary proof of citizenship have now been purged from the voter registration system solely for failure to provide such documentation. *See* Ex. 1, McDonald Rep., at 16-17. Among these voters were Plaintiffs Ortiz, Bucci, Stricker, and Boynton. *See* Ex. 3, Ortiz Decl. ¶ 13; Ex. 4, Bucci Decl. ¶ 14; Ex. 5, Stricker Decl. ¶ 16; Ex. 6, Boynton Decl. ¶ 11. As of December 11, 2015, more than 13,700 voters remain on the suspense list solely for failure to provide documentary proof of citizenship. This pool of voters remains disproportionately young (approximately 45%) and unaffiliated (approximately 54%). *See* Ex. 1, McDonald Rep., at 14-15.

II. Related Litigation

A. *Arizona v. Inter Tribal Council of Arizona, Inc.*

In 2013, the Supreme Court decided *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (“*ITCA*”), which addressed whether the NVRA preempted an Arizona law requiring documentary proof of citizenship to register to vote, with respect to registrants who use the federal mail-in form (the “Federal Form”) for voter registration, one of the three channels for voter registration prescribed by the NVRA. The Supreme Court held that with respect to Federal Form applicants, States are preempted by the NVRA from imposing any proof-of-citizenship requirements above and beyond those set forth in the Federal Form itself: namely, a signed attestation, under oath, that the applicant meets the eligibility requirements for voting, including citizenship. *ITCA*, 133 S. Ct. at 2260. These requirements are the same as those outlined in § 20508 of the NVRA itself. Justice Scalia, writing for the Court, explained:

We conclude that the fairest reading of the [NVRA] is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is “inconsistent with” the NVRA’s mandate that States “accept and use” the Federal Form. . . . [T]he Elections Clause requires that Arizona’s [documentary proof of citizenship] rule give way. . . .

[T]he NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form.

ITCA, 133 S. Ct. at 2257.

B. *Kobach v. U.S. Election Assistance Commission*

Two days after the *ITCA* decision, Arizona Secretary of State Ken Bennett and Kansas Secretary of State Kobach each submitted requests to the EAC to change the Federal Form for their States to incorporate a documentary proof-of-citizenship requirement, an administrative challenge left open by *ITCA*. Secretaries Bennett and Kobach also initiated litigation to force the

EAC to grant their request, *Kobach v. EAC*, 772 F.3d 1183 (10th Cir. 2014) (hereinafter, “EAC opinion” or “EAC decision”), *cert. denied*, 135 S. Ct. 2891 (2015).

In a final decision issued on January 17, 2014, the EAC denied Arizona’s and Kansas’s requests to incorporate a documentary proof-of-citizenship requirement for the Federal Forms in those States.⁴ The Tenth Circuit affirmed the EAC’s determination, rejecting Kobach’s and Bennett’s argument that the EAC had a nondiscretionary duty to grant Kansas’s and Arizona’s respective requests to alter the Federal Form to incorporate a documentary proof-of-citizenship requirement. *EAC*, 772 F.3d at 1194. The Tenth Circuit observed that the NVRA’s legislative history indicated that Congress considered but rejected permitting States to impose a documentary proof-of-citizenship requirement with respect to Federal Form applicants: “Both houses of Congress debated and voted on the specific question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and ultimately rejected such a proposal.” *Id.* at 1195 n.7. On June 29, 2015, the Supreme Court denied Secretary Kobach’s petition for a writ of certiorari. *Kobach v. EAC*, 135 S. Ct. 2891 (2015).⁵

⁴ Alice P. Miller, 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 (hereinafter “Miller Memo”), <http://www.eac.gov/assets/1/Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf>, attached to the Danjuma Decl. for the Court’s convenience as Ex. 8.

⁵ On February 1, 2016, Brian Newby, the new Executive Director of the EAC and a former Elections Commissioner of Johnson County, Kansas (who was appointed to his prior position by Defendant Secretary Kobach), abruptly and unilaterally changed the instructions to the federal voter registration form for Kansas, to incorporate a documentary proof-of-citizenship requirement. Plaintiffs’ claims do not turn on the instructions for the Federal Form but, as further explained below, on the requirements of the motor-voter provisions of the NVRA. Nevertheless, Plaintiffs note that Mr. Newby’s policy reversal is plainly unauthorized. As explained by EAC Commissioner Tom Hicks, this “unilateral[]” move by Mr. Newby exceeds his delegated authority, violates federal administrative procedural requirements for “a notice and public comment period,” and arbitrarily reverses prior EAC determinations without any basis. Statement by Vice-Chair Tom Hicks, Feb. 2, 2016,

ARGUMENT

Plaintiffs are entitled to a preliminary injunction to suspend enforcement of the DPOC law against Kansans registering for federal elections at DMVs. A preliminary injunction should be granted where, as here, the moving party establishes: (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Furthermore, a relaxed standard applies for evaluating likelihood of success on the merits when a party seeking a preliminary injunction can establish the other three factors listed above. In such cases, “instead of showing a substantial likelihood of success, the party need only prove that there are ‘questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.’” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-47 (10th Cir. 2001) (citation omitted). Plaintiffs satisfy the elements for a preliminary injunction under either standard.

[http://www.eac.gov/assets/1/Documents/Statement%20by%20Commissioner%20Hicks%20NVR A%20Form%20\(2-2-16\)-1.pdf](http://www.eac.gov/assets/1/Documents/Statement%20by%20Commissioner%20Hicks%20NVR%20Form%20(2-2-16)-1.pdf); *see also EAC*, 772 F.3d at 1198 (holding that changing the federal form to incorporate a documentary proof-of-citizenship requirement “would have risked arbitrariness, because Kobach and Bennett offered little evidence that was not already offered in Arizona’s 2005 request, which the EAC rejected”). Mr. Newby’s unilateral and unlawful actions are currently the subject of separate litigation and a pending motion for a preliminary injunction in the U.S. District Court for the District of Columbia. *See Mot. for TRO & Prelim. Inj., League of Women Voters v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 17, 2016), ECF No. 11.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the DPOC Requirement Violates the NVRA.

The NVRA prohibits Defendants from imposing a documentary proof-of-citizenship requirement on motor-voter registrants. Under the NVRA, States must “provide simplified systems for registering to vote in federal elections.” *Young v. Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted). By rejecting motor-voter registrations unaccompanied by documentary proof of citizenship, Defendants have erected a registration barrier that has disenfranchised tens of thousands of Kansas voters.

