No. 16-3147

In the
United States Court of Appeals
for the Tenth Circuit

STEVEN WAYNE FISH; DONNA BUCCI; CHARLES STRICKER;
THOMAS J. BOYNTON; DOUGLAS HUTCHINSON;
LEAGUE OF WOMEN VOTERS OF KANSAS,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas – Kansas City, No. 2:16-cv-02105-JAR-JPO.
The Honorable **Julie A. Robinson**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES
Oral Argument Is Scheduled

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CORPORATE DISCLOSURE STATEMENT

The League of Women Voters of Kansas (the "League") is a non-profit organization organized under Section 501(c) of the Internal Revenue Code. The League does not issue stock. There are no publicly held corporations that own ten percent or more of the stock of the League.

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A separate appeal from the decision below has been filed by the other defendant in this litigation, and is currently pending before this Court, *Fish, et al v. Jordan*, Case Number 16-3175.

GLOSSARY

Ala. Code 1975	Alabama Code of 1975
APA	Administrative Procedures Act
A.R.S.	Arizona Revised Statutes
DMV	Department of Motor Vehicles
DOR	Kansas Department of Revenue
DPOC	Documentary Proof of Citizenship
EAC	United States Election Assistance Commission
Federal Form	The Federal Mail-In Voter Registration Form promulgated by the EAC
KSA	Kansas Statutes Annotated
NVRA	National Voter Registration Act
O.C.G.A	Official Code of Georgia Annotated
SOS	Kansas Secretary of State

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees do not dispute Defendant-Appellant's jurisdictional statement.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the District Court correctly concluded that Section 5 of the National Voter Registration Act limits the documentation that States may require from motor-voter applicants.
2. Whether the District Court correctly held that Kansas's documentary proof of citizenship is unnecessary to assess the eligibility of motor-voter applicants.
3. Whether the District Court appropriately exercised its discretion in finding that Plaintiffs – whose voter registration applications were canceled in late 2015 – and more than 18,000 similarly-situated Kansans faced irreparable harm in the form of disenfranchisement in the 2016 elections, which outweighed the State's assertions of administrative burdens.

STATEMENT OF THE CASE

Defendant Kansas Secretary of State Kris Kobach ("Kobach") has unlawfully disenfranchised more than 18,000 individuals who applied to register to vote in conjunction with an application for a driver's license ("motor-voter applicants"). Kobach blocked the voter registration applications of these Kansans pursuant to Kan. Stat. Ann. § 25-2309(*l*) (the "DPOC Law" or "DPOC requirement"), which requires voter registration applicants to provide documentary proof of citizenship ("DPOC"), such as a birth certificate or passport, in order to become registered to vote.

The District Court found that the DPOC Law, as applied to motor-voter applicants, violates the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (the "NVRA" or "the Act"), commonly known as the "Motor-Voter Law." Section 5 of the NVRA, *id.* § 20504 ("Section 5"), requires simultaneous voter registration in conjunction with a driver's license application at Department of Motor Vehicles ("DMV") offices in a single integrated application. It provides that the motor-voter application "may require only the minimum amount of information necessary," and that motor-voter applicants may establish that they are U.S. citizens and eligible to vote via an "attestation" signed "under penalty of perjury." *Id.* § 20504(c)(2)(B)-(C). Section 5 authorizes no documentation requirements for establishing U.S. citizenship; indeed, Congress considered and

rejected an amendment to the statute that would have granted States the authority to require DPOC from voter registration applicants under the NVRA.

Kobach is the chief elections official of the State of Kansas, and is therefore "responsible for coordination of State responsibilities" under the NVRA. *Id.* § 20509. Ignoring that obligation, Kobach has refused to register thousands of motor-voter applicants pursuant to the DPOC Law. And, pursuant to a Kansas administrative rule, Kan. Admin. Regs. § 7-23-15, Kobach instructs local elections officials to cancel the registration applications of individuals who do not produce DPOC within 90 days. The result has been "a confusing and inconsistently-enforced maze of requirements," App. 728, preventing the five individual Plaintiffs—and more than 18,000 similarly-situated Kansans whom they represent—from registering to vote. This regime is unique; Kansas is the only State that uses a DPOC requirement to block motor-voter registration.

In the decision below, the District Court held that the DPOC Law, as applied to motor-voter applicants, is preempted by Section 5 of the NVRA, and granted a preliminary injunction. This appeal followed.

A. The NVRA

Congress enacted the NVRA in 1993 to establish national procedures for voter registration for federal elections, finding that the right to vote "is a fundamental right"; that States have a "duty … to promote the exercise of that

right"; and that "unfair registration laws and procedures can have a direct and damaging effect on voter participation." 52 U.S.C. § 20501(a). The NVRA's four express statutory goals are:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to … enhance[] 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.

Id. § 20501(b).

To further these objectives, the NVRA "requires States to provide simplified systems for registering to vote in federal elections," *Young v. Fordice*, 520 U.S. 273, 275 (1997), through three methods: (1) "by application made simultaneously with an application for a motor vehicle driver's license"; (2) "by mail application" using a one-page federal mail-in form (the "Federal Form") prescribed by the U.S. Election Assistance Commission ("EAC"); and (3) "by application in person" at various State offices, including those that provide public assistance and disabilities services. 52 U.S.C. § 20503(a). Motor-voter applications are the most frequently-used form of registration in Kansas, accounting for 43.7% of Kansas registrants during the last decade. *See* App. 683.

The NVRA places strict limits on the information that States may require from motor-voter applicants. The motor-voter application "may require only the

minimum amount of information necessary to … enable State election officials to assess the eligibility of the applicant." 52 U.S.C. § 20504(c)(2)(B). Section 5 specifies the means of proof by which motor-voter applicants establish U.S. citizenship: "an attestation" signed "under penalty of perjury." *Id.* § 20504(c)(2)(C). The statute does not authorize any other method of determining the eligibility of motor-voter registrants at the time of application. Indeed, as this Court previously recognized, "[b]oth houses of Congress debated and voted on the specific question of whether to permit States to require documentary proof of citizenship" in order to register under the NVRA, "and ultimately rejected such a proposal." *U.S. Election Assistance Comm'n v. Kobach*, 772 F.3d 1183, 1195 n.7 (10th Cir. 2014) ("*EAC*").

B. Kansas's DPOC Law

The Kansas "Secure and Fair Elections Act" ("SAFE Act"), *inter alia*, established a DPOC requirement for voter registration. It was justified during legislative deliberations as a response to the supposed threat of noncitizen registration. As Kobach notes, "[t]he Kansas Legislature … received testimony from the Seward County clerk regarding a concerted attempt by more than fifty noncitizens to register and vote in one election" in 1997, Appellant's Br. ("Br.") at 7, regarding "a county referendum on a proposed hog-farming operation." *Id.* at 9.

Kobach has described this incident as "'[t]he most notorious case of aliens voting in Kansas.'" *Id.* at 10.[1]

The DPOC requirement became effective on January 1, 2013. App. 677. Codified as Kan. Stat. Ann. § 25-2309(*l*), it directs that "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship," by presenting one of thirteen forms of documentation – including a passport or birth certificate. App. 675-77. Applicants who lack any of the acceptable documents for proving citizenship "may demonstrate citizenship by presenting other evidence" to the State Elections Board, a three-member body consisting of the Governor, the Attorney General, and the Secretary of State. Br. at 2 (citing K.S.A. § 25-2309(m)). "[O]nly three individuals in more than three years have availed themselves of this procedure, out of the thousands of applicants rejected for lack of DPOC." App. 728.

"If an applicant has not provided DPOC," the application "is designated as 'in suspense' or 'incomplete'" in the State voter registration system "until the applicant provides the remaining information." *Id.* 681. Subsequent regulations

[1] Citing *Hearing on "The President's Executive Actions on Immigration and Their Impact on State and Local Elections" Before the Subcomm. on Nat'l Sec. and Subcomm. on Health Care, Benefits, and Admin. Rules*, 114th Cong. (2015) (statement of Kris W. Kobach, Kansas Secretary of State), https://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

promulgated by Kobach – which became effective on October 2, 2015 – provide "that applications deemed 'incomplete' are to be 'cancelled' from the State's list of applicants if the applicant does not produce DPOC within 90 days of application." *Id.* 681-82 (citing K.A.R. § 7-23-15).

The Kansas DPOC regime is unique. Only four states have a DPOC Law: Kansas, Alabama, Arizona, and Georgia.[2] Alabama and Georgia are currently not enforcing their respective DPOC laws, and have indicated no definitive plans to do so by a particular date.[3] Arizona permits Federal Form applicants to register for federal elections without submitting DPOC,[4] and does not block motor-voter applicants from registering under its DPOC law.[5] Kansas is the *only state* that requires DPOC from all voter registration applicants.

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[2] *See* Ala. Code 1975 § 31-13-28; A.R.S. § 16–166(F); O.C.G.A § 21-2-216.

[3] Kobach admitted in another case that "neither State is yet enforcing its proof-of-citizenship law." Kobach Resp. to Mot. for a TRO & Prelim. Inj. at 11, *League of Women Voters v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 21, 2016), ECF No. 27.

