APPENDIX

APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 18-3133

[Filed April 29, 2020]

STEVEN WAYNE FISH, on behalf of himself and all others similarly situated; DONNA BUCCI, on behalf of herself and all others similarly situated; CHARLES STRICKER, on behalf of himself and all others similarly situated; THOMAS J. BOYNTON, on behalf of himself and all others similarly situated; DOUGLAS HUTCHINSON, on behalf of himself and all others similarly situated; LEAGUE OF WOMEN VOTERS OF KANSAS,	)
Plaintiffs - Appellees,	)
v.	)
SCOTT SCHWAB, in his official capacity as Secretary of State for the State of Kansas,	)
Defendant - Appellant.	)

STATE OF TEXAS; STATE OF ARKANSAS; STATE OF OKLAHOMA; STATE OF WEST VIRGINIA; PAUL LEPAGE,[†] Governor of Maine; STATE OF MISSOURI; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND,	)
Amici Curiae.	)

No. 18-3134

CODY KEENER; ALDER CROMWELL,	)
Plaintiffs,	)
and	)
PARKER BEDNASEK,	)
Plaintiff - Appellee,	)

[†] Paul LePage is no longer Governor of Maine. In a letter dated March 15, 2019, counsel for Maine's Attorney General, informed the court that Maine's current Governor, Janet T. Mills, "does not support the position taken [by several states and then-Governor LePage] in the amicus brief filed in this case on October 5, 2018," and that "the position taken in the amicus [brief] does not reflect the position of the State of Maine." Letter of Susan P. Herman, Deputy Attorney General to Tenth Circuit Clerk, Case Nos. 18-3133 & 18-3134, at 1 (Mar. 15, 2019). Although we acknowledge this correspondence, it has no impact on our resolution of this appeal.

v.

SCOTT SCHWAB,
Kansas Secretary of State,

Defendant - Appellant.

STATE OF TEXAS; STATE OF ARKANSAS; STATE OF OKLAHOMA; STATE OF WEST VIRGINIA; PAUL LEPAGE, Governor of Maine; STATE OF MISSOURI; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND,

Amici Curiae.

Appeals from the United States District Court for the District of Kansas
(D.C. No. 2:16-CV-02105-JAR)
(D.C. No. 2:15-CV-09300-JAR)

Toby Crouse, Solicitor General of Kansas, (Derek Schmidt, Attorney General of Kansas, Jeffrey A. Chanay, Chief Deputy Attorney General, Bryan C. Clark, Assistant Solicitor General, Dwight R. Carswell, Assistant Solicitor General, with him on the briefs), Office of Attorney General, Topeka, Kansas, for Defendant- Appellant.

Dale Ho, American Civil Liberties Union Foundation, New York, New York, (R. Orion Danjuma and Sophia Lin Lakin, American Civil Liberties Union Foundation, New York, New York; Mark P. Johnson, Curtis E. Woods and Samantha Wenger, Dentons US LLP, Kansas City, Missouri; Neil A. Steiner and Rebecca Kahan Waldman, Dechert LLP, New York, New York; Angela M. Liu, Dechert LLP, Chicago, Illinois; Lauren Bonds and Zal K. Shroff, ACLU Foundation of Kansas, Overland Park, Kansas; Lino S. Lipinsky De Orlov, Dentons US LLP, Denver, Colorado; Mark T. Emert, Fagan, Emert & Davis LLC, Lawrence, Kansas; Shannon Wells Stevenson, Davis Graham & Stubbs LLP, Denver, Colorado, with him on the brief), for Plaintiffs-Appellees.

Ken Paxton, Attorney General of Texas, Jeffrey C. Mateer, First Assistant Attorney General, Kyle D. Hawkins, Solicitor General, Matthew H. Frederick, Deputy Solicitor General, Beth Klusmann, Assistant Solicitor General, filed an amicus curiae brief for the States of Texas, Arkansas, Missouri, Oklahoma, West Virginia and Paul R. LePage, Governor of Maine, in support of Defendant- Appellant.

Lawrence J. Joseph, Washington, D.C., filed an amicus curiae brief on behalf of Eagle Forum Education & Legal Defense Fund, in support of Defendant-Appellant.

Before **BRISCOE**, **McKAY**,[*] and **HOLMES**, Circuit Judges.

HOLMES, Circuit Judge.

In these two consolidated appeals, we must determine whether a Kansas law requiring documentary proof of citizenship ("DPOC") for voter registration is preempted by section 5 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20504, or violates the Fourteenth Amendment's Equal Protection Clause.

We addressed the first of these questions, i.e., whether Kansas's DPOC requirement is preempted by section 5 of the NVRA, in *Fish v. Kobach* ("*Fish I*"), 840 F.3d 710 (10th Cir. 2016). Section 5 of the NVRA mandates that a voter-registration form must be a part of any application to obtain or renew a driver's license.

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[*] The late Honorable Monroe G. McKay was a member of the three judge panel assigned to this case and heard the parties' oral arguments, but he passed away on March 28, 2020. He took no part in the final disposition of this case, including the preparation of this opinion. "The practice of this court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal." *United States v. Wiles*, 106 F.3d 1516, 1516 n.* (10th Cir. 1997); *see also* 28 U.S.C. § 46(d) (providing that "[a] majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum"). The remaining two panel members have acted as a quorum with respect to this appeal, and, for the reasons stated herein, have voted to **affirm** the decision of the district court.

Such a registration form "'may require only the minimum amount of information necessary to' prevent duplicate registrations and to 'enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.'" *Id.* at 715–16 (footnotes omitted) (quoting 52 U.S.C. § 20504(c)(2)(B)). In *Fish I*, we held that—on the factual record then before this court—"the DPOC required by Kansas law [was] more than the minimum amount of information necessary [to perform the Kansas Secretary of State's eligibility-assessment and registration duties] and, therefore, [was] preempted by the NVRA." *Id.* at 717. Thus, we held that "the district court did not abuse its discretion in granting [a] preliminary injunction [against the enforcement of the DPOC law] because the NVRA preempts Kansas's DPOC law as enforced against those applying to vote while obtaining or renewing a driver's license." *Id.* at 716. We remanded for a trial on the merits where Kansas's Secretary of State would have an opportunity to demonstrate that the DPOC requirement was *not* more than the minimum amount of information necessary to perform his eligibility-assessment and registration duties.

On remand, the district court consolidated that statutory challenge with a related case that raises the second aspect of this appeal, i.e., whether the DPOC requirement violates the Fourteenth Amendment's Equal Protection Clause. The Supreme Court and this court have evaluated challenges to state-voter-identification requirements under the Equal Protection Clause. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008) (plurality opinion of Stevens,

J.); *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008). Proceeding under that framework, the Equal Protection Clause challenge to the DPOC requirement is predicated on the idea that the DPOC requirement unconstitutionally burdens the right to vote because the interests asserted by the Kansas Secretary of State ("the Secretary") are insufficient to justify the burden it imposes on that right.

After holding a joint bench trial, the district court entered a permanent injunction against the enforcement of the DPOC requirement under both section 5 of the NVRA and the Equal Protection Clause. The Secretary has appealed. His appeal raises the two fundamental questions outlined above. First, in *Bednasek v. Schwab*, No. 18-3134, does the DPOC requirement violate the Equal Protection Clause? Second, in *Fish v. Schwab*, No. 18-3133, does section 5 of the NVRA preempt the DPOC requirement? Exercising jurisdiction under 28 U.S.C. § 1291, we answer both questions in the affirmative and thus **affirm** the district court's judgment enjoining enforcement of the DPOC requirement. In doing so, we summarize the relevant background, assure ourselves that the challengers possess standing, and then discuss both challenges to the DPOC requirement, taking up first (for organizational convenience) the constitutional challenge.

I. Background

A. Kansas's DPOC Requirement

Both suits on appeal challenge Kansas's DPOC requirement, and so we start by recounting *Fish I*'s

summary of the statute and regulations that constitute Kansas's DPOC requirement:

> Kansas adopted its DPOC requirement for voter registration on April 18, 2011. Secure and Fair Elections ("SAFE") Act, ch. 56, § 8(l), 2011 Kan. Sess. Laws 795, 806, 809–11 (codified at Kan. Stat. Ann. § 25–2309(l)). The requirement took effect January 1, 2013. *Id.* at § 8(u), 2011 Kan. Sess. Laws at 812. The SAFE Act requires that
>
> > (l) The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship. Evidence of United States citizenship as required in this section will be satisfied by presenting one of the documents listed . . . in person at the time of filing the application for registration or by including a photocopy of one of the following documents with a mailed registration application. After a person has submitted satisfactory evidence of citizenship, the county election officer shall indicate this information in the person's permanent voter file.
>
> Kan. Stat. Ann. § 25–2309(l). The statute then lists thirteen forms of documentation acceptable to prove U.S. citizenship, including a birth certificate or passport. *See*

> § 25–2309(l)(1)–(13). For citizens unable to present DPOC, subsection (m) provides an alternate means to prove citizenship by the submission of evidence to the state election board followed by a hearing. *See* § 25–2309(m). The state election board is composed of "the lieutenant governor, the secretary of state and the attorney general." § 25–2203(a).
>
> [Then-serving Kansas] Secretary [of State Kris W.] Kobach promulgated regulations for the DPOC requirement on October 2, 2015. Kan. Admin. Regs. § 7–23–15 (the "90-day regulation"). Those regulations provide that applications unaccompanied by DPOC are deemed to be "incomplete." § 7–23–15(a). Once an application is designated as incomplete, a voter has ninety days to provide DPOC or else the application is canceled and a new voter-registration application is required to register. *See* § 7-23-15(b)-(c)

840 F.3d at 717.

B. Factual Background

1. *Bednasek v. Schwab*, No. 18-3134

Mr. Parker Bednasek—the only remaining plaintiff in *Bednasek v. Schwab*, No. 18-3134—moved from Texas to Kansas in order to attend the University of Kansas. While he was a full-time student at the University of Kansas, he canceled his Texas voter registration and applied to register to vote in Kansas.

He did so because he "considered [him]self to be a resident in Kansas, and [he] wanted to vote in Kansas elections." Aplt.'s App., Vol. 38, at 9339 (Tr. of Bench Trial, Day 2, P.M. Session, filed Mar. 30, 2018). In applying, he swore that he was a Kansas resident and that he had abandoned his former residence. He later swore that he had "no intent to leave Kansas in the future." *Id.*, Vol. 48, at 11692 (Aff. of Parker Bednasek, filed Apr. 21, 2016). While at the University of Kansas, Mr. Bednasek paid out-of-state tuition, had a vehicle that he jointly owned with his parents that was registered in Texas, had a car insurance policy on that vehicle registered to his parents' Texas home, and applied for and received a Texas driver's license.

When he submitted his application to register to vote, Mr. Bednasek did not provide DPOC. He did not do so because (1) his birth certificate was at his parent's home in Texas, and (2) "he [did] not agree with the law" and was attempting to challenge it. *Id.*, Vol. 47, at 11466 (Findings of Fact & Conclusions of Law, filed June 18, 2018); *see id.*, Vol. 38, at 9368–69. Mr. Bednasek would later acquire a copy of his DPOC in order to apply to the Navy but did not submit it to Kansas. Because he never submitted DPOC to Kansas, his application was canceled under the DPOC requirement.

2. *Fish v. Schwab*, No. 18-3133

In *Fish v. Schwab*, No. 18-3133, multiple plaintiffs attempted to register to vote as "motor voters" under section 5 of the NVRA, but their applications to register were denied because of the DPOC requirement. We briefly recount some of their experiences. Mr. Steven

Fish applied for a driver's license and to register as a voter. The driver's license examiner did not inform him that he needed to provide DPOC, but he subsequently received notices informing him that he needed to submit DPOC. However, he had difficulty locating his birth certificate because "he was born on a decommissioned Air Force base." *Id.*, Vol. 47, at 11460. He thus was unable to vote in the 2014 general election. A family member subsequently found his birth certificate, and he has now registered. Similarly, Ms. Donna Bucci applied to vote while renewing her driver's license. She was not told that she needed to provide DPOC, but, like Mr. Fish, she later received a notice informing her that she needed to provide DPOC in order to register. However, Ms. Bucci did not possess a copy of her birth certificate. The district court found that "[s]he [could not] afford the cost of a replacement birth certificate from Maryland and she credibly testified that spending money to obtain one would impact whether she could pay rent." *Id.* at 11461. Her application was canceled for failure to provide DPOC, and she was unable to vote in the 2014 election. A third plaintiff, Mr. Douglas Hutchinson, likewise applied to register to vote while renewing his driver's license but did not provide DPOC. His application was also later canceled.

Other plaintiffs did bring DPOC to register, but various errors in the administration of the DPOC requirement prevented their registration. Mr. Charles Stricker applied to vote while renewing his driver's license and brought DPOC with him, but the clerk told him that he did not need to provide anything. He only learned that his application had been canceled for lack

of DPOC when he was not allowed to vote at the polls. Similarly, Mr. Thomas Boynton applied to vote, and his application was suspended for failure to provide DPOC. He had, however, brought DPOC with him to register and provided the requested documentation. Nevertheless, he was told that he was not registered when he showed up at the polls. After the election, he received a notice that he needed to resubmit DPOC in order to complete the voter-registration process.

The final plaintiff is the League of Women Voters of Kansas ("Kansas League"), "a nonpartisan, nonprofit volunteer organization that encourages informed and active participation of citizens in government." *Id.* at 11452. The district court found that "the DPOC requirement significantly hampered the Kansas League's voter registration work," *id.* at 11453, "the DPOC requirement forced the Kansas League to devote substantial resources to assist voters whose applications are in suspense due to the failure to provide DPOC," *id.* at 11455, and "the DPOC requirement has forced the Kansas League to spend a considerable amount of member resources—including volunteer time—and money to educate the public about registering under the DPOC law," *id.*

C. Procedural Background

1. *Fish I*

The *Fish* plaintiffs brought suit seeking a preliminary injunction against the enforcement of the DPOC requirement. The district court granted the preliminary injunction and "required [the Secretary] to register to vote any applicants previously unable to

produce DPOC and to cease enforcement of Kansas's DPOC requirement with respect to individuals who apply to register to vote at the Kansas Department of Motor Vehicles ('DMV') through the motor voter process." *Fish I*, 840 F.3d at 716. The Secretary appealed the entry of the preliminary injunction, and we affirmed. *Id.* at 716–17.

As recounted in more depth below, we held that section 5 of the NVRA preempted Kansas's DPOC requirement. *Id.* at 716. The relevant portion of section 5 of the NVRA, known as the "motor-voter" provision, states:

> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
>
> (A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));
>
> (B) *may require only the minimum amount of information necessary* to—
>
> (i) prevent duplicate voter registrations; and
>
> (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

> (C) shall include a statement that—
> (i) states each eligibility requirement (including citizenship);
> (ii) *contains an attestation that the applicant meets each such requirement*; and
> (iii) requires the signature of the applicant, under penalty of perjury . . . .

52 U.S.C. § 20504(c)(2)(A)–(C) (emphases added). In *Fish I*, we read subparagraph (C)'s "attestation requirement" as establishing "the presumptive minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties [under subparagraph (B)]." 840 F.3d at 737. However, we acknowledged that "whether the attestation requirement actually satisfies the minimum-information principle in a given case turns on the factual question of whether the attestation requirement is sufficient for a state to carry out these duties." *Id.* at 738. We held that "in order for a state advocating for a DPOC regime to rebut the presumption that the attestation requirement is the minimum information necessary for it to carry out its eligibility-assessment and registration duties," section 5 of the NVRA requires "[the] state to show that 'a substantial number of noncitizens have successfully registered' notwithstanding the attestation requirement." *Id.* at 738–39 (quoting *Kobach v. U.S. Election Assistance Comm'n* ("*EAC*"), 772 F.3d 1183, 1198 (10th Cir. 2014)).

We held that the Secretary had failed to demonstrate that a substantial number of noncitizens had successfully registered. *Id.* at 746–47. In particular, the Secretary had only shown that between 2003 and 2013 "thirty noncitizens registered to vote." *Id.* at 746. "These numbers [fell] well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties." *Id.* at 747. Thus, we concluded that the plaintiffs' challenge was likely to succeed on the merits. *Id.* at 750. We went on to address the remaining preliminary-injunction factors and concluded that the district court did not err in concluding that they, too, favored a preliminary injunction. *Id.* at 751–56. We thus affirmed the district court's grant of the preliminary injunction. *Id.* at 756.

2. The Joint *Fish* and *Bednasek* Bench Trial

On remand, the district court consolidated *Fish*—the statutory case—with *Bednasek*—the constitutional case—for trial. We summarize the district court's factual findings, its legal conclusions in both cases, and the remedies it imposed.

a. Factual Findings

In addition to the above evidence about individual plaintiffs with suspended or canceled applications, the plaintiffs put forward statistical evidence about the overall number of suspended applications. The district court found that, before the preliminary injunction in *Fish* was issued, there were 14,770 individuals who had applied to vote but whose applications were

suspended for failure to provide DPOC. Of these, 5,655 were motor-voter applicants. Another 16,319 individuals had their applications canceled for failure to provide DPOC. Of these, 11,147 were motor-voter applicants. That "amount[ed] to 31,089 total applicants who were denied registration for failure to provide DPOC." Aplt.'s App., Vol. 47, at 11447. Other numbers and expert testimony demonstrated that "[c]anceled or suspended applicants represented 12.4% of new voter registrations between January 1, 2013[,] and December 11, 2015." *Id.* at 11448. An expert opined that the total number of applicants with suspended or canceled applications would have increased but for the injunction, "in part because voter registration activity typically increases in the months leading up to a presidential election." *Id.* at 11449. However, while there was significant evidence that would-be voters had their applications suspended and canceled by the DPOC requirement, the court acknowledged that "[t]here was little admissible evidence presented at trial about the rate of DPOC possession by suspended and canceled applicants." *Id.* at 11457.

The district court also made factual findings about the number of noncitizens who had applied to register to vote. The district court found that, "at most, 67 noncitizens registered or attempted to register in Kansas over the last 19 years." *Id.* at 11519. Of these, "there [were] only 39 confirmed noncitizens who successfully registered to vote between 1999 and 2013 when the DPOC law became effective." *Id.* at 11508. Those 39 individuals represented 0.002% of all registered voters in Kansas as of January 1, 2013—the date the DPOC requirement went into effect. *Id.* And

specifically as to those applications that were suspended, the court found that the estimated number of suspended applications that belonged to noncitizens was "statistically indistinguishable from zero," while "more than 99% of the individuals" whose voter-registration applications were suspended were citizens who would have been able to vote but for the DPOC requirement. *Id.* at 11491–92; *see id.* at 11481. Moreover, even those few instances of noncitizens attempting to register to vote may be explained by "administrative anomalies." *Id.* at 11520. For example, Kansas's voter-registration database included 100 individuals with purported birth dates in the 19th century and 400 individuals with purported birth dates *after* their date of voter registration.

While the district court only found these 39 instances of noncitizen registration, the Secretary presented several anecdotes regarding noncitizens who purportedly attempted to register to vote. There was evidence that some noncitizens with temporary driver's licenses had been registered to vote and that one citizen told Kansas officials that she had voted before becoming a citizen. The Secretary also identified an incident, summarized in a letter in the record, where employees of a hog farm "were transported to [a county] office by their employer to register to vote" even though a county clerk stated that "some of these employees felt they were pressured to register even though they may not be legal." *Id.*, Vol. 30, at 7668 (Letter from Seward Cty. Clerk to Kan. S. Ethics & Elections Comm., dated Mar. 3, 2011). In its preliminary injunction analysis, the district court had concluded that the evidence submitted about this

incident was "insufficient to show that noncitizens actually voted." *Id.*, Vol. 4, at 867 (Mem. & Order, filed May 17, 2016). While the Secretary returns to these examples in this court, it is unclear how they relate to the 39 instances of noncitizen registration that the district court identified.

Apart from the 39 confirmed instances of noncitizen registration, Kansas presented expert testimony on statistical estimates of noncitizen registration and on noncitizen registration outside Kansas. But the district court either gave little weight or entirely rejected Kansas's expert testimony on these topics. The court found that one expert's testimony contained "myriad misleading statements" and "preordained opinions." *Id.*, Vol. 47, at 11474; *see id.* at 11476 ("The record is replete with further evidence of [the expert]'s bias."). The court also concluded that studies offered by a different expert were "confusing, inconsistent, and methodologically flawed." *Id.* at 11491. "[L]ooking beyond Kansas, [the Secretary's] evidence of noncitizen registration at trial was weak." *Id.* at 11519. The district court explained at length why it excluded large portions of the Secretary's expert testimony on statistical estimates of noncitizen registration in Kansas and found much of the remaining testimony unpersuasive. *Id.* (explaining that one of the Secretary's experts was "credibly dismantled" by the architect of the survey upon which the expert had relied).

b. Legal Conclusions in *Bednasek v. Schwab*, No. 18-3134

In *Bednasek*, the court carefully evaluated these facts under the equal-protection rubric established by the Supreme Court's opinion in *Crawford v. Marion County Election Board*, *supra*. As discussed at length below, *Crawford* instructs that we are to examine the burden that a state law places on the right to vote and then weigh the government's asserted interests for imposing that law against that burden. Guided by *Crawford*, the district court here balanced the burdens imposed by the DPOC requirement against the state's interests in preventing noncitizen voter registration, maintaining accurate voter rolls, and maintaining confidence in elections. The court concluded that "the magnitude of potentially disenfranchised voters impacted by the DPOC law and its enforcement scheme cannot be justified by the scant evidence of noncitizen voter fraud before and after the law was passed, by the need to ensure the voter rolls are accurate, or by the State's interest in promoting public confidence in elections." Aplt.'s App., Vol. 47, at 11526.

c. Legal Conclusions in *Fish v. Schwab*, No. 18-3133

In *Fish*, the court held that the preemption framework established in *Fish I* was the law of the case. Applying that framework and considering the evidence summarized above, the court concluded that there was "no credible evidence that a substantial number of noncitizens registered to vote under the attestation regime." *Id.* at 11507. Instead, it found that the "evidence of a small number of noncitizen

registrations in Kansas . . . is largely explained by administrative error, confusion, [and] mistake." *Id.* at 11509. The court concluded that "[the Secretary] ha[d] failed to rebut the presumption that the attestation clause meets the minimum information principle in § 5 of the NVRA, and [it] therefore order[ed] judgment in favor of [the *Fish*] Plaintiffs." *Id.* at 11515.

d. Remedies

Finding that the DPOC requirement violated the Equal Protection Clause and section 5 of the NVRA, the court ordered the Secretary "not [to] enforce the DPOC law and accompanying regulation against voter registration applicants in Kansas." *Id.* at 11529. The court also ordered various specific forms of relief not at issue here, e.g., ordering the Secretary to update websites and provide applicants with certificates of registration. *Id.* at 11530. The Secretary timely appealed.

II. Standing

The Secretary first argues that Mr. Bednasek—the only remaining plaintiff in *Bednasek v. Schwab*, No. 18-3134—lacks standing.[1] We summarize the relevant

[1] The Secretary does not challenge the *Fish* plaintiffs' standing. Nevertheless, "[w]e have an obligation to assure ourselves of litigants' standing under Article III." *Frank v. Gaos*, --- U.S. ----, 139 S. Ct. 1041, 1046 (2019) (per curiam) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006)). We concluded that the *Fish* plaintiffs had standing in *Fish I*, *see* 840 F.3d at 716 n.5 ("We are confident on the current record that Plaintiffs–Appellees have standing to sue."), and we see no reason to depart from that conclusion now.

legal principles and conclude Mr. Bednasek has standing.

A. Legal Principles Governing Standing

Article III of the United States Constitution restricts the jurisdiction of federal courts to the adjudication of "Cases" or "Controversies." U.S. CONST. art. III, § 2, cl. 1. To satisfy Article III's case-or-controversy requirement, a plaintiff must demonstrate standing by establishing "(1) an 'injury-in-fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)); *accord Spokeo, Inc. v. Robins*, --- U.S. ----, 136 S. Ct. 1540, 1547 (2016). "Put simply, a plaintiff must establish three elements: an injury-in-fact, causation, and redressability." *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007).

We are focused on the first two of these requirements. As to the first, "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560); *accord People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 996–97 (10th Cir. 2017). And as to the second, causation is established when the injury "is fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547 (citing

Lujan, 504 U.S. at 560–61); *accord Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1273 (10th Cir. 2018) ("To satisfy the traceability requirement, the defendant's conduct must have caused the injury."). This requires proving that there is "a substantial likelihood that the *defendant's conduct* caused plaintiff's injury in fact." *Bronson*, 500 F.3d at 1109–10 (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005)).

"We . . . review the district court's rulings on standing de novo." *Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014); *accord People for the Ethical Treatment of Prop. Owners*, 852 F.3d at 996. However, we review the factual findings underlying the district court's standing determination for clear error. *See Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008); *see also McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) ("Questions of standing are . . . reviewed de novo, but underlying factual findings are reviewed for clear error."); *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 19 (D.C. Cir. 2011) (same); *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (same).

B. Application

The Secretary raises two arguments that Mr. Bednasek lacks standing. First, the Secretary argues that Mr. Bednasek did not suffer an injury-in-fact because he was not a Kansas resident and so he was ineligible to vote. Second, the Secretary argues that Mr. Bednasek's harm was not caused by the DPOC requirement and was instead self-inflicted. We reject

both arguments before briefly assuring ourselves that Mr. Bednasek's injury-in-fact is redressable.

1. Injury-in-fact

The Secretary argues that Mr. Bednasek did not suffer "an invasion of a legally protected interest," *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560), when his application was cancelled because Mr. Bednasek ostensibly was not a resident of Kansas and so was ineligible to vote there. For purposes of "determining the residence of a person offering to vote" under Kansas law, a person's residence is "the place adopted by a person as such person's place of habitation, and to which, whenever such person is absent, such person has the intention of returning." Kan. Stat. Ann. § 25-407. "That this determination is not based solely on intent has been recognized by the Kansas Supreme Court, which has stated that a citizen has the right to change his residence permanently or temporarily, and that 'whether he does so, or which he does, is determined by *his acts* and his intentions.'" *Warren v. Gaston*, 55 F. Supp. 2d 1230, 1237 (D. Kan. 1999) (quoting *State ex rel. Parker v. Corcoran*, 128 P.2d 999, 1003 (Kan. 1942)). While Mr. Bednasek's family is from Texas, he was enrolled as a full-time student at the University of Kansas when he attempted to register to vote. Moreover, in the fall of 2015, he cancelled his Texas voter registration and attempted to register in Kansas because he "considered [him]self to be a resident in Kansas, and [he] wanted to vote in Kansas elections." Aplt.'s App., Vol. 38, at 9339. In applying to register in Kansas, he swore that he was a Kansas resident and that he had abandoned his former

residence. And, as part of this lawsuit, he submitted an affidavit wherein he stated that he was a Kansas resident and had "no intent to leave Kansas in the future." *Id.*, Vol. 48, at 11692. The district court thus concluded that Mr. Bednasek was a resident of Kansas.

The Secretary, however, points out that Mr. Bednasek paid out-of-state tuition at the University of Kansas, had a car that he jointly owned with his parents that was registered in Texas, had a car insurance policy—for which his parents are listed as the policy holders—that was also registered to his parents' Texas home, and applied for and received a Texas driver's license. The Secretary argues that these actions undermine Mr. Bednasek's declared intentions. But in rejecting a motion to dismiss on standing grounds, the district court stated: "the Court finds that neither Bednasek's Texas driver's license, nor his Texas automobile registration and insurance, objectively disprove Bednasek's repeated attestations of Kansas residency." *Id.*, Vol. 49, at 11825 (Mem. & Order, filed July 29, 2016). This factual finding about Mr. Bednasek's residence was incorporated in the summary judgment and trial rulings. We only review the district court's factual findings for clear error. *See Protocols*, 549 F.3d at 1298; *McCormack*, 788 F.3d at 1024; *ASCPA*, 659 F.3d at 19; *Me. People's All.*, 471 F.3d at 283. And this factual finding was not clearly erroneous: Mr. Bednasek had chosen to live in Kansas, canceled his Texas voter registration, and sworn that he intended to remain in Kansas. The district court could weigh all of this evidence and make a credibility

determination.[2] We conclude that the district court's finding that Mr. Bednasek was a Kansas resident for purposes of voter registration was not clearly erroneous.

The Secretary counters by citing two Kansas cases: *Willmeth v. Harris*, 403 P.2d 973 (Kan. 1965), and *Gleason v. Gleason*, 155 P.2d 465 (Kan. 1945). But these cases acknowledge that residency is a "question of fact" that turns on "all the surrounding facts and circumstances," *Gleason*, 155 P.2d at 467; *see also Willmeth*, 403 P.2d at 978 (concluding "[t]here is ample evidence in the record to support the trial court's findings" about an individual's residency); thus, those authorities do nothing to change our conclusion that

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[2] Moreover, the standard for paying in-state tuition is more onerous than that for voter residency. Kansas's regulations concerning in-state tuition state that "[v]oting or registration for voting in Kansas," "standing alone, ordinarily shall not constitute sufficient evidence of a change to Kansas residence." Kan. Admin. Regs. § 88–3–2(c)(1). The regulations also create a presumption that individuals enrolled in academic programs are *not* residents for purposes of in-state tuition. *Id.* § 88–3–2(d). No similar presumption is in the voter-residency statute. And the relevant statute requires an individual to be a domiciliary resident of Kansas for twelve months prior to receiving in-state tuition, *see* Kan. Stat. Ann. § 76–729(a)(1); no such requirement is in the voter-registration residency definition. Thus, the fact that Mr. Bednasek paid out-of-state tuition does not tell us much. Additionally, Kansas's then-existing guidance on "Election Standards" stated that residency for purposes of voter registration "is not related to or affected by vehicle registration," and so the Texas vehicle registration also is far from dispositive here. Aplt.'s App., Vol. 49, at 11825. Likewise, we do not find the fact that his parents linked the auto insurance policy with their house to be telling.

the district court's factual finding that Mr. Bednasek was a Kansas resident was not clearly erroneous. Moreover, neither case was interpreting residency under the relevant voter-registration statute, and so neither could provide a persuasive reason to depart from the above analysis in any event.

In sum, we conclude that district court did not clearly err in concluding that Mr. Bednasek was a resident of Kansas and thus suffered an injury-in-fact when the Secretary cancelled his registration application.

2. Causation

The Secretary next argues that Mr. Bednasek did not have standing to sue because his injury was "self-inflicted" and thus not fairly traceable to Kansas's conduct. Aplt.'s Opening Br. at 23. The Secretary's argument turns on the following facts: that Mr. Bednasek possessed DPOC that was located at his parent's home in Texas, that he acquired a copy of this DPOC at some point during his Kansas residency in order to apply to the Navy, and that he stated that he did not bring the DPOC when he attempted to register to vote because he did not agree with the law. But we rejected similar arguments in *Fish I*. *See* 840 F.3d at 716 n.5, 753–54. We stated that "our cases show that typically a finding of self-inflicted harm results from either misconduct or something akin to entering a freely negotiated contractual arrangement, not from a failure to comply with an allegedly unlawful regime." *Id*. at 753 (collecting cases). "[W]e reject[ed] the notion that the source of an injury is a litigant's decision not to comply with an allegedly unlawful state regime,

rather than *the regime itself*." *Id.* at 754 (emphasis added). "Were this notion to apply in a case like this one, a court could never enjoin enforcement of an unlawful statute if the plaintiffs could have complied with the statute but elected not to; this hypothetical scenario borders on the absurd." *Id.* This all remains true now.

Our opinion in *ACLU of New Mexico v. Santillanes*, *supra*, underscores the point. There, in-person voters were required to produce voter identification. We concluded that the plaintiffs who intended to vote in future elections and would be required to present identification in those elections had standing. 546 F.3d at 1319. This was the case even though "no individual [plaintiff] lack[ed] photo identification." *Id.* Kansas's denial of Mr. Bednasek's application to register to vote for lack of DPOC functions analogously to the voter-identification law in *Santillanes*; the requirement that Mr. Bednasek provide DPOC is sufficient to establish standing. *Cf. Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) ("Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing.").

In arguing to the contrary, the Secretary relies most heavily on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). In that case, the plaintiffs asserted they were "suffering ongoing injuries" because they had chosen "to take costly and burdensome measures to protect the confidentiality of their international communications" from the potential of surveillance under the Foreign Intelligence Surveillance Act. *Id.* at

402, 415. The Supreme Court rejected the notion that these expenditures established standing: "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416. But unlike the hypothetical enforcement in *Clapper*, the DPOC requirement here actually was enforced against Mr. Bednasek. And it was that enforcement that caused Mr. Bednasek's injury-in-fact, not any decision he made to spend money to avoid a hypothetical injury. Furthermore, the suit here concerns the fundamental right to vote; it does not concern "[the] actions of the political branches in the fields of intelligence gathering and foreign affairs," where the Court engages in an especially rigorous standing inquiry. *Id.* at 408–09. We thus conclude Mr. Bednasek has demonstrated that there is a substantial likelihood that his injury-in-fact was caused by the Secretary's actions. *See Bronson*, 500 F.3d at 1109–10.

3. Redressability

And while not challenged by the Secretary, we have no doubt that there is "a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List*, 573 U.S. at 158 (alteration in original) (quoting *Lujan*, 504 U.S. at 560–61). An order enjoining the Secretary from enforcing the DPOC requirement will ensure that approximately 30,000 voters whose applications were canceled or suspended are registered to vote. *Cf. Santillanes*, 546 F.3d at 1319.

We thus conclude Mr. Bednasek has established standing.

III. Discussion

Turning to the merits of the two challenges to the DPOC requirement, we summarize our standard of review before considering whether the DPOC requirement unconstitutionally burdens the right to vote and whether the DPOC requirement is preempted by section 5 of the NVRA. We conclude that the DPOC requirement is both unconstitutional and preempted by section 5 of the NVRA, and thus affirm the district court's judgment.

A. Standard of Review

"We review the district court's legal conclusions in a bench trial de novo; findings of fact will not be set aside unless clearly erroneous." *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) (quoting *Ryan v. Am. Nat. Energy Corp.*, 557 F.3d 1152, 1157 (10th Cir. 2009)); *accord United States v. Estate of St. Clair*, 819 F.3d 1254, 1264 (10th Cir. 2016). Because the Secretary only challenges the court's legal conclusions, *see* Aplt.'s Opening Br. at 21 (explaining that "the State asserts only legal error"), our review is de novo.

B. Whether Kansas's DPOC Requirement Violates the Fourteenth Amendment's Equal Protection Clause

We first ask whether Kansas's DPOC requirement violates the Fourteenth Amendment's Equal Protection Clause. We structure this inquiry by setting forth the *Anderson-Burdick* balancing test that governs our analysis, *see Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and then analyzing the constitutionality of the DPOC

requirement under that test by weighing the burdens the voting requirement imposes against the interests the government asserts. We conclude that the DPOC requirement is unconstitutional and uphold the district court's injunction against its enforcement.

1. Governing Legal Principles

Crawford v. Marion County Election Board, *supra*, instructs that when examining a claim that a state law unconstitutionally burdens a plaintiff's right to vote under the Equal Protection Clause, we are to examine the burden that the state law places on the right to vote and then weigh the government's asserted interests for imposing that law against the burden. In the following discussion, we introduce the so-called *Anderson-Burdick* balancing test before summarizing how it was applied in *Crawford*.

a. The *Anderson-Burdick* Balancing Test

The right to vote is "a fundamental political right, . . . preservative of all rights." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (omission in original) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)); *Fish I*, 840 F.3d at 752 ("There can be no dispute that the right to vote is a constitutionally protected fundamental right."); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are

illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Nevertheless, "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433; *accord Utah Republican Party v. Cox*, 892 F.3d 1066, 1076 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1290 (2019). Instead, the Constitution allows states to "prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433 (citation omitted) (quoting U.S. CONST. art. I, § 4, cl. 1). These regulations can help *protect* the right to vote by ensuring that elections are "fair and honest" and that "some sort of order, rather than chaos, . . . accompan[ies] the democratic processes." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *accord Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000); *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.").

However, there is "[n]o bright line," *Timmons*, 520 U.S. at 359, that separates those regulations that properly impose order—thereby protecting the fundamental right to vote—from those that unduly burden it—thereby undermining it. *See Crawford*, 553 U.S. at 190 (plurality opinion of Stevens, J.) (explaining that instead of applying a "litmus test" courts must

make a "hard judgment"); *Anderson*, 460 U.S. at 789 (explaining that instead of applying a "litmus-paper test" "a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation"). Instead, the Supreme Court has instructed that:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *accord Santillanes*, 546 F.3d at 1320 ("[T]he appropriate test when addressing an Equal Protection challenge to a law affecting a person's right to vote is to 'weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.'" (quoting *Crawford*, 553 U.S. at 190)). This balancing test has become known as the *Anderson-Burdick* balancing test. *See Cox*, 892 F.3d at 1077 ("[W]e analyze electoral regulations using the now-familiar *Anderson-Burdick* balancing test.").[3]

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[3] The Supreme Court's cases have equivocated over which provision of the Constitution mandates this balancing test.

Both parties agree that this *Anderson-Burdick* balancing test applies here. We thus turn to examine how the *Anderson-Burdick* test was applied to a related voting restriction in *Crawford v. Marion County Election Board*, *supra*.

Compare Anderson, 460 U.S. at 786 n.7 ("[W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the 'fundamental rights' strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests." (collecting cases)), *with Crawford*, 553 U.S. at 207 n.* (plurality opinion of Scalia, J.) ("A number of our early right-to-vote decisions, purporting to rely upon the Equal Protection Clause, strictly scrutinized nondiscriminatory voting laws requiring the payment of fees." (collecting cases)). Our court, however, has traced the *Anderson-Burdick* balancing test to the Equal Protection Clause. *See Santillanes*, 546 F.3d at 1319–20; *see also* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 674 (2017) (explaining that the Supreme Court's "equal-protection-for-voting jurisprudence has evolved into what is known as the '*Anderson-Burdick* balancing test'"). Yet, as explained above, the *Anderson- Burdick* balancing test does not entail "a traditional equal-protection inquiry." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019); *see also Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (discussing relationship between *Anderson-Burdick* and the Equal Protection Clause, and collecting cases)

b. *Crawford v. Marion County Election Board*

Crawford involved "the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government." 553 U.S. at 185 (plurality opinion of Stevens, J.). The Court—in two plurality opinions, one by Justice Stevens and one by Justice Scalia—upheld the constitutionality of the statute under the *Anderson-Burdick* balancing test. *Id.* at 189–90 (plurality opinion of Stevens, J.); *id.* at 204–05 (plurality opinion of Scalia, J.). We have held that Justice Stevens's opinion is controlling, and so we focus on that opinion here. *See Santillanes*, 546 F.3d at 1321 ("Following *Crawford*, it appears that Justice Stevens's plurality opinion controls, a position advocated by the Plaintiffs in the present case because it is the narrowest majority position."); *id.* at 1321–25 (citing, in the analysis, only to Justice Stevens's opinion); *see also* Foley, *supra*, at 676 ("The controlling opinion in [*Crawford*] was written by Stevens and joined by Roberts and Kennedy.").

Justice Stevens's opinion—joined by Chief Justice Roberts and Justice Kennedy—started its discussion of the relevant legal standard with *Harper v. Virginia State Board of Elections*, *supra*, a case that invalidated a poll-tax under the Equal Protection Clause. Justice Stevens explained that *Harper* had not invalidated the poll-tax because of any racial classification or animus; instead, it invalidated the poll-tax as "invidious because it was irrelevant to the voter's qualifications."

Crawford, 553 U.S. at 189; *see Harper*, 383 U.S. at 668 ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause." (citation omitted) (quoting *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

Justice Stevens thus deduced the rule that "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford*, 553 U.S. at 189. At the same time, Justice Stevens acknowledged "that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*." *Id.* at 189–90 (quoting *Anderson*, 460 U.S. at 788 n.9). But determining how to "neatly separate valid from invalid restrictions" is not always an easy task. *Id.* at 190. Notably, Justice Stevens applied the *Anderson-Burdick* balancing test even though the voter-identification law at issue was *not* "unrelated to voter qualifications." *Id.* at 189; *see id.* at 193 (noting that Congress had indicated "that photo identification is one effective method of establishing a voter's qualification to vote"). Instead, "[h]owever slight th[e] burden [imposed on the right to vote] may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). In other words, *Anderson-Burdick* scrutiny is

required even when the burden imposed by a voter-identification law has some relationship to voter qualifications and even when the burden imposed may appear slight.

An important question then is exactly what this scrutiny entails. Justice Stevens's opinion explained that the degree of scrutiny was "flexible." *Id.* at 190 n.8; *see Burdick*, 504 U.S. at 434 (explaining that under *Anderson* the mere fact that a burden was imposed does not itself mandate strict scrutiny; instead, "a more flexible standard applies"); *accord Campbell v. Davidson*, 233 F.3d 1229, 1233 (10th Cir. 2000) (applying "the flexible standard of *Burdick*"). This "flexib[ility]" acknowledges that we must engage in a case-specific inquiry based on (1) "the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate," (2) "the precise interests put forward by the State as justifications for the burden imposed by its rule," and (3) "the extent to which those [state] interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Thus, the scrutiny we apply will wax and wane with the severity of the burden imposed on the right to vote in any given case; heavier burdens will require closer scrutiny, lighter burdens will be approved more easily. *Id.* ("Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

We, and our sister circuits and commentators, have referred to this as a "sliding scale" test. *Navajo Nation*

v. San Juan Cty., 929 F.3d 1270, 1283 (10th Cir. 2019); *see Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019) ("We have described this approach as a 'sliding scale'—the more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." (quoting *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016))); Foley, *supra*, at 675 ("*Anderson* and *Burdick* create a kind of sliding-scale balancing test, whereby the strength of the state's justification required to defend its law depends on the severity of the burden that the law imposes on the would-be voter's opportunity to cast a ballot . . . ."); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (per curiam) ("While a rational basis standard applies to state regulations that do not burden the fundamental right to vote, strict scrutiny applies when a state's restriction imposes 'severe' burdens. For the majority of cases falling between these extremes, we apply the 'flexible' *Anderson*/*Burdick* balancing test." (citations omitted)).[4]

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[4] Justice Scalia would have abandoned this traditional understanding of the *Anderson-Burdick* balancing test as a flexible, sliding scale test. Instead, he characterized *Burdick* as "forg[ing] *Anderson*'s amorphous 'flexible standard' into" a more rigid "two-track approach." *Crawford*, 553 U.S. at 205 (plurality opinion of Scalia, J.). Under his view, strict scrutiny would be applied to "severe" burdens while "nonsevere, nondiscriminatory restrictions" would be reviewed under "a deferential 'important regulatory interests' standard." *Id.* at 204–05 (quoting *Burdick*, 504 U.S. at 433–34). Applying this framework to the law at issue in *Crawford*, Justice Scalia would have concluded that the burden imposed by Indiana's photo-identification law was "simply not severe" and thus justified by Indiana's generalized interests under

Justice Stevens—applying this "flexible" approach—then concluded that the photographic-identification requirement at issue in *Crawford* "impose[d] only a limited burden on voters' rights." 553 U.S. at 203 (quoting *Burdick*, 504 U.S. at 439). In particular, Justice Stevens relied heavily on the district court's conclusion that the challengers "had 'not introduced evidence of a single, individual Indiana resident who will be unable to vote'" as a result of the law "or who will have his or her right to vote unduly burdened by its requirements." *Id.* at 187 (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)). Additionally, while Justice Stevens acknowledged that the law could impose a burden on those without photo identification, "the evidence in the record d[id] not provide [the Court] with the number of registered voters without photo identification." *Id.* at 200. "Much of the argument about the numbers of such voters c[ame] from extrarecord, postjudgment studies, the accuracy of which ha[d] not been tested in the trial court." *Id.* Thus, he concluded that any costs associated with requiring voters to acquire freely provided photographic identification did not "qualify as a

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a deferential standard. *Id.* at 209. But six Members of the Court—Chief Justice Roberts, Justice Stevens, Justice Kennedy, *see id.* at 190 n.8, and all three dissenters, *see id.* at 210 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 237 (Breyer, J., dissenting)—rejected Justice Scalia's reframing of the *Anderson-Burdick* balancing test as involving only two distinct tracks. And, as we have previously held that Justice Stevens's opinion is controlling, we must apply the "flexible" approach to the *Anderson-Burdick* balancing test that was used by Justice Stevens, *see Crawford*, 553 U.S. at 190 n.8, as well as by the Court's earlier cases, *see Burdick*, 504 U.S. at 434.

substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198. This determination that the burden was not substantial was "record-based." *Id.* at 208 (plurality opinion of Scalia, J.); *see id.* at 189 (plurality opinion of Stevens, J.) ("[*T*]*he evidence in the record* is not sufficient to support a facial attack on the validity of the entire statute . . . ." (emphasis added)); *id.* at 200 (plurality opinion of Stevens, J.) ("[*O*]*n 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." (emphasis added)).

In light of this weak evidence of a burden, Justice Stevens concluded that the state's justifications were "sufficiently weighty to justify the limitation." *Id.* at 191 (quoting *Norman*, 502 U.S. at 288–89). In particular, Indiana had "unquestionably relevant" interests in election modernization, preventing voter fraud, and safeguarding voter confidence. *Id.* Justice Stevens determined that these interests were "legitima[te]" and "importan[t]," even though, for example, "[t]he record contain[ed] no evidence of any [voter-impersonation] fraud actually occurring in Indiana." *Id.* at 194, 196. Thus, the *Crawford* opinion demonstrates that when there is limited evidence of a burden on the right to vote, the state need not present concrete evidence to justify its assertion of legitimate or important generalized interests. *See Santillanes*, 546 F.3d at 1323 ("In requiring the City to present evidence of past instances of voting fraud, the district court imposed too high a burden on the City.").

However, when a more substantial burden is imposed on the right to vote, our review of the government's interests is more "rigorous[]." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) ("North Carolina asserts goals of electoral integrity and fraud prevention. But nothing in the district court's portrayal of the facts suggests that those are anything other than merely imaginable."); *Obama for Am. v. Husted*, 697 F.3d 423, 433–34 (6th Cir. 2012) (holding voting regulation was not justified by "vague interest[s]" when the state had submitted "no evidence" to justify its invocation of the interests); *cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (explaining that the determination of whether the "four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are . . . compelling . . . is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant").

Finally, in addition to Justice Stevens's consideration of the "facial attack on the validity of the entire statute" in *Crawford* based on "the statute's broad application to all Indiana voters," 553 U.S. at 189, 202–03, he also parsed the burden imposed on specific categories of voters: "elderly persons born out

of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed," *id.* at 199 (footnote omitted). But the record evidence concerning the burdens imposed on these voters was once again lackluster: "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.* at 200. "[T]he evidence in the record d[id] not provide [the Court] with the number of registered voters without photo identification," "the deposition evidence presented in the District Court d[id] not provide any concrete evidence of the burden imposed on voters who currently lack photo identification," and the "record sa[id] virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed." *Id.* at 200–01. Furthermore, the Court noted that the unique burdens on these classes of individuals would be mitigated by a provision in the Indiana law that allowed certain "voters without photo identification [to] cast provisional ballots that will ultimately be counted." *Id.* at 199.[5]

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[5] Justice Scalia criticized the "lead opinion" for this focus on the burden imposed on specific populations. 553 U.S. at 204–05. In his view, traditional equal-protection principles required evaluating the burden the voter-identification requirement imposed on *all* voters, even if different populations felt the impacts of that single

In sum, *Crawford* teaches that we must balance any burden on the right to vote imposed by the DPOC requirement against the government's asserted interests as justifications for imposing that burden. We must apply the *Anderson-Burdick* balancing test flexibly, i.e., "the rigorousness of our inquiry into the propriety of [the DPOC requirement] depends upon the extent to which [it] burdens" voters' rights. *Burdick*, 504 U.S. at 434. And, while we are to evaluate "the statute's broad application to all . . . voters" to determine the magnitude of the burden, *Crawford*, 553 U.S. at 202–03 (plurality opinion of Stevens, J.), we may nevertheless specifically consider the "limited number of persons" on whom "[t]he burdens that are relevant to the issue before us" will be "somewhat heavier," *id.* at 198–99 (plurality opinion of Stevens, J.); *see also Harper*, 383 U.S. at 668 (holding poll tax facially unconstitutional while identifying the specifically pernicious effect such a tax has on those unable to pay it); Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 101 (2008) ("Voting laws that are unconstitutional on their face are usually

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burden differently. *Id.* at 205; *see also id.* at 206 (arguing that, in its prior opinions, "when [the Court] began to grapple with the magnitude of burdens, [it] did so categorically and did not consider the peculiar circumstances of individual voters or candidates"). He particularly thought Justice Stevens's focus on the requirement's impact on the poor, disabled, and elderly was problematic because these are not suspect classifications. *Id.* at 207. He would have avoided "[t]he lead opinion's record-based resolution" and instead held that "[t]he burden of acquiring, possessing, and showing a free photo identification is simply not severe." *Id.* at 208-09.

so because a minority (even a nonsuspect one) is disadvantaged.").