Defendants’ DPOC requirement directly conflicts with the text, structure, and purpose of the NVRA and is preempted by federal law. *First*, Congress retains expansive authority under the Constitution’s Election Clause to preempt State law regarding the election of federal representatives. *Second*, recent authority from the Supreme Court and Tenth Circuit makes clear that the DPOC law unlawfully exceeds the minimum amount of information necessary to determine whether a motor-voter registrant is a citizen. *Third*, by requiring motor-voter registrants to produce documentary proof of citizenship once to obtain a driver’s license and then a second time to register to vote, the DPOC law violates the NVRA’s express prohibition against requiring duplicate information. *Fourth*, the NVRA’s legislative history demonstrates that Congress specifically intended the statute to prevent States from imposing DPOC requirements like the one applied by Defendants in this case. *Fifth*, the DPOC law clearly undermines the statutory purposes of the NVRA to remove barriers to registration and increase the numbers of registered voters.

A. Congress Has Broad Authority to Preempt State Laws Involving Federal Elections.

The Elections Clause of the Constitution grants Congress the authority to supersede State law concerning the “[t]he Times, Places and Manner of holding Elections” for federal office.

U.S. Const. Art. I, § 4, cl. 1. State law constitutes the default rule for choosing federal representatives “but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. Art. I, § 4, cl. 1; *see also ITCA*, 133 S. Ct. at 2253 (“the Clause . . . invests the States with [default] responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.” (internal quotation marks omitted) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997))).

Congress’s preemptive power under the Elections Clause is particularly expansive. The clause “gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’” *Foster*, 522 U.S. at 71 n.2 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). This authority “encompasses matters like . . . registration” and numerous other election related procedures. *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (internal quotation marks omitted) (quoting *Smiley*, 285 U.S. at 366). States do not retain any independent authority over the holding of federal elections by virtue of State sovereignty. To the contrary, the States’ role in “electing representatives to the National Legislature . . . aris[es] from the Constitution itself” and is wholly contingent on the Elections Clause. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

For this reason, “[t]he power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’” *ITCA*, 133 S. Ct. at 2253-54 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)). A stronger form of preemption applies in these cases “[b]ecause the power the Elections Clause confers is none other than the power to pre-empt.”

ITCA, 133 S. Ct. at 2257. Thus, in cases involving the Elections Clause, “courts should not assume reluctance to preempt state law.” *EAC*, 772 F.3d at 1195. Rather, when evaluating conflicts between State and federal law under the Elections Clause, the Supreme Court has declined to defer to a State’s sovereign interests or to apply the presumption against preemption that sometimes operates in cases involving the Constitution’s Supremacy Clause. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (for cases predicated on the Supremacy Clause, courts “presume[] that Congress does not cavalierly pre-empt state-law causes of action”).

Furthermore, in contrast to the treatment of federalism in other contexts, the Elections Clause grants Congress “plenary authority not only to supplant state rules *but to conscript states to carry out federal enactments.*” *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012) (emphasis added), *aff’d*, *ITCA*, 133 S. Ct. 2247; *see also Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (“Congress can . . . regulate federal elections *and* force the state to bear the expense of the regulation.”). While States may set specific qualifications for voting, “a state’s role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out whatever procedures Congress requires.” *Gonzalez*, 677 F.3d at 391.

The Supreme Court has characterized the relationship between laws passed by State legislatures and those enacted by Congress under the Elections Clause as analogous to “prior and subsequent enactments of the same legislature.” *Siebold*, 100 U.S. at 384. “The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by

Congress.” *Id.* at 388. However, “the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.” *Id.* at 397.

As explained below, in this case, Kansas’s DPOC law can have no effect as applied to motor-voter registrants for federal elections, because it conflicts with and is superseded by the NVRA.

B. The Plain Language of the NVRA Preempts Kansas’s DPOC Requirement with Respect to Motor-Voter Registrants.

Kansas’s DPOC law, as applied to voters who register to vote while submitting a driver’s license application (including any renewal), is incompatible with the text of the NVRA in at least two respects. First, it demands substantially more than the “minimum amount of information necessary” to gauge a registrant’s eligibility as a citizen. *See* 52 U.S.C. § 20504(c)(2)(B). Second, the DPOC law requires that registrants provide “duplicate[.]” documentary proof-of-citizenship information that is already required in the driver’s license portion of an initial application for a license. *See* 52 U.S.C. § 20504(c)(2)(A).

1. Motor-Voter Registration Must Be the Easiest Method of Registration Under the NVRA.

Section 5 of the NVRA instructs States to provide simplified, simultaneous driver’s license applications and voter registration at DMVs. In order to “increase the number of eligible citizens who register to vote,” 52 U.S.C. § 20501(b)(1), the NVRA is designed to eliminate registration barriers by strictly limiting what a State may demand from an individual who is registering to vote. As pertinent here, a State “may require only *the minimum amount of information* necessary to . . . assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20504(c)(2)(B) (emphasis added).

The statutory term “minimum” has an ordinary meaning that can be readily understood. “Minimum” means “[t]he least possible quantity or degree” or “[t]he lowest degree or amount reached or recorded; the lower limit of variation.” American Heritage Dictionary, Fifth Edition, 2015. “It is . . . a cardinal principle of statutory construction . . . [to] give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted). And “the function of the courts” in interpreting a law “is to construe the language so as to give effect to the intent of Congress.” *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542 (1940). In order to have meaningful effect in the NVRA, the clause “minimum amount of information necessary” must be interpreted as limiting to a bare minimum the information a State can demand from an applicant before registering them to vote.

The word “minimum” appears only once in the text of the NVRA. For instance, in the comparable provision placing limits on the contents of the Federal Form, the NVRA does not use the phrase “minimum amount of information.” Cf. 52 U.S.C. § 20508(b)(1). When interpreting a statute, “if a word is used in one phrase but omitted in another, the two phrases are intended to mean something different.” *Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990). It therefore follows that, of the three registration methods established by the NVRA, Congress intended that members of the public would face the lowest possible barriers when registering to vote at DMVs.

2. The DPOC Law Requires Submission of Documents that Exceed the Minimum Amount of Information Necessary to Evaluate a Motor-Voter Registrant’s Eligibility to Vote.