[4] *See* Ariz. Sec. of State, *Register to Vote or Update Your Current Voter Information*, http://www.azsos.gov/elections/voting-election/register-vote-or-update-your-current-voter-information (applicants "using the Federal Form … are not required to provide proof of citizenship in order to register to vote in elections for Federal office.").

[5] The Arizona DPOC law, A.R.S. § 16–166(F), provides that proof of citizenship can be established with a driver's license *number* alone, without submitting a hard copy of a document. *See id.* § 16–166(F)(1). Moreover, A.R.S. § 16–152(A), which sets forth the DPOC requirements for voter registration forms in the state at subsection 23, "does not apply to registrations received from the department of

C. Motor-Voter Registration Under the DPOC Law

Since 2007, Kansas law has required all applicants for driver's licenses, including renewals, to "provide documentary proof of lawful presence." App. 675. (citing K.S.A. § 8-240(b)). "Usually, proof of lawful presence for citizens who apply for a new driver's license will suffice as DPOC on the voter registration application." *Id.* 707. That is, citizens making an initial application for a driver's license necessarily satisfy the DPOC requirement using the same documents that they use to obtain their driver's licenses. Thus, as long as the DMV forwards their information to the appropriate elections official, initial applicants satisfy the DPOC requirement; the record, however, demonstrated that DMV does not consistently forward the correct information. DMV's failures have necessitated an "interagency policy" through which elections officials "have been given access to the DMV database so that they may check to see if a person presented DPOC to the DMV." App. 878-79. Several Plaintiffs testified that they provided DPOC to the DMV, but their voter registration applications were nevertheless placed in suspense, and ultimately canceled. *See* App. 688 (Hutchinson), 697 (Boynton).

Driver's license renewal applicants face a "different application process," *id.* 707, and therefore a different problem. The Department of Revenue ("DOR") has

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transportation pursuant to § 16-112," A.R.S. § 16–152(E), which must be accompanied by "an attestation" of "citizenship." A.R.S. § 16–112(C).

"waived the proof of lawful presence requirement for renewals," *see id.* 697 n.83, and thus, "DMV clerks do not request DPOC from driver's license renewal applicants." *Id.* 680. DMV clerks also fail to "inform voter registration applicants that DPOC is required to complete the registration process." *Id.* 707. The result is that license "renewal applicants that also apply to register to vote are … guaranteed to be in 'suspense' at the outset," *id.*, and are "therefore required to separately submit DPOC to the counties" to become registered. *Id.* 883.[6]

D. The Effect of the DPOC Law on Motor-Voter Applicants

"[A]s a direct result of the DPOC law and enforcement scheme, over 18,000 otherwise eligible motor voter applicants in Kansas have been prohibited from registering to vote." App. 710. They include "12,717 motor voter registration applications cancelled under K.A.R. § 7-23-15 for failure to provide DPOC," and "5655 motor voter applications that are in 'incomplete' status due to failure to provide DPOC." *Id.* 688-89. Collectively, they represent "[e]ight percent of all voter registration applications" since the DPOC Law went into effect. *Id.* 710. Defendants have not identified any of these applicants as a noncitizen.

[6] This is in contrast to Arizona, which does not have a suspense list of thousands of prospective motor-voters, and instead coordinates with motor vehicle agencies to require the same documentation at the initial application and renewal phases of the driver's license process. *Cf.* Ariz. Rev. Stat. § 28-3153(D).

The five individual Plaintiffs are among the affected voters. Plaintiff Steven Fish is "a United States citizen" who, on August 21, 2014 "went to the driver's license office in Lawrence to renew his driver's license" and "decided to register at this time." *Id*. 683-84. "The clerk did not ask Mr. Fish for DPOC and did not tell Mr. Fish that Kansas law requires DPOC." *Id*. 684. Afterwards, he "received a postcard" from the Douglas County Clerk informing him "that he needed to submit DPOC in order to complete the registration process. Mr. Fish searched his records but could not find any documents that would be sufficient to prove his citizenship under § 25-2309(l)." *Id*. Because he was born on a long-closed Air Force base, Mr. Fish "did not know how to obtain a copy of his birth certificate." *Id.* He also "has a modest income and could not afford to obtain a copy of his birth certificate." *Id*. Mr. Fish "was unable to vote in the 2014 election," and, eventually, "his application was cancelled." Subsequently, Mr. Fish "recently found his birth certificate in a safe in his stepfather's house. Nonetheless, [he] will not be able to vote in the upcoming primary or general elections of 2016 unless he reapplies to register and submits this document." *Id*.

Plaintiff Donna Bucci is "a United States citizen," who, in 2013, "went to the driver's license office in Wichita, Kansas to renew her driver's license." *Id.* While "[t]he DMV clerk asked her at that time if she wanted to register to vote[,] … [t]he clerk did not ask Ms. Bucci for DPOC and did not tell Ms. Bucci that

Kansas law requires DPOC. Ms. Bucci left the driver's license office believing that she had successfully registered to vote." *Id.* 684-85. Ms. Bucci "did not learn that she was not registered to vote until six or seven months later when she received a notice in the mail telling her that she needed to show proof of citizenship in order to be a registered voter." *Id.* 685. She did not complete her registration because she "does not have any documents that would be sufficient to prove her citizenship," and "[o]btaining a copy of her Maryland birth certificate would cost $24," which "would be a financial burden for her." *Id.* "Ms. Bucci's application was cancelled on October 15, 2015 pursuant to K.A.R. § 7-23-15….[S]he stated that this experience discourages her from attempting to register to vote in the future." *Id.*

Plaintiff William Stricker is "a United States citizen who … went to the [Wichita] DMV office in October 2014," but "was told that he had insufficient documentation." *Id.* He subsequently returned with various documents, and "[t]he DMV clerk asked him at that time if he wanted to register to vote, and he said yes. The clerk did not ask Mr. Stricker for DPOC and did not tell him that he lacked the necessary documentation to register to vote. Mr. Stricker left the driver's license office believing that he had successfully registered to vote." *Id.* 685-86. "On Election Day in November 2014, Mr. Stricker went to his polling place," but the pollworker "could not find Mr. Stricker's name on the voting roll." *Id.* 686. He

was "only allowed to cast [a] provisional ballot[] that w[as] not counted." *Id.* 725. "Due to his schedule, he was unable to submit the necessary documentation to county election officials," and "[h]is voter registration application was cancelled on November 6, 2015." *Id.* 686. *See also id.* 683-88 (describing similar experiences of the two other individual Plaintiffs).

E. Proceedings Below

On May 17, 2016, the District Court issued a detailed 67-page decision granting a preliminary injunction. The Court found that Plaintiffs made "a strong showing that they are likely to succeed on their claim that the NVRA preempts the Kansas DPOC law as it applies to motor voter registrants under § 5"; and "a strong showing of irreparable harm" absent immediate relief, such that the equities tipped in their favor. App. 720, 724.

Specifically, the Court found that "the process of submitting DPOC for motor voter applicants is burdensome, confusing, and inconsistently enforced." *Id.* 706. The Court found that "[t]he sheer number of people cancelled or held in suspense because of the DPOC requirement since October 2015 evidences the difficulty of complying with the law as it is currently enforced." *Id.* 710. The Court also credited "evidence that the DPOC law has caused a chilling effect, dissuading those who try and fail at navigating the motor voter registration process from reapplying in the future." *Id.* 725.

The Court further found that "very few noncitizens in Kansas successfully registered to vote under an attestation regime." *Id.* 712. The Court scrutinized the evidence of what Kobach called the "notorious" 1997 Seward County incident, and found that it was "insufficient to show that noncitizens actually voted in that referendum." *Id.* The Court found that, even crediting all of the remaining evidence submitted by Kobach, there were a total of "about three noncitizens [registering] per year," out of hundreds of thousands of registrations during the same period (more than 860,000 since 2006 alone). *Id.* 711-12. The Court also found that the State had other methods at its disposal to prevent noncitizen registration, including "an attestation," as prescribed by the NVRA itself; "better training to DMV workers," who mistakenly offered voter registration to noncitizens; and criminal prosecutions to deter noncitizen registration. *Id.* 711, 713-14.

In light of this record, the District Court determined that "Plaintiffs have made a strong showing that the information required under the Kansas DPOC exceeds the minimum amount of information necessary for State election officials to assess citizenship eligibility." *Id.* 706. The Court then directed Kobach to "register to vote those applicants whose only infirmity was not having the opportunity to produce DPOC contemporaneously with their driver's license applications." *Id.* 735. The Court found that any burdens on the State were

"outweighed by the risk of thousands of otherwise eligible voters being disenfranchised in upcoming federal elections." *Id.* The Court then, *sua sponte*, stayed implementation of the injunction for 14 days, until May 31, 2016. *Id.* 735-36.

On May 20, Kobach moved in the District Court for a stay pending appeal. On May 25, the Court denied the motion, but extended the stay for an additional 14 days to permit Kobach to seek relief from this Court. App. 890. Kobach then moved for a stay in this Court, which denied the motion on June 10. The preliminary injunction went into effect on June 15. *Id*. This appeal followed.

SUMMARY OF ARGUMENT

Kobach's position in this case boils down to a single assertion: that "there is *no* constraint in the NVRA over what additional documentation a State may request beyond the form itself." Br. at 27. That view cannot be squared with the plain text of the NVRA, Congress's clearly-stated intent in the legislative history, the record in this case, or governing precedent.