2. Application

In the following discussion, we (a) set out the burdens imposed on the right to vote by the DPOC requirement, (b) discuss the interests that the Secretary offers to justify those burdens, and then (c) arrive at the "hard judgment" *Crawford* demands. We conclude that the significant burden quantified by the 31,089 voters who had their registration applications canceled or suspended requires us to increase the "rigorousness of our inquiry," *Burdick*, 504 U.S. at 434, and that such an inquiry demonstrates that the precise interests put forward by the Secretary do not justify the burden imposed on the right to vote. Thus, we conclude the DPOC requirement is unconstitutional.

a. Burden on Voters

Based primarily on the district court's finding that 31,089 applicants were prevented from registering to vote because of the DPOC requirement, we conclude that the burden imposed on the right to vote by the DPOC requirement was significant and requires heightened scrutiny.[6] In arriving at this conclusion, we reject the Secretary's counterargument that the burden

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[6] In labeling the burden "significant," we—applying Justice Stevens's "flexible" approach in *Crawford*—conclude that the burden is at least somewhere in between the two poles identified by Justice Scalia, i.e., "severe" and "nonsevere."

imposed here compares favorably to the burden that the Supreme Court found insubstantial in *Crawford*.

The district court found that—before the preliminary injunction in *Fish I* was issued—14,770 individuals had applied to vote but had their applications suspended by the Secretary for failure to provide DPOC. In addition to these suspended applications, another 16,319 individuals had their applications canceled by the Secretary for failure to provide DPOC. The district court thus found that "31,089 total applicants . . . were denied registration for failure to provide DPOC." Aplt.'s App., Vol. 47, at 11447. Expert testimony demonstrated that "[c]anceled or suspended applicants represented 12.4% of new voter registrations between January 1, 2013[,] and December 11, 2015," or "approximately 12% of the total voter registration applications submitted since the law was implemented." *Id.* at 11448–49. And an expert opined that the total number of applicants with suspended or canceled applications would have increased but for the injunction. And despite the eventual injunction, many of the would-be voters—including both Mr. Fish and Ms. Bucci—actually were disenfranchised and "were not registered in time to vote in the [intervening] 2014 election by operation of the DPOC law." *Id.* at 11450–51. The Secretary challenges none of these findings on appeal.

These factual findings create a fundamental distinction between this case and *Crawford*: based on an extensive record, the district court here concluded that the Kansas Secretary of State actually denied

approximately thirty thousand would-be voters' registration applications in his implementation of the DPOC requirement, while, in *Crawford*, the scant evidence before the Court left it with the unenviable task of attempting to estimate the magnitude of the burden on voting rights, largely from untested extra-record sources. The district court in *Crawford* had found that the challengers "had 'not introduced evidence of a single, individual Indiana resident who w[ould] be unable to vote'" as a result of the law. 553 U.S. at 187 (quoting *Ind. Democratic Party*, 458 F. Supp. 2d at 783). The Court concluded that "the evidence in the record d[id] not provide [it] with the number of registered voters without photo identification." *Id.* at 200. This was because the district court had found the challengers' experts "to be 'utterly incredible and unreliable.'" *Id.* (quoting *Ind. Democratic Party*, 458 F. Supp. 2d at 803). Contrast that with the district court's factual finding here that 31,089 total applicants were denied registration for failure to provide DPOC. While the record in *Crawford* led Justice Stevens to conclude that the burden there was slight, the record before us instead leads us to conclude that the burden on the right to vote here was significant.

Moreover, in finding Indiana's statute constitutional, Justice Stevens relied on the fact that—even for that unquantified number of voters who would lack a photo identification at the next election—Indiana's statute provided that, "if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted." *Id.* at 199. In order to have such a provisional ballot

counted, an eligible voter without photographic identification only needed to execute the required affidavit at the local circuit court clerk's office. *Id.* Additionally, "[p]resumably most voters casting provisional ballots w[ould] be able to obtain photo identifications before the next election," and thus would not bear this burden going forward. *Id.* at 199 n.19. Thus, the Court concluded that the statute as a whole "impose[d] only a limited burden on voters' rights." *Id.* at 203 (quoting *Burdick*, 504 U.S. at 439).

But as the district court here concluded, Kansas's DPOC requirement offered no similar safety valve. *See* Aplt.'s App., Vol. 47, at 11520 ("[U]nlike the Indiana law in *Crawford*, an eligible Kansas applicant on the suspense or cancellation list does not have the option to fill out a provisional ballot, produce DPOC after the election, and have their ballot counted."). The Kansas law allows voters who submit an application without DPOC to supplement that application at any point within the following ninety days. *See* Kan. Admin. Regs. § 7–23–15(b). Counties have been instructed to contact each voter that has submitted an application without DPOC three times within this ninety-day period. *See* Aplt.'s App., Vol. 47, at 11446. And, if they do not have DPOC, they may apply for a hearing where they are otherwise able to prove their citizenship. *See* Kan. Stat. Ann. § 25–2309(m). But these provisions are significantly less effective than the safety valve in *Crawford* because that safety valve allowed certain individuals to actually cast provisional votes while these provisions do not. Thus, voters who were not registered due to a lack of DPOC—including those who did not know that they were not registered, like Mr.

Boynton and Mr. Stricker—could show up to vote but be turned away without a backup option for them to cast votes.

Thus, we conclude that this case presents fundamental differences with *Crawford*—differences that make the burden on the right to vote more substantial here than in *Crawford*. In sum, the burden imposed on the right to vote by the DPOC requirement was significant and requires heightened scrutiny.[7]

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[7] We acknowledge that the record also reflects certain instances where the disenfranchisement of voters arguably was not directly related to the burdens associated with the legal requirement that voters produce DPOC. That is because, in some instances, the voters in fact produced DPOC to Kansas state employees and their disenfranchisement apparently stemmed from bureaucratic snafus in Kansas's implementation of the DPOC regime. Notably, in some instances, disenfranchisement was the result of the apparently inadvertent failures of state employees to record and to give effect to the DPOC that prospective voters provided. For example, Mr. Stricker and Mr. Boynton both brought DPOC when they went to register and either provided it to the clerk or were told that they did not need to. The Secretary does not argue that disenfranchisement stemming from such bureaucratic or administrative failures in the implementation of the DPOC regime should not be considered by us to be part and parcel of that regime, nor, relatedly, that such disenfranchisement should be excluded from our analysis of the alleged burden caused by the DPOC regime under *Anderson-Burdick*. *Cf. Democratic Exec. Comm. of Fla.*, 915 F.3d at 1319–21 (considering "the way in which Florida implements the scheme" when determining the severity of the burden imposed under *Anderson-Burdick*); *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 591–95 (considering burden imposed on the right to vote by "poll-worker error" under *Anderson-Burdick*). In particular, the Secretary does not argue that prospective voters disenfranchised through such bureaucratic snafus should not be counted, for purposes of the burden analysis, among the

The Secretary offers several arguments to the contrary, but we do not find any of them persuasive. First, the Secretary argues that—as a matter of law—the DPOC requirement here only imposes a limited burden on voters. He bases his argument on Justice Stevens's statement in *Crawford* that "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. But Justice Stevens made that statement in light of the record then before the Court. *Id.* at 189 (concluding "*the evidence in the record is not sufficient* to support a facial attack on the validity of the entire statute" (emphasis added)); *id.* at 200 ("[*O*]*n 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." (emphasis added)). But while there was no evidence in *Crawford* that the inconvenience of going to the Bureau of Motor Vehicles constituted a significant burden, the approximately 30,000 would-be voters disenfranchised in this case provide a concrete evidentiary basis to find that a significant burden was imposed by the DPOC requirement. Thus, the fundamental differences between the record in this case and in *Crawford* lead us to a different conclusion.

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approximately 30,000 would-be voters that the district court found to be disenfranchised. Therefore, we have no occasion to consider any such argument further.

Furthermore, we also reject the Secretary's argument that features of the DPOC requirement made it—as a matter of law—less burdensome than the law in *Crawford*. While the Secretary notes that Kansas allows those without DPOC to register by meeting with him and other officials, this procedure has only been used five times, and we agree with the district court's finding that its byzantine nature "adds, not subtracts, from the burdensomeness of the law." Aplt.'s App., Vol. 47, at 11526; *cf. Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965) (finding unconstitutional what was "plainly a cumbersome procedure" to avoid a poll tax). The Secretary also argues that Kansas accepts DPOC through e-mail, fax, or mail, while the law at issue in *Crawford* required voters without photo identification to travel to the Bureau of Motor Vehicles. But the provisions the Secretary cites do not mention e-mail or fax. *See* Kan. Stat. Ann. § 25–2309(l), (t). Moreover, it is far from clear that requiring all registrants to provide DPOC—even though they need only submit it once—is less burdensome than *Crawford*'s requirement that voters bring identification to the polls. After all, many Indiana voters in *Crawford* no doubt would have driven to the polls and therefore already would have had their driver's licenses with them; consequently, they would not have been obliged to take *any* further steps to vote.

The Secretary also argues that there is no way to determine how many of the 31,089 would-be voters whose applications were suspended or denied "were actually unable (as opposed to just unwilling) to obtain a birth certificate or other evidence of citizenship." Aplt.'s Opening Br. at 32; *cf. 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."). In support, he notes that the district court acknowledged that "[t]here was little admissible evidence presented at trial about the rate of DPOC possession by suspended and canceled applicants." Aplt.'s App., Vol. 47, at 11457; *see also id.* ("There is no evidence about how many canceled and suspended applicants in fact lack DPOC . . . ."). And, as his argument goes, if voters simply did not want to be inconvenienced by providing DPOC, this inconvenience does not necessarily constitute a cost that is beyond the "usual burdens of voting." *Crawford*, 553 U.S. at 198 (plurality opinion of Stevens, J.). But the concrete record evidence of the disenfranchisement of the 31,089 would-be voters again provides reason to believe that the DPOC requirement does impose a significant burden on Kansas voters, even if some of those voters could have registered with DPOC. While the district court was unable to determine what percentage of the disenfranchised voters lacked DPOC, it did recount extensive testimony about individual voters like Mr. Fish and Ms. Bucci who lacked DPOC or faced significant costs to obtain it. When this testimonial evidence was combined with the statistical evidence of disenfranchised voters, the district court could properly conclude here that the DPOC requirement imposed a significant burden on the right to vote.[8]

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[8] We note that a sister circuit has concluded—in the NVRA context—that this very DPOC requirement burdens the right to vote by imposing "onerous" processes that can lead would-be voters

The Secretary further argues that *Crawford* is analogous to this case because the district court in *Crawford* had "estimated" that, "when the statute was enacted, around 43,000 Indiana residents lacked a state-issued driver's license or identification card." *Id.* at 187–88 (plurality opinion of Stevens, J.) (citing *Ind. Democratic Party*, 458 F. Supp. 2d at 807). The Secretary thus argues that, like here, there was widespread and quantified evidence of disenfranchisement in *Crawford*, and so we should reach the same result as the Court did there. But this argument ignores that the Supreme Court in *Crawford* found that this 43,000 number was meaningless because it told the Court "nothing about the number of free photo identification cards [that had been] issued since" the statute's enactment and thus nothing about how many voters actually would be turned away from the polls. *Id.* at 202 n.20. We thus do not view the Court in *Crawford* as implying that the disenfranchisement of 43,000 voters would not be significant. Furthermore, the Court in *Crawford* concluded that "the evidence in the record d[id] not provide [it] with the number of *registered voters* without photo identification" and thus the number of voters who might be unable to vote. *Id.* at 200 (emphasis added). In contrast, we know here that

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to give up. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016) ("It does not matter whether [would-be voters were being held on a suspension list] because they lack access to the requisite documentary proof or simply because the process of obtaining that proof is so onerous that they give up. The outcome is the same—the abridgment of the right to vote." (citations omitted)).

approximately 30,000 Kansans took affirmative and concrete steps to register to vote and were disenfranchised by application of the DPOC requirement. Therefore, we are not persuaded by the Secretary's attempt here to analogize *Crawford* to this case.

The Secretary relatedly argues that the district court overstated the burden by considering all 31,089 would-be voters with canceled or suspended applications because some of them might have later submitted DPOC to cure their applications if the district court had not enjoined the DPOC requirement. It is true that in *Crawford* Justice Stevens suggested that certain estimates of the number of voters without photographic identification were likely overstated because some voters may have obtained identification in the intervening months. *Id.* at 188 n.6, 202 n.20. However, the Secretary's argument disregards the expert's opinion here that the total number of applicants with suspended or canceled applications would have increased but for the injunction. The Secretary's argument, in contrast, is based on sheer speculation: he makes no attempt to estimate how many of the would-be Kansas voters with canceled or suspended applications would have taken the step to submit DPOC. And, as Justice Stevens rightly pointed out in *Crawford*, "[s]upposition . . . is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication." *Id.* at 202 n.20. And the concrete, admissible evidence here indicates that—because of Kansas's DPOC requirement—31,089 would-be voters were not

permitted to vote; without doubt, that is a significant burden.

In sum, we conclude that the DPOC requirement imposed a significant burden on the right to vote.[9]

b. Asserted State Interests

We now turn to "evaluate the interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 190 (plurality opinion of Stevens, J.). The Secretary puts forward four interests: "(i) protecting the integrity of the electoral process, (ii) ensuring the accuracy of voter rolls, (iii) safeguarding voter confidence, and (iv) preventing voter fraud." Aplt.'s Opening Br. at 33. We agree with the Secretary that each of these interests is legitimate in the abstract. However, the Secretary points to no

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[9] Mr. Bednasek also argues that the DPOC requirement is suspect because it applies different registration requirements to those who registered before the statute was enacted than to those who registered after. *See* Kan. Stat. Ann. § 25-2309(n) ("Any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship."). But Mr. Bednasek concedes that this distinction is justified in part by Kansas's "legitimate state interest" in protecting the reliance interests of voters who were registered under the previous regime, Aplee.'s Resp. Br. at 76, and the authority he provides that found certain grandfather clauses unconstitutional in the voting context concluded that the statutes were unconstitutional because they sought to avoid the import of the Fifteenth Amendment. *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 49–50 (1959); *Guinn v. United States*, 238 U.S. 347, 363 (1915). No similar allegations have been made here, and so we do not base our analysis of the burden on this argument.

concrete evidence that "those interests make it necessary to burden the plaintiff's rights" in this case, *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789), and so—in the following section—we conclude that, on this record, these legitimate interests are insufficiently weighty to justify the limitations on the right to vote imposed by the DPOC requirement.

While nominally distinct interests, three of the Secretary's asserted interests—protecting the integrity of the electoral process, ensuring the accuracy of voter rolls, and preventing vote fraud—largely overlap. Each fundamentally can be boiled down to Kansas's interest in making sure that only eligible voters vote in its elections. And we agree with the Secretary that "[t]here 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 (plurality opinion of Stevens, J.); *see id.* ("[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."). Likewise, when put in terms of electoral integrity, "[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) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). And we agree that "[t]he State's interest is particularly strong with respect to efforts to root out fraud," *Doe v. Reed*, 561 U.S. 186, 197 (2010), because fraud "drives honest citizens out of the democratic process and breeds distrust of our government," *id.* (quoting *Purcell*, 549 U.S. at 4). "While the most effective method of preventing election fraud may well

be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196 (plurality opinion of Stevens, J.). Thus, we agree with the Secretary that Kansas's interest in counting only the votes of eligible voters is legitimate in the abstract, but, on this record, we do not see any evidence that such an interest made it necessary to burden voters' rights here.

The Secretary argues that—even if there is no inaccuracy or fraud to correct—the DPOC requirement furthers Kansas's interest in increasing public confidence and participation in the democratic process. Aplt.'s Opening Br. at 35–36; *see also id.* at 34 ("Preventing Kansas from verifying the bedrock voter qualification of United States citizenship would undermine the integrity of the electoral process—*whether widespread voter fraud exists or not*." (emphasis added)). Again, we agree with the Secretary that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. Such confidence is vital because "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Id.* Voters "will feel disenfranchised" when they have reason to "fear their legitimate votes will be outweighed by fraudulent ones." *Id.* Thus, the Supreme Court has recognized that "public confidence in the integrity of the electoral process has independent significance[] because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (plurality opinion of Stevens, J.). While we agree with the Secretary that Kansas has a legitimate interest in safeguarding voter

confidence, we explain below why there is no evidence that the DPOC requirement furthers that interest.

Thus, we agree that each of the interests asserted by the Secretary is legitimate in the abstract. However, we now turn to explain why—due to the significant burden that the DPOC requirement imposes on the right to vote and the lack of concrete evidence supporting the relevance of these interests in this case—we cannot conclude "those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

c. Balancing

As we have discussed, "the rigorousness of our inquiry into the propriety of [the DPOC requirement] depends upon the extent to which [it] burdens" voters' rights. *Id.* Here, the evidence of the approximately 30,000 disenfranchised voters means that heightened scrutiny is appropriate. Thus, we must look at more than whether the proffered interests are legitimate in the abstract; we must ask whether the concrete evidence demonstrates that "those interests make it necessary to burden the plaintiff's rights" in this case. *Id.* (quoting *Anderson*, 460 U.S. at 789); *see Cal. Democratic Party*, 530 U.S. at 584; *League of Women Voters of N.C.*, 769 F.3d at 246; *Obama for Am.*, 697 F.3d at 433–34. Doing so, we conclude that the Secretary has failed to introduce sufficiently weighty evidence to justify the burdens imposed on voters.

To start, the district court found essentially no evidence that the integrity of Kansas's electoral process had been threatened, that the registration of ineligible

voters had caused voter rolls to be inaccurate, or that voter fraud had occurred. In particular, it found that, "at most, 67 noncitizens registered or attempted to register in Kansas over the last 19 years." Aplt.'s App., Vol. 47, at 11519. Of these, "[a]t most, 39 noncitizens have found their way onto the Kansas voter rolls in the last 19 years." *Id.* at 11520. The Secretary does not argue that these factual findings are clearly erroneous. Thus we are left with this incredibly slight evidence that Kansas's interest in counting only the votes of eligible voters is under threat. Indeed, even as to those 39 noncitizens who appear on the Kansas voter rolls, the district court effectively found that "administrative anomalies" could account for the presence of many—or perhaps even most—of them there. *Id.* Supporting this determination is the fact that Kansas's voter-registration database included 100 individuals with purported birth dates in the 19th century and 400 individuals with purported birth dates *after* their date of voter registration. And so it is quite likely that much of this evidence of noncitizen registration is explained by administrative error.

The Secretary also presented the district court with out-of-state evidence about election fraud and noncitizen registration. But the district court concluded that, "looking beyond Kansas, [the Secretary's] evidence of noncitizen registration at trial was weak." *Id.* at 11519. It explained at length why it excluded large portions of the Secretary's expert testimony and found much of the remaining testimony unpersuasive. *Id.* (explaining that one of the Secretary's experts was "credibly dismantled" by the architect of the survey upon which the expert had relied and that the court

"d[id] not fully credit" a second expert's testimony "given its inclusion of misleading and false assertions"). We have no doubt that inaccurate voter registrations exist in our country, *see, e.g.*, *Husted v. A. Philip Randolph Inst.*, --- U.S. ----, 138 S. Ct. 1833, 1838 (2018) ("It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate."), but the Secretary fails to connect this generalized information to the DPOC requirement at issue here or to argue that the district court clearly erred in finding that "the trial evidence did not demonstrate the largescale problem urged by [the Secretary]." Aplt.'s App., Vol. 47, at 11520. In light of the significant burden on the right to vote, we thus do not rely on the Secretary's out-of-state evidence of voter-fraud and nonvoter registration.

Finally and relatedly, while much of the above discussion focused on Kansas's interest in counting only the votes of eligible voters, it is also true that the evidence did not demonstrate that Kansas's interest in safeguarding voter confidence made it necessary to enact the DPOC requirement. In particular, the district court found that "the evidence in this case d[id] not show that the DPOC law furthers" Kansas's "significant interest" in "maintaining confidence in the electoral process." *Id.* at 11527–28. The district court found that, even under calculations from one of *the Secretary's* experts, the estimated number of suspended applications that belonged to noncitizens was "statistically indistinguishable from zero," while "more than 99% of the individuals" whose voter-registration applications were suspended were citizens who

presumably would have been able to vote but for the DPOC requirement. *Id.* at 11491–92; *id.* at 11528 ("[T]he DPOC law disproportionately impacts duly qualified registration applicants, while only nominally preventing noncitizen voter registration."). Thus, the district court found that this disproportionate impact on qualified registration applicants "also may have the inadvertent effect of eroding, instead of maintaining, confidence in the electoral system." *Id.* at 11528. Again, while the Secretary casts aspersions on these factual findings, he does not contest them as clearly erroneous. *See* Aplt.'s Opening Br. at 21 ("[T]he State asserts only legal error . . . .").

In sum, the burden on the right to vote evinced by the approximately 30,000 disenfranchised voters elevates "the rigorousness of our inquiry into the propriety of [the DPOC requirement]." *Burdick*, 504 U.S. at 434. And when we look at "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights,'" *id.* (quoting *Anderson*, 460 U.S. at 789), we see that the Secretary's proffered justifications are not supported—and indeed in several places are undercut—by the facts found by the district court. We thus make the "hard judgment," *Crawford*, 553 U.S. at 190 (plurality opinion of Stevens, J.), that the DPOC requirement unconstitutionally burdens the right to vote and uphold the district court's judgment.

To be sure, the Secretary argues that *Crawford* and our opinion in *Santillanes* prohibit us from examining whether there is any evidence behind his proffered

justifications. In *Crawford*, Justice Stevens's opinion accepted three justifications—election modernization, protection against voter fraud, and safeguarding voter confidence—in the abstract, i.e., without requiring evidence that these interests were at risk in Indiana or remedied by the photographic-identification requirement at issue. *Id.* at 191–97 (plurality opinion of Stevens, J.). Similarly, in *Santillanes*, we concluded that "[i]n requiring the City to present evidence of past instances of voting fraud, the district court imposed too high a burden on the City." 546 F.3d at 1323. Guided by *Crawford*, we relied on the city's general invocation of its interest and *Crawford*'s citation to "flagrant examples of such fraud in other parts of the country," *id.* (quoting *Crawford*, 553 U.S. at 195 (plurality opinion of Stevens, J.)), in concluding that "[p]revention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement for local elections," *id.*

But in *Crawford* and *Santillanes*, the Supreme Court and our court had concluded that there was only a light burden on the right to vote. *Crawford*, 553 U.S. at 202–03 (plurality opinion of Stevens, J.); *Santillanes*, 546 F.3d at 1322–23. While both of those decisions acknowledged that the laws at issue there could impose a burden on the right to vote, those burdens were limited and were further mitigated by the possibility of casting provisional ballots. But the evidence here that 31,089 voter-registration applications were either suspended or canceled differentiates the magnitude of the burden here from the magnitude of the burdens in those cases. Because "the rigorousness of our inquiry into the propriety of [the challenged law] depends upon

the extent to which [it] burdens" voters' rights, *Burdick*, 504 U.S. at 434, and neither of those decisions confronted the level of disenfranchisement that the record evidence establishes that the DPOC requirement produced here, neither of those decisions applied the more robust scrutiny that we must here. And it is only after engaging in that heightened scrutiny that we find that the facts in this case do not support the conclusion that the Secretary's legitimate interests justify the burdens that the DPOC law imposes on the right to vote. Thus, our approach here is entirely consistent with *Crawford* and *Santillanes*; the different result is driven by the different record of burdens and, consequently, the different level of judicial scrutiny applied.

In sum, we conclude that the DPOC requirement is unconstitutional and uphold the district court's injunction in *Bednasek v. Schwab*, No. 18-3134.[10]

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[10] While the Secretary argues that we should not facially invalidate the statute based on "the allegedly 'confusing' implementation of Kansas law," Aplt.'s Opening Br. at 33, or "the unique circumstances of one individual," Aplt.'s Reply Br. at 16, he does not offer a broader challenge to the scope of the relief that the district court ordered. We do not rely here on the confusing implementation of the DPOC law or the circumstances of any individual plaintiff, instead finding that the demonstrated disenfranchisement of approximately 30,000 would-be voters demonstrates that the "broad application" of the DPOC requirement imposed an unjustified burden on "all [Kansas] voters." *Crawford*, 553 U.S. at 202–03 (plurality opinion of Stevens, J.)

C. Whether Section 5 of the NVRA Preempts the DPOC Requirement

We also uphold the district court's entry of the injunction against the enforcement of the DPOC requirement with regard to motor-voter registrants (i.e., the appeal in *Fish v. Schwab*, No. 18-3133) because section 5 of the NVRA preempts Kansas's DPOC requirement. In coming to that conclusion, we (1) summarize our opinion in *Fish I*, (2) explain why that opinion establishes the law of this case, and (3) hold that, under the *Fish I* framework, Kansas's DPOC requirement is preempted by section 5 of the NVRA because Kansas failed to demonstrate substantial numbers of non-citizen voters attempted to register or vote. Thus, even apart from our constitutional holding in *Bednasek v. Schwab*, No. 18-3134, we affirm the district court's injunction—as to the class of voters who sought to register under section 5 of the NVRA.

1. Preemption Framework Established in *Fish I*

In *Fish I*, we addressed the fundamental question of whether Congress—through the NVRA—had utilized the authority vested in it by the Elections Clause to preempt state regulations—namely, the DPOC requirement. The Constitution's Elections Clause states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at

> any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1. This provision makes clear that while states must set the "Times, Places and Manner" of their elections, "Congress can step in, either making its own regulations that wholly displace state regulations or else modifying existing state regulations." *Fish I*, 840 F.3d at 724; *see Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013) ("Upon the States [the Elections Clause] imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether."). In other words, "[t]he Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citation omitted); *accord Fish I*, 840 F.3d at 725–26.

In *Fish I*, we explained that, in order to answer the fundamental preemption question, "the Elections Clause requires that we straightforwardly and naturally read the federal and state provisions in question as though part of a unitary system of federal election regulation but with federal law prevailing over state law where conflicts arise." *Fish I*, 840 F.3d at 729; *accord Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012) (en banc), *aff'd sub nom. Inter Tribal*, 570 U.S. 1 (2013). We then turned to the relevant portions of Kansas's DPOC requirement and the NVRA. Kansas's

DPOC requirement provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." Kan. Stat. Ann. § 25–2309(l). The statute then "enumerates thirteen forms of documentation, including a birth certificate and a passport, that meet this requirement." *Fish I*, 840 F.3d at 732. We then turned to the relevant portion of section 5 of the NVRA, which states:

> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
>
> (A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));
>
> (B) may require only the minimum amount of information necessary to—
>
> (i) prevent duplicate voter registrations; and
>
> (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (C) shall include a statement that—
>
> (i) states each eligibility requirement (including citizenship);

> (ii) contains an attestation that the applicant meets each such requirement; and
> (iii) requires the signature of the applicant, under penalty of perjury . . . .

52 U.S.C. § 20504(c)(2)(A)–(C).

We read subparagraph (B) as "restricting states' discretion in creating their own DMV voter-registration forms" by establishing what we referred to as the "minimum-information principle." *Fish I*, 840 F.3d at 733. The minimum-information principle "establishes a ceiling on what information the states can require" on the motor-voter form. *Id.*; *see id.* ("Under NVRA section 5, a state motor voter form 'may require only the *minimum* amount of information necessary' for state officials to carry out their eligibility-assessment and registration duties." (quoting 52 U.S.C. § 20504(c)(2)(B))). This principle "calls on states to include the least possible amount of information necessary on the motor voter form." *Id.* at 736. We also noted subparagraph (C)'s command to "states to list qualifications and also to require applicants to attest that they meet them and to sign the attestation under penalty of perjury." *Id.* Subparagraph (C) "*mandates* that states include an attestation requirement" on the motor-voter form. *Id.*

Reading subparagraphs (B) and (C) harmoniously, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an

harmonious whole.'" (citations omitted) (first quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); then quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959))), we concluded that "section 5 is reasonably read to establish [subparagraph (C)'s] attestation requirement as the presumptive minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties [under subparagraph (B)]," *Fish I*, 840 F.3d at 737; *id.* at 737–38 (inferring "from the statutory structure that Congress contemplated that the attestation requirement would be regularly used and would typically constitute the minimum amount of information necessary for state officials to carry out their eligibility-assessment and registration duties"). While subparagraph (C)'s attestation requirement provides the *presumptive* minimum amount of information necessary for a state to carry out its subparagraph (B) duties, we "recognize[d] that in a given case [the attestation requirement] may not be sufficient for a state to carry out its eligibility-assessment and registration duties." *Id.* at 737.

"[W]hether the attestation requirement actually satisfies the minimum-information principle in a given case turns on the factual question of whether the attestation requirement is sufficient for a state to carry out these duties." *Id.* at 738. Thus, "in order for a state advocating for a DPOC regime to rebut the presumption that the attestation requirement is the minimum information necessary for it to carry out its eligibility-assessment and registration duties, it must make a factual showing that the attestation requirement is insufficient for these purposes." *Id.*

"More specifically, in order to rebut the presumption as it relates to the citizenship criterion, we interpret[ed] the NVRA as obliging a state to show that 'a substantial number of noncitizens have successfully registered' notwithstanding the attestation requirement." *Id.* at 739 (quoting *EAC*, 772 F.3d at 1198). And so we observed that "if Kansas fails to rebut this presumption that attends the attestation regime, then DPOC necessarily requires more information than federal law presumes necessary for state officials to meet their eligibility-assessment and registration duties (that is, the attestation requirement)." *Id.* In that circumstance, "Kansas's DPOC law would be preempted." *Id.*

Finally, we then applied this preemption framework and concluded that the Secretary had failed to demonstrate that a substantial number of noncitizens had successfully registered. *Id.* at 747–48. In particular, the Secretary had only shown that between 2003 and 2013 "thirty noncitizens registered to vote." *Id.* at 746. "These numbers [fell] well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties." *Id.* at 747. Thus, we concluded that the plaintiffs' challenge was likely to succeed on the merits. *Id.* at 750–51. We then concluded that the district court did not err in holding that the remaining preliminary-injunction factors also favored a preliminary injunction, and thus affirmed the district court's grant of a preliminary injunction. *Id.* at 751–56. However, we acknowledged that if, on remand, "evidence comes to light that a

substantial number of noncitizens have registered to vote in Kansas during a relevant time period, inquiry into whether DPOC is the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties would then be appropriate." *Id.* at 750–51. In other words, while the Secretary had not demonstrated that a substantial number of noncitizens had registered to vote at the preliminary-injunction stage of the litigation, we left open the possibility that he would be able to make that showing at a trial on the merits. As noted, however, the district court subsequently concluded that the Secretary failed to make that showing.

2. The *Fish I* Framework Governs

We conclude that the *Fish I* framework governs our inquiry into whether section 5 of the NVRA preempts Kansas's DPOC requirement. However, the Secretary argues against this conclusion, claiming that *Fish I* "is not binding on this panel" and that we should reevaluate the *Fish I* framework. Aplt.'s Opening Br. at 18, 41–42. Thus, before we turn to evaluating whether the Secretary has demonstrated that a substantial number of noncitizens registered to vote, we explain why, under the law-of-the-case doctrine, *Fish I*'s legal determinations are the law of the case.

The law-of-the-case doctrine provides that, "when a court rules on an issue of law, the ruling 'should continue to govern the same issues in subsequent stages in the same case.'" *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014) (quoting *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013)); *accord*

Arizona v. California, 460 U.S. 605, 618 (1983). "Under this doctrine, 'the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.'" *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (quoting *Zinna v. Congrove*, 755 F.3d 1177, 1182 (10th Cir. 2014)). The doctrine serves "important" functions. *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016). "Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Id.*; *see also* 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4478, Westlaw (2d ed., database updated Apr. 2020) ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.").

However, despite its importance, "the decision whether to apply law of the case doctrine remains a matter of judicial discretion." *Entek GRB*, 840 F.3d at 1242; *see Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011) ("This doctrine is designed to promote finality and prevent re-litigation of previously decided issues, but does not serve to limit a court's power."). "Although the law of the case doctrine is not a limit on our power, nor 'an inexorable command,'" *United States v. Irving*, 665 F.3d 1184, 1192 (10th Cir. 2011) (citations omitted) (quoting *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998)), it "is subject to very limited exceptions," *id.* In particular,

"[w]e will only deviate from the law of the case '(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice.'" *Cressman*, 798 F.3d at 946 (quoting *Irving*, 665 F.3d at 1192 n.12); *accord United States v. Trent*, 884 F.3d 985, 995 (10th Cir. 2018).

In light of all this, it is clear that, at least ordinarily, a panel of our court would follow any rulings made in prior appeals in the same case; thus, we ordinarily would follow *Fish I*'s framework. But the Secretary argues that "*Fish I* does not bind this panel" because that opinion was considering a preliminary injunction while we are now considering the merits. Aplt.'s Opening Br. at 41–42 (bold-faced font omitted). His argument relies centrally on *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). In that case, a two-judge motions panel of this court granted an emergency motion for a preliminary injunction that enjoined the relevant law pending review of the merits. *Id.* at 903. "In doing so, the motions panel held that [the plaintiff] established a likelihood of success on the merits" on his claim that the relevant statute was unconstitutional. *Id.* On remand, the district court stated its own view that the statute was constitutional, but it nevertheless—under its perceived duty—entered judgment enjoining enforcement of the statute based on the motions panel's ruling. *Id.* In an appeal of that order, i.e., a second appeal, we held that the motions panel's preliminary ruling was not the law of the case and thus did not bind the district court's or our

subsequent merits determinations. *Id.* at 904–05. This was because "the two judge panel decision of our court constituted an interlocutory ruling, and its holding was limited to the conclusion that [the plaintiff] had shown a likelihood of success on the merits of his claim." *Id.* at 904. Furthermore, "[t]o the extent that any language in [the motions-panel's decision] c[ould] be read as an assessment of the actual merits of [the plaintiff's] claim, as opposed to his likelihood of success on the merits, such language [was] dicta" and "not subject to the law of the case doctrine." *Id.* at 904 n.5; *see Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." (citations omitted)).

The Secretary argues, based on *Homans* and *Camenisch,* that *Fish I* is not entitled to law-of-the-case effect. We disagree. As *Camenisch* indicates, the normal rule is that "[r]ulings—predictions—as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case, whether the ruling is made by a trial court or by an appellate court." 18B WRIGHT ET AL., *supra*, at § 4478.5 (footnotes omitted); *cf. Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) ("In affirming the district court's denial of a preliminary injunction, we do not address the underlying merits of Oklahoma's ultimate claims at trial."). This rule exists because "the court of appeals must often consider such preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations." *Sherley v. Sebelius*, 689 F.3d 776, 782

(D.C. Cir. 2012). And so our sister circuits and a leading treatise agree that "[*a*] *fully considered* appellate ruling on an issue of law made on a preliminary injunction appeal . . . become[s] the law of the case for further proceedings in the trial court on remand and in any subsequent appeal." 18B WRIGHT ET AL., *supra*, at § 4478.5 (emphasis added) (footnote omitted); *see Rodriguez v. Robbins*, 804 F.3d 1060, 1080–81 (9th Cir. 2015) (explaining that conclusions on pure issues of law made during appeal of preliminary injunction constitute law of the case), *rev'd on other grounds sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (collecting cases from other circuits reaching the conclusion that "when a court reviewing the propriety of a preliminary injunction issues a fully considered ruling on an issue of law with the benefit of a fully developed record, then the conclusions with respect to the likelihood of success on the merits are the law of the case in any subsequent appeal").

Guided by this authority, we note that, in *Homans*, the motions panel granted the emergency motion two days after it was made, and so it made sense there that we would not afford law-of-the-case effect to the motion panel's decision—made, as it was, under (necessarily) severe time constraints. 366 F.3d at 903. Here, however, the *Fish I* panel was able to consider the issue fully and issue a lengthy opinion discussing pure issues of law. *See Sherley*, 689 F.3d at 783 ("The time constraints and limited record available to the court in those cases are not present here. We therefore follow the other circuits in concluding that the exception [to the law-of-the-case doctrine] is not present either.").

"[W]here the earlier ruling, though on preliminary-injunction review, was established in a definitive, fully considered legal decision based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints, why should we not follow the usual law-of-the-case jurisprudence?" *Id.* at 782. We, like our sister circuits, think that it makes eminent sense to apply the law-of-the-case doctrine in these circumstances.

Arguing against this conclusion, the Secretary also cites to the concurring opinion in *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015, 1029 (10th Cir.) (McConnell, J., concurring), *vacated*, 546 U.S. 1072 (2005). But the majority opinion in that case adopted the same position set out above—namely that an opinion that robustly addresses legal issues at the preliminary-injunction stage of the litigation will provide "the district court with the appropriate legal framework within which to view th[e] case." *Id.* at 1020; *see id.* at 1021 ("In so ruling [on an issue in the earlier appeal of the preliminary injunction], it would appear that [the prior ruling] is the law of this case . . . ."). In responding to the concurring opinion cited by the Secretary, "we specifically recognized that the principles of law of the case are flexible," and so "while it [wa]s true that we [we]re not *bound* by *Prairie Band I*, it [wa]s not true that 'the law of the case doctrine does not apply' merely because *Prairie Band I* dealt with a preliminary injunction." *Id.* at 1026 (quoting *id.* at 1030 (McConnell, J., concurring)).

We think this gets it exactly right: because the *Fish I* panel was able to consider the issue fully and issue a lengthy opinion discussing pure issues of law, we conclude that the law-of-the-case doctrine applies to *Fish I*'s legal conclusions. Of course, this doctrine "does not serve to limit a court's power." *Rimbert*, 647 F.3d at 1251. And exceptions to the doctrine's effect exist when there is new and different evidence, an intervening change in controlling authority, or the prior ruling was clearly erroneous and would work a manifest injustice. *Id.* But it is undisputed that none of these exceptions applies here, and thus we adhere to the "thorough and sound" discussion of the applicable preemption framework found in our prior opinion, *Fish I. Prairie Band Potawatomi Nation*, 402 F.3d at 1026.

In sum, we conclude that *Fish I*'s preemption framework is the law of the case.

3. Whether the Secretary Presented Sufficient Evidence to Satisfy *Fish I*

The Secretary argues that he satisfied the *Fish I* framework on remand. But the district court's factual findings undermine this argument, and the Secretary's remaining arguments turn on his already-rejected view that Kansas must be afforded "sufficient discretion [for it] to determine whether the problem of unqualified voters becoming registered is 'substantial.'" Aplt.'s Opening Br. at 57. We thus conclude that the Secretary has failed to show that a substantial number of noncitizens registered to vote.

In *Fish I*, we held that "to overcome the presumption that attestation constitutes the minimum

amount of information necessary for a state to carry out its eligibility-assessment and registration duties, the state must show that a substantial number of noncitizens have successfully registered to vote under the attestation requirement." 840 F.3d at 739. At that stage, "[t]he district court found that between 2003 and the effective date of Kansas's DPOC law in 2013, only thirty noncitizens registered to vote," and we concluded that "[t]hese numbers [fell] well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties." *Id.* at 746–47. But we acknowledged that "[i]f evidence comes to light that a substantial number of noncitizens have registered to vote in Kansas during a relevant time period, inquiry into whether DPOC is the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties would then be appropriate." *Id.* at 750–51. Thus, to overcome the presumption that the attestation requirement satisfies the minimum-information principle, the Secretary needed to provide greater evidence of noncitizens registering to vote.

But, at the trial on the merits, the district court found that only 39 noncitizens "successfully registered to vote despite the attestation requirement." Aplt.'s App., Vol. 47, at 11472; *see id.* at 11508. Yet recall that, even as to those 39 noncitizens who appear on the Kansas voter rolls, the district court effectively found that "administrative anomalies" could account for the presence of many—or perhaps even most—of them there. *Id.* at 11520. In other words, even the figure of

39 registered noncitizens could be more the product of such anomalies than of the voluntary registration actions of noncitizens in the face of the attestation requirement. But, accepting that figure at face value, the confirmed noncitizens who successfully registered to vote from 1999 to 2013 was equivalent to less than three noncitizen voters a year. In *Fish I* we concluded that the 30 noncitizens who had registered to vote between 2003 and 2013—which also equated to "no more than three per year"—were "well short" of "substantial." 840 F.3d at 746–47. Following *Fish I*'s guidance, we reach a similar conclusion here. Specifically, we conclude that the addition of nine voters spread over four more years means that the Secretary has still failed to demonstrate that substantial numbers of noncitizens successfully registered to vote notwithstanding the attestation requirement. Thus, we conclude that the Secretary has failed to rebut the presumption that the attestation requirement satisfies the minimum-information principle.

The Secretary does not argue that the district court's factual findings concerning the number of noncitizens who registered to vote were clearly erroneous. Nevertheless, he references statements made in the legislative record by certain legislators who believed noncitizens had registered to vote, cites a letter from a court clerk asserting that employees of a hog farm "were transported to [the county clerk's] office by their employer to register to vote" and that "some of these employees felt they were pressured to register even though they may not be legal," Aplt.'s App., Vol. 30, at 7668, and notes possible instances of noncitizens

registering to vote, including one where a citizen told Kansas officials that she had voted before becoming a citizen, *see* Aplt.'s Opening Br. at 57–58 (citing Aplt.'s App., Vol. 38, at 9460–65, 9522–23). But because the Secretary does not directly contest the district court's factual findings about how many noncitizens registered to vote, he may not wage a guerilla war on the district court's factual findings through these ad hoc, anecdotal references to other purported incidents of noncitizen registration. This evidence does not establish that substantial numbers of noncitizens registered to vote.

The Secretary also cites to two cases from the Seventh Circuit that identified individual noncitizens who registered to vote using motor-voter forms, *see Kimani v. Holder*, 695 F.3d 666, 668, 671 (7th Cir. 2012); *Keathley v. Holder*, 696 F.3d 644, 645 (7th Cir. 2012), and provides a citation to an internet story about another noncitizen whom Illinois officials registered to vote, *see* Aplt.'s Opening Br. at 58–60. These anecdotes, even were we to consider them, do not establish that "substantial" numbers of noncitizens registered to vote in Kansas during a relevant time period and thus are not pertinent to the registration of noncitizen voters in Kansas. *See* Aplee.'s Resp. Br. at 37. This showing thus cannot satisfy the Secretary's burden.

The Secretary falls back on arguing that "[t]he elected representatives of the people of the State of Kansas determined that requiring proof of citizenship as a condition of voter eligibility was a permissible response to the threat posed by voter fraud." Aplt.'s Opening Br. at 57. But this is just an argument that

states should be able to determine what § 20504(c)(2)(B)'s term "necessary" means—an argument that we expressly rejected in *Fish I*. *See* 840 F.3d at 743 (noting that "the Supreme Court in *Inter Tribal* rejected such an understanding of federal election regulation and confirmed that the NVRA's plain language evinces Congress's intent to restrain the regulatory discretion of the states over federal elections, not to give them free rein").

Moreover, the Secretary relatedly argues that the attestation requirement does not provide the minimum information necessary if even one noncitizen registers to vote because even a small number of noncitizens registered to vote could be "determinative" in certain close elections. Aplt.'s Opening Br. at 60 (pointing to various close elections in Kansas between 2000 and 2016, including 33 elections decided by fewer than 100 votes and one that was tied (citing Aplt.'s App., Vol. 27, at 6938; *id.*, Vol. 39, at 9765–69)); *see* Aplt.'s Reply Br. at 33–34. But we rejected this argument in *Fish I*: "The NVRA does not require the least amount of information necessary to prevent even a single noncitizen from voting." 840 F.3d at 748. As we explained there, "Congress adopted the NVRA to ensure that whatever else the states do, 'simple means of registering to vote in federal elections will be available.'" *Id.* (quoting *Inter Tribal*, 570 U.S. at 12). "This purpose would be thwarted if a single noncitizen's registration would be sufficient to cause the rejection of the attestation regime." *Id.* The Secretary provides no reason here to deviate from that conclusion, and, for that reason alone, we could reject his argument. And, furthermore, if the Secretary is correct that Kansas's recent history

is sprinkled with some hotly contested, close elections such that he reasonably could have an especially keen interest in ensuring that every proper vote counts, we are hard-pressed to see how that interest is furthered by the DPOC law—a law that undisputedly has disenfranchised approximately 30,000 would-be Kansas voters who presumably would otherwise have been eligible to vote in such close elections. Indeed, the DPOC law would appear to undercut, rather than further, the Secretary's professed interest in ensuring that every proper vote counts.

Finally, the Secretary argues that "even if there were no widespread problem of voter fraud in Kansas, the Supreme Court has recognized that the States can proactively fight against the prospect of fraud." Aplt.'s Opening Br. at 61. To make this point, he cites to Justice Stevens's discussion in *Crawford* of Indiana's undisputed interest in preventing voter fraud even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. But this interest was asserted in an entirely different context: Justice Stevens was analyzing a constitutional challenge in a case where the relevant law only imposed a limited burden on voters. *Id.* at 202–03. He said nothing about the evidentiary burden required to displace the statutory presumption created by section 5 of the NVRA and thus the citation is inapt.

In short, we conclude that the Secretary has failed to show that a substantial number of noncitizens successfully registered to vote.[11]

* * *

The Secretary has failed to show that a substantial number of noncitizens have successfully registered in Kansas notwithstanding section 5 of the NVRA's attestation requirement. Thus, the DPOC requirement necessarily requires more information than federal law presumes necessary for state officials to meet their eligibility-assessment and registration duties. And so we conclude that Kansas's DPOC law is preempted by section 5 of the NVRA. We uphold the district court's entry of a permanent injunction against the enforcement of the DPOC requirement as to the those voters who sought to register under section 5 of the NVRA.

IV. Conclusion

In *Bednasek*, No. 18-3134, we conclude the DPOC requirement unconstitutionally burdens the right to vote and thus **AFFIRM** the district court's injunction. Likewise, in *Fish*, No. 18-3133, we **AFFIRM** the district court's injunction because section 5 of the NVRA preempts the DPOC requirement.

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[11] We do not reach the district court's separate analysis concerning whether—if the number of noncitizen voters here did count as substantial—the DPOC requirement nevertheless satisfied the minimum-information principle.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 16-2105-JAR-JPO

[Filed June 18, 2018]

STEVEN WAYNE FISH, et al.,

Plaintiffs,

v.

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

Defendant.

Case No. 15-9300-JAR-JPO

PARKER BEDNASEK,

Plaintiffs,

v.

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

the State of Kansas,)
)
Defendant.)
_____)

CASES CONSOLIDATED FOR TRIAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

To register to vote, one must be a United States citizen. The Kansas legislature passed the Secure and Fair Elections ("SAFE") Act in 2011, which included a new requirement that Kansans must produce documentary proof of citizenship ("DPOC") when applying to register to vote. These cases were consolidated for trial because they both challenge the DPOC law as a method for enforcing the citizenship qualification. In Case No. 16-2105, the *Fish* Plaintiffs challenge the law as it applies to "motor voter" applicants—individuals who apply to register to vote at the same time they apply for or renew their driver's license online or at a Division of Motor Vehicles ("DOV") office. Plaintiffs include the Kansas League of Women Voters, as well as several Kansas residents who applied to register to vote when applying for a driver's license, but were denied voter registration for failure to submit DPOC. One claim remained for trial in that case alleging that under the Election Clause in Article 1 of the United States Constitution, the Kansas DPOC law is preempted by § 5 of the National Voter Registration Act ("NVRA"), which provides that voter registration applications may only require the minimum amount of information necessary for a State

to determine applicants' eligibility to register to vote, and to perform its registration duties.

In Case No. 15-9300, Plaintiff Parker Bednasek challenges the DPOC law on constitutional grounds. His remaining claim for trial is brought under 42 U.S.C. § 1983, based on a violation of the right to vote under the Fourteenth Amendment's Equal Protection Clause.[1] Mr. Bednasek's claim is not limited to motor-voter applicants.

The seven-day bench trial in these matters concluded on March 19, 2018. After hearing and carefully considering the evidence presented by the parties at trial, this Court first resolves the remaining motions by Plaintiffs to exclude expert testimony, and next issues its Findings of Fact and Conclusions of Law under Fed. R. Civ. P. 52(a). As explained more fully below, the Court grants in part and denies in part the motion to exclude Dr. Steven Camarota, and grants the motion to exclude Patrick McFerron. Under the test set forth by the Tenth Circuit Court of Appeals that governs whether the DPOC law violates § 5 of the NVRA, the Court finds in favor of Plaintiffs in the *Fish* case. The Court further finds in favor of Plaintiff Bednasek on his constitutional challenge to the law. Declaratory and injunctive relief is granted in both matters as set forth in this opinion. Further, the Court imposes specific compliance measures given Defendant's history of non-compliance with this Court's

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[1] The docket numbers referenced throughout this opinion are to the *Fish* matter, Case. No. 16-2105. References to documents filed in the *Bednasek* case will be preceded by that Plaintiff's last name.

orders. And, the Court imposes sanctions responsive to Defendant's repeated and flagrant violations of discovery and disclosure rules.