The DPOC law goes well beyond the “minimum amount of information” needed and imposes a major barrier to registration that has already disenfranchised tens of thousands of Kansans. Recent authority from the Supreme Court and the Tenth Circuit has now established the following principles: (1) Under the Supreme Court’s decision in *ITCA*, Kansas cannot force

voters who register using the Federal Form to provide additional documentary proof beyond a sworn attestation of citizenship; and (2) under the Tenth Circuit's *EAC* decision, no constitutional conflict is created by requiring Kansas to rely on a sworn attestation of citizenship to assess an applicant's eligibility to vote. Because motor-voter registrants must be registered to vote based on the "minimum amount of information necessary" to evaluate citizenship, and the *ITCA* and *EAC* decisions approved Federal Form registration based on a sworn attestation of citizenship without documentary proof, Defendants may not demand more than that minimum. Kansas's DPOC requirement is "unnecessary" as a matter of law, both in light of this precedent, and in light of the State's pre-2013 history of registering voters based on a sworn attestation of citizenship alone, without any additional documentation requirement. The DPOC requirement thus contravenes the plain text of the NVRA and frustrates the simplified registration system designed by Congress.

The *ITCA* and *EAC* decisions have effectively settled the "minimum amount of information" a State needs to evaluate citizenship eligibility for federal elections. *ITCA* holds that "the NVRA forbids States to demand that an applicant submit additional information beyond" the sworn attestation required on the Federal Form itself. 133 S. Ct. at 2257. A State may deny registration to specific individuals based on information already in its possession that demonstrates that a registrant is not an eligible voter. *Id.* But it cannot demand that an individual provide more than the sworn attestation as a precondition for registering to vote. *Id.*

The only leeway *ITCA* allowed the State was an opportunity to litigate whether the NVRA "precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2259. *ITCA* observed that if federal law made it impossible for a State "to effectuate its citizenship requirement," *id.* at 2260, then reexamination of the federal

statute might be warranted, under the canon of constitutional avoidance. But Defendant Kobach raised precisely this argument and was rebuffed by the Tenth Circuit.

The *EAC* case affirms that no constitutional conflict is created by requiring States to rely on a sworn attestation rather than documentary proof of citizenship. In *EAC*, the Tenth Circuit rejected Kobach’s contention that the absence of a documentary proof-of-citizenship requirement in the NVRA “unconstitutionally precludes [Kansas] from enforcing [its] laws intended to prevent noncitizen voting.” 772 F.3d at 1199. Rather, the *EAC* court held that Kansas had failed to prove that the Federal Form’s lack of a documentary proof-of-citizenship requirement “precluded [it] from obtaining information that is necessary to enforce [Kansas’s] voter qualifications.” *Id.* at 1196-97 (internal quotation marks and citation omitted). As the Tenth Circuit observed, the Federal Form need not incorporate a documentary proof-of-citizenship requirement in part because there are “no fewer than five alternatives to requiring documentary evidence of citizenship that states can use to ensure that noncitizens do not register using the Federal Form.” *Id.* at 1197.⁶

⁶ The EAC’s 2014 administrative determination carefully considered the petitioning States’ request and concluded that “The Requested Proof-of-Citizenship Instructions Would Require Applicants to Submit *More Information Than is Necessary* to Enable Election Officials to Assess Eligibility.” Ex. 8, Miller Memo, at 28 (emphasis added). *First*, the EAC reviewed Kansas’s alleged cases of voter fraud and observed that, even presuming that these allegations were accurate, a documentary proof-of-citizenship requirement is unnecessary because the evidence “at most suggests that 21 of 1,762,330 registered voters, approximately 0.001 percent, were unlawfully registered noncitizens around the time [Kansas’s] new proof-of-citizenship requirement took effect [T]hese percentages are exceedingly small.” *Id.* at 34. *Second*, the EAC reasoned that there are five alternative means for States to enforce citizenship requirements: (1) deterring fraud by prosecuting cases where noncitizens have voted; (2) cross-referencing the records of prospective registrants with the proof-of-citizenship documents retained by the DMVs; (3) examining prospective jurors’ representation of their citizenship when being considered for jury duty; (4) cross-referencing the federal SAVE database, which stores information regarding noncitizen residents in the United States; and (5) verifying birth data via the Electronic Verification of Vital Events system promulgated by the National Association for Public Health Statistics and Information Systems. *Id.* at 37-40.

ITCA holds that it is legitimate to require a State to rely on a sworn attestation of citizenship under the NVRA while the *EAC* case holds that it is constitutional to do so. These authorities control the outcome in this case. As the Tenth Circuit concluded, a documentary proof-of-citizenship requirement is *not* “necessary to enforce [Kansas’s] voter qualifications.” *EAC*, 772 F.3d at 1196-97. Because documentary proof is not necessary to enforce the qualification, Defendants’ attempt to impose that requirement on DMV registrants exceeds the “minimum amount of information necessary” to assess an applicant’s eligibility as a citizen. 52 U.S.C. § 20504(c)(2)(B). Applying the DPOC law to motor-voter registrants therefore violates the plain text of the NVRA.

Indeed, Kansas’s own history of NVRA registrations demonstrates that the DPOC law is not necessary. Kansas itself has previously required less information to gauge citizenship eligibility. When Congress enacted the NVRA in 1993, Kansas passed legislation to implement procedures for motor-voter registrations—procedures that remain codified at Kan. Stat. Ann. § 25-2352. Until 2013, this law, as well as Kansas’s general voter registration statute, Kan. Stat. Ann. § 25-2309, permitted voters to register by providing a sworn attestation of citizenship; in

Similarly, the EAC’s predecessor agency, the Federal Election Commission (“FEC”) did not deem a documentary proof-of-citizenship requirement necessary when it developed the initial Federal Form after an extensive notice and comment rulemaking process. *See* 58 Fed. Reg. 51,132 (Sept. 30, 1993) (Advance Notice of Proposed Rulemaking); 59 Fed. Reg. 11,211 (Mar. 10, 1994) (Notice of Proposed Rulemaking); 59 Fed. Reg. 32,311 (June 23, 1994) (Final Rules); *see also* 11 C.F.R. § 9428.4(b)(1)-(3) (specifying the information the Federal Form can require of an applicant with no reference to documentary proof of citizenship). Indeed, during the course of rulemaking, the FEC observed: “While U.S. citizenship is a prerequisite for voting in every state, . . . [t]he issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words ‘For U.S. Citizens Only’ will appear in prominent type on the front cover of the national mail voter registration form.” 59 Fed. Reg. 32,311, 32,316 (June 23, 1994). No further documentary proof of citizenship was required.

other words, for nearly two decades after the passage of the NVRA, Kansas itself did not deem documentary proof of citizenship to be “necessary.”