Section 5 expressly limits States to requiring only "the minimum amount of information necessary to … enable State election officials to assess the eligibility" of motor-voter applicants, and provides that such applicants may establish their eligibility to vote with an "attestation" signed "under penalty of perjury." 52 U.S.C. § 20504(c)(2)(B)-(C). If that were not clear enough, Congress rejected an

amendment to the statute that would have provided States with authority to request DPOC from NVRA applicants, expressly finding that granting such authority was "inconsistent" with the Act because it could "adversely affect" registration. H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).

It is ironic that Kobach describes this reading of the statute according to its plain meaning as "novel." Br. at 3. Kansas is the only State that blocks motor-voter registration with a DPOC requirement. Prior to this case, no Court had the occasion to reach this issue because no other State has so drastically curtailed the rights of motor-voter applicants.

Kobach nonetheless asserts that the disenfranchisement of more than 18,000 Kansans is "necessary" to prevent noncitizen registration, Br. at 39, but the District Court found otherwise. The Court concluded that the problem of noncitizen registration in Kansas is "at best nominal"; and that several "less burdensome alternative[s] exists" for preventing noncitizen registration. App. 706, 712, 718. Those findings were amply supported by the record, and confirm that the DPOC Law is an unnecessary barrier that has disenfranchised thousands of Kansans.

What is not "novel" is Kobach's erroneous insistence that the NVRA places "no constraint" on the documentation requirements that States may impose on registration applicants, an argument that has been uniformly rejected in other cases. In *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) ("*ITCA*"),

Arizona argued that States have unfettered discretion to request DPOC from NVRA applicants, and could reject federal mail-in voter registration applications that were unaccompanied by DPOC; the Supreme Court disagreed. *Id.* at 2257. In *EAC*, Kobach argued that the Election Assistance Commission had a nondiscretionary duty to incorporate Kansas's DPOC requirement into the federal mail-in form, because States supposedly have unfettered discretion to require documentation from registration applicants; this Court ruled against him, holding 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)." 772 F. 3d at 1195. Undeterred, Kobach regurgitates the same unavailing arguments here.

Finally, the District Court did not abuse its discretion in finding that the equities favor preliminary relief. Plaintiffs applied to register to vote in accordance with the NVRA, only to be stymied by the DPOC Law. Their registrations were canceled shortly after a new administrative rule went into effect in October 2015, and they initiated proceedings only a few weeks later by sending a notice of violations of the NVRA to Kobach, as required by the statute. 52 U.S.C. § 20510(b). The Court appropriately exercised its discretion to find that the disenfranchisement of Plaintiffs and more than 18,000 similarly-situated voters outweighed any harms to Kobach associated with restoring the motor-voter

registration system used in Kansas for 18 years between the 1995 effective date of the NVRA and the 2013 effective date of the DPOC Law—the same system used throughout the country. The preliminary injunction should be affirmed.

STANDARD OF REVIEW

The decision to grant a preliminary injunction is "committed to the [C]ourt's discretion," *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 614 (D. Kan. 1995), and will be overturned on appeal *only* if the District Court abused that discretion. *Verlo v. Martinez*, 820 F.3d 1113, 1125 (10th Cir. 2016). Because of the highly deferential standard of review on appeal, so long as the Court "clearly set[s] forth its reasoning for granting the injunction," and that reasoning is not an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment," the Court is within the bounds of proper exercise of its discretion, and an appellate court must affirm the injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1205–06 (10th Cir. 2003)). "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1075 (10th Cir. 2009).

The district court should grant a preliminary injunction where the moving party establishes: (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm; (3) the harm alleged by the movant outweighs any harm to the

non-moving party; and (4) an injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).[7]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE NVRA PREEMPTS KANSAS'S DPOC LAW WITH RESPECT TO MOTOR-VOTER APPLICANTS.

The text of the NVRA, governing precedent, and the District Court's factual findings confirm that an attestation of citizenship constitutes the "minimum amount of information necessary to … enable State election officials to assess the eligibility" of motor-voter applicants. 52 U.S.C. § 20504(c)(2)(B). Hence, the

[7] Kobach argues that a "heightened standard" for preliminary relief applies, Br. at 29, and the District Court – without holding that such a standard applied – found that Plaintiffs had satisfied it: "Plaintiffs have made a strong showing on both likelihood of success on the merits, and on the balance of harms." App. 699. In any event, the heightened standard is not applicable here. The injunction restores the status quo, by permitting voters to register in the same fashion they would have prior to the DPOC law, which is the "last peaceable uncontested status existing between the parties before the dispute developed." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005). The injunction is prohibitory, as it *halts* enforcement of the DPOC law, rather than requiring Defendants to "affirmatively … act in a particular way," *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 979 (10th Cir. 2004) (en banc) (Murphy, J., concurring in part & dissenting in part). And the preliminary injunction did not "render a trial on the merits largely or partly meaningless," *id*. at 1003, because Plaintiffs seek additional relief at trial with respect to procedures for assisting voters born outside of Kansas in completing the registration process. *See* First Am. Compl, ECF No. 39.

DPOC requirement exceeds that "minimum" amount of proof, and is preempted by the NVRA.

A. The NVRA Was Enacted Pursuant to Congress's Plenary Authority Under the Elections Clause, and Is Not Subject to the Supremacy Clause's Plain Statement Rule.

Kobach concedes that "the NVRA preempts state laws that conflict with its provisions." *See* Br. at 4. Congress enacted the NVRA pursuant to the Elections Clause, which grants Congress plenary "authority to provide a complete code for federal elections," including "regulations relating to 'registration.'" *ITCA*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).[8] Because "the power the Elections Clause confers is none other than the power to pre-empt," where a state law conflicts with the NVRA, the state law is preempted and "ceases to be operative." *Id.* at 2257, 2254 (quoting *Ex parte Siebold*, 100 U.S. 371, 384 (1879)).

Congress enacted the NVRA with the express purpose of "increas[ing] the number of eligible citizens who register," based in part on a finding that "unfair registration laws and procedures can have a direct and damaging effect on voter participation." 52 U.S.C. §§ 20501(a)-(b). The Supreme Court has therefore explained that the NVRA "*necessarily* displaces some element of a pre-existing

[8] This "plenary authority" permits Congress "not only to supplant state [election] rules but to conscript states to carry out federal enactments." *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012) (emphasis added), *aff'd*, *ITCA*, 133 S. Ct. 2247.

legal regime erected by the States." *ITCA*, 133 S. Ct. at 2257. Preemption of state laws restricting voter registration is presumed.

Nevertheless, Kobach asserts that the "plain statement" rule from Supremacy Clause jurisprudence applies here. Br. at 27-31. As an initial matter, he did not raise this argument below and therefore has waived it. *See Campbell v. City of Spencer*, 777 F.3d 1073, 1080 (10th Cir. 2014). In any event, the Supreme Court has rejected this view, noting that it "ha[s] never mentioned such a principle in [its] Elections Clause cases." *ITCA*, 133 S. Ct. at 2256. As this Court has explained, because the NVRA was enacted pursuant to Congress's authority under the Elections Clause (and not the Supremacy Clause), "courts should not assume reluctance to preempt state law." *EAC*, 772 F.3d at 1195. The Supremacy Clause cases on which Kobach relies are therefore inapposite. *See* Br. at 31 (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582 (2011); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (stating that the case's applicable "pre-emption doctrine is derived" from "the Supremacy Clause").

B. Section 5 of the NVRA Prohibits States from Imposing a Documentary Proof of Citizenship Requirement on Motor-Voter Applicants.

1. The Text of Section 5 Limits States to the "Minimum" Amount of Information Necessary to Assess Voter Eligibility, Which Is An Attestation of Citizenship.

Even if the plain statement rule applied (which it does not), it would be

satisfied here. Section 5 requires that each application for a driver's license, including a renewal, "shall serve as an application for voter registration with respect to elections for Federal office." 52 U.S.C. § 20504(a)(1). Under Section 5, States "may require only the minimum amount of information necessary to … enable State election officials to assess the eligibility" of motor-voter applicants. *Id.* § 20504(c)(2)(B). Consistent with this Court's guidance to interpret the NVRA according to its "ordinary meaning," *Valdez v. Squier*, 676 F.3d 935, 946 (10th Cir. 2012), the District Court held that "the word 'minimum' in the NVRA should be given its ordinary meaning of 'least possible' to quantify the information necessary for State election officials to assess an applicant's citizenship eligibility." App. 706; *see also id.* 701 ("Black's Law Dictionary defines 'minimum' as: 'Of, relating to, or constituting the smallest acceptable or possible quantity in a given case.' Similarly, Merriam Webster defines 'minimum' as 'the least quantity assignable, admissible, or possible.'").

Kobach argues that "the NVRA does not mention proof of citizenship at all," Br. at 2, but Section 5's plain text sets forth the requisite proof a motor-voter applicant shall provide to establish eligibility "including citizenship." Specifically, a motor-voter registration application

shall include a statement that—

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

52 U.S.C. § 20504(c)(2)(C). Kansas's requirement of a citizenship document such as a passport or birth certificate constitutes *additional* proof of citizenship beyond this "minimum amount" prescribed by the statute, and is therefore prohibited.