I. Motions to Exclude Defense Experts Camarota and McFerron

The parties filed several motions to exclude expert testimony before trial. The Court orally ruled on all but two: Plaintiffs' written Motion to Exclude the Testimony and Report of Steven A. Camarota,[2] and Plaintiffs' oral and written motion to exclude the expert testimony of Patrick McFerron under Rule 702, *Daubert*, and the rule against hearsay.[3] These experts were offered by Defendant in both cases. The Court discusses each in turn after setting forth the appropriate legal standards.

A. Standards

The Court has broad discretion in deciding whether to admit expert testimony.[4] The proponent of expert testimony must show "a grounding in the methods and procedures of science which must be based on actual knowledge and not subjective belief or unaccepted speculation."[5] First, the Court must determine whether

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[2] Doc. 429.

[3] Doc. 460; Bednasek Doc. 183.

[4] *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir. 1996) (quoting *Orth v. Emerson Elec. Co., White Rodgers Div.*, 980 F.2d 632, 637 (10th Cir. 1992)).

[5] *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 780 (10th Cir. 1999).

the expert is "qualified by 'knowledge, skill, experience, training, or education' to render an opinion."[6] "[A] district court must [next] determine if the expert's proffered testimony . . . has 'a reliable basis in the knowledge and experience of his discipline.'"[7] To determine reliability, the court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid."[8] The district court must further inquire into whether the proposed testimony is sufficiently "relevant to the task at hand."[9]

It is within the discretion of the trial court to determine how to perform its gatekeeping function under *Daubert*.[10] The most common method for fulfilling this function is a *Daubert* hearing, although such a process is not specifically mandated.[11] In this case, the parties proffered each experts' testimony,

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[6] *Milne v. USA Cycling, Inc.*, 575 F.3d 1120, 1133 (10th Cir. 2009) (quoting *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001)).

[7] *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 (10th Cir. 2005) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)).

[8] *BG Tech., Inc. v. Ensil Int'l Corp.*, 464 F. App'x 689, 703 (10th Cir. 2012).

[9] *Daubert*, 509 U.S. at 597.

[10] *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

[11] *Id.*

which the Court provisionally admitted subject to later review under Rule 702 and *Daubert*.

B. Steven A. Camarota

Defendant called Dr. Camarota to testify about the impact of the Kansas DPOC law on voter registration and participation rates. Specifically, Defendant offered Dr. Camarota "as an expert . . . in the fields of demography, census data, voter registration statistics, and voter participation statistics."[12] Dr. Camarota earned a Ph.D. in American Government with a focus on policy analysis from the University of Virginia. He is currently the Director of Research at the Center for Immigration Studies ("CIS"), where his primary responsibility for the last nineteen years has been to analyze United States Census Bureau data. In this position, he helped construct the American Community Survey, which is a large annual survey conducted by the Census Bureau that includes questions about citizenship and voting. Dr. Camarota has also published peer-reviewed articles and book chapters about census data relating to immigration issues, but not on any issue related to voting. He has served as a peer reviewer for several scholarly journals. Dr. Camarota has published many non-peer-reviewed conference papers and reports for the Census Bureau and CIS, and he has testified before Congress several times about Census Bureau Data, mostly as it relates to immigration issues.

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[12] Doc. 510, Trial Tr. at 1264:5–8.

In his report and testimony, Dr. Camarota looked at Kansas administrative data provided by the SOS's Office, and data from the Current Population Survey ("CPS"), a large Census Bureau survey that asks about registration and voting in November of every other year when federal elections are held. Dr. Camarota observed that the administrative data showed an increase in registration and turnout between October 2010 and October 2014. Dr. Camarota then compared registration and voting rates in Kansas between November 2010 and November 2014, before and after the effective date of the DPOC law, based on the CPS data. Dr. Camarota also compared the Kansas registration and turnout rates to those rates nationally, and in neighboring states without DPOC laws, and found that there was no significant deviation. Dr. Camarota opined that because registration and turnout rates in Kansas increased between 2010 and 2014, the DPOC law did not unduly burden Kansans' ability to register and vote.

The Court finds that Dr. Camarota is qualified to testify as an expert in this case about Census Bureau data, including the CPS. His education and work experience qualify him to explain and present this Census data. However, the Court does not find him qualified to interpret these survey results as they relate to the DPOC law, particularly to the extent he challenges Professor Michael McDonald, whose expertise and scholarship in election law is extensive, and who more closely evaluated the administrative data. Dr. Camarota's experience at CIS is limited to scholarship and reports that generally deal with immigration and citizenship issues, not election issues

such as voter registration. He has never published peer-reviewed research on the subjects relevant to this litigation, nor do his non-peer-reviewed articles contain analysis of the issues relevant to this case. To the extent Defendant offers Dr. Camarota as an expert on "voter registration statistics, and voter participation rates" beyond presenting Census Bureau data, that opinion is excluded. Dr. Camarota is qualified as an expert to explain the results of CPS data showing voter registration and turnout changes in Kansas between 2010 and 2014. And he is certainly qualified to explain how the CPS data was collected and whether it is reliable. But Dr. Camarota is not qualified to explain the reasons for the change in data between 2010 and 2014, or to insert assumptions into the record based on studies or academic literature regarding voter registration and turnout. These are not his areas of expertise.

The limitations of Dr. Camarota's expertise in this field were similarly evident in the recent NVRA case of *Bellitto v. Snipes*.[13] There, the district court initially limited his testimony because he was not qualified to "offer testimony as to the degree of accuracy of . . . rates [of voter registration from the Census Bureau's American Community Survey]."[14] That case went to trial and the district court issued its findings of fact and conclusions of law after this trial concluded, on March 30, 2018. In that order, the court found Dr.

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[13] Case No. –F. Supp. 3d–, 2017 WL 2972837, at *9 (S.D. Fla. July 12, 2017).

[14] *Id.*

Camarota's population analysis to be misleading and inaccurate by comparing mismatched data.[15]

Plaintiffs further challenge the reliability of Dr. Camarota's opinions in this matter on several grounds: (1) he fails to control for confounding factors, such as general interest in the election, whether an advocacy group took an interest in the election, get-out-the vote efforts, competitiveness of the election, laws governing registration, education levels, ethnicity, age, and natural population growth; (2) the choice to compare non-presidential election year data fails to account for any change that may be due to the DPOC law as opposed to other factors; (3) he relied on and cherry-picked flawed statistical data from the SOS's Office; and (4) he relied on conclusory assumptions, such as that some noncitizens mistakenly believe they are citizens when they register to vote.[16] Plaintiffs also point to evidence of Dr. Camarota's bias based on public positions taken by CIS, and based on statements made by executives at CIS. Defendant maintains that these issues go to the weight and not the admissibility of the evidence.

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[15] Case. No. 16-61474, slip. op. at 18–20 (S.D. Fla. Mar. 30, 2018), ECF No. 244.

[16] Dr. Stephen Ansolabehere, Plaintiffs' rebuttal expert whose opinions are discussed in the Court's findings of fact, found that some citizens mistakenly report that they are noncitizens on another survey, the CCES. In contrast to Dr. Camarota's conclusory assumption, this opinion was supported by empirical research, and rendered by the chief architect of the CCES survey.

The Court agrees with Defendant that Plaintiffs' reliability challenges largely go to the weight and not the admissibility of Dr. Camarota's report and testimony, to the extent the testimony relates to his area of expertise. As described below in its findings of fact and conclusions of law, the Court does not credit Dr. Camarota's opinion that: (1) CPS data about registration and turnout is a better measure of registration and turnout than the actual numbers maintained by the SOS's Office; (2) comparing election years 2010 and 2014 is an accurate measure for determining how the SAFE Act impacted registration and voting rates; (3) that election years 2010 and 2014 in Kansas are comparable to one another, or to other states; and (4) registration rates and voter turnout is the best measure of how burdensome the DPOC law is. The Court therefore grants in part and denies in part Plaintiffs' motion to exclude Dr. Camarota's testimony. As to the Census Bureau data described in Dr. Camarota's report, the Court gives it little weight in determining the overall burdensomeness of the DPOC law, as described in the Court's findings of fact and conclusions of law.

C. Patrick McFerron

In May 2016, Patrick McFerron conducted a telephone survey of 500 Kansans by CHS & Associates to help determine the rates of possession of DPOC. The survey purports to control "for gender, age, and geographic region in order to replicate US Census information."[17] The executive summary of the survey

[17] Ex. 863 at 1.

concludes that it "reveals requiring proof of citizenship in order to register to vote is not a concern for residents and is not hampering voter registration."[18] The study surveyed a sample of 500 Kansans, and found 83% are registered to vote. Of those not registered, only one reported that lack of DPOC was the reason.

Mr. McFerron drafted the survey results, but did not complete his own expert report, nor was he ever designated as an expert in this case. Instead, Hans von Spakovsky, one of Defendant's other experts, attached it to his expert report. Mr. McFerron is listed on the executive summary as the President of CHS & Associates, which is in Oklahoma City, Oklahoma. Plaintiffs deposed him on June 7, 2016, during which Plaintiffs' counsel asked him whether he purported to testify as an expert in this case, and he testified that he did not believe so. Mr. McFerron testified about the survey, its methodology, and its results. On January 30, 2018, Defendant filed his final witness disclosures,[19] listing Mr. McFerron as a fact witness by written deposition.

Plaintiffs moved *in limine* to exclude McFerron's testimony, strike and exclude from trial his deposition designations, and exclude his survey. They argued that his testimony is inadmissible lay opinion, that it should be excluded as expert opinion because it was not disclosed under Rule 26(a)(2), and Defendant's failure to disclose was neither harmless nor substantially

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[18] *Id.*

[19] Docs. 443–44.

justified. The Court ruled that McFerron's testimony was not lay opinion, and as a sanction for failing to designate him as an expert witness, the Court required him to testify at trial as a live witness instead of by deposition. The Court took under advisement Plaintiffs' motion to exclude as inadmissible hearsay, and at trial, Plaintiffs also moved to exclude the survey under Rule 702 and *Daubert*. The Court provisionally admitted his testimony, subject to a later admissibility ruling.[20]

Defendant vacillated at trial between offering Mr. McFerron as a fact and expert witness, despite the Court's ruling that his testimony was not admissible lay opinion. Mr. McFerron testified for the first time on cross-examination that he was paid an hourly rate of $100 per hour for research, and $150 per hour for his testimony based on an agreement reached with Defendant two weeks before trial that was not previously disclosed to Plaintiffs.[21] This fact, in conjunction with the nature of Mr. McFerron's substantive testimony, reinforces this Court's previous ruling that he is clearly offered as an expert witness.[22] He testified not only about the methodology of his survey, but about its accuracy and conclusions, including that the DPOC law is not burdensome because most Kansans possess DPOC, or can obtain it easily. Mr. McFerron's testimony illustrates the

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[20] Doc. 480.

[21] Defendant previously disclosed only the $9,000 fee for conducting the survey.

[22] *See* Doc. 480.

prejudice involved in allowing an expert to testify without first meeting the requirements of Rule 26(a)(2)(B). Mr. McFerron's "Report" contains a two-page summary of the survey's results; it does not contain a statement of his compensation, qualifications, or a list of all publications he has either authored or co-authored in the last ten years. He did not sign the report. In fact, Mr. McFerron admitted during his testimony that he was not sure whether he was being paid to testify as a fact or expert witness.

The Court has already excluded Mr. McFerron's testimony to the extent Defendant offers it as lay opinion. With respect to the admissibility of Mr. McFerron's expert testimony, the Court grants Plaintiffs' motion to exclude because he is not qualified to render the opinion contained in the report's summary, and because his survey is unreliable and not relevant. Also, because it fails to adhere to generally accepted survey principles, the survey lacks the indicia of trustworthiness required for survey evidence to meet an exception to the hearsay rule.

1. Qualifications

Plaintiffs argue that Mr. McFerron is not qualified to provide expert testimony on the subject matter of his survey because he is a pollster, and not a trained statistician. The Court agrees. It is true that McFerron's qualifications are based on his experience, and not an academic background in statistics. It is also true that Mr. McFerron has spoken to numerous university classes regarding polling, and that the firm he works for conducts approximately 50 to 70 public opinion surveys in any given year. Mr. McFerron has

conducted approximately 15 to 20 polls in Kansas since 1993. But, as Plaintiffs point out, Mr. McFerron only took one statistics course as an undergraduate and one while he was studying for his master's degree, though he cannot recall the name of the graduate statistics course. Mr. McFerron has never written a peer-reviewed article, nor has he ever served as a peer reviewer for a journal. Mr. McFerron has not published anything on survey methodology or polling methodology. At the time of deposition, Mr. McFerron was not familiar with the American Association of Public Opinion Research, nor other standard survey research principles described by Dr. Matthew Barreto, Plaintiffs' rebuttal expert. He is unfamiliar with the basic concept of social desirability bias leading to overreporting in survey research, a concept that applies to surveys concerning voter registration and voting, or that asks if one possesses an underlying document deemed socially important.[23] Notably, Mr. McFerron

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[23] *See* Doc. 513, Trial Tr. at 1847:18–1850–13 (Dr. Hersh explaining that "[s]ocial desirability bias is when someone does something in a study because it's either socially desirable outside of the context of the study or socially desirable inside the context of the study," and discussing studies showing an overreporting bias for voter registration and voting); Doc. 515, Trial Tr. at 2074:11–2077:20 (Dr. Barreto describing best practices in survey research and explaining extensive political science literature recognizing over-reporting when a question is worded in such a way that suggests a particular answer that people socially desire, especially those dealing with important "underlying documents"); *see also* Ex. 102 ¶25–26 (explaining with citations that "lengthy academic literature on registration and voting has noted that people substantially over-report registration and turnout, and that considerable caution should be drawn from survey data that

has never previously testified as an expert witness.

While an academic background is not required to testify as an expert witness, the expert testimony in this case requires a background in survey methodology that Mr. McFerron does not have. In sum, while the Court finds that Mr. McFerron obviously is an experienced pollster, particularly in the Midwest, he is not qualified to render an expert opinion about the accuracy of the results of this study about DPOC possession under well-accepted survey principles.

2. Reliability and Trustworthiness

Survey evidence is admissible in this circuit as an exception to the hearsay rule "if the survey is material, more probative on the issue than other evidence and if it has guarantees of trustworthiness."[24] The Court will find a survey trustworthy "if it is shown to have been conducted according to generally accepted survey principles."[25] Therefore, the survey standards for reliability under *Daubert* and trustworthiness under the hearsay exception are parallel. Assuming Mr. McFerron is qualified to render an expert opinion about the survey's methodology and the accuracy of the conclusions stated in the report's summary, the survey must be excluded because Plaintiffs established during

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purport to measure registration based on self-reports of survey respondents as to their registration status.").

[24] *Id.* (quoting *Brunswick Corp. v. Spirit Reel Co.*, 832 F.2d 513, 522 (10th Cir. 1987)).

[25] *Id.*

Mr. McFerron's cross-examination, and with their rebuttal expert Dr. Matthew Barreto, that the survey relies on flawed methodology and is thus unreliable and untrustworthy for several reasons.

The Court finds Dr. Barreto credible and qualified to discuss accepted survey methodology.[26] He explained the myriad flaws with the McFerron Survey that render it inadmissible under Rule 702, *Daubert*, and the rule against hearsay. First, the McFerron Survey does not contain a large enough sample for reliable estimates about individuals who might be burdened by the DPOC requirement. The survey targeted eligible Kansas voters generally, rather than the pool of individuals who are subject to the DPOC requirement: eligible Kansas voters who are not yet registered to vote. The McFerron Survey contained a sample of only 65 individuals who were not yet registered to vote.[27]

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[26] Dr. Barreto is a Professor of Political Science in Chicano Studies at the University of California, Los Angeles. He has taught several classes on research methodology and survey methodologies, as well as classes on statistical analysis. He has authored four books and about 60 articles and book chapters—all of which were subject to peer review. He is also the co-founder of the research and polling firm Latino Decisions. He has testified extensively as an expert witness in the areas of survey research, specifically as it applies to voting rights issues. *See* Ex. 137.

[27] This flaw also severely limits the probative value of the McFerron Survey. The DPOC law became effective on January 1, 2013. K.S.A. § 25-2309(u) (repealed 2016). A person already registered to vote on the Act's effective date is not required to submit evidence of citizenship. *Id.* § 25-2309(n). Defendant later promulgated K.A.R. § 7-23-14(c), which provides that "[a] registered voter who has previously provided sufficient evidence of

This is substantially less than the sample size of 300–500 people that Mr. McFerron himself testified would be necessary for reliable statistical results at the statewide level.

Second, the sample of 500 Kansas adults in the McFerron Survey was not a representative sample of the entire eligible voting population. The "most important and single first principle" one considers in a survey is whether the survey sample is representative of the population as a whole.[28] But the McFerron Survey did not look at respondents' educational attainment, household income categories, and homeownership or renter status to ensure representativeness. Moreover, as Mr. McFerron admitted during his testimony, surveys typically use weights to achieve a representative sample, yet he relied on a quota-based approach. He acknowledged that academic literature for decades has discredited quotas, but believes that criticism is outdated because it was based on the prevalent use of landlines to conduct surveys, which does not pose a concern today. He could provide no citation to authority that contradicted Dr. Barreto's strongly-cited opinion that generally accepted survey methodology relies on weighting, and not quotas. Indeed, the results of Mr.

United States citizenship with a voter registration application in this state shall not be required to resubmit evidence of United States citizenship with any subsequent voter registration application." Therefore, the burden at issue in this case is not on Kansans who are already registered to vote, but on those who were not registered before January 1, 2013.

[28] Doc. 515, Trial Tr. at 2057:12–2058:1.

McFerron's survey, which substantially differ from the Census Bureau data relied on by Dr. Camarota, illustrates the problems with Mr. McFerron's approach. For example, Mr. McFerron reported in his survey that 39% of households had incomes below $50,000, while the Census data shows that this figure is 48%.

Third, the McFerron Survey was only conducted over a three-day period in the evening hours between a Monday and a Wednesday. This sampling schedule precluded participation from individuals who, due to their work schedule, may not have been available during those limited days and hours. This practice violated the norms of survey research.

Fourth, when reporting his survey results, Mr. McFerron did not include a response rate, which makes it impossible to assess the reliability and the generalizability of the data collected. As another district court explained, "[n]on-response bias typically becomes a concern when the response rate falls below eighty percent. Response rates below that point—even far below that point—are commonplace and do not necessarily invalidate a survey, but they do require an analysis as to the reasons for the nonresponses and the effect they may have on the results."[29] Here, Mr. McFerron has provided no response rate to evaluate.

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[29] *Hostetler v. Johnson Controls, Inc.*, No. 15-CV-226 JD, 2016 WL 3662263, at *13 (N.D. Ind. July 11, 2016) (citing David H. Kaye & David Freeman, Reference Guide on Statistics, in Fed. Judicial Ctr., Reference Manual on Scientific Evidence 211, 285 (3d ed. 2011)) (citation and footnote omitted).

Fifth, the questions on the McFerron Survey about DPOC possession are contaminated by bias because their wording primed respondents to state that they possessed DPOC even if they did not. Before any questions about possession of DPOC were asked, respondents were asked a series of nine questions prefaced by the following:

> Now I want to read you a short list of documents. Only one of these documents is needed in order to register to vote in Kansas. For each of these, please let me know if you have that document at your home, office, or other location or if someone else keeps the document for you and could get it to you if necessary, or if the document does not exist.[30]

The following nine questions asked about the types of documents that can be used to meet the DPOC requirement (e.g., birth certificates). The prefatory statement to that series of nine questions, "primed" the respondent that one of the documents on a list he/she would hear was needed to register to vote in Kansas. Extensive political science research suggests that such priming will lead to overreporting of access to documents.

Respondents were also asked in Question 18: "In 2011 because of evidence that aliens were registering and voting in Kansas elections, the Kansas legislature passed a law requiring that people who register to vote

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[30] Ex. 863 at 3.

for the first time must prove that they are United States citizens before they can become registered. Do you support or oppose this law?"[31] The Court easily finds that this question primed the respondent to answer that they support the law. Indeed, the at 6. Defendant himself drafted this loaded question and demanded that Mr. McFerron include it. Mr. McFerron "had reservations about" the question, so much so that he decided to place it toward the end of the survey so that it would not impact the earlier questions.

For these reasons, the Court finds the McFerron Survey is neither reliable nor trustworthy.

3. Relevance

Finally, even assuming the reliability of Mr. McFerron's methodology, the relevance of the survey is nominal at best. As already discussed, only 65 of the survey's 500 respondents were unregistered voters. Because the law does not apply to registered voters, there is no constitutional burden to assess for these individuals as a matter of law. Setting aside the fact that this percentage of the sample does not match the Census data touted by Defendant's other expert, Dr. Camarota,[32] it is simply not relevant how burdensome the law is on individuals who need not comply with the law because they were registered before the law's effective date.

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[31] *Id.*

[32] Ex. 1140 at 10 (showing a registration rate among Kansans of 67.9% in 2014, compared to McFerron's 83%)

The survey also failed to ask several relevant questions. The survey's possession questions were compound, so it is impossible to know whether each respondent did not have the particular document addressed in the question, or whether someone else keeps the document for them. Respondents were not asked how long it would take for them to get a copy of their DPOC if they did not personally possess it. Nor were they asked how much it would cost them to obtain a birth certificate or other form of DPOC. Respondents were also not asked whether the name on any document that could have been used to meet the DPOC requirement matches their current name. Mr. McFerron acknowledged that people sometimes change their names, and thus, a person who answered that they do possess DPOC might still be unable to satisfy the DPOC requirement because of a name mismatch. For these reasons, the Court does not find the McFerron Survey is helpful to the trier of fact.

For all of these reasons, the Court grants Plaintiffs' motion to entirely exclude the McFerron Survey and his expert testimony. He is not qualified to render an expert opinion on the survey's methodology or conclusions. Moreover, the survey is unreliable and untrustworthy because it fails to follow accepted survey methods and practices. Finally, the survey is not helpful to the trier of fact. Even if the Court admitted Mr. McFerron's testimony and report, for the same reasons identified above, the Court would give it little to no weight.

II. Findings of Fact

A. Kansas Law Governing Citizenship Eligibility

Under Kansas law, legally qualified voters must register to be eligible to vote,[33] and only United States citizens over the age of 18 may register to vote.[34] Before January 1, 2013, Kansas voter registration applicants met these eligibility requirements by signing an attestation of eligibility on the registration application. The attestation states: "I swear or affirm that I am a citizen of the United States and a Kansas resident, that I will be 18 years old before the next election, that if convicted of a felony, I have had my civil rights restored, that I have abandoned my former residence and/or other name, and that I have told the truth on this application."[35] Kansans may apply to register to vote in person, by mail, through a voter registration agency, in conjunction with applying for a Kansas driver's license, or "by delivery to a county election officer to be registered."[36]

Defendant Kansas Secretary of State ("SOS") Kris Kobach does business in and is an elected official of the State of Kansas. In his capacity as SOS, he is the Chief Election Officer for the State of Kansas. During his campaign to become SOS, news stories about the

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[33] K.S.A. § 25-2302.

[34] Kansas Constitution art. 5, § 1.

[35] Ex. 80.

[36] K.S.A. §§ 25-2309(a), -2352(a)(1).

problem of noncitizen voting fraud began to increase. Defendant campaigned on that issue, asserting it was a pervasive problem. After becoming SOS, he helped craft the SAFE Act, which became law in April 2011.[37] In addition to an attestation of eligibility, the SAFE Act requires that voter registration applicants submit DPOC at the time they apply to register to vote. The law provides thirteen forms of acceptable documentation:

> (1) The applicant's driver's license or nondriver's identification card issued by the division of vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship;
> (2) the applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or SOS;
> (3) pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or

[37] Defendant asked the Court to judicially notice the entire 592-page legislative history of the SAFE Act. The Court agreed to take judicial notice that Exhibit 1209 is the legislative history, but explained that judicially noticing this exhibit does not entail admission of the documents contained therein for the truth of the matter asserted.

presentation to the county election officer of the applicant's United States passport;
(4) the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States bureau of citizenship and immigration services by the county election officer or the SOS, pursuant to 8 U.S.C. § 1373(c);
(5) other documents or methods of proof of United States citizenship issued by the federal government pursuant to the immigration and nationality act of 1952, and amendments thereto;
(6) the applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number;
(7) the applicant's consular report of birth abroad of a citizen of the United States of America;
(8) the applicant's certificate of citizenship issued by the United States citizenship and immigration services;
(9) the applicant's certification of report of birth issued by the United States department of state;
(10) the applicant's American Indian card, with KIC classification, issued by the United States department of homeland

> security;
> (11) the applicant's final adoption decree showing the applicant's name and United States birthplace;
> (12) the applicant's official United States military record of service showing the applicant's place of birth in the United States; or
> (13) an extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.[38]

The DPOC requirement became effective on January 1, 2013.[39]

If an applicant is a United States citizen but unable to provide one of the thirteen forms of identification listed in subsection (l), the statute allows that applicant to submit another form of citizenship documentation by directly contacting the SOS's Office. Although information about the subsection (m) hearing alternative has been available on the SOS's website, it is not publicized to applicants at the time they apply to register to vote. To avail oneself of this option, an applicant must submit a "RCD" form with the SOS's Office, and schedule a hearing. The form requires a declaration under penalty of perjury that the applicant does "not possess any of the documents . . . that may be

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[38] K.S.A. § 25-2309(l).

[39] *Id.* § 25-2309(u) (repealed 2016).

used for proof of citizenship according to Kansas law."[40] The form also states that a false statement on the affirmation is a severity level 9 nonperson felony.

The hearing must be before the State Election Board, which will assess the alternative evidence of citizenship to determine whether it is satisfactory.[41] The State Election Board is comprised of three high-ranking State officials: the SOS, the Attorney General, and the Lieutenant Governor.[42] The RCD form states that the Board will give the applicant five days' notice of the date, time, and location of the hearing. In practice, a hearing may be held with two out of the three members of the Board, and one representative of the third member. Personal attendance by the applicant is not required.

There is no statute, regulation, or list maintained by the SOS of specific documents that would satisfy the State Election Board. Bryan Caskey, the Director of Elections at the SOS's Office, testified and Defendant argued that an applicant's own declaration explaining his or her circumstances and why he or she does not possess a proof of citizenship document would satisfy the board. Five individuals have completed this hearing

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[40] Ex. 837.

[41] *Id.* § 25-2309(m).

[42] K.S.A. § 25-2203(a)..

process since the law became effective, and all had their citizenship approved.[43]

If a voter registration applicant fails to submit the requisite DPOC before the registration deadline in Kansas, that applicant can still submit DPOC to the county election office in person, by mail, or electronically (including by text message) before midnight on the day before an election.[44]

On June 25, 2015, Defendant Kobach promulgated K.A.R. § 7-23-15, which became effective on October 2, 2015. The regulation applies to registration applications that have been deemed "incomplete" and therefore held "in suspense." Such applications are "canceled" if they do not produce DPOC, or otherwise cure the deficiency in the application, within 90 days of application. The applicant must submit a new, compliant voter registration application in order to register to vote.

The *Bednasek* case was filed on September 30, 2015, just before K.A.R. § 7-23-15 became effective. The *Fish* case was filed on February 18, 2016. On May 17, 2016, this Court issued an extensive Memorandum and Order granting in part the *Fish* Plaintiffs' motion for a preliminary injunction barring enforcement of the Kansas DPOC law until the case could be decided on

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[43] Ex. 150. One additional person requested a hearing, but Defendant represented that his office believes that sixth person did not go through with the hearing. *See* Doc. 510, Trial Tr. at 1236:4 - 1237:22.

[44] K.A.R. § 7-23-14(b).

the merits.[45] It was effective on June 14, 2016.[46] The Tenth Circuit affirmed that ruling on October 19, 2016, providing significant guidance on Plaintiffs' preemption claim that § 5 of the NVRA displaces the Kansas DPOC law.[47] On remand, the Court reopened discovery in *Fish* as to evidence relevant to the Tenth Circuit's guidance.

B. DOV Policies and Procedures

Driver's license applicants in Kansas must provide proof of lawful presence when they apply for the first time.[48] As part of this requirement, the Kansas Division of Vehicles ("DOV")

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

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[45] 189 F. Supp. 3d 1107 (D. Kan. 2016).

[46] Doc. 145.

[47] 840 F.3d 710 (10th Cir. 2016).

[48] Despite the statutory language, Mr. Caskey testified that proof of lawful presence is not required for renewals.

> application for asylum in the United States; (G) has a pending or approved application for temporary protected status in the United States; (H) has approved deferred action status; or (I) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.[49]

The DOV website identifies five documents that purportedly "show your date of birth, identity, and lawful status as a U.S. citizen" when applying for an original Kansas driver's license or nondriver identification card: a certified U.S. birth certificate, an unexpired United States Passport or Passport Card, a U.S. Consular Report of Birth Abroad, a Certificate of Naturalization, and a Certificate of Citizenship. These documents also meet the DPOC requirement for voter registration.[50] In order to renew a Kansas driver's license, the applicant must also provide the DOV with proof of identity (such as an expiring Kansas driver's license), a Social Security number, and proof of Kansas residency.

After reviewing an applicant's documentation, a DOV employee enters the applicant's name and date of birth into the DOV database and takes the applicant's photo as well as captures their signature. Currently,

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[49] K.S.A. § 8-240(b)(2).

[50] *See* K.S.A. § 25-2309(l)(2), (3), (4), (7), (8).

DOV procedure and training provides that driver's license examiners are to scan all documents an applicant provides during a driver's license renewal.[51] If a proof of citizenship document was scanned into the DOV system during a prior transaction and a voter applies to register to vote during a renewal, the DOV is to inform the SOS's Office that such document is on file. The DOV only has documents scanned into the system since 2013.

As part of the driver's license application and renewal processes, the driver's license examiner is to ask each applicant if they want to register to vote. The DOV currently has a policy of not offering voter registration to driver's license applicants who self-identify as noncitizens, such as TDL applicants or driver's license applicants who show a green card to demonstrate lawful presence while applying for a driver's license. The examiners are trained to enter a "Y" in the appropriate field of the computer interface if a customer answers "yes" to the voter registration question. The examiner then directs the applicant to read a voter oath located on the counter in front of the applicant and to ask the applicant to read that oath.[52] Next, the examiner is to ask the applicant if he/she affirms the voter oath. Applicants are not required to provide a signature after reading the voter oath. The signature occurs during the photo and signature

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[51] The record does not indicate when this policy was implemented.

[52] The exhibit referenced in the parties' stipulation containing the oath was not attached to the stipulation. *See* Doc. 494.

portion of driver's licensing process before the voter registration part of the process begins.

The examiners are to ask applicants who affirm the voter oath a series of questions including whether they are citizens of the United States, whether they will be 18 years of age before the next election, whether they want to register with a political party, and whether they want to provide their telephone numbers. The examiners are to record the customers' answers to these questions in the computer interface.

Noncitizens who apply for a driver's license may receive a temporary driver's license ("TDL"), the duration of which is tied to the length of time that the documentation they provided to the DOV permits their presence in the United States. Noncitizen lawful permanent residents who apply for a driver's license receive a standard six-year license. Lawful permanent residents are not required to provide a lawful presence document when they renew their driver's license. The DOV does not keep statistics on the number of driver's licenses issued to permanent residents.

A voter registration receipt prints automatically when someone applies to register to vote at the DOV. DOV procedure requires examiners to provide the applicant with the voter registration receipt. The receipt is on a small piece of paper that resembles a fast-food receipt, according to one witness, and it contains the applicant's picture. The following language appears on the receipt in small font:

> Thank you for your voter registration application. Your application will be sent

> to your county election office for processing.
>
> Unless you already submitted to the division of vehicles a document proving U.S. citizenship, you need to submit one to your county election office before you will be added to the voter registration list. Visit www.gotvoterid.com for a list of acceptable documents. If you were a registered voter in Kansas before 2013 and are still registered, you do not need to provide a citizenship document.
>
> A notice will be mailed to you when processing is completed. If you have questions about your application, please call the county election office . . . or call the Kansas SOS . . . .[53]

C. Impact of the DPOC Law on Kansas Applicants

1. Administrative Data

The Kansas Election Voter Information System ("ELVIS") is a statewide voter registration database, maintained by Defendant; ELVIS assigns a unique identification number to all voters. Each county election office is responsible for maintaining the voter lists for its county, so this central database reflects data that is entered by the counties. When a voter registration application is received by the relevant

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[53] Ex. 825. Mr. Stricker testified emphatically that this exhibit does not resemble the size of the receipt provided by the DOV.

county election office, a record is created in the ELVIS database. County election officers have been instructed to enter into ELVIS all voter registration applications regardless of whether the applicant provided proof of citizenship. When a person applies for a driver's license or a renewal at the DOV but does not apply to register to vote at that time, an ELVIS file is not created and the SOS is not notified.

ELVIS contains codes for "source of information description," showing how the applicant registered to vote. "MV" is the code recorded in ELVIS to indicate that an applicant has applied to register to vote at the DOV in conjunction with a driver's license application. ELVIS contains status codes, including "A" for Active, "R" for Canceled, and "S" for Suspense. ELVIS contains voter registration reason codes, which explain the reason an applicant is or is not registered to vote. "CITZ" is the code recorded in ELVIS to indicate that an applicant has failed to provide DPOC.

Defendant and county election officers may accept DPOC at a different time or in a different manner than an application for voter registration, as provided in (l), "as long as the applicant's eligibility can be adequately assessed by the SOS or county election officer as required by this section."[54] Under this authority, Defendant has established interagency agreements with two Kansas agencies to verify whether one of the thirteen forms of DPOC listed in § 25-2309(l) may be on file.

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[54] K.S.A. § 25-2309(t).

First, on January 7, 2014, Defendant and Robert Moser, MD, Secretary of the Kansas Department of Health and Environment ("KDHE"), entered into an Interagency Agreement called the "Birth/Voter Registration Data Link," whereby the KDHE agreed to crosscheck the names of incomplete voter registration applicants with the database of birth certificates and marriage licenses on file with the Kansas Department of Vital Statistics ("OVS"), and provide Defendant with the results. Defendant sends a list of new voter registration applicants on the suspense list to the KDHE on approximately a monthly basis. The agreement makes clear that "The Kansas OVS maintains records only on Kansas vital events occurring in the State of Kansas. The voter registration form does not collect State of birth for the voter."[55] The SOS' Office does not currently check with any agencies outside of Kansas to verify citizenship of voter registration applicants.

Second, in May 2016, after the preliminary injunction hearing in the *Fish* case, Defendant implemented an interagency policy for coordinating with the Kansas Department of Revenue ("KDOR") to verify citizenship documents that may have been provided by voter registration applicants when they applied for a Kansas driver's license. Defendant and the county clerks were given access to a secure internet portal whereby they may check the DOV database for records of any registration applicant on the suspense list to determine if the DOV possesses DPOC for that resident. Defendant has instructed the counties to

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[55] Ex. 1027 at 6.

check for every applicant on their suspense list to determine whether incomplete voter registration applicants may have provided acceptable DPOC to the DOV when applying for a driver's license.

The SOS's Office has instructed the counties to contact each voter registration applicant on the suspense list at least three times before the 90-day period under K.A.R. § 7-23-15 expires. The notices from Douglas County in evidence at trial list the various acceptable forms of citizenship under § 25-2309(l), and state the applicant can send copies to the county election office by regular mail or e-mail. The notices do not reference the hearing procedure in § 25-2309(m).[56]

According to ELVIS records, as of January 1, 2013, there were 1,762,330 registered voters in Kansas. As of October 2016, there were 1,817,927 registered voters.[57] As of March 28, 2016, before the preliminary injunction was issued requiring Defendant to register to vote applicants suspended or canceled for failure to provide DPOC, there were 14,770 applicants on the suspense list. Of these, 5,655 were motor voter applicants. As of March 28, 2016, 16,319 individuals had their applications canceled under K.A.R. § 7-23-15 due to lack of DPOC.[58] Of these, 11,147 were motor voter

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[56] *See, e.g.*, Exs. 859, 860.

[57] This number includes those registered by operation of the Court's May 2016 preliminary injunction. *See* Doc. 495 ¶ 3.

[58] The March 2016 statistics of canceled and suspended registration applicants are the most recent figures disclosed to Plaintiffs in discovery. See Ex. 41, 42, 43, 44. They were also

applicants. These figures amount to 31,089 total applicants who were denied registration for failure to provide DPOC, 16,802 of whom applied through the DOV.

Professor Michael McDonald testified as an expert witness for Plaintiffs about the composition of the suspense and cancellation lists. Dr. McDonald is an Associate Professor of Political Science at the University of Florida and a leading scholar on American elections, voter registration, and factors affecting voter behavior and turnout.[59] He has received numerous research grants and honors for his academic work. Dr. McDonald has offered expert testimony in numerous election law cases, including cases involving voter registration and the NVRA.[60] He has written

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stipulated by the parties in the June 13, 2017 Pretrial Order. Doc. 349. Therefore, the Court excluded Defendant's attempt to introduce new, updated figures into the record at trial.

[59] Ex. 139.

[60] The Court takes judicial notice of the admission of Prof. McDonald's expert testimony in the many cases referenced in his CV. Ex. 139 at 12–13. Defendant pointed the Court to two previous decisions where his testimony was criticized: *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), and *Page v. State Board of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (Payne, J., dissenting). The Court took judicial notice of these cases, *see* Exs. 898–99.

In *Backus*, a Voting Rights Act case challenging South Carolina's 2011 redistricting plan, the court determined that Dr. McDonald relied on incomplete information in concluding that race was a predominant factor in the redistricting plan. 857 F. Supp. 2d at 561–63. The court determined that he did not consider all of the

numerous peer-reviewed books, book chapters, and articles about elections and voter registration.

Dr. McDonald examined data extracts from the ELVIS database to evaluate the individuals whose applications were canceled or suspended for lack of DPOC, and he offered opinions about the effect of the law based on that analysis. He looked at three sources of information: (1) a list of suspended applicants as of September 24, 2015, provided to him by the Plaintiffs; (2) the electronic voter registration file dated December 11, 2015, including the list of suspended applications as of that date, provided by Defendant; and (3) a list of

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race-neutral factors considered by the legislature. Dr. McDonald fully conceded on cross-examination that he did not consider all of these factors, but explained it was impossible for him to do so. Doc. 503, Trial Tr. at 189:15–23. Defendant fails to explain how the criticism in *Backus* is relevant to Dr. McDonald's analysis in this case of the composition of the suspense and cancellation lists under the Kansas DPOC law.

In *Page*, another redistricting case, the dissenting judge found that Dr. McDonald's opinion that race was a predominant factor in the challenged 2012 redistricting was inconsistent with a law review article Dr. McDonald authored before being retained as an expert, in which he opined that protecting incumbents was the primary motivator in the 2012 redistricting. *Page*, 2015 WL 3604029, at *20–22. The dissenting judge also criticized Dr. McDonald's analysis of the racial composition of the populations moved in and out of the district at issue, relied on by the plaintiffs in that case. *Id.* at 31–34. However, the majority found his opinions credible and persuasive, finding the dissent's rejection of Dr. McDonald and endorsement of the Defendant's expert "puzzling" given the disparity in their qualifications. *Id.* at *9 n.16. This dissenting opinion concerning a different type of statistical analysis does not convince the Court Dr. McDonald's testimony lacks credibility in this case.

canceled and suspended applicants as of March 31, 2016, disclosed by Defendant.

Dr. McDonald examined the voter registration data and determined that most of the individuals on the suspense list as of September 25, 2015 did not become registered by December 11, 2015. 22,814, or 70.9% of the applicants on the September 2015 list, remained on the December 2015 list. Canceled or suspended applicants represented 12.4% of new voter registrations between January 1, 2013 and December 11, 2015. Dr. McDonald acknowledges that a few of these suspended or canceled applicants may in fact be noncitizens, however given the individual-level data he reviewed, he believes that the majority are eligible citizens.

As of March 31, 2016, the confidential ELVIS data provided to Dr. McDonald pursuant to the protective order in this case showed a total of 30,732 voter registration applications were either held in suspense or canceled due to the DPOC requirement—16,749 applications were canceled, and 13,983 applications were suspended. These 30,732 unregistered applicants represented approximately 12% of the total voter registration applications submitted since the law was implemented in 2013. Of the 30,732 applicants whose applications were, as of March 31, 2016, suspended or canceled due to failure to provide DPOC, approximately 75% were motor-voter applicants.[61] Dr. McDonald

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[61] The Court acknowledges that the figures in Dr. McDonald's report are slightly higher than the stipulated figures as of March 28, 2016—three days earlier. The total number of suspended and canceled applicants evaluated by Dr. McDonald was higher by 356 applicants. Neither party elicited testimony about this difference

opined that these numbers would have increased further before the 2016 presidential election but for the Court's preliminary injunction order, in part because voter registration activity typically increases in the months leading up to a presidential election. Indeed, Mr. Caskey's testimony and Defendant's own statements during the contempt hearing that followed this trial support Dr. McDonald's opinion. They suggested that problems coordinating certificates of registration to those affected by the preliminary injunction were tied to their increased activity and workload associated with the runup to that election.

Dr. McDonald further credibly opined that the DPOC law disproportionately affects the young and those who are not politically affiliated. He testified that 43.2% of motor voter applicants held in suspense or canceled were between the ages of 18–29, and 53.4% of suspended and canceled motor voter applicants were unaffiliated. To be sure, the law only applies to new voter registration applicants—those registering for the first time in Kansas after January 1, 2013. Those

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and what might explain it, although it may be explained by the fact that some of the ELVIS records Dr. McDonald reviewed were coded as CITZ but were also underage. Also, he identified several hundred applicants coded with CITZ who had a registration date on or before the end of 2012, before the effective date of the law. Although Defendant challenged the reliability of Prof. McDonald's conclusions drawn from the ELVIS records, he did not challenge the underlying data which was provided by his office to this expert. Further, the Court does not find that this discrepancy had any impact on Dr. McDonald's evaluation of the composition of these lists, nor the Court's ultimate finding that the DPOC law prevented tens of thousands of eligible Kansans from registering to vote.

voters tend to be young and unaffiliated with a political party. But that is the point: the fact that the law affects only new applicants means that it disproportionately affects certain demographic groups. Dr. McDonald explained that there is a consensus in social science that barriers to voter registration increase the cost of voting and dissuade individuals from participating in the political process. Moreover, these groups—the young and unaffiliated—already have a lower propensity to participate in the political process and are less inclined to shoulder the costs associated with voter registration. This opinion is borne out by Ms. Marge Ahrens' testimony, discussed infra, which provided examples of how difficult it has been for the Kansas League of Women Voters to help register young voters due to the DPOC law.

2. Current Population Survey Data

As described in the Court's *Daubert* ruling, Dr. Camarota disagrees with Dr. McDonald about whether the DPOC law poses a burden on voter registration and voting. He primarily relies on the Census Bureau's Current Population Survey to opine that the burden must be low because voter registration and turnout rates in Kansas increased between 2010 and 2014. The Court has already ruled that Dr. Camarota's qualifications limit his expert opinion to explaining the CPS data; he is not qualified as an expert in voter registration, voting trends, or election issues, so he is not qualified to opine on issues of causation.

Even if Dr. Camarota is deemed qualified, the Court gives little weight to his ultimate opinion for several reasons. Primarily, the Court finds that the best

evidence about the DPOC law's burden is the actual data from the suspense and cancellation lists, evaluated by Dr. McDonald. This data demonstrates a concrete burden for thousands of voter registration applicants, many of whom were not registered in time to vote in the 2014 election by operation of the DPOC law. Because this data was presented to the Court, it need not look at indirect survey data that is based on sampling, nor must the Court look at how Kansas compares in terms of Census data to neighboring states. As Dr. McDonald explained, the individual-level data that he analyzed is the "gold standard," so there is no need to rely on statistical sampling. In the same vein, the Court gives no weight to Dr. Camarota's bare observations about the uptick in new registration and voter turnout numbers between 2010 and 2014, as shown in the administrative data. As the Court discussed in its *Daubert* ruling, Dr. Camarota is not qualified to opine about this administrative data. He did not verify this data, as Dr. McDonald did, with the individual data. Importantly, Dr. Camarota's observation that the stipulated registration and turnout numbers are larger in 2014 is not helpful to the trier of fact—the Court has accepted the parties' stipulations as to these numbers and can glean for itself that the 2014 figures are higher. For the reasons described below, such a comparison tells the Court little about the impact of the DPOC law.

Moreover, comparing 2010 and 2014 election data is not a reliable way to measure the impact of the DPOC law. To make a valid comparison between the voter registration and turnout statistics between these two election years, one would have to assume that the only

difference in Kansas between 2010 and 2014 is the DPOC law. But as Plaintiffs submitted, this isn't true. First, the 2014 election in Kansas was highly competitive compared to 2010. The Gubernatorial and U.S. Senate races were close elections. Sam Brownback won the race for governor by only 3.7 points; the Democratic candidate for U.S. Senate withdrew and consolidated support behind an independent candidate. Also, there were several Kansas Supreme Court justices on the ballot and a strong advertising effort had been made by groups urging Kansans to vote against retention. The states with which Dr. Camarota compared, Oklahoma and Nebraska, did not have similarly competitive races. The competitiveness of these high-profile races could easily account for the increased registration and turnout between 2010 and 2014. Dr. Camarota conceded that he did not take these facts into account when comparing 2010 to 2014, nor when comparing Kansas rates to those of other states. Similarly, he did not control for differences in state laws between 2010 and 2014 that may have explained his observation that Kansas "bucked the national trend" of a decline in voter registration.

Importantly, comparing 2010 and 2014 registration data does not provide a reliable measure of the impact of the DPOC law because there is no way to know when the increased registration occurred—the 2014 data represents an increase from 2010, but the DPOC law did not become effective until January 1, 2013. Dr. Camarota's analysis does not demonstrate when the increased registrations occurred, before or after the law was passed. Similarly, as Dr. McDonald testified, because the DPOC law only applies to new registrants,

it makes sense that the law would not have a large impact on the overall registration numbers and turnout rates, as measured by survey data. Most registered voters surveyed in Kansas in 2014 were registered before January 1, 2013, before the law became effective, and were thus exempt from the DPOC requirement.

3. Kansas League of Women Voters

Margaret Ahrens, the immediate past co-president of Plaintiff League of Women Voters of Kansas (the "Kansas League") and an advisor and mentor to the current leadership, testified on behalf of the Kansas League. The Kansas League is a nonpartisan, nonprofit volunteer organization that encourages informed and active participation of citizens in government and works to influence public policy through education and advocacy. Founded almost 100 years ago, the Kansas League is active throughout Kansas, with nine local affiliates and more than 800 members. The Kansas League was established to encourage and assist voters to access the vote, register, and "participate in the vote" in an informed manner. As Ms. Ahrens testified, "[t]he biggest passion of the [Kansas L]eague is to engage every possible citizen in the vote."[62]

To accomplish this mission, the Kansas League provides educational resources and holds voter registration drives at various locations including schools, libraries, grocery stores, nursing homes, naturalization ceremonies and community events. The

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[62] Doc. 504, Trial Tr. at 330:12–16.

Kansas League also performs studies on a variety of public policy issues to inform membership action and advocacy efforts as well as to educate its members and the public on these issues. The Kansas League assists all prospective voters, but it is particularly committed to engaging individuals who are "underrepresented in the vote," including the first-time voter, the elderly, and individuals with limited resources and time.

Ms. Ahrens was President of the Kansas League from 2015–2017, after the DPOC law became effective. She explained that the Kansas League has opposed the SAFE Act since before its passage because it "saw [the law] as a complex network of hoops and jumps for the average Kansas citizen" that would "create barriers to the vote."[63]

Once it went into effect, the DPOC requirement substantially affected the Kansas League's work in at least three respects. First, the DPOC requirement significantly hampered the Kansas League's voter registration work. Ms. Ahrens described the impact of the DPOC Law on the Kansas League's ability to fulfill its mission as "huge. It was a dead hit. It was absolutely a blow and I found the word shock to be appropriate in thinking about this."[64] When the law came into effect, the Kansas League initially stopped all registration activity in every county but one, to protect volunteer members from any liability that could arise from handling or copying applicants' personal

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[63] *Id.* at 337:21–338:7.

[64] *Id.* at 338:16–18.

documents. The Kansas League leadership spent considerable resources on developing a copying policy to mitigate the risks associated with handling DPOC.