While Kansas’s legislative policy preferences may have changed, those new preferences cannot trump the federal registration standards mandated by Congress. A State’s policy preferences must yield to federal mandates unless and until Congress changes federal law. *See ITCA*, 133 S. Ct. at 2256-57 (“The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under [the Elections Clause], which empowers Congress to ‘make or alter’ state election regulations.”). Congress retains “plenary authority . . . to conscript states to carry out federal enactments.” *Gonzalez*, 677 F.3d at 394 (9th Cir. 2012).

Permitting Defendants to apply the DPOC law to motor-voter registrants would be equivalent to reading the text “minimum amount of information necessary” out of 52 U.S.C. § 20504(c)(2)(B) and substituting it with “whatever information State election officials deem helpful” to evaluating a registrant’s eligibility. That is not a valid construction of the statute. *See Cohen v. United States*, 105 Fed. Cl. 733, 751 (2012) (“Because plaintiff’s reading does not give effect to the word ‘minimum,’ the court declines to adopt plaintiff’s interpretation of the statute.” (citing *Hohn v. United States*, 524 U.S. 236, 249 (1998) (“We are reluctant to adopt a construction making another statutory provision superfluous.”))), *aff’d*, 528 F. App’x 996 (Fed. Cir. 2013). Defendants are not entitled to supersede the NVRA by substituting their own judgment for that of Congress.

The application of the DPOC law to motor-voter registrants is a particular problem for those who wish to register to vote while renewing a driver’s license. Kansas’s Division of Vehicles does not require that individuals applying to renew a driver’s license show

documentary proof of legal presence to renew their licenses. Kan. Stat. Ann. § 8-247(d)(1).⁷ For this reason, many Kansans do not bring their proof-of-citizenship documents to the DMV when they seek to renew, and are blocked by the DPOC law when they elect to register to vote. This is precisely the situation in which Plaintiffs Ortiz, Fish, and Bucci found themselves. *See* Ex. 3, Ortiz Decl. ¶¶ 10-11; Ex. 2, Fish Decl. ¶¶ 7-8; Ex. 4, Bucci Decl. ¶¶ 5-6, 9. And for many voters, this is no mere inconvenience: for Plaintiff Bucci, the cost of obtaining her birth certificate from the State where she was born represents a significant financial burden. *See* Ex. 4, Bucci Decl. ¶ 13. For Plaintiff Fish, the DPOC requirement appears completely insurmountable: he was born on an out-of-State military base that closed decades ago and has been unable to locate a record of his birth. *See* Ex. 2, Fish Decl. ¶ 10.

Congress enacted the NVRA not to defer to States' registration preferences but with the express purpose of *overriding* State barriers to voter registration. *See* 52 U.S.C. § 20501 (congressional findings 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”). In sum, the DPOC law, as applied to motor-voter registrants, conflicts with that purpose and with the plain text of the NVRA. Plaintiffs are thereby likely to prevail on their claim that the law is preempted.

3. The DPOC Law Requires Motor-Voter Registrants to Produce Duplicate Information in Violation of the NVRA.

The DPOC law, as implemented, further conflicts with the NVRA because U.S. citizens who are initial applicants for a Kansas driver's license must already provide documentary proof

⁷ *See also* John Hanna, “Kansas Won't Require Proof of Legal Residency for Driver's License Renewals,” *Kan. City Star*, Sept. 16, 2013, <http://www.kansascity.com/news/local/article327552/Kansas-won%E2%80%99t-require-proof-of-legal-residency-for-driver%E2%80%99s-license-renewals.html>.

of citizenship in order to obtain a Kansas driver's license, and yet Kansas requires many of these motor-voter registrants to submit such documentation a *second* time in order to become registered. The NVRA is designed to streamline the motor-voter registration process by precluding States from requiring an individual to produce the same information multiple times: "The voter registration application portion of an application for a State motor vehicle driver's license . . . may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature [or an attestation or restatement of eligibility requirements])." 52 U.S.C. § 20504(c)(2). The Supreme Court has explained that "[s]tates cannot force driver's license applications to submit the same information twice (on license applications and again on registration forms)." *Young*, 520 U.S. at 286. Requiring an individual to present such documents a second time as a condition of voter registration squarely conflicts with the NVRA's prohibition against duplicate information in 52 U.S.C. § 20504(c)(2)(A).

Yet this is exactly what the DPOC law requires of many first-time driver's license applicants. In order to obtain a Kansas driver's license, a first-time applicant must produce documentary "proof of age and proof of identity." Kan. Stat. Ann. § 8-240(b)(1). Furthermore, under Kansas law, a DMV "shall not issue any driver's license or instruction permit to any person who fails to provide proof that the person is lawfully present in the United States." Kan. Stat. Ann. § 8-240(b)(2). For U.S. citizens, the Kansas Department of Revenue, Division of Vehicles, requires an applicant to produce one original document from a list of five accepted for U.S. citizens: a certified U.S. birth certificate, unexpired United States Passport or Passport Card, U.S. Consular Report of Birth Abroad, Certificate of Naturalization, or Certificate of

Citizenship.⁸ A U.S. citizen applying for the first time for a Kansas driver’s license *cannot* obtain one without showing one of these documents, each of which is also deemed acceptable under Kan. Stat. Ann. § 25-2309(*I*) to establish citizenship for purposes of voter registration.

The implication of the above is that, in order to receive a Kansas driver’s license, any U.S. citizen who is a first-time driver’s license applicant must show documentation to the DMV that is also sufficient to establish citizenship for voter registration purposes. And yet, many such citizens who have successfully obtained licenses—including Plaintiffs Stricker, Boynton, and Hutchinson—have nevertheless found themselves on the suspense list. *See* Ex. 5, Stricker Decl. ¶¶ 7-8, 14; Ex. 6, Boynton Decl. ¶¶ 6, 10; Ex. 7, Hutchinson Decl. ¶¶ 6, 10-11, 14-15. The fact that they had produced citizenship documents at the DMV was apparently insufficient; Defendants refused to register them because they had not provided documentary proof of citizenship a *second* time, directly to an elections official. *See* Ex. 5, Stricker Decl. ¶¶ 7-8, 14; Ex. 6, Boynton Decl. ¶¶ 6, 10; Ex. 7, Hutchinson Decl. ¶¶ 14-15.