The District Court properly rejected Kobach's tortured interpretation of Section 5 as "only refer[ring] to what information is to be written by the applicant on the DMV form.… not … to additional documentation that a State may require outside of the form." Br. at 12. As the District Court correctly noted, "[t]he statute does not distinguish between information required to be provided on the form itself, and information required by the application form that must be produced separate from the form." App. 705. The NVRA's statutory scheme is straightforward, mandating a simplified motor-voter registration application form that is integrated into the drivers' license application, and directing 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 to the appropriate State motor vehicle authority" within a specified time period. 52 U.S.C. § 20507(a)(1)(A).

Kobach's position would also nullify the NVRA's protections for motor-voter applicants. States cannot evade the NVRA's prohibition against requiring

more than the "minimum amount information necessary," by demanding that information forbidden on the integrated motor-voter application form be submitted separately to elections officials. Congress intended the NVRA to streamline the registration process; it did not authorize States to divide the registration process into multiple stages at which applicants must produce new information. *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (construction of statutory provisions "must, to the extent possible, ensure that the statutory scheme is coherent and consistent").

In Kobach's view, there is no limit on the additional eligibility documentation that States could require.[9] If, as Kobach argues, States are permitted to reject motor-voter applications based on any state-imposed restrictions, motor-voter registration 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.'" *ITCA*, 133 S. Ct. at

[9] If Kobach were correct, States could, for example, require applicants to obtain affidavits from other citizens to confirm the applicant's eligibility to vote, which was a common practice in the Jim Crow South. *See United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (challenging statute requiring registration applicants to produce a "supporting witness [who] must affirm that he … is aware of no reason why the applicant would be disqualified from registering."); *United States v. Manning*, 205 F. Supp. 172, 172-73 (W.D. La. 1962) (challenging statute under which the "registrar [of voters] may require [an applicant] to establish his identity by producing two credible persons registered to vote in his ward and precinct to identify him under oath.").

2256 (alternation in original) (quoting 52 U.S.C. § 20501(b) (formerly 42 U.S.C. § 1973gg(b))).

2. The Legislative History of the NVRA Establishes that Congress Sought to Preempt States from Imposing a DPOC Requirement.

In a futile attempt to rewrite legislative history, Kobach asserts that "[n]o Member of Congress ever described the NVRA as having th[e] effect [of preempting States from imposing a DPOC requirement]," Br. at 2. But this Court has already recognized that "[b]oth houses of Congress debated and voted … and ultimately rejected … a proposal" to allow States to require DPOC from NVRA applicants. *EAC*, 772 F.3d at 1195 n.7. That proposal was an amendment introduced by Senator Simpson (the "Simpson Amendment"), which sought "to ensure that States will continue to have the right … to require documents to verify citizenship." 139 Cong. Rec. S2897-04, S2902, 1993 WL 73164 (daily ed. Mar. 16, 1993). The Simpson Amendment was initially adopted by the Senate, but was ultimately stripped from the bill by the House-Senate Conference Committee. *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).

Kobach's attempts to muddy the waters regarding the legislative history of the Simpson Amendment are unavailing. As Kobach notes, during the Senate floor debate over the Simpson Amendment, Senator Wendell Ford, a sponsor of the NVRA, stated his view that the NVRA does not preclude States from requiring DPOC. *See* App. 674 (citing 139 Cong. Rec. S2902, 1993 WL 73164). As an

initial matter, Senator Ford's comments were not memorialized in an official congressional report, and such "contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982).

More fundamentally, Kobach is mistaken in stating that Senator Ford "opposed this provision." Br. at 48. In fact, Senator Ford *supported* the Simpson Amendment, stating that he had "no objection" to it, which then passed the Senate by voice vote, with Senator Ford's support. 139 Cong. Rec. S2902, 1993 WL 73164.[10] But Congress ultimately *disagreed*, and rejected Senator Ford's interpretation of the statute. It stripped out the Simpson Amendment, explaining in the House-Senate Conference Committee Report that:

> It is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well.

H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.) (emphases added).

[10] Senator Ford made a procedural motion to reconsider the Simpson Amendment, which he would only do if he had voted in favor of it. 139 Cong. Rec. S2902, 1993 WL 73164. *See* U.S. Senate, *Senate Glossary*, "reconsider," http://www.senate.gov/reference/glossary_term/reconsider.htm ("Normally a supporter of the outcome immediately moves to reconsider the vote, and the same senator or another immediately moves to table this motion, thus securing the outcome of the vote.").

Kobach erroneously suggests that the Conference Report is ambiguous as to Congress's purpose because it does not use the magic words: "Proof of citizenship requirements are *prohibited* by this Act." Br. at 49. But the "[Supreme] Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990). And there can be no confusion regarding Congress's intentions here. The point of the Simpson Amendment was to allow States to require DPOC. By rejecting it, Congress made crystal-clear that the NVRA *does not* permit States to demand DPOC for voter registration. "Congress'[s] rejection of the very language that would have achieved the result [Kansas] urges here weighs heavily against [Kansas's] interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

Next, Kobach cites the House Report, which states that, under the NVRA, "election officials continue to make determinations as to applicant's eligibility, such as citizenship," Br. at 47 (quoting H.R. Rep. No. 103-9, at 8-9 (1993) (emphasis removed)), and argues that this passage evinces Congress's intent "that the determination of an applicant's citizenship would be done according to the laws of each state," Br. at 47. But that is *not* what the House Report says. Kobach conveniently omits the preceding sentences to the passage he cites, which states:

> Although the application for voting registration is simultaneous with an application for a driver's license, it is not the intent of the bill to supplant the traditional role of voting registrars over the registration procedure. The bill makes it very clear that the motor vehicle agency is responsible for

> forwarding voting registration applications to the appropriate State election official.

H.R. Rep. No. 103-9, at 8. Thus, far from implying that States remain free under the NVRA to assess eligibility however they see fit, the House Report simply clarified that the NVRA "should not be interpreted in any way to supplant th[e] authority" of state election officials to "enroll eligible voters." H.R. Rep. No. 103-9, at 8.[11] Finally, the House Report *preceded* the Conference Committee Report; even if Kobach's characterization of the House Report were correct—and it is not—it would be superseded by the Conference Report's express rejection of State authority to impose DPOC requirements.

C. The District Court's Factual Findings Confirm that Kansas's DPOC Requirement Is Unnecessary to Assess Voter Eligibility, and Is Therefore Prohibited by the NVRA.

Kobach complains that the District Court engaged in a "fact-bound inquiry." Br. at 30. Fact-finding, however, is precisely what a district court is supposed to do. And here, the District Court's review of the record supported the common-sense conclusion that a registration barrier that has disenfranchised more than 18,000 Kansans is inconsistent with the NVRA. These factual findings—which are entitled to substantial deference on appeal, *see RoDa Drilling Co.*, 552 F.3d at

[11] The same concern was addressed in the Senate Report: "The Committee is aware that some concern has been expressed that this provision of the bill transfers voting registration authority from State voting registrars to State drivers licensing officers. That is not the intent." S. Rep. No. 103-6, at 6 (1993).

1208—confirm "that the information required under the Kansas DPOC [Law] exceeds the minimum amount of information necessary for State election officials to assess citizenship eligibility," App. 706, because the law is (1) unduly burdensome, and (2) unnecessary to prevent noncitizen registration.

1. The District Court Did Not Clearly Err in Finding that the DPOC Law Is "Burdensome, Confusing, and Inconsistently Enforced."

The District Court found that "the process of submitting DPOC for motor voter applicants is burdensome, confusing, and inconsistently enforced." App. 706. That finding was amply supported by the record. For example, crediting the undisputed testimony of Plaintiff Donna Bucci, the Court found that "Ms. Bucci does not have any documents that would be sufficient to prove her citizenship under § 25-2309(*l*). Obtaining a copy of her Maryland birth certificate would cost $24, and this would be a financial burden for her." *Id.* 685. Kobach suggests that obtaining DPOC is "probably no more difficult than it would be to … obtain a U.S. passport," Br. at 19-20 (citation omitted), but obtaining a passport is no easy hurdle for many: an initial application costs $135.[12] The District Court found that, for

[12] *See* U.S. State Dep't, *United States Passport Fees* (Mar. 2016), https://travel.state.gov/content/dam/passports/FeeChart/Passport%20Fees%20Chart_TSG%20March2016.pdf. Only about 39% of Americans have a passport. *Compare* U.S. Census Bureau, *U.S. and World Population Clock* (Dec. 2015), http://www.census.gov/popclock/ (U.S. population in December 2015 was approximately 322,755,353) *with* U.S. State Dep't, *Passports Statistics* (Dec.

low-income individuals like Ms. Bucci, "[t]he cost of obtaining a birth certificate or passport is often prohibitive." App. 726.[13]

In finding that the DPOC Law is confusing, the District Court highlighted the experiences of various Plaintiffs. For example,

> Mr. Stricker's experience underscores how confusing this process is. He went home to retrieve a social security card because he did not bring sufficient proof of lawful presence with him. Again, he told the DMV clerk that he wanted to register to vote and was not advised that he lacked the necessary documentation to complete that process. He left the DMV believing that he was registered and unsuccessfully attempted to vote in the November 2014 election.

App. 708. Similarly, other Plaintiffs left the DMV believing that they were registered, but only later learned that they were not. *Id.* 707-08 (Plaintiffs Bucci and Hutchinson).

