No. ______

In the

Supreme Court of the United States

SCOTT SCHWAB, *in his official capacity as Secretary of State for the State of Kansas*,
Petitioner,

v.

STEVEN WAYNE FISH, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Kansas Constitution establishes United States citizenship as a qualification to vote and directs the Legislature to provide for proof of eligibility. Thus, when an applicant in Kansas registers to vote, Kansas law requires "satisfactory evidence of United States citizenship." Kan. Stat. Ann. § 25-2309(l).

The questions presented are:

(1) Whether the United States Constitution prohibits Kansas from requiring applicants to provide proof of United States citizenship when registering to vote.

(2) Whether Section 5 of the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq.*, prohibits Kansas from requiring motor-voter applicants to provide proof of United States citizenship when registering to vote.

PARTIES TO THE PROCEEDING

Petitioner is Scott Schwab, in his official capacity as Secretary of State for the State of Kansas.

Respondents are Steven Wayne Fish, Donna Bucci, Charles Stricker, Thomas Boynton, Douglas Hutchinson, League of Women Voters of Kansas, and Parker Bednasek.

STATEMENT OF RELATED PROCEEDINGS

- *Fish v. Schwab*, No. 16-2105 (D. Kan.) (June 19, 2018)
- *Bednasek v. Schwab*, No. 15-9300 (D. Kan.) (June 19, 2018)
- *Fish v. Schwab*, No. 18-3133 (10th Cir.) (Apr. 29, 2020)
- *Bednasek v. Schwab*, No. 18-3134 (10th Cir.) (Apr. 29, 2020)

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in two consolidated cases that "involve identical or closely related [federal] questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 957 F.3d 1105. Pet. App. 1-80. The United States District Court for the District of Kansas's decision containing its Findings of Fact and Conclusions of Law is reported at 309 F. Supp. 3d 1048. Pet. App. 81-237. The Tenth Circuit's decision affirming the District Court's entry of a preliminary injunction is reported at 840 F.3d 710. Pet. App. 238-333.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its decision on April 29, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. Pet. App. 334-43.

STATEMENT OF THE CASE

The Kansas Constitution requires United States citizenship as a qualification to vote and directs the Legislature to provide for proof of eligibility. Kan.

Const. art. 5, §§ 1, 4.[1] This case concerns Kansas's authority to verify that qualification to vote.

1. This Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), set the stage for this dispute. There, this Court upheld an "Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court prior to election day, to present photo identification issued by the government." *Id.* at 185.

In the wake of *Crawford*, the Kansas Legislature refined its election security laws in several ways by passing the Kansas Secure and Fair Elections (SAFE) Act. *See* 2011 Kan. Sess. Laws 795–825 (codified in relevant part at Kan. Stat. Ann. § 25-2309). The SAFE Act had three principal components: (i) those seeking to register to vote in Kansas must provide documentary proof of citizenship; (ii) those seeking to cast their vote in person must provide photographic identification; and (iii) those seeking to cast their vote by mail must have their signature verified and provide a full Kansas driver's license or non-driver identification number. *See id.*

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[1] As the Tenth Circuit observed, it is unremarkable that Kansas insists on citizenship as a qualification to vote. Pet. App. 246. Every State requires United States citizenship to register to vote at the state level. *See, e.g.*, Keith Gaddie, Justin J. Wert, and Charles S. Bullock III, *Seats, Votes, Citizens, and the One Person, One Vote Problem*, 23 Stan. L. & Pol'y Rev. 431, 448 n.63 (2012); *see also* https://www.vote.org/voter-registration-rules/ (last visited July 20, 2020).

The SAFE Act enjoyed near-unanimous, bipartisan support. The Kansas Senate approved the measure on a 36-3 vote; the Kansas House of Representatives voted 111-11 in favor of it. Journal of the Kansas Senate, 2011 Session, at 474 (March 23, 2011); Journal of the Kansas House of Representatives, 2011 Session, at 788 (March 29, 2011). The SAFE Act was then presented to the Governor, who signed it into law on April 18, 2011. It became effective on January 1, 2013.

The SAFE Act's documentary proof of citizenship requirement operates during the registration process. When a person applies to register to vote, Kansas law directs the relevant election officer to assess whether the applicant is eligible for registration. Kan. Stat. Ann. § 25-2309(b). To do this, the applicant must indicate that he or she is a citizen of the United States of America and "the county election officer or chief state election official" must indicate "whether the applicant has provided with the application the information necessary to assess the eligibility of the applicant, including such applicant's United States citizenship." *Id.* at § 25-2309(b)(15), (16). While "[t]he county election officer or secretary of state's office shall accept any completed application for registration," "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." Kan. Stat. Ann. § 25-2309(l).

The SAFE Act contemplates several ways to establish citizenship for purposes of voter registration. The most direct method is to provide documentary proof of citizenship at the time of registration. In particular, the law declares that "[e]vidence of

citizenship shall be satisfied" by providing just one of thirteen different documents, such as a photocopy of a birth certificate or a valid or expired passport. Kan. Stat. Ann. § 25-2309(l).