This bureaucratic maze is no accident; it is a direct result of how Kansas designed its DPOC law. A provision of Kansas State law expressly authorizes Kansas officials to request duplicate information in the driver’s license and voter registration portions of the motor-voter application. Kan. Stat. Ann. § 25-2352(b)(1) provides that “[t]he voter registration section of the [NVRA] application . . . [m]ay require . . . information that duplicates, or is in addition to, information in the driver’s license or nondriver’s identification card section of the application . . . to enable Kansas election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” The State’s statutory requirement is directly contrary to the NVRA’s prohibition against requiring “any information that duplicates

⁸ Kan. Department of Revenue, *Driver’s License Proof of Identity*, <http://ksrevenue.org/dmvproof.html>.

information required in the driver’s license portion of the form.” 52 U.S.C. § 20504(c)(2)(A).

Under the Elections Clause, the State law requirement must yield to the federal statute.

C. The NVRA’s Legislative History Demonstrates Congress’s Clear Intent to Preclude States from Requiring Documentary Proof of Citizenship as a Condition for Registration.

The conflict between the NVRA and the DPOC law as applied to motor-voter registrants—which is clear from the plain text of the statute—is doubly confirmed by the NVRA’s legislative history. Most significantly, Congress contemplated and specifically rejected an amendment that would have authorized States to condition voter registration on the submission of documentary proof of citizenship. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Congress’s rejection of the very registration barrier that Defendants seek to impose here is decisive proof that the NVRA preempts the DPOC law.

Three principles regarding congressional intent emerge from the legislative reports that accompanied passage of the NVRA. *First*, the core objective of the NVRA is to make it easier to register to vote in federal elections, which militates against permitting States to add obstacles to registration at DMVs beyond those found in the statute itself. *See* H.R. Rep. No. 103-9, at 3-4 (1993) (explaining that the principal purpose of the NVRA is to address “difficulties encountered by eligible citizens in becoming registered to vote” and to “make the registration process more accessible,” citing “extensive hearings” in which “the Committee heard a variety of witnesses testify that registration procedures in the United States were not uniform, were not nondiscriminatory and, in some cases, were interpreted in such a manner as to deny eligible citizens their right to vote.”); S. Rep. No. 103-6, at 3 (1993) (stating that the “legislation will

provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act.”).

Second, Congress understood an attestation under oath to be a sufficient means of verifying a motor-voter registrant’s citizenship status. *See* S. Rep. No. 103-6, at 11 (expressing the Senate Committee’s expectation that individuals who are ineligible to vote would independently decline to register to vote after being apprised of the registration requirements, and that the Act “provides sufficient safeguards to prevent noncitizens from registering to vote” by requiring voter registration applicants to sign a sworn attestation that they satisfy the eligibility requirements, combined with existing safeguards around driver’s license applications at DMVs: “the processing of voting registration applications at the motor vehicles agency would lessen the likelihood of such fraud and certainly would not make it greater than it is now.”); H.R. Rep. No. 103-9, at 7-8 (“The Committee would expect that any driver’s license applicant who does not meet the requirements for eligibility to vote would decline to do so. It is important, therefore, that each applicant be advised of the voting requirements and the need to decline to register if he or she does not meet the requirements.”).

Third, the NVRA, as passed out of committee in both the Senate and the House, was understood by members of Congress as *prohibiting* States from imposing a documentary proof-of-citizenship requirement on applicants using the methods of registration prescribed by the statute. And Congress specifically rejected an amendment that would have permitted States to impose such citizenship documentation requirements. The dissenting members of the Senate Committee clearly understood that the legislation prevented States from requiring documentary proof of citizenship. They protested that the bill would “prohibit[]” States from “asking applicants to supply identification to determine that persons registering are who they claim to be

or live where they say they do.” S. Rep. No. 103-6, at 52-53. They argued that “the incidence of illegal alien voting . . . might be combated by requiring proof of citizenship at the time of registration,” but noted that the simplified registration methods established under the NVRA “would preclude such corrective action.” *Id.* at 55. The dissenting House members shared that interpretation. *See* H.R. Rep. No. 103-9, at 35 (protesting that the bill “limits the state’s ability to confirm independently the information contained in voter registration applications,” including a requirement that applicants show documentary proof of citizenship as a condition of voter registration at DMVs).

In response to this concern, once the bill reached the floor of the Senate, an amendment was proposed that would permit States to impose such documentation requirements, but the amendment was ultimately rejected. Senator Alan Simpson introduced a floor amendment providing that “[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. 5098 (Mar. 16, 1993). In introducing the amendment, Senator Simpson stated that the amendment would “allow[] States to check documents to verify citizenship.” *Id.*; *see also id.* at 5099.6 (explaining that he “offer[ed] [the] amendment to try to ensure that States will continue to have the right, if they wish, to require documents verifying citizenship.”). In reconciling the House and Senate bills, however, the conference committee deleted the Senate’s amendment on the ground that it was “*not necessary or consistent with the purposes of this Act.*” H.R. Conf. Rep. No. 103-66, at 23 (emphasis added). The committee was concerned that the amendment would “permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program” and could “adversely affect the administration of the other registration programs as well.” *Id.*

The removal of the Simpson amendment is a direct “rejection of the very language that would have” permitted States to adopt and enforce restrictions like the Kansas DPOC law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-580 (2006). Under the principles of statutory construction, this rejection “weighs heavily against the . . . interpretation” that States may nevertheless require documentary proof of citizenship as a condition of registration. *Id.*; *see also Doe v. Chao*, 540 U.S. 614, 622-623 (2004). Indeed, there would have been no need to debate the Simpson amendment in the first place if the NVRA permitted States to demand documentary proof of citizenship.

In sum, there can be no doubt that Congress intended to preclude barriers to registration on motor-voter registrants such as the DPOC law.

D. Kansas’s DPOC Law Undermines the Purposes of the NVRA.

This case may be resolved on the basis of the plain text of the statute. But the facts on the ground in Kansas also demonstrate that it is simply impossible to reconcile the sweeping effect of the DPOC law on voter participation with the NVRA’s express goals of “increas[ing] the number of eligible citizens who register to vote in elections for Federal office” and “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office.” 52 U.S.C. § 20501(b). Congress enacted the NVRA based in part on findings that failure to register was the primary reason eligible citizens gave for not voting. *See* H.R. Rep. No. 103-9, at 3. Congress concluded that “low voter turnout in Federal elections poses potential serious problems in our democratic society.” *Id.* at 4. Permitting Defendants to apply the DPOC law to motor-voter registrants would eviscerate the central purpose of the NVRA: streamlining the process of voter registration and increasing the number of Americans who register to vote.