2015), https://travel.state.gov/content/passports/en/passports/statistics.html (for the year 2015, there were 125,907,176 U.S. passports in circulation).

[13] Kobach's reliance on *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) is misplaced. *Crawford* rejected "a broad attack on the constitutionality" of Indiana's voter identification law, *id.* at 200; it did not involve a DPOC requirement or address whether such a requirement is "necessary" within the meaning of the NVRA. In any event, *Crawford*'s holding was based on the fact that "the evidence in the record d[id] not provide us with the number of registered voters without photo identification," and said "virtually nothing about the difficulties faced" in obtaining ID." *Id.* at 200-01 (plurality op.). Here, the District Court found that the burdens imposed by the DPOC Law "go beyond the inconvenience of obtaining a photo-ID by adding another layer onto the procedure already required at the DMV," App. 708, disenfranchising more than 18,000 Kansans.

In sum, the District Court concluded that "[t]he sheer number of people cancelled or held in suspense because of the DPOC requirement since October 2015 evidences the difficulty of complying with the law as it is currently enforced." App. 710. This is not what Congress intended. The House Committee that introduced the NVRA expressed a concern that "low voter turnout in Federal elections poses potential serious problems in our democratic society," and intended the motor-voter process to be "the broadest, most effective and cost-efficient method of registration." H.R. Rep. No. 103-9, at 4. But the DPOC requirement layers "a confusing and inconsistently-enforced maze of requirements," App. 728, on top of what is supposed to be a simple, "[s]imultaneous application" procedure at DMVs, 52 U.S.C. § 20504.

2. The District Court Did Not Clearly Err in Finding that the Rate of Noncitizen Registration in Kansas Is "At Best Nominal."

Next, the District Court found that the DPOC Law is *unnecessary* because noncitizen registration is extremely rare in Kansas, a finding that was well-supported by the record. During an approximately ten-year period from 2006 through 2016, "860,604 people registered to vote in the State of Kansas." App. 711. In comparison, Kobach presented evidence of an "at best nominal" problem of noncitizen voting. *Id.* 712. The sum total of his evidence, which was "discovered over the span of approximately three years" of investigative work, Br. at 38, amounted to a total of "thirty noncitizens [who] registered to vote [between

2003 and 2013], about three noncitizens per year," as well as evidence of fourteen noncitizens who allegedly had been prevented from registering since 2013, *see id.* 711-13.

Rejecting Kobach's unsubstantiated, self-serving speculation that these incidents are just the "tip of the iceberg," Br. at 55, the Court found that the number of noncitizens who have registered "pales in comparison to the number of people not registered as a result of the DPOC law." App. 730. That finding is consistent with this Court's previous ruling, based on a materially identical record, that Kansas "failed to meet [its] evidentiary burden of proving that [it] cannot enforce [its] voter qualifications because a substantial number of noncitizens have successfully registered." *EAC*, 772 F.3d at 1197-98;[14] *cf. ACORN v. Edgar*, 56 F.3d 791, 794-95 (7th Cir. 1995) (holding that even if the NVRA "ma[d]e it more difficult to enforce some [voter] qualifications," the statute was constitutional because there was no evidence it was "impossible for the state to enforce its voter qualifications").

[14] In *EAC*, Kobach argued that a DPOC requirement was necessary based on "evidence that twenty noncitizens had registered to vote, falsely affirming their citizenship." *See* Pls.-Appellees' Resp. Br., *Kobach v. U.S. Election Assistance Comm'n*, No. 14-3072, 2014 WL 3386893, at *37 (10th Cir. June 30, 2014). Here, he has produced materially similar allegations of approximately thirty total noncitizen registrations.

3. The District Court Did Not Clearly Err in Finding that Kansas Has Multiple Alternatives to Prevent Noncitizen Registration.

The District Court further found that there are multiple alternatives for preventing noncitizens from registering. Here, too, these findings were well supported, and far from clearly erroneous.

First, Kansas can rely on an attestation of citizenship, given that the NVRA already "requires each motor voter application to include a list of the eligibility requirements, including citizenship, and an attestation that the applicant meets each requirement." App. 706 (citing 52 U.S.C. § 20504(c)(2)(C)). That attestation is the sum total of proof of U.S. citizenship required from motor-voter applicants in virtually every State nationwide; indeed, the attestation of citizenship is what Kansas itself relied on exclusively for 18 years, from the effective date of the NVRA in 1995 to the effective date of the DPOC Law in 2013. As noted, this Court has already found that there is "not … substantial evidence of noncitizens registering to vote" using a mere attestation. *EAC*, 772 F.3d at 1199.[15]

Importantly, as the District Court observed, "Kobach himself made a strong case [that the attestation] is the minimum amount of information necessary for Kansas election officials to assess an applicant's citizenship," because he employs

[15] Kobach quotes comments made during oral argument in *ITCA* for the proposition that an attestation does not constitute proof of citizenship. *See* Br. at 38. Comments during argument are neither Court holdings nor precedential, particularly where, as here, they are squarely contradicted by the decision itself.

a procedure that purportedly enables some individuals who lack citizenship documents to obtain a hearing with the state elections board, and then register to vote using nothing more than a "declaration of citizenship." App. 714. Being able to prove one's U.S. citizenship via an affidavit is exactly the remedy Appellees seek for all Kansas voters, except in the form mandated by the NVRA, and actually accessible to voters.

Second, Kansas can "provide better training to DMV workers who are charged with asking applicants if they are United States citizens, and with advising applicants that they are signing an attestation of citizenship under penalty of perjury." App. 713. In Kansas, "[a]t the end of the motor voter application process, the applicants sign a digital form that includes the NVRA-required attestation clause that what they are signing is true and correct, and that they are a United States citizen." *Id.* 681. Kobach concedes that this is Kansas's duty under the NVRA. *See* Br. at 5 (citing 52 U.S.C. § 20504(c)(2)(D)) (conceding "the voter registration application also must inform applicants of voter eligibility requirements," including citizenship, "and penalties for submitting a false voter registration application.").

The record demonstrated, however, that Kansas DMV employees sometimes offer voter registration services to individuals who identify themselves as noncitizens during the driver's license application process, and that "coordination

between the Secretary of State's office and the Department of Revenue is lacking." App. 713. Indeed, contrary to Kobach's assertions that, prior to the DPOC Law, "noncitizens falsely attesting to United States citizenship were registering in Kansas," Br. at 7, the District Court found that *every* instance in the record of noncitizen registration through the DMV "involve[d] mistaken understandings of the eligibility requirements," App. 713. Thus, the Court found that Kansas can prevent noncitizen registration by training its DMV employees to follow the law. *See id*. Congress determined that such safeguards, if followed consistently, would be sufficient to prevent unlawful registrations at DMV offices. *See* H.R. Rep. No. 103-9, at 7-8 ("The Committee would expect that any driver's license applicant who does not meet the requirements for eligibility to vote would decline to do so. It is important, therefore, that each applicant be advised of the voting requirements and the need to decline to register if he or she does not meet the requirements.").[16]

Third, "the State can prosecute noncitizens who register," App. 711. Indeed, this Court recognized the possibility of criminal prosecution as one of "five alternatives to requiring documentary evidence of citizenship … to ensure that noncitizens do not register." *EAC*, 772 F.3d at 1197. And Kobach has such

[16] *See also* S. Rep. No. 103-6, at 11 (1993) (the Act "provides sufficient safeguards to prevent noncitizens from registering to vote" because "the processing of voting registration applications at the motor vehicles agency would lessen the likelihood of such fraud and certainly would not make it greater than it is now.").

prosecutorial authority, but he "has not prosecuted any cases of noncitizen voter fraud"; and, at the time of the preliminary injunction hearing, he could not identify a single prosecution brought by others in Kansas. App. 713-14.

In sum, there are multiple alternatives available for preventing noncitizen registration.

4. The District Court Employed an Objective Standard in Defining "Necessary."

In holding that the DPOC requirement is unnecessary, the District Court did not, as Kobach suggests, "select[] a subjective rather than objective definition … of what might be considered … 'necessary'" for assessing voter eligibility. Br. at 31. Rather, the District Court found that an attestation of citizenship was the objective minimum standard set forth by Congress, followed by virtually every other state nationwide. In arguing that Kansas may demand DPOC as long as there is some indication that "*any* noncitizens are succeeding in registering to vote," Br. at 37, Kobach asks this Court to credit *his* subjective interpretation of the facts. But his difference of opinion is insufficient to overturn the District Court's considered judgment. *See Beltronics USA, Inc.*, 562 F.3d at 1075 ("Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.") (citation omitted); *RoDa Drilling Co.*, 552 F.3d at 1208 (a district court's findings on a preliminary injunction must be affirmed

unless they are "arbitrary, capricious, whimsical, or manifestly unreasonable") (citation omitted).

The dispositive question is not whether the word "necessary" is subject to an "objective" understanding, but whether the *federal* government determines what is necessary to assess the eligibility of registrants for *federal* elections. Kobach insists that "[w]hat is 'necessary' is defined by the State," Br. at 33, but Congress enacted the NVRA with the express purpose of overriding State barriers to voter registration, *see* 52 U.S.C. § 20501(a)(3) (finding 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"). Although Kobach concedes that Congress intended the NVRA to set a "national standard" for voter registration, Br. at 54 (citation omitted; emphasis removed), his interpretation of the statute would reduce it to a patchwork that varies according to the different requirements of the States.

