No. 20-109

IN THE

Supreme Court of the United States

SCOTT SCHWAB, SECRETARY OF STATE OF KANSAS,

Petitioner,

—v.—

STEVEN WAYNE FISH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED

Kansas is the only state requiring first-time voter registration applicants to present documentary proof of citizenship ("DPOC"), usually "a birth certificate or passport," App.8—as opposed to signing a sworn attestation under penalty of perjury or providing a driver's license number—in order to establish U.S. citizenship.

The questions presented are:

1. Whether Kansas's unique DPOC requirement, which disenfranchised over 31,000 eligible U.S.-citizen voters, and which Kansas's own expert estimated prevented essentially "zero" noncitizens from voting, App.16–17, violates the Fourteenth Amendment under this Court's well-established *Anderson-Burdick* standard.

2. Whether Section 5 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20504, which provides for registration based on an attestation of citizenship, preempts Kansas's DPOC requirement for applicants registering to vote at a department of motor vehicles office, in light of this Court's ruling in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

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INTRODUCTION

This case does not implicate a state's right to set U.S. citizenship as a qualification for voting, which every state does. Nor does it question whether states may require "applicants to provide proof of United States citizenship when registering to vote," Pet. i., which every state with voter registration does as well—almost always via a sworn attestation under penalty of perjury, as required under the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501, *et. seq*.

Rather, this case concerns only an idiosyncratic requirement in a single state: Kansas's particular *method* for requiring first-time registrants to prove they are citizens—by presenting a document establishing U.S. citizenship. Unlike a "voter ID" law, which typically requires voters at the polls to show proof of identity like a driver's license, Kansas's documentary proof of citizenship ("DPOC") law requires prospective registrants to show a citizenship document, usually "a birth certificate or passport," in order to register to vote. App.8. People almost never carry such documents, and often do not have or cannot easily locate them.

Kansas is the only state in the Union requiring those seeking to register to present a citizenship document, as opposed to signing an attestation or writing down a driver's license number. This outlier registration requirement—the most onerous in the nation—caused a "mass denial of a fundamental constitutional right." App.331. The law was in effect for a little more than three years, and prevented a total of 31,089 people—approximately one out of eight applicants—from becoming registered. App.44.

Kansas's own expert estimated that "more than 99% of the[se] individuals" were "United States citizens," and that the number of noncitizens prevented from registering by the law was "statistically indistinguishable from zero." App.58.

Affirming a district court judgment rendered after a seven-day trial, the court of appeals concluded that Kansas's DPOC requirement is preempted by Section 5 of the NVRA, 52 U.S.C. § 20504, as to voters who register at motor vehicle offices ("motor-voter" registrants), and violates the Fourteenth Amendment.

First, applying this Court's holding in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 15 (2013) ("*ITCA*"), that the Elections Clause and the NVRA "require[] that Arizona's [evidence-of-citizenship] rule give way" for registrants using a uniform federal voter registration mail-in form (the "Federal Form"), the Tenth Circuit held that the NVRA likewise "preempts Kansas's DPOC requirement" as to motor-voter registrants. App.62. That decision was a straightforward application of this Court's precedent.

Second, applying this Court's *Anderson-Burdick* test, the Tenth Circuit held that Kansas's outlier DPOC requirement violates the Fourteenth Amendment. Based on the extensive record and the district court's careful factual findings—which Petitioner did not contest on appeal, *see* App.59—the Tenth Circuit determined that the DPOC requirement "unconstitutionally burdens the right to vote because the interests asserted … are insufficient to justify the burden it imposes on that right." App.7.

The decision below does not warrant review. Petitioner alleges no circuit split, and there is none.

Contrary to Petitioner's representations, no other state enforces a DPOC system like Kansas's. A ruling in this case would therefore be of little relevance to other states. The court of appeals correctly applied settled legal standards under the NVRA and the Fourteenth Amendment, and conducted a fact-sensitive analysis of Kansas's peculiar requirement. Certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

A. Voter Registration in Kansas

The NVRA generally requires states, including Kansas, to provide three means of voter registration: (1) "motor-voter" registration; (2) by mail, using a uniform Federal Form promulgated by the U.S. Election Assistance Commission ("EAC"); and (3) through offices that offer public assistance or disability services. 52 U.S.C. §§ 20503-06. Under the NVRA, voters applying via these means sign an attestation under penalty of perjury that they meet their state's qualifications for voting, including citizenship. 52 U.S.C. §§ 20504(c)(2)(C), 20506(a)(6)(A), 20508(b)(2).

In addition to these three NVRA-prescribed methods of registration, states are free to offer registration by other means. Kansas, for example, also permits registration in-person at state offices and online. The most common forms of first-time registration in Kansas are motor-voter (46.98%); followed by online (24.30%); and through "mail, email

or fax," which includes Federal Form registrants (8.89%).[1]

Kansas's DPOC law, Kan. Stat. Ann. § 25-2309(l), directs that a first-time "applicant shall not be registered" unless the applicant shows documentation such as "a birth certificate or … passport." Pet. 4. An implementing regulation, Kan. Admin. Regs. § 7-23-15, deems registrations "canceled" if DPOC is not presented within 90 days of the application being designated "incomplete." App.9.

The DPOC requirement was not enacted as a "bipartisan" standalone measure, Pet. 12, but as one part of a 30-page omnibus bill, the Secure and Fair Elections ("SAFE") Act, 2011 Kan. Sess. Laws Ch. 56 (795–825). The Act included 19 sections addressing a wide range of other subjects, including driver's license fees; identification requirements for voting; absentee voting processes, including signature verification and language assistance; pollbooks; provisional ballots; and recounts.

The Kansas requirement is unique. While three states have similar laws, two are inoperative and one is substantially less onerous. Alabama and Georgia have never implemented their laws,[2] and do not

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[1] U.S. Election Assistance Commission, *Election Administration and Voting Survey, 2018 Comprehensive Report, A Report to the 116th Congress* at 69 (June 2019), *available at* https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

[2] As Petitioner's predecessor acknowledged in separate litigation, neither Alabama nor Georgia has "enforc[ed] its proof of citizenship law." TRO Resp. Br. for Defendant-Intervenor Kan. Sec'y of State at 11, *League of Women Voters of the U.S. v. Newby*, Doc. 27, No. 16-cv-236 (RJL) (D.D.C. Feb. 21, 2016).

require DPOC for registration.[3] Arizona is the only other state that requires more than an attestation to establish citizenship for voter registration. But Arizona's law can be satisfied by simply writing down a "driver's license number," *or* by showing a citizenship document. *ITCA*, 570 U.S. at 24 (Thomas, J., dissenting) (citing Ariz. Rev. Stat. Ann. § 16–166(F)(1)–(6)). While Kansas's requirement prevented tens of thousands of citizens from registering to vote, there is no similar record in Arizona.