Applicants who do not submit proof of citizenship at the time of registration have additional avenues to establish United States citizenship. The law provides a 90-day window in which an applicant can later provide documentary proof of citizenship that completes the registration process.[2] Kan. Admin. Reg. § 7-23-15(b). And the Secretary of State has instructed the county election officers to contact each voter registration applicant who has not provided proof of citizenship at least three times before the 90-day period expires. Pet. App. 46. If the applicant fails to provide proof of citizenship in that 90-day window, the application is cancelled. Kan. Admin. Reg. § 7-23-15(c). But there is no penalty for failing to provide proof within this time frame: the applicant simply "may submit a new voter registration application in order to become registered to vote." *Id.*

And for those unable to produce any of the thirteen categories of documents, there is yet another option. Kansas law provides that any applicant who "does not have any of the documents listed" in the statute has a right to request a hearing in order to offer other evidence of United States citizenship to the State Election Board, which consists of the Kansas Secretary

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[2] Eventually, the Secretary of State also entered into interagency agreements with other state agencies to utilize those agencies' records to verify whether the State already possessed proof of citizenship for the applicant. *See* Pet. App. 115-17.

of State, Kansas Attorney General, and the Lieutenant Governor. Kan. Stat. Ann. § 25-2309(m). And if the State Election Board denies the application, the applicant may seek judicial review of that determination in a state court. *See* Kan. Stat. Ann. § 25-2309(m)(3).

2. In 2015 and 2016, two separate lawsuits were filed in the United States District Court for the District of Kansas. Each proceeded on a different theory, but both sought to enjoin implementation of the documentary proof of citizenship requirement.

Bednasek. The first case filed, in which Respondent Parker Bednasek is the sole remaining plaintiff, asserted that the documentary proof of citizenship requirement deprived plaintiffs of the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment. Bednasek, a student from Texas attending the University of Kansas, chose not to provide his birth certificate when applying to be a Kansas voter because he disagreed with the Kansas law and because it was at his parents' home in Texas, although he later obtained a copy of it for his application to the Navy. Pet. App. 10

Fish. In the second case, several plaintiffs, including Respondent Steven W. Fish, asserted that Section 5 of the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. § 20501, *et seq.*, preempts Kansas's requirement of documentary proof of citizenship. Section 5 is commonly known as the "motor voter" provision, since it requires States to make an application for voter registration part of the State's application for a driver's license. *See* 52 U.S.C. § 20504(c)(1). Under that

provision, States are directed to create a form for use in conjunction with the driver's license application that also "shall serve as an application for voter registration." *Id.* § 20504(a)(1). Section 5 specifies what may, may not, and must appear on a State's application:

> The voter registration application portion of an application for a State motor vehicle driver's license--
>
> > (A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (c));
> >
> > (B) may require only the minimum amount of information necessary to--
> >
> > > (i) prevent duplicate voter registrations; and
> > >
> > > (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
> >
> > (C) shall include a statement that--
> >
> > > (i) states each eligibility requirement (including citizenship);
> > >
> > > (ii) contains an attestation that the applicant meets each such requirement; and

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

52 U.S.C. § 20504(c)(2)(A)-(C).

a. The *Fish* plaintiffs filed a motion seeking a preliminary injunction against the Kansas law, which the district court granted. In doing so, the court held that the Kansas law's insistence on documentary proof of citizenship required more than the "minimum amount of information necessary" under 52 U.S.C. § 20504(c)(2)(B).

The district court's analysis proceeded in three steps. Pet. App. 249-51. The district court concluded that the statute contained a minimum-information principle that precluded Kansas from requiring any information beyond the applicant's attestation unless the State established that the attestation was ineffective to ensure the applicant is a United States citizen. It next found that the Kansas law's requirement of documentary proof of citizenship was quite burdensome whereas attestation was both less burdensome and had prevented all but a very few noncitizens from registering to vote. And finally, the district court rejected the State's argument that the proof of citizenship requirement is authorized by the Constitution's Voter Qualifications Clause because the State failed to show the attestation requirement resulted in a significant number of noncitizens voting.

b. Kansas appealed the NVRA Section 5 issue to the Tenth Circuit. In expedited proceedings given the upcoming elections, that court heard oral argument, rendered judgment, *see Fish v. Kobach*, 691 F. App'x

900, 901 (10th Cir. 2016), and later issued a written decision explaining the rationale for its judgment. Pet. App. 238-333.

The Tenth Circuit's subsequent written decision ("*Fish I*") largely adopted the rationale of the district court. Pet. App. 238-333. Kansas argued that Section 5 is silent about whether documentary proof of citizenship is permissible and that preemption doctrine requires a clear expression of congressional intent before a state law can preempted. The Tenth Circuit rejected that argument, concluding that it was not permitted to "finely parse the federal statute for gaps or silences in federal election statutes" as Congress had near plenary power under the Elections Clause. Pet. App. 273. Thus, according to the Tenth Circuit, Section 5 "establishes a ceiling on what information the states can require." Pet. App. 282.

