IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, RALPH ORTIZ, DONNA BUCCI, CHARLES STRICKER, THOMAS J. BOYNTON, AND DOUGLAS HUTCHINSON on behalf of themselves and all others similarly situated, Plaintiffs, v. KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas; NICK JORDAN, in his official capacity as Secretary of Revenue for the State of Kansas, Defendants.	)	Case No. 2:16-cv-02105

CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

There is no dispute that thousands of Kansans are being prevented from participating in federal elections solely because they purportedly have not produced documentary proof of citizenship pursuant to Kan. Stat. Ann. § 25-2309(*l*) ("DPOC law" or "DPOC requirement"). Defendant's own records indicate that at least 16,000 motor-voter registrants have seen their registrations suspended or canceled due to the DPOC Law, and Defendants'[1] responsive briefing now makes clear that this widespread disenfranchisement of would-be voters has been predicated on a wholly invalid interpretation of Kansas's obligations under the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (the "NVRA").

In enacting the NVRA, Congress mandated that States simplify the voter registration process by removing hurdles to registration. For motor-voter registration, Congress placed the strictest limitations on the State's ability to impose any barriers: States "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) (emphasis added). To the extent that there could be any question of whether the DPOC law exceeds the "minimum amount of information" permitted under the NVRA, Congress eliminated any uncertainty by expressly rejecting documentary proof of citizenship requirements as "not necessary or consistent with the purposes of this Act." H.R. Conf. Rep. No. 103-66, at 23 (1993). And decisions from the Supreme Court and Tenth Circuit hold that it is both valid and constitutional to require States to

[1] Defendant Jordan repeatedly objects to any reference by Plaintiffs to him in conjunction with Defendant Kobach given their different roles as Secretary of Revenue and Secretary of State. Except where specified, Plaintiffs will continue to refer to both Defendants together. This is appropriate because Defendant Jordan has joined all arguments raised in Defendant Kobach's Brief, *see* ECF No. 57, Def. Jordan's Resp. to Pls.' Mot. for Prelim. Inj. ("Jordan PI Opp'n") at 32-33, and as explained, *infra* § VI, motor-voter registration under the NVRA requires joint administration and enforcement by the Department of Vehicles and the Secretary of State.

rely on a sworn attestation in order to assess an individual's eligibility as a citizen.

In opposing Plaintiffs' Motion for Preliminary Injunction, Defendants brazenly attempt to read "only the minimum amount of information" out of the NVRA entirely. Defendants' briefing scarcely references the statutory language at the heart of this case, and makes no effort to advance an interpretation that would give Congress's words any effect. Instead, Defendants contend that the NVRA places no restrictions on the range of information that a State can demand of motor-voter registrants before permitting them to vote. Such an interpretation would render the language of the law a nullity and is per se invalid. Ultimately, through the DPOC requirement, Defendants seek to accomplish at the State level what the dissenting members of Congress who opposed passage of the NVRA could not. The Constitution bars that effort. States cannot supersede federal law regulating the manner in which citizenship will be verified for federal elections.

This state of affairs is not only unlawful, it casts a pall on the upcoming 2016 elections for no legitimate reason. Despite claiming that injury is not imminent, Defendant Kobach has conceded that, absent a preliminary injunction, there will be no possibility of relief for the thousands of affected voters before the August primary and November general elections this year. The evidence produced by Defendants establishes that the thousands of affected voters are disproportionately young and unaffiliated with a political party. Dr. Michael McDonald's undisputed expert analysis concludes that not only have these voters been blocked from voting in the short term, they will be less likely to participate in future elections. Against this, Defendants have offered no evidence of a legitimate problem of noncitizen registration and voting. The DPOC law violates the NVRA and must be enjoined.

ARGUMENT

I. ALTHOUGH THE TRADITIONAL PRELIMINARY INJUNCTION STANDARD APPLIES TO THIS MOTION, PLAINTIFFS HAVE SATISFIED THE HEIGHTENED STANDARD FOR PRELIMINARY RELIEF INVOKED BY DEFENDANTS.