B. Prior Litigation Preempting Kansas's DPOC Requirement for Federal Form Registrants

Shortly after this Court's decision in *ITCA*, the Tenth Circuit held in separate litigation that Kansas's DPOC requirement is preempted by Sections 6 and 9 of the NVRA, 52 U.S.C. §§ 20505, 20508, as to registrants using the uniform Federal Form. *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1194–95 (10th Cir. 2014), *cert. denied*, 576 U.S. 1055 (2015).

In the *Kobach* case, the Tenth Circuit applied *ITCA*, in which this Court considered a challenge under Section 6 of the NVRA to Arizona's less stringent law. Section 6 compels states to "accept and use" the Federal Form, which requires "only that an applicant aver, under penalty of perjury, that he is a citizen," and "does not require documentary evidence

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[3] *See* Alabama Mail-In Voter Registration Form, *available at* https://www.sos.alabama.gov/sites/default/files/voter-pdfs/nvra-2.pdf?_ga=2.238944256.1246739288.1596646523-1759311593.1596646523; Georgia Application for Voter Registration, *available at* https://sos.ga.gov/admin/files/GA_VR_APP_2019.pdf.

of citizenship." *ITCA*, 570 U.S. at 4–5. Justice Scalia's majority opinion held that "a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate," and thus, Arizona's law demanding additional evidence of citizenship beyond an attestation must "give way" for Federal Form registrants. *Id.* at 15. *ITCA* further explained that a state could ask the EAC to modify the Federal Form to require DPOC and, if denied, would have "the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement" for voting. *Id.* at 20.

After *ITCA*, the Secretaries of State of Arizona and Kansas sued the EAC and attempted to demonstrate that the Federal Form's attestation was insufficient. But the Tenth Circuit found that they had "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." *Kobach*, 772 F.3d at 1197–98. The Tenth Circuit then reaffirmed that "the NVRA preempts Arizona's and Kansas's state laws insofar as they require Federal Form applicants to provide documentary evidence of citizenship to vote in federal elections." *Id.* at 1194.

This Court denied certiorari, *see* 576 U.S. 1055, leaving Kansas's DPOC requirement preempted as to Federal Form applicants.

C. The Effect of Kansas's DPOC Requirement

Following the *ITCA* and *Kobach* litigation, Kansas's DPOC requirement remained in effect for first-time registrants who applied through means

other than the Federal Form, including motor-voter registrants.

As of March 28, 2016, a total of 31,089 applicants had been denied registration for failure to provide DPOC, representing "approximately 12% of the total voter registration applications submitted since the law was implemented" in 2013. App.44. About one-half (16,802) of the denied applicants were motor-voter registrants. App.116.

The Plaintiffs in this case include individuals prevented from voting by the law. Donna Bucci, who works as a cook in a Kansas correctional facility, "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." App.11. Steven Wayne Fish "had difficulty [obtaining a birth certificate] because he was born on a decommissioned Air Force base," *id.*; ultimately, "it took nearly two years to find it." App.133. And Parker Bednasek, a student at the University of Kansas, did not have his birth certificate, which "was at his parent's home in Texas." App.10. Neither Ms. Bucci nor Mr. Fish were even informed of the DPOC requirement when they applied to register to vote. App.11, 134. Both were "unable to vote in the 2014 general election." App.11.

Others were disenfranchised by Kansas's implementation and enforcement of the DPOC requirement, which the district court found included:

> incorrect notices sent to applicants, incorrect information about registration status communicated over the phone by State employees, failure to accept DPOC by State employees, failure to

> meaningfully inform applicants of their responsibilities under the law, and evolving internal efforts to verify citizenship, that have all caused confusion….

App.222–23. Charles Stricker and T.J. Boynton's registration applications, for example, were cancelled under the law, even though both brought DPOC while applying. *See* App.47 n.7, App.137. They did not learn their registrations had been rejected until they showed up at the polls on Election Day in 2014 and were "not allowed to vote." App.12.

The DPOC requirement also "significantly hampered the Kansas League [of Women Voters'] voter registration work," App.12, because "many individuals do not have the necessary documents at hand." App.125. The time it took to assist applicants increased substantially, from 3–4 minutes per applicant before the law passed, to approximately an hour per applicant thereafter. App.125. The number of registrations successfully completed by the League's Wichita chapter declined by 90%. App.125.

The DPOC requirement was also applied unevenly. Only first-time registrants were required to submit DPOC, Kan. Stat. Ann. § 25-2309(n), a disproportionately young and politically unaffiliated population, whom the district court found is less likely "to shoulder the costs associated with voter registration." App.119–20.

The DPOC law contains a provision that is "not publicized," App.105, which purports to permit applicants lacking DPOC to submit other "evidence [they] believe[] demonstrates … citizenship," Kan. Stat. Ann. § 25-2309(m). The procedure requires a

hearing before a three-member board composed of the Lieutenant Governor, the Attorney General, and the Secretary of State. App.9. This "byzantine" procedure, App.49, is "lengthy and burdensome," App.141, and "has only been used five times," App.49. One individual who used this process was "represented by retained counsel." App.142. Another applicant took "more than five months" to complete the process—and had to "pay $8 for the State of Arkansas to search for her birth certificate to prove that it did not exist"; collected "her baptismal record" and school records in another state; and relied on a friend "to drive her 40 miles to the hearing." App.141–42.

D. Noncitizen Registration in Kansas

The ostensible purpose of the DPOC requirement is to prevent noncitizens from fraudulently registering to vote. Yet Kansas's own expert at trial estimated that, of the more than 31,000 applicants blocked by the requirement, "more than 99% … were citizens who … would have been able to vote but for the DPOC requirement," and that the "number of suspended applications that belonged to noncitizens was 'statistically indistinguishable from zero.'" App.58–59.