Once the copying policy was in place, the Kansas League re-initiated registration efforts, but the number of individuals the Kansas League could successfully register declined significantly. Ms. Ahrens provided several examples during her testimony. In Wichita, the Kansas League estimated that it helped register 4,000 individuals the year before the DPOC became effective. In 2013, after the law became effective, the Kansas League estimated it registered 400. Ms. Ahrens explained that this decline was because many individuals do not have the necessary documents at hand, or are not willing to provide such documents to League volunteers, to satisfy the DPOC requirement. She estimated that before the law passed, it took the League 3–4 minutes to assist a voter registration applicant, but after the DPOC law, it would take an hour per applicant.

In one registration effort, Kansas League volunteers in Douglas County went to high schools to register voters but returned with such "large numbers of incomplete voter registrations" due to the fact that the students did not have DPOC at hand that the volunteers called the students' families and schools and went back three times "to try to get as many young people registered [as possible]."[65] During another voter registration effort at Washburn University, Kansas League volunteers provided multiple opportunities for

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[65] *Id.* at 346:19–349:17.

students to complete their voter registration applications and to provide DPOC, by maintaining a voter registration table at the university over multiple weeks. Despite this concerted effort, out of approximately 400 students who attempted to register to vote, only about 75 students successfully completed their registration applications.

Second, the DPOC requirement forced the Kansas League to devote substantial resources to assist voters whose applications are in suspense due to the failure to provide DPOC. To reach these suspended voters, the Kansas League purchased from the SOS both the suspense list as well as the full voter file several times. The Kansas League has published the suspense list on the Kansas League website and circulated the list to local newspapers to do the same to notify applicants that their registrations are not complete. Kansas League volunteers also spent considerable time and effort to reach individuals on the suspense list directly to assist them in completing their registration applications. Ms. Ahrens provided the notable example of efforts by Kansas League volunteers in Douglas County who, after unsuccessful attempts to reach individuals on the suspense list by phone and email, visited the residences of 115 people whose voter registration applications were on the suspense list with a mobile copy machine. Of those 115 people, only 30 ultimately registered. At least half of these 30 individuals who completed their registrations did not personally possess or were not able to provide DPOC to the Kansas League volunteers and were unable to complete their registrations immediately onsite. Since the DPOC Law went into effect, the Kansas League has

devoted thousands of hours to contacting the tens of thousands of voters on the suspense list and attempting to help them satisfy the DPOC requirement.

Third, the DPOC requirement has forced the Kansas League to spend a considerable amount of member resources—including volunteer time—and money to educate the public about registering under the DPOC law. The Kansas League created thousands of informational trifolds "to help people understand the changes in the law and how to participate in the vote" that volunteers distributed to community colleges, public libraries, and high schools across the state. The Kansas League had in the past developed written educational materials to assist voters in registering but "not to this extent."[66] The Kansas League also developed a teaching module and an accompanying instructional video to distribute on its website and to universities, community colleges, vocational and technical schools, and high schools throughout the state in order to educate new voters about how to register to vote under the SAFE Act.

Following the Court's preliminary injunction in this case, the Kansas League again obtained a copy of the suspense list from the SOS. This list included the names of voters who were registered under court orders, including this Court's preliminary injunction

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[66] *Id.* at 413:3–6; Ex. 13.

ruling.[67] The SOS refused the Kansas League's request for a list of suspended applicants that did not include voters registered under court orders.[68] As a result, the Kansas League is no longer able to effectively use the suspense list to inform and reach voters who are unable to vote because their registration applications are on the suspense list because it lacks confidence that the list is accurate.

4. Access to DPOC by Suspended and Canceled Applicants

There was little admissible evidence presented at trial about the rate of DPOC possession by suspended and canceled applicants. As already discussed, the McFerron Survey is inadmissible, but even if

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[67] This evidence is consistent with other evidence in the record that the SOS's Office continued to treat registered voters under this Court's preliminary injunction order as unregistered and held in suspense. *See* Doc. 520.

[68] In addition to the Court's order in this case requiring Defendant to register all motor voter registrants who had been deemed incomplete or cancelled for failure to provide DPOC, there is a preliminary injunction in place prohibiting state-specific instructions on the Federal mail-in form that would require an applicant to produce DPOC. *League of Women Voters v. Newby*, 838 F.3d 1 (D.C. Cir. 2016), *rev'g* 195 F. Supp. 80 (D.D.C. 2016). Also, on September 23, 2016, Shawnee County District Court Judge Larry D. Hendricks ordered Defendant to provide notice to all voters impacted by this Court's preliminary injunction ruling that they would be "deemed registered and qualified to vote for the appropriate local, state, and federal elections for purposes of the November 8, 2016 general election, subject only to further official notice." *Brown v. Kobach*, No. 2016-CV-550, slip op. at 3–4 (Shawnee Cty. Dist. Ct. Sept. 23, 2016).

admissible, the Court gives its findings no weight due to its many methodological flaws. There is no evidence about how many canceled and suspended applicants in fact lack DPOC, although the Court can reasonably infer from the suspense and cancelation numbers that either (1) these applicants lack immediate access to such documents because they were repeatedly notified of the need to produce DPOC in order to register, yet they did not complete the registration process; or (2) these applicants were not well enough informed about the DPOC requirement to locate their DPOC and provide it to the county election office in order to become registered; or (3) these applicants were otherwise unable or unwilling to go through the steps to produce DPOC.

Dr. Jesse Richman estimates that only 2.2% of the applicants on the suspense list lack access to DPOC, based on a survey he conducted of individuals on the suspense list.[69] Yet Dr. Richman's results are not statistically distinguishable from zero, as the margin of error is 2.7%.[70] Furthermore, Dr. Richman concludes that 97.8% of citizens on the suspense list have what he describes as "immediate access" to DPOC, but his estimate includes individuals who do not personally possess DPOC, but have someone who "keeps" such a document for them. Obtaining a document from another person constitutes an additional step in the voter registration process, which increases the costs of

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[69] Ex. 952 at 9.

[70] Ex. 102 at 33 ¶ 74; *see also* Part II.D.3.a.ii, *infra*, for further discussion about Dr. Richman's margin of error calculations.

voting. As Dr. Richman himself has written in published articles, "electoral rules that increase the costs of voting are expected to diminish voter participation."[71]

Although Dr. Richman speculated that it would be relatively easy for a registration applicant to obtain a citizenship document from another person who "keeps" the document for them, his survey provides no support for this conclusory statement. As such, Dr. Richman conceded during his trial testimony that it was an overstatement to say that a respondent has "immediate access" to DPOC when answering yes to his survey question.[72]

Defendant argues that the suspense list is dynamic and constantly in flux, therefore it does not represent the universe of applicants prevented from registering to vote—many are ultimately registered under the State's interagency agreements, or because they later submit DPOC. There are several problems with this argument. First, while the suspense list may be dynamic, the cancelation list (before the preliminary injunction) is not. More than 16,000 voter registration applicants had been canceled under K.A.R. § 7-23-15 at the time of the Court's preliminary injunction. Moreover, at the time of the Court's preliminary injunction, more than 13,000 individuals were on the suspense list. To be sure, the evidence established that some portion of this number may come off the list due

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[71] Doc. 512, Trial Tr. at 1567:24–1570:11.

[72] *Id.* at 1593:4–1594:8.

to the State's interagency agreement with the DOV, but as of March 2016, the KDHE agreement had been in place for three years. Yet, each time Dr. McDonald took a snapshot of the suspense list between September 2015 and March 2016, the combined number of suspended and canceled applicants represented about 12% of all new voter registration applications. Dr. McDonald found that 22,814, or 70.9% of the applicants on the September 2015 list, remained on the December 2015 list. While that number certainly was lower by March 2016, that is undoubtedly because many of those on the suspense list were canceled under the regulation by that point, given that in December 2015, the 90-day rule had not yet been effective for 90 days. Defendant, by contrast, provided no data about the number of those on the suspense list who have come off because DPOC was ultimately verified, or provided, as opposed to cancellation. The Court finds that the majority of those on the suspense list ultimately did not become registered.

5. Lay Testimony by Individuals Lacking DPOC

Dr. McDonald's analysis demonstrates that tens of thousands of individuals who applied to register to vote after the DPOC law became effective were held in suspense or canceled for failure to submit DPOC. He further credibly opined that the clear majority of those suspended or canceled are in fact United States citizens. Ms. Ahrens' testimony demonstrates that the DPOC law made the Kansas League's mission of helping register voters difficult, by substantially reducing the number of individuals it could assist in

registering to vote, particularly within the groups it targets: first time voters, the elderly, and individuals with limited resources and time. This evidence leads the Court to the conclusion that tens of thousands of eligible citizens were blocked from registration before this Court's preliminary injunction, and that the process of completing the registration process was burdensome for them.

The experiences of several lay witnesses, including the individual Plaintiffs in both cases, illustrate Dr. McDonald's findings and Ms. Ahrens' concerns about the barriers to registration after the DPOC law became effective. Plaintiff Steven Wayne Fish is a U.S. citizen, a resident of Kansas, and over 18 years old. He works the overnight shift at an American Eagle distributor. In August 2014, he applied to register to vote while renewing a Kansas driver's license at the DOV in Lawrence, Kansas. Mr. Fish brought documents to fulfill the Kansas residency requirement for obtaining a driver's license. The driver's license examiner did not inform him that he needed a citizenship document to register to vote; when he left the DOV, he believed he had registered to vote. Subsequently, he received notices in the mail from the Douglas County election office telling him that he needed to provide DPOC in order to become registered. Those notices listed the 13 acceptable forms of DPOC under the K.S.A. § 25-2309(l). They make no mention of the alternative hearing process under subsection (m).[73] He searched for his birth certificate but could not find it. He attempted to obtain a replacement birth certificate but could not

[73] Exs. 859, 860.

determine how to do so—he was born on a decommissioned Air Force base in Illinois. Mr. Fish was unable to vote in the 2014 general election, and his voter registration application was subsequently canceled for failure to provide DPOC under the 90-day rule.

Later, in May 2016, Mr. Fish's sister located a copy of his birth certificate that had apparently been placed in a safe by Mr. Fish's mother, who passed away in 2013. Although the birth certificate was ultimately located, it took nearly two years to find it. Due to the preliminary injunction in this case, Mr. Fish became registered to vote in June 2016. In September or October 2016, Mr. Fish relocated within Douglas County and changed his address with the DOV in person. At that time, Mr. Fish filled out a second voter registration application and provided his birth certificate. He is now registered to vote based on this October 2016 application, having provided DPOC. He voted in the 2016 general election.

Plaintiff Donna Bucci is a U.S. citizen, a resident of Kansas and over 18 years old. She was born in Baltimore, Maryland. Ms. Bucci has been employed at the Kansas Department of Corrections for the last six years. She is a cook in the prison kitchen on the 3:00 a.m. to 12:00 p.m. shift. She is provided with limited time off, and must provide two-weeks' notice to use it. In 2013, Ms. Bucci applied to register to vote while renewing a Kansas driver's license at the DOV in

Sedgwick County, Kansas.[74] The driver's license examiner did not tell Ms. Bucci that she needed to provide proof of citizenship, and did not indicate that she lacked any necessary documentation. When she left the DOV, she believed she had registered to vote. Later, she received a notice in the mail informing her that she needed to show a birth certificate or a passport to become registered to vote. It did not include information about how to pursue the hearing process in K.S.A. § 25-2309(m). Ms. Bucci does not possess a copy of her birth certificate or a passport. She cannot afford the cost of a replacement birth certificate from Maryland and she credibly testified that spending money to obtain one would impact whether she could pay rent. Ms. Bucci's voter registration application was canceled for failure to provide DPOC. She could not vote in the 2014 election, but was able to vote in the 2016 election by operation of the preliminary injunction. Ms. Bucci first learned of the alternative hearing procedure when defense counsel informed her of it during her deposition in this case. She testified that it would be hard for her to even participate in a telephonic hearing because she is not allowed to use her cell phone on a work break.

Plaintiff Charles Stricker is a U.S. citizen, a resident of Kansas, and over 18 years old. He was born in Missouri and has lived in Kansas since late 2013, after a period of living in Chicago. Prior to living in Chicago, Mr. Stricker lived in Kansas and was registered to vote in Kansas during that time. He

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[74] Ms. Bucci testified that she renewed her driver's license in 2014. The ELVIS records show that she applied in August 2013. Ex. 2.

works as a hotel manager in downtown Wichita. Mr. Stricker applied to register to vote while renewing a Kansas driver's license at the Sedgwick County DOV in October 2014. He was told that he had insufficient documentation, and a clerk provided him with a list of documents he needed. Mr. Stricker was attempting to register on the last day of registration before an election, it was so important to him to become registered that he took the day off work to accomplish it. Mr. Stricker rushed home and "grabbed every single document that I could and started shoving them into a file folder to try to get back before the DMV closed,"[75] including his birth certificate. He made it back to the DOV in time to complete his application, and recalls telling the clerk that he wanted to register to vote. The DOV clerk did not tell him that he needed any further documentation to register. The clerk printed a small receipt for Mr. Stricker and explained to him that it would be his temporary driver's license until he received his license in the mail. He asked the clerk if there was anything else he needed to do, including whether he needed a voting card. The clerk told him nothing more was necessary. He believed that he was registered to vote.

Mr. Stricker attempted to vote in the 2014 midterm election. He presented his driver's license to the poll worker, but she could not find a record of his registration. He was given a provisional ballot to fill out at an open table with another voter. Mr. Stricker testified that he was confused and embarrassed by the experience. Election day was the first time Mr. Stricker

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[75] Doc. 502, Trial Tr. at 68:20–25.

learned that he was not registered to vote. He testified that he learned about the DPOC law sometime later through a press report and wondered if it could explain why he was not allowed to vote. He does not recall receiving any notices from Sedgwick County asking him to provide proof of citizenship.

In 2015, Mr. Stricker's voter registration application was canceled in the ELVIS system. His registration was reinstated by operation of the preliminary injunction on June 22, 2016. At some point in advance of the November 2016 election, Mr. Stricker attempted to check his registration status online and by calling the Sedgwick County election office. The person with whom he spoke told him that it was unclear whether he would be able to vote in the upcoming election because there were legal issues that were still up in the air. When he checked online, there was no record of his registration. On October 26, 2016, the Sedgwick County Election Office sent Mr. Stricker a "Notice of Voter Registration Status."[76] It states:

> This notice is to inform you that you have been granted full voter registration status in Kansas and that you are qualified to vote in all official elections in which voters in your precinct are eligible to participate.
>
> According to Kansas Statutes Annotated 25, 2309(l), any person registering to vote for the first time in Kansas on or after

[76] Ex. 838 at 9.

> January 1, 2013, must provide evidence of United States citizenship along with the registration application in order to be granted full registration status.
>
> Our records indicate that you submitted a voter registration application during the above-mentioned time period, but you did not provide evidence of your U.S. citizenship. We have since received information from the Kansas Department of Health and Environment's Office of Vital Statistics indicating that you have a Kansas birth certificate on file. Based on that determination, your registration status is deemed complete, and we have granted you full voter registration status.[77]

This notice was signed by Tabitha Lehman, the Sedgwick County Election Commissioner. Ms. Lehman testified that, despite Fed. R. Evid. 615 being invoked at the beginning of trial, she read media reports about the trial, including reports of Mr. Stricker's testimony. She testified that ELVIS records indicate Mr. Stricker is active and "fully registered," and that after reviewing his file prior to her testimony, she believes that the notice he received erroneously referenced his Kansas birth certificate, when in fact his citizenship document was in the DOV's database. She testified that in October 2016, just prior to the election, her office had not updated the generic notice sent to applicants whose

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[77] *Id.*

DPOC was verified by the county to include the DOV database check, a policy that had changed in May 2016. Therefore, between May 2016 when the DOV policy went into effect, and the 2016 election, Sedgwick County—the second largest county in the State—was apparently sending out erroneous and confusing notices to individuals stating that citizenship was confirmed through the department that maintains Kansas birth certificates, when in fact that was not true.

Plaintiff Thomas Boynton is a U.S. citizen, a resident of Kansas, and over 18 years old. He was given a code of "suspense" in ELVIS for failure to provide DPOC. He moved to Kansas for the first time in July 2014 to begin teaching as a professor of English at Wichita State University. In August 2014, Prof. Boynton attempted to register to vote at a DOV in Wichita. He recalls being asked if he would like to register to vote, and responded that he did. Prof. Boynton brought several documents with him that he suspected he might need to obtain a driver's license, including his Illinois birth certificate. He does not recall which documents he specifically showed the clerk, but he produced the documents the clerked requested during the transaction. The DOV clerk did not tell him that he did not have the necessary documentation to register to vote, and when he left the DOV, Prof. Boynton understood he was registered to vote. He went to his polling place in November 2014, but the poll worker told him that his name was not on the rolls and offered him a provisional ballot. He was surprised to learn for the first time that his registration had not been completed at the DOV.

In December 2014 or January 2015, Prof. Boynton received a notice in the mail informing him that he would need to submit DPOC to complete the voter registration process. It did not advise him about the hearing process under K.S.A. § 25-2309(m). Prof. Boynton was frustrated upon receiving this notice, believing that he had registered before the November 2014 election, and understanding that his provisional ballot had not been counted. He was disappointed and irritated upon learning that his vote did not count. Voting is important to him and he had regularly voted in federal elections up until that point.

Prof. Boynton visited the DOV two times in 2015 to obtain replacement driver's licenses. Both times he declined when the clerk asked him if he wanted to register to vote. He testified that he was dissuaded from registering after his 2014 attempt failed. "I thought to myself, this doesn't seem to be the kind of process that leads to me being successfully registered, so I might as well just save myself the effort and say no this time . . . ."[78]

Prof. Boynton's ELVIS file shows that a certified United States birth certificate was submitted on August 4, 2014, contradicting Mr. Caskey's testimony that Prof. Boynton did not apply to register to vote until November 4, 2014, Election Day. On November 5, 2015, Prof. Boynton's voter registration application was canceled. According to Mr. Caskey, the SOS found a citizenship document through the DOV web portal after access had been granted in 2016. The fact that the

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[78] Doc. 503, Trial Tr. at 270:7–11.

web portal located a citizenship document—likely the birth certificate he took to the DOV that day—supports Prof. Boynton's testimony that he in fact applied to register to vote in August 2014. His ELVIS record now shows that he is active based on the citizenship document the SOS office located on June 20, 2016, after this Court issued its preliminary injunction.

Plaintiff Douglas Hutchinson is a U.S. citizen, a resident of Kansas, and over 18 years old. Mr. Hutchinson applied to register to vote while renewing a Kansas driver's license at a Johnson County DOV in 2013. His application was suspended for failure to provide DPOC and it was ultimately canceled on January 27, 2016. He was later registered by operation of this Court's preliminary injunction order. On July 30, 2016, his status changed to active after he submitted DPOC at the Johnson County Election Office and is now considered "fully registered."

Plaintiff Parker Blake Bednasek is a United States citizen over the age of 18, who moved to Kansas in August 2014 to attend school at the University of Kansas ("KU"). Plaintiff was born in Oklahoma. His parents, who live in Texas, possess his Oklahoma birth certificate. Prior to moving to Kansas, Mr. Bednasek was registered to vote in Tarrant County, Texas. In the fall of 2015, Mr. Bednasek volunteered with the Kansas Democratic Party. Through this work, he discussed the issue of voter registration, including the DPOC law, with the party's field and political director. He canceled his Texas voter registration on December 3, 2015. On December 4, 2015, Mr. Bednasek applied to register to vote in person at the Douglas County Election Office.

He did not provide DPOC for two reasons: (1) he did not physically possess DPOC at the time of application; and (2) he does not agree with the law requiring DPOC. The Douglas County Clerk's Office accepted Plaintiff's application, but deemed it incomplete for failure to submit DPOC. Mr. Bednasek received two or three letters from the Douglas County election office, informing him that he needed to provide his DPOC and advising him that he had been placed on a 90-day waiting list. Plaintiff's voter registration application was canceled on March 4, 2016 under K.A.R. § 7-23-15.

Since the DPOC law was passed, 6 individuals have applied for a hearing under § 25-2309(m) with the State Election Board. One of these individuals, Ms. Jo French, lost her birth certificate after moving several times. She testified about the lengthy and burdensome process of registering to vote without a citizenship document. Ms. French's many encounters with the SOS's office led her to characterize her relationship with former-Deputy SOS Eric Rucker as a friendship. She testified that she hoped her testimony would make Defendant "look good." But her testimony contradicted Defendant's position that the DPOC requirement is not burdensome. As she testified, Ms. French's first of many hurdles was to pay $8 for the State of Arkansas to search for her birth certificate to prove that it did not exist, even though she already knew did not exist because she had requested it twice before. Second, she had to collect documents with the help of several other people—her baptismal record through an old friend in Arkansas and school records from her old school district in Arkansas. Third, she spoke with Mr. Rucker, who in turn reached out to her friends and cousin to

vouch for her citizenship. Fourth, Ms. French relied on a friend to drive her 40 miles to the hearing; it was difficult for her to drive because she had recently had knee replacement surgery.

Ms. French's hearing before the State Election Board lasted 30 to 35 minutes and was attended by Defendant, the Lieutenant Governor, and a representative from the Kansas Attorney General's office. Also present were members of the media. The entire process from application to the date of her hearing took more than five months. After the hearing, Ms. French was interviewed, and stated: "I just thought it was strange that I had to go through this procedure to be able to vote. And any other state, you go in, throw down your driver's license and that gives you the right to vote. So this was totally off the wall for me. . . . I don't look funny. I don't talk funny, I've been here all my life."[79]

The hearing records contain information on the other four individuals who availed themselves of the hearing process. One established citizenship through a hearing and was represented by retained counsel. Another individual, Mr. Dale Weber, stated that he did not possess DPOC and that procuring such a document would be cost-prohibitive. The State Election Board ultimately accepted an affidavit that Mr. Weber executed on his own behalf as proof of his citizenship, attesting that he had been born on a military base and

[79] Doc. 511, Trial Tr. at 1421:16–1422:11.

was a U.S. citizen.[80] The State Election Board apparently found that Mr. Weber's mere attestation was sufficient to establish his citizenship.

D. Noncitizen Registration in Kansas Before and After the DPOC Law

1. Empirical Cases of Noncitizen Registration or Attempted Registration

Pretrial, Defendant stipulated that it had confirmed instances of 127 noncitizens who either registered to vote, or attempted to register to vote since 1999, based on data collected from Mr. Caskey and Tabitha Lehman, the Sedgwick County Election Officer. Of the 127 individuals identified by Mr. Caskey and Ms. Lehman, 43 had successfully registered to vote, and 11 have voted. 88 are motor-voter applicants, 25 of whom successfully registered to vote; 5 have voted.

At trial, Mr. Caskey asserted that his office had uncovered 129 instances where noncitizens had registered or attempted to register to vote. But the documentary evidence does not fully support this testimony. The underlying ELVIS records reveal that many of these instances are a result of false positive matches, confusion, or administrative error by either the county election office or a driver's license examiner. At trial, Defendant submitted evidence of: (1) 38 incidents of noncitizen registration or attempted

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[80] Ex. 150. The State Election Board orders and records from these § 25-2309(m) hearings were produced to Plaintiffs for the first time during trial

registration in Sedgwick County;[81] (2) 79 possible incidents of noncitizen registration by comparing the voter rolls with the DOV's list of TDL holders;[82] and (3) 3 noncitizens who were found because they stated on juror questionnaires that they were noncitizens.[83]

Ms. Lehman testified about the first category, based on a spreadsheet she helped maintain for several years, reflecting incidents of noncitizen registration in Sedgwick County. She did not create the spreadsheet; it was created by and is now maintained by the SOS's Office. The spreadsheet was last updated in January 2018, reflecting 38 incidents of noncitizen registration or attempted registrations going back to 1999, 18 of whom successfully registered to vote between 1999 and 2011, 5 of whom voted. The other 13 were on the voter rolls for extended periods of time, but never voted. Between 2013 and November 2016, the spreadsheet reflects 16 noncitizens who attempted to register to vote. And the spreadsheet reflects 4 individuals who are now citizens, but had been held in suspense because they applied to register to vote before becoming naturalized citizens. Because these 4 applied to register after the DPOC law passed, they were registered to vote pursuant to the Court's preliminary

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[81] Ex. 1133 (updated January 2018).

[82] Doc. 507, Trial Tr. at 752:23–753:5.

[83] *Id.* at 753:9–755:12. Mr. Caskey testified that his office has received additional unsubstantiated reports of noncitizen registration from members of the public and county election offices, but he could not identify any specific instance of noncitizen registration through such an informal report.

injunction order. Most of the individuals on this spreadsheet were discovered during naturalization ceremonies held in Wichita, Kansas, which members of Ms. Lehman's office regularly attend to help register to vote newly-naturalized citizens.

The ELVIS records for many of the individuals on the Lehman spreadsheet demonstrate instances of applicant confusion and administrative error. For example, one individual listed an "A-number" in the field for "Naturalization number (if applicable)" on the voter registration form.[84] Another individual voted four times between 2004 and 2008, but stated that she "was a permanent resident of the U.S. and did not know she wasn't allowed to vote until after 2008 when one of her friends told her she couldn't, she then stopped voting."[85]

The records for several "attempted registrations" on this spreadsheet are in fact instances where a noncitizen applicant did not intend to register to vote. One person Ms. Lehman lists as an attempted registrant on January 1, 2014, indicated to the DOV that she was not a citizen, but the DOV processed the voter registration application anyway. In fact, Ms. Lehman had an email exchange about this applicant with former election director Brad Bryant, who stated, "I just wish DMV would not register people who they know to be noncitizens."[86] This applicant also wrote to

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[84] Ex. 143 at 29.

[85] Exs. 1133 at 1, 1205.

[86] Ex. 22.

the DOV "Please put in the record that I am not a citizen. I cannot vote." She underlined "am not" and "I cannot vote."[87]

Another applicant indicated to the DOV that she was not a citizen, but the DOV nonetheless processed the application. This applicant "came into the office w/a POC notification letter and stated that her registration was a mistake on the part of the DMV when she renewed her license. She is not a U.S. citizen. She filled out a [c]ancellation form."[88] Another applicant replied in the negative when the DOV clerk asked if she was a United States citizen and produced a "Resident Alien" card, yet the DOV submitted an application, prompting the applicant to request cancellation. There are also two examples of voter registration forms being submitted to the county election office despite the applicants' failure to answer the question, "Are you a citizen of the United States of America" on the form.

Ms. Lehman personally transmitted to Defendant an application that had checked "no" to the citizenship question on the form. Ms. Lehman disingenuously testified that this "would be a case where it would be something anomalous to report up. . . . I think it's a dicey one so I send it on."[89] The Court does not find this testimony credible. Ms. Lehman testified that she is one of four county election commissioners directly appointed by Defendant, and that she reports directly

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[87] Ex. 99 at 4.

[88] Ex. 101 at 4; Ex. 1133 at 5.

[89] Doc. 505, Trial Tr. at 529.18–530:22.

to him. She stated that her office was charged with helping determine instances of noncitizen registration, and that when they "see something they suspect" could be noncitizen registration, her staff reports that to her, and she in turn reports it to Defendant. It appears that Ms. Lehman was either instructed or took it upon herself to pass along to Defendant even noncolorable attempts at noncitizen registration caused by State employee oversight or lack of training, rather than deliberate attempts to register to vote.

For his second category of empirical evidence, Defendant identified 79 instances of purported noncitizen voter registration by comparing a list of TDL holders generated by the DOV, with the voter rolls. Mr. Caskey testified that he compared these lists 4 times, in 2009, 2011, 2016, and 2017. Plaintiffs' expert Eitan Hersh was retained to conduct his own matching analysis of these two lists. Dr. Hersh is an expert in voter registration records and matching analysis. He is a tenured professor of political science at Tufts University, whose academic research is focused on studying large-scale individual databases, such as the ELVIS system, and matching those databases to other sources of individual-level data. The Court finds Dr. Hersh qualified, and that his testimony was credible as to the significance of Mr. Caskey's TDL list matches. Dr. Hersh conducted an extensive and thorough matching analysis, which is fully set forth in his report. He found that of the 79 individuals matched by Mr. Caskey, only 14 successfully registered to vote, and 12 had the "CITZ" code in their ELVIS records at some point, indicating they applied to register to vote and

were suspended or canceled for lack of DPOC.[90] Therefore, of these 79 individuals, 26 either successfully registered to vote or were stopped from registering under the DPOC requirement. One of these 26 individuals voted. Nine of the 79 individuals successfully registered to vote at a DOV, 1 of whom had a "CITZ" code at some point.[91]

Moreover, as Dr. Hersh testified, Mr. Caskey's TDL matches to the voter file do not necessarily represent cases of noncitizen registration or attempted registration. Even where there are correct matches, as with the 79 individuals identified by both Mr. Caskey and Dr. Hersh, it is possible a person could obtain a TDL and later naturalize prior to registering to vote. Dr. Richman agreed with Dr. Hersh, testifying that a person is not necessarily a noncitizen simply by virtue of appearing in the TDL file. Thus, Defendant has not demonstrated that all 79 individuals matched on the TDL list were noncitizens at the time they registered to vote.

Giving full credit to Mr. Caskey's evidence that 3 noncitizens were discovered to be registered voters through juror questionnaires, and ignoring evidence that several of the Lehman spreadsheet applicants were confused about whether they had the right to register to vote, and/or State employees submitted their applications despite having knowledge that they were

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[90] Ex. 107 at 3 (showing 11 matches in "Active" status, and 3 matches in "inactive" status and 12 matches with the "CITZ" code).

[91] *Id.*

noncitizens, the evidence shows that 67 noncitizen individuals registered to vote under the attestation regime, or attempted to register after the DPOC law was passed. Of these, 39 successfully registered to vote despite the attestation requirement,[92] and 28 noncitizens attempted to register to vote after the DPOC law was passed but were thwarted by operation of that law. Extrapolating percentages based on these numbers, the total number of confirmed noncitizens who successfully registered to vote between 1999 and 2013 is .002% of all registered voters in Kansas as of January 1, 2013. Of the estimated 115,500 adult noncitizens in Kansas,[93] .06% have successfully registered or attempted to register to vote since 1999. And, the number of attempted noncitizen registrations since the DPOC law became effective in 2013 is .09% of the total number of individuals canceled or suspended as of March 31, 2016, for failure to provide DPOC.

2. Expert Testimony Regarding Incidents of Noncitizen Registration in Kansas

The Court admitted in part the expert opinion and testimony of Defendant's expert Hans von Spakovsky in the areas of elections, election administration, and voter fraud. Mr. von Spakovsky is a senior legal fellow at The Heritage Foundation, "a think tank whose mission [is to] formulate and promote conservative

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[92] Included in this number are the 4 noncitizens listed on the Lehman spreadsheet who apparently registered to vote after the Court's preliminary injunction became effective.

[93] *See* Ex. 958 at 28 (citing the American Community Survey's 5-year estimate of the noncitizen population in Kansas).

public policies."[94] He is an adjunct, non-tenured professor at the Law School of George Mason University. He has never testified as an expert witness before and has published no peer-reviewed research on any subject. Notably, Mr. von Spakovsky could not identify any expert on the subject of noncitizen voter registration. The methodology Mr. von Spakovsky utilized in his expert report entailed collecting information on prosecutions, and various other reports of noncitizens voting and summarizing that information.

Mr. von Spakovsky opined that there is a problem with noncitizen voter registration and that attestation is not sufficient to prevent noncitizens from registering to vote. These opinions are premised on his assertion that any time a noncitizen registers to vote, regardless of that person's intent, it defrauds the votes of legitimate citizens. In his view, the numbers of individuals held in suspense or canceled under the Kansas DPOC law is irrelevant because those individuals could become fully registered with effort. Although he could provide no example of a noncitizen vote affecting the outcome of a close election, he opines that the mere possibility of that happening justifies the DPOC law.[95] He based his opinions on the summary of noncitizen voting in his expert report.

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[94] Doc. 509, Trial Tr. at 1099:25–1100:2.

[95] Mr. von Spakovsky proffered evidence of noncitizen registration in Virginia since the time of his last report. The Court excluded this evidence because it was not disclosed in a supplemental report before trial.

The Court gives little weight to Mr. von Spakovsky's opinion and report because they are premised on several misleading and unsupported examples of noncitizen voter registration, mostly outside the State of Kansas. His myriad misleading statements, coupled with his publicly stated preordained opinions about this subject matter, convinces the Court that Mr. von Spakovsky testified as an advocate and not as an objective expert witness.

As to Kansas noncitizen registration, Mr. von Spakovsky is aware of only 30 instances of noncitizen registration or attempted registration provided to him on the Lehman spreadsheet at the time he prepared his report. He did nothing to verify this information. Yet, he opined that "[c]learly aliens [in Sedgwick County] who applied to register at the DMV were not dissuaded from falsely asserting U.S. citizenship by the oath requirement."[96] He later admitted during cross-examination that he had no personal knowledge as to whether or not any of these individuals had in fact falsely asserted U.S. citizenship when they became registered to vote and that he did not examine the facts of these individual cases. As the Court has already discussed, several of the individual ELVIS records for those on the Lehman spreadsheet include noncitizens who disclosed their noncitizen status to the DOV clerk, so his statement that they "were not dissuaded from falsely asserting U.S. citizenship" is not supported by the record.

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[96] *Id.* at 1151:10-16; *see also* Ex. 865 at 3.

Mr. von Spakovsky stated in his report that a local NBC television station in Florida identified 100 individuals excused from jury duty who were possible noncitizens on the voter rolls; but on cross-examination, he admitted that he failed to include a follow-up story by the same NBC station that determined that at least 35 of those 100 individuals had documentation to prove that they were, in fact, U.S. citizens. He claimed that, at the time of his expert report, he was unaware of the NBC follow-up report, and only learned about it at his deposition. Yet after his deposition Mr. von Spakovsky never submitted a supplement or correction to his expert report to acknowledge this omission.

Mr. von Spakovsky also cited a U.S. GAO study for the proposition that the GAO "found that up to 3 percent of the 30,000 individuals called for jury duty from voter registration rolls over a two-year period in just one U.S. district court were not U.S. citizens."[97] On cross-examination, however, he acknowledged that he omitted the following facts: the GAO study contained information on a total of 8 district courts; 4 of the 8 reported that there was not a single-noncitizen who had been called for jury duty; and the 3 remaining district courts reported that less than 1% of those called for jury duty from voter rolls were noncitizens. Therefore, his report misleadingly described only the district court with the highest percentage of people reporting that they were noncitizens, while omitting any mention of the 7 other courts described in the GAO

[97] Ex. 865 at 5.

report, including 4 that had no incidents of noncitizens on the rolls.

Mr. von Spakovsky wrote an editorial in 2011, alleging that 50 noncitizens from Somalia voted in an election in Missouri. Yet, nearly one year earlier, the Missouri Court of Appeals issued an opinion, *Royster v. Rizzo*,[98] affirming the trial court's finding that no fraud had taken place in that Missouri election. While he testified that he was not aware of the court opinion at the time he wrote the op-ed, Mr. von Spakovsky admitted that he never published a written retraction of his assertion about Somalian voters illegally participating in that election.

The record is replete with further evidence of Mr. von Spakovsky's bias. Dr. Minnite testified to, and Mr. von Spakovsky's CV demonstrates, his longtime advocacy of voting restrictions. He admitted during his testimony that, at least as early as 2012, he was already an advocate for DPOC requirements like the one at issue in this case. Moreover, as early as 2001, Mr. von Spakovsky was already of the view that the NVRA was "a universal failure," and "was so flawed as to actually undermine our registration system."[99] Mr. von Spakovsky also contributed to Defendant's first campaign for SOS and wrote an email promoting a fundraiser for that campaign. He did not disclose these

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[98] 326 S.W.3d 104, 114 (Mo. Ct. App. 2010) ("Royster has failed to demonstrate that the trial court erred in concluding that all of these voters were registered and voted for whom the individual chose without any illegal or fraudulent interference.").

[99] Doc. 509, Trial Tr. at 1118:13–17.

facts in his report or on direct examination. When Mr. von Spakovsky opined in his report that the incidence of noncitizen registration collected by Ms. Lehman in Sedgwick County is likely just the "tip of the iceberg," he used the exact same phrase employed by Defendant to describe the same 30 incidents of noncitizen registration in Sedgwick County in a press release issued just a few months earlier.[100] Indeed, that phrase has been Defendant's refrain in this case in describing the problem of noncitizen voter registration.

As stated above, the Court gives little weight to Mr. von Spakovsky's opinions. While his lack of academic background is not fatal to his credibility in this matter, the lack of academic rigor in his report, in conjunction with his clear agenda and misleading statements, render his opinions unpersuasive. In contrast, Plaintiffs offered Dr. Lorraine Minnite, an objective expert witness, who provided compelling testimony about Defendant's claims of noncitizen registration. Dr. Minnite is an associate professor at Rutgers University-Camden, a tenured position, where her research focuses on American politics and elections. Dr. Minnite has extensively researched and studied the incidence and effect of voter fraud in American elections. Her published research on the topic spans over a decade and includes her full-length, peer reviewed book, *The Myth of Voter Fraud*, for which Dr. Minnite has received grants and professional distinction, and numerous articles and chapters in

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[100] *Compare* Ex. 865 at 3 *with* Ex. 147.

edited volumes.[101] This topic has been the focus of her work and research for the past seventeen years. Dr. Minnite has been offered and accepted as an expert on the incidence and effect of voter fraud in numerous cases.[102]

Notably, Dr. Minnite testified that when she began researching the issue of voter fraud, which includes noncitizen voter fraud, she began with a "blank slate" about the conclusions she would ultimately draw from the research. This stands in stark contrast to Mr. von Spakovsky's starting point as an advocate. In forming her opinions on the incidence of voter fraud and noncitizen registration in Kansas, Dr. Minnite relied on numerous quantitative, qualitative and archival sources. These include, among other sources, thousands of news reports, publicly available reports, court opinions, as well as various documents relied on by Defendant as evidence of noncitizen registration, including various iterations of Ms. Lehman's spreadsheet and underlying voter registration records. To evaluate these sources, Dr. Minnite employed a "mixed methods" research approach, in which different data sources are triangulated in order to identify patterns across the sources. This Court found on the record at trial Dr. Minnite's methodology is reliable under *Daubert*.

Although she admits that noncitizen registration and voting does at times occur, Dr. Minnite credibly

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[101] Ex. 140.

[102] *See id.* The Court took judicial notice of these cases at trial.

testified that there is no empirical evidence to support Defendant's claims in this case that noncitizen registration and voting in Kansas are largescale problems. Of the nominal number of noncitizens who have registered and voted, many of these cases reflect isolated instances of avoidable administrative errors on the part of government employees and/or misunderstanding on the part of applicants.

This testimony is supported by the ELVIS records underlying the Lehman spreadsheet, discussed *supra*. Although the ELVIS records at times are less than pellucid, mostly due to the many codes insisted upon by Defendant's office to continue to track individuals registered by operation of law pursuant to this Court's order, Dr. Minnite could comment and interpret them without undergoing training as "an election administrator or DMV clerk." In fact, both Dr. Minnite and this Court can draw the reasonable inference from an ELVIS record where the applicant replied "No" they were not a United States citizen, that a State employee erroneously completed the voter registration application in the face of clear evidence that the applicant was not qualified.

Dr. Minnite's testimony is further supported by Dr. Hersh's expert testimony. Dr. Hersh explained that the number of purported incidents of noncitizen registration found by Defendant is consistent with the quantity of other low-incidence idiosyncrasies in ELVIS and in voter files more generally, and is suggestive of administrative errors. For example, 100 individuals in ELVIS have birth dates in the 1800s, indicating that they are older than 118. And 400 individuals have birth

dates after their date of registration, indicating that they registered to vote before they were born. In a state with 1.8 million registered voters, issues of this magnitude are generally understood as administrative mistakes, rather than as efforts to corrupt the electoral process. Accidental registrations could have occurred as a result of clerks' administrative errors in inputting handwritten data from paper forms. Moreover, the very low incidence of voting among purported noncitizen registrants suggests that those individuals ended up in ELVIS due to accidents, as opposed to intentional unlawful registrations. The voting rate among purported noncitizen registrations on Mr. Caskey's TDL match list is around 1%, whereas the voting rate among registrants in Kansas more generally is around 70%. If these purported noncitizen registrations were intentional, one would expect these individuals to vote more frequently; the fact that they do not suggests that these registrations are the product of administrative mistakes by State employees or by the applicants themselves.

In short, the Court gives more weight to the careful, documented, and nonmisleading testimony of Dr. Minnite and Dr. Hersh on the issue of the significance of noncitizen voter registration in Kansas.

3. Statistical Estimates of Noncitizen Registration in Kansas

The remaining category of evidence offered by Defendant to demonstrate the degree of noncitizen registration in Kansas is statistical estimates generated by his expert, Dr. Jesse Richman. The Court admitted Dr. Richman's expert report and testimony,

finding him qualified as an expert in the fields of elections, voter registration, survey construction and analysis, and political methodology.

Dr. Richman holds a M.A. and a Ph. D. in Political Science from Carnegie Mellon University. He is an associate professor at Old Dominion University and was the Director of University Social Science Research Center there for 3 years. Dr. Richman teaches research, research design, and advanced statistics, including statistical analysis. His academic research includes, among other topics, voting and participation, and he has published 12 or 13 peer-reviewed articles, several of which involve elections or voting.

Dr. Richman has published one peer-reviewed article on noncitizen registration, in the British journal, *Electoral Studies*. The article was based on data collected through a survey known as the Cooperative Congressional Elections Study ("CCES"), a large online survey concerning American voting behavior. Dr. Richman is not and has never been involved in designing or implementing the CCES. He has published one peer-reviewed paper based on a survey that he designed, and he has never published any peer-reviewed research addressing the accuracy of survey responses for a survey that he designed, or any peer-reviewed research involving his own efforts to compare survey responses to government records to assess the validity of those survey responses. He has never, other than in this case, designed or implemented any survey to measure citizenship rates of survey respondents.

Plaintiffs offered the testimony of their rebuttal expert, Dr. Stephen Ansolabehere to assess Dr. Richman's various statistical estimates. Dr. Ansolabehere is the Frank G. Thompson Chair at Harvard University in the Department of Government. He has been on the board of American National Election Studies for 12 years, which is the longest running political science research project in the country, was the founding director of the Caltech/MIT voting technology project, and has worked for CBS News since 2006 on the election night decision desk that designs the surveys used and the data collection process. He has published a substantial body of peer-reviewed work: 5 books and approximately 80 articles on a variety of topics, including survey research methods, statistics for analyzing large sample data, and for matching large surveys. He has received a variety of research grants. Dr. Ansolabehere has testified in numerous voting rights cases, which all cite to his testimony favorably.[103]

Dr. Ansolabehere is the creator and principal investigator of the CCES, the survey on which Dr. Richman relied in his *Electoral Studies* article on noncitizen registration. Dr. Richman considers Dr. Ansolabehere to be knowledgeable about survey research, and believes that Dr. Ansolabehere has a good reputation as a political scientist among other political scientists. Indeed, the Court found his testimony and report to be persuasive, consistent, supportable, and methodologically sound. Dr. Ansolabehere opined that Dr. Richman's various

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[103] Ex. 136 at 14–15. The Court took judicial notice of these cases.

estimates—collectively and individually—did not provide statistically valid evidence of noncitizen registration in Kansas. For the following reasons, the Court credits Dr. Ansolabehere's testimony and finds that Dr. Richman's estimates are not statistically valid.

a. Estimates of Noncitizen Registration or Attempted Registration in Kansas

Dr. Richman offers four different estimates based on four different data sources of noncitizen registration or attempted registration in Kansas: (1) 14 Kansas respondents in the 2006–2012 CCES who stated that they were noncitizens, out of which 4 stated that they were registered to vote,[104] (2) records of approximately 800 newly-naturalized citizens in Sedgwick County, 8 of whom had records of pre-existing registration applications;[105] (3) a survey of 37 TDL holders, 6 of whom stated that they were registered or had attempted to register to vote;[106] and (4) 19 survey responses from a group of "incidentally-contacted" noncitizens, 1 of whom stated that they were registered or had attempted to register to vote.[107] Dr. Richman

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[104] Ex. 952 at 5.

[105] *Id.*

[106] *Id.* at 10.

[107] *Id.* at 11–12. These individuals were incidentally contacted during the January 2017 telephone survey commissioned by the State of Kansas, and conducted by a national polling firm, Issues and Answers. It surveyed the TDL holders referenced in Dr. Richman's third estimate, as well as individuals on the suspense

failed to provide margins of error with his original report for the first three estimates he discussed, and he admitted during his testimony that such failure does not conform to peer-review standards for statistical estimates. Dr. Richman issued a supplemental report that included margin of error calculations, under various alternative methods. Nonetheless, all four of these estimates, taken individually or as a whole, are flawed.

i. CCES Survey Results—4 of 14 respondents

After extrapolating the CCES survey results of 4 out of 14 noncitizen registrations to an estimated noncitizen adult population in Kansas of 114,000, Dr. Richman estimated that 28.5%, or 32,000 noncitizens, were registered to vote, with a confidence interval of between 11.7% and 54.6%.[108] The first problem with Dr. Richman's estimate is that the sample size is too small. As both Dr. Richman and Dr. Ansolabehere testified, estimates based on such small samples have large margins of error, and do not amount to reliable or probative statistical evidence.[109] To be sure, Defendant

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list, and registered voters in Ford, Seward, Finney, and Grant counties.

[108] Defendant attempted to introduce new extrapolated figures during trial based on a more updated estimate of the noncitizen voting population. The Court excluded this evidence for failure to timely supplement.

[109] *See, e.g.*, *Blackwell v. Strain*, 496 F. App'x 836, 843–44 (10th Cir. 2012) (finding statistical evidence unreliable because sample size of 7 was too small); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (finding sample size of 9 too small to provide

discounted this estimate in his opening statement due to this flaw.

Second, Dr. Richman failed to demonstrate that the 14 CCES respondents were in fact noncitizens. Dr. Ansolabehere credibly testified, as the creator and principle investigator of that survey, that individuals who are U.S. citizens sometimes mistakenly respond that they are noncitizens, and published a peer reviewed article explaining this error. He explained that while this "citizenship misreporting" error occurred relatively infrequently, the number of errors is large when compared to the number of individuals who identify themselves as noncitizens on the CCES, and thus fatally contaminates any attempt to use the CCES to make statistical estimates about noncitizens. Indeed, Dr. Richman's published findings about noncitizen voting can be accounted for entirely by citizenship misreporting. In fact, a group of approximately 200 political scientists signed an open letter criticizing Richman's work on essentially the same grounds.

Third, Dr. Richman's CCES estimate suffers from registration overreporting. Dr. Hersh testified that social desirability bias sometimes causes individuals to respond to survey questions that they are registered to vote when they are not. In a peer-reviewed article, Drs. Ansolabehere and Hersh have documented

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reliable statistical results). Dr. Ansolabehere calculated the margin of error on this estimate as plus or minus 27.7%. He testified that a statistician would normally seek a sample size of 1,000 or greater to guarantee a margin of error of plus or minus 3%.

overreporting of registration in the CCES. Dr. Richman testified that he has no reason to doubt Dr. Ansolabehere's findings on this issue. In fact, Dr. Ansolabehere explained that registration overreporting in Dr. Richman's survey sample is supported by the survey results— of the 4 respondents in the CCES sample who stated that they were registered to vote, only 1 can be validated to an actual voter file.

Finally, Dr. Richman did not weight the CCES sample to accurately reflect the population of Kansas. Even though Dr. Richman weighted his national estimates of noncitizen registration using CCES data in his *Electoral Studies* article, among other things, by race and Hispanic ethnicity, he did not conduct any weighting for his estimates of noncitizen registration based on the same underlying data in his expert reports.

For all of these reasons, the Court gives no weight to Dr. Richman's estimate that 32,000 noncitizens registered or attempted to register to vote based on responses to the CCES.

ii. Records of Newly-Naturalized Citizens in Sedgwick County—8 of 791

To reach a total estimate based on the Sedgwick County naturalization records, Dr. Richman observed that in that county, "roughly 1 percent of newly naturalized citizens since January 1 2016 (8/791) turned out to have previously registered to vote while non-citizens."[110] In his supplemental report, Dr.

[110] Ex. 952 at 5.