Defendants have misconstrued the circumstances that trigger heightened review of preliminary injunctions. The Tenth Circuit holds: "Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show a (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (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. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014). That traditional standard applies in this case, because Plaintiffs simply seek to be registered to vote in the same fashion they would have been prior to the DPOC law. In determining whether a proposed injunction alters the status quo, the Tenth Circuit looks to "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) (quoting 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948, at 136 (2d ed. 1995)). Here, the "last peaceable uncontested status" between Defendants and the class of motor-voter registrants identified in the complaint is the nearly twenty-year period from 1995 through 2013 during which Kansas registered voters pursuant to the motor-voter provisions of the NVRA, and did not require DPOC from such individuals.

Similarly, the injunction requested is not mandatory because Plaintiffs seek to *halt Defendants' enforcement* of the DPOC law. Mandatory injunctions are characterized by judicial orders requiring a party to "affirmatively . . . act in a particular way, [which] as a result . . .

place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *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). Plaintiffs' do not request elaborate supervision of Defendants by this Court. Plaintiffs' requested injunction is prohibitory rather than mandatory because it simply seeks to remove an unlawful barrier to motor-voter registration for the upcoming elections.

Finally, a preliminary injunction would not grant Plaintiffs all the relief they could recover after a full trial. To warrant a heightened standard, a preliminary injunction must "render a trial on the merits largely or partly meaningless." *Id*. at 1003. Trial is not set until 2017; Plaintiffs seek a preliminary injunction *so that they can vote in the next set of elections* being held in a few months. Without an injunction, Plaintiffs will lose the opportunity to participate in these crucial contests. For purposes of trial and final judgment, Plaintiffs seek different relief: a permanent injunction against the DPOC law as applied to motor-voter registrants, a declaration that they remain registered to vote, and an injunction regarding Defendants' selective registration practices that discriminate against citizens born outside of Kansas.

In any event, were the Court to apply a heightened standard of review for preliminary relief, Plaintiffs would certainly meet it here. Even where, unlike here, an injunction is properly characterized as mandatory or altering the status quo, the Tenth Circuit requires only that a party "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms[.]" *O Centro*, 389 F.3d at 976; *see also id*. at 975 (rejecting higher "heavily and compellingly" standard for disfavored injunctions). Here, Plaintiffs readily satisfy a heightened standard in light of the extraordinary harm that will occur in the absence of an injunction, and the limited burden to Defendants. As explained *infra*, § II.A, more than 16,000

motor-voter registrants will be prevented from participating in upcoming 2016 elections. All that is necessary for relief is to identify these affected voters (which, as explained *infra*, § VII, the Secretary of State's own Director of Elections explained will take approximately one hour to do) and to register them; and that Defendants cease applying the DPOC requirement to motor-voter registrants. There can be little doubt that this exceeds the "strong showing" necessary under the heightened standard.

II. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM.

There can be no serious argument that unlawfully barring the named Plaintiffs and thousands of Kansans from registering to vote in advance of the upcoming primary and general elections constitutes irreparable harm sufficient to warrant a preliminary injunction. Contrary to Defendants' assertions, this widespread disenfranchisement is neither insignificant nor reparable.

A. Absent a Preliminary Injunction, Plaintiffs and Thousands of Other Kansans Will Be Denied the Ability to Vote in the Upcoming 2016 Elections.