The impact of the DPOC law is not abstract, as exemplified by the experiences of Plaintiffs Fish and Bucci—who either cannot obtain or face significant burdens in attempting to

obtain their birth certificates. *See* Ex. 2, Fish Decl. ¶ 10; Ex. 4, Bucci Decl. ¶¶ 11, 13. They, along with tens of thousands of other Kansans, have been prevented by Defendants from becoming properly registered to vote. An astounding 14% of new registrants in Kansas have wound up on the State’s “suspense list” due to the DPOC requirement since January 1, 2013. *See* Ex. 1, McDonald Rep., at 2-3. This represents more than 35,000 individuals who would have been seamlessly registered were it not for Defendants’ application of the DPOC law. *See id.* After Defendant Kobach began purging eligible voters in September 2015, more than 12,000 registrants who were suspended for lack of proof of citizenship have been removed from the voter lists altogether. *Id.* at 16. Another estimated 13,730 were on the “suspense list” for lack of proof of citizenship as of December 11, 2015. *Id.* at 13.

The burden of Kansas’s registration barriers falls disproportionately on groups that are already much less likely to become registered, and for whom additional bureaucratic hurdles to registration represent a significant deterrent to participation. Dr. Michael McDonald, a political scientist and a leading expert on United States elections who has served as an expert witness in several cases involving voter registration practices, analyzed the pool of voters on the suspense list due to the DPOC law, and found that these voters are disproportionately young and unaffiliated with a political party. *See* Ex. 1, McDonald Rep., at 14-15. Would-be voters aged 18-29 and those who do not affiliate with a major political party are greatly overrepresented on the suspense and purge lists. Dr. McDonald found that young Kansans are *three times more likely* to be on the suspense list due to the DPOC law versus their representation on the active and inactive voter rolls: “44.6% of registrants on the Suspense List for reason of not providing citizenship documentation are age 18-29, compared to only 14.9% among Active and Inactive registrants.” *Id.* at 14. Similarly, Kansas residents who do not affiliate with a political party were

nearly twice as likely to have been placed on the suspense list: “53.9% of registrants on the Suspense List for reason of not providing citizenship documentation are Unaffiliated with a political party, compared to 31.1% among Active and Inactive registrants.” *Id.*

The disproportion is due in part to the discriminatory exemptions in the DPOC law, which favor voters who are already registered. Voters who were registered in Kansas prior to 2013 have been grandfathered in and exempted from the DPOC requirement. *See* Kan. Stat. Ann. § 25-2309(n) (“Any person who is registered in this state on the effective date of [the DPOC law] is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship.”); *see also* Kan. Stat. Ann. § 25-2309(p) (same exemption for registered voters who move within Kansas). Because of this exemption, younger voters registering for the first time and unaffiliated voters who have not participated consistently in the past are most likely to be obstructed by the registration restriction. Thus the DPOC law thwarts Congress’s goal of increasing registration numbers by erecting barriers for new and less frequent voters and favoring entrenched groups who are already active in the political process.

The DPOC law is likely to inhibit participation because younger and unaffiliated Kansans are precisely the voters who are most likely to be dissuaded from voting by registration barriers. As detailed by Dr. McDonald, the greater the “cost” of voting is in terms of logistical difficulties and bureaucratic hurdles to overcome, the less likely it is that citizens will exercise that right. *See* Ex. 1, McDonald Rep., at 18-19. Not all populations are equally affected by the “calculus” or “cost” of voting. *Id.* at 21-22. Young and unaffiliated citizens are on average less politically engaged than other demographic groups and are less likely to tolerate heightened requirements for registering to vote. *Id.* The DPOC law therefore has the greatest impact on the populations of citizens that are least likely to surmount obstacles to becoming registered. For these groups of

voters, the NVRA's simplified voting systems are most important to ensuring political participation and increasing numbers of registered voters.

Congress made motor-voter registration the centerpiece of the NVRA and intended it to be the most accessible method of voter registration with the goal of reaching citizens who would not otherwise participate in the political process. The House Committee that introduced the NVRA viewed a "simultaneous application procedure" at DMVs to be "the broadest, most effective and cost-efficient method of registration" because motor vehicle agencies are the most frequent point of contact between citizens and State government. H.R. Rep. No. 103-9, at 4; *see also* S. Rep. No. 103-6, at 5 ("The driver's license procedure appears to be ideally suited to the purpose of registering voters."). The House Committee was particularly interested in reaching citizens who would otherwise be unlikely to register. *See* H.R. Rep. No. 103-9, at 5 ("Many of those applying for identification cards fell into the demographic categories of those least likely to be registered."). By increasing the difficulties and hassles of becoming registered, the DPOC requirement deters political participation by the demographic groups who are already least likely to vote. Congress intended the NVRA to do precisely the opposite, and Defendants' application of the DPOC law directly undermines that goal.

These barriers have been erected despite barely any evidence of actual voter fraud, the purported reason that documentary proof of citizenship is necessary to evaluate voter eligibility. Defendant Kobach has repeatedly made public statements characterizing the threat of noncitizens voting as "massive" and "pervasive," relying on anecdotal reports including stories of a "Muslim lady" who allegedly double voted in Wichita, and "alien hog farm workers" supposedly bussed in from Oklahoma to vote illegally in Kansas. Expert Report of Lorraine C. Minnite, PhD, Feb. 25, 2016, at 16-20, 22-23, 32, attached to Danjuma Decl. as Ex. 9. Although Defendant Kobach

also sought and obtained extraordinary authority from the Kansas legislature to prosecute cases of voter fraud directly and halt the supposedly “massive” problem of “aliens registering to vote,” he has not, as of this date, identified a single noncitizen in Kansas to prosecute for voter fraud. *See id.* at 27. Dr. Lorraine Minnite, a political scientist and a leading expert on voter fraud who has testified on this subject as an expert in numerous cases thoroughly investigated these and other claims that Defendant Kobach has made concerning noncitizen registration and voting, and found them unsubstantiated. As Dr. Minnite concluded, there is little to no evidence of widespread noncitizen voter registration and certainly no evidence to justify disenfranchising tens of thousands of eligible citizens. *See id.* at 1, 32-33.