Furthermore, Kansas "only identified 39 noncitizens who had successfully registered to vote" in the state since 1999, Pet. 11, representing "0.002% of all registered voters in Kansas as of January 1, 2013." App.16. Far from constituting evidence of fraud, the district court found that "many of these cases reflect[ed] isolated instances of avoidable administrative errors on the part of government employees and/or misunderstanding on the part of applicants." App.156. One instance, for example,

involved a driver's license applicant who expressly stated "they were not a United States citizen," but a "[s]tate employee nonetheless erroneously completed the voter registration application in the face of clear evidence that the applicant was not qualified." App.156.

Putting the 39 instances of noncitizen registration in Kansas into perspective, the Kansas voter file includes more than 100 individuals with purported birth dates in the nineteenth century, and more than 400 individuals with purported birth dates *after* their dates of registration. App.17. The court thus found that "administrative anomalies" rather than fraud "account for many—or perhaps even most" of these isolated cases. App.57.

E. *Fish I*: Preliminary Injunction

In 2016, the Tenth Circuit affirmed the district court's decision preliminarily enjoining the DPOC requirement as to motor-voter registrants ("*Fish I*"). App.242–43.

The court began with the text of Section 5 of the NVRA, which provides that a "state motor voter form 'may require only the minimum amount of information necessary to … enable State election officials to assess the eligibility of the applicant….'" App.243–44 (quoting 52 U.S.C. § 20504(c)(2)(B)(ii)). The Tenth Circuit observed that "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." App.244 (citing 52 U.S.C. § 20504(c)(2)(C)). Given that *ITCA* held that "the NVRA … require[s] [states] to accept Federal Forms unaccompanied by DPOC," so long as the applicant

signs a sworn attestation of U.S. citizenship, App.247, the Tenth Circuit reasoned that such an attestation constitutes "the *presumptive* minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties." App.244.

The Tenth Circuit acknowledged that, under *ITCA*, requiring a state to register applicants based on an attestation alone could "raise a Constitutional doubt," but only if it "precluded [the state] 'from obtaining information necessary for enforcement' of the state's voter qualifications." App.247 (quoting *ITCA,* 570 U.S. at 17). Following that guidance, the Tenth Circuit held that the presumption can be overcome, and a state may impose a DPOC requirement on motor-voter applicants, with "a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement." App.244.

The Tenth Circuit concluded that Kansas had "fall[en] well short" of such a showing given the small number of noncitizen registrations in Kansas. App.313. However, it remanded to permit Kansas to adduce "evidence … that a substantial number of noncitizens have registered to vote in Kansas during a relevant time period." App.322. Kansas did not seek certiorari.

The Kansas Secretary of State was subsequently held in civil contempt because he "failed to ensure that voter registration applicants covered by the preliminary injunction order became fully registered," and refused to provide "accurate and consistent information … to county election officials, individuals impacted by the preliminary injunction,

and the public." *Fish v. Kobach*, 294 F. Supp. 3d 1154, 1168 (D. Kan. 2018).

F. *Fish II* / *Bednasek*: Permanent Injunction

On remand, the district court conducted a seven-day trial featuring 21 witnesses, and issued a careful 118-page opinion with detailed findings of fact, App.81–237. The court ruled that the DPOC law violates both Section 5 of the NVRA and the Fourteenth Amendment. The Tenth Circuit affirmed ("*Fish II*").

First, the Tenth Circuit reaffirmed that "[S]ection 5 of the NVRA preempts Kansas's DPOC requirement" as to motor-voter applicants. App.62. As noted, *supra* n.1, motor-voter registrants constitute almost one-half of first-time registrants in Kansas.

Second, the Tenth Circuit held, based on factual findings uncontested on appeal, that the DPOC requirement violates the Fourteenth Amendment, thus precluding its enforcement as to Kansas's remaining registrants. The court followed the instruction in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), to apply the *Anderson-Burdick* balancing test, "examin[ing] the burden that [the DPOC requirement] places on the right to vote and then weigh[ing] the government's asserted interests for imposing that law against that burden." App.30.

The Tenth Circuit began with this Court's guidance that "when a more substantial burden is imposed on the right to vote, our review of the government's interests is more 'rigorous[],'" App.40 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Here, there was "concrete record evidence of the disenfranchisement of … 31,089 would-be voters"

in Kansas, including individuals who lacked or faced difficulty in obtaining DPOC. App.50. The Tenth Circuit determined that this case therefore "presents fundamental differences with *Crawford*," App.47, where the plaintiffs "had not introduced evidence of a single, individual Indiana resident who would be unable to vote" as a result of Indiana's voter ID law, 553 U.S. at 187 (plurality opinion of Stevens, J.). Here, by contrast, the record contained evidence of voters who "actually were disenfranchised" in the 2014 midterms. App.44. These "differences … ma[d]e the burden on the right to vote more substantial here than in *Crawford*." App.47. Accordingly, because "the burden imposed on the right to vote by the DPOC requirement was significant," the Tenth Circuit held that it "requires heightened scrutiny." *Id.*

Turning to the state's interests, the Tenth Circuit acknowledged that they were "legitimate in the abstract," App.53, but found a "lack of concrete evidence" that the DPOC requirement actually advanced those interests. App.56. There was no evidence that the DPOC requirement prevented noncitizen registration or helped maintain accurate voter rolls, as Kansas's own expert testified that the number of noncitizens prevented from registering by the law was "statistically indistinguishable from zero," and that "more than 99%" of the blocked registrants were in fact U.S. citizens eligible to vote. App.58. And the law had the "effect of eroding, instead of maintaining, confidence in the electoral system," App.59, because it blocked "eligible Kansans[]" from voting, while "misinformation from State officials" left Kansans unsure "about whether they are registered to vote." App.222–23.

Petitioner "d[id] not contest [these findings] as clearly erroneous." App.59. In light of the uncontested record, the Tenth Circuit held that it "cannot conclude '[that the state's] interests make it necessary to burden the plaintiff's rights.'" App.56 (quoting *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))). It "thus ma[d]e the 'hard judgment,' that the DPOC requirement unconstitutionally burdens the right to vote…." App.59 (quoting *Crawford*, 553 U.S. at 190 (plurality opinion of Stevens, J.)).