In moving for a preliminary injunction, Plaintiffs provided initial expert analysis estimating that, as of December 11, 2015, thousands of Kansans had their registration applications canceled or had become suspended because of the DPOC requirement. *See* ECF No. 20-1, Ex. 1, Expert Report of Dr. Michael P. McDonald, Feb. 25, 2016 ("McDonald Rep."), at 2-3. Expedited discovery from Defendants now confirms that, according to the Secretary of State's own records, more than 16,000 Kansans have been purged or suspended from the voter registration rolls for the "sole reason" that they purportedly have not provided documentary proof of citizenship. *See* Def. Kobach's Resp. to Pls.' 1st Interrogs., at 2-3 (Resp. to Interrog. 3), filed concurrently herewith as Ex. 11.[2] The affected motor-voter applicants are people whose

[2] According to Defendants' records, due to the DPOC Law, 11,147 motor-voter registrants had been purged, as of March 23, 2016, *see* Ex. 11, Def. Kobach's Resp. to Pls.' 1st Interrogs., at 2-3 (Resp. to Interrog. 3), and 5,350 motor-voter registrants were suspended as of March 31, *see* Def.

registrations are complete in all respects other than providing DPOC, meaning that they have sworn an attestation under oath that they are in fact U.S. citizens. Defendants have not asserted that the Plaintiffs – or *any* of these 16,000-plus Kansans – are non-citizens who should be prevented from registering to vote. Nor have Defendants provided any evidence disputing Dr. McDonald's analysis that these voters are disproportionately young and unaffiliated, and therefore are particularly the types of voters whose ability to participate will be inhibited by these sorts of barriers. *See* Ex. 1, McDonald Rep., at 3, 11, 14, 18.

There can be no serious dispute that these injuries amount to irreparable harm. *See* ECF No. 19-1, Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Opening Br."), at 35-38 (citing cases on the fundamental nature of the right to vote). Being prevented from registering to vote and participating in an election are quintessential examples of irreparable harm, because they cannot be subsequently reversed or compensated through damages.[3] "Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise." *Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1105 (10th Cir.

Kobach's 2d Suppl. to Pls.' 1st Req. for Prod. of Docs., at 3 (Resp. to RFP 3), filed concurrently herewith as Ex. 12. Dr. McDonald initially estimated that as of December 11, 2015, 22,814 individuals who had applied to vote using any method of registration had been purged or suspended because of the DPOC law. *See* Ex. 1, McDonald Rep., at 3. The variance between Dr. McDonald's initial estimate and the information provided by Defendants in discovery appears to result from (1) the different dates on which the data were obtained and (2) the fact that Dr. McDonald did not have access to confidential information indicating individuals' method of registration. *See* Ex. 1, McDonald Rep., at 8. The data Defendants have now provided pursuant to the protective order validate Dr. McDonald's initial estimates. *See* Supplemental Report of Dr. Michael P. McDonald, Apr. 11, 2016 ("McDonald Suppl. Rep.") at 5 n.11 (showing that Defendants' data is consistent with Dr. McDonald's initial estimate percentages of registrants suspended due to the DPOC law), filed concurrently herewith as Ex. 15.

[3] Defendants contend that Plaintiffs have "invent[ed]" this standard for irreparable harm. ECF No. 58-1, Def. Kobach's Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Kobach PI Opp'n"), at 26 n.9. But it has been clearly and repeatedly articulated by the Tenth Circuit. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain.").

2003). Defendants argue that Plaintiffs and other affected voters are not injured because they are not qualified to vote in Kansas until they are registered, *see* Kobach PI Opp'n at 28, but that is circular at best: in Defendants' worldview, one could *never* challenge a restriction on voter registration because individuals who are not registered to vote, *ipso facto*, have no voting rights. Given that "registration [i]s a prerequisite to the right to vote" in Kansas, *Dunn v. Bd. of Comm'rs of Morton Cty.*, 165 Kan. 314, 327 (1948), the denial of Plaintiffs' NVRA-prescribed voter registration rights amounts to a denial of their voting rights, *see Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004) (finding irreparable harm based on denial of registration under NVRA), *aff'd*, 408 F.3d 1349 (11th Cir. 2005).[4]