Further, Defendant Kobach has offered very little evidence of noncitizens fraudulently registering to vote at DMVs. In a November 17, 2015 letter to the Executive Director of the Election Assistance Commission, Defendant Kobach’s office presented a spreadsheet identifying eighteen noncitizens who supposedly had registered or attempted to register to vote in Kansas’s Sedgwick County (seven who had registered prior to 2013, and eleven who had attempted to register since 2013). Ex. 9, Minnite Rep., at 28-29. Of the seven noncitizens who registered to vote in Sedgwick County, a total of three were registered at a DMV in the years from 2003 to 2012 – a rate of less than 1 noncitizen registration at a DMV every three years. *See id.*; *See also id.* at Appendix D. *None of the three ever actually voted. See id.* at 28-29. If one were to take the figure of eighteen noncitizens attempting to vote at face value, this number would represent 0.0066% of the 270,801 registered voters in Sedgwick County, *id.* at 29, a percentage dwarfed by the percentage of qualified new voters who have attempted to register but who have been blocked by the DPOC Law.

More fundamentally, it appears that attempts by noncitizens to register to vote at DMVs are the result of mistakes or negligence by *State officials themselves*. In a recent article in the Washington Post, Defendant Kobach said that workers at the DMV often unwittingly register noncitizens to vote.⁹ Mr. Kobach stated, “Thousands and thousands of driver’s licenses are issued every day, many of those to noncitizens, and it appears that noncitizens are routinely being asked, ‘Would you like to register to vote?’ So we had a lot of aliens getting on the voting rolls.”¹⁰ Similarly, in a recent court hearing, Defendant Kobach stated on the record that “accidental registration at the DMV is a huge problem all across this country, because the lady behind the desk says, oh, when would you like to register to vote, because she said that to 400 people before you walked up. So many people register accidentally who are not U.S. citizens.”¹¹ To the extent such accidental registrations of noncitizens actually occur, there is a simple and direct solution: *Defendants can properly train their own employees*. As noted, *supra* note 3, applicants for a driver’s license in Kansas must present to a DMV worker some form of documentary proof of legal presence, a document that will clearly identify the applicant as a citizen or not. The potential for negligence by DMV workers clearly cannot justify registration barriers that have disenfranchised tens of thousands of Kansans, particularly when the State can solve the problem by simply training its officers more carefully.

⁹ Sari Horwitz, “Want to vote in this state? You have to have a passport or dig up a birth certificate,” *Washington Post*, Feb. 19, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/>.

¹⁰ *Id.*

¹¹ Tr. of TRO/Prelim. Inj. Hr’g at 66, *League of Women Voters v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 22, 2016), attached in excerpted form to Danjuma Decl. as Ex. 10.

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Suspense List and 90-Day Purge Rule Violate the NVRA.

Defendants have further violated the NVRA by suspending and purging registrants from the State's voting system if they did not provide documentary proof of citizenship. By the end of September 2015, more than 32,000 registrants were trapped in limbo in the Kansas voter system for failure to provide documentary proof of citizenship. Ex. 1, McDonald Rep., at 10-11. There is little doubt that the huge numbers of Kansans blocked from voting due to the DPOC law were a source of embarrassment to Defendants. By adopting and enforcing the 90-Day Purge Rule against those who purportedly have not provided documentary proof of citizenship, Defendants have compounded their violation of the NVRA by establishing an illegal and automatic system to remove registrants from the State's voter rolls.

Section 8 of the NVRA prevents a State from manipulating the list of registrants and removing eligible voters. The NVRA mandates that "each State shall . . . ensure that any eligible applicant is registered to vote in an election" if, while registering in conjunction with a driver's license application, "the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority" within the specified timeframe. 52 U.S.C. § 20507(a)(1)(A). This section lays out an exclusive set of reasons for removing registrants from voter lists: (1) if the registrant requests it; (2) if State law provides that criminal convictions or mental incapacity makes a registrant ineligible; and (3) under a general program where a State makes reasonable efforts to remove ineligible voters due to the registrant's death or change in residence. 52 U.S.C. §§ 20507(a)(3)-(4). Furthermore, "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform,

nondiscriminatory, and in compliance with the Voting Rights Act of 1965 [52 U.S.C. §§ 10301-10314].” 52 U.S.C. § 20507(b).

Defendants are in violation of Section 8 of the NVRA because they do not fully register individuals who have submitted valid motor-voter registration forms unaccompanied by documentary proof of citizenship. Defendants instead place these eligible voters into the limbo of the State’s suspense list. Defendants then automatically purge these voters from the State’s voter registration system after 90 days if they do not provide documentary proof of citizenship. Failure to provide documentary proof of citizenship is not a permissible reason for removing an eligible voter from a State’s registration system under 52 U.S.C. § 20507(a).

III. Plaintiffs Have Suffered and Will Continue to Suffer Irreparable Harm as a Result of the Interference with their Right to Vote.

Plaintiffs, along with thousands of other eligible Kansas voters, will be irreparably harmed if Defendants continue to apply the DPOC requirement to motor-voter registrants. Courts have traditionally looked at two factors in determining whether a movant will suffer irreparable harm: (1) whether the injury is “certain [and] great,” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citing *Wis. Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No. 15-4010-DDC-KGS, 2015 WL 736344, at *3-4 (D. Kan. Feb. 20, 2015), or (2) whether the harm cannot be adequately compensated with an effective monetary remedy following a trial, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001); *Neal v. Lewis*, 259 F. Supp. 2d 1178, 1181 (D. Kan. 2003). Plaintiffs satisfy either approach to establishing irreparable harm.

“There is no right more basic in our democracy than the right to participate in electing our political leaders.” *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1440-41 (2014);

see also Reynolds v. Sims, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”). Preventing eligible voters from registering to vote constitutes a serious and certain harm that is irreparable. *See Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (“the right to vote is a precious and fundamental right” (internal quotation marks and citation omitted))

Defendants have irreparably harmed Plaintiffs and the proposed class they represent by blocking them from exercising their right to vote. Each named Plaintiff wants to vote in upcoming elections. *See* Ex. 4, Bucci Decl. ¶ 7; Ex. 7, Hutchinson Decl. ¶ 9; Ex. 3, Ortiz Decl. ¶ 14; Ex. 2, Fish Decl. ¶ 7; Ex. 5, Stricker Decl. ¶ 5; Ex. 6, Boynton Decl. ¶ 12. The August statewide primary election is fewer than six months away, and the voter registration deadline is a little over four months away, on July 12; the November general election is fewer than nine months away with a voter registration deadline of October 18, 2016.¹² Furthermore, several named Plaintiffs have already been deterred or prevented from voting in the 2014 general election because of the DPOC law. *See* Ex. 2, Fish Decl. ¶ 13; Ex. 5, Stricker Decl. ¶¶ 12-14; Ex. 6, Boynton Decl. ¶ 10.