REASONS FOR DENYING WRIT

Petitioner does not identify any split among circuit courts or state courts of last resort. Instead, he asserts that this case "implicates 'an important question of federal law,'" Pet. 12 (quoting S. Ct. R. 10(c)), and that the decision below was erroneous.

Petitioner is wrong on both counts. Kansas is the only state that has blocked tens of thousands of citizens from registering to vote based on a documentation requirement. That is because Kansas is the only state that requires voter registration applicants to establish citizenship by presenting a document—as opposed to signing a sworn attestation under penalty of perjury, or writing down a driver's license number (which Arizona—the only other state requiring more than an attestation—permits).

This case therefore does not question a state's right to establish citizenship as a qualification for voting. All states do that. Nor does it question the ability of states to require "proof of United States citizenship." Pet. i. All states requiring voter registration do that as well, almost always through a sworn attestation. Rather, this case involves only

Kansas's unique *manner* of requiring such proof. And this Court explained in *ITCA* that questions about the manner of proving citizenship do not generally implicate a state's authority under the Qualifications Clause. *See* 570 U.S. at 8–9, 17–18.

Moreover, both questions presented involve the fact-bound application of settled legal standards. And the Tenth Circuit's ruling is correct on both counts. The extensive trial record and the district court's unchallenged factual findings established that Kansas's DPOC requirement prevented 31,089 Kansans from registering to vote, while Kansas's own expert estimating that the number of noncitizens prevented from registering by the law was "statistically indistinguishable from zero." App.58. Based on these uncontested facts, the Tenth Circuit correctly determined that the DPOC requirement could not pass constitutional muster under the *Anderson-Burdick* balancing test.

The Tenth Circuit's NVRA ruling is also a straightforward application of this Court's precedent. In *ITCA*, this Court ruled that the NVRA entitles Federal Form applicants to register to vote based on an attestation, without additional evidence of citizenship—absent a showing by the state that additional evidentiary requirements are "necessary to enforce its voter qualifications." 570 U.S. at 17. The Tenth Circuit correctly ruled that Section 5 of the NVRA—which similarly provides for motor-voter registration based on "an attestation" of citizenship, 52 U.S.C. § 20504(c)(2)(C)—preempts the DPOC requirement. Kansas failed to make the requisite showing in *Kobach* that an attestation was insufficient to enforce its citizenship qualification for

voting, 772 F.3d at 1196–97, and it again failed to do so in this case.

I. THE DECISION BELOW IS NARROW, FACT-BOUND, AND SPECIFIC TO KANSAS

The decision below does not implicate voter registration practices beyond Kansas. Moreover, the Kansas law at issue had already been rendered inoperative in part through separate litigation, in which this Court denied certiorari—as is common in voting rights cases. And, contrary to Petitioner's assertions, this case does not implicate the constitutional authority of states to set qualifications for voting.

A. Kansas is the only state that has blocked tens of thousands of citizens from registering due to a DPOC requirement. Although Petitioner repeatedly references *Crawford*, that case involved a "voter ID" law, and this case does not. Thirty-six states[4] require voters to present identification while voting, such as a driver's license or a non-photo ID, and this Court rejected a facial constitutional challenge to Indiana's voter ID law in *Crawford*. Kansas's DPOC requirement is different. It requires people to show (at the point of registration, not voting) a *citizenship document*, usually "a birth certificate or passport," App.8, which almost no one routinely carries, and is often difficult (or for some people, impossible), to locate or retrieve.

[4] Nat'l Conf. of St. Legs., *Voter Identification Requirements / Voter ID Laws*, (Aug. 25, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

Every state sets citizenship as a voter qualification, but no other state imposes such an onerous requirement for registration. Petitioner claims that "[a]t least three other States"—Arizona, Alabama, and Georgia—have enacted similar laws. Pet. 15. Even prior to this litigation, however, Georgia and Alabama never enforced their respective requirements; both states permit registration based solely on an attestation of citizenship, without requiring DPOC.[5] Arizona is the only state besides Kansas requiring more than an attestation to establish citizenship, but its law can be satisfied by providing a "driver's license number," *ITCA*, 570 U.S. at 24 (Thomas, J., dissenting). Arizona's law does not affect motor-voter applicants (who have or receive driver's license numbers at the time of application), and is thus not implicated by the Tenth Circuit's NVRA decision. And because Arizona's requirement can be satisfied by simply jotting down a driver's license number rather than producing or submitting a document, it does not present the same burden on voters for purposes of an *Anderson-Burdick* analysis. While Kansas blocked tens of thousands of citizens from registering, there is no similar record in Arizona.

Kansas's requirement was also unusual because, unlike Indiana's voter ID law, it was not "uniformly impose[d] on all voters." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). Rather, it applied only to some voters (first-time registrants), and was implemented in an inconsistent and confusing manner. Voters who sought to comply were disenfranchised due to "misinformation," App.222, and "bureaucratic snafus in Kansas's

[5] *See supra* n.2–3.

implementation of the DPOC regime," which Petitioner did not contest were "part and parcel of that regime." App.47 n.7.

In sum, Kansas is the only state requiring registrants to present an actual document to establish citizenship; it implemented its requirement in a highly irregular and inconsistent manner; and it disenfranchised some 31,000 citizens. No other state has a similar record. The decision below was simply a fact-bound determination applying settled law to the record of a seven-day trial concerning one state's requirement, which caused massive citizen disenfranchisement and prevented negligible attempted noncitizen registration. It does not merit this Court's review.

B. While Petitioner asserts that this Court has "repeatedly granted certiorari to review voting rights disputes without any noted conflict among the circuits," Pet. 15, he neglects to mention that this Court *denied* certiorari in the closest case to this one, which set aside another portion of Kansas's DPOC requirement. *See Kobach*, 576 U.S. 1055.

There, as here, the petitioner was the Kansas Secretary of State. In *Kobach*, he sought to alter the Federal Form so that Kansas could impose its DPOC requirement on individuals using that form to register. There, as here, the petitioner argued that the decision below—which resulted in the partial preemption of Kansas's law—interfered with the state's authority to "set[] the qualifications for electors in federal elections." *Kobach*, No. 14-1164, Pet. for Writ Cert., 2015 WL 1322263, at *33 (U.S. March 21, 2015). And there, as here, the petitioner asserted that review by this Court was necessary to

provide "guidance to [Kansas and Arizona], as well as to Alabama and Georgia." *Id.* at *35. This Court denied certiorari. *See Kobach,* 576 U.S. 1055.

Here, Petitioner does not assert that *Kobach* was wrongly decided—and does not challenge its basic proposition that, under federal law, states must register at least some applicants based on an attestation alone. Review of the decision below in this case would therefore have limited effect.

In fact, this Court has denied review in "voting rights disputes" far more frequently than it has granted it, including in cases where state voting practices were deemed to violate federal law.[6] Indeed, Petitioner cites only three certiorari grants, Pet. 15–16, and they are all easily distinguishable.

In *ITCA,* the petitioner argued that the "Courts of Appeals are split concerning the appropriate preemption analysis for challenges to state laws under

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[6] *See, e.g.*, *Missouri St. Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (invalidating at-large elections under Voting Rights Act (VRA)), *cert. denied*, 139 S. Ct. 826 (2019); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (holding that Texas's voter ID law violated VRA), *cert. denied*, 137 S. Ct. 612 (2017); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (invalidating voter ID law and other provisions), *cert. denied*, 575 U.S. 950 (2015); *United States v. Blaine Cty.*, 363 F.3d 897 (9th Cir. 2004) (at-large elections violated VRA), *cert. denied*, 544 U.S. 992 (2005); *United States v. Charleston Cty.,* 365 F.3d 341 (4th Cir. 2004) (same), *cert. denied*, 543 U.S. 999 (2004); *Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000) (same), *cert. denied*, 531 U.S. 1150 (2001); *Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000) (same), *cert. denied*, 531 U.S. 944 (2000); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) (permanent injunction requiring California to comply with NVRA), *cert. denied*, 516 U.S. 1093 (1996).

the elections clause," *ITCA*, No. 12-71, Pet. for Writ Cert., 2012 WL 2930906, at *22 (U.S. July 16, 2012). *See also id.* at *24 (arguing that the Ninth Circuit's decision conflicted with decisions of the Fifth and Seventh Circuits). *ITCA* resolved that split by affirming the Ninth Circuit's approach and explaining that "the presumption against pre-emption" from "Supremacy Clause cases" does not apply to "Elections Clause cases," because

> [t]here is good reason for treating Elections Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to "make or alter" state election regulations. Art. I, § 4, cl. 1.

570 U.S. at 13–14. Unlike in *ITCA*, there is no split here.

Husted v. A. Philip Randolph Institute, 138 S. Ct. 1833 (2018), concerned whether, under the NVRA, a state may use "voter inactivity as part of its [voter list] maintenance program," a question that, as Ohio noted in its petition, affected at least *eleven states*. *See Husted*, No. 16-980, Pet. for Writ. Cert. at 17–18 (U.S. Feb. 3, 2017). And the lower court decision in *Husted* had subjected states to "conflicting litigation"—"[o]n one hand … sued by parties claiming that they have violated … [the NVRA] by insufficiently maintaining registration lists," and "[o]n the other hand, States have been sued by those arguing that these efforts themselves violate the NVRA." *Id.* at 19–20. This case, by contrast, involves a single outlier state, and no conflicting litigation.

Crawford also affected many states: the petition there identified 26 states that had a voter ID requirement, and argued that, "[g]iven the fact that restrictive identification requirements are being implemented and considered throughout the United States, the question presented … is of great national importance." *Crawford*, No. 07-21, Pet. for Writ Cert., 2007 WL 1957762, at *15 (U.S. July 2, 2007).

Similarly, this Court's recent grants in *Brnovich v. Democratic National Committee*, No. 19-1257, and *Arizona Republican Party v. Democratic National Committee*, No. 19-1258, Pet. for Writ Cert., 2020 WL 2095042 (U.S. April 27, 2020), involved petitions alleging a circuit split, and concerned voting requirements operative in many states. *See id.* at *15–*18 (asserting split between the Ninth Circuit's decision and decisions of the Fourth, Sixth, and Seventh Circuits); *id.* at *21–*22 (arguing the decision below "would invalidate over three dozen election laws across the country," referring to 26 states that do not count out-of-precinct ballots, and more than a dozen that restrict absentee ballot collection).

By contrast, Kansas's DPOC requirement stands alone. As in *Kobach*, there is no basis for certiorari here.

C. Petitioner incorrectly suggests that this case warrants certiorari because it implicates the Qualifications Clause. But this case does not involve whether states can require voters to be citizens, or require "proof" of U.S. citizenship, Pet. i. All 50 states set citizenship as a voter qualification; and all of the 49 states that require voters to register require applicants to prove they are citizens. This case involves only the uniquely stringent *manner* of proof

that Kansas requires, which does not implicate the Qualifications Clause.

Petitioner's argument is refuted by *ITCA*, which explained that there is a distinction between *qualifications* for voting, and the *manner* in which those qualifications may be enforced during voter registration. States have authority over the former under the Qualifications Clause, which provides that the qualifications for voting in federal elections in a state shall be the same as those for voting for "'the most numerous Branch of the State['s] Legislature.'" *ITCA*, 570 U.S. at 16; U.S. Const. art. I, § 2, cl. 1.

But Petitioner is incorrect that states also have "exclusive power … to … verify the qualifications to vote." Pet. 13. The Elections Clause provides that "Congress may at any time by Law make or alter" regulations concerning "The Times, Places and Manner" of federal elections. U.S. Const. art I, § 4, cl. 1. As *ITCA* explained, this power "embrace[s] authority to provide a complete code for congressional elections,' including, … regulations relating to 'registration.'" 570 U.S. at 8–9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932), and "to pre-empt state legislative choices" in that regard, *id.* at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

Thus, *ITCA* established that Congress can provide that an attestation of citizenship is sufficient to demonstrate eligibility to vote in a federal election. Kansas—like every other state—has set citizenship as a voter qualification. But *ITCA* provides that, for purposes of federal elections, Congress has the power to set requirements for verifying that qualification, and inconsistent state requirements, like Kansas's DPOC law, must "give way." *Id.* at 15.

To be sure, the Court in *ITCA* acknowledged that a Qualifications Clause issue might arise if a state were altogether "preclude[d] … from obtaining the information *necessary* to enforce its voter qualifications." 570 U.S. at 17 (emphasis added). But that is a question of fact, and here the state's own expert testified that the Kansas DPOC requirement prevented essentially "zero" noncitizens from registering to vote. App.17. On that record, one cannot plausibly argue that the decision below "precludes" Kansas from enforcing its citizenship qualification for voting.

II. THE TENTH CIRCUIT'S CONSTITUTIONAL RULING IS A STRAIGHTFORWARD AND CORRECT APPLICATION OF *ANDERSON-BURDICK*

Certiorari is inappropriate to address the first question presented because there is no dispute that *Anderson-Burdick* sets out the applicable legal standard for constitutional challenges to voting restrictions. Petitioner objects only that the Tenth Circuit applied that fact-intensive standard incorrectly. But the application of an established standard to facts does not constitute a basis for certiorari under Supreme Court Rule 10, even if the court below erred in applying it. And, in any event, it did not.

A. The "parties agree that th[e] *Anderson-Burdick* balancing test applies." App.33. That test requires courts to make a record-based "hard judgment," weighing the burden on the right to vote against "the interests put forward by the State as justifications for the burden imposed." *Crawford*, 553 U.S. at 190 (plurality opinion of Stevens, J.). "[T]he

rigorousness of [a court's] inquiry into the propriety of [a voting restriction] depends upon the extent to which [it] burdens" voters' rights. *Burdick*, 504 U.S. at 434. Any burden on the fundamental right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (plurality opinion of Stevens, J.) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

There is no dispute that the Tenth Circuit stated and applied the *Anderson-Burdick* balancing test to the extensive record in this case, App.33–36—generated by a seven-day bench trial featuring 21 witnesses, App.83. The Tenth Circuit made the requisite "hard judgment" based on the district court's thorough and detailed factual findings, App.102–82, which Petitioner conceded on appeal, App.44. While Petitioner argues that the Tenth Circuit applied the *Anderson-Burdick* test incorrectly, its fact-bound determination does not warrant this Court's review.

Petitioner suggests in a footnote that this Court should "overrule or refine the *Anderson-Burdick* test." Pet. 16 n.3. But this Court adopted a fact-sensitive balancing test in *Anderson*, *Burdick*, and *Crawford* for good reason, and Petitioner provides no basis for abandoning decades of precedent in favor of the "litmus test" the Court rejected in *Crawford*, 553 U.S. at 190 (plurality opinion of Stevens, J.). In any event, if this Court were inclined to revisit the *Anderson-Burdick* standard, a better vehicle would be a case like those cited in the amicus brief submitted by the State of Texas, in which circuit courts purportedly "reached inconsistent conclusions" about similar or identical election laws, *see* Br. for States as Amici Curiae at 9–12, rather than this case—which involves a *sui generis*

and particularly burdensome Kansas requirement; factual findings that officials' inconsistent and unreasonable enforcement actions caused additional U.S. citizens to be wrongly disenfranchised; and no circuit split.

B. In any event, the Tenth Circuit correctly applied *Anderson-Burdick* to hold that Kansas's unique DPOC registration requirement, the most onerous in the country, does not pass constitutional muster. As instructed by *Crawford*, the court first "examine[d] the burden that [Kansas's DPOC requirement] places on the right to vote and then weigh[ed] the government's asserted interests for imposing that law against that burden." App.30.

1. The court properly found that the nature of the Kansas law and the record in this case were dramatically different from those in *Crawford*. There, the plaintiffs "had not introduced evidence of a single, individual Indiana resident who would be unable to vote …." 553 U.S. at 187 (plurality opinion of Stevens, J.) (citations omitted). Consequently, "[t]he record sa[id] virtually nothing about the difficulties faced by" voters under Indiana's voter ID law. *Id.* at 201. Here, by contrast, there was "concrete record evidence of the disenfranchisement of … 31,089 would-be voters," including "extensive testimony about individual voters like Mr. Fish and Ms. Bucci who lacked DPOC or faced significant costs to obtain it," App.50, and who "actually were disenfranchised"—facts that Petitioner conceded on appeal. App.44.

Petitioner claims that "[i]n *Crawford*, there were over 40,000 individuals who did not have photo identification." Pet. 19. But this Court declined to

consider the 40,000 figure in *Crawford* because it was an "estimate[]" divined by the district court from "extrarecord" sources, and not subject to adversarial testing. 553 U.S. at 187–88, 200; *see also* App.45. Furthermore, the court's pre-enforcement estimate did not account for "free photo identification" cards obtained under the statute for voting purposes. 553 U.S. at 188 n.6, 202 n.20 (plurality opinion of Stevens, J.); *see also* App.51. *Crawford* therefore concluded that "[o]n the basis of the evidence in the record it [was] not possible to quantify" the number of individuals affected by the photo ID law, 553 U.S. at 200 (plurality opinion of Stevens, J.), let alone "how many voters actually would be turned away from the polls." App.51.

Here, by contrast, the district court made careful post-enforcement factual findings, based on Kansas's own data, of a "significant burden quantified by the 31,089 voters who had their registration applications canceled…." App.43. Petitioner's unfounded speculation that these voters may have suffered from "apathy," Pet. 20, is belied by the uncontested factual finding that more than "30,000 Kansans took affirmative and concrete steps to register to vote and were disenfranchised by application of the DPOC requirement." App.52. There was no comparable evidence in *Crawford* of *any* voters turned away by the ID requirement. *See* 553 U.S. at 187.

Petitioner next argues that Kansas's DPOC requirement is categorically constitutional under *Crawford*, because "voters in Indiana … had to present a birth certificate, [or] passport … to obtain …

photo identification." Pet. 17.[7] But Indiana voters "without photo identification may cast provisional ballots that will ultimately be counted," by signing an "affidavit" at the county clerk's office after election day—a safety valve that *Crawford* found "mitigated" the burden of compliance with the law. 553 U.S. at. 199 (plurality opinion of Stevens, J.). In other words, voters in *Crawford* were allowed to establish their identity and vote without photo ID (and thus, without DPOC) by simply *signing an attestation*.

Petitioner also notes that Kansas voters have to present DPOC one time when they register, while voters in Indiana must show ID every time that they vote. *See* Pet. 18. But that ignores the fundamental difference in the types of documents required. As the Tenth Circuit noted, many voters "no doubt ... already would have … their driver's licenses with them" when they voted, because "many Indiana voters ... would have driven to the polls …." App.49. By contrast, almost no one regularly carries their birth certificate or passport, and thus citizens are unlikely to have them when they happen upon a voter registration opportunity like a registration drive. *See, e.g.*, App.12, 125 (recounting evidence that the Kansas League of Women Voters' voter registration work plummeted, including by 90% in Wichita, after implementation of the DPOC requirement). Many people do not have a passport, and many have substantial difficulty finding or obtaining their birth certificate. App.10–11, 132–34. Here, the uncontested post-enforcement record demonstrates that Kansas's DPOC requirement

[7] By contrast, Kansans can renew driver's licenses without presenting DPOC or proof of legal presence. *See* App.108 n.48.

imposes a much greater burden than Indiana's ID requirement.

Petitioner notes that Kansans without DPOC can, in theory, request a hearing before three top executive branch officials (the Lieutenant Governor, Attorney General, and Secretary of State, App.8–9). Pet. 22. But the district court found—and Petitioner does not contest—that the Kansas hearing process is "lengthy and burdensome," requiring months-long efforts to collect documents like baptismal records, spend money, drive dozens of miles, and/or retain counsel. App.141–43. Of the more than 30,000 Kansans who were blocked from registering because of the DPOC requirement, only five ever used this "byzantine" procedure. App.49.

And Petitioner "fails to appreciate the different contexts in which the laws operate." Pet. 22. "[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." App.213. Kansans denied registration by the DPOC requirement could not vote on Election Day, period.

2. Finally, the district court did *not* "recognize[] that the proof of citizenship law advanced the State's legitimate interests," as Petitioner contends. Pet. 9. In fact, the district court concluded the *opposite*. While both the district court and the Tenth Circuit recognized the state's interests as "legitimate in the abstract," App.53, they found a "lack of concrete evidence" that the DPOC requirement actually advanced Kansas's asserted interests, and found that it instead *undermined* several of them.

App.56. That determination was based on extensive factual findings, none of which Petitioner contested on appeal.

First, "the district court found essentially no evidence that the integrity of Kansas's electoral process had been threatened." App.56. Very few noncitizens had become registered, and many who did were themselves the victims of administrative error. *See* App.57. The district court rejected the contrary testimony of one of Kansas's proffered experts because it was "premised on several misleading and unsupported examples," and the "record [wa]s replete with" evidence of his "bias," including "myriad misleading statements" and "preordained opinions." App.18.

Second, the district court found that the DPOC requirement resulted in *less accurate* voter rolls, because "more than 99% of the individuals" whose registration applications were blocked by the law were in fact U.S. citizens, while the number of noncitizens prevented from registering by it was "statistically indistinguishable from zero." App.174.

And *third*, the district court found that the DPOC requirement "*erodes* confidence in the electoral system" because it blocks "eligible Kansans[]" from becoming registered and having their votes counted, and because the law's implementation was marred by "misinformation from State officials" that left Kansans unsure "about whether they are registered to vote." App.222–23 (emphasis added).

Petitioner does not contest any of these findings. The Tenth Circuit correctly concluded that the absence of evidence that the DPOC requirement furthers the state's asserted interests was fatal,

because, under *Anderson-Burdick*, the concrete record of a "burden on the right to vote evinced by the approximately 30,000 disenfranchised voters elevates 'the rigorousness of [the court's] inquiry into the propriety of [the DPOC requirement].'" App.59 (quoting *Burdick*, 504 U.S. at 434). Given this record of disenfranchisement, the state "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (citations omitted).

Petitioner failed to carry that burden. While he may disagree with the district court's factual findings, Petitioner does not contest them as clearly erroneous, nor would such error constitute a basis for certiorari. S. Ct. R. 10.

III. THE TENTH CIRCUIT'S NVRA RULING IS A STRAIGHTFORWARD AND CORRECT APPLICATION OF *ITCA*.

Certiorari is also inappropriate on the second question presented, because the Tenth Circuit's NVRA ruling simply applied the standard set forth by this Court in *ITCA* for determining whether federal legislation enacted pursuant to the Elections Clause preempts state voting regulations. And the court correctly concluded that, as in *ITCA*, the state's additional evidence-of-citizenship requirement is preempted by the NVRA's attestation requirement, and must "give way." 570 U.S. at 15.

A. The preemption decision is a straightforward application of *ITCA*. That case recognized that, "[w]hen Congress legislates with

respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States." 570 U.S. at 14. This Court thus rejected Arizona's argument that a "presumption against pre-emption" applies to Elections Clause legislation. *Id.* at 13. Instead, the Court held that "Elections Clause legislation, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Id.* at 14 (internal quotation marks and citation omitted). Then, applying Section 6 of the NVRA—which governs voter registration using the Federal Form—the Court held that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Id.* at 15 (citation omitted). Accordingly, Arizona's evidence-of-citizenship requirement had to "give way" for Federal Form users. *Id.*

The Tenth Circuit employed the same preemption standard here in applying an analogous provision of the statute—Section 5, which governs motor-voter registration. Citing *ITCA*, the Tenth Circuit observed 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.'" App.63 (citation omitted). It then arrived at the same result that this Court reached in *ITCA*—*i.e.*, that the state's additional evidence-of-citizenship requirement "is preempted" in favor of the NVRA's "attestation requirement." App.80.

B. As Petitioner acknowledges, "Section 5 [of the NVRA] specifies what may, may not, and must appear on a State's [motor-voter] application." Pet. 6. It provides that, as part of the motor-voter process, states "may require *only the minimum* amount of information necessary to … assess the eligibility of the applicant" 52 U.S.C. § 20504(c)(2)(B) (emphasis added). The text of Section 5 is nearly identical to the provisions governing the Federal Form at issue in *ITCA*; if anything, Section 5 is stricter. *Compare with* 52 U.S.C. § 20508(b)(1) ("The mail voter registration form … may require only such identifying information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant…."). And like the Federal Form at issue in *ITCA*, the motor-voter registration process is based on "an attestation" that the applicant meets the state's "eligibility requirement[s]" for voting, "including citizenship." 52 U.S.C. § 20504(c)(2)(C). *Compare with id.* § 20508(b)(2) (identical attestation requirement for Federal Form).

Given *ITCA's* ruling that "the NVRA … require[s] [states] to accept Federal Forms unaccompanied by DPOC" so long as the applicant signs a sworn attestation of U.S. citizenship, App.247, the Tenth Circuit held that this attestation of citizenship constitutes "the presumptive minimum amount of information necessary for [state election officials] to carry out [their] eligibility-assessment and registration duties …." App.14 (internal quotation marks and citation omitted). It thus "preempts Kansas's DPOC requirement" for motor-voter registrants. App.62.

C. Petitioner's objections are unavailing. First, Petitioner argues that the NVRA does not expressly prohibit states from requiring DPOC. But Petitioner's reliance on a presumption against preemption ignores *ITCA*'s holding that Elections Clause legislation "necessarily displaces some element" of state law, and that the NVRA's attestation requirement *necessarily* preempts additional state evidence-of-citizenship requirements. 570 U.S. at 14–15. In limiting states to "*only the minimum* amount of information necessary to … assess the eligibility" of motor-voter applicants, 52 U.S.C. § 20504(c)(2)(B) (emphasis added), Congress was not required to identify every conceivable registration barrier it prohibited. *See United States v. Turkette*, 452 U.S. 576, 593 (1981) (legislation's broad terms must be given effect absent clear evidence of contrary congressional intent).

Next, Petitioner argues that states may require any information or documents that state officials "deem necessary," under a "loose" understanding of that term, including anything "merely helpful and appropriate." Pet. 26–28. That limitless interpretation contorts the plain meaning of the text, rendering the words "only the minimum amount of information" null and void. App.285; *see also* App.283 (quoting definitions of "minimum" as the "lowest possible amount or degree permissible or attainable"). While Petitioner asks for "deference" to his view that DPOC is helpful, Pet. 28, a state's "determination of … compliance with federal law is not entitled to … deference …." *Amisub (PSL), Inc. v. State of Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989).

In *ITCA*, this Court rejected the same argument raised by Petitioner here, because it

undermines the express purpose of the NVRA. If states may "demand of [voter registration] applicants every additional piece of information," then the NVRA would "cease[] to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" 570 U.S. at 13 (quoting 52 U.S.C. § 20501(b)(1)). While Petitioner objects to the wisdom of attestation-based registration under the NVRA, "[i]t is not [the Court's] prerogative to judge the reasonableness of that congressional judgment …." *Husted*, 138 S. Ct. at 1848.[8]

Petitioner complains that the Tenth Circuit created an "an extra-textual standard." Pet. 8. It did not. The Tenth Circuit simply followed *ITCA*, which explained that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 570 U.S. at 17. It thus held that a state must have "the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement,"

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[8] The cases cited by Petitioner are inapposite. *Young v. Fordice*, 520 U.S. 273 (1997), was "a VRA preclearance case," 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." App.310–11. And *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), concerned the Privacy Act's authorization for certain states to continue requiring social security numbers from voter registration applicants, a specific exemption that "survive[s] the more general provisions of the NVRA." *Id.* at 756. The Federal Form specifically "allows states to instruct applicants to provide their full social security numbers in the 'ID number' box…." *Gonzalez v. Arizona*, 677 F.3d 383, 400 n.26 (9th Cir. 2012), *aff'd sub nom.*, *ITCA*, 570 U.S. 1.

and that, if a state can make such a showing, the Federal Form must be modified to incorporate a state's requirements for additional evidence of citizenship. *Id.* at 20. Afterwards, Kansas tried and "failed to meet [its] evidentiary burden of proving that [it] cannot enforce [its] voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form." *Kobach*, 772 F.3d at 1197–98, *cert. denied*, 576 U.S. 1055.

Here, the Tenth Circuit applied this same logic to the motor-voter process. Just as in *ITCA*, the Tenth Circuit held that a state may require additional evidence of citizenship if it can make a factual showing "that the attestation requirement is insufficient" to enforce its citizenship qualification for voting. App.66–67 (internal quotation marks and citation omitted). And here, as in *Kobach*, Petitioner simply "failed to demonstrate that substantial numbers of noncitizens successfully registered to vote notwithstanding the attestation requirement." App.76.

Next, Petitioner argues that the registration of a single noncitizen would justify the DPOC requirement as "necessary" under Section 5. *See* Pet. 29–30. But that argument is foreclosed by *ITCA*'s holding that a state seeking to impose additional evidence-of-citizenship requirements beyond an attestation must show that it has been altogether "precluded" from enforcing its voter qualifications. 570 U.S. at 17. In any event, even accepting Petitioner's construction of the statute, Kansas's own expert estimated that the DPOC requirement prevented "zero" noncitizens from registering. App.16–17. And Petitioner's reliance on Section 8 of the NVRA, which requires states to "ensure that any

eligible applicant is registered," Pet. 30 (quoting 52 U.S.C. § 20507(a)(1)), is ironic in light of the fact that the DPOC requirement prevented more than 31,000 *eligible* Kansans from becoming registered.

Finally, Petitioner complains that the decision below will cause states to "creat[e] two sets of voter lists"—in which some voters (those who comply with the NVRA, but not Kansas DPOC requirement) may vote in federal elections only, while those who submit DPOC may vote in both state and federal elections. Pet. 31. Petitioner made the same complaint in his rejected *Kobach* petition. *See Kobach*, No. 14-1164, Pet. for Writ Cert., 2015 WL 1322263, at *7 (U.S. Mar. 21, 2015).

The possibility of states having two-track registration systems is not a consequence of the decision below, but of our federalism and the limits of the NVRA. While the NVRA governs registration only for federal elections, "[s]tates retain the flexibility to design and use their own registration forms," which "may require information the Federal Form does not," and "which can be used to register voters in both state and federal elections." *ITCA*, 570 U.S. at 12. As Petitioner acknowledges, Arizona established such a two-track system in response to *ITCA*, a choice that has nothing to do with the decision below. *See* Pet. 31 n.7. In any event, Kansas does not have two different voter lists, but rather operates a single registration system, pursuant to state law. *See id*.

CONCLUSION

The Petition should be denied.

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