No. 20-109

In the
Supreme Court of the United States

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

v.

STEVEN WAYNE FISH, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas

JEFFREY A. CHANAY
Chief Deputy Attorney General

TOBY CROUSE
Solicitor General
(Counsel of Record)
BRANT M. LAUE
Deputy Solicitor General
DWIGHT R. CARSWELL
KURTIS K. WIARD
JERRY EDWARDS
Assistant Solicitors General

120 S.W. 10th Ave., 2d Floor
Topeka, Kansas 66612
(785) 296-2215
toby.crouse@ag.ks.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULE

OTHER AUTHORITIES

REPLY BRIEF

Bipartisan supermajorities in both chambers of the Kansas Legislature determined that it is necessary and proper to require voter registration applicants to provide documentary proof of citizenship to verify that they meet the State's qualifications to vote. The Tenth Circuit's decision to invalidate this law, infringing on the State's authority under the Voter Qualifications Clause, U.S. Const. art. I, § 2, cl. 1 and amend. XVII, warrants this Court's review.

I. This case presents important issues warranting certiorari.

Respondents are wrong to suggest that this case is unimportant because Kansas's law stands alone. As noted in the Petition, three other States have laws requiring documentary proof of citizenship for voter registration. *See* Ariz. Rev. Stat. Ann. § 16-166(F); Ala. Code § 31-13-28(c)-(l); Ga. Code Ann. § 21-2-216(g). While Georgia's and Alabama's laws have not been implemented yet, in part because of ongoing litigation, those laws have been duly enacted by their state legislatures, and the outcome of this case could affect the implementation of those laws.

Respondents' argument that Arizona's law is different than Kansas's because Arizona allows the use of a driver's license to prove citizenship is misleading. Arizona's law allows use of a driver's license only if the license itself indicates "that the person has provided satisfactory proof of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F)(1). Kansas has the exact same provision. *See* Kan. Stat. Ann. § 25-2309(l)(1)

(allowing use of a driver's license or nondriver's identification card to prove citizenship "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").

But even if Kansas's law were unique, this case would still raise important issues. A basic premise of our system of federalism is that States may make different choices as to what laws are appropriate. Indeed, the purpose of the Voter Qualifications Clause was to leave decisions about voter qualifications to the States rather than to impose a single national standard. Pet. at 13.

Nor has the uniqueness of a state law prevented this Court from granting certiorari in the past. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), for example, Indiana's law was an outlier. While a handful of States insisted on some form of identification, Indiana's requirement of a government-issued driver's license imposed the greatest burden on voters. *Id.* at 236 n.26 (Souter, J., dissenting) (comparing Indiana's law to voter identification laws in other States); *id.* at 239-40 (Breyer, J., dissenting) (demonstrating how Indiana's law was more severe than Florida's and Georgia's).

In addition, the rules for verifying voter qualifications for even a single State could have a national effect, particularly when it comes to the Electoral College outcome or control of Congress. And, as *Crawford* shows, other States may choose to follow Kansas's lead if this Court removes the cloud of

uncertainty imposed by this litigation. *See* Pet. at 2 (noting that Kansas adopted its voter identification law in the wake of *Crawford*).

Respondents also argue that this case does not implicate the Voter Qualifications Clause because, in their view, an attestation should be sufficient proof of citizenship. But in many other contexts, laws require an applicant to submit documentary proof and do not rely on a mere attestation alone. *See*, *e.g.*, 8 U.S.C. § 1324a (requiring documentary proof of employment authorization in addition to an attestation); REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 310 (requiring documentary proof of lawful presence, usually a passport or birth certificate for U.S. citizens, in order to obtain a compliant driver's license). Bipartisan supermajorities in the Kansas Legislature likewise decided to require documentary proof of citizenship when it comes to the fundamentally important right to vote. While some States may choose to make a different choice, the Constitution affords the States authority to require the information that they reasonably deem necessary to enforce their voter qualifications. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2003) ("[T]he power to establish voting requirements is of little value without the power to enforce those requirements . . . .").

II. Just as in *Crawford*, Respondents have failed to identify an unconstitutional burden on the right to vote.

Despite Respondents' claim that this is a fact-intensive dispute, this case is not materially different than *Crawford*.

Respondents repeatedly point to the roughly 30,000 applicants who were not registered in Kansas, but they cannot and do not dispute that there is *no* evidence as to how many of these individuals did not possess or could not obtain proof of citizenship. App. 129 (district court finding of no evidence on this question). The fact that these individuals did not provide proof of citizenship does not demonstrate that it would have been a burden—much less an unconstitutionally severe burden—for them to do so. Pet. at 20-21. In fact, Respondents concede, as they must, that 88% of applicants provided proof of citizenship and were successfully registered. Resp. at 7; App. 44.

Respondents argue that the applicants who were not registered took affirmative steps to do so, Resp. at 26, but in many cases this involved no more than answering "yes" when asked whether they wanted to register to vote while applying for a driver's license and then completing the application. These applicants may have been unwilling to bear even a slight burden, no greater than the common burdens associated with voting. *See Crawford*, 553 U.S. at 198 (holding that "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").

Of the nearly 30,000 suspended or canceled applications, Respondents identified only 3 applicants who allegedly could not afford or obtain a birth certificate or other proof of citizenship.[1] App. 132-41. Respondent Parker Bednasek claimed he could not provide his birth certificate because it was at his parents' home in Texas, but he could have easily asked his parents to mail it to him or to send a picture by email or text message. Pet. at 20. In fact, he later obtained a copy to apply for the Navy. *Id.*

Respondent Donna Bucci was born in Maryland and testified that the cost of a replacement birth certificate would impair her ability to pay rent. App. 134. But the cost to obtain a copy of a Maryland birth certificate is only $10.[2] This minimal cost for those who do not

---

[1] Respondents identified two other individuals, Charles Stricker and Thomas Boynton, who testified that they took their birth certificates with them while applying for Kansas driver's licenses in 2014 but were not registered to vote due to a failure to provide proof of citizenship. It is unclear what happened, but there has been no showing that this was a common problem. And in any event, the Kansas Secretary of State and the Kansas Department of Revenue (which oversees the driver's license application process) entered into an interagency agreement in May 2016 to ensure that citizenship documents provided during the driver's license application process are recorded and provided to election officials. App. 114-15. Thus, whatever happened with Stricker's and Boynton's applications is unlikely to recur and provides no basis for permanently enjoining the Kansas law.

[2] https://health.maryland.gov/vsa/Pages/fees.aspx.

already have a copy of their birth certificate cannot be considered a substantial burden, especially since providing proof of citizenship is a one-time requirement. *Cf. Crawford*, 553 U.S. at 198 n.17 (noting that Indiana charged a fee between $3 and $12 to obtain a birth certificate). In addition, many applicants may ultimately need a copy of their birth certificate for other purposes, such as obtaining a REAL ID-compliant driver's license or demonstrating work authorization.

And even if the minimal cost of obtaining a birth certificate could be considered a substantial burden for indigent applicants, Respondents provided "no indication of how common the problem is." *Crawford*, 553 U.S. at 202. As in *Crawford*, "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Id.* at 202 n.20. Thus, it is not possible to conclude "that the statute imposes excessively burdensome requirements on any class of voters." *Id.* at 202 (quotation marks omitted).

The only other individual who allegedly was unable to obtain a birth certificate, Respondent Steven Wayne Fish, was born on a decommissioned Air Force base in Illinois and testified that he did not know how to obtain a copy of his birth certificate. App. 133. There is no indication that he contacted the Illinois Department of Public Health or any government agency to determine whether they could provide a copy. Nor is there any evidence that Fish's situation is a widespread problem. The unique circumstances hampering one individual's ability to obtain a birth certificate cannot facially

invalidate the entire Kansas proof of citizenship law. *See Crawford*, 553 U.S. at 201-03. In addition, an applicant who is truly unable to afford or obtain a birth certificate can request a hearing before the State Election Board to demonstrate citizenship by other means. *See* Kan. Stat. Ann. § 25-2309(m).

Because Kansas's law's "broad application to all . . . voters . . . 'imposes only a limited burden on voters' rights,'" Kansas's interests—which are identical to Indiana's interests in *Crawford*—are sufficient to defeat Respondents' challenge. *See Crawford*, 553 U.S. at 191-97, 202-03 (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)). Both the Tenth Circuit and the district court recognized the legitimacy of the State's interests but held them insufficient to justify Kansas's law based solely on an erroneous burden analysis. App. 53-56, 211.

Respondents argue that *Crawford* is distinguishable because Kansas's law applies to only new voter applicants. Resp. at 17. But the Tenth Circuit held that Kansas's decision to grandfather in existing voters does not violate the Constitution, Pet. at 23 n.6, and Respondents have not sought review of that holding.

Respondents' argument that this case is different than *Crawford* because most people do not carry proof of citizenship with them, Resp. at 1, 16, ignores the fact that Kansas's law does not require proof of citizenship to be presented at the polls. Rather, it is required a single time as part of the registration process. And if an applicant does not submit proof of citizenship at the time of registration, Kansas law provides the applicant

a 90-day window to later do so, including by remote means. Pet. at 18 & n.5, 22.

While Kansas's law could be upheld under a straightforward application of *Crawford*, this case also presents the Court with an opportunity to clarify or refine the constitutional standard for evaluating these types of disputes. Contrary to Respondents' claims, there is substantial controversy and confusion about the *Anderson-Burdick* balancing test. *Crawford* was decided by two separate three-Justice pluralities that disagreed on the proper legal standard. And lower courts have struggled to apply the *Anderson-Burdick* standard, with many criticizing it as an amorphous balancing test that fails to provide clear rules but instead leaves much to judges' subjective preferences. *See* Pet. at 16 n.3; Amicus Curiae Br. of Texas and 17 Other States at 3-13.

III. *Inter Tribal* does not justify the Tenth Circuit's questionable interpretation of Section 5 of the NVRA.

As Kansas explained in its Petition, the Tenth Circuit's novel interpretation of Section 5 of the NVRA cannot be squared with the statutory text. Pet. at 24-30. Rather than focusing on the text of Section 5, Respondents mistakenly claim that the Tenth Circuit's interpretation follows from this Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). Resp. at 30-31.

But *Inter Tribal* addressed a different provision of the NVRA. There, this Court interpreted the meaning of a phrase requiring States to "accept and use" the

federal voter registration form. 570 U.S. at 9-15. That interpretation has no bearing on the proper interpretation of the NVRA's motor voter provisions.

Contrary to Respondents' claim, *Inter Tribal* does not stand for the proposition that attestation alone is the presumptive minimum amount of information necessary to enforce a citizenship qualification. Instead, *Inter Tribal* left it to the Election Assistance Commission, subject to judicial review, to determine whether to "alter the Federal Form to include information [a] State deems necessary to determine eligibility." 570 U.S. at 19.

But as to motor voter registration, the *States* are responsible for creating the application. *See* 52 U.S.C. § 20504(c)(1). Just as Congress gave the EAC the power to determine the content of the Federal Form, it gave States the authority to decide what to require as part of a motor voter application, subject to the provisions of 52 U.S.C. § 20504(c). And so the phrase "minimum amount of information necessary" in § 20504(c)(2)(B) is most properly read as deferring to the States' reasonable judgments about what information, including proof of citizenship, they deem necessary to enforce their voter qualifications.

Nor does anything in *Inter Tribal* support the Tenth Circuit's holding that a State must establish to a federal court's satisfaction that "a substantial number of noncitizens have successfully registered" in order to require proof of citizenship. App. 67. Even if *Inter Tribal*'s standard for requiring the EAC to modify the federal form could somehow be grafted onto Section 5—a questionable proposition in itself—a State is

"precluded" from enforcing its voter qualifications when it is prevented from ensuring that each and every applicant is indeed qualified. And the district court found that Kansas's law prevented at least a handful of noncitizens from registering to vote. App. 149. The Tenth Circuit's substantial-number-of-unqualified-voters standard is not only inconsistent with the statutory text, but it also raises serious and avoidable constitutional concerns under the Voter Qualifications Clause.

* * *

This case presents "important question[s] of federal law." S. Ct. R. 10(c). The Tenth Circuit's decision directly conflicts with this Court's decision in *Crawford* and offers a novel and erroneous interpretation of Section 5 of the NVRA, the proper interpretation of which "has not been, but should be, settled by this Court" given the important interests at stake. *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General
(Counsel of Record)
BRANT M. LAUE
Deputy Solicitor General
DWIGHT R. CARSWELL
KURTIS K. WIARD
JERRY EDWARDS
Assistant Solicitors General

120 S.W. 10th Ave., 2d Floor
Topeka, Kansas 66612
(785) 296-2215
toby.crouse@ag.ks.gov

Counsel for Petitioner