Faced with similar considerations, courts have repeatedly held that interfering with an individual’s right to vote constitutes irreparable harm. *See Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of right to vote is unquestionably “irreparable harm”); *Obama for Am.*, 697 F.3d at 436. Indeed, courts have specifically held that a State causes irreparable harm when it fails to properly register a voter pursuant to the NVRA. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004), *aff’d*, 408 F.3d 1349 (11th Cir.

¹² *See* Office of the Kansas Secretary of State, *A Guide to Voting in Kansas* (2016), http://www.kssos.org/forms/elections/A_Guide_to_Voting_in_Kansas.pdf.

2005); *see also League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (finding irreparable harm on claims that State law conflicted with NVRA “because the denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm”).

In addition, constitutional violations “unquestionably constitute[] irreparable harm.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Preservation of constitutional rights is so vital that typically no further showing is needed for a preliminary injunction once a movant has demonstrated that a constitutional violation. *Marie v. Moser*, 65 F. Supp. 3d 1175, 1204 (D. Kan. 2014) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” (quoting *Kikumura v. Hurley*, 424 F.3d 950, 963 (10th Cir. 2001))); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995). Here, Defendants’ deprivation of Plaintiffs’ right to vote combined with their violation of the Elections Clause of the Constitution undoubtedly establishes irreparable harm.

The harm is also irreparable because the injury—being prevented from voting—is not compensable. A movant suffers irreparable harm when the court would be unable to grant an “effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain.” *Dominion*, 269 F.3d at 1156; *see Neal*, 259 F. Supp. 2d at 1181. Absent injunctive relief, Plaintiffs and other eligible Kansas voters in the proposed class will miss their opportunity to vote in upcoming elections. If Plaintiffs are denied their right to vote in these elections, there will be no way to compensate them after the fact. *See Charles H. Wesley*, 324 F. Supp. at 1368 (finding irreparable harm because “no monetary award can remedy the fact that [a plaintiff who should have been registered pursuant to the NVRA] will not be permitted to vote in

the precinct of her new residence.”) They would therefore continue to suffer irreparable harm without an injunction. *See Potawatomi*, 253 F.3d at 1250-51; *see also Hoblock v. Albany Cty. Bd. of Elections*, 341 F. Supp. 2d 169, 176 (N.D.N.Y. 2004) (“Money cannot compensate these Plaintiffs for the harm of being shut out of the political process, and therefore they have met the requirement of showing irreparable harm.”).

IV. The Balance of Equities Tips Sharply in Plaintiffs’ Favor.

A movant is entitled to a preliminary injunction if the movant’s threatened injury without the preliminary injunction outweighs the injury to the other party under the preliminary injunction. *Awad v. Ziriya*, 670 F.3d 1111, 1125 (10th Cir. 2012). Put another way, a movant must show that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party. *See Newland v. Sebelius*, 542 F. App’x 706, 709-10 (10th Cir. 2013). Here, the balance of hardships tips overwhelmingly in favor of Plaintiffs.

Plaintiffs here have each been denied their fundamental right to participate in electing their federal representatives. The Supreme Court has also explained that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Courts within the Tenth Circuit have acknowledged the significant weight to be afforded to a movant when infringement of fundamental rights is at stake. “[W]hen a law is likely unconstitutional, the interests of those [whom] the government represents . . . do not outweigh a plaintiff’s interest in having [her] constitutional rights protected.” *Marie*, 65 F. Supp. 3d at 1205 (brackets in original) (quoting *Hobby Lobby*, 723 F.3d at 1145).

By contrast, the only harm Defendants would suffer through the granting of the injunction is the administrative inconvenience of halting enforcement of the DPOC law. In *ITCA*, the Supreme Court held that States must register Federal Form applicants who did not provide documentary proof of citizenship. Applying that same requirement to motor-voter

registrants cannot possibly constitute significant injury to the State. And as the Supreme Court has recognized, “administrative convenience” cannot justify practices that impinge upon fundamental rights. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *see also Newland*, 542 F. App’x at 709 (“[T]he only harm HHS would face from the injunction would be the inability to ‘enforce regulations that Congress found to be in the public interest’ and that this harm ‘pale[s] in comparison to the possible infringement upon [Plaintiffs’] constitutional and statutory rights.’” (citation omitted)). Here, to the extent that Defendants face any difficulty from the inability to enforce the DPOC law, that inconvenience pales in comparison to the infringement upon Plaintiffs’ right to vote.

V. The Preliminary Injunction Will Serve the Public Interest.

Plaintiffs are entitled to a preliminary injunction where the injunction would not be adverse to the public interest. *See Awad*, 670 F.3d at 1125; *see also, e.g., Neal*, 259 F. Supp. 2d at 1181. Here, the granting of the preliminary injunction would not be adverse to the public interest. To the contrary, there is an extraordinary public interest in protecting the right to vote. *See, e.g., Wesberry*, 376 U.S. at 17.

A preliminary injunction here would further the public interest of preventing voter disenfranchisement and permitting participation by eligible voters in the upcoming elections. *See, e.g., U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) (“Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State’s] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].”). “While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote.” *Obama for Am.*, 697 F.3d. at 436 (internal quotation marks and citations omitted). Indeed, “[t]he public interest . . . favors permitting as many qualified

voters to vote as possible.” *Id.* at 437; *see also Awad*, 670 F.3d at 1132 (“[w]hile the public has an interest in the will of the [legislatures] being carried out . . . the public has a more profound and long-term interest in upholding an individual’s constitutional rights.” (citation omitted)). Indeed, the very legitimacy of the upcoming elections in Kansas will be called into question if tens of thousands of motor-voter registrants remain disenfranchised as a result of the DPOC Law and the 90-Day Purge Rule.

CONCLUSION

For all of the foregoing reasons, Defendants’ application of the DPOC law to motor-voter registrants should be preliminarily enjoined.

Dated this 26th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 26th day of February, 2016, 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/ Stephen Douglas Bonney
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