D. Governing Precedent Establishes that An Attestation Constitutes the "Minimum" Amount of Information Necessary to Assess the Eligibility of Registration Applicants.

1. The Supreme Court and This Court Have Rejected Kobach's Argument that "There Is No Constraint in the NVRA" on Information that States Can Require.

Kobach denigrates the District Court's application of the plain meaning of Section 5's text as a "novel interpretation" of the NVRA, Br. at 3. Tellingly, he

cites no authority for his argument that "there is *no* constraint in the NVRA over what additional documentation a State may request beyond the form itself." *Id.* at 27. To the contrary, that argument was squarely rejected by *ITCA* and *EAC*, which recognize that an attestation constitutes the "minimum" amount of information necessary to assess the eligibility of registration applicants.

Construing a different provision of the NVRA, the Supreme Court held in *ITCA* that the "NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal [mail-in voter registration] Form," which required only a sworn attestation to establish an applicant's citizenship. 133 S. Ct. at 2257. Justice Alito, in his dissent, expressed a contrary view—essentially identical to Kobach's in this case—"that the [NVRA] lets the States decide for themselves what information 'is necessary … to assess the eligibility of the applicant.'" *Id.* at 2274. But the Supreme Court rejected that view. As this Court has explained, *ITCA* is "one of those instances in which the dissent clearly tells us what the law is not." *EAC*, 772 F.3d at 1188.

Kobach then challenged the EAC's refusal to add a DPOC requirement to the Federal Form, and lost: This Court held that the EAC properly refused to incorporate such a requirement into the Federal Form. *See EAC*, 772 F. 3d at 1195 ("[T]he 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)."). This Court further held that adding such a requirement would have "risked arbitrariness," in violation of the Administrative Procedures Act ("APA"). *EAC*, 772 F.3d at 1198. A necessary consequence of that ruling is that an attestation of citizenship is an acceptable level of proof for ascertaining the eligibility of voter registration applicants. Anything beyond such an attestation therefore exceeds the "minimum amount of information necessary" for assessing voter eligibility, and is precluded by Section 5 of the NVRA.

Young v. Fordice, *supra*, does not support Kobach's interpretation of the statute. *Young* was a Voting Rights Act preclearance case, and simply observed that "[t]he NVRA does not list … all the other information the State may—or may not—provide or *request*." 520 U.S. at 286 (emphasis added). *Young* did not say that States may *require* whatever information they deem appropriate from registration applicants. The District Court thus correctly observed that *Young* "did not say that the States have unfettered discretion under the NVRA to request information in conjunction with a motor voter registration application." App. 704. Indeed, *Young* makes no mention whatsoever of whether States may impose DPOC requirements. The NVRA "is silent as to some information that a State may or may not require," such as, for example, information about a motor-voter applicant's race, and thus does not prohibit states from *requesting* that information.

App. 705. But "the NVRA is not silent about information needed by State officials to assess eligibility on the motor voter application": it places specific, detailed restrictions in that regard, namely, an attestation of citizenship, and nothing more. *Id*.

McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000)—which held that some States may require social security numbers (SSNs) for voter registration, but did not address DPOC requirements specifically—is not to the contrary. *McKay* was based on the Privacy Act of 1974, Pub.L. No. 93–579, § 7, 88 Stat. 1896, 1909 (1974), which generally bars States from requiring full SSNs for voter registration, but contains a grandfather exception for those States that, as of January 1, 1975, *already* required SSNs. *See id.* at 755. The Sixth Circuit applied a "principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum," and held that Tennessee's SSN requirement did not violate the NVRA because Congress intended the Privacy Act's "more specific 'grandfather' provision ... to survive the more general provisions of the NVRA." *Id.* But that is irrelevant to this case, because there is no analogous federal statute that specifically authorizes States to require DPOC from registration

applicants. *Cf. Gonzalez*, 677 F.3d at 400 n.26 (distinguishing DPOC requirements from SSN requirements).[17]

2. This Court Has Rejected Kobach's Constitutional Doubt Arguments.

This Court has already rejected Kobach's argument that requiring states to register voters based on an attestation of citizenship is an unconstitutional intrusion on state power to determine voter qualifications. *See EAC*, 772 F.3d. at 1199. Kobach's argument conflates a voter qualification (*i.e.*, U.S. citizenship, *see* Kan. Const. art. 5, § 1) with how a person *proves* that she is eligible (*i.e.*, in Kansas, submitting a piece of paper documenting the fact of one's citizenship). As this Court has explained, "individual states retain the power to set *substantive* voter qualifications (*i.e.*, that voters be citizens)," but "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)." *EAC*, 772 F.3d at 1195.[18]

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[17] And, even with respect to SSNs, States that are not grandfathered in under the Privacy Act are *prohibited* from requiring full SSNs by the NVRA. *See McKay v. Altobello*, No. CIV.A. 96-3458, 1997 WL 266717, at *3 (E.D. La. May 16, 1997) (Louisiana, "by requiring a social security number … violates the NVRA," because "the exemptive provision in the Privacy Act has not been met.").

[18] Again, the view espoused by Kobach here is one that was set forth in a *dissent* in *ITCA*. *See ITCA*, 133 S. Ct. at 2262 (Thomas, J., dissenting) (arguing that "the Voter Qualifications Clause, U.S. Const. art. I, §2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal

Defendant Kobach's argument that the preliminary injunction establishes different qualifications for federal and state elections—an argument that he did not raise below and therefore has waived, *see Campbell*, 777 F.3d at 1080—fails for the same reason. Under Kobach's bifurcated registration system, the voter qualification (citizenship) remains the same for both federal and state elections; only the manner and procedural requirement for verifying citizenship would be different. *Cf. EAC*, 772 F.3d at 1195. In any event, as explained *infra* Sec.II.B., nothing compels Defendant Kobach to enact a labyrinthine dual registration system for federal and state elections—one that a state court has already declared violates Kansas law, but whose judgment Kobach continues to flout.

E. Interpreting the NVRA According to Its Plain Meaning to Preempt the DPOC Law Does Not Result in "Absurd Consequences."

Kobach asserts that the preliminary injunction creates a "nonsensical distinction between DMV applicants and other applicants," Br. at 51, but that argument fails.

First, as a textual matter, the precise requirements for registration through other channels prescribed by the NVRA are irrelevant, because they are governed under different provisions of the statute. Motor-voter registration is addressed in

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elections, which necessarily includes the related power to determine whether those qualifications are satisfied."). Once again, "the dissent clearly tells us what the law is not." *EAC*, 772 F.3d at 1188.

Section 5 of the NVRA, 52 U.S.C. § 20504, whereas mail registration, for example, is addressed in Sections 6 and 9 of the statute, 52 U.S.C. §§ 20505, 20508. As the District Court observed, "the word 'minimum' appears in § 5, but not in § 9, which suggests that Congress intended for a stricter standard to apply in § 5." App. 702. Thus, the motor-voter registration application process must be the most accessible form of registration under the statute. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted); *Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1502 (10th Cir. 1991) ("[T]he legislature's use of two different terms is presumed to be intentional."). Kobach, however, would read the word "minimum" out of Section 5, thus violating "a cardinal principle of statutory construction that … if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Rajala v. Gardner*, 709 F.3d 1031, 1038 (10th Cir. 2013) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).[19]

[19] Kobach twists the statute in knots to argue that the word "minimum" "can vary, depending on how many duplicate [registrations] a State wishes to eliminate." Br. at 35. This bizarre argument, which was not raised below and is therefore waived, *see Campbell*, 777 F.3d at 1080, misreads the statute by placing no limitations on what States may require from motor-voter applicants.

Second, the resulting "special privilege" for motor-voter applicants to register without DPOC is not absurd in the least. After the *ITCA* decision, Kansas was required to register Federal Form applicants who failed to provide DPOC. *See ITCA*, 133 S. Ct. at 2257 ("[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.") (citation omitted). A "special privilege" to register without DPOC was precisely the point of *ITCA*.[20]

[20] Although the EAC recently "modified the state-specific instructions of the Federal Form" to incorporate a DPOC requirement for several states, Br. at 9, that action, which followed several previous decisions by the EAC to reject such a requirement, contravenes this Court's statement that such change "risk[s] arbitrariness" in violation of the APA. *EAC*, 772 F.3d at 1198. Furthermore, this change is not, as Kobach implies, due to the fact that the EAC now has "a quorum of commissioners," Br. at 9-10; in fact, it was made unilaterally *without commissioner approval* by the Executive Director of the EAC, who is a former colleague of Kobach. *See Statement by [EAC] Vice-Chair Tom Hicks* (Feb. 2, 2016), http://www.eac.gov/assets/1/Documents/Statement%20by%20Commissioner%20Hicks%20NVRA%20Form%20(2-2-16)-1.pdf. The Executive Director's decision is the subject of separate litigation now on appeal, as the district court in that case denied preliminary relief based on a finding that the organizational plaintiffs failed to establish irreparable harm to their voter registration efforts. *See* Mem. Op. at 20-23, *League of Women Voters v. Newby*, No. 1:16-cv-00236 (D.D.C. June 29, 2016), ECF No. 92, *appeal docketed*, No. 16-5196 (D.C. Cir. July 1, 2016).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE EQUITIES FAVORED PRELIMINARY RELIEF.

In concluding that the disenfranchisement of 18,000-plus Kansans outweighed Kobach's exaggerated claims of harm, the District Court acted well within its discretion.[21]

A. The District Court Did Not Abuse Its Discretion in Finding that Plaintiffs Would Be Disenfranchised Absent Preliminary Relief.

The District Court found "that Plaintiffs have made a strong showing of irreparable harm," based on "strong evidence that otherwise eligible voters in Kansas have been entirely precluded from registering to vote based solely on the DPOC law." App. 725-26. The Court concluded that the named Plaintiffs desired to vote in upcoming elections but had been stymied by the "confusing and inconsistently-enforced maze of requirements under the new DPOC law." *Id.* 728. The Court credited Plaintiffs' testimony that they "believed they had successfully registered to vote when they left the DMV office" only to learn they could not vote months later via mail or at the polls. *Id*. 707, 725. Furthermore, Plaintiffs "demonstrated a financial and administrative burden to obtaining the two most common forms of DPOC." *Id*. 726. The named Plaintiffs' experiences mirrored the "uncontroverted evidence that thousands of qualified Kansas motor voter

[21] In discussing the equities, Kobach oddly invokes the "presumption of constitutionality" of state laws, Br. at 57, but that presumption is wholly irrelevant to this case, which challenges the DPOC Law as violating a federal *statute*.

applicants have not been registered" solely because of the DPOC law. *Id*. 725. The Court also concluded that "the DPOC law has caused a chilling effect, dissuading those who try and fail at navigating the motor voter registration process from reapplying in the future." *Id*. These findings are amply supported by record evidence; none is clearly erroneous.

"Courts routinely deem restrictions on fundamental voting rights irreparable injury," because "once [an] election occurs, there can be no do-over and no redress." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LWVNC*"), *cert. denied*, 135 S. Ct. 1735 (2015); *see also Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of right to vote is unquestionably "irreparable harm"); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury."), *stay denied*, 133 S. Ct. 497 (2012).

1. Relief is Not Barred by Any Supposed "Delay."

Kobach attempts to evade the consensus in precedent by erroneously asserting that Plaintiffs unduly delayed in filing suit. Br. at 15-17. But that contention relies on inapt doctrine evaluating irreparable harm in the context of common law and trademark suits. The distinction is significant; courts presume irreparable harm from interference with the ability to vote.

The District Court correctly noted that "all qualified voters have a

constitutionally protected right to vote, and to have their votes counted," and that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." App. 724 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). A similar presumption of irreparable harm operates for statutory violations of the NVRA because of its express provisions authorizing injunctive relief, *see* 52 U.S.C. § 20510 (providing a private right to bring a "civil action in an appropriate district court for declaratory or injunctive relief"). *Cf. Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981) ("When the evidence shows that 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, irreparable harm to the plaintiffs need not be shown."); *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt.*, 496 F.3d 769, 772 (7th Cir. 2007) (federal provisions "authoriz[ing] district courts to provide equitable relief … alter[] the common law [by] dispens[ing] with the need to show irreparable injury"). Where, as here, "Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction … [because] Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue...." *Burlington N. R. Co. v. Bair*, 957 F.2d 599, 601-02 (8th Cir. 1992).

Even setting aside the presumption of irreparable harm, Kobach's arguments fail because he has mischaracterized the record and misconstrued the law. Kobach suggests that irreparable harm does not exist, asserting that Plaintiffs "could have filed suit as early as July 2011, in order to prevent the proof-of-citizenship requirement from affecting them during the [2012 elections]." Br. at 16. But Plaintiffs did not attempt to register to vote until well afterwards "in 2013 or 2014; the latest application was made in October 2014 by Mr. Stricker." App. 728. Plaintiff Boynton did not even move to Kansas until 2014. *See id*. at 686. Kobach asserts that "the State's voter registration database shows that individualized notice [of the DPOC requirement] was mailed to each [Plaintiff]." Br. at 17.[22] But the District Court found that the State's "records show only notations that these notices were sent. There is no evidence in the record that they were actually received." App. 709. In fact, the record shows that several Plaintiffs did not learn that they

[22] Kobach asserts that "each Appellee was given *individualized notice* of the proof-of-citizenship requirement by DMV personnel," and "w[as] fully aware that they still needed to provide [DPOC]." Br. at 15 (citing App. 1034), 17 (citing, *inter alia*, App. 754-755). These mischaracterizations rely on materials that have been stricken from the record on appeal. *See* Order, July 20, 1016. And the District Court found that there is no evidence that any of the Plaintiffs actually received notice of the DPOC requirement when applying at the DMV, as they "believed they had successfully registered to vote when they left the DMV office." App. 707.

had been ensnared by the DPOC Law until much later. *Id.* 728.[23]

Moreover, Kobach ignores the fact that it was not until October 31, 2015 that a new administrative rule became effective that canceled the registrations of voters who failed to provide DPOC within 90 days of their applications. Though the District Court declined to enjoin this administrative rule in its entirety, it recognized that the change to Plaintiffs' status harmed them anew, "requir[ing] them to resubmit their voter applications." App. 728-29. Plaintiffs sent their NVRA notice less than three weeks later, on November 20; they waited the requisite 90 days before initiating litigation under the NVRA's notice provision and filed suit on the first day possible in February 2016. *See id.* 728 (citing 52 U.S.C. § 20510(b)); Compl., ECF No. 1. Under these circumstances, the District Court appropriately exercised its discretion to conclude that "[a]ny delay is attributable to the lengthy application scheme in place after the law changed, the passage of the 2015 regulation, and the lack of notice among the Plaintiffs that they had not successfully registered to vote." App. 728-29.

Kobach also disregards the fact that harm in this case was ongoing. The District Court found that Plaintiffs' experiences "are illustrative of the burdensome

[23] *See* App. 685-86 (Plaintiff Stricker learned for the first time that there was a problem with his registration when he unsuccessfully tried to vote in the November 2014 election); *id.* 686-87 (Plaintiff Boynton did not definitively learn that his registration was incomplete due to failure to provide DPOC until 2015).

enforcement scheme" that "has resulted in thousands of otherwise qualified voters in Kansas being kept off the voter rolls." *Id.* 729. Before the District Court issued its injunction, it was uncontested that Defendants were canceling and suspending motor-voter applications on a constant basis. *Id*. 428 (Elections Director Caskey confirming that new registration applications are being suspended "every day"). Defendants cannot evade injunctive relief by arguing delay when they were causing fresh injuries every day. *See LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 58 (2d Cir. 2004) ("[P]laintiffs [may] adduce evidence of harm representatively, so long as they lay a foundation that the representative plaintiffs are similarly situated with regard to the issue of irreparable harm."). None of the authorities on which Kobach relies involved actions where, as here, the defendants continued to cause new injuries on a daily basis.

2. Plaintiffs' Injury Is Not "Self-Inflicted."

Kobach's assertion that "all that is preventing [Plaintiffs] from being registered to vote is their unwillingness to comply" with the DPOC Law, Br. at 18, is similarly misplaced. Plaintiffs applied to register to vote at a DMV in accordance with Section 5 of the NVRA and did everything required by the NVRA to register – including signing an attestation that they are U.S. citizens. They were "entirely precluded from registering to vote *based solely* on the DPOC law." App. 726 (emphasis added). That is, they would be registered *but for* the "burdensome

enforcement scheme necessitated by the Kansas DPOC law." *Id*. 729.

Kobach in essence argues that Plaintiffs cannot establish irreparable harm if they could have mitigated the consequences of the State's unlawful action. But the Supreme Court has found irreparable harm where Plaintiffs challenged the validity of laws that violate their federal rights in some respect, regardless of whether compliance with the law would have been possible. *See, e.g.*, *Burwell*, 134 S. Ct. at 2766 (corporations "demonstrated irreparable harm" under the Religious Freedom Restoration Act although they were capable of providing insurance coverage for abortion and birth control services); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (upholding injunction against enforcement of ordinance requiring Plaintiff to display "Live Free or Die" on his license plate although plaintiff could have complied with the ordinance). And, as noted above, this Court has held that the type of statutory violations presented here presumptively establish irreparable harm. *See Atchison*, 640 F.2d at 259.

The only case advanced by Kobach in support of his "impossibility" standard, *Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003), simply held that the harm asserted by the plaintiff in that case was self-inflicted because it "result[ed] from the express terms of a contract [plaintiff] had negotiated[.]" *See id*. In sharp contrast, Plaintiffs in this case had no involvement in drafting the DPOC law or negotiating its content; their injury "was

initiated by Defendants, not Plaintiff." *Cf. Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011) (rejecting contention that plaintiffs' harm was self-inflicted). Tellingly, Kobach did not apply this "impossibility" standard to his own assertions of irreparable harm when he sought an emergency stay of the District Court's preliminary injunction order. *See* Kobach Br. in Supp. of Mot. for Stay Pending Appeal, May 28, 2017.

Finally, Kobach's argument is factually incorrect. The District Court credited Plaintiff Bucci's testimony that she is *unable* to comply with the DPOC Law because she cannot afford a birth certificate. *See* App. 685, 726. Kobach asserts that Ms. Bucci can register to vote by seeking a hearing before the State elections board, *see* Br. at 19, and then presenting "an affidavit" attesting to her U.S. citizenship, *id.* at 2. But the District Court found that this hearing procedure is not an adequate "safety net," and instead constitutes an "additional burdensome layer in the Kansas enforcement scheme." App. 727. Neither the DPOC Law nor its implementing regulations contain information as to how to request a hearing; the procedures governing a hearing; or what sort of proof will be deemed acceptable. To successfully complete the hearing process, a voter must somehow "(a) learn about the existence of the procedure; (b) divine and then generate some alternative form of proof of citizenship; (c) contact the Secretary of State's Office;

and then (d) obtain a hearing date with three very busy high-level state officials." *Id.* 711. The Court found that "[t]he fact that only three individuals in more than three years have availed themselves of this procedure, out of the thousands of applicants rejected for lack of DPOC, is evidence that the average voter does not view this as an easy and obvious choice…." *Id.* 728.[24]

B. Continuing the Preliminary Injunction Will Not Cause Any Serious Harm to Kobach.

The District Court appropriately exercised its discretion in rejecting Kobach's assertions that the preliminary injunction will cause him injury in the form of possible noncitizen registration and administrative work.

First, although Kobach warns ominously about "[t]he threat of noncitizens registering to vote in Kansas," Br. at 55, the injunction applies only to people who have sworn an attestation of U.S. citizenship under penalty of perjury. Kobach has not identified any of the individuals who were registered pursuant to the injunction as noncitizens. As explained *supra* Sec.I.C.2, the purported threat of noncitizen registration and/or voting is illusory.

[24] Kobach incorrectly claims that Ms. Bucci "stated that in light of this procedure, she no longer objected to the Kansas proof-of-citizenship requirement," Br. at 19, again relying on material that has been stricken from the record on appeal. See Order, July 20, 2016. In any event, the District Court found that "Ms. Bucci's deposition testimony in fact illustrates that citizens are not aware of this option, nor what is required of them to meet the DPOC law under this alternative provision." App. 886.

Second, Kobach refers to unquantified "administrative costs" associated with administering a "bifurcated election" featuring a separate registration list for motor-voters whom he will permit to vote for federal offices only. Br. at 56. But Kobach does not dispute that this problem is "of the State's own making." App. 732.[25] Any "administrative costs" associated with implementing a two-tiered registration system could be avoided if Kobach complied with an existing state court judgment.

Moreover, while Kobach characterizes the injunction as creating "a confusing *new* status of half-registered voters," Br. at 59 (emphasis added), he omits the fact that he *already* operates such a bifurcated registration system: during the 2014 elections, Kobach permitted voters who used the federal registration form to vote for federal offices *only*. *See* App. 732. With or without the preliminary injunction, this bifurcated system would remain in place for at least some voters (unless Kobach decides to comply with the state court's decision). As the District Court found, even with a larger pool of such "federal-only" voters, "there is no evidence of significant administrative burdens with the 2016 election stemming

[25] This two-tiered system has already been declared to violate Kansas state law. *See Belenky v. Kobach*, No. 2013CV1331, at 25 (Shawnee Cty. Dist. Ct. Jan. 15, 2016). Kobach's motion for reconsideration of that decision – which was pending at the time of the district court's decision in this case – has since been denied. *See Belenky*, at 25 (Shawnee Cty. Dist. Ct. June 14, 2016).

from the dual forms of registration that would outweigh Plaintiffs' irreparable harm." *Id.*

In any event, Courts of Appeals have routinely rejected administrative burdens as a justification for permitting disenfranchisement. *See, e.g.*, *Obama for Am.*, 697 F.3d at 436 (granting preliminary injunction based on finding that potential disenfranchisement "outweighs any corresponding burden on the State, which has not shown that [it] will be unable to cope" with plaintiffs' requested relief). Administrative burdens are not a talisman that justifies any restrictions on voting. *See LWVNC*, 769 F.3d at 244 (reversing denial of preliminary relief, and faulting district court for "sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing").

C. The District Court Did Not Abuse Its Discretion in Finding that the Public Interest Favors Preliminary Relief.

In holding that the public interest strongly favors preliminary relief, the District Court appropriately exercised its discretion. "While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Obama for Am.*, 697 F.3d. at 436 (internal quotation marks and citations omitted). Indeed, "[t]he public interest … favors permitting as many qualified voters to vote as possible." *Id*. at 437; *cf. Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1369 (N.D. Ga. 2004) ("The public has an interest in seeing that

the State … complies with federal law, especially in the important area of voter registration."), *aff'd*, 408 F.3d 1349 (11th Cir. 2005); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[w]hile the public has an interest in the will of the [legislatures] being carried out … the public has a more profound and long-term interest in upholding an individual's constitutional rights") (citation omitted).

Here, preliminary relief was necessary to prevent the disenfranchisement of more than 18,000 "otherwise qualified applicants [who] run the risk of losing the right to vote for federal offices in the 2016 primary and general election." App. 725.[26] Given the absence of evidence of any serious harms on the other side of the ledger, the District Court did not abuse its discretion in finding that the public interest favors preliminary relief. *See, e.g, U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary relief].").

[26] Kobach claims that a "survey of 500 Kansans," conducted by a partisan polling firm suggests that the DPOC requirement is not burdensome for most voters. Br. at 58. That unreliable and methodologically flawed survey has been stricken from the record on appeal. *See* Order, July 20, 2016. Nonetheless, the District Court found that even if the survey were properly in the record, "[t]here are no survey questions or results that controvert the clear statistics … that thousands of individuals in Kansas … would be registered but for the DPOC requirement and its flawed execution." App. 887-88.

Kobach argues that there is a "public interest in ensuring that the election process is easily understood…." Br. at 60. But he does not dispute the District Court's findings "that Kansas motor voters are already confused about the current DPOC law and how to meet its requirements." App. 731. Most notably, "[t]he record conclusively showed at the time of the hearing that the DMV and Secretary of State did not coordinate," such that, "as a matter of policy, all [driver's license] renewal applicants [who applied to register to vote] were automatically placed on the suspense list because the DMV did not request DPOC from those applicants at the time of application." App. 883. Many voters therefore left the DMV after renewing their licenses thinking that they were registered to vote, only to discover later that they were not, including "[t]wo Plaintiffs [who] tried to vote in the 2014 election and did not have their ballots counted." *Id.* 884. Thus, while "the State has a strong interest in preventing voter confusion," the District Court appropriately concluded that it "cannot find that the status quo enforcement efforts further that State interest." App. 731.

Kobach relies on *Purcell v. Gonzalez*, which cautions that "voter confusion" may cause eligible voters "to remain away from the polls." 549 U.S. 1, 4-5 (2006). But the preliminary injunction mitigates that concern, by enjoining the DPOC Law, which "caused a chilling effect, dissuading those who try and fail at navigating the motor voter registration process from reapplying in the future." App. 725. That

finding was well-supported by the record, including Plaintiff Bucci's uncontroverted testimony that her experience with the DPOC Law "discourage[d] her from attempting to register to vote in the future." *Id.* 685. At this point, de-registering the affected voters until final judgment would only sow more voter disengagement.

And, even taking Kobach's assertions about voter confusion at face value, the District Court found that it was "unpersuaded that the State's interest in ensuring that Kansas voters are not confused is strong enough to counterbalance the irreparable harm that thousands of disenfranchised voters will suffer if the DPOC [law] prevents them from voting in federal elections." *Id.* 730-31. Kobach warns that when the motor-voters who are registered under the preliminary injunction "go to the polls[,] they will find that they are permitted to vote for federal offices only." Br. at 60. He apparently prefers that these voters not be permitted to vote for *any offices at all*, which happened to two Plaintiffs in 2014, *see, supra* II.A. "Voter confusion," to the extent it exists, does not trump all other equitable considerations. Thus, the Supreme Court recently rejected claims of potential "mass confusion," and denied stays where lower courts ordered relief involving major electoral changes to prevent violations of federal rights, even where elections were imminent or already underway. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016) (mem.) (denying stay pending appeal of redistricting decision

even though absentee balloting had already begun); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (mem.) (denying stay pending appeal of redistricting decision even though election cycle had begun).

Purcell does not stand for an unequivocal rule against legal changes for a pending election, such that a litigant is always entitled to continue holding elections under an unlawful regime until final judgment. In dissolving the Ninth Circuit's entry of an injunction pending appeal, the Supreme Court in *Purcell* admonished the Court of Appeals for failing, "as a procedural matter," to "give deference to the discretion of the District Court." 549 U.S. at 5. Given the District Court's extensive findings in this case, reversing the injunction would replicate the Ninth Circuit's error in *Purcell*.

CONCLUSION

Kansas is an outlier. The preliminary injunction, far from "disrupt[ing] the administration of elections … throughout the nation," Br. at 22, simply brings Kansas's motor-voter process in line with federal law and prevailing practices around the country. The only risk of a "disrupt[ion]" would be from reversal, which would guarantee the disenfranchisement of more than 18,000 Kansans in November. The decision below should be affirmed.

Dated this 21st day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 21st day of July, 2016, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32 because it contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced font in Microsoft Word 2010 using 14-point Times New Roman.

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