Defendants identify no cases holding that preventing eligible residents from registering to vote was deemed insufficient to demonstrate irreparable harm, and their attempts to distinguish the cases cited in Plaintiffs' opening brief border on frivolous. For example, in *Obama for America v. Husted*, the Sixth Circuit unambiguously held that "[a] restriction on the fundamental right to vote . . . constitutes irreparable injury." 697 F.3d 423, 436 (6th Cir. 2012). Defendant Kobach attempts to distinguish the case on the grounds that the injury was different: "Absent an injunction, the non-military plaintiffs would have lost three days on which they could vote in the

[4] To be sure, U.S. citizenship is a qualification for voting in Kansas, *see* Kan. Const. art. 5, § 1. But possessing a piece of paper documenting the fact of one's citizenship is *not a voter qualification*; rather, it a *means* by which Kansas requires applicants to establish *proof* that they are qualified voters. Being qualified to vote and possessing proof of those qualifications are distinct concepts: as, the Tenth Circuit has explained, States have authority over the former, while the federal government has plenary authority over the latter, for purposes of federal elections: "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)." *Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014) ("*EAC*"). Plaintiffs and other similarly-situated Kansans therefore possess the qualifications of an elector in Kansas by virtue of their U.S. citizenship, regardless of whether they have completed the registration process to the state's satisfaction.

election." Kobach PI Opp'n at 27. But the impending injury in this case is much greater: rather than simply losing the opportunity to vote on three (out of 35) early voting days, Plaintiffs and other similarly-situated Kansans face the prospect of not being able to vote altogether. *Charles H. Wesley Education Foundation v. Cox* provides an example of an NVRA case almost directly on point. 324 F. Supp. 2d at 1368. In *Cox*, the court enjoined Georgia from illegally rejecting registration applications compiled into bundles during voter registration drives. *Cox* "easily conclude[d] that plaintiffs will be irreparably injured absent an injunction . . . [because i]n the case of [the individual plaintiff], no monetary award can remedy the fact that she will not be permitted to vote in the precinct of her new residence." 324 F. Supp. 2d at 1368. Defendant Kobach attempts to distinguish *Cox* on the grounds that it involved a situation where the State had "improperly rejected" registration applications, Kobach PI Opp'n at 27, but that is precisely the claim Plaintiffs press in this case: Defendants have "improperly rejected" valid voter registration applications submitted by Plaintiffs and more than 16,000 other Kansans.

Moreover, Plaintiffs' irreparable injury is imminent and unavoidable absent preliminary relief. The next election is August 2, 2016 and early voting begins on July 13, 2016. ECF No. 77-3, Caskey Aff., ¶ 4; Tr. of Disc. & Scheduling Conf., Mar. 23, 2016 ("Mar. 23 Tr."), at 33:10-11, filed concurrently herewith as Ex. 13. Although Defendant Kobach argues in his brief that there is "no imminence, sufficient to meet the standard for issuance of a preliminary injunction," *see* Kobach PI Opp'n at 24, he acknowledged the opposite in a hearing before Magistrate Judge O'Hara: "*[T]o the extent plaintiffs have a hope of getting some sort of injunction in place before the August 2nd primary, then their only realistic hope would be if Judge Robinson grant[s] their preliminary injunction request*. I don't think the case in chief could be, you know, resolved [on] a subsequent injunction before – under any circumstances before that July 13th beginning [of]

the voting date for [the] August 2nd primary." Ex. 13, Mar. 23 Tr., at 33:17-24 (emphasis added). Without preliminary injunctive relief, there will be no way to turn back the clock and permit Plaintiffs to participate in those elections after-the-fact.

B. The Court Should Consider Evidence of Irreparable Harm to the More than 16,000 Kansans Who Have Been Purged Or Suspended Because of the DPOC Law.