Richman applied 1.01% to the updated statewide estimate of noncitizens in Kansas, estimating that 1,169 noncitizens registered to vote across the state.[111]

This estimate contains the largest sample size of Dr. Richman's various estimates, and therefore should offer the greatest statistical certainty. But as Dr. Ansolabehere explained, his results are not statistically distinguishable from zero, meaning there is so much uncertainty about this estimate that the number could be zero or close to it. "[I]t's just an expression of how much uncertainty there is and whether we accept the hypothesis that this is any more than a—a minimal or de minimus amount of non-citizens in the state attempting or registering to vote."[112]

Dr. Ansolabehere calculated a theoretical margin of error of plus or minus 3.6%, meaning that Dr. Richman's 1% estimate is within the margin of error. Dr. Richman vehemently disagreed with Dr. Ansolabehere's calculation of the theoretical margin of error, which assumed that "the only source of variation in estimates is due to random sampling."[113] He contends that his estimate is within the bounds of several alternative confidence intervals he calculated in the supplemental report, although he claims the

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[111] Ex. 958 at 28. Dr. Richman also provided a lower confidence boundary of .51%, estimating 576 noncitizen registrations, and an upper confidence boundary of 1.98%, estimating 2,354 noncitizen registrations.

[112] Doc. 513, Trial Tr. at 1835:1–14.

[113] Ex. 102 at 36.

"Wilson Score" method is recommended in the field for the types of estimates he utilizes in this case. Dr. Richman also points to the fact that his sample includes confirmed examples of individuals who registered and then re-registered upon naturalization, so to suggest that the true figure is zero or below is plainly erroneous.

But Dr. Ansolabehere explained that he applied a margin of error that uses a "P" of .5 because that is "the standard approach to calculating the standard errors" where, as here, there is no information about the assumptions of the survey researcher.[114] Dr. Ansolabehere testified that is the conventional method used by political scientists.[115] The "Exact," "Agresti", "Jefferys" and "Wilson Score" methods used in Dr. Richman's supplemental report "are all under specific assumptions and there's no reporting of any of the assumptions for the sample data collection, so I have no reason to believe that those were appropriate methods as opposed to just applying a bunch of methods that are

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[114] Doc. 513, Trial Tr. at 1873:21–1874:2; 1810:5–1811:10; 1815:6–25 ("I only received—the only information I had was the information in Professor Richman's report. It told me nothing about what the assumptions of the people were who designed the study. Those assumptions are what informs the margin of error calculation. So in the absence of that, we used the conventional margin of error calculation.").

[115] Dr. Richman admitted during cross-examination that he used this method in his peer-reviewed *Electoral Studies* article to calculate a rate of noncitizen registration nationally. Doc. 512, Trial Tr. at 1610:1–20.

in a toolbox."[116] Dr. Richman points to no assumption contained in his report that would justify a different method. The Court is more persuaded by Dr. Ansolabehere's testimony about the appropriate margin of error for Dr. Richman's estimates and therefore finds that Dr. Richman's estimate based on Sedgwick County data from naturalization ceremonies is not statistically distinguishable from zero.

Additionally, the estimate of noncitizen registration based on Sedgwick County naturalization data is not based on a representative sample of noncitizen adults in Kansas. This sample includes only newly-naturalized citizens, and categorically excludes undocumented immigrants and legally present noncitizens who have not naturalized. Dr. Ansolabehere testified that noncitizens who naturalize tend to be older, more stable in their living situations and better-educated than noncitizens who do not. All of these factors tend to correlate with higher registration rates. As a result, an estimate of noncitizens based on naturalized citizens is likely to overestimate the number of noncitizens who are registered to vote in Kansas. Dr. Richman speculated that registration rates among those about to naturalize are likely to be lower than registration rates among other noncitizens, but he acknowledged that he has never done any research that attempts to quantify or compare registration rates among those noncitizens who naturalize and those who do not, and the only authority he cites in support of that proposition is a news interview with a single former Immigration and Customs Enforcement officer.

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[116] Doc. 513, Trial Tr. at 1874:9–1875:2.

Dr. Richman did not weight the sample of newly-naturalized citizens to accurately reflect the noncitizen population of Kansas. Even though he weighted his estimates of noncitizen registration in his published research by, among other things, race and Hispanic ethnicity, and he weighted his suspense list survey by age and gender, he did not conduct any weighting for his estimates of noncitizen registration. Dr. Richman did not collect information from the voter registration applications of these individuals that, for example, could have enabled him to weight his sample by age. Finally, Defendant did not establish that this estimate is based on noncitizens who had successfully registered to vote prior to naturalizing. In his initial report in this case, quoting Ms. Lehman, Dr. Richman noted that the 8 identified noncitizen registrants "were already in ELVIS,"[117] but he admitted that individuals who merely attempt to register to vote can be found in ELVIS, even if they never successfully registered.

For these reasons, the Court gives no weight to Dr. Richman's estimate that 1,169 noncitizens registered or attempted to register to vote based on responses to the CCES.

iii. TDL List Survey—0 or 6 of 37

Extrapolating the TDL list survey results statewide, Dr. Richman estimated in his initial report that 16.5%, or up to 18,000 noncitizens,[118] could be registered to vote. In his opening statement, Defendant cited this

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[117] Ex. 952 at 5.

[118] *Id*. at 10.

figure of 18,000, and described it as the "best estimate" of noncitizen registration in the State of Kansas. Yet, Dr. Richman ultimately weighted his estimate based on the TDL sample to match the overall noncitizen population in Kansas, which reduced his original estimate to about 13,000 noncitizen registrations. Dr. Richman testified that he considers this weighted estimate to be more reliable than his original 18,000 estimate.

Like the previous two estimates, Dr. Richman's estimate based on the TDL list suffers from flaws that give it little probative value. First, the sample size of 37 is too small to draw credible estimates. Dr. Richman himself admitted that the TDL sample has "a very modest sample size," and that the estimate therefore has "substantial uncertainty."[119] Assuming the validity of Dr. Richman's confidence interval using the Wilson Score method, it is still a large interval of over 20 percentage points. As the Court has already explained, this is too uncertain to produce a reliable estimate of noncitizen registration.

Second, Dr. Richman's estimate of noncitizen registration based on the TDL list survey is attributable entirely to registration overreporting, i.e., individuals who said that they had registered or had attempted to register, but who in fact had done neither. Dr. Hersh looked for the 6 individuals who self-reported being registered to vote or having attempted to register to vote in the ELVIS database, but was unable to find them. This indicates that none of them

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[119] Doc. 512, Trial. Tr. at 1640:22–1642:7.

even attempted to register to vote. Dr. Richman did not conduct a similar analysis, and did not dispute Dr. Hersh's findings in this regard.

Third, as with the newly-naturalized citizen list, Dr. Richman's calculations do not provide information about the number of noncitizens who successfully registered to vote. The survey instrument he used asked what Dr. Ansolabehere referred to as a "double-barreled" question: did the person register to vote *or* attempt to register to vote.[120]

Finally, Dr. Richman did not provide a response rate for the TDL survey. Although he provided an estimate for the overall response rate for all of the surveys performed by Issues and Answers of 16%, he was unable to provide a response rate for his survey of TDL holders. It is therefore impossible to assess the statistical reliability of the TDL survey. He explained on direct examination that this response rate compares well to the response rate for national polling, but fails to consider whether non-response bias could have affected the results of this survey.[121] Dr. Richman's failure to consider the response rate for the TDL survey and whether it was affected by non-response bias further reduces the value in this estimate of noncitizen registration.

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[120] *See* ex. 109 at 1, qu. 3.

[121] *See supra* note 29 and accompanying text.

iv. Incidentally-Contacted Individuals—1 of 19

Finally, as to the 19 incidentally contacted noncitizens from his survey, Dr. Richman estimates that 5.3%, or 6,000 noncitizens, registered or attempted to register to vote, with a confidence level of between .9% and 24.6%.

Again, there are several methodological flaws with this estimate. First, using the conventional method for calculating the margin of error, the estimate is not statistically distinguishable from zero. Second, the sample size is "extremely small," as Dr. Richman conceded in his report,[122] and therefore has low statistical power. Using any of the methods of calculating margins of error that Dr. Richman employs in his supplemental report, the confidence interval for this estimate is more than 20 percentage points, which is too large to form a probative estimate of noncitizen registration in Kansas.[123] Third, the estimate is based on the same faulty survey question as the TDL survey, so there is no way to distinguish between a respondent who registered or attempted to register to vote. And finally, the sample was not weighted to match the noncitizen population in Kansas. For all of these reasons, the Court agrees with Dr. Richman's

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[122] Ex. 952 at 12.

[123] *See* Ex. 102 at 19–20 ("The margin of error on that estimate is so wide that one can have no confidence that the number of non-citizens in Kansas who are registered to vote is larger than the single case found.").

assessment in his report that his extrapolation based on this single survey response is "very uncertain."[124]

v. Survey of Registered Voters—0 of 576

Included in Dr. Richman's report, but discounted by him during his testimony, are survey results from another component of the Issues and Answers survey. This survey contacted more than 500 registered voters in 4 Kansas counties: Ford, Finney, Grant, and Seward. Dr. Richman explained in his report that these counties were selected due to their "large non-citizen populations."[125] Zero respondents indicated that they were noncitizens, yet Dr. Richman did not calculate an estimate of noncitizen registration based on this particular survey, and gave the results short shrift. He testified that if he had estimated the rate of noncitizen registration based on this survey, it would be zero.

In his supplemental report, Dr. Richman argued that because this sampling included citizens, "it is inappropriate to include as analogous to the other items," as it "is an estimate of the percentage of 2008 through 2012 voter registrants who are still on the voter rolls and still at the phone number provided when the [sic] registered, and also non-citizens."[126]

Given that the Court's task in this matter is to determine the number of noncitizens who successfully

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[124] *Id.*

[125] Ex. 952 at 11.

[126] Ex. 958 at 10.

registered to vote during the attestation regime, i.e., before 2013, the Court is not persuaded by Dr. Richman's conclusory legal assertion about the relevance of this data. To the contrary, this data appears to be highly relevant to the Court's endeavor. If Defendant's contention is true that substantial numbers of noncitizens registered to vote before the DPOC law was passed, one would expect this number to be higher than zero, particularly given the robust sample size as compared to Dr. Richman's other estimates, and even assuming some level of social desirability bias. These results do not support Dr. Richman's overall opinion, and the Court is not persuaded by his attempt to eliminate it from his analysis.

vi. Meta-Analysis

Because Dr. Richman failed to identify a "best estimate" among his myriad calculations, Dr. Ansolabehere performed a "meta-analysis" of Dr. Richman's four estimates along with the results of the registered voters survey, weighting them based on sample size. Assuming all this data is accurate, taken together Dr. Ansolabehere estimates a 1.3% rate of noncitizen registration with a wide margin of error of 7.6%. Given this margin of error, a collective estimate of Dr. Richman's results is not statistically significant—there is so much uncertainty associated with them that "there can be no confidence that the number of non-citizen registration is more than the nominal cases in the sample. It is not possible to reject the hypothesis that the rate of non-citizen registration

in the State of Kansas is different from zero."[127] Dr. Richman responded to these calculations in his supplemental report, producing his own meta-analysis for the first time with his own confidence interval calculations, ranging from 1.1% to 1.8%. As already described, the Court was more persuaded by Dr. Ansolabehere's explanation of the appropriate margin of error that applies to Dr. Richman's calculations.

The Court finds Dr. Richman's testimony and report about the methodology and basis for concluding that a statistically significant number of noncitizens have registered to vote in Kansas, are confusing, inconsistent, and methodologically flawed. Most importantly, his refusal to opine as to the accuracy of any one estimate undercuts this Court's ability to determine that any one of his wildly varying estimates is correct. The extrapolations included in his report and testimony range from 0 to 32,000 noncitizen registrations. Given this range of estimates, most of which are based on sample sizes that cannot produce reliable results, this Court finds none of them represents an accurate estimate of the numbers of noncitizens registered to vote in Kansas.

b. Survey Results

Dr. Richman further testified about his survey of over 1,300 individuals on the suspense list. Seven of these respondents reported that they were noncitizens. After weighting, he estimated that these results demonstrate that .7% of the suspense list are

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[127] Ex. 102 at 6.

noncitizens, although his report concedes that "given the small sample size, any inference about the precise magnitude of the non-citizen presence on the suspense list is fraught with substantial uncertainty."[128] Beyond Dr. Richman's admission that the sample size renders this estimate substantially uncertain, there are other problems with the estimate. First, although Dr. Richman did not provide a margin of error, Dr. Ansolabehere did, and determined that Dr. Richman's estimate that 0.7% of the people on the suspense list are noncitizens is statistically indistinguishable from zero. Dr. Richman did not dispute Dr. Ansolabehere's finding in this regard. Moreover, taken at face value, the corollary to Dr. Richman's estimate that 0.7% of people on the Suspense List are noncitizens, is that more than 99% of the individuals on the suspense list are United States citizens.

Second, Dr. Richman weighted his sample by various characteristics that, in his view, could correlate with citizenship status, including age, gender, party identification, geographic region, year of registration, and "foreign name," in order to account for differences between the sample and the suspense list. After weighting the sample, he concluded that 117 individuals on the suspense list are noncitizens. Dr. Richman and a graduate student assistant went through the suspense list and determined which names were, in their view, foreign. Neither Dr. Richman nor his assistant had any experience in identifying so-called foreign names. By his own admission, their determinations were subjective and based primarily on

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[128] Ex. 952 at 8.

whether the name was "anglophone,"[129] meaning originating in the British Isles. Dr. Richman also testified that their work was performed quickly, and that they made many mistakes along the way. A review of their coding revealed inconsistencies; for example, of five individuals with the last name of "Lopez," two were coded as foreign and three were coded as non-foreign. On cross examination, Dr. Richman admitted that he would have coded Carlos Murguia, a United States District Judge sitting in this Court, as foreign.

E. Alternative Methods of Enforcing Citizenship Eligibility

The parties presented evidence about several methods of enforcing the State's citizenship eligibility requirement for voter registration, other than the DPOC law.

1. DOV List Comparisons

The DOV has compared the list of individuals on the suspense list to information in the DOV database concerning driver's license holders who presented proof of permanent residency (or "green cards") in the course of applying for a driver's license, and identified possible noncitizens. There is no evidence that the SOS's Office has conducted vigorous follow-up investigations on these individuals to determine if they were still noncitizens at the time they applied to register to vote.

Similarly, as the Court has already found, Defendant's office has compared the TDL list to the

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[129] Doc. 512, Trial Tr. at 1595:18–1598:6.

ELVIS database four times in the last decade. As of January 30, 2017, Defendant has identified 79 individuals through matching these lists. While showing some false positives, this method has allowed Defendant to identify some noncitizens on the voter rolls.

2. DOV Training

Brad Bryant, the former Elections Director for the SOS's Office, testified by deposition that in the mid-1990's into the early 2000's, the DOV believed that under the NVRA it was required to offer voter registration to any driver's license applicant, regardless of citizenship. "[T]here was nobody telling them be careful if somebody is not a citizen."[130] Mr. von Spakovsky testified that after the NVRA was passed, there was a nationwide problem with State motor vehicle offices offering voter registration to noncitizens. He opined that motor vehicle officials did not want their clerks making judgment calls about whether an applicant should be offered the right to register to vote. He testified that several states took the position that voter registration should be offered to every applicant.

Bryant recalls a greater effort in 2010 when Chris Biggs was SOS, to make clear to the DOV that its employees need not offer voter registration forms to noncitizens.[131] The SOS's Office relied primarily on posters sent to each DOV office throughout the State, to clarify that noncitizens could not register to vote.

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[130] Doc. 493 at 83:12–25.

[131] *Id.* at 85:16–88:7.

Nonetheless, since the time of this effort in 2010, there is evidence that DOV employees sometimes mistakenly offered noncitizens voter registration applications, and that even when applicants denied U.S. citizenship, the application was completed by the clerk, creating an ELVIS file. This evidence included the email between Ms. Lehman and Mr. Bryant lamenting this problem with DOV registration of obvious noncitizens. Since Mr. Caskey has been Elections Director, it has been the SOS's Office's policy that noncitizens should not be offered the opportunity to register to vote at the DOV, yet his office has not drafted a written instruction to DOV clerks to not offer voter registration applications to noncitizens.

Another problem revealed by this record, and confirmed by Mr. Caskey, is that at least for some period the DOV did not accept DPOC offered by applicants if it was unnecessary to fulfill the proof of residency requirement to obtain a driver's license. Mr. Caskey testified, "I'm aware of many cases where a person brought a documentary proof of citizenship document and it was not needed as part of their driver's license application and was not scanned in the system and as part of their voter registration record."[132]

Mr. Caskey testified as follows about the scope of the SOS's role in training DOV staff:

> Our office routinely talks with the Division of Motor Vehicles executive staff as well as their trainers concerning

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[132] Doc. 507, Trial Tr. at 740:3–7.

> requirements that the Division of Motor Vehicles has to comply with the National Voter Registration Act as it relates to offering the opportunity to register to vote to anyone who conducts a transaction at the Division of Motor Vehicles.
>
> We also periodically review any changes in the state and federal law regarding elections. Previously we have reviewed the training materials that their trainers use. DMV routinely uses kind of a train-a-trainer approach where they have a group of trainers who then train their individual field offices. So we have provided—in years past, we provided posters and reviewed their training materials, you know, over the last 10 to 15 years.[133]

DOV clerks in Kansas receive, on average, no more than 30 minutes of training regarding motor voter registration laws during their two-day in-classroom training. They were provided updated training after the SAFE Act became effective in 2013. Between February 2015 and June 2016, the SOS's Office did not provide any new written training materials to the DOV concerning motor voter registration laws. And Mr. Caskey testified that there have been no recent changes to DOV training or procedures.

Mr. Caskey is also charged with providing instruction and training to the 105 county election

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[133] *Id.* at 881:13–882:3.

officials on the rules and regulations governing elections. There is an electronic training manual maintained by Mr. Caskey that used to be available online. It was last revised in 2012 to reflect the DPOC law. The office does not update the document as procedures change. Instead, Mr. Caskey testified that his office provides training to the counties by e-mail and phone, and that they attend regional and statewide meetings. Mr. Caskey and Defendant insist, however, that they have no authority to force the counties to comply, and that it is impractical to monitor whether they are implementing the SOS's policies.

3. Department of Homeland Security's Systematic Alien Verification for Entitlements Program

The Systematic Alien Verification for Entitlements ("SAVE") program is overseen by the United States Department of Homeland Security ("DHS"). In a letter dated August 20, 2012, DHS notified Kansas that

> States will be able to access SAVE to verify the citizenship status of individuals who are registered to vote in that state provided that the requesting state has a signed information sharing agreement with the Department of Homeland Security and that each state be able to supply for each individual it seeks to verify (1) a specific type of unique identifier like an alien number or certificate number that appears on immigration-related documentation, and (2) a copy of the immigration-related

> documentation in question to complete the verification process.[134]

On this basis, Defendant maintains that "A-numbers" or Alien Verification Numbers ("AVNs") are required to run SAVE searches, such that this is not a viable option because this information is not required on the registration application.

But the trial record demonstrates two instances where the SOS's Office has confirmed noncitizenship status of registrants through DHS: (1) it confirmed noncitizenship of three individuals who stated they were noncitizens on juror questionnaires in 2017; and (2) it confirmed noncitizenship of 6 respondents to Dr. Richman's TDL survey.[135] Moreover, Mr. Caskey acknowledged in his testimony that other states such as Florida, Virginia, and Colorado use, or have attempted to use, SAVE for voter registration purposes. Mr. Caskey has not contacted any of these states' election officials to learn how they utilized SAVE.

Other agencies in Kansas have access to noncitizen documentation that could be used for SAVE searches. For example, DOV collects noncitizen documents when it issues TDLs. While the SOS obtains information from the DOV to confirm whether a driver's license applicant has provided DPOC, it does not obtain A-number information or copies of noncitizen documents from the DOV. The SOS has not requested from the Legislature a law that would enable it to obtain A-

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[134] Pretrial Order Stipulation, Doc. 349 ¶ 106.

[135] *See* Ex. 952 at 10.

number information or copies of noncitizen documents from the DOV, and has not investigated whether other agencies in Kansas (such as the KDHE) have AVN information that could be used for SAVE searches.

4. Prosecutions

Former Deputy SOS Eric Rucker, an experienced prosecutor, testified by deposition that criminal prosecutions can prevent and deter criminal conduct. Since July 1, 2015, Defendant has had the independent authority to prosecute any person who has committed or attempted to commit any act that constitutes a Kansas elections crime.[136] Since July 1, 2015, the SOS's Office has become aware of multiple instances of noncitizens registering to vote in Kansas. Since obtaining prosecutorial authority over Kansas elections crimes, the SOS has filed zero criminal complaints against a noncitizen for allegedly registering to vote. As of June 20, 2017, Defendant has filed one criminal complaint and obtained one conviction against an individual who actually voted while being a noncitizen.

5. Juror Questionnaires

In Kansas, people who are called for jury service are sent jury duty questionnaires that include a question about U.S. citizenship. District Courts send to the SOS's Office on at least a monthly basis the lists of individuals who requested to be excused from jury service based on their claims of noncitizenship. The SOS's Office has compared lists of individuals who

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[136] K.S.A. § 25-2435(a).

answered on their jury questionnaires that they were not citizens with the voter registration roll.

As of March 24, 2017, Defendant identified 3 individuals who were on the voter rolls but who had self-identified as noncitizens on their jury questionnaires. An investigator employed by Defendant provided the full names and dates of birth of the 3 individuals who had self-identified as noncitizens on their jury questionnaires to the DHS via email. After receiving the full names and dates of birth of the 3 individuals who had self-identified as noncitizens on their jury questionnaires from the investigator, DHS responded with an email describing information known to DHS about the immigration and citizenship status of these 3 individuals. The response from DHS was the first time in Mr. Caskey's experience that DHS has aided the SOS, despite seeking assistance in the past. Only noncitizens called for jury duty can be identified by comparing ELVIS records with jury questionnaires.

III. Justiciability Challenges

Defendant has challenged Plaintiffs in both cases repeatedly on standing and mootness grounds. Defendant challenges Plaintiff Bednasek's standing because he has access to DPOC yet fails to produce it, and because he is a Texas resident. Defendant asserts that the claims of the individual *Fish* Plaintiffs are moot. The Court has addressed these challenges in detail in prior orders, but briefly addresses them again to the extent they are raised in Defendant's proposed findings of fact and conclusions of law, and addresses the mootness of Mr. Fish's claim sua sponte.

A. Parker Bednasek

Defendant challenges Bednasek's standing on the basis that he is a Texas, not Kansas, resident, and because he has access to DPOC. The Court has twice addressed and rejected Defendant's standing arguments in prior, lengthy orders.[137] The Court incorporates by reference those rulings, and finds no further evidence presented at trial changes those decisions.

B. William Stricker, III, Thomas Boynton, Douglas Hutchinson, and Steven Wayne Fish

Defendant challenges the claims asserted by Plaintiffs Stricker, Boynton, and Hutchinson in Case No. 16-2105 on mootness grounds because they have become fully registered while this case has been pending and a favorable decision would not change their status. These challenges have been raised and rejected. The record shows that all 3 Plaintiffs' voter registration applications were canceled under the DPOC law before they were resurrected by operation of the Court's preliminary injunction order. But for that order, which required Defendant to register motor voter applicants whose applications had been suspended or canceled, these Plaintiffs would have been required to file new applications for registration to become registered.

Mr. Stricker's voter registration application was canceled in the ELVIS system in 2015. His registration was reinstated by operation of the preliminary

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[137] Bednasek Docs. 107 at 8–15, 165 at 15–17.

injunction on June 22, 2016. Only after his registration was reinstated pursuant to the Court's preliminary injunction order did Defendant investigate behind the scenes and locate a citizenship document. Unfortunately for Mr. Stricker, this was well after he was denied the right to vote in the 2014 election.

On November 5, 2015, Prof. Boynton's voter registration application was canceled. According to Mr. Caskey, the SOS's Office later found a citizenship document through the DOV web portal after that access was granted in May 2016, after Prof. Boynton's registration was reinstated by operation of the preliminary injunction. Prof. Boynton's ELVIS file shows that a certified United States birth certificate was found and added on August 4, 2014 notwithstanding the fact that Mr. Caskey testified that Mr. Boynton did not apply to register to vote until November 4, 2014, Election Day.

Plaintiff Hutchinson's 2013 motor voter application was suspended for failure to provide DPOC, and it was ultimately canceled on January 27, 2016. He was registered by operation of this Court's preliminary injunction order. On July 30, 2016, his status changed to active after he submitted DPOC at the Johnson County Election Office and is now considered "fully registered."

But for this lawsuit and the preliminary injunction, these applications would not have been reinstated and they each would have been required to reapply to register to vote. Under these circumstances, the Court finds Defendant has not met his burden of demonstrating mootness for the same reasons

explained in the Court's May 4, 2017 Memorandum and Order.[138] Defendant's unilateral enforcement actions of the statute, which have been a moving target since this case's inception, and which were possible due to this Court's Order, do not render these Plaintiffs' claims moot. In fact, this Court previously warned Defendant that if he "continues his pattern of picking off Plaintiffs through targeted back-end verifications in an attempt to avoid reaching the merits of this case, the Court may be inclined to revisit its previous decision denying Plaintiffs' motion for class certification."[139]

There is one exception to the Court's mootness ruling, which this Court addresses sua sponte because it is jurisdictional. "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[140] Mr. Fish testified that in September or October 2016, he relocated within Douglas County and changed his address with the DOV in person. At that time, Mr. Fish filled out a second voter registration application and provided his birth certificate. He is now registered to vote, having provided DPOC. The evidence demonstrates that Mr. Fish's active registration status is therefore not due to the Court's

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[138] Doc. 334 at 14–19.

[139] *Id.* at 19.

[140] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013)).

preliminary injunction, but his voluntary action of reapplying to register to vote at which time he provided DPOC. Unlike the other 3 Plaintiffs, whose applications were canceled but resurrected due to the unilateral efforts of Defendant, Mr. Fish filed a new application in full compliance with the DPOC law while this action was pending. Therefore, although he suffered an injury at the time the Complaint was filed, he no longer suffers an injury that can be redressed in this case and his remaining claim must be dismissed as moot.

IV. Conclusions of Law in *Fish v. Kobach*, 16-2105

The parties in the *Fish* case went to trial on the only remaining claim in this case—Count 1, which alleges a violation of § 5 of the National Voter Registration Act ("NVRA") based on preemption under the Election Clause in Article 1 of the United States Constitution. Section 5 of the NVRA requires that every application for a driver's license, "shall serve as an application for voter registration with respect to elections for Federal office."[141] Subsection (c)(2)(B)–(C) of § 5 provides:

> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
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> . . . .
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> (B) may require only the minimum amount of information necessary to—

[141] 52 U.S.C. § 20504(a)(1). The Court refers to the sections of the NVRA as they appear in Pub. Law No. 103-31, 107 Stat. 77, 77–89 (1993), but cites to the codified version of the Act.

> (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;
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> (C) shall include a statement that—
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> (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.[142]

Under the NVRA, Defendant is "responsible for coordination of State responsibilities" under the NVRA.[143]

Shortly after this case was filed, Plaintiffs successfully moved for a preliminary injunction based on their likelihood of success on the merits of their § 5 claim. Defendant appealed, and the Tenth Circuit affirmed, providing detailed guidance on whether the Kansas DPOC law is preempted by § 5's mandate that a motor-voter registration application contain the minimum-amount of information necessary for the state to exercise its eligibility-assessment and registration duties.

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[142] *Id.* § 20504(c).

[143] 52 U.S.C. § 20509.

In its opinion, the Tenth Circuit set forth the applicable rules of statutory interpretation and preemption under the Elections Clause, interpreted the NVRA's requirements under § 5, and applied that interpretation to the facts as found by this Court in its preliminary injunction order. In the course of its detailed analysis, the Tenth Circuit "rejected Secretary Kobach's readings of the NVRA."[144] As the Court previously explained on summary judgment, under both the law of the case doctrine, and the mandate rule, the Tenth Circuit's opinion with regard to issues of law governs at all subsequent stages of the litigation.[145] The Court therefore proceeds to apply the standards announced by the Tenth Circuit in its October 19, 2016 published opinion in this case to the trial record. The Court once again declines to revisit Defendant's arguments that were resolved by that opinion.[146]

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[144] *Fish v. Kobach*, 840 F.3d 710, 746 (10th Cir. 2016).

[145] *See, e.g.*, *Dish Network Corp. v. Arrowwood Indem. Co.*, 772 F.3d 856, 864 (10th Cir. 2014).

[146] On June 13, 2018, Defendant submitted a Notice of Supplemental Authority (Doc. 540), pointing the Court to the recently-decided Supreme Court decision, *Husted v. A. Philip Randolph Inst.*, No, 16-980, 2018 WL 2767661 (June 11, 2018). In *Husted*, the Court construed § 8 of the NVRA, which governs the States' ability to remove voters from registration rolls on change-of-residence grounds. *See id.* at * 3–5 (discussing 52 U.S.C. § 20507(b)(c) and (d)).

Defendant argues that the *Husted* decision calls into question the Tenth Circuit's interpretation of § 5 in this case because, like the lower courts in *Husted*, it reads an implicit prohibition into the

The Tenth Circuit held that the attestation requirement in § 5(c)(2)(C) presumptively satisfies the minimum-information requirement for motor voter registration in subsection (c)(2)(B).[147] However, this presumption is rebuttable if the state can demonstrate "that the attestation requirement is insufficient for it

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NVRA that is not permitted by the text. The Court does not read *Husted* so broadly. That decision entails a statutory interpretation of a different section of the NVRA, which construes different language. Absent an on-point ruling that applies to § 5, this Court is bound by the Tenth Circuit's guidance and leaves it to that court to determine whether *Husted* impacts its prior ruling.

Defendant also suggests that the policy arguments advanced by Plaintiffs about less burdensome alternatives to the DPOC law are policy arguments foreclosed by *Husted*. Again, the Court reads *Husted* to deal only with the issue of statutory interpretation of § 8 of the NVRA. The majority rejected the dissents' arguments, which it characterized as "policy disagreement[s]," and stated that the "only question before us" is whether Ohio's law violated federal law, specifically § 8 of the NVRA. The less burdensome alternatives argument in this case, referenced by Defendant, is not a policy justification for rejecting the DPOC law as preempted by § 5 of the NVRA. Instead, it is part of the test formulated by the Tenth Circuit, which only applies if Defendant makes a showing that substantial numbers of noncitizens successfully registered to vote under the attestation regime. This two-part test was formulated as a method of interpreting the minimum-information principle in § 5(c)(2)(B), language not at issue in *Husted*. Again, the Court remains bound by the Tenth Circuit's statutory construction of § 5, and leaves Defendant's challenges to that court to accept or reject.

[147] *Fish*, 840 F.3d at 738.

to carry out its eligibility-assessment and registration duties."[148] The court went on:

> More specifically, in order to rebut the presumption as it relates to the citizenship criterion, we interpret the NVRA as obliging a state to show that "a substantial number of noncitizens have successfully registered" notwithstanding the attestation requirement. In *EAC*, we held that the EAC was not under a nondiscretionary duty to add state-specific DPOC instructions to the Federal Form at two states' behest. We reached this conclusion because "[t]he states have failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form." The failure to make such an evidentiary showing was seemingly dispositive there of Secretary Kobach's Qualifications Clause challenge
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> This results in the preemption analysis here being quite straightforward: if Kansas fails to rebut this presumption that attends the attestation regime, then DPOC necessarily requires more

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[148] *Id.*

> information than federal law presumes necessary for state officials to meet their eligibility-assessment and registration duties (that is, the attestation requirement). Consequently, Kansas's DPOC law would be preempted.[149]

In a footnote, the court explained that if a state could show that attestation does not satisfy the minimum-information standard by demonstrating that substantial noncitizens are able to register to vote notwithstanding attestation of citizenship, then this Court would need to consider whether DPOC should be deemed "adequate to satisfy" the minimum-information standard.[150] This second inquiry would require the state to "show that nothing less than DPOC is sufficient to meet those duties."[151]

In its preliminary injunction order, this Court found that between 2003 and the effective date of the DPOC law, 14 noncitizens had registered or attempted to register to vote in Sedgwick County, Kansas. The Tenth Circuit found that this number "fall[s] well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its

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[149] *Id.* at 738–39 (quoting and citing *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014)).

[150] *Id.* at 738 n.14.

[151] *Id.*

eligibility-assessment and registration duties."[152] In addressing this evidence, the court considered and rejected Defendant's argument that "even if one noncitizen successfully registers under the attestation regime, then DPOC is necessary to ensure applicant eligibility."[153] This is because in adopting the NVRA registration procedures, Congress intended "to ensure that whatever else the states do, 'simple means of registering to vote in federal elections will be available.'"[154] If 1 vote by a noncitizen is too many, then states would be able to justify even harsher means of verifying citizenship.[155] The court explained, "[t]he NVRA does not require the least amount of information necessary to prevent even a single noncitizen from voting."[156]

After remand, the Court reopened discovery in the *Fish* matter related to the Tenth Circuit's test. Defendant was given the opportunity to retain experts and marshal evidence to meet his burden of demonstrating that "a substantial number of noncitizens have successfully registered to vote under the attestation requirement" in order to rebut the presumption that attestation meets the minimum-

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[152] *Id.* at 747.

[153] *Id.* at 747–48.

[154] *Id.* at 748 (quoting *Arizona v. Inter Tribal Council of Ariz., Inc. ("ITCA")*, 133 S. Ct. 2247, 2255 (2013)).

[155] *Id.*

[156] *Id.*

information requirement of § 5[157] and that nothing less than DPOC is sufficient to meet his eligibility-assessment and registration duties under the NVRA. As described below, the Court finds that on the trial record Defendant has failed to make a sufficient showing on the first inquiry. Moreover, even if Defendant could demonstrate a substantial number of noncitizen registrations, he has not demonstrated that nothing less than the DPOC law is sufficient to enforce the State's citizenship eligibility requirement.

A. Substantial Number of Successful Noncitizen Registrations Under Attestation

Under the first part of this test, the parties dispute the meaning of "substantial." Defendant has argued that "substantial" should be interpreted to mean any number that can change the outcome an election. Plaintiffs argue that "substantial" must be evaluated in comparison to the number of total registered voters. In its summary judgment order, the Court provided the parties with guidance as to how it would apply the standard. After reviewing the Tenth Circuit's opinion in this case, and the decisions upon which it rested,[158]

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[157] *Id.* at 739. Defendant cites this Court's summary judgment order for the proposition that this is a purely legal question. *See* Doc. 523 at 52 (citing Doc. 421 at 18). That is not an accurate recitation of the Court's ruling when read in context. The Court must decide the meaning of "substantial" as a matter of law under the test formulated by the Tenth Circuit. However, the Court must determine as the trier of fact whether Defendant's evidence of noncitizen registration meets that definition.

[158] *Fish*, 840 F.3d at 733–39; *ITCA*, 133 S. Ct. at 2259–60; *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1195–96 (10th

this Court found that Defendant's showing must go beyond the number of registrations that would impact the outcome of an election to be substantial. Instead, the Court considers the number of noncitizen registrations in relation to the number of registered voters in Kansas as of January 1, 2013, when the DPOC law was passed, and is otherwise guided by legal authority cited with approval by the Tenth Circuit in its October 2016 ruling when determining whether Defendant's evidence meets the threshold of "substantial."[159]

During his opening statement at trial, Defendant invited the Court to adopt a third approach to substantiality he deemed a "functional failure test." Under Defendant's test, the Court would determine whether a reasonable person would find that the attestation requirement failed to perform the function of preventing noncitizens from registering to vote. Defendant offers no explanation about how the Court is to apply this test, nor any authority for using a "reasonable person" test. Moreover, Defendant's proposed approach effectively modifies the Tenth Circuit's test by removing the words "substantial number." The plain meaning of the word "substantial" when describing an amount, means "considerable in

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Cir. 2014) (reviewing Mem. Decision Concerning State Requests to Include Add'l Proof-of-Citizenship Instructions on the National Mail Voter Registration Form, Case No. EAC-2013-0004 (U.S. Election Assistance Comm'n Jan. 17, 2014), attached as Doc. 367-25).

[159] Doc. 421 at 29.

quantity; significantly great."[160] By asking this Court to consider whether attestation "functions" a certain way, instead of quantifying the noncitizens allowed to vote under attestation—a straightforward question— this inquiry runs afoul of the test formulated by the Tenth Circuit.

Defendant makes no mention of his "functional failure test" in his proposed findings of fact and conclusions of law. Instead, he argues for the first time that the Court should look to social security cases construing "substantial" in the context of reviewing administrative law judges' ("ALJ") decisions about whether "substantial gainful activity exists in significant numbers in the national economy," an inquiry relevant to a disability determination under the Social Security Act.[161] The Court does not find this line of cases helpful or relevant in determining the meaning of substantial in this case. First, the social security cases review ALJ decisions to determine if they are supported by substantial evidence in the record, a different standard of review than this Court employs during a civil bench trial.[162] Second, those cases construe the term "significant number," not "substantial number," in an entirely different context, guided by such factors as "the level of claimant's disability; the reliability of the vocational expert's

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[160] Merriam Webster's Collegiate Dictionary at 1174 (10th ed. 1996).

[161] *See, e.g.*, *Trimiar v. Sullivan*, 966 F.2d 1326, 1329 (10th Cir. 1992).

[162] *Id.* at 1330.

testimony; the distance claimant is capable of travelling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work, and so on."[163] Obviously, none of these factors are relevant to the question before the Court in this case. Instead, the Court considers whether Defendant's evidence of noncitizen registration is substantial according to the guidance provided at summary judgment, which relied on cases determining this question in the context of noncitizen voter registration.

For the reasons already explained, the Court finds no credible evidence that a substantial number of noncitizens registered to vote under the attestation regime. The only information about Kansas registration rates relied upon by Mr. von Spakovsky was provided to him by Mr. Caskey, and the Court has already evaluated that underlying data in more detail than Mr. von Spakovsky, who simply accepted the numbers as true. His generalized opinions about the rates of noncitizen registration were likewise based on misleading evidence, and largely based on his preconceived beliefs about this issue, which has led to his aggressive public advocacy of stricter proof of citizenship laws. The Court likewise does not find Dr. Richman's opinion as to the numbers of noncitizen registration carry weight given the numerous methodological flaws set forth in the Court's findings of fact.

That leaves Defendant's empirical evidence of noncitizen registration. He has submitted evidence of

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[163] *Id.*

129 instances of noncitizen registration or attempted registration since 1999, but looking closely at those records reduces that number to 67 at most. Even these 67 instances are a liberal estimate because it includes attempted registrations after the DPOC law was passed, a larger universe than what the Tenth Circuit asked the Court to evaluate. Only 39 successfully registered to vote. And several of the individual records of those who registered or attempted to register show errors on the part of State employees, and/or confusion on the part of applicants. They do not evidence intentional fraud. As discussed below, in determining whether nothing less than requiring DPOC is sufficient to enforce the citizenship requirement, it matters whether noncitizens are intentional registrants or not.

Moreover, the Court is unable to find empirical evidence that a substantial number of noncitizens successfully registered to vote under the attestation regime. As stated in the Court's findings of fact, there are only 39 confirmed noncitizens who successfully registered to vote between 1999 and 2013 when the DPOC law became effective. This is but .002% of all registered voters in Kansas as of January 1, 2013 (1,762,330). Furthermore, the 67 confirmed registrations and attempted registrations between 1999 and 2018 amounts to only .004% of registered voters.[164] Of the estimated 115,500 adult noncitizens in

[164] The Court's finding would be no different if it fully credited the 129 instances cited by Defendant.

Kansas,[165] .06% have successfully registered or attempted to register to vote since 1999. The number of attempted noncitizen registrations since the DPOC law became effective is .09% of the total number of individuals canceled or suspended as of March 31, 2016, for failure to provide DPOC. The Court finds none of these numbers are substantial when compared to the total number of registered voters, the total number of noncitizens in Kansas, or the number of applicants on the suspense/cancellation list as of March 2016. They all fall below 1%. Instead, these numbers support the opinions of Drs. Minnite, McDonald, and Hersh that while there is evidence of a small number of noncitizen registrations in Kansas, it is largely explained by administrative error, confusion, or mistake.

Defendant insists that these numbers are just "the tip of the iceberg." This trial was his opportunity to produce credible evidence of that iceberg, but he failed to do so. The Court will not rely on extrapolated numbers from tiny sample sizes and otherwise flawed data. Dr. Richman's estimates were not only individually flawed and wildly varied, but his refusal to opine as to the best method of estimating the iceberg renders them all suspect. Mr. von Spakovsky's opinions fare no better. His advocacy led him to cherry pick evidence in support of his opinion, and he failed to demonstrate knowledge of Kansas noncitizen registration that would allow him to reliably quantify the iceberg beyond Mr. Caskey and Ms. Lehman's

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[165] *See* Ex. 958 at 28 (citing the American Community Survey's 5-year estimate of the noncitizen population in Kansas).

testimony. While the Court acknowledges that Defendant has limited tools at his disposal to quantify the statewide numbers of noncitizen registrations, the Court does not assume as Defendant does that this means there must be additional, substantial cases of noncitizen registration. Instead, the Court draws the more obvious conclusion that there is no iceberg; only an icicle, largely created by confusion and administrative error.

B. Alternatives to DPOC

Although the Court finds Defendant has not met his burden of showing a substantial number of successful noncitizen registrations under attestation in Kansas, out of an abundance of caution it proceeds to consider whether "nothing less than DPOC is sufficient to meet" Kansas's NVRA eligibility-assessment and registration duties. The parties presented evidence about the following alternatives to enforcing the Kansas citizenship requirement: (1) better training of State employees, particularly at the DOV; (2) list matching; (3) reviewing juror questionnaires; (4) the SAVE program; and (5) prosecution and enforcement of perjury for false attestations.[166]

The Court begins its analysis of this part of the test by finding that no system for detecting noncitizen

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[166] There was evidence at trial about the Electronic Verification of Vital Events ("EVVE") program as a possible alternative enforcement mechanism. Plaintiffs did not pursue this as an acceptable alternative, and the evidence showed that it required information such as the applicant's state of birth, not captured by the voter registration application.

registration is perfect because there is no way to completely eliminate human error. The experts for both sides agree on this point. But the evidence at trial showed that a greater effort to pursue several of these alternatives, taken together or individually, would be sufficient to meet Kansas's NVRA duties. The testimony of Drs. Minnite and Hersh established that many confirmed instances of noncitizen registration or attempted registration in Kansas were due to either applicant confusion or mistake, or errors by DOV and county employees, not intentional voter fraud. Lack of intent matters not as a means of determining legal liability, but because it frames the acceptable alternative approaches that would allow Defendant to better enforce the State's citizenship requirement while imposing a less burdensome process on Kansans who apply to register to vote. If most noncitizen registrations are due to mistake or administrative error, as opposed to intentional fraud, that fact shapes the best method for enforcing the citizenship requirement.

1. Training

The evidence made clear that several noncitizens who registered or "attempted" to register, according to Defendant, either did not intend to register to vote or did not understand that they were prohibited from registering to vote. Some applicants told the DOV clerk that they were not citizens, yet the clerk completed a voter registration application. For some period of time prior to 2010, the evidence established that the DOV had been offering voter registration to all applicants as a matter of course, even if the clerk knew that the

applicant was a noncitizen. It is not difficult to understand why many noncitizens registered to vote during this period if they were offered a voter registration application notwithstanding their disclosure to the DOV clerk of noncitizen status. These applications are part of the universe forwarded to the county clerks that were flagged as attempted registrations instead of mistakes. There was also evidence of DOV and county clerk error in implementing the DPOC law prior to and after the preliminary injunction order became effective in June 2016. There was evidence that DOV clerks continued to offer voter registration to noncitizens after 2010. And there was evidence that DOV clerks did not accept DPOC presented by driver's license applicants, and therefore applicants were suspended or canceled despite fully complying with the law.

The SOS's Office could make better, more meaningful efforts toward training DOV employees charged with completing motor voter applications. While it is true that an effort was made back in 2010 to train DOV clerks that noncitizens should not be offered voter registration, Mr. Caskey could not quantify a sustained effort by his office to train these workers not to fill out applications for those who disclose they are noncitizens either by providing evidence of noncitizenship during the application process, or by answering "no" to the question about U.S. citizenship. The evidence suggests a shift in policy around 2010 when the SOS's Office came up with training posters for the DOV on this issue. Yet, the errors identified during Ms. Lehman's testimony involved applications after 2013, suggesting that the problems continued

after 2010. Mr. Caskey's testimony provided no indication of how often he or the SOS's Office "talks with" DOV trainers about these policies, nor what "periodically review[ing]" their training materials entails. Although drivers' license clerks received updated training between February 2015 and June 2016, there have been no new written training materials since that time. Despite the interagency agreement between the SOS's Office and the DOV that became effective in May 2016, and the Court's preliminary injunction that became effective in June 2016, the record does not establish that robust, updated training was provided to the DOV. The Court is convinced that a greater effort at training DOV staff would reduce the amount of inadvertent noncitizen registrations. The Court is further convinced that without the burdensome DPOC law to enforce, Mr. Caskey and his staff would have far more resources to devote to this endeavor.

Mr. Caskey testified that there is a training manual for the counties that was last updated in 2012, which used to be available online. Instead of updating the manual, he sends out emails and holds regular conference calls with the counties when items must be updated. Therefore, there is no centralized, updated training manual at the counties' disposal containing policy guidance from the SOS. Instead, the counties apparently must maintain their own index of emails and conference call notes to determine current policy on voter registration under the SAFE Act, the enforcement of which has been a moving target for the last 5 years given the many changes in internal policy since the law was passed. Since the law was passed,

Defendant implemented the cancellation regulation under K.A.R. § 7-23-15, and it has established interagency agreements with the DOV and KDHE. In addition, the preliminary injunction created additional duties for the counties. There is no record of exactly how many updates to the training manual have been implemented through informal emails and phone calls, but the Court can reasonably infer that there have been many. More consistent, centralized training for county clerks would be another less burdensome way to ensure they understand the State's eligibility requirement, and how to ensure to the best of their abilities that noncitizens do not inadvertently end up on the voter rolls.

2. DOV List Matching and Juror Questionnaires.

Defendant has relied on list matching between the TDL list and the ELVIS database to produce evidence of some noncitizen registrations in this case. He could certainly continue to compare these lists, and confirm noncitizenship through either the individual records, or through DHS's help, as he has done in previous cases. Moreover, there is evidence that Defendant could compare and investigate those applicants in the DOV database that presented green cards during the driver's license application process, with the ELVIS database.

Defendant also demonstrated that he can examine juror questionnaires for self-identified noncitizens who are called to jury duty from the voter rolls. Although these methods may generate false positives, as the Court discussed in its findings of fact, they at least offer a less burdensome starting point for investigation

and confirmation. Given that Defendant currently uses these alternative means for detecting and addressing noncitizen registration, Defendant has failed to establish that nothing less than a DPOC requirement is sufficient to address the problem of noncitizen registration.

3. SAVE Database

Defendant maintains that he cannot rely on the SAVE database to determine noncitizen status of Kansas voter registration applicants, relying on a 2012 letter from DHS requiring A-numbers and a copy of immigration documentation in order to share information with Kansas. Yet, the evidence at trial demonstrated that DHS has confirmed noncitizenship status in the past without this information, and that other states without DPOC laws use SAVE under agreements with DHS. Mr. Caskey admitted that he has not attempted to contact these states to determine how they utilize SAVE, and whether it might be an acceptable alternative to the DPOC law in Kansas. And, it is not clear that the SOS's Office has leveraged information from other state agencies to access the information needed by DHS to confirm citizenship status of voter registration applicants. The Court finds that such an approach would be less burdensome than the DPOC law.

4. Prosecutions

Defendant already has prosecutorial authority over Kansas election crimes. Yet, since obtaining this authority, and despite claiming to have located 129 instances of noncitizen registration in Kansas,

Defendant has filed zero criminal complaints against noncitizens for registering to vote. To the extent Defendant takes the position that these are all cases that meet the definition of perjury, or otherwise involve fraudulently registering to vote, his own office has taken the position that prosecuting such individuals should act as a deterrent to future registrations by noncitizens. However, as the Court has already found, the evidence at trial demonstrates that many of the 129 cited instances of noncitizen registration were mistakes or the result of administrative error, which may not be prosecutable[167] and which may undermine the deterrent effect of future prosecutions. Given that Defendant has not meaningfully sought to utilize criminal prosecutions, at least when he detects intentional cases of noncitizen registration, he has failed to establish that nothing less than DPOC is sufficient to address the problem of noncitizen registration.

The second prong of the Tenth Circuit's test does not require Defendant to establish that an alternative to DPOC would eliminate noncitizen registration; indeed, all the experts agree that may not be possible given the component of human error involved. The test instead requires that Defendant demonstrate that nothing less than DPOC would be a sufficient alternative. He does not satisfy this test. Several alternatives exist, especially when taken together, that would be sufficient to reduce the nominal amount of noncitizen registration that occurs through an

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[167] It is axiomatic that a person must act with intent in order to be guilty of committing a crime.

attestation regime. Thus, the Court finds that Defendant has failed to rebut the presumption that the attestation clause meets the minimum information principle in § 5 of the NVRA, and therefore orders judgment in favor of Plaintiffs on this remaining claim.

V. Conclusions of Law: *Bednasek v. Kobach*

Plaintiff Bednasek claims that the DPOC law unconstitutionally burdens his right to vote under the Fourteenth Amendment.[168] The Supreme Court has made clear that there is no "litmus test" for considering a constitutional challenge to a State's election laws.[169] Instead, the Court is to "first, consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate."[170] Second, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."[171] In considering the State's interest, the Court is to both "determine the

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[168] Plaintiff conceded at the summary judgment oral argument back on March 3, 2017, that his claim arises under the Equal Protection clause, and not the Due Process clause. Bednasek Doc. 162 at 41:19–42:4. The Court therefore need not address Defendant's lengthy closing argument that there is insufficient evidence to support a due process claim in this matter.

[169] *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Burdick v. Takushi*, 504 U.S. 428, 438–39 (1992); *Anderson v. Celebrezzo*, 460 U.S. 780, 789 (1983).

[170] *Anderson*, 460 U.S. at 789.

[171] *Id.*

legitimacy and strength of each" State interest, and also "consider the extent to which those interests make it necessary to burden the plaintiff's rights."[172] The Court has explained the balancing test as follows:

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.[173]

In 2008, the Supreme Court decided *Crawford v. Marion County Election Board*, which considered a challenge to an Indiana law requiring its citizens to present photo identification ("photo-ID") when voting in-person.[174] Indiana identified the following interests

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[172] *Id.*

[173] *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992); *Anderson*, 460 U.S. at 788) (citations omitted).

[174] *Crawford*, 553 U.S. at 185.

to justify the law's burden on voters: (1) deterring and detecting voter fraud; (2) election modernization; and (3) safeguarding voter confidence.[175] As to voter fraud, the Court acknowledged no record evidence of in-person voter fraud (the only kind of fraud the statute could address) at any time in Indiana.[176] However, the Court found that "flagrant examples of such fraud in other parts of the country," "occasional examples [that] have surfaced in recent years" in other places, and "Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor" involving the use of absentee ballots, "demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election."[177] The Court found that the State's interest in preventing voter fraud was legitimate and proper.[178] The Court also found that the State has an interest in modernizing elections, pointing to the NVRA and the Help America Vote Act ("HAVA"), which "indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology."[179] Finally, the Court acknowledged the "independent

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[175] *Id.* at 191.

[176] *Id.* at 194–95.

[177] *Id.* at 195 (footnotes omitted).

[178] *Id.* at 196.

[179] *Id.* at 193.

significance" of the State's interest in public confidence in the integrity of the electoral process.[180]

In considering the burdens imposed by Indiana's photo-ID law, the Supreme Court distinguished between the types of burdens it imposes on voters. Burdens "arising from life's vagaries," such as a lost or stolen wallet, are not constitutionally significant because "the availability of the right to cast a provisional ballot provides an adequate remedy."[181] Instead, the Court considered burdens imposed on those who are eligible to vote, but who do not possess a photo ID that complies with Indiana law. The Court found that the burden on this subgroup was low because Indiana issued free photo-ID cards to these individuals, and: "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[182] The Court found that the evidence demonstrated a heavier burden was placed on elderly persons born outside of Indiana, persons who have difficulty obtaining a birth certificate required to obtain a photo-ID, homeless persons, and persons with religious objections to being photographed.[183] However, the severity of the burden

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[180] *Id.* at 197.

[181] *Id.*

[182] *Id.* at 198 (footnote omitted).

[183] *Id.* at 199.

on these groups is "mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit."[184] The burden would only be a constitutional problem if it was "wholly unjustified," and even then, the burden on "just a few voters" would be insufficient to facially invalidate the statute.[185]

In balancing the State's interests against the burden on voters, the Court stressed that instead of weighing the burden that the law imposes on all voters, the plaintiffs asked the Court to look at only a narrow group of voters that experienced a special burden.[186] The Court found that the evidence in the record was insufficient to quantify "either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."[187] The petitioners presented no evidence of the number of registered voters lacking a photo ID, or of the specific burdens felt by the categories of burdened voters identified by the Court.[188] Moreover, those with difficulty obtaining a photo-ID, such as the elderly, could vote absentee without presenting photo-ID. Thus,

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[184] *Id.*

[185] *Id.* at 199–200.

[186] *Id.* at 200.

[187] *Id.*

[188] *Id.* at 200–03.

"on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters."[189] The Court declined to invalidate the entire statute on this showing.[190] Given this guidance, the Court proceeds to consider the balancing test as it applies to the evidence in this trial record.

A. The State's Interests

Defendant submits that the DPOC law furthers the State's legitimate interests in preventing noncitizen registration, maintaining accurate voter rolls of only qualified U.S. citizens, and maintaining confidence in the electoral process. The Court finds that although all 3 are legitimate interests, Defendant failed to produce evidence that they are strong enough to outweigh the tangible and quantifiable burden on eligible voter registration applicants in Kansas who were not registered to vote before January 1, 2013.

The Court has already determined that at most, 67 noncitizens registered or attempted to register in Kansas over the last 19 years. Even looking beyond Kansas, Defendant's evidence of noncitizen registration at trial was weak. Dr. Richman's *Electoral Studies* article concluding that millions of noncitizens registered and voted was credibly dismantled by Dr. Ansolabehere, the architect of the survey upon which Dr. Richman's conclusions were based. He explained that Dr. Richman's findings in that article are based on

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[189] *Id.* at 202.

[190] *Id.* at 203.

a flawed data analysis, and over 200 political scientists wrote an open letter criticizing its methodology and conclusion. Similarly, the Court does not fully credit Mr. von Spakovsky's summary of reported incidents of noncitizen registration, given its inclusion of misleading and false assertions. While there is certainly some evidence of noncitizen voter registration nationally, the trial evidence did not demonstrate the largescale problem urged by Defendant.

Maintaining accurate voter rolls of only U.S. citizens is again a legitimate State interest, however, for the same reasons already described, evidence that the voter rolls include ineligible citizens is weak. At most, 39 noncitizens have found their way onto the Kansas voter rolls in the last 19 years. And, as Dr. Hersh explained, given the almost 2 million individuals on the Kansas voter rolls, some administrative anomalies are expected. In the case of Kansas, this includes 100 individuals in ELVIS with birth dates in the 1800s, and 400 individuals with birth dates after their date of registration.

Finally, the Court concludes that maintaining confidence in the electoral process has independent significance, as found in *Crawford*.

B. Burdens Imposed by the DPOC Law

This Court previously denied summary judgment based on genuine issues of material fact as to the burdens imposed by the DPOC law in this case. The Court explained then that unlike the photo-ID cases largely relied on by Defendant that deal with requirements for casting an in-person ballot, the DPOC

law is distinguishable because it applies to registration. There is no safety valve such as a provisional ballot that can serve to mitigate the burden on voters.[191] Therefore, unlike the Indiana law in *Crawford*, an eligible Kansas applicant on the suspense or cancellation list does not have the option to fill out a provisional ballot, produce DPOC after the election, and have their ballot counted.

This distinction is illustrated by Mr. Stricker's experience—the burden imposed on him by the DPOC law disenfranchised him in 2014. He was offered a provisional ballot, but because he was not registered before the election, there was no way for him to cure and have his ballot counted after the election. The only way to cure a violation of the DPOC law is to submit DPOC before midnight on the day before the election. Of course, in Mr. Stricker's case, he did not know he was not registered the day before the election because he had provided a birth certificate at the time he applied to register, he told the driver's license clerk he wished to register, he signed the attestation of eligibility, and he was told that there was nothing more he needed to do, including that he did not need a "voting card." Similarly, Prof. Boynton brought a birth certificate to the DOV when he sought to register to vote, and he too believed that he had registered when he left the DOV. He learned for the first time that he was not in fact registered when he was offered a provisional ballot in the 2014 general election. Prof.

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[191] *See, e.g.*, *id.* at 199–201; *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008); *Frank v. Walker*, 768 F.3d 744, 746 (7th Cir. 2014).

Boynton was so frustrated by the experience that he declined to register to vote the next 2 times he applied for a driver's license, lamenting that he "might as well save [him]self the effort and say no this time."[192]

The DPOC law's deterrent effect on registration is further supported by Ms. Ahrens's and Dr. McDonald's testimony. The DPOC requirement fundamentally changed the Kansas League's ability to accomplish its mission of encouraging and assisting citizens in registering to vote and voting. Ms. Ahrens explained that the law was a "dead hit" on this mission, stopping all its registration efforts until it could conceive of a safe copying policy—previously, the League could assist registrants by having them fill out an application and sign an attestation of eligibility. Now, they were required to ask for a sensitive, personal document and maintain a copy of that document with each registration application. In 2013 in Wichita, for example, the Kansas League helped register only 400 individuals, compared to 4000 the year before. The Kansas League was also hampered in helping young people register to vote for the first time—less than one-quarter of all students who tried to register to vote at one Kansas university could successfully complete their applications due to lack of immediate access to DPOC.

This testimony supports Dr. McDonald's expert opinion formed after analyzing the individual ELVIS records for those on the suspense and cancellation lists, that the DPOC law disproportionately affects the young and unaffiliated. Dr. McDonald explained that

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[192] Doc. 504, Trial Tr. at 270:10–11.

the consensus in social science is that barriers to voter registration increase the cost of voting and dissuade individuals from participating in the political process. Dr. Richman agreed with this proposition. And these groups—the young and unaffiliated—already have a lower propensity to participate in the political process and are less inclined to shoulder the costs associated with voter registration. As compared to photo-ID laws, the Kansas DPOC law is an absolute bar to registration for any applicant lacking access to such DPOC. And even for those that have access the additional steps to possess such a document, such as locating it from a family member or separately obtaining an underlying document, increase the "costs" of voting that Dr. McDonald testified dissuade individuals from participating in the political process.

As the Court explained in its summary judgment order, another distinguishing feature between this case and *Crawford*, is that the number of incomplete and canceled registration applications for failure to submit DPOC provides concrete evidence of the magnitude of the harm. These individuals all sought to register to vote but were blocked by the DPOC requirement. This evidence contrasts with the photo-ID cases, where courts were unable to determine how many people were unable to vote based on the photo-ID requirement, and therefore found the burden to be speculative.[193] The administrative data presented in this case, coupled with the expert opinions of Dr. McDonald, Minnite, and Hersh, all support the burdensomeness of the law.

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[193] *See Crawford*, 553 U.S. at 200; *Frank*, 768 F.3d at 748–49.

Of the tens of thousands of individuals whose voter registration applications have been suspended or canceled due to lack of DPOC, less than 1% have been confirmed to be noncitizens. There is no evidence to suggest that the rest are not U.S. citizens, and thus these applicants are all eligible to register to vote but have been unable to produce DPOC. Defendant argues that any burden imposed by the law only applies to individuals on the list who do not have access to DPOC, and only a small number of those prevented from registering under the DPOC law do not either possess DPOC, or have immediate access to it. He points to Dr. Richman's estimate that only 2.2% of people on the suspense list lack immediate access to DPOC. He also points to the McFerron survey. As discussed earlier in this opinion, the McFerron Survey is inadmissible. And even if it was admissible, it is riddled with so many methodological errors that the Court would give it no weight. Likewise, Dr. Richman's estimate that only 2.2% of the individuals on the suspense list lack DPOC list is flawed for the many reasons discussed in the findings of fact. Moreover, that survey tells the Court nothing about those whose applications were canceled, nor does it provide evidence about the universe of eligible unregistered Kansas citizens subject to this law.

Defendant argues that the law is easy to comply with, pointing to the ability to submit DPOC electronically, and the State's attempts to verify citizenship through the KDOR and KDHE. Moreover, Defendant argues that the suspense list is dynamic, and that most of the applicants on the list eventually come off the list either through the State locating a

citizenship document, or because the applicant eventually submits a compliant document. First, there is no clear evidence about the number of applicants that have been cleared through the KDHE and KDOR process since it went into effect; Defendant opted not to update discovery requests with new suspense list figures before trial.[194] But the suspense list before this Court's preliminary injunction order is a credible snapshot of the overall burdensomeness of the law—those figures represent the number of applicants impacted during the first 3 years it was enforced and subsumes the KDHE policy that was effective long before 2016. While the Court acknowledges that the KDOR agreement likely lowers the number of individuals on the suspense list somewhat, it could not resurrect applications that were canceled before the agreement became effective.[195]

Ms. Lehman testified that her office received bounce-back notices from about one-third of the individuals on the suspense list, and surmised that

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[194] The Court notes that this KDOR policy was implemented after the *Fish* case was filed, and appears to be in direct response to the allegations in that case that compliant documents were being submitted at the time of application, but rejected by DOV employees as a matter of course. The KDOR policy was not yet in place at the time of the preliminary injunction hearing on April 14, 2016.

[195] Instead, Defendant unilaterally cured the applications of previously canceled applicants only after they were resurrected by the preliminary injunction. But for the Court's order, the applications of Stricker, Boynton, and Hutchinson would have been canceled and they would have been required to reapply for any interagency policy to benefit them.

because many of them moved, they should not be counted. First, there is no evidence of statewide bounce-back notices on this scale. Second, even if that rate of notices bounced back, it says nothing about the citizenship status of the recipients. Instead, it shows how burdensome the notice process is, and the fact that many of those impacted by the law are not receiving notice of (1) the fact that they are not registered to vote, after in at least some cases being told that they were at the time of application; and (2) what they need to do to cure the problem. In sum, unlike in the in-person voting photo-ID cases, there is evidence here that "substantial numbers of persons eligible to vote have tried" to register but have been unable to do so.[196]

Defendant suggests that the hearing procedure in § 25-2309(m) mitigates the burden imposed by the DPOC law, because if a person lacks the ability to obtain one of the 13 forms of DPOC in the statute, the hearing procedure allows them to submit some alternative proof of citizenship. He claims that this procedure is easy to comply with, but the evidence does not support that statement. First, the hearing procedure in subsection (m) is not explained to applicants when they apply to register, nor to applicants who were suspended for lack of DPOC. Neither the small DOV receipt, nor the example notices sent by the counties, contain any language explaining the hearing option to applicants. None of the named Plaintiffs in either case recall this option being

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[196] *Frank*, 768 F.3d at 746–47 (noting lack of evidence of "substantial numbers of persons eligible to vote have tried to get a photo ID but been unable to do so.").

mentioned to them. This explains why only 5 individuals, out of the more than 30,000 individuals on the suspense and cancellation list in March 2016, availed themselves of this option in the 5 years that the law has been in effect.

Second, even for those individuals who were registered after going through the alternative hearing process, their experiences were burdensome. One such individual, Ms. French, testified at trial. Ms. French admitted to a newspaper after the hearing that she "thought it was strange that I had to go through this procedure to be able to vote."[197] Although she whole-heartedly agreed with the law as a policy matter, her experience illustrates the many steps required to comply under this procedure, which took five months to accomplish in the spring and summer of 2016, incidentally during the very timeframe when the *Fish* case was filed and the preliminary injunction in that case was being heard and decided. The Court does not find it to be coincidental that Mr. Rucker became Ms. French's "friend" during this time period. The Court would not normally expect a high-level government official to invest the time and attention Ms. French described during her testimony to help an applicant locate citizenship records and navigate the hearing procedure, much less keep in close personal contact after the process is complete. Based on this level of individual attention, and the fact that the media was present at the hearing, it appears the State was motivated to help this applicant navigate the system

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[197] Doc. 511, Trial Tr. at 1421:16–1422:11.

and become registered through the hearing process.[198] The Court therefore does not find that Ms. French is a typical example of how an applicant would expect to experience this process, assuming the average applicant was aware that this process was available.

The hearing records reveal that another applicant was represented by retained counsel at the hearing, and yet another was required to execute his own affidavit explaining that he had been born on a military base and was therefore a U.S. citizen.[199] The Court finds that this alternative procedure adds, not subtracts, from the burdensomeness of the law.

The Court determines that the magnitude of potentially disenfranchised voters impacted by the DPOC law and its enforcement scheme cannot be justified by the scant evidence of noncitizen voter fraud before and after the law was passed, by the need to ensure the voter rolls are accurate, or by the State's interest in promoting public confidence in elections. Unlike in *Crawford*, Plaintiff has presented evidence of the number of voters who were unable to register to vote due to lack of DPOC, and the specific burdens felt by those who lack DPOC.[200] Also, there is no mitigating

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[198] *See* Ex. 1214 (SOS employees' text messages indicting that "Eric . . . prob has her number saved in his phone.").

[199] Ex. 150. The State Election Board orders and records from these § 25-2309(m) hearings were produced to Plaintiffs for the first time at trial.

[200] *See Crawford*, 553 U.S. at 203 n.20 (explaining that record evidence that 43,000 Indiana citizens lacked photo-ID "tells us

provision comparable to the provisional ballot in Indiana that would cure the failure to register before an election. Given the evidence in the trial record that before the Court's preliminary injunction about 12% of all new voter registration applicants were either suspended or canceled, the Court finds that the burden imposed on Kansans by this law outweighs the state's interest in preventing noncitizen voter fraud, keeping accurate voter rolls, and maintaining confidence in elections. The burden is not just on a "few" voters, but on tens of thousands of voters, many of whom were disenfranchised in 2014. At least one voter, Prof. Boynton, was deterred from registering again after the burdensome process he endured in 2014, a result supported by the testimony of several election experts in this case that increased "costs," or steps to registration, decrease the likelihood of registration and voting. This deterrent effect on young voters is particularly acute.

Moreover, the evidence does not support a fit between the DPOC law and the State's interest in ensuring only qualified citizens are included on the State's voter rolls. The experts agree that several of the nominal cases of noncitizen registrations identified by Defendant can be explained by administrative error and confusion. Indeed, the evidence showed that other

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nothing about the number of free photo identification cards issued since then" and that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.")

far less burdensome methods are available to the State to maintain accurate voter rolls of eligible Kansans by utilizing tools such as matching DOV lists, investigating self-reported noncitizens who are called for jury service, and utilizing the SAVE database. Moreover, better training of DOV staff could help ensure that voter registration applications are not offered to noncitizens.

And while maintaining confidence in the electoral process has independent significance as *Crawford* held, the evidence in this case does not show that the DPOC law furthers this significant interest. Instead, the law has acted as a deterrent to registration and voting for substantially more eligible Kansans than it has prevented ineligible voters from registering to vote. At least one applicant testified that he opted not to apply to register to vote again, despite possessing DPOC, because of the burdensome experience of being held in suspense and prevented from voting in 2014 due to the law. There has also been evidence of incorrect notices sent to applicants, incorrect information about registration status communicated over the phone by State employees, failure to accept DPOC by State employees, failure to meaningfully inform applicants of their responsibilities under the law, and evolving internal efforts to verify citizenship, that have all caused confusion during the 5 years this law has been effective. If Kansans who try to register to vote cannot be sure if they are in fact registered, particularly after they have been led to believe they complied with all registration laws, it erodes confidence in the electoral system. If Kansans receive misinformation from State officials about whether they are registered to vote, it

erodes confidence in the electoral system. If eligible Kansans' votes are not counted despite believing they are registered to vote, it erodes confidence in the electoral system.

In sum, the type of burden and the quality of the evidence in support of that burden is distinguishable from *Crawford*, which the Supreme Court was careful to limit to the record in that case. Based on this record, the magnitude of the burden on unregistered eligible Kansas voters cannot be justified by the State interests relied on by Defendant. The evidence at trial demonstrated that those interests, while legitimate, are not furthered by the DPOC law. Instead, the DPOC law disproportionately impacts duly qualified registration applicants, while only nominally preventing noncitizen voter registration. It also may have the inadvertent effect of eroding, instead of maintaining, confidence in the electoral system given the confusing, evolving, and inconsistent enforcement of the DPOC laws since 2013. For all of these reasons, the Court finds in favor of Plaintiff Bednasek on his § 1983 claim alleging a Fourteenth Amendment violation of his right to vote.

VI. Remedies

Plaintiffs' requests in both cases for declaratory and injunctive relief is granted. As already stated, K.S.A. § 25-2309(l) and K.A.R. 7-23-15, violate § 5 of the NVRA and infringe on the right to vote under the Fourteenth Amendment. Defendant shall not enforce the DPOC law and accompanying regulation against voter registration applicants in Kansas. As the Court stated in an earlier opinion finding Defendant in

contempt, Defendant's well-documented history of avoiding this Court's Orders, and providing confusing notices and information on the State's websites in conjunction with this Court's rulings, warrant specific compliance measures with this injunction as spelled out below.

Defendant argues that Plaintiffs lack standing to seek the specific compliance measures requested by the *Fish* Plaintiffs, and that the NVRA does not require any specific educational materials or ballot types. The Court disagrees. First, these items are part and parcel of registering eligible Kansans to vote, and ensuring that they are not any more confused than necessary by the change in policy. If Defendant takes the position that he is entitled under the NVRA to continue to falsely assert the status of the law on his website, and that he may require registered voters to complete provisional ballots, he is invited to file a brief to the Court, not to exceed ten pages in length, citing authority for this proposition. Moreover, the Court rejects Defendant's standing argument. These measures would not be required but for past enforcement problems necessitated by Defendant's claims of failing to understand the confines of the Court's preliminary injunction order. These specific compliance measures attempt to address Defendant's past complaints that the Court's directives were not specific enough, and to avoid the need for further compliance directives going forward. They allow Plaintiffs' claims under § 1983 and the NVRA to be fully redressed.

(1) To the extent he has not already done so, Defendant shall provide all registrants covered by the permanent injunction with the same information provided to other registrants (including but not limited to certificates of registration); and must ensure that all elections-related public education materials (including but not limited to voter-aimed notices and websites, in all languages in which those documents are available, including English and Spanish) make clear that voter registration applicants need not provide DPOC in order to become registered to vote, and need not provide any additional information in order to complete their voter registration applications.

(2) Defendant shall instruct all state and county elections officers, and must ensure that all training and reference materials for elections officials in Kansas (including but not limited to the SOS's County Elections Manual) make clear, that voter registration applicants need not provide DPOC in order to be registered to vote, and need not provide any additional information in order to complete their voter registration applications.

(3) Defendant shall maintain the "Voter View" website to accurately reflect covered voters' registration status.

(4) Defendant shall ensure that, in counties that use paper poll books, the names of all registrants lacking DPOC appear in the same manner and in the same list as all other registered voters' names, and that all registrants covered by this Order shall be entitled to vote using standard ballots rather than provisional

ballots at polling places on Election Day or when they request advance mail-in ballots.

The parties shall meet, confer, and file a joint status report 30 days before the next primary election scheduled in Kansas to verify compliance with the permanent injunction. Following this joint status report, the Court may determine whether modification of its final order is warranted or whether any additional steps may be necessary to ensure that effective relief for covered voters is not denied or otherwise undermined by Defendant.

VII. Sanctions

Throughout this opinion, the Court referenced several instances when Defendant failed to disclose evidence under Fed. R. Civ. P. 26(a), or to supplement discovery under Rule 26(e). In many of these instances, the Court excluded the evidence. In others, Plaintiffs either withdrew the objection, or the Court allowed the evidence with some limitation. At least once, Defendant attempted to introduce such evidence despite the Court's ruling excluding it. These violations led to objections throughout trial despite the Court's repeated efforts to educate Defendant about his Rule 26 disclosure obligations.

The Court's rulings were governed by Fed. R. Civ. P. 37(c)(1), which states that when a party fails to produce information or identify a witness in violation of Rule 26(a) or (e),

> the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial,

> unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> (B) may inform the jury of the party's failure; and
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).[201]

In determining whether a failure to disclose is harmless or substantially justified, the Court looks to several factors: "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness."[202] The burden to demonstrate that the failure to disclose is harmless or substantially justified is on the party who failed to properly disclose.[203]

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[201] Fed. R. Civ. P. 37(c)(1).

[202] *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1130 (10th Cir. 2011) (quoting *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)).

[203] *Paliwoda v. Showman*, No. 12-2740-KGS, 2014 WL 3925508, at *5 (D. Kan. Aug. 12, 2014).

There were several violations that justified sanctions under Rule 37(c)(1). First, the Court issued a pretrial ruling on disclosure issues involving Mr. McFerron and Dr. Richman.[204] The Court found that Defendant failed to designate Mr. McFerron as an expert witness after determining that his proffered testimony was not admissible lay opinion. As a sanction for failing to properly disclose him as an expert, the Court required that he testify live, and not by deposition as urged by Defendant. As for Dr. Richman, Defendant attempted to submit an untimely supplemental report by attaching it to his final witness and exhibit list for trial. This report contained estimates and extrapolations based on new data that was available to him in July 2017, yet Defendant failed to supplement at that time, and failed to disclose to Plaintiffs that Dr. Richman would be issuing a supplemental report when the parties informally exchanged their expert witness lists in January 2018 to determine whether to file pretrial *Daubert* motions. As the Court explained in its previous Order, this last-minute attempt at supplementation with new data prevented Plaintiffs' rebuttal experts from evaluating the report and updating their own opinions. It also prevented Plaintiffs from filing a *Daubert* motion by the deadline challenging the new figures.

At trial, Defendant again attempted to introduce updated extrapolations by Dr. Richman not included in his original or supplemental report. For example, Defendant tried to introduce a new estimate by Dr. Richman of 3,813 noncitizen registrations in Kansas

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[204] Doc. 490.

through a demonstrative exhibit. Dr. Richman explained that this figure is derived from multiplying 3.3%—the percentage of noncitizens identified in the national 2008 CCES dataset with a voter match file and self-reported registration—by an updated adult noncitizen population estimate for the State of Kansas of 115,500, included in his supplemental report. Dr. Richman had not previously, in his supplemental report or otherwise, opined that this represented an accurate estimate of noncitizen registration in Kansas. Dr. Richman attempted to explain the omission from his previous reports by testifying that "this initial report came out just before the source I was getting that number [the noncitizen population in Kansas] from updated. And so in the supplemental report, partly in response to the prompting of one of the experts for the plaintiffs, I updated the number to the more current census estimate of the number of adult non-citizens in the state of Kansas."[205]

Dr. Richman's explanation for his late-disclosed extrapolation was misleading and conflated Dr. Ansolabehere's criticisms of his national estimates with his Kansas estimates. They are both based on the CCES, but on different datasets. Page 3 of Dr. Richman's original report, which he pointed the Court to during his testimony, recites the findings of his 2014 *Electoral Studies* article, that 3.3% of noncitizens nationally were registered to vote based on 2008 CCES data.[206] Dr. Richman did not extrapolate this 3.3%

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[205] Doc. 511, Trial Tr. at 1455:8–19.

[206] Ex. 952 at 3.

figure to Kansas by applying it to the American Community Survey's estimate of the number of adult noncitizens in Kansas at the time of his original report (114,000). Instead, he presented a different extrapolation based on self-reported noncitizens who resided in Kansas (14) from the 2006 through 2012 CCES. That extrapolation was 32,000 noncitizen registrations.

Dr. Ansolabehere's report extensively criticized Dr. Richman's *Electoral Studies* article and its findings about the national rate of noncitizen registration, including that the CCES is not representative of the noncitizen population, and that classification error "can completely account for Dr. Richman's findings."[207] Dr. Ansolabehere separately criticized Dr. Richman's estimate that 32,000 noncitizens in Kansas (an estimate abandoned by Defendant during his opening statement given the small sample size) was flawed, in part because it did not use the 2014 CCES, which included only 4 respondents who stated they were noncitizens, none of whom had a matching voter record. This criticism targeted the CCES sample he used, not the number of noncitizens in Kansas.

Therefore, it was disingenuous to suggest during his testimony that his new estimate of 3,183 noncitizen registrants in Kansas was merely an updated figure from his original report to answer Dr. Ansolabehere's

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[207] Ex. 102 ¶ 34.

criticisms.[208] Notwithstanding the fact that Dr. Richman had an opportunity to answer such criticisms in his supplemental report, he never opined that the appropriate way to estimate noncitizen registration in Kansas would be to multiply 3.3% by the estimated number of adult noncitizens in Kansas. As the Court explained at trial, it is troubled by Dr. Richman's attempt to insert yet another noncitizen registration estimate into the record during the trial that had not been previously disclosed.[209] The Court is even more troubled by his misleading testimony upon closer inspection of the reports post trial.

Second, Defendant failed to disclose documents underlying the subsection (m) hearings that have taken

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[208] Defendant argued that the Court allowed this sort of supplementation with Plaintiffs' expert Dr. McDonald in a demonstrative exhibit. This is a false equivalency. Plaintiffs' demonstrative exhibit, which included a source citation to Dr. McDonald's report, contained the numerical equivalent of a percentage included in Dr. McDonald's report. His report stated that 22,814 out of 35,314 applicants who were suspended on September 24, 2016 remained suspended or were canceled on December 11, 2016. The demonstrative stated "22,814 or 70.9% of applicants who were suspended on Sep. 24, 2016 remained suspended or were canceled by Dec. 11, 2016." The Court overruled Defendant's objection to the percentage reference. Defendant, by contrast, attempts to introduce an entirely new estimate of noncitizen registration, in addition to the many other estimates that Dr. Richman previously asserted in his reports. The Court drew the line at the many figures Dr. Richman already calculated, which Plaintiffs' experts had a chance to consider. Defendant's proffered evidence was no mere update, or conversion of a numeral to a percentage; he compares apples to oranges.

[209] Ex. 511, Trial Tr. at 1460:15–1461–6.

place since the DPOC law was passed. Exhibit 150 was provided to Plaintiffs for the first time during the trial. These records include the RCD forms for 6 applicants, and the State Election Board orders and copies of supporting documentation for 5 registrants, including Ms. French. As the Court found on the record, this late-produced discovery violated Rule 26(a) because Plaintiffs had requested Defendant provide "correspondence between Defendant Kobach and any other person concerning the purpose or implementation of the DPOC. . . . This Request 1 is not intended to include uniform letters sent to individual registration applicants regarding their voter registration applications."[210] Had Defendant properly disclosed these documents to Plaintiffs, they would have been on notice of Ms. French, a witness Defendant convinced the Court to allow as a rebuttal witness mid-trial, despite his failure to disclose her as a witness before trial.[211] Plaintiffs would have also been aware of the

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[210] Doc. 510, Trial Tr. at 1225:13–22, 1234:7–24.

[211] Defendant disclosed his intention to call Ms. French at the end of the trial day on Friday, March 9. The Court initially granted the request, giving Plaintiffs the weekend to interview her and obtain the documents included in Exhibit 150. After defense counsel rescheduled a weekend interview for Plaintiffs of Ms. French, Plaintiffs spoke with her for the first time the following Monday morning before trial started, a few hours before her testimony. Although Plaintiffs ultimately decided her testimony was more helpful than hurtful and backed off their disclosure objection as to her testimony, Ms. French is another example of a witness that should have been disclosed under 26(a)(1)(A), because she would have likely had information that Defendant would use to support his defense in this case that the DPOC law, including the hearing procedure, is not burdensome. Nonetheless, the Court allowed her

identities of the other individuals who availed themselves of a subsection (m) hearing who could have potentially held discoverable information or testified as witnesses at trial.

Third, Defendant attempted to elicit testimony from Mr. von Spakovsky about updated information and opinions not included in his original report, which he completed in 2016 and never supplemented.

Fourth, Defendant repeatedly attempted to introduce updated numbers of suspended and canceled voter registration applicants based on reports that Mr. Caskey generated the weekend before trial. These figures had not been disclosed to Plaintiffs during discovery. Defendant first attempted to introduce these figures during his opening statement in demonstrative exhibits. The Court excluded the demonstrative exhibits. He then tried to elicit the information through Mr. Caskey. When that did not work, he asked for the Court to take judicial notice of these figures. The Court excluded the evidence under Rule 37(c)(1) for failure to supplement discovery under Rule 26(e), and because different numbers had been stipulated to in the Pretrial Order. The Court also found that they were not appropriate facts for judicial notice because they could not "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[212] Defendant again attempts to introduce these numbers,

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to testify as a rebuttal witness because Ms. Ahrens had testified at length about the hearing procedure, and was not previously disclosed as a witness expected to testify in detail about that topic.

[212] *See* Fed. R. Evid. 201(b)(2).

despite their exclusion at trial, into his proposed findings of fact and conclusions of law.[213]

In responding to Plaintiffs' disclosure objections, Defendant was incredulous that the Court would not allow him to introduce into the record the most recent statistics on canceled and Rule suspended applications. But these numbers were provided to Plaintiffs for the first time a few days before trial in the form of a demonstrative exhibit. In fact, Plaintiffs argued that Defendant had not disclosed any updated information about the suspense and cancellation lists after March 2016. Because they were not previously provided, Plaintiffs had no way to verify their accuracy with the underlying ELVIS records. And their experts were not provided an opportunity to supplement their opinions based on these new numbers. Both Drs. McDonald and Hersh relied on the March 2016 records provided to them by Defendant to render their detailed analysis about the contents of the suspense and cancellation lists, and to perform certain list matching. Had these lists been updated, Plaintiffs could have asked these experts to reevaluate their original reports and supplement them based on the new data.

Because the updated information was provided in a demonstrative exhibit, Defendant suggested that this Court's courtesy rule requiring disclosure of demonstrative exhibits 24 hours in advance of their use should excuse his failure to abide by Rule 26(e)'s duty to supplement discovery. This argument was and is unavailing. Because Defendant failed to provide

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[213] *See* Doc. 523 at 36 ¶ 76.

updated figures about the number of DOV applicants suspended or canceled after March 2016, he may not ambush the Plaintiffs and this Court with updated information on the eve of, or during, trial. This was a straightforward violation of Defendant's ongoing duty to supplement discovery disclosures under Rule 26(e), and under Rule 37(c)(1) this Court finds that the violation was not harmless or substantially justified. The prejudice described above demonstrates the failure was not harmless. And, given Mr. Caskey's testimony about the ease of running reports to capture this data, the failure to disclose was not substantially justified. Indeed, Ms. Ahrens described the Kansas League's ability to purchase the suspense list several times after the DPOC law was passed, as recently as the summer of 2017. Given this evidence, Defendant's failure to supplement his March 2016 disclosure about the contents of the suspense and cancelation lists was not substantially justified.

The disclosure violations set forth above document a pattern and practice by Defendant of flouting disclosure and discovery rules that are designed to prevent prejudice and surprise at trial. The Court ruled on each disclosure issue as it arose, but given the repeated instances involved, and the fact that Defendant resisted the Court's rulings by continuing to try to introduce such evidence after exclusion, the Court finds that further sanctions are appropriate under Rule 37(c)(1), which permits, in addition to exclusion of the evidence, "other appropriate sanctions." It is not clear to the Court whether Defendant repeatedly failed to meet his disclosure obligations intentionally or due to his unfamiliarity

with the federal rules. Therefore, the Court finds that an additional sanction is appropriate in the form of Continuing Legal Education. Defendant chose to represent his own office in this matter, and as such, had a duty to familiarize himself with the governing rules of procedure, and to ensure as the lead attorney on this case that his discovery obligations were satisfied despite his many duties as a busy public servant. The Court therefore imposes a CLE requirement of 6 hours for the 2018-2019 reporting year **in addition to** any other CLE education required by his law license. These 6 additional hours must pertain to federal or Kansas civil rules of procedure or evidence. Defendant shall file a certification with this Court before the end of the reporting period on June 30, 2019, certifying that this CLE requirement has been met.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion to Exclude the Testimony and Report of Dr. Steven Camarota (Doc. 429) is **granted in part and denied in part**, and Plaintiffs' Motion to Exclude Patrick McFerron (Doc. 460, Bednasek Doc. 183) is **granted**.

IT IS FURTHER ORDERED that in Case No. 16-2105, the Court finds in favor of Plaintiffs Donna Bucci, Charles Stricker, III, Thomas Boynton, and Douglas Hutchinson on their remaining claim under § 5 of the NVRA. Plaintiff Steven Wayne Fish's remaining claim is dismissed as moot.

IT IS FURTHER ORDERED that in Case No. 15-9300, the Court finds in favor of Plaintiff Parker

Bednasek on his remaining claim under 42 U.S.C. § 1983.

IT IS FURTHER ORDERED Plaintiffs' requests for declaratory and injunctive relief are granted as set forth in this Order. **Defendant shall strictly comply** with the directives in this Order meant to enforce the Court's permanent injunction of the DPOC law and K.A.R. § 7-23- 15.

IT IS FURTHER ORDERED that Defendant shall attend 6 hours **in addition to** any other CLE education required by his law license for the 2018-2019 reporting year. The additional CLE must pertain to federal or Kansas civil rules of procedure or evidence. Defendant shall file a certification with this Court before the end of the reporting period on June 30, 2019, certifying that this CLE requirement has been met. This sanction is imposed under Fed. R. Civ. P. 37(c)(1) for the disclosure violations identified in this Order under Rule 26(a) and (e).

IT IS SO ORDERED.

Dated: June 18, 2018

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

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 16-3147

[Filed October 19, 2016]

STEVEN WAYNE FISH; DONNA BUCCI; CHARLES STRICKER; THOMAS J. BOYNTON; DOUGLAS HUTCHINSON; LEAGUE OF WOMEN VOTERS OF KANSAS,	)
Plaintiffs - Appellees,	)
v.	)
KRIS W. KOBACH, in his official capacity as Secretary of State for the State of Kansas,	)
Defendant - Appellant,	)
and	)
NICK JORDAN,	)
Defendant.	)

ENGLISH FIRST FOUNDATION; ENGLISH FIRST; U.S. JUSTICE FOUNDATION; PUBLIC ADVOCATE OF THE UNITED STATES; GUN OWNERS FOUNDATION; GUN OWNERS OF AMERICA; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; U.S. BORDER CONTROL FOUNDATION; POLICY ANALYSIS CENTER; and COMMON CAUSE,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:16-CV-02105-JAR-JPO)

Dale Ho (Rodkangyil Orion Danjuma and Sophia Lin Lakin, American Civil Liberties Union Foundation, Inc., New York, New York; Stephen Douglas Bonney, ACLU of Kansas and Western Missouri, Overland Park, Kansas; Neil A. Steiner and Rebecca Kahan Waldman, Dechert LLP, New York, New York; Angela M. Liu, Dechert LLP, Chicago, Illinois, with him on the briefs), American Civil Liberties Union, New York, New York for Plaintiffs-Appellees.

Kris W. Kobach, Secretary of State of Kansas (Garrett R. Roe, Kansas Secretary of State's Office, Topeka, Kansas, with him on the brief), Kansas Secretary of State's Office, Topeka, Kansas, for Defendant-Appellant.

Herbert W. Titus of William J. Olson, P.C. (William J. Olson, Jeremiah L. Morgan, John S. Miles, and Robert J. Olson, William J. Olson, P.C., Vienna, Virginia; Marc A. Powell, Powell Law Office, Wichita, Kansas; Michael Connelly, U.S. Justice Foundation, Ramona, California, with him on the brief), filed an amicus curiae brief for the English First Foundation, English First, the U.S. Justice Foundation, Public Advocate of the United States, the Gun Owners Foundation, the Gun Owners of America, the Conservative Legal Defense and Education Fund, the U.S. Border Control Foundation, and the Policy Analysis Center, in support of Defendant-Appellant.

Debo P. Adegbile of Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York (Jason D. Hirsch, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Joshua M. Koppel, Tyeesha Dixon, and Derek A. Woodman, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, District of Columbia, with him on the brief), filed an amicus curiae brief for Common Cause in support of Plaintiffs-Appellees.

Before **BRISCOE**, **HOLMES**, and **McHUGH** Circuit Judges.

HOLMES, Circuit Judge.

INTRODUCTION

In this case, we must resolve whether section 5 of the National Voter Registration Act (the "NVRA"), 52 U.S.C. § 20504, preempts a Kansas law requiring documentary proof of citizenship ("DPOC") for voter registration, Kan. Stat. Ann. § 25-2309(*l*), as applied to the federally mandated voter-registration form that must be a part of any application to obtain or renew a driver's license (the "motor voter" process).[1] Section 5 of the NVRA mandates that states include a voter-registration form as part of the application for a driver's license, and provides that this voter-registration form "may require only the minimum

[1] We refer to the sections of the NVRA as they appear in Pub. Law No. 103-31, 107 Stat. 77, 77–89 (1993) (codified as amended at 52 U.S.C. §§ 20501–20511), but, naturally, cite to the U.S. Code. The relevant sections of the U.S. Code beginning at § 20501 of Title 52 are each numbered one lower than the corresponding sections of the NVRA, when considering only the final two digits of the U.S. Code sections. *Compare, e.g.*, NVRA § 12, 107 Stat. at 88, *with* 52 U.S.C. § 20511. It should also be noted that while the NVRA was originally codified in Title 42, §§ 1973gg to 1973gg-10, *see* Pub. Law No. 103-31, 107 Stat. 77, it has since been editorially reclassified with other voting and election provisions from titles 2 and 42 into Title 52, effective September 1, 2014. *See Shelby Cty. v. Lynch*, 799 F.3d 1173, 1178 n.1 (D.C. Cir. 2015); *Editorial Reclassification: Title 52, United States Code*, OFFICE L. REVISION COUNSEL, http://uscode.house.gov/editorialreclassification/t52/index.html (last visited Sept. 13, 2016).

amount of information necessary to"[2] prevent duplicate registrations and to "enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[3] 52 U.S.C. § 20504(c)(2)(B). Section 5 further mandates that motor voter forms include the following: a statement of the criteria for eligibility, "including citizenship"; an attestation that the applicant meets those criteria; and the applicant's signature "under penalty of perjury." § 20504(c)(2)(C).[4]

Granting a motion for a preliminary injunction against enforcement of Kansas's DPOC requirements, the U.S. District Court for the District of Kansas held that the Plaintiffs-Appellees had made a strong showing that Kansas's DPOC law was preempted by NVRA section 5, insofar as DPOC was more than the "minimum amount of information necessary" to achieve the purposes set forth by the statute. Defendant-Appellant Kansas Secretary of State Kris Kobach

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[2] As a convenient shorthand, we frequently refer to the principle established by this language as the "minimum-information principle."

[3] Section 5, subparagraph (c)(2)(B)(ii) ("to assess the eligibility of the applicant and to administer voter registration and other parts of the election process"), is integral to the NVRA's minimum-information principle. As a shorthand for this lengthy statutory language, we use "eligibility-assessment and registration duties."

[4] We frequently refer to these statutory requirements, collectively, as the "attestation requirement." The penalty-of-perjury component is an essential feature of this requirement, putting motor voter applicants on notice that false attestations may carry serious criminal consequences.

appeals from the district court's entry of the preliminary injunction, which required him to register to vote any applicants previously unable to produce DPOC and to cease enforcement of Kansas's DPOC requirement with respect to individuals who apply to register to vote at the Kansas Department of Motor Vehicles ("DMV") through the motor voter process.

Exercising jurisdiction pursuant to 28 U.S.C. § 1292,[5] we hold that the district court did not abuse its discretion in granting the preliminary injunction because the NVRA preempts Kansas's DPOC law as enforced against those applying to vote while obtaining or renewing a driver's license. Specifically, section 5 of the NVRA provides, as most relevant here, that the state motor voter form "may require only the minimum

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[5] Secretary Kobach argued in earlier motions practice before this court that the Plaintiffs-Appellees would have lacked standing but for the fact that they chose not to comply with the Kansas DPOC requirements while being able to do so. Def.-Aplt.'s Resp. to Pls.-Aplees.' Mot. Correct Appellate R. & Strike Extra-R. Materials from App. 7–10. He claimed that because they had the ability to comply but did not, their injury was self-inflicted and so could not provide standing. *Id.* at 8–9. Secretary Kobach raises essentially the same argument in his merits brief, but this time with regard to irreparable harm, again characterizing the Plaintiffs-Appellants as having inflicted the harm on themselves. This argument is without merit for the reasons we will address below. *See* Discussion *infra* Section II.D (analyzing the irreparable-harm prong of the preliminary injunction standard). Standing requires that plaintiffs have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547 (2016). We are confident on the current record that Plaintiffs-Appellees have standing to sue.

amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20504(c)(2)(B)(ii). Section 5 also requires motor voter forms to include a signed attestation under penalty of perjury that the applicant meets the state's eligibility criteria, including citizenship. § 20504(c)(2)(C). We hold that this attestation under penalty of perjury is the *presumptive* minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties. As it pertains to the citizenship requirement, the presumption ordinarily can be rebutted (i.e., overcome) only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement. Having determined that Secretary Kobach has failed to make this showing, we conclude that the DPOC required by Kansas law is more than the minimum amount of information necessary and, therefore, is preempted by the NVRA. We **affirm** the grant of a preliminary injunction.

I. BACKGROUND

A. Kansas's DPOC Requirement and Prior Litigation

Unremarkably, in Kansas, only citizens may vote in state and federal elections. KAN. CONST. art. V, § 1. The Kansas Constitution also requires the legislature to "provide by law for proper proofs of the right to suffrage." *Id.* art. V, § 4. Kansas adopted its DPOC requirement for voter registration on April 18, 2011.

Secure and Fair Elections ("SAFE") Act, ch. 56, § 8(*l*), 2011 Kan. Sess. Laws 795, 806, 809–11 (codified at Kan. Stat. Ann. § 25-2309(*l*)). The requirement took effect January 1, 2013. *Id.* at § 8(u), 2011 Kan. Sess. Laws at 812. The SAFE Act requires that

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

Kan. Stat. Ann. § 25-2309(*l*). The statute then lists thirteen forms of documentation acceptable to prove U.S. citizenship, including a birth certificate or passport. *See* § 25-2309(*l*)(1)–(13). For citizens unable to present DPOC, subsection (m) provides an alternate means to prove citizenship by the submission of evidence to the state election board followed by a hearing. *See* § 25-2309(m). The state election board is composed of "the lieutenant governor, the secretary of state and the attorney general." § 25-2203(a).

Secretary Kobach promulgated regulations for the DPOC requirement on October 2, 2015. Kan. Admin. Regs. § 7-23-15 (the "90-day regulation"). Those regulations provide that applications unaccompanied by DPOC are deemed to be "incomplete." § 7-23-15(a). Once an application is designated as incomplete, a voter has ninety days to provide DPOC or else the application is canceled and a new voter-registration application is required to register. *See* § 7-23-15(b)–(c).

We believe that it will provide useful context for our subsequent discussion of the procedural history of the present case for us to briefly refer to Kansas's prior litigation before our court involving the DPOC issue. Some groundwork must be laid first, however. In 2013, an Arizona DPOC requirement was challenged as running afoul of sections 6 and 9 of the NVRA. *Arizona v. Inter Tribal Council of Ariz., Inc. (Inter Tribal)*, — U.S. —, 133 S. Ct. 2247, 2252–53 (2013). Section 9 provides for a universal mail-in form for voter registration for federal elections (the "Federal Form") and entrusts the creation and administration of that form to the Election Assistance Commission (the "EAC") in consultation with the chief election officers of the states. *See* 52 U.S.C. § 20508(a). Section 6 provides that "[e]ach State shall accept and use the mail voter registration application form prescribed by . . . Section 20508(a)(2)." § 20505(a)(1). The case came before the U.S. Supreme Court, which was faced with the question of whether the federal statutory requirement that states "accept and use" the Federal Form preempted Arizona's law requiring officials to reject Federal Form applications unaccompanied by DPOC. *See Inter Tribal*, 133 S. Ct. at 2253. The Court

held that the NVRA did require Arizona to accept Federal Forms unaccompanied by DPOC but also stated that Arizona could petition the EAC to add a state-specific instruction requiring DPOC and, in the case of its refusal to add it, the state could obtain judicial review of the EAC decision. *Id.* at 2259–60. The court further held that to raise a constitutional doubt under the Qualifications Clause (i.e., U.S. CONST. art. I, § 2, cl. 1), the state would have had to show that the law precluded it "from obtaining information necessary for enforcement" of the state's voter qualifications. *Id.* at 2259.

Ken Bennet, then Secretary of State of Arizona, together with Secretary Kobach, subsequently requested that the EAC add state-specific instructions for Arizona and Kansas requiring DPOC. Rebuffed by the EAC, they filed suit in the District of Kansas attempting to force the EAC to grant their request to add Arizona- and Kansas-specific DPOC instructions to the Federal Form or to obtain a judgment that the NVRA was unconstitutional as applied. *Kobach v. U.S. Election Assistance Comm'n* (*EAC*), 772 F.3d 1183, 1187–88 (10th Cir. 2014). They prevailed in district court, but we reversed on appeal. Specifically, we rejected their challenge and held that the EAC's refusal was in accordance with the NVRA and the Administrative Procedure Act and that no Qualifications Clause issue had been raised. *See id.* at 1199. Now we proceed to the procedural circumstances of this case.