The Tenth Circuit then concluded that the attestation required by 52 U.S.C. § 20504(c)(2)(C) is the presumptive "minimum amount of information necessary" to assess an applicant's eligibility. Pet. App. 289-94. It also imposed an extra-textual standard that a State is required to satisfy before it can insist on anything beyond attestation. The Tenth Circuit held that the State may require more than attestation if—but only if—it (i) established "that 'a substantial number of noncitizens have successfully registered' notwithstanding the attestation requirement," Pet. App. 295; and (ii) that its means for verifying citizenship was the least restrictive approach. Pet. App. 295-97 & n.14.

Applying this standard, the Tenth Circuit affirmed the district court's entry of a preliminary injunction.

c. Following remand, the district court consolidated *Fish* and *Bednasek* for discovery and trial. After discovery closed, it held a seven-day bench trial and later issued its Findings of Fact and Conclusions of Law that made the preliminary injunction permanent.

As to the Equal Protection challenge, the district court concluded that the documentary proof of citizenship provision unconstitutionally burdened the right to vote because it had caused 31,089 applicants to be denied registration. Pet. App. 112-20; 212-223. The district court did not, however, determine what, if any, burden the law imposed on the individuals who failed to provide proof of citizenship. Pet. App. 129. And while the district court recognized that the proof of citizenship law advanced the State's legitimate interests of preventing noncitizen registration, maintaining accurate voter rolls of only qualified voters, and maintaining confidence in the electoral process, it found that those interests were not "strong enough to outweigh the tangible and quantifiable burden on eligible voter registration applicants" in Kansas. Pet. App. 211.

The district court also concluded that Section 5 of the NVRA preempted Kansas's law. Applying the Tenth Circuit's *Fish I* test, the district court found that the State had not demonstrated that a "substantial number of noncitizens ha[d] successfully registered" to vote when it had only identified between 39 and 129 instances of noncitizen registrations. Pet. App. 193-99. And even if this did constitute a substantial number

that warranted more than attestation, the district court found that the State failed to establish that "nothing less than" documentary proof of citizenship would be sufficient because other options were available, such as better office training, more voter education, prosecutions of noncitizens, and the like. Pet. App. 199-206.

d. The State appealed again to the Tenth Circuit. Following oral argument, the panel affirmed.

Adhering to circuit precedent, the panel purported to apply the *Anderson-Burdick* balancing test as described in Justice Stevens' plurality decision in *Crawford*. Pet. App. 34. According to the Tenth Circuit, "*Crawford* teaches that we must balance any burden on the right to vote imposed by the [documentary proof of citizenship] requirement against the government's asserted interests as justifications for imposing that burden." Pet. App. 42.

The Tenth Circuit categorized the burden on the right to vote as "significant," which it described as lying "at least somewhere between the two poles" of "severe" and "nonsevere." Pet. App. 43-53 & n.6. This was "[b]ased primarily on the district court's finding that 31,089 applicants were prevented from registering to vote because of the [documentary proof of citizenship] requirement." Pet. App. 43. But like the district court, the Tenth Circuit acknowledged that the record did not indicate how many of the 31,089 applicants lacked documentary proof of citizenship. Pet. App. 49-50. Nor did the record reflect how many of the 31,089 applicants were unable to obtain documentary proof of citizenship—as opposed to being unwilling to make

minimal efforts to provide it or ineligible to vote due to citizenship status. Pet. App. 50.

Given its conclusion that the burden was "significant," the Tenth Circuit held the State to an exacting measure of proof. Like the district court, the Tenth Circuit recognized that Kansas had advanced "legitimate interests" in election security, but it concluded that those interests were "insufficiently weighty to justify the limitations on the right to vote imposed" by the documentary proof of citizenship requirement. Pet. App. 53-54. As a result, the court held the Kansas law unconstitutional.

The Tenth Circuit also concluded that the SAFE Act's documentary proof of citizenship requirement was preempted by Section 5 of the NVRA. Rejecting Kansas's argument to the contrary, the Tenth Circuit held it was bound by the test in *Fish I*: to justify its law, Kansas had to establish (i) that a "substantial number" of noncitizens have successfully registered and (ii) that nothing less than the documentary proof of citizenship requirement was sufficient to deter those registrations. Pet. App. 74-75. Because of the district court's finding that Kansas had only identified 39 noncitizens who had successfully registered to vote, the Tenth Circuit held that Kansas failed to meet this burden. Pet. App. 75-80.

REASONS FOR GRANTING THE PETITION

The Constitution grants the States sovereign authority to establish qualifications, including citizenship, for voting. And this Court has recognized that "the power to establish requirements" for voter qualifications "would mean little without the ability to enforce them." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Yet that is exactly what the Tenth Circuit has prevented Kansas from doing in this case.

This case therefore implicates "an important question of federal law" that warrants this Court's review. S. Ct. R. 10(c). The Tenth Circuit's constitutional holding directly conflicts with this Court's decision in *Crawford*. And the application of the "motor-voter" provision of the NVRA is a question that "has not been, but should be, settled by this Court," S. Ct. R. 10(c), given that the Tenth Circuit's erroneous interpretation of that provision infringes on the States' constitutional authority to establish and verify qualifications to vote. The State of Kansas therefore asks this Court to grant its petition for writ of certiorari.

A. This Case Presents an Important Question of Federal Law.

Bipartisan supermajorities of the Kansas Legislature passed an election security law that requires documentary proof of United States citizenship before an individual can qualify as an elector. This case warrants certiorari given the gravity

of the Tenth Circuit's decision striking down that law and the important constitutional principles at stake.

This case implicates core sovereign state authority reflected in the Constitution. The Voter Qualifications Clause provides: "The Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1 (House of Representatives); *accord* U.S. Const. amend. XVII (Senate); *cf.* Art. II, § 1, cl. 2 (appointment of presidential electors). That provision confers exclusive power on the States to establish and verify the qualifications to vote. *Inter Tribal*, 570 U.S. at 17-18. The Tenth Circuit's ruling below eviscerates this express authority.

The Framers' intent in enacting the clause was "to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 228 (1986). James Madison successfully argued that the clause "must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." *Id.* (quoting The Federalist No. 52, p. 354 (J. Cooke ed. 1961)).

Exercising that power, Kansans enshrined in their state constitution that United States citizenship is a qualification to vote. Specifically, in Kansas, "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Kan. Const. art. V, § 1. And the Kansas Legislature has the duty to "provide by law for

proper proofs of the right of suffrage." Kan. Const. art. V, § 4.

While the Elections Clause grants Congress power to regulate the time, place, and manner of federal elections, it does not override the States' authority to set and verify voter qualifications. As this Court recognized, the Elections Clause "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal*, 570 U.S. at 16.

The Tenth Circuit's holding epitomizes what the Framers feared—an overbroad application of federal law that encroaches on a State's authority to define who qualifies to vote. But as this Court noted, prescribing voting qualifications forms no part of the national government's power. *Id.* at 17. And "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements," *id.*, the Tenth Circuit's act of striking down the Kansas law treads on that solely state power of setting qualifications to vote.

This case also presents questions going to the States' compelling interest in ensuring that elections are fairly administered. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196. Likewise, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). That interest "is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It drives honest citizens out of

the democratic process and breeds distrust of our government." *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (internal quotation marks omitted). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. The Tenth Circuit's decision, which prevents Kansas from verifying the qualifications of voters, undermines these important interests.

Nor is this issue limited to Kansas. At least three other States have enacted laws requiring applicants to provide proof of citizenship to register to vote. Ariz. Rev. Stat. Ann. § 16-166(F); Ala. Code § 31-13-28(c)-(l); Ga. Code Ann. § 21-2-216(g); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 5-7 (D.C. Cir. 2016) (discussing these laws and litigation under other provisions of the NVRA involving the federal form at issue in *Inter Tribal*).

Recognizing these important interests, this Court has recently and repeatedly granted certiorari to review voting rights disputes without any noted conflict among the circuits. *See Husted v. A. Phillip Randolph Institute*, 138 S. Ct. 1833 (2018) (reviewing the Sixth Circuit's interpretation of the list maintenance provision of the NVRA); *Inter Tribal*, 570 U.S. at 7 (reviewing the Ninth Circuit's interpretation of the "Federal Form" provision to Arizona law); *see also Crawford*, 553 U.S. at 188 (granting review given "the importance of these cases"). The Tenth Circuit's decision to strike down Kansas's law likewise justifies this Court's review. *See* Steven M. Shapiro, et al., *Supreme Court Practice*, §§ 4.11 & 4.12 (11th ed. 2019)

(recognizing certiorari is appropriate when the dispute involves a matter of great public import and where a state statute has been held invalid).

B. The Tenth Circuit's Decision Conflicts with this Court's Decision in *Crawford*.

Not only does this case present an important issue of federal law, but the Tenth Circuit's constitutional holding is also directly at odds with this Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Kansas shares the same interests that justified Indiana's voter identification law, and the burden imposed by the Kansas law is no more severe than in *Crawford*. Yet the result in this case is opposite.

This Court arrived at its judgment in *Crawford* by two distinct paths. Justice Stevens's plurality opinion concluded that the photo identification law was related to voter qualifications, and therefore not invidious, and that Indiana's interests outweighed any potential burden on voters under the so-called *Anderson-Burdick* balancing test. *See Crawford*, 553 U.S. at 189-90, 202-03 (opinion of Stevens, J.). Justice Scalia's plurality opinion—which represents the better approach—came to the same conclusion applying more traditional equal protection principles.[3] *Id.* at 204-09 (Scalia, J.,

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[3] To succeed on the merits, Kansas does not need this Court to overrule or refine the *Anderson-Burdick* balancing test as described in Justice Stevens's plurality opinion. Yet this case does present an opportunity to do so and thereby eliminate the significant confusion in this area of law that has caused judges and scholars to wonder whether the application of *Anderson-Burdick*'s malleable standard merely reflects the policy preferences of the reviewing judges. *See*

concurring in the judgment). This case is materially indistinguishable from *Crawford* under either approach.

1. The burdens imposed on prospective voters under the Indiana and Kansas laws are similar. The Indiana law at issue in *Crawford* required a photo identification to vote, while the Kansas law requires proof of citizenship to register. But prospective voters in Indiana had to present a birth certificate, passport, or some other document to obtain the free photo identification the State provided. *See* 553 U.S. at 198 n.17. That was so even though obtaining a birth certificate required paying a fee. *See id.* A birth certificate, passport, or other similar documentation, satisfies the Kansas law as well. *See* Kan. Stat. Ann. § 25-2309(l). If requiring voters to obtain a birth certificate did not unconstitutionally burden Indiana voters' right to vote in *Crawford*, it does not and cannot violate Respondents' right to vote here.[4]

Daunt v. Benson, 956 F.3d 396, 423-24 (6th Cir. 2020) (Readler, J., concurring) ("Absent stricter rules and guidelines for courts to apply, *Anderson-Burdick* leaves much to a judge's subjective determination."); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013) (noting that the *Anderson-Burdick* test is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another).

[4] As further evidence of the lack of a significant burden, the REAL ID Act requires proof of lawful presence—generally a birth certificate or passport for U.S. citizens, the same documents that would be acceptable under Kansas's proof of citizenship law—in order to obtain a qualifying driver's license. *See generally* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 310.

If anything, the burden imposed by Kansas's law is *less* than that imposed by Indiana's. The Kansas law only requires an individual to present proof of citizenship once, *see* Kan. Stat. Ann. § 25-2309(p), whereas Indiana's photo identification law is an ongoing requirement that burdens voters to some extent at every election. *See Crawford*, 553 U.S. at 197 (discussing "life's vagaries," including losing one's photo identification or having it stolen or become outdated due to changes in appearance that no doubt will burden many). And the Kansas law makes it easier to present the required proof of citizenship because it can be emailed, sent by text message, faxed, or mailed, without ever having to leave one's home, *see* Kan. Stat. Ann. § 25-2309(l), (t),[5] as opposed to obtaining photo identification, which at the very least requires a trip to the Bureau of Motor Vehicles, *see Crawford*, 553 U.S. at 198. In addition, the Kansas Secretary of State

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[5] The Tenth Circuit noted that the statute does not explicitly mention email, texting, or fax, Pet. App. 49, but Kan. Stat. Ann. § 25-2309(t) provides:

> Nothing in this section shall prohibit an applicant from providing, or the secretary of state or county election officer from obtaining satisfactory evidence of United States citizenship, as described in subsection (1), at a different time or in a different manner than an application for registration is provided, as long as the applicant's eligibility can be adequately assessed by the secretary of state or county election officer as required by this section.

The Secretary of State has also adopted a regulation allowing proof of citizenship to be submitted by electronic means. *See* Kan. Admin. Reg. § 7-23-14(b); *see also* Pet. App. 109 (district court findings of fact recognizing the document can be submitted by electronic means, including text message).

entered into an agreement with the Kansas Department of Health and Environment that further reduces the burden for many prospective voters by crosschecking the list of voter applicants who have not submitted proof of citizenship against other state records to determine whether the State already possesses proof of the applicant's citizenship. Pet. App. 116.

In finding a "significant burden on the right to vote," the Tenth Circuit repeatedly and almost exclusively relied on "the district court's finding that 31,080 applicants were prevented from registering" because of the documentary proof of citizenship requirement. Pet. App. 43-45. But that alleged burden is illusory.

In *Crawford*, there were over 40,000 individuals who did not have a photo identification, but this Court found no evidence of a concrete burden. 553 U.S. at 187-88. Here, the only evidence was that approximately 30,000 individuals did not *provide* proof of citizenship. The district court did not find that those individuals *did not have it or could not obtain it*. It is equally possible these applicants were simply unwilling to bear burdens no greater than "the usual burdens of voting." *Crawford*, 553 U.S. at 198. After all, many of these individuals were motor-voter applicants who may have answered "yes" when asked whether they wanted to register to vote just to appear like responsible citizens, even though they had no real intent or desire to vote. The fact that 88% of applicants provided proof of citizenship, *see* Pet. App. 44, demonstrates that the Kansas law does not impose a severe burden on voters

generally. It is not unreasonable to believe that most, if not all, of the remaining applicants were simply unwilling to bear even a slight burden, due to voter apathy or otherwise.

Respondent Parker Bednasek illustrates this point. He argues that the Kansas law imposed a severe burden on him because his birth certificate was at his parents' house in Texas while he was attending college at the University of Kansas. Therefore, his argument goes, complying with Kansas law required him to take the allegedly onerous step of asking his parents to either mail the birth certificate to him or send him a picture of it by email or text message. But *Crawford* held that the process of "gathering the required documents" (like a birth certificate) for a photo identification card and making a trip to the Bureau of Motor Vehicles "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. Proving the point, Bednasek—when not trying to take a political stand—later obtained and provided his birth certificate when he applied to the Navy; he could have just as easily presented it to the county election office. Pet. App. 10.

The proper focus is not on the number of applicants who were not registered, but on the *actual burden* the proof of citizenship law imposes. *See Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014) ("If people who already have copies of their birth certificates do not choose to get free photo IDs, it is not possible to describe the need for a birth certificate as a legal obstacle that disfranchises them."). There is no

evidence in this case that Kansas's proof of citizenship requirement imposes a significant burden on voters generally.

Of course, as in *Crawford*, there may be a "small number of voters who may experience a special burden" because they "cannot afford or obtain a birth certificate." 553 U.S. at 200. But *Crawford* found this prospect insufficient to invalidate Indiana's law because "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.*

The same is true here. Of the 30,732 suspended or cancelled applications, Respondents identified only two who allegedly cannot afford or obtain a birth certificate. Pet. App. 132-33 (Steven Fish), 134 (Donna Bucci). This is no more than the scarce evidence this Court found insufficient in *Crawford*. 553 U.S. at 201-02. As in *Crawford*, "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Id.* at 202 n.20. Thus, it is impossible to conclude "that the statute imposes excessively burdensome requirements on any class of voters." *Id.* at 202 (quotation marks omitted). Furthermore, even if Kansas's law did impose a substantial burden on a small number of prospective voters, Respondents "have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute." *Id.* at 203.

The Tenth Circuit tried to distinguish *Crawford* by stating that Kansas's law does not include a "safety

valve" like the provision in Indiana's law that allowed voters to cast a provisional ballot. Pet. App. 46. But that criticism fails to appreciate the different contexts in which the laws operate. In *Crawford*, photo identification was required at the polling site and the law was directed at in-person voting. Thus, those without it needed to (and were afforded) the ability to cast a provisional ballot. There was a fit between the law and the safety valve the law afforded.

So, too, under Kansas law. In Kansas, the proof of citizenship law applies at the time of registration. Thus, those seeking to be registered can either provide proof of citizenship at the time of registration or within 90 days thereafter (even after the registration deadline, up until the day before the election, *see* Kan. Admin. Reg. § 7-23-14(b)). And during that time, county election offices have been instructed to contact the applicant at least three times to let the applicant know the application is incomplete. Pet. App. 46. In addition, in the rare situations where an applicant is unable to obtain one of the acceptable forms of documentation, the applicant may request a hearing before the State Election Board to prove citizenship by other means. Kan. Stat. Ann. § 25-2309(m).

Because the law's "broad application to all . . . voters imposes only a limited burden on voters' rights," the "precise interests advanced by the State are therefore sufficient to defeat [Respondents'] facial challenge." *Crawford*, 553 U.S. at 202-03 (quotation marks omitted). Kansas's interests here are nearly identical to Indiana's interests in *Crawford*. Yet the Tenth Circuit found these interests insufficiently

weighty to justify Kansas's law because the court found that Kansas had not submitted sufficient evidence of voter fraud, despite the fact that in *Crawford*, the "record contain[ed] no evidence of [in-person voter] fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. A faithful application of *Crawford* would have required the Tenth Circuit to uphold the constitutionality of Kansas's law.

2. While Kansas's proof of citizenship law is constitutional under Justice Stevens's plurality opinion, which the Tenth Circuit treated as controlling, it is even more defensible under Justice Scalia's plurality opinion. That approach is more faithful to traditional equal protection case law and better reflects the deference the Voter Qualifications Clause requires that States receive in setting and enforcing voter qualifications.

Typically, to prove an equal protection violation, a plaintiff must show that the challenged law treats similarly situated individuals differently and that the State does not have a sufficient basis for the disparate treatment. *See Crawford*, 553 U.S. at 207 (Scalia, J., concurring in the judgment); *see also, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). But the Kansas law treats the entire class of voter registration applicants the same.[6] And Respondents have not even attempted to prove discriminatory purpose or intent, which is required for an equal protection claim based on disparate impact.

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[6] The law does grandfather in already registered voters, but the Tenth Circuit correctly held that this provision does not violate the Constitution. Pet. App. 53 n.9.

See, e.g., *Crawford*, 553 U.S. at 207 (Scalia, J., concurring in the judgment); *accord Washington v. Davis*, 426 U.S. 229, 241-42 (1976).

Even if Respondents could overcome these hurdles, their claim would also fail because the burden Kansas law imposes is not severe. Burdens on the right to vote should only be invalidated if they are "severe," meaning they impose something more than an inconvenience and are "so burdensome [that they are] virtually impossible to satisfy." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). "Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe," and individual impacts are irrelevant to determining the severity of the burden a voting regulation imposes. *Id.* Like the Indiana photo identification law at issue in *Crawford*, in which the plaintiffs were required to obtain one of the same sorts of documents required to prove citizenship here, the Kansas law requiring documentary proof of citizenship to vote is not severe. Kansas's law therefore should have been upheld under a deferential, "important regulatory interests" standard. *Id.* at 204.

C. The Tenth Circuit's Interpretation of Section 5 of the NVRA Is an Important Issue that Should Be Addressed by this Court.

This Court should also grant certiorari to address the Tenth Circuit's novel and erroneous interpretation of Section 5 of the NVRA. That interpretation—which is unmoored from the text of the statute—infringes on the States' authority under the Voter Qualifications

Clause and therefore presents an important issue warranting this Court's review.

The text of Section 5 is the centerpiece of this inquiry. *See Inter Tribal*, 570 U.S. at 14 ("[T]he reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent."). It provides:

> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
>
> . . .
>
> > (B) may require only the minimum amount of information necessary to—
> >
> > > (i) prevent duplicate voter registrations; and
> > >
> > > (ii) *enable State election officials to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process;

52 U.S.C. § 20504(c)(2)(B) (emphasis added). Thus, the NVRA explicitly authorizes States to require the information their election officials need to assess voter qualifications in their State. And so when a State requires citizenship as a qualification for voting, the State should be able to require *proof* of citizenship as part of the registration process.

In holding that Section 5 of the NVRA preempts Kansas's law, the Tenth Circuit made several fundamental errors. *First*, the Tenth Circuit improperly invented a presumption that the attestation of voter

eligibility required by 52 U.S.C. § 20504(c)(2)(C) is the minimum amount of information necessary to assess the eligibility of an application under 52 U.S.C. § 20504(c)(2)(B). Pet. App. 14, 65-66, 293. This presumption is extra-textual; preemptive effect cannot be implied absent a textual basis. *See generally Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Sections (c)(2)(B) and (c)(2)(C) are distinct provisions. Section (c)(2)(B) allows States to require information necessary to assess applicants' qualifications *in addition* to the information required by section (c)(2)(C). Were the attestation alone sufficient to determine an applicants' eligibility, then the authorization to require additional information in section (c)(2)(B)(ii) would be redundant. And if Congress had wanted to create a presumption that the attestation is sufficient, it could have easily said so, but it did not. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . ."); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("[W]here the text is clear, as it is here, we have no power to insert an amendment."); *see also* A. Scalia & B.A. Garner, *Reading Law* 174 (2012) ("Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable." (quoting E.D. Hirsch, *Validity in Interpretation* 236 (1967))).

Congress, after all, knew how to preclude States from requiring certain information on the application.

In 52 U.S.C. § 20504(c)(2)(A), Congress provided that the application "may not require any information that duplicates information required in the driver's license portion of the form." The fact that Congress prohibited States from requiring certain information in subparagraph (A) but said nothing about restricting States from requiring proof of citizenship is strong evidence that Congress did not intend to prohibit States from requiring proof of citizenship when citizenship is a qualification for voting. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013).

By creating an extra-textual presumption that the attestation alone is sufficient, the Tenth Circuit impermissibly placed a thumb on the scale against the States' ability to require information they deem necessary to assess an applicant's qualifications. This creates a presumption *of* preemption, shifting the burden to the States to prove that certain information is necessary, rather than requiring Respondents to prove that federal law preempts State registration requirements under the Elections Clause.

Second, the Tenth Circuit also erred in adopting an overly stringent interpretation of the phrase "minimum amount of information necessary" in 52 U.S.C. § 20504(c)(2)(B) that essentially requires States to satisfy a strict scrutiny standard. To be sure, in "the strictest sense of the term, something is 'necessary' only if it is essential." *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) (citing Webster's Third New International Dictionary 1510 (1993) and 10 Oxford English Dictionary 275-276 (2d ed. 1989)). But the term "necessary" is commonly used "more loosely." *Id.* For

example, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), this Court famously held that the *Necessary* and Proper Clause does not mean "absolutely necessary." *Id.* at 414-15. Similarly, a "necessary" business expense under the Internal Revenue Code, 26 U.S.C. § 162(a), may be an expense that is merely helpful and appropriate. *See Commissioner v. Tellier*, 383 U.S. 687, 689 (1966). And a "necessary" party under Rule 19 of the Federal Rules of Civil Procedure is one whose participation is helpful and important, though not *strictly* required. *See Alabama-Quassarte Tribal Town v. United States*, 899 F.3d 1121, 1123 (10th Cir. 2018). As Black's Law Dictionary has put it, the term "may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Ayestas*, 138 S. Ct. at 1093 (internal quotation marks omitted) (quoting Black's Law Dictionary 928 (5th ed. 1979)).