In evaluating the magnitude of the injury asserted on this motion, the Court should consider not only the Plaintiffs' situation, but also that of the more than 16,000 similarly-situated Kansans, on whose behalf this putative class action is brought. Plaintiffs brought this case as a class action and moved for class certification on the same day that they filed the original Complaint in this matter; they seek relief not only behalf of themselves but also on behalf of all others similarly-situated. *See* ECF Nos. 1, 3. Defendant Kobach requested a lengthy five-week extension to respond to Plaintiffs' motion for class certification. Defendant Kobach now attempts to use Plaintiffs' accommodation of his scheduling request against them, arguing that because "individual plaintiffs have not been granted status as class representatives as of this time . . . this preliminary injunction is appropriately limited to the facts of the [six] individual plaintiffs actually discussed in Plaintiffs' memorandum." Kobach PI Opp'n at 1 n.2. Such gamesmanship should not be tolerated. Here, the evidence of classwide harm is readily apparent: Defendants' own records indicate that more than 16,000 Kansans have been disenfranchised by the practices challenged in this case. In light of that record and the pending class certification motion, it is wholly appropriate for the Court to weigh evidence of classwide harm in evaluating equitable factors and fashioning injunctive relief.

Moreover, Defendant Kobach is incorrect in suggesting that this Court must issue a final ruling on class certification before considering evidence of classwide injury. Plaintiffs are seeking a preliminary injunction prohibiting Defendants from enforcing the DPOC Law and 90-

Day Purge rule against motor-voter registrants. ECF No. 19, Pls.' Mot. for Prelim. Inj.; ECF No. 39, 1st Am. Compl., ¶ 27. Courts frequently permit classwide preliminary injunctive relief *prior* to final resolution of a pending motion for class certification. *See, e.g.*, *Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015) (collecting cases where courts "issued a preliminary injunction concurrently with certifying a class or even prior to fully certifying a class"); *Meyer v. Portfolio Recovery Assocs., LLC*, No. 11CV1008 AJB (RBB), 2011 WL 11712610, at *1 (S.D. Cal. Sept. 14, 2011) (granting preliminary injunction concurrent with provisional class certification); *Kaiser v. Cty. of Sacramento*, 780 F. Supp. 1309, 1312 (E.D. Cal. 1991) (granting classwide injunctive relief to provisionally certified the class where court had not yet fully addressed defendants' class certification arguments); *Harris v. Graddick*, 593 F. Supp. 128, 130 (M.D.Ala.1984) (provisionally certifying a plaintiff and defendant class concurrently with issuing a preliminary injunction); *Thomas v. Johnston*, 557 F. Supp. 879, 916 n. 29 (W.D. Tex. 1983) ("It appears to be settled . . . that a district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers.").

Indeed, Defendant Kobach himself only selectively applies the very approach he proposes. For purposes of contesting irreparable harm, Defendant Kobach ignores the classwide injuries and focuses solely on addressing the six named plaintiffs and (erroneously) characterizing their injuries as "self-inflicted." *See* Kobach PI Opp'n at 25. But later in the same memorandum, *when seeking to emphasize the burden on his office of complying with a preliminary injunction*, he refers to the supposedly "expensive administrative burdens in changing tens of thousands of voter registration records" to active status. *See* Kobach. PI Opp'n at 54. Defendant Kobach cannot have it both ways. In weighing the equitable factors for

injunctive relief, the Court should consider the uncontested evidence that thousands of Kansans will be denied the right to vote absent an injunction.

C. Plaintiffs Need Not Demonstrate Inability to Comply With a Challenged Law in Order to Establish Irreparable Harm.

Unable to rebut the clear evidence of irreparable harm, Defendant Kobach instead advances a novel theory that Plaintiffs' injuries are "self-inflicted." Kobach PI Opp'n at 25. According to Secretary Kobach, "all that is preventing Plaintiffs from being registered to vote is their *unwillingness* to comply with" the DPOC law, "*not an inability* to comply with the law." *Id.* There is no legal support for the contention that a plaintiff must be completely unable to comply with a law in order to establish irreparable harm. And in any event, it is factually incorrect because several Plaintiffs do not possess and cannot obtain documentary proof of citizenship.