B. Procedural Background

Steven Wayne Fish, Donna Bucci, Charles Stricker, Thomas J. Boynton, and Douglas Hutchinson (together with the League of Women Voters of Kansas,[6] the "Plaintiffs-Appellees") filed their initial complaint in the U.S. District Court for the District of Kansas on February 18, 2016. The individual Plaintiffs-Appellees are U.S. citizens eligible to vote who claim that they have been prevented from registering to vote by Kansas's DPOC requirement. Bringing suit under the private right of action established by the NVRA, 52 U.S.C. § 20510(b), and 42 U.S.C. § 1983, Plaintiffs-Appellees allege that Kansas's DPOC requirement and the 90-day regulation are preempted by the NVRA and are unconstitutional under both the Elections Clause (i.e., U.S. CONST. art. I, § 4, cl. 1) and the Privileges and Immunities Clause (i.e., U.S. CONST. art. IV, §2, cl. 1). After Plaintiffs-Appellees filed their motion for a preliminary injunction on February 25, 2016, limited and expedited discovery ensued. In response to the preliminary injunction motion, Secretary Kobach argued that the NVRA did not speak to or preempt state DPOC requirements and, to so interpret the statute, would raise a doubt as to whether the NVRA was constitutional because it would bring the statute into conflict with the states' power under the Qualifications Clause. The district court disagreed, issuing a memorandum and order on May 17.

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[6] The League of Women Voters of Kansas was joined as a plaintiff by an amended complaint filed March 17, 2016.

The order granted in part and denied in part the Plaintiffs-Appellees' motion for a preliminary injunction. The court denied the motion as to enjoining enforcement of the 90-day regulation, holding that the Plaintiffs-Appellees were unlikely to prevail on their claim that the regulation was preempted by Section 8 of the NVRA. But the court granted the motion to enjoin Kansas from enforcing the DPOC requirement and further enjoined Secretary Kobach to register each person whose application had been suspended or cancelled for failure to provide DPOC.[7] The court did so

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[7] The injunction issued by the district court requires Secretary Kobach to register for purposes of both congressional and presidential elections those applicants unable to provide DPOC but who have otherwise filled out valid motor voter forms. The NVRA, by relying on the definitions of federal campaign finance law, applies expressly to all federal general and primary elections, including presidential elections. 52 U.S.C. § 20502(1)–(2) (incorporating the definitions of "election" and "Federal office" from § 30101(1), (3)); § 30101(1) (defining "election" to include general and primary elections and caucuses); § 30101(3) (defining "Federal office" to include the presidency, vice presidency, and congressional offices).

We recognize that, by its literal terms, the Elections Clause only addresses congressional elections. *See* U.S. CONST. art. I, § 4, cl. 1. But both the Supreme Court and our sister courts have rejected the proposition that Congress has no power to regulate presidential elections. *See id.* art. II, § 1, cl. 4 (expressly providing as to the election of the President and Vice-President, "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States"). *Compare Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (per curiam) ("Congress has power to regulate Presidential elections and primaries . . . .") *and ACORN v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997) ("Congress has been granted authority to regulate presidential elections . . . ."), *with Inter*

on the grounds that the minimum-information principle of NVRA section 5 preempted Kansas's DPOC requirements and, in that regard, Secretary Kobach had failed to show that the statute's attestation requirement did not meet this statutory principle or to raise a constitutional doubt under the Qualifications Clause.

To reach this conclusion, the court first interpreted the term "minimum" in NVRA section 5 to bear its plain meaning. Accordingly, under the minimum-information principle, a "State may require only the least possible amount of information necessary to enable State election officials to assess whether the applicant is a United States Citizen." *Fish v. Kobach*, — F. Supp. 3d —, 2016 WL 2866195, at *16 (D. Kan. 2016). Next the court determined that DPOC was quite burdensome whereas attestation was less burdensome and had successfully prevented all but a very few noncitizens from registering to vote. DPOC was

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Tribal, 133 S. Ct. at 2268 n.2 (Thomas, J., dissenting) ("Constitutional avoidance is especially appropriate in this area because the NVRA purports to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever.").

Regarding this case, no party has raised the issue of whether the NVRA—which we must infer, for reasons explicated *infra* at note 9, was enacted pursuant to the Elections Clause—may constitutionally extend to presidential elections. Accordingly, we have no need to opine on this issue. Consequently, as we use the term in this opinion, "federal elections" reaches the full spectrum of elections—both congressional and presidential; this is consistent with both the plain meaning of the NVRA, § 20502(1)–(2), and the terms of the district court's injunction, which we affirm today.

therefore adjudged to be greater than the least amount of information necessary and preempted by the NVRA, while attestation met the statutory minimum-information principle. Lastly, the court rejected Secretary Kobach's Qualifications Clause challenge to preemption under the NVRA. Guided by *Inter Tribal* and *EAC*, the court held that, because Kansas had failed to show that the statutory attestation requirement resulted in a "significant number of noncitizens voting," the NVRA's preemption of Kansas's DPOC requirement did not preclude the state from enforcing its citizenship qualification in contravention of the Qualification Clause. *Id.* at *23.

After the court issued its preliminary injunction, Secretary Kobach timely appealed, arguing that the district court erred in its interpretation of the NVRA, that the Plaintiffs-Appellees had failed to meet the irreparable-harm standard, and that the balance of harms was improperly weighed.[8]

[8] The district court also denied a motion to dismiss for lack of subject matter jurisdiction brought by the other defendant in the case. That defendant, Nick Jordan, the Secretary of Revenue for the State of Kansas—under whose purview the Kansas DMV falls—has filed a separate appeal with this court under the name *Fish v. Jordan*, No. 16-3175.

C. Statutory Background: The National Voter Registration Act

1. General Purposes and Structure

Acting pursuant to the Elections Clause,[9] Congress crafted and passed the NVRA against a backdrop of lackluster voter registration and political participation. Congress found 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, including racial minorities." 52 U.S.C. § 20501(a)(3). In crafting the NVRA, Congress had four overriding purposes:

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[9] Although Congress did not expressly invoke the Elections Clause in enacting the NVRA, both the Supreme Court and our court have operated on the premise that the Elections Clause was Congress's source of authority in enacting the NVRA, in resolving disputes that are analogous to the present one. *See, e.g.*, *Inter Tribal*, 133 S. Ct. at 2257 ("We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form. If this reading prevails, *the Elections Clause requires that Arizona's rule give way*." (emphasis added) (citation omitted)); *id.* at 2256–57 (holding, with reference to the NVRA, that traditional Supremacy Clause preemption analysis does not apply to legislation passed under the Elections Clause); *EAC*, 772 F.3d at 1194–95 (observing with reference to the NVRA that "the [*Inter Tribal*] Court reaffirmed that the United States has authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections"). In light of this controlling precedent, we are constrained to infer that Congress was acting pursuant to its Elections Clause power when it enacted the NVRA.

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

§ 20501(b).

To achieve these purposes, the NVRA creates three federally mandated voter-registration mechanisms, two of which are implemented almost entirely by the states. Section 4 provides the basic outlines of the statute's requirements:

> [N]otwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office—
>
> (1) by application made simultaneously with an application

> for a motor vehicle driver's license pursuant to section 20504 of this title;
>
> (2) by mail application pursuant to section 20505 of this title;
>
> (3) by application in person—
>
> . . . .
>
> (B) at a Federal, State, or nongovernmental office designated under section 20506 of this title.

§ 20503(a). Together, these mechanisms ensure that, whatever else the states do, simple means are available to register for federal elections and those means are actively presented to voters by the states. The NVRA thus mandates both the means by which registration is achieved and where and how those means will be presented to potential voters.

The NVRA sets requirements for the contents of both the Federal Form and any state forms used in the motor voter or agency registration processes. The contents of the mail-in Federal Form of sections 6 and 9 (the subject of both *Inter Tribal* and *EAC*) are prescribed partly by statute, § 20508(b), and otherwise entrusted to the administrative judgment of the EAC, a federal agency. *See* § 20508(a); *EAC*, 772 F.3d at 1195–96. While states are permitted to create their own mail-in forms, § 20505(a)(2), they must nevertheless accept and use the Federal Form, *see* § 20505(a)(1)–(2); *Inter Tribal*, 133 S. Ct. at 2247.

Similarly, in the context of Section 7's agency provisions, state agencies must either distribute the Federal Form or use "the office's own form if it is equivalent to the form described in section 20508(a)(2)," i.e. the Federal Form.

§ 20506(a)(6)(A)(i)–(ii).

By contrast, section 5's motor voter provisions require states to develop a form for use in tandem with applications to obtain or renew a driver's license. *See* § 20504(c). But the NVRA does not give states a free hand to determine the contents of their motor voter forms. The statute sets out requirements for the contents of state motor voter forms in terms that largely mirror the requirements for the Federal Form—but that also differ in important ways. *Compare* § 20504(c)(2) (motor voter form requirements), *with* § 20508(b) (Federal Form requirements).

In addition to mandating and regulating the means of voter registration, the NVRA requires that states actively present voters with those means. Alongside the motor voter regime, section 7's agency provisions require state public assistance agencies and other offices designated by the state (as well as armed forces recruitment offices) to distribute with their applications for services either the Federal Form or an "equivalent" state form and to accept completed forms for transmittal to state election officials. § 20506(a)(1)–(4), (6); *see also* § 20506(c) (military recruitment office provision). Congress intended with this provision to reach potential voters who would otherwise not be reached by the motor voter program. *See* H.R. REP. NO. 103-66, at 19 (1993) (Conf. Rep.) ("If

a State does not include either public assistance, agencies serving persons with disabilities, or unemployment compensation offices in its agency program, it will exclude a segment of its population from those for whom registration will be convenient and readily available—the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principle [sic] place to register under this Act. . . . The only way to assure that no State can create an agency registration program that discriminates against a distinct portion of its population is to require that the agencies designated in each State include an agency that has regular contact with those who do not have driver's licenses."), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144.

The motor voter provision assures that all persons who drive will sooner or later be presented with an opportunity to register to vote:

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

§ 20504(a)(1). Once a valid motor voter registration form is submitted to a state, the state is required to ensure registration so long as the form is submitted within the lesser of thirty days before the election date or the period provided by state law. *See* § 20507(a)(1)(A). Indeed, section 8 requires that

whenever any "valid voter registration form" mandated by the statute is submitted, the state must ensure registration to vote in an election so long as the form was submitted within the requisite time period. § 20507(a)(1)(A)–(C). In other words, when an eligible voter avails herself of one of the mandated means of registration and submits to the state a valid form, ordinarily the state must register that person. *See Inter Tribal*, 133 S. Ct. at 2255.

2. The Motor Voter Provisions

In the present case, only the motor voter provisions are at issue—specifically, the requirements for the contents of motor voter forms. Subsection (c) of section 5 both sets out specific requirements for the motor voter form and establishes an overarching principle that restrains the discretion of states to require additional information in carrying out their eligibility-assessment and registration duties. The relevant statutory language reads:

> (2) The voter registration application portion of an application for a State motor vehicle driver's license—
>
> (A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

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

(i) prevent duplicate voter registrations; and

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

(C) shall include a statement that—

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

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

(iii) requires the signature of the applicant, under penalty of perjury[.]

§ 20504(c)(2)(A)–(C) (emphasis added). Thus, under subparagraph (A), no duplicate information may be required, § 20504(c)(2)(A); under subparagraph (B), while states may require more than what is expressly required by the NVRA, such discretion is restricted by

the principle that the states not require more than "the minimum amount of information necessary to" prevent duplicate registrations and to carry out their eligibility-assessment and registration duties, § 20504(c)(2)(B); and under subparagraph (C) the application must include a list of eligibility requirements, "including citizenship," and a signed attestation under penalty of perjury that the applicant meets those requirements, § 20504(c)(2)(C).

II. DISCUSSION

After stating our standard of review, we begin by recalling the elements of the preliminary injunction standard. We then discuss each prong of the preliminary injunction standard, beginning with the likelihood of success on the merits. In determining whether the district court erred in holding that the Plaintiffs-Appellees were likely to succeed on the merits, we consider first the nature of Congress's power under the Elections Clause and Congress's role in regulating elections vis-à-vis the states. We next consider preemption questions and the nature of statutory interpretation under the Elections Clause. Under the Elections Clause, we apply ordinary tools of statutory interpretation and any conflicting state provision is preempted.

Third, we interpret the meaning of the NVRA's requirements for state motor voter forms and hold that the NVRA attestation requirement presumptively meets the minimum-information principle; it therefore preempts Kansas's DPOC requirement absent a factual showing that the attestation requirement is insufficient on these facts to satisfy that principle. Next we

examine whether Secretary Kobach has succeeded in showing that attestation is insufficient under the statutory minimum-information principle and hold that he has not. Last, we turn to Secretary Kobach's Qualifications Clause arguments and the remaining prongs of the preliminary injunction standard.

A. Standard of Review

On appeal, we review a district court's decision to grant a preliminary injunction for abuse of discretion. *See, e.g.*, *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). An abuse of discretion occurs where a decision is premised "on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (quoting *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1223–24 (10th Cir. 2008)). Thus, we review the district court's factual findings for clear error and its conclusions of law de novo. *Heideman*, 348 F.3d at 1188.

B. Preliminary Injunction Standard

Four factors must be shown by the movant to obtain a preliminary injunction: (1) the movant "is substantially likely to succeed on the merits; (2) [the movant] will suffer irreparable injury if the injunction is denied; (3) [the movant's] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

Additionally, some preliminary injunctions are disfavored and require a stronger showing by the movant—*viz.*, movants must satisfy a heightened standard. They are "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Awad*, 670 F.3d at 1125 (quoting *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048–49 (10th Cir. 2007), *rev'd on other grounds*, 555 U.S. 460 (2009)). In seeking such an injunction, the movant must "make[] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Beltronics*, 562 F.3d at 1071 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc)). The parties dispute whether the injunction requested here falls under one or more of these categories. The district court did not reach the question because it held that the Plaintiffs-Appellees had made a sufficiently strong showing to meet the heightened standard. Similarly, we decline to reach the question of whether the heightened standard for disfavored preliminary injunctions applies and hold that, even assuming *arguendo* that the heightened standard applies, the Plaintiffs-Appellees meet that standard.

C. Likelihood of Success on the Merits

We first examine the text of the Elections Clause and the Supreme Court's jurisprudence concerning statutory interpretation and preemption under that clause. We next interpret the NVRA's requirements for

the contents of state motor voter forms and apply that interpretation to the facts as found by the district court. Last, we address Secretary Kobach's arguments regarding constitutional doubt under the Qualifications Clause.

1. The Elections Clause

The Elections Clause states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1. The plain text of the clause requires the states to provide for the regulation of congressional elections. *See Inter Tribal*, 133 S. Ct. at 2253; *Foster v. Love*, 522 U.S. 67, 69 (1997). The text makes equally clear, however, that Congress can step in, either making its own regulations that wholly displace state regulations or else modifying existing state regulations. *See Inter Tribal*, 133 S. Ct. at 2253 ("The Clause empowers Congress to preempt state regulations governing the 'Times, Places and Manner' of holding congressional elections.").

This unusual allocation of powers and responsibilities between the federal government and the states stems from the Founders' concern that the states could refuse to conduct federal elections, effectively terminating the national government. *See id.*; *see also* THE FEDERALIST NO. 59, at 328 (Alexander

Hamilton) (Robert A. Ferguson ed., 2006) ("Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the state legislatures, would leave the existence of the union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs."). Thus, although the regulation of congressional elections is in the first instance entrusted by the Elections Clause to the states, Congress can always intervene. Indeed, the Anti-Federalists themselves recognized the preemptive power of Congress under the Elections Clause, although they discerned more insidious motives in its breadth. *See Federal Farmer No. XII* (Jan. 12, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 294, 300 (Herbert J. Storing, ed., 1981) ("[T]he true construction is, that when congress shall see fit to regulate the times, places, and manners of holding elections, congress may do it, and state regulations, on this head, must cease. . . . [But] it was not merely to prevent an annihilation of the federal government that congress has power to regulate elections.").

Justice Story also shared this understanding of the Elections Clause, despite the fact that in the decades between the Constitution's adoption and the drafting of his commentary on the Elections Clause, Congress had not exercised this preemptive power. 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 824, at 290–92 (Fred B. Rothman & Co. 1991) (1833). He characterized the preemptive power of the clause as constituting a "superintending" or "supervisory" power over state regulations. *See, e.g.*, *id.*

§§ 813, 820, at 280, 288. He also observed that opponents of the Constitution "assailed" the Elections Clause "with uncommon zeal and virulence" because of the express power granted to Congress to preempt state election regulations. *Id.* § 813, at 280.

The Supreme Court has hewn to this view of the Elections Clause since at least 1880 in *Ex parte Siebold*, 100 U.S. 371 (1879) and has reaffirmed it in both *Inter Tribal* and in *Foster v. Love*, 522 U.S. 68 (1997). In *Ex parte Siebold*, the Court was presented with the argument—put forth by defendants seeking habeas relief, following their conviction under federal law for ballot box stuffing—that when Congress acts under the Elections Clause, it must, in modern terms, occupy the field. 100 U.S. at 382–83 ("[T]hey contend that [Congress] has no constitutional power to make partial regulations to be carried out in conjunction with regulations made by the States."). Although the Court agreed that Congress could, if it so desired, occupy the field of election regulations, the Court flatly rejected the proposition that Congress could not partially regulate alongside state regulations or alter state regulations; in doing so, the Court made clear that when Congress makes or alters regulations and this action engenders conflict with state election regulations, state law must give way:

> If Congress does not interfere [with state election regulations], of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. . . . If it only alters, leaving, as

> manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. *But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to "make or* alter."

Id. at 383–84 (emphasis added; emphasis on "alter" in the original). This concept of the Election Clause's preemptive reach has not fallen into desuetude since then.

The Supreme Court has recently and repeatedly reaffirmed that "the power the Elections Clause confers is none other than the power to pre-empt." *Inter Tribal*, 133 S. Ct. at 2257. In *Foster v. Love*, the Court observed, "The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." 522 U.S. at 69 (citations omitted). Indeed, when Congress legislates under the Elections Clause, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Inter Tribal*, 133 S. Ct. at 2257.

Further, both the Supreme Court and this court have recognized that the power to preempt state

regulations of "time, places, and manner" extends to the regulation of voter registration:

> "The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.'"

EAC, 772 F.3d at 1195 (quoting *Inter Tribal*, 133 S. Ct. at 2253); *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (source for the second-level internal quotations). Congress therefore has the power to preempt state voter-registration regulations.

Although the preceding doctrine is well settled, it is important to define clearly the relationship that the Constitution establishes between the states and the federal government and the extent and nature of the power delegated to each. Congress permissively allows the states to regulate, but only to the extent that Congress chooses not to regulate. Congress possesses the power to alter existing state regulations—not the other way around. At bottom, Secretary Kobach argues that states should be able to modify existing federal election regulations, in order to repurpose an existing federal registration regime for the states' own ends. This would invert the relationship that the Elections Clause establishes between Congress and the states because it would give the states—rather than Congress—the last word. Having established Congress's preemptive power under the Elections

Clause, we turn now to how to interpret the scope of preemption.

2. Preemption and Statutory Interpretation Under the Elections Clause

Sitting en banc, the Ninth Circuit, in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd sub nom. Inter Tribal*, 133 S. Ct. 2247, has offered a persuasive synthesis of the method of statutory construction required when a congressional enactment under the Elections Clause allegedly conflicts with state election regulations. There, the Ninth Circuit construed *Siebold* and *Foster* as requiring courts to consider the relevant congressional and state laws as part of a single statutory scheme but treating the congressional enactment as enacted later and thus superseding any conflicting state provision:

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold*, 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act,

> based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster*, 522 U.S. at 74, 118 S. Ct. 464; *see id.* at 72–73, 118 S. Ct. 464. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

Gonzalez, 677 F.3d at 394. This framework that the Ninth Circuit has articulated is supported by close readings of *Siebold* and *Foster* as well the Supreme Court's more recent decision, *Inter Tribal*, as we demonstrate *infra*. We first address the closely related decision, *Inter Tribal,* to show that the Court did not repudiate or abandon the framework of *Siebold* and *Foster*—indeed *Inter Tribal* depends on them—before turning to those cases.

In *Inter Tribal*, the Court rejected Arizona's argument that the presumption against preemption applies in Elections Clause cases and held instead that the plain text of a federal statute "accurately communicates the scope of Congress's preemptive intent." *Inter Tribal*, 133 S. Ct. at 2257. First, it observed that the rationale underlying the presumption against preemption under the Supremacy Clause does not apply to the Elections Clause. As to the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 2256 (quoting

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Thus, "'Congress does not exercise lightly' the 'extraordinary power' to 'legislate in areas traditionally regulated by the States.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *cf. United States v. Locke*, 529 U.S. 89, 108 (2000) ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

But the regulation of congressional elections is not a subject of state police power nor one that is traditionally the province of the states. Nor could it be, because the states' power over congressional elections—or rather the duty to provide for elections—derives from an express grant in the Constitution. *See* U.S. CONST. art. 1, § 4, cl. 1; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) ("As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . .'" (quoting 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627)); *id.* at 804–05 ("It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States . . . . This duty parallels the duty under Article II [to appoint electors to choose the president]."). Thus "[u]nlike the States' 'historic police powers,' the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law.'" *Inter Tribal*, 133 S. Ct. at 2257 (citations

omitted) (quoting, respectively, *Rice*, 331 U.S. at 230; *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). The Court concluded, "[T]here is no compelling reason *not* to read Elections Clause legislation *simply to mean what it says*." *Inter Tribal*, 133 S. Ct. at 2257 (emphases added).

Applying these concepts, the Court held that under "the fairest reading of the statute" Arizona's DPOC requirement was inconsistent with the NVRA's requirement that states "accept and use" the Federal Form and, thus, preempted. *Id.* To arrive at this result, the Court simply compared Arizona's DPOC requirement with the requirements of the NVRA and asked whether Arizona's requirement conflicted with the NVRA—to the extent that it did, Arizona's DPOC law was preempted by the NVRA. *Id.* ("If this reading prevails, the Elections Clause requires that Arizona's rule give way.").

Further, *Siebold* and *Foster* help to more fully flesh out how to approach this interpretive task and how it is influenced by Congress's presumptively preemptive power under the Elections Clause. In *Siebold*, the Court likened the task of statutory construction in a case of federal-state conflict under the Elections Clause to that of reading a single, harmonious code of regulations. This analogy derives from Congress's plenary power under the Elections clause: "If [Congress] only alters [state regulations] . . . there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of congress over the subject is

paramount." *Siebold*, 100 U.S. at 383–84. The court then likened the analysis to reading the state and federal provisions as part of a single statutory scheme:

> Suppose the Constitution of a State should say, "The first legislature elected under this Constitution may by law regulate the election of members of the two Houses; but any subsequent legislature may make or alter such regulations,"—could not a subsequent legislature modify the regulations made by the first legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not: it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would so far, and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.

Id. at 384.

Foster establishes that the reading to be applied to the federal and state statutes at issue is a plain one. In *Foster*, the Court was presented with the question of whether a Louisiana statute violated a federal law that set the date for congressional elections. 522 U.S. at 70. Louisiana's law created an open primary in October such that if no candidate took a majority, a runoff would be held between the two highest performing candidates on the federally mandated election day. *Id.* But this could and did result in congressional elections being decided in October, *id.*, rather than on the federally mandated "Tuesday next after the 1st Monday of November," *id.* at 69. The Court, rather than getting lost in the "nicety [of] isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute," *id.* at 72, instead applied a plain meaning analysis of the two statutes (i.e., the state and federal statutes): "The State's provision for an October election addresses timing quite as obviously as [the federal statute] does. . . . [T]he open primary does purport to affect the timing of federal elections: a federal election takes place prior to federal election day whenever a candidate gets a majority in the open primary." *Id.* at 72–73. In other words, the fact that the federal and state regulations both spoke to the same issue and differed in their requirements was sufficient to preempt the state regulation. Importantly, the Court reached this conclusion without parsing the congressional enactment for lacunae or silences where the state could regulate. Thus, the Court held that "a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take

place on the date chosen by Congress, clearly violates [the federal statute]." *Id.* at 72.

Guided by these cases, it is clear to us that the Elections Clause requires that we straightforwardly and naturally read the federal and state provisions in question as though part of a unitary system of federal election regulation but with federal law prevailing over state law where conflicts arise. We do not finely parse the federal statute for gaps or silences into which state regulation might fit. We refrain from doing so because were states able to build on or fill gaps or silences in federal election statutes—as Secretary Kobach suggests he is permitted to do with respect to the NVRA—they could fundamentally alter the structure and effect of those statutes. If Congress intended to permit states to so alter or modify federal election statutes, like the NVRA, it would have so indicated. The Elections Clause does not require Congress to expressly foreclose such modifications by the states.

i. The Plain Statement Rule Derives from the Presumption Against Preemption and Does Not Apply to Legislation Under the Elections Clause

Secretary Kobach argues—while conceding that there is no presumption against preemption under the Elections Clause—that the plain statement rule nonetheless applies. That rule requires that, when Congress intends to preempt state law, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 460 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58,

65 (1989)). But as the Plaintiffs-Appellees point out, this argument was forfeited for failure to raise it before the district court.

"[I]f [a new] theory simply wasn't raised before the district court, we usually hold it forfeited." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). A forfeited argument, unlike one that is waived, may nonetheless be presented and considered on appeal—but we will *reverse* a district court's judgment on the basis of a forfeited argument "only if failing to do so would entrench a plainly erroneous result." *Id.* Further, under *Richison*, "the failure to argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court." *Id.* at 1131.

Secretary Kobach contends that he "*repeatedly* argued below that the NVRA must contain an express statement prohibiting DPOC if any preemption can occur." Aplt.'s Reply Br. 12 n.5. He points to five pages of his Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, but that section of his briefing before the district court argues only that the statute is silent and cannot be construed to prohibit DPOC, reasoning from precedent and ordinary principles of statutory interpretation. No mention is made of the plain statement rule. Our review of the record below does not reveal any other material that could fairly be read to present Secretary Kobach's plain statement theory. Nor does he make an argument for plain error review on appeal. Consequently, his plain statement argument has come to the end of the road and is effectively waived.

In seeking to avoid such an outcome, in his reply brief, Secretary Kobach concedes that in his briefing before the district court he cited no caselaw regarding the plain statement rule. *Id.* But he points to *United States v. Johnson*, 821 F.3d 1194 (10th Cir. 2016) for the proposition that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 1199 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). On the basis of *Johnson*, he argues that the "claim (minus the case law) was certainly presented," so his theory was not forfeited. Aplt.'s Reply Br. 12 n.5. But this argument is spurious under our forfeiture and waiver principles.

The proposition from *Johnson* is not relevant in this context because the heart of our waiver and forfeiture doctrines lies in the recognition that we are not "a 'second-shot' forum, a forum where secondary, back-up *theories* may be mounted for the first time. Parties must be encouraged 'to give it everything they've got' at the trial level." *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) (emphasis added) (citation omitted). Theories—as opposed to the overarching claims or legal rubrics that provide the foundation for them—are what matters. *Richison*, 634 F.3d at 1127 ("Where, as here, a plaintiff pursues a new legal *theory* for the first time on appeal, that new *theory* suffers the distinct disadvantage of starting at least a few paces back from the block." (emphasis added)); *see Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993) (noting that "a situation where a litigant changes to a new *theory* on appeal that

falls under the same general category as an *argument* presented at trial" constitutes a failure of preservation where the issue was "not passed upon below [and thus] will not be considered on appeal" (emphasis added)); *accord McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002) (stating that forfeiture and waiver apply to a "new theory on appeal that falls under the same general category as an argument presented at trial" (quoting *Lyons*, 994 F.2d at 722)). We have expressly rejected the notion that Secretary Kobach urges: "It would force the judicial system to permit costly 'do-overs' in the district court anytime a party can conceive a new winning *argument* on appeal—even when the district court answered perfectly every question of law the parties bothered to put before it." *Richison*, 634 F.3d at 1130 (emphasis added). Secretary Kobach failed to raise an argument based on a plain statement theory before the district court and fails also to make an argument for plain error. Therefore, we would be well within the boundaries of our discretion to decline to consider his plain statement argument.

Even were we to reach Secretary Kobach's plain statement argument, we would conclude that it lacks merit: specifically, it rests both on an incomplete reading of the plain statement cases that he cites and on an erroneous distinction between the presumption against preemption and the plain statement rule. In this regard, *Gregory*, which Secretary Kobach cites, makes clear that the plain statement rule applies only where "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government.'" 501 U.S. at 460 (quoting *Will*, 491 U.S. at 65). Or, as Secretary Kobach's brief quotes

Gregory, "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Aplt.'s Opening Br. 28 (quoting *Gregory*, 501 U.S. at 461). But the states in fact have no inherent sovereign power in the area at issue here—federal elections—nor could they have any if not for the Constitution's delegation of power to the states. And this delegation is expressly limited by Congress's power to "make or alter" state regulations. *See Inter Tribal*, 133 S. Ct. at 2256–57, 2257 n.6; *U.S. Term Limits*, 514 U.S. at 802, 804–05; *see also* Discussion *supra* Section II.C.2.

Unsurprisingly, Secretary Kobach is unable to cite Elections Clause cases to support his plain statement argument: *Will* addressed congressional preemption of sovereign immunity, 491 U.S. at 64–65; *Gregory* concerned whether the Age Discrimination in Employment Act was intended to preempt state, age-based mandatory retirement provisions for judges, 501 U.S. at 460–61; and *Sugarman v. Dougall*, 413 U.S. 634, 635–36 (1973), is not even a preemption case, dealing instead with whether a state may bar aliens from civil service positions under the Fourteenth Amendment. This inability to cite even one case applying the plain statement rule in the Elections Clause context is telling.

In truth, contrary to Secretary Kobach's suggestion, the plain statement rule is not independent of the presumption against preemption; instead, it is one way that the presumption is applied. *See Gonzales v.*

Oregon, 546 U.S. 243, 291–92 (2006) (Scalia, J., dissenting) ("The clear-statement rule based on the presumption against preemption does not apply because the Directive does not pre-empt any state law."). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision [to interpret a statute as effecting preemption of state law]." *Gregory*, 501 U.S. at 461 (quoting *Will*, 491 U.S. at 65). However, the Supreme Court has noted that this presumption against preemption occurs nowhere in its Election Clause jurisprudence. *Inter Tribal*, 133 S. Ct. at 2256 ("We have never mentioned such a principle [i.e., the presumption] in our Elections Clause cases."). Similarly, the Ninth Circuit observed that the Court has never applied either the presumption or the plain statement rule in the context of Elections Clause legislation. *Gonzalez*, 677 F.3d at 392 ("[T]he 'presumption against preemption' and 'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context. . . . [O]ur survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles.").

The reason for this absence is patent. Because Congress's regulation of congressional elections *necessarily* displaces state regulations, and because the states have no power *qua* sovereigns to regulate such elections, *Inter Tribal*, 133 S. Ct. at 2257 & n.6, the plain statement rule, as a creature of the presumption

against preemption, has no work to do in the Elections Clause setting—*viz.*, it is unnecessary to prevent inadvertent or ill-considered preemption from altering the traditional state-federal balance. *See Gonzalez*, 677 F.3d at 392 ("[T]he Elections Clause, as a standalone preemption provision, establishes its own balance [between competing sovereigns]. For this reason, the 'presumption against preemption' and 'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context."). Therefore, Secretary Kobach's reliance on the plain statement rule is misplaced.[10]

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[10] In light of our prior discussion of *Inter Tribal*, it is unnecessary to dissect Secretary Kobach's argument that *Inter Tribal* applied the plain statement rule. To the contrary, *Inter Tribal* expressly rejected stricter standards of statutory interpretation predicated on the presumption against preemption; instead—eschewing such standards —it simply construed the plain terms of the NVRA. 133 S. Ct. at 2257. Indeed, Secretary Kobach's approach would cause us ill-advisedly to embrace the position of the *dissent* in *Inter Tribal*. There, Justice Alito opined, "The NVRA does not come close to manifesting *the clear intent to pre-empt* that we should expect to find when Congress has exercised its Elections Clause power in a way that is constitutionally questionable." *Id.* at 2273 (Alito, J., dissenting) (emphasis added). It is beyond peradventure that Justice Alito was not in this passage speaking for the court or establishing the law regarding the interpretation of the NVRA. Quite the contrary is true. *Cf. EAC*, 772 F.3d at 1188 (noting that "[t]his is one of those instances in which the dissent clearly tells us what the law is not"). Accordingly, *Inter Tribal* lends Secretary Kobach no succor regarding the plain statement rule's applicability. Ultimately, even if the plain statement rule were doctrinally independent and applicable—apart from the presumption against preemption—(which it is not) we would still decline to apply the plain statement rule for the same reason that

We also reject Secretary Kobach's argument that preemption of Kansas's DPOC law cannot be inferred because the NVRA's express terms are silent as to whether states may impose a DPOC requirement. Were we to adopt such interpretive reasoning, we would upset the relationship that our Constitution establishes between the state and federal governments regarding regulation of congressional elections. States, rather than Congress, would have the power to "alter" or build on congressional regulations, rather than the other way around. The Elections Clause clearly does not contemplate such an eventuality: it empowers Congress to displace or alter state regulations governing the procedures for congressional elections.

Having rejected the heightened interpretive principle advanced by Secretary Kobach—the plain statement rule—we examine the plain meaning of the NVRA and apply the canons of construction as we ordinarily would to determine whether the NVRA's minimum-information principle preempts Kansas's DPOC requirement. We examine the Kansas statute and then the NVRA, cognizant that conflicting state provisions are preempted.

3. NVRA Requirements for State Motor Voter Forms

Here, the relevant Kansas statute provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant

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the Supreme Court and our court have refused to apply the presumption in this Elections Clause context.

has provided satisfactory evidence of United States citizenship," and it enumerates thirteen forms of documentation, including a birth certificate and a passport, that meet this requirement. Kan. Stat. Ann. § 25-2309(*l*).

The NVRA provisions at issue are in section 5, specifically subparagraphs (c)(2)(B) and (C). The relevant statutory language reads:

> (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;
>
> (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). By their express terms, these subparagraphs have related but distinct meanings. Absent a convincing argument to the contrary, "may" should be "construed as permissive and to vest discretionary power," *United States v. Bowden*, 182 F.2d 251, 252 (10th Cir. 1950), while "shall" should be construed as "mandatory," *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992). Each provision restricts the discretion of states in fashioning the motor voter form in unique ways that are consistent with this permissive-mandatory distinction.

More specifically, subparagraph (B) serves to restrict what states "may" do—restricting states' discretion in creating their own DMV voter-registration forms by establishing the statutory minimum-information principle. *See* § 20504(c)(2)(B). This principle establishes a ceiling on what information the states can require. Understanding the nature of this limit on state discretion begins with an examination of the meaning of the term "minimum."

"If the words of the statute have a plain and ordinary meaning, we apply the text as written. We may consult a dictionary to determine the plain meaning of a term." *Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) (quoting *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir.2009)). Dictionaries agree on the meaning of "minimum": "Of, consisting of, or representing the lowest possible amount or degree permissible or attainable," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1150 (3d ed. 1992); "Of, relating to, or constituting the smallest acceptable or possible quantity in a given case," *Minimum*, BLACK'S LAW DICTIONARY (10th ed. 2014); "smallest or lowest," THE NEW OXFORD ENGLISH DICTIONARY 1079 (2d ed. 2005); "of, relating to, or constituting a minimum: least amount possible," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1438 (1961).

Notably, this is in contrast to NVRA section 9, which was at issue in *Inter Tribal* and *EAC*. Section 5 establishes a stricter principle than that applied in *Inter Tribal* and *EAC* under section 9. Under NVRA section 5, a state motor voter form "may require only the *minimum* amount of information necessary" for state officials to carry out their eligibility-assessment and registration duties. § 20504(c)(2)(B). But section 9 states that, as to the Federal Form, the EAC "may require only such identifying information . . . as is necessary" for state officials to meet their eligibility-

assessment and registration duties.[11] § 20508(b)(2). Because we must, if possible, give effect "to every clause and word" of a statute, *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006), we hold that section 5's "only the minimum amount of information necessary" is a stricter principle than section 9's "such identifying information . . . as is necessary." By adding "minimum," Congress intended to restrain the discretion of states more strictly than it restrains the EAC's discretion in composing the Federal Form. Accordingly, states do not enjoy the same breadth of discretion as the EAC to require DPOC, *see Inter Tribal*, 133 S. Ct. at 2259–60—a higher burden must be met before a state may require DPOC for its motor voter form.

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[11] The relevant portion of section 9, § 20508(b), states:

> The mail voter registration form developed under subsection (a)(2)—
>
> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (2) shall include a statement that—
>
> (A) specifies each eligibility requirement (including citizenship);
>
> (B) contains an attestation that the applicant meets each such requirement; and
>
> (C) requires the signature of the applicant, under penalty of perjury;

We reject Secretary Kobach's argument to the contrary. Secretary Kobach takes the position that the principle established in subparagraph (B) of section 5 is no different than that of section 9 because the former's "only the minimum amount of information necessary" and the latter's "only such . . . information . . . as is necessary" mean "substantially the same thing." Aplt.'s Opening Br. 34. Accordingly, under his view, states should enjoy the same discretion accorded to the EAC under *Inter Tribal* to require DPOC. The similarity of the language between section 5 and section 9 is undeniable. Adopting Secretary Kobach's reading, however, would make surplusage of section 5's term "minimum"—something we cannot do. *See Toomer*, 443 F.3d at 1194.

Additionally, this reading logically relies on the premise that "necessary" here means "necessary" in the strictest, most demanding sense, such that the addition of the term "minimum" would not further restrict, in the section 5 context, the amount of information that the state could add to the motor voter form. We do recognize that some dictionaries define the term "necessary," at least among other ways, in this rigorous sense. *See, e.g.*, WEBSTER'S, *supra*, at 1510–11 (in defining the term "necessary" stating "that must be by reason of the nature of the thing . . . that cannot be done without: that must be done or had: absolutely required: essential, indispensable"). However, dictionaries also recognize that in common parlance "necessary" can mean something less. *See, e.g.*, *Necessary*, BLACK'S LAW DICTIONARY, *supra* ("1. That is needed for some purpose or reason."); THE NEW OXFORD AMERICAN DICTIONARY, *supra*, at 1135 (observing in a

usage note that "Necessary applies to something without which a condition cannot be fulfilled . . . although it generally implies a pressing need rather than absolute indispensability"). This is not a linguistic nuance without legal application.

In this regard, the courts also have frequently interpreted "necessary" to mean something less than absolute necessity—most famously in *M'Culloch v. Maryland*:

> Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. . . . It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is *often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports*. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind

> would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction, that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

17 U.S. (4 Wheat.) 316, 414–15 (1819) (emphasis added); *see also United States v. Comstock*, 560 U.S. 126, 134 (2010) ("Chief Justice Marshall emphasized that the word 'necessary' does not mean 'absolutely necessary.'"); *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 893 (10th Cir. 1990) (interpreting "necessary" in the context of when a debtor-in-possession may reject a collective bargaining agreement under the bankruptcy code and observing that "[t]he word 'necessary' in subsection (b)(1)(A) does not mean absolutely necessary"); *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1236–37 (D.C. Cir. 1988) ("But

courts have frequently interpreted the word 'necessary' to mean less than absolutely essential . . . .").

Following Chief Justice Marshall's observation that "necessary" is frequently qualified so as to add to or detract from its urgency, we reject Secretary Kobach's argument that Congress intended no difference between "minimum . . . necessary" and a bare, unadorned "necessary."[12] As in the Constitution, with its prohibition of state imposts and duties except as "absolutely necessary" for inspection laws, U.S. CONST. art. I, § 10, cl. 2, and the "necessary" of "necessary and proper," *id.* art. I, § 8, cl. 18, in the NVRA Congress distinguished between "minimum . . . necessary," § 20504(c)(2)(B) and merely "necessary," § 20508(b)(1). Giving meaning to the term "minimum," we reject Secretary Kobach's argument that the two are identical in meaning. The term "minimum" contemplates the least possible amount of information. We now turn to

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[12] Secretary Kobach also argues that Congress used the term "minimum" in section 5, in order to establish subparagraph (c)(2)(B)(i)'s prohibition on requiring more than the minimum necessary to prevent duplicate voter registrations. According to this argument, states could otherwise determine how much additional information to require depending on how thoroughly they wished to prevent duplicate registrations. This contention is readily rebutted by the plain meaning of the statute and its structure. The language "minimum amount of information necessary to" lies in subparagraph (c)(2)(B) and applies to both of the clauses that fall underneath it: both the duplicate voter-registration clause, (c)(2)(B)(i), and the clause dealing with state officials' eligibility-assessment and registration duties, (c)(2)(B)(ii). Adopting Secretary Kobach's suggested reading would contradict this plain reading of the statute.

the attestation requirement and its relationship with the minimum-information principle.

Subparagraph (C) restricts state discretion in a distinct way from subparagraph (B)'s minimum-information principle. Specifically, it commands states to list qualifications and also to require applicants to attest that they meet them and to sign the attestation under penalty of perjury. *See* § 20504(c)(2)(C). Given the important discretion-limiting effects of these two subparagraphs on state power relative to federal elections, it is essential that we inquire further into the relationship between them to discern whether Kansas's DPOC law conflicts with section 5 of the NVRA. It is well settled that we are obliged to construe cognate statutory provisions harmoniously, if possible. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" (citations omitted) (quoting, respectively, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959))); *Pharmanex v. Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000) (same); *In re Harline*, 950 F.2d 669, 675 (10th Cir. 1991) ("[F]ollowing the rule that, whenever possible, statutes should be read in harmony and not in conflict . . . ." (quoting *Shumate v. Patterson*, 943 F.2d 362, 365 (4th Cir. 1991))).

With the foregoing guidance in mind, recall, on the one hand, that the statutory minimum-information principle of subparagraph (B) calls on states to include the least possible amount of information necessary on

the motor voter form and, on the other, that subparagraph (C) *mandates* that states include an attestation requirement on that form. § 20504(c)(2)(B)–(C). Reading these two provisions harmoniously—as we must—we may safely proceed on the premise that the attestation requirement of subparagraph (C) does not violate in any instance the minimum-information principle of subparagraph (B). Otherwise, we would be forced to contemplate the absurdity of Congress providing a statutory principle in one breath and immediately violating it in the next. *See Levy's Lessee v. McCartee*, 31 U.S. (6 Pet.) 102, 111 (1832) (Story, C.J.) ("In any other view of the matter, this extraordinary consequence would follow, that the legislature could solemnly perform the vain act of repealing, as statutes, what, in the same breath, it confirmed as the common law of the state; that it would propose a useless ceremony; and by words of repeal would intend to preserve all the existing laws in full force. . . . [I]t would be unintelligible and inconsistent with a design to retain them all as a part of its own common law."); *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir. 1998) ("[I]t is inconceivable to us that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be 'qualified' at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employment."); *see also Weininger v. Castro*, 462 F. Supp. 2d 457, 488 (S.D.N.Y. 2006) ("[I]t would be contradictory for Congress in the same breath to expressly make assets subject to execution and at the

same time make the owner of those assets immune from suit to recover those assets."). That thought we will not entertain. The attestation requirement, in our view, cannot contravene or overstep the minimum-information principle, but we do recognize that in a given case it may not be sufficient for a state to carry out its eligibility-assessment and registration duties.

The minimum-information principle does not operate in a vacuum. It directly pertains to whether states are able to carry out their eligibility-assessment and registration duties in registering qualified applicants to vote. In other words, the NVRA expressly contemplates that states will undertake these duties using the motor voter form in registering applicants to vote, but it limits their discretion to request information for this purpose to the minimum amount of information necessary. With the harmonious relationship between subparagraphs (B) and (C) in mind, we do believe that section 5 is reasonably read to establish the attestation requirement as the presumptive minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties; as a result of a state carrying out these duties, qualified applicants gain access to the franchise.

In this regard, Congress has historically relied on an attestation requirement "under penalty of perjury" as a gate-keeping requirement for access to a wide variety of important federal benefits and exemptions.[13]

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[13] Kansas, too, once depended on an attestation requirement for such a function. Prior to enacting its DPOC requirement, Kansas's

See, e.g., 7 U.S.C. § 2020(e)(2)(B)(v) (requiring state applications for Supplemental Nutrition Assistance Program aid be signed under penalty of perjury as to the truth of the information contained in the application and the citizenship or immigration status of household members); 26 U.S.C. § 6065 (requiring that any tax "return, declaration, statement, or other document" be "verified by a written declaration that it is made under the penalties of perjury"); 42 U.S.C. § 1395w-114(a)(3)(E)(iii)(I) (requiring "an attestation under penalty of perjury" as to assets for receipt of prescription drug plan subsidies); 42 U.S.C. § 1436a(d)(1)(a) (requiring an attestation of citizenship or "satisfactory immigration status" for the receipt of housing assistance); *United States v. Garriott*, 338 F. Supp. 1087, 1097 (W.D. Mo. 1972) (noting that the military's Form 150, accompanied by a conscientious objector certificate, is "executed by the registrant under pain of perjury"); *cf.* 45 C.F.R. § 206.10(a)(1)(ii) (requiring that application forms for various state-administered welfare programs be signed "under a penalty of perjury"); Official Bankruptcy Form B 101, Voluntary Petition for Individuals Filing for

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voter-registration statute tracked the requirements of the NVRA in relying on attestation for eligibility verification. *Compare* Kan. Stat. Ann. § 25-2309 (2001), *with* Kan. Stat. Ann. § 25-2309 (Supp. 2015) (including the DPOC requirements in section (*l*) added by the SAFE Act, 2011 Kan. Sess. Laws 795). And, even after the institution of the DPOC regime, Kansas recognizes that the attestation requirement can play a role—albeit a limited one—in ensuring that only citizens are registered to vote. *See*, *e.g.*, Aplt.'s App., Vol. 3, at 711–14 (evincing Secretary Kobach's admission that attestation before the state election board would suffice where documentary proof is unavailable).

Bankruptcy, 11 U.S.C.A. (West) (requiring attestation under penalty of perjury as to the truth of the information provided to file for bankruptcy); Official Form DS-11, Application for a U.S. Passport, http://www.state.gov/documents/organization/212239.pdf (requiring signed attestation under pain of perjury). Therefore, it is entirely reasonable for us to infer from the statutory structure that Congress contemplated that the attestation requirement would be regularly used and would typically constitute the minimum amount of information necessary for state officials to carry out their eligibility-assessment and registration duties—more specifically, their duties to register qualified applicants to vote.

Put another way, we interpret section 5 as establishing the attestation requirement in every case as the *presumptive* minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties. But whether the attestation requirement actually satisfies the minium-information principle in a given case turns on the factual question of whether the attestation requirement is sufficient for a state to carry out these duties. Thus, we go no further than to say that the attestation requirement *presumptively* satisfies the minimum-information principle: nothing in the statute suggests that a state cannot rebut that presumption in a given case by demonstrating that the attestation requirement is insufficient for it to carry out its eligibility-assessment and registration duties. In other words, we do not conclude here that section 5 prohibits states from requiring DPOC in all circumstances and without exception. However, guided by *Inter Tribal* and

our decision in *EAC*, we hold that in order for a state advocating for a DPOC regime to rebut the presumption that the attestation requirement is the minimum information necessary for it to carry out its eligibility-assessment and registration duties, it must make a factual showing that the attestation requirement is insufficient for these purposes. *See EAC*, 772 F.3d at 1195.

We believe that construing section 5 to permit states to rebut the presumptive sufficiency of the attestation requirement is in keeping with *Inter Tribal* and our precedent. In *Inter Tribal*, the Court reasoned that if the NVRA prevented a state from acquiring the information necessary to enforce its qualifications to vote—notably, citizenship—it would raise a serious constitutional concern. 133 S. Ct. at 2258–59. But the Court also observed that states have the opportunity to petition the EAC to add state-specific instructions requiring DPOC and—in the event of an EAC refusal—the opportunity to "establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include [DPOC]." *Id.* at 2259–60. Of course, Congress did not entrust an administrative agency like the EAC with the interpretation of the requisite content for state motor voter forms. However, the provisions governing the content of the Federal Form (i.e., section 9 of the NVRA) and state motor voter forms are analogous. And thus just as the *Inter Tribal* Court construed the requirements of section 9 to avoid constitutional doubt by giving states the opportunity—after failing to obtain relief from the EAC—to obtain state-specific, DPOC

instructions by making a factual showing to a court that the attestation requirement ("a mere oath") is not sufficient, 133 S. Ct. at 2260, we construe the analogous provisions of section 5 as also permitting states to rebut the presumption that the attestation requirement of subparagraph (C) satisfies the minimum-information principle in a particular case.[14]

More specifically, in order to rebut the presumption as it relates to the citizenship criterion, we interpret the NVRA as obliging a state to show that "a substantial number of noncitizens have successfully registered" notwithstanding the attestation requirement. *EAC*, 772 F.3d at 1198. In *EAC*, we held that the EAC was not under a nondiscretionary duty to add state-specific DPOC instructions to the Federal Form at two states' behest. 772 F.3d at 1196. We

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[14] Whether this step would be dispositive regarding the use of DPOC appears to be an open question. Should a state advocating for a DPOC regime succeed in showing in a given case that the attestation requirement does not satisfy the minimum-information principle, we would be faced with a question not confronted by the courts in *Inter Tribal* and *EAC*: Does it ineluctably follow that DPOC should be adjudged adequate to satisfy this principle? It is logically conceivable that something more than attestation but less burdensome than requiring DPOC could be sufficient, which would preclude requiring DPOC. Thus, a two-step analysis would be required: first a state would bear the burden of showing that attestation falls below the minimum necessary to carry out its eligibility-assessment and registration duties and then, second, it would need to show that nothing less than DPOC is sufficient to meet those duties. Because Secretary Kobach fails to make a sufficient showing on this possible first step of the analysis, we have no need to opine definitively on whether the NVRA mandates satisfaction of a second step.

reached this conclusion because "[t]he states have failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form." *Id.* at 1197–98. The failure to make such an evidentiary showing was seemingly dispositive there of Secretary Kobach's Qualifications Clause challenge.

Here, we of course are concerned with the statutory principle established by subparagraph (B) of section 5 rather than the Qualifications Clause. And we do recognize that the questions asked under this principle and the Qualifications Clause are linguistically distinct and therefore do not inexorably call for exactly the same analysis. *Compare Inter Tribal*, 133 S. Ct. at 2258–59 ("[I]t would raise serious constitutional doubts if a federal statute *precluded a State from obtaining the information necessary to enforce its voter qualifications*." (emphasis added)), *with* § 20504(c)(2)(B) ("[M]ay 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*" (emphasis added)). However, these questions are sufficiently similar that it seems logical to apply a similar proof threshold to them. And Secretary Kobach has not argued to the contrary.

Thus, we hold that to overcome the presumption that attestation constitutes the minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties, the state must show that a substantial number of noncitizens

have successfully registered to vote under the attestation requirement. This results in the preemption analysis here being quite straightforward: if Kansas fails to rebut this presumption that attends the attestation regime, then DPOC necessarily requires more information than federal law presumes necessary for state officials to meet their eligibility-assessment and registration duties (that is, the attestation requirement). Consequently, Kansas's DPOC law would be preempted.[15]

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[15] The requirements for the content of motor voter forms and the Federal Form differ, and thus it should not be surprising that the analysis applied here to a challenge to a DPOC requirement in the setting of a state motor voter form differs somewhat from the analysis we employed in the Federal Form context in *EAC* with regard to the requested state-specific DPOC requirement. There, in evaluating whether the EAC's decision was arbitrary and capricious, we noted that the agency decision had discussed five non-DPOC alternatives to ensure that noncitizens do not register using the Federal Form. *EAC*, 772 F.3d at 1197. Here, however, we need to consider only one alternative because, notably, the principle established by Congress for state motor voter forms is stricter than the one that guides the EAC's determination of whether to include a state-specific DPOC requirement on the Federal Form. As we held *supra*, section 5 sets a stricter principle than the "necessary" principle of section 9. Under this more rigorous principle, it is unnecessary to consider alternatives other than the presumptive minimum amount necessary—the attestation requirement. If Kansas fails to rebut Congress's presumptive conclusion that the attestation requirement satisfies the minimum-information principle, then DPOC necessarily requires more than federal law authorizes (i.e., attestation); accordingly, Kansas's DPOC law would be preempted.

i. The NVRA Does Not Conclusively Bar State DPOC Requirements in the Motor Voter Process

Among other arguments for affirming the district court, both Plaintiffs-Appellees and amicus Common Cause contend that the NVRA conclusively forecloses states from requiring DPOC. In other words, they read section 5's attestation requirement—found in subparagraph (C)—as satisfying in every instance the minimum-information principle of subparagraph (B), *viz.*, as constituting in every instance the minimum amount of information necessary for states to carry out their eligibility-assessment and registration duties. This argument fails because it requires a strained reading of the plain text of the statute and risks making surplusage of the minimum-information principle.

Although these provisions are related, and subparagraph (C) cannot be interpreted as running afoul of subparagraph (B), that does not mean that Congress intended that subparagraph (C) exclusively particularize or instantiate the principle set out in subparagraph (B). Congress did not expressly establish a relationship of definition or elaboration between subparagraphs (B) and (C)—though it knows how to craft such a textual relationship; this suggests to us that Congress did not intend to create such a relationship. When Congress knows how to achieve a specific statutory effect, its failure to do so evinces an intent *not* to do so. *See, e.g.*, *United States v. Burkholder*, 816 F.3d 607, 615 (10th Cir. 2016) ("Congress clearly knew how to add a proximate-cause

requirement in criminal penalty-enhancement statutes when it wished to do so. That it nevertheless did not do so in § 841(b)(1)(E) is thus very telling; indeed, it suggests that Congress intended to omit a proximate cause requirement . . . .").

More specifically, Congress knows how to draft a provision that specifies or elaborates on a more general statutory standard. For example, in Chapter 11 of the Bankruptcy Code, Congress requires that when a class of creditors or interests has rejected a reorganization plan, the plan must meet a variety of requirements to be confirmed, including that the plan be "fair and equitable" towards impaired classes that rejected the plan. 11 U.S.C. § 1129(b)(1). Congress then specifies requirements to meet the fair and equitable standard: "For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements[.]" § 1129(b)(2). Then specific requirements are set out for classes holding secured claims, unsecured claims, or other interests. *See* § 1129(b)(2)(A)–(C).

Similarly, Congress knows how to define with specificity key statutory terms. For instance, the Dodd-Frank Act defines the terms "systemically important" and "systemic importance"—concepts essential to that regulatory regime. 12 U.S.C. § 5462(9) ("The terms 'systemically important' and 'systemic importance' mean a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial

institutions or markets and thereby threaten the stability of the financial system of the United States."). Moreover, in a context nearer to the present one, the Voting Rights Act (the "VRA") defines the term "test or device," which is frequently used throughout that statute: "The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting [meet one of four kinds of requirements]." 52 U.S.C. § 10303(c).

But, in the NVRA, Congress did not expressly elaborate on or define subparagraph (B)'s minimum-information principle, much less do so in a manner indicating that the principle equates (in every instance) to the attestation requirement of subparagraph (C). *See* 52 U.S.C. § 20504(c)(2). In our view, this omission strongly suggests a congressional intention not to equate in every instance the statutory minimum-information principle with the attestation requirement.

This reading is further supported by the punctuation that separates the two provisions. In interpreting these provisions, we must "account for a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Here, subparagraphs (B) and (C) are set off from one another by semicolons. *See* § 20504(c)(2). The semicolons accentuate the independent nature of each provision in the statute's structure—signaling that they are separate by congressional design. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960) (concluding that a provision is separate and distinct where it was followed by a semicolon and another

provision). While we are certainly not slaves to punctuation where its use defies the "natural meaning of the words employed," *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932), its use here serves to further clarify the statute's meaning, and should therefore be "accorded appropriate consideration." *See Haskell v. United States*, 241 F.2d 790, 792 (10th Cir. 1957).[16]

Reading subparagraph (C) as exhaustively particularizing subparagraph (B) would effectively render the latter surplusage. Yet, we must attempt to "give effect, if possible, to every word of the statute." *Quarles v. United States ex rel. BIA*, 372 F.3d 1169, 1172 (10th Cir. 2004). And interpreting subparagraph (C) as defining or exclusively particularizing subparagraph (B)'s minimum-information principle—in the absence of any explicit direction from Congress that the two provisions should be so read—fails to give independent "operative effect" to the diverse language used in the two subparagraphs. *See Finley v. United States*, 123 F.3d 1342, 1347 (10th Cir. 1997). The reading of the statute that we adopt has the beneficial effect of avoiding this outcome: under it, subparagraph (C)'s attestation requirement does no more than *presumptively* satisfy the minimum-information principle of subparagraph (B); it is not coterminous with or an exclusive particularization of this principle.

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[16] But, at the same time, as evident from our analysis *supra*, the two provisions are only separated by a semicolon—rather than, say, a period—and also share a common "parent" provision (i.e., § 20504(c)(2)); this suggests that they are in fact interrelated and should be construed in a harmonious manner if possible.

A state still may seek to rebut the presumption—*viz.*, to establish that the attestation requirement is not the minimum amount of information necessary to carry out its eligibility-assessment and registration duties.

By following this interpretive path, we also are adopting the reading that best avoids even a shadow of constitutional doubt and should permit courts to largely avoid the constitutional question of whether the NVRA runs afoul of the Qualifications Clause. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). Although we do not invoke the constitutional doubt canon to choose among plausible alternative readings, we may nonetheless employ it to buttress our plain reading of the NVRA. *See Marx v. Gen. Revenue Corp*, 133 S. Ct. 1166, 1181 (2013) ("Because the text is plain, there is no need to proceed any further. Even so, relevant canons of statutory interpretation lend added support . . . ."). The constitutional doubt canon "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Almendarez-Torres*, 523 U.S. at 238 (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)).

Were we to adopt the reading that, in every instance, the attestation requirement is all that a state may ever mandate in the motor voter application context, no flexibility would remain for states to make a *statutory* showing that something more is

necessary—only a constitutional challenge would remain. We find it implausible that Congress would intend to adopt a requirement (and to adopt it so unclearly) under which states are forced to resort exclusively to constitutional challenges in order to protect their Qualification Clause powers and related interests. First, such a result would run counter to the presumption underlying the constitutional-doubt canon–i.e., that Congress legislates within the limits set down for it in the Constitution. Second, such an interpretation would force a court to reach the Qualifications Clause question whenever a state wished to require something more than attestation.

Our reading of section 5 of the NVRA—like the Supreme Court's reading of section 9 in *Inter Tribal*, 133 S. Ct. at 2259–60 (relying on recourse to the EAC and judicial review to avoid constitutional doubt)—provides an escape valve. States may respond to a challenge to a DPOC requirement with a showing that attestation is insufficient under the statute. That is to say, there is conceivably room in the NVRA's minimum-information principle for more than just attestation. Thus, challenges to DPOC can be decided, where appropriate, on statutory grounds—permitting the courts to largely avoid resolving the merits of constitutional questions, such as the Qualifications Clause issue. These considerations lend further support to the reading we adopt and undercut the reading that the NVRA conclusively forecloses the use of DPOC. Having dispensed with that extreme interpretation of the statute, we turn now to erroneous ones advanced by Secretary Kobach.

ii. Secretary Kobach's Readings of the Statute Are Unavailing

Secretary Kobach argues that the district court erred in interpreting the NVRA in a variety of ways. First, he argues that "necessary" means "what is necessary under state law" such that the states are the final arbiters of what is necessary to meet the minimum-information principle. Second, Secretary Kobach argues that the statute's requirements apply only to information on the motor voter form itself and therefore do not preclude the imposition of a DPOC requirement because DPOC is not information written on the form. Third, he argues that *Young v. Fordice*, 520 U.S. 273 (1997), holds that the NVRA does not constrain what states may request of applicants. Finally, he argues that it is absurd to construe the motor voter requirements as establishing a standard different from that established for the Federal Form or agency registration requirements.

Secretary Kobach argues that "the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," § 20504(c)(2)(B), means essentially "what is necessary under state law." In particular, he argues that this is the "natural reading of 'administering voter registration and other parts of the election process,'" because what is necessary for administering voter registration and the election process is determined by state law. Aplt.'s Opening Br. 32. We reject this argument because the Supreme Court in *Inter Tribal* rejected such an understanding of

federal election regulation and confirmed that the NVRA's plain language evinces Congress's intent to restrain the regulatory discretion of the states over federal elections, not to give them free rein.

The notion that the NVRA "lets the States decide for themselves what information 'is necessary'" was Justice Alito's position in his dissent in *Inter Tribal*, 133 S. Ct. at 2274 (Alito, J., dissenting) (quoting statutory text currently found at 52 U.S.C. § 20508). The majority rejected that position and held that the NVRA requires states to register voters who provide a valid Federal Form. *Id.* at 2255–56 (majority opinion). Although *Inter Tribal* dealt with a different section of the NVRA, the same reasoning applies here. The NVRA creates a federal regime intended to guarantee "that a simple means of registering to vote in federal elections will be available." *Id.* at 2255. Allowing the states to freely add burdensome and unnecessary requirements by giving them the power to determine what is the "minimum amount of information necessary" would undo the very purpose for which Congress enacted the NVRA. Drawing on our reasoning in *EAC*, we may similarly conclude that "the dissent [of Justice Alito] clearly tells us what the law is not," *EAC*, 772 F.3d at 1188; consequently, Secretary Kobach's argument here is legally untenable.

Secretary Kobach next argues that the limitations of section 5 of the NVRA—most saliently, the minimum-information principle—only define the scope of the information that can appear on the motor voter form itself. As his argument goes, because Kansas's DPOC requirement does not appear on the motor voter

form and does not involve a supplemental request for form information, the DPOC requirement does not run afoul of section 5's restraints. However, Secretary Kobach points to nothing in the statute's text that indicates that the minimum-information principle does not extend beyond the four corners of the motor voter form. Indeed, as we see it, Secretary Kobach simply seeks to repackage here his failed argument that, as long as Congress is silent in the NVRA's express terms regarding DPOC, Kansas may tack onto the NVRA's regulatory scheme a DPOC requirement, without conflicting with that scheme. But, as we have noted *supra*, such an argument rests on an erroneous understanding of the relationship established between the states and Congress by the Elections Clause. And it would involve applying the presumption against preemption or the plain statement rule; doing so, however, would be improper here.

Our rejection of Secretary Kobach's reading of the statute is also supported by *Inter Tribal*'s reasoning. There, Arizona argued that the NVRA "requires merely that a State receive the Federal Form willingly and use that form as one element in its (perhaps lengthy) transaction with a prospective voter." *Inter Tribal*, 133 S. Ct. at 2254. But subparagraph (B) of section 8 of the NVRA in the Federal Form context requires states to register applicants who have submitted "valid voter registration form[s]" within a period of no less than 30 days before the election. *See* § 20507(a)(1)(B). The Court reasoned that Arizona's ability to reject a Federal Form unaccompanied by DPOC could only be "squared"with its short-time-fuse registration obligation under section 8—i.e, 30 days or less—if the

completed form could be deemed not a "valid voter registration form" because of the absence of the DPOC required by state law. 133 S. Ct. at 2255. The court discussed the EAC's role in crafting the form and concluded that it was "improbable" that the completed form was not valid standing alone because the statute "takes such pains to create" the form. *Id.*

Secretary Kobach's argument that the NVRA does not prevent states from requiring additional documentation not on the motor voter form creates a similar squaring problem to the one present in *Inter Tribal*. A provision of section 8 of the NVRA that is analogous to the one at issue in *Inter Tribal* governs the states' obligations in the motor voter context to register applicants who submit valid voter-registration forms, up to thirty days prior to the election. Specifically, subparagraph (A) requires states to "ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is submitted . . . not later than the lesser of 30 days, or the period provided by State law, before the date of the election." § 20507(a)(1)(A). While we recognize that the present case is distinct from *Inter Tribal* insofar as the creation of motor voter forms is entrusted to the state, § 20504(c)(1), and not the EAC, Congress has carefully crafted the motor voter form requirements and has restricted states to requesting the least possible amount of information necessary to effect their eligibility-assessment and registration duties. And, as in the Federal Form context, Congress has imposed on the states a short-time-fuse registration obligation, presumably with an interest in ensuring that the public has ready access to the

franchise, *see* § 20501(b) (1) ("establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office").

Given these circumstances, we find it "improbable," *Inter Tribal*, 133 S. Ct. at 2255, that Congress would envision that the states could routinely deem a motor voter form to be the starting place in a more elaborate state registration scheme that required the presentation of DPOC, where the inescapable effect of this approach would be (1) to render the motor voter form—the requirements of which Congress carefully limited to the least amount of information necessary—an invalid voter-registration form because it is not accompanied by DPOC, and (2) to shut polling-place doors on citizens who have submitted otherwise valid motor voter forms. Thus, *Inter Tribal*'s reasoning bolsters our conclusion that Secretary Kobach's argument that the NVRA does not prevent states from requiring additional documentation not on the motor-voter form is untenable and misguided.

Furthermore, the fact that Congress spoke only to requiring information on the motor voter form tends to cut against rather than in favor of Secretary Kobach's approach. The omission of requirements for, or prohibitions on, other documents that states might require does not suggest that states may require anything that they desire to facilitate the registration process beyond the form itself. To the contrary, it suggests by the negative-implication canon, *expressio unius est exclusio alterius*, that Congress intended that the motor voter form would—at least presumptively—constitute the beginning and the end of the registration

process. *See,* e.g., *Marx*, 133 S. Ct. at 1181 ("[W]hen Congress includes one possibility in a statute, it excludes another by implication.").[17]

Third, Secretary Kobach argues that *Young v. Fordice* held that the NVRA places no restrictions on what a state may require in the motor voter registration process. The relevant language from *Young* states:

> In saying this, we recognize that the NVRA imposes certain mandates on States, describing those mandates in detail. The NVRA says, for example, that the state driver's license applications must also serve as voter registration applications and that a decision not to register will remain confidential. It says that States cannot force driver's license applications to submit the same information twice (on license applications and again on registration forms). Nonetheless, implementation of the NVRA is not purely ministerial. The NVRA still leaves room for policy choice. *The NVRA does not list, for example, all the other information the State may—or may*

[17] Although we have decided this case on the basis of the plain text of the statute, we may nonetheless use the canons to buttress our adopted reading and to reject Secretary Kobach's reading. *See Marx*, 133 S. Ct. at 1181 ("Because the text is plain, there is no need to proceed any further. Even so, relevant canons of statutory interpretation lend added support to reading § 1692k(a)(3) as having a negative implication. . . . [*Expressio unius*] reinforces what the text makes clear.").

> *not—provide or request*. And a decision about that other information—say, whether or not to tell the applicant that registration counts only for federal elections—makes Mississippi's changes to the New System the kind of discretionary, nonministerial changes that call for federal VRA review. Hence, Mississippi must preclear those changes.

Young, 520 U.S. at 286 (emphasis added) (citations omitted). This language—especially the italicized passage—cannot fairly be read as "indicat[ing] that there is *no* constraint in the NVRA over what additional documentation a State may request beyond the form itself." Aplt.'s Opening Br. 27. Instead, *Young* simply states that the NVRA does not comprehensively and specifically prescribe what may or may not be included on state motor voter forms and thus allows space for the states to exercise discretion regarding this matter; consequently, they must invoke the preclearance process under the VRA. 520 U.S. at 286 ("The NVRA does not list, for example, all the other information the State may—or may not—provide or request."). Put another way, *Young* is a VRA preclearance case from beginning to end. The Court's discussion of the NVRA occurs in the context of explaining why states that conform to the NVRA must nonetheless preclear planned changes—specifically, because room for potentially discriminatory policy choice remains. *See id. Young* says nothing about the minimum-information principle at issue here. And under no circumstances can it be read as giving the states *carte blanche* under the NVRA to fashion

registration requirements for their motor voter forms. In short, *Young* is not on point.

Finally, Secretary Kobach argues that reading Section 5 to establish a standard different from that applied to the Federal Form or agency registration is absurd and so the district court erred in adopting such an interpretation. "The absurdity doctrine applies 'in only the most extreme of circumstances,' when an interpretation of a statute 'leads to results so gross as to shock the general moral or common sense,' which is a 'formidable hurdle' to the application of this doctrine." *In re Taylor*, 737 F.3d 670, 681 (10th Cir. 2013) (quoting *United States v. Husted*, 545 F.3d 1240, 1245 (10th Cir. 2008)). To explicate the requirements of this rigorous doctrine is to answer the question here: Secretary Kobach's absurdity argument must fail. There is nothing absurd about Congress creating a stricter principle—i.e., the minimum-information principle—to govern the states in fashioning motor voter forms, which are the NVRA's central mode of registration,[18] than the principle applicable to the other

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[18] That Congress intended and understood the motor voter provisions as the center of the NVRA is reflected in Congress's treatment of section 7's agency provisions as a kind of gap filler to capture potential voters unlikely to go to the DMV. H.R. REP. NO. 103-66, at 19 (1993) (Conf. Rep.) ("If a State does not include either public assistance, agencies serving persons with disabilities, or unemployment compensation offices in its agency program, it will exclude a segment of its population from those for whom registration will be convenient and readily available—the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principle [sic] place to register under this Act."), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144.

two forms of registration under the statute.[19] Even if one could reasonably say that Congress acted in an unusual manner in failing to craft a uniform principle for the NVRA's three modes of registration (which one cannot), this congressional slip-up would fall well short of "the most extreme of circumstances" or engender a result "so gross as to shock the general moral or common sense." *Taylor*, 737 F.3d at 681. The absurdity doctrine thus finds no purchase here.

Having rejected Secretary Kobach's readings of the NVRA, we turn now to whether he put forward the required factual showing to overcome the presumption that the attestation requirement satisfies the minimum-information principle with respect to the state's eligibility-assessment and registration duties. To overcome the presumption, a state must show that a substantial number of noncitizens have successfully registered to vote under the attestation requirement.

4. Kobach Fails to Rebut the Presumption that the Attestation Requirement Is the Minimum Amount of Information Necessary

The district court found that between 2003 and the effective date of Kansas's DPOC law in 2013, only

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[19] Secretary Kobach also asserts that there is no "minimum necessary" principle in section 7's agency registration requirements and that this is an example of the district court's absurd reading of the statute as requiring different standards under the NVRA's various programs. But section 7 requires use of the Federal Form or the agency's own form if "it is equivalent to" the Federal Form. § 20506(a)(6)(A). Thus, the agency provisions rely on the same principle required for the Federal Form.

thirty noncitizens registered to vote—no more than three per year. Secretary Kobach was only able to show that fourteen noncitizens had attempted to register to vote in Sedgwick County, Kansas, since the enactment of the DPOC requirement.[20] These numbers fall well short of the showing necessary to rebut the presumption that attestation constitutes the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties. Finally, as the district court pointed out in its order granting the preliminary injunction, Secretary Kobach conceded that the state election board will accept as sufficient proof of citizenship a declaration or affidavit from an applicant at a hearing under subsection (m) of the SAFE Act.[21] That concession, in our view,

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[20] Of those fourteen cases, the district court found that twelve could have been avoided by better training at the DMV because those registrations resulted from misunderstandings of the eligibility requirements rather than intentional fraud.

[21] At the preliminary injunction hearing, when asked whether the state election board would accept as sufficient proof of citizenship the affirmation of an individual unable to otherwise provide DPOC, Secretary Kobach responded:

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

Fish v. Kobach, 2016 WL 2866195, at *5 (emphasis added); *accord* Aplt.'s App., Vol. V, at 1133–34 (providing transcribed comments

undermines the legitimacy of Secretary Kobach's

of Secretary Kobach). Based largely on these representations the district court found:

> The state election board is comprised of the Secretary of State, the Attorney General, and the Lieutenant Governor. Secretary Kobach represents that this hearing before the election board may be telephonic, that three people have so far availed themselves of this provision, and that all three were approved by the election board. Examples provided by Secretary Kobach of alternative forms of citizenship documentation under subsection (m) include an affidavit from a sibling stating the date and place of birth, school records, *or even an applicant's own affidavit.*

Id. (emphasis added). The court further found that "[a]s an example of an acceptable form of DPOC under subsection (m) of the law, which may be triggered when an applicant is unable to obtain one of the thirteen forms of DPOC listed in subsection (*l*), Mr. Kobach suggested that a person's own declaration of citizenship would satisfy the state election board." *Id.* at *22.

We recognize that Secretary Kobach's remarks on this matter at the preliminary injunction hearing are not pellucid. They are amenable to more than one permissible reading. In that regard, they could be reasonably read as indicating that an applicant's sworn affidavit or declaration of citizenship, while acceptable and important evidence of citizenship, could not fully satisfy the applicant's evidentiary burden; notably, there is some suggestion in Secretary Kobach's comments that an applicant might be required to explain his personal reasons for not being able to secure statutorily acceptable DPOC. However, in finding that Secretary Kobach's comments amounted to a concession that the state election board would accept a sworn affidavit or declaration of citizenship as sufficient evidence "the district court made a choice between two permissible views of the evidence, and it is not our role to label this choice clearly erroneous." *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 777 n.2 (10th Cir. 2009); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

assertion that a written attestation on a motor voter registration form is insufficient to allow State officials to meet their eligibility assessment and registration duties.

Secretary Kobach does not appear to contest the district court's factual findings as to how many noncitizens registered or attempted to register to vote. Instead, he contests the conclusion to be drawn from those findings. Secretary Kobach argues that if even one noncitizen successfully registers under the attestation regime, then DPOC is necessary to ensure applicant eligibility. However, as we have already noted, "necessary" should not be understood in an absolute sense here. *See* Discussion *supra* Section II.C.3. Section 5 does not require whatever is strictly necessary to prevent even a single noncitizen from registering. Moreover, recall that in *EAC* we held that "to establish in a reviewing court that a mere oath will not suffice," 772 F.3d at 1197 (quoting *Inter Tribal*, 133 S. Ct. at 2260), the state has an "evidentiary burden of proving that they cannot enforce their voter qualifications because *a substantial number* of noncitizens have successfully registered." *Id.* at 1197–98 (emphasis added). Although the context there was the Federal Form and the Qualifications Clause, we have held here that the same rule applies. *See* Discussion *supra* Section II.C.3.

Moreover, it cannot be that, while intending to create a simplified form of registration for federal elections, Congress adopted such a malleable statutory principle (i.e., minimum information) that the states could effectively become the final arbiters of what is

required under the NVRA by the simple expedient of claiming that one noncitizen managed to register to vote. Congress adopted the NVRA to ensure that whatever else the states do, "simple means of registering to vote in federal elections will be available." *Inter Tribal*, 133 S. Ct. at 2255. This purpose would be thwarted if a single noncitizen's registration would be sufficient to cause the rejection of the attestation regime. Indeed, under Secretary Kobach's "one is too many" theory, even the DPOC regime could conceivably be found to require less than the minimum information necessary,[22] allowing states to employ still harsher and more burdensome means of information gathering to prevent noncitizen registration. The NVRA does not require the least amount of information necessary to prevent even a single noncitizen from voting.

5. Secretary Kobach Fails to Make the Showing Required by *Inter Tribal* to Raise Constitutional Doubt Under the Qualifications Clause

In addition to challenging the district court's reading of the NVRA as being contrary to the statute, Secretary Kobach argues that the court's reading of the

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[22] For example, our immigration laws—despite requiring documentary proof of identity and authorization to work in the United States—are frequently circumvented. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) ("There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions."). Even DPOC is unlikely to prevent a determined noncitizen from successfully registering to vote.

NVRA raises doubt as to the statute's constitutionality by preventing Kansas from exercising its constitutionally delegated power to enforce qualifications for congressional elections under the Qualifications Clause and the Seventeenth Amendment. He further argues that the court's interpretation would result in different qualifications for state and federal elections in Kansas, running afoul of the Qualifications Clause and the Seventeenth Amendment. Both arguments fail.

First, Secretary Kobach has failed to make any showing that the NVRA prevents Kansas from enforcing its qualifications. It is true that the states—not Congress—have the power to determine "*who* may vote in" elections. *Inter Tribal*, 133 S. Ct. at 2257. This includes the power "to enforce those requirements." *Id.* at 2258. But *Inter Tribal* held that no constitutional doubt was raised under the Qualifications Clause unless the NVRA "precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2259. In *EAC*, we deemed it determinative of whether Secretary Kobach had demonstrated such preclusion that he had failed to show that substantial numbers of noncitizens had registered to vote. 772 F.3d at 1197–98. Here, Secretary Kobach offers us nothing more than the meager evidence of noncitizens registering to vote that he proffered in connection with his statutory arguments *supra*—evidence that we deemed insufficient to show that substantial numbers of noncitizens had registered to vote. He does not contend that something about the Qualifications Clause preclusion standard should lead us to evaluate this

evidence in a different light. Consequently, we reach the same conclusion of insufficiency as to his evidentiary showing in the Qualifications Clause context. Thus, given this evidentiary failing, we need not engage in a constitutional doubt inquiry. *Id.* at 1996 (observing as to *Inter Tribal* and the constitutional doubt question that "[t]he Court did not have to resolve this potential constitutional question in [*Inter Tribal*], nor did it employ canons of statutory construction to avoid it, because such steps would only be necessary if Arizona could prove that federal requirements precluded it from obtaining information necessary to enforce its qualifications.").

Secretary Kobach also argues that the district court's decision creates separate qualifications for state and federal elections in Kansas, in violation of the Qualifications Clause and the Seventeenth Amendment, which specify that the qualifications for state and congressional elections should be the same. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. According to Secretary Kobach, this occurs because the injunction issued by the district court and the NVRA itself require that motor voter applicants without DPOC be registered for federal elections, s*ee* § 20503(a), whereas Kansas law of course requires applicants for state and local elections to present DPOC. Thus, some voters will be registered to vote in Kansas's federal elections but not its state and local elections.

This argument fails because the divergence in who is registered for purposes of Kansas's state and federal elections results not from a substantive distinction in

the qualifications required to vote but from Kansas's choice to impose greater procedural burdens by demanding more information of applicants than federal law requires. In *EAC*, we interpreted *Inter Tribal* as holding that while the states have the final say over the substantive qualifications required, Congress can preempt state procedures to enforce those substantive qualifications so long as doing so does not preclude the states from enforcing their qualifications. *EAC*, 772 F.3d at 1195. And, significantly, we construed *Inter Tribal* as holding that, while citizenship is indeed a substantive qualification, the state registration mechanisms, like DPOC, that are designed to enforce it are not substantive, but instead procedural. In this regard, we observed there:

> Even as the [*Inter Tribal*] Court reaffirmed that the United States has authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections (i.e. that documentary evidence of citizenship may not be required), it noted that individual states retain the power to set *substantive* voter qualifications (i.e., that voters be citizens).

Id.[23] Properly understood, then, citizenship is the substantive qualification, while attestation and DPOC are the procedural conditions for establishing that

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[23] "That federal authority to establish procedural rules can coexist with state authority to define substantive rights is familiar from other contexts, such as the federal rules of civil procedure." *EAC*, 772 F.3d at 1195 n.8.

qualification for registration purposes. Consequently, the district court's order enjoining the use of the DPOC requirement in federal elections did not effect a difference in the substantive qualifications applicable in federal elections and Kansas state and local elections, only the procedures for enforcing that qualification.

This distinction between substantive voter qualifications and procedural requirements for registration also forecloses Secretary Kobach's argument (made under both the irreparable-harm and likelihood-of-success-on-the merits prongs) that registration itself—including a DPOC requirement—is a qualification to vote in Kansas. Although *Inter Tribal*, by its strict terms, refrained from addressing this argument, 133 S. Ct. at 2259 n.9 (noting that Arizona raised for the first time in its reply brief the theory that registration itself is the relevant qualification, not citizenship, but declining to address that theory), in *EAC* we read *Inter Tribal* as effectively pointing the way toward resolution of this question. There, we determined, in the shadow of *Inter Tribal*, that DPOC constitutes a procedural condition—not a substantive qualification. *See EAC*, 772 F.3d at 1195. Thus, under our precedent, Secretary Kobach is incorrect to contend that registration itself—and thus DPOC—is a qualification to vote.

Secretary Kobach's arguments under the Qualifications Clause fail for one final reason: his arguments regarding the extent of the states' power under the Qualifications Clause and its relationship with Congress's power under the Elections Clause

mirror those of Justice Thomas's dissent in *Inter Tribal*. Like Justice Thomas, Secretary Kobach contends that this is essentially a case not about regulating voter registration for federal elections but about who is qualified to vote in federal elections. *Compare* Aplt.'s Opening Br. 45–46 ("If a state requires proof of citizenship prior to registration to be a qualified elector, then Article I, § 2, Cl. 1, and the Seventeenth Amendment command that the federal government must respect the State's decision and acknowledge that the same qualification applies to federal elections."), *with Inter Tribal*, 133 S. Ct. at 2269 (Thomas, J., dissenting) ("Arizona has the independent *constitutional* authority to verify citizenship in the way it deems necessary." (emphasis added)), *and id.* at 2269–70 ("Given States' exclusive authority to set voter qualifications and to determine whether those qualifications are met, I would hold that Arizona may request whatever additional information it requires to verify voter eligibility."). But "[t]his is one of those instances in which the dissent clearly tells us what the law is not." *EAC*, 772 F.3d at 1188 (referring to Justice Thomas's dissent in *Inter Tribal*).

Under the rule we adopt today, Plaintiffs-Appellees have more than adequately shown a likelihood of success on the merits and Secretary Kobach's arguments to the contrary fail. The district court did not abuse its discretion or otherwise err in finding that Plaintiffs-Appellees met their burden to show a likelihood of success on the merits, even under the heightened standard for a disfavored preliminary injunction that we have assumed is applicable. Of course, we have only considered the record as it stands

at this early stage of the proceedings. Further discovery will presumably ensue. If evidence comes to light that a substantial number of noncitizens have registered to vote in Kansas during a relevant time period, inquiry into whether DPOC is the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties would then be appropriate. We now address the remaining prongs of the preliminary injunction analysis.

D. Threat of Irreparable Harm

To show a threat of irreparable harm, a plaintiff must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Irreparable harm also occurs if "the district court cannot remedy [the injury] following a final determination on the merits." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).[24]

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[24] The Plaintiffs-Appellees argue that under our precedent, particularly *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981), no showing of irreparable harm is necessary when "the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations," *id.* at 259. But *Lennen* and our other decisions following it (*Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 651–52 (10th Cir. 2004); *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993)), must be read in light of the Supreme Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (postdating *Lennen*) and the line of cases that follow *Romero-Barcelo*. Those cases clarify the narrow circumstances when a presumption of

irreparable injury could apply stemming from a congressional enactment.

The Court held in *Romero-Barcelo* that courts should "not lightly assume that Congress has intended to depart from established principles" of equity jurisprudence simply because a federal statute specifies that courts have the power to dispense equitable relief for statutory violations. 456 U.S. at 313 (reversing the First Circuit, which had held that the district court had a duty under the relevant statute to issue an injunction). Further, the Court specified in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), that applying a presumption of irreparable harm for violation of a federal statute, without a proper textual basis in the statute, is a departure from traditional equitable principles. *Id.* at 544–45 ("This presumption is contrary to traditional equitable principles and has no basis in [the Alaska National Interest Lands Conservation Act]."). Following *Romero-Barcelo*, we have held that only an "unequivocal statement" by Congress may modify the courts' traditional equitable jurisdiction. *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1129 (10th Cir. 2008). Of course, a court's choice in weighing factors under such equitable jurisdiction—*viz.*, in fashioning a remedy to enforce a congressional enactment—does not extend to a choice regarding whether to enforce the statute at all. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497–98 (2001) ("Their [i.e., district courts acting in equity] choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.").

Here, there is no indication in the NVRA's text that Congress intended to constrain or otherwise guide the traditional exercise of equitable jurisdiction in weighing whether an injunction should issue to remedy violations of the statute. The NVRA simply lays out time periods in which an aggrieved person may bring suit for either declaratory or injunctive relief. § 20510(b). In that sense, the NVRA is unlike section 10 of the Administrative Procedure Act, which requires that a "reviewing court *shall* . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.

We have held that irreparable harm "does not readily lend itself to definition," *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250 (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)), and is "not an easy burden to fulfill," *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). "The court's discretion is to be exercised in light of the purposes of the statute on which plaintiff's suit is based." *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230 (10th Cir. 1997).

There can be no dispute that the right to vote is a constitutionally protected fundamental right. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("By denying some citizens the right to vote, such laws deprive them of a 'fundamental political right, . . .

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§ 706 (emphasis added); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) ("In sum, we hold that Congress, through 5 U.S.C. § 706, has explicitly removed from the courts the traditional equity balancing that ordinarily attends decisions whether to issue injunctions."). Similarly, the NVRA is unlike the Endangered Species Act of 1973, which was at issue in *TVA v. Hill*, 437 U.S. 153 (1978). As the Court later explained, "That statute contains a flat ban on destruction of critical habitats of endangered species and it was conceded that completion of the dam would destroy the critical habitat of the snail darter. . . . Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute [not the bare fact of a statutory violation] limited the remedies available . . . [and] only an injunction could vindicate the objectives of the Act.'" *Amoco*, 480 U.S. at 543 n.9 (alteration in original) (quoting *Romero-Barcelo*, 456 U.S. at 314). The NVRA is far from approaching the specificity required to limit the courts' traditional equitable discretion. Accordingly, we apply our traditional abuse of discretion standard to the familiar four-pronged preliminary injunction analysis.

preservative of all rights.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))); *accord Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A Charles Allen Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)). Accordingly, while we must nonetheless engage in our traditional equitable inquiry as to the presence of irreparable harm in such a context, we remain cognizant that the violation of a constitutional right must weigh heavily in that analysis. *Cf. Elrod v. Burns*, 427 U.S. 347, 374 & n.29 (1976) (holding that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[,]" while noting that this is so because "[t]he timeliness of political speech is particularly important"). This is especially so in the context of the right to vote. Because there can be no "do-over" or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *accord Obama for Am. v. Husted.*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986).

The district court did not legally err or otherwise abuse its discretion in finding irreparable harm. The district court found that several of the named plaintiffs had registered in 2013 or 2014 to vote in the 2014 elections and that they desired to vote in the upcoming

2016 elections. Further, as of March 2016, 12,717 applications had been cancelled since Kansas's DPOC requirement went into effect and another 5,655 applications were suspended as incomplete. In other words, over 18,000 Kansans stood to lose the right to vote in the coming general elections—elections that are less than one month away. The district court further found that the DPOC requirement has a chilling effect, discouraging otherwise qualified citizens, once rejected, from reapplying. Taking these findings together, we determine that the court did not abuse its discretion in concluding that there was an almost certain risk that thousands of otherwise qualified Kansans would be unable to vote in November. This denial of the right to vote constitutes a strong showing of irreparable harm, and one which cannot be compensated by money damages.

Against these findings of fact, Secretary Kobach makes two arguments. First, he argues that the Plaintiffs-Appellees delayed at least thirty months in bringing their claims, and their delay forecloses a finding of irreparable harm. Second, he argues that the plaintiffs' harm is self-inflicted and so cannot constitute irreparable harm. We address each argument in turn.

As for delay, it is true that "delay in seeking preliminary relief cuts against finding irreparable injury." *RoDa Drilling*, 552 F.3d at 1211 (quoting *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994)). However, delay is only one factor to be considered among others, *id.*, and there is no categorical rule that

delay bars the issuance of an injunction, *see id.* at 1210, 1211–12 ("We note that the Supreme Court has rejected the application of categorical rules in injunction cases. . . . [D]elay is but one factor in the irreparable harm analysis . . . ."). The question instead is whether the delay was reasonable, was not a decision by the party to "sit on its rights," and did not prejudice the opposing party. *See id.* at 1211–12.

Here, Secretary Kobach points to delay as though it should conclusively defeat a preliminary injunction but fails to make any argument as to how the particular delay at issue here undercuts a finding of irreparable harm. He argues only the length of the delay and fails to show how that delay prejudiced him. This failure alone is sufficient for us to reject his delay rationale. *See Kan. Health Care Ass'n*, 31 F.3d at 1544 ("Finally, we agree with the district court that defendants have not claimed that they are somehow disadvantaged because of the delay. We therefore find no error or abuse of discretion in the district court's conclusion that plaintiffs established that they have or will suffer an irreparable harm, which is not undermined by their delay in commencing this action.").

Secretary Kobach next argues that Plaintiffs-Appellees' harm is self-inflicted because they could have complied with the DPOC requirement but simply chose not to do so. The district court made factual findings that cut against his self-inflicted harm contention, and they were not clearly erroneous. For instance, the court found that there was no evidence in the record to establish either Kansas's efforts to inform voters of the new requirements or that the named

plaintiffs received the individual notices of failure to meet the DPOC requirements. The district court also found that the plaintiffs had established that they faced financial and administrative obstacles to obtaining DPOC. Further, the court found that the administrative hearing alternative to DPOC, Kan. Stat. Ann. § 25-2309(m), was too burdensome and vague to serve as an effective safety valve—particularly given that only three voters had ever availed themselves of it.

Moreover, our cases show that typically a finding of self-inflicted harm results from either misconduct or something akin to entering a freely negotiated contractual arrangement, not from a failure to comply with an allegedly unlawful regime. For example, in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), we discerned self-inflicted harm because the defendant improperly entered "into contractual obligations that anticipated a pro forma result" from National Environmental Protection Act review. *Id.* at 1116; *see also Sierra Club v. Bostick*, 539 Fed. App'x 885, 893 (10th Cir. 2013) ("A close reading of *Davis* reveals that what led us to brand the state defendants' harm with the 'self-inflicted' label, and decline to weigh it, was the fact that the harm-inducing contractual conduct of those defendants . . . was predicated on the federal agency's improper actions, and the impropriety of those actions was attributable to the state defendants. . . . The state defendants expected a 'pro forma result' because they had been knowingly collaborating with the federal agency defendant while it improperly 'prejudged the NEPA issues.'"). Even the lone case cited by Secretary Kobach concerns harms caused by "the express terms of a contract [the plaintiff] negotiated,"

Salt Lake Tribune Publ'g Co. v. AT&T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003), not harms caused by an allegedly unlawful state statute.

In short, the circumstances that breathe vitality into the doctrine of self-inflicted harm are not present here. Moreover, we reject the notion that the source of an injury is a litigant's decision not to comply with an allegedly unlawful state regime, rather than the regime itself. *Cf. Meese v. Keene*, 481 U.S. 465, 475 (1987) (noting that "the need to take such affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury"). Were this notion to apply in a case like this one, a court could never enjoin enforcement of an unlawful statute if the plaintiffs could have complied with the statute but elected not to; this hypothetical scenario borders on the absurd.

In the end, our task is not de novo review. "[W]e need only evaluate whether the district court's remedial decision is within the range of reasonable choices." *Garcia v. Bd of Educ.*, 520 F.3d at 1129. Put succinctly, the NVRA's statutory purposes are to "enhance[] the participation of eligible citizens as voters in elections for Federal office" while protecting election integrity and the accuracy and currency of registration rolls. § 20501(b). In light of these purposes and the imminent disenfranchisement of over 18,000 Kansans, we conclude that there is no error or abuse of discretion in the district court's finding of irreparable harm.

E. Balance of Equities

"We must next balance the irreparable harms we have identified against the harm to defendants if the preliminary injunction is granted." *Davis*, 302 F.3d at 1116. Again we review for abuse of discretion. We do not reject out of hand that the administrative burdens of compliance with the preliminary injunction are a real harm or conclude that the state has no legitimate interest in preventing even small numbers of noncitizens from voting. But the district court found that Secretary Kobach had shown only three cases of noncitizens actually voting and that the administrative burden of altering the registration status of the roughly 18,000 applicants in question was limited to a largely automated process that would be neither unduly time consuming or costly. The district court further found that Kansas managed to cope with a bifurcated election in 2014.[25] Most importantly, however, the court found

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[25] In the run-up to oral argument, the parties informed the court of ongoing litigation in the Kansas state courts concerning whether Kansas law prohibited Secretary Kobach from operating bifurcated registration and election systems. A temporary injunction was issued in that case, which requires Secretary Kobach to count the votes of those registered for federal elections in *both* state and federal elections, *Brown v. Kobach*, Case No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016). Secretary Kobach informed us at oral argument, however, that a further hearing was to take place on this matter, but we have not received an update from either party as to further developments in that case. Lacking further information, we proceed on the assumption that Kansas may still go forward with a bifurcated system. We remind the parties that

> [i]t is the parties, not the court, who are positioned to remain abreast of external factors that may impact their case; this is of particular importance

that the burden of a bifurcated system was of Kansas's own creation because Kansas chose to pass and enforce a law that conflicts with the NVRA and, thus, that law cannot apply to federal elections.

Furthermore, we reject as based on conjecture Secretary Kobach's invitation to consider as "just the tip of the iceberg" the twenty-five cases in Sedgwick County of aliens registering or attempting to register. Aplt.'s Opening Br. 55. The assertion that the "number of aliens on the voter rolls is likely to be in the hundreds, if not thousands" is pure speculation. *Id.* at 56. The extent of the harm to Secretary Kobach by the issuance of the injunction consists of essentially two things: (1) light administrative burdens, and (2) any costs associated with the hindering of Kansas's choice to pursue a zero-instance policy regarding the registration of noncitizens.

On the other side of the equation is the near certainty that without the preliminary injunction over 18,000 U.S. citizens in Kansas will be disenfranchised for purposes of the 2016 federal elections—elections less than one month away. We cannot ignore the irreparable harm of this denial of the right to vote, particularly on such a large scale. There is no contest between the mass denial of a fundamental constitutional right and the modest administrative

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> where, as here, those factors directly pertain to this court's substantive inquiry. We look to the parties to inform us of such developments, and we should be assured that they will do so diligently.

Jordan v. Sosa, 654 F.3d 1012, 1020 n.11 (10th Cir. 2011).

burdens to be borne by Secretary Kobach's office and other state and local offices involved in elections. Nor does the negligible risk that a few votes might be cast by noncitizens alter our equitable calculus—especially given the certainty of irreparable harm to the rights of so many citizens. We also reject Secretary Kobach's arguments that the Plaintiffs-Appellees suffer no harm, as he merely rehashes the arguments we addressed in the context of the irreparable harm analysis. Those arguments fail, and the district court did not abuse its discretion in finding that the balance of equities strongly favors the Plaintiffs-Appellees.

F. Whether an Injunction Is in the Public Interest

"A movant also has the burden of demonstrating that the injunction, if issued, is not adverse to the public interest." *Heideman*, 348 F.3d at 1191. We note that our "democratically elected representatives . . . are in a better position than this Court to determine the public interest[;] . . . [t]he courts' peculiar function is to say what the law is, not to second-guess democratic determinations of the public interest." *Id.* In *Romero-Barcelo*, the Supreme Court noted that although courts should exercise their traditional equitable practices in evaluating requests for injunctive relief for violation of a federal statute, those practices are "conditioned by the necessities of the public interest which Congress has sought to protect." 456 U.S. at 320.

There is no question that Kansas's interest in ensuring that not a single noncitizen (or an insubstantial number of them) should vote is in tension with the right to vote of over 18,000 Kansans. Kansas's

interest is also in tension with the registration procedures that Congress required in the NVRA. Congress has spoken clearly by ensuring that whatever else the states do, "a simple means of registering to vote in federal elections will be available." *Inter Tribal*, 133 S. Ct. at 2255.[26] The registration requirements set forth by Congress in the NVRA—requirements designed to increase the number of eligible voters who register and vote—demonstrate Congress's determination that the public interest in the widespread exercise of the franchise trumps the narrower interest of ensuring that not a single noncitizen votes (or an insubstantial number of them). Indeed, as the district court observed, exceedingly few noncitizens have been shown to have voted compared to the number of Kansans who stand to lose the right to vote in the coming elections. The public interest in broad exercise of the right to vote will be furthered rather than harmed by the district court's injunction.

III. CONCLUSION

Based on the foregoing, we **AFFIRM** the district court's grant of a preliminary injunction and **REMAND** the case for further proceedings not inconsistent with this opinion.

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[26] Secretary Kobach argues that a bifurcated election will produce "great confusion for voters." Aplt.'s Opening Br. 59. However, Kansas's concerns about voter confusion thus ring hollow; the principal source of that confusion is Kansas's own voter-registration laws. As the district court found, "the record suggests that Kansas motor voters are already confused about the current DPOC law and how to meet its requirements." *Fish v. Kobach*, 2016 WL 2866195, at *29.

APPENDIX D

U.S. Const. art. I, § 2, cl. 1 (House of Representatives) provides in part:

> [T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. Const. amend. XVII (Senate) provides in part:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. Const. art. I, § 4, cl. 1 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. amend. XIV, § 1 provides in part:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Kan. Const., Art. V, § 1 provides in part:

> Every 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, § 4 provides:

> The legislature shall provide by law for proper proofs of the right of suffrage.

APPENDIX E

1. 52 U.S.C. § 20504 provides in part:

(c) Forms and procedures

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

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

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

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

2. 52 U.S.C. § 20507, provides in part:

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by

the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

3. Kan. Stat. Ann. § 25-2309 (2012 Supp.) states in part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) If the state election board finds that the evidence presented by an applicant does not constitute satisfactory evidence of United States citizenship, such applicant shall have the right to appeal such determination by the state election board by instituting an action under 8 U.S.C. § 1503. Any negative assessment of an

applicant's eligibility by the state election board shall be reversed if the applicant obtains a declaratory judgment pursuant to 8 U.S.C. § 1503, demonstrating that such applicant is a national of the United States.