Given these competing definitions of "necessary," the Tenth Circuit should have afforded deference to the reasonable determinations of state officials as to what information they deem necessary to assess voter qualifications in their respective States. This Court has previously recognized that the NVRA provides room for the States to make the policy choices they deem appropriate under the circumstances. *See Young v. Fordice*, 520 U.S. 273, 286 (1997) ("The NVRA does not list, for example, all the other information the State may—or may not—provide or request."); *see also, e.g.*, *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000) (recognizing States' discretion under the NVRA to require voter registration applicants to provide their

social security number even though it might not be strictly essential to preventing duplicate registration or determining voter eligibility). Indeed, tying the term "necessary" in (c)(2)(B) to the "State election officials" who are to "assess the eligibility of the applicant" confirms Congress intended to grant state election officials discretion to determine what is necessary for that particular State.

At the very least, the term "necessary" and the phrase "minimum amount of information necessary" are subject to multiple interpretations. And where a statute's language is subject to multiple reasonable interpretations, one that creates serious constitutional concerns and one that does not, the Court should choose the one that does not. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The Court in *Inter Tribal* (and Justice Thomas, in dissent) recognized that the Voter Qualifications Clause gives States the authority not only to *set* qualifications for voter eligibility but also to *verify* whether those qualifications have been satisfied. 570 U.S. at 17 (recognizing "the power to establish voting requirements" would be "of little value without the power to enforce" them); *id.* at 28 (Thomas, J., dissenting) (same). A statute that prohibits States from requiring *proof* of an applicant's qualifications—as opposed to the applicant's mere say-so—would raise serious constitutional concerns.

Third, the Tenth Circuit further compounded its error by holding that in order to show that proof of citizenship is "necessary" to assess an applicant's qualifications, a State must prove—to a federal court's satisfaction— that "a substantial number of noncitizens

have successfully registered." Pet. App. 14, 67, 244, 296-87. But that is not what Congress said: Section 20504(c)(2)(B)(ii) authorizes States to require the information necessary to determine the qualifications of *each and every applicant*; it does not say that States may only require information necessary to ensure the qualifications of *most* applicants, or even the overwhelming majority of applicants. The Tenth Circuit's contrary interpretation also creates serious—and unnecessarily encountered—concerns under the Voter Qualifications Clause. *See Inter Tribal*, 570 U.S. at 17-18. There is no de minimis exception to the Voter Qualifications Clause that only allows States to verify voter qualifications when the problem of unqualified voters becomes "bad enough" in the subjective view of federal judges.

Section 8 of the NVRA reinforces this point. It imposes on States the duty to "ensure that any *eligible* applicant is registered to vote." 52 U.S.C. § 20507(a)(1) (emphasis added). If an applicant fails to satisfy the eligibility criteria, the State must deny the application. *See Inter Tribal*, 570 U.S. at 15 n.7 (accusing the dissent of overlooking the fact that the NVRA "only requires a State to register an '*eligible* applicant'" (emphasis in original)). State election officials therefore must be able to request the information they determine necessary to assess whether an applicant is "eligible." *See* 52 U.S.C. § 20504(c)(2)(B)(ii). Even if the attestation requirement were sufficient to ensure that most applicants are qualified, it does not enable State election officials to determine that each particular applicant is eligible. States retain the constitutional

and statutory authority to require proof of a voter's eligibility before registering that voter.

The potential effects of the Tenth Circuit's NVRA holding underscore the importance of this issue. The NVRA was adopted under Congress's Election Clause authority to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Thus, if the Tenth Circuit's NVRA holding is correct, a state proof of citizenship law is preempted only with respect to those elections. Absent any constitutional impediment, States remain free to require proof of citizenship for state, local, and presidential elections, thus effectively creating two sets of voter lists.[7] But that result would be in tension with the purpose of the Voter Qualifications Clause, which was to create a symmetry between the qualifications required for federal congressional elections and the qualifications required for state legislative elections. States should be allowed to verify the qualifications of voters for *all* elections, and a proper interpretation of the NVRA poses no impediment to them doing so.

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[7] Indeed, this appears to be the current status in Arizona. *See* https://azsos.gov/elections/voting-election/proof-citizenship-requirements (explaining that a person who does not present proof of citizenship is a "federal only voter") (last visited July 27, 2020). Legal challenges to a similar system in Kansas remain pending in state court, *Brown v. Schwab*, No. 116989 (Kan. Ct. App.) and *Belenky v. Schwab*, No. 116332 (Kan. Ct. App.), although those cases have been stayed pending the final outcome of this case given the injunction against the Kansas law issued here.

CONCLUSION

The petition for writ of certiorari should be granted.

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