First, there is no duty for a party seeking to enjoin a policy or statute to prove "an inability to comply with the law." If that were true, Plaintiffs would never be able to vindicate a broad range of constitutional or statutory rights that have been consistently protected by the law. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014) (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). Plaintiffs seek to assert their rights under the NVRA, which "requires States to provide simplified systems for registering to vote in federal elections," *Young v. Fordice*, 520 U.S. 273, 275 (1997) (emphasis removed), and to register motor-voter applicants based on "only the minimum amount of information necessary" to assess their eligibility, 52 U.S.C.

§ 20504(c)(2)(B). In effect, Defendant Kobach asserts that Plaintiffs are not harmed because they could choose to ignore their rights under the NVRA and voluntarily submit to Defendants' illegal registration requirements. This is not a legitimate response to Plaintiffs' allegations that Defendants are violating federal law by creating a bureaucratic maze of registration requirements that violate the NVRA and have disenfranchised more than 16,000 would-be voters.

Second, Defendants are mistaken as a factual matter. In fact, several named Plaintiffs are *unable to comply* with the DPOC law because they lack documentary proof of citizenship. Mr. Fish does not have a passport or birth certificate. *See* ECF No. 20-2, Ex. 2, Fish Decl. ¶ 9. After learning of the DPOC law, he searched through his possessions to try to find documents that might satisfy Defendants' requirements but could not locate any. *See id*. Because he was born on a U.S. Air Force base that was decommissioned long ago, Mr. Fish does not know if there is even any way to obtain the documentary proof of citizenship Defendants' demand. *Id*. ¶ 10. Similarly, Ms. Bucci does not have a passport, copy of her birth certificate, or any other documents that would satisfy the DPOC law. *See* ECF No. 20-4, Ex. 4, Bucci Decl. ¶ 11. It would be a severe financial burden for her to obtain those documents from out-of-state. *Id*. ¶ 13. Many of the named Plaintiffs even attempted to comply with the law and *relied* upon representations that they had provided sufficient documents in order to register, and were still disenfranchised: they showed up at the polls in 2014 only to learn that they could not vote. *See* ECF No. 20-5, Ex. 5, Stricker Decl. ¶¶ 8-14; ECF No. 20-6, Ex. 6, Boynton Decl. ¶¶ 6-10. And other named Plaintiffs *did comply* with the DPOC law, but were still not registered because the DMV failed to transmit copies of these documents to the Secretary of State's office. *See* Ex. 6, Boynton Decl. ¶¶ 6-10; ECF No. 20-7, Ex. 7, Hutchinson Decl. ¶¶ 10-15. These are not "self-inflicted" wounds; rather, Defendants' policies have proven disastrous for voter registration.

D. Plaintiffs Have Not Delayed In Moving for Preliminary Injunction.

Defendant Kobach claims that the Motion for Preliminary Injunction should be denied because Plaintiffs should have brought suit when the DPOC law was passed on April 18, 2011. For numerous reasons, this argument is meritless.

First, Defendants again ignore that Plaintiffs' action is brought on behalf of a class of motor-voter registrants. It is uncontested that Defendants are suspending and purging individuals in the identified class on a constant basis. Dep. of Bryan Caskey, Apr. 6, 2016 ("Caskey Dep."), at 153:3-18 (confirming that new registration applications are being suspended "every day"), filed concurrently herewith as Ex. 14. Defendants cannot evade injunctive relief by arguing delay when Defendants are causing fresh injuries every day. None of the authorities Defendants advance involved class actions where defendants continued to inflict harm on the proposed class.

Second, it would have been impossible for many of the named Plaintiffs to have brought a challenge to the DPOC Law in 2011. Two named Plaintiffs *did not even live in Kansas* at the time the law was passed. *See* Ex. 5, Stricker Decl. ¶ 4 (moved to Kansas in 2013); Ex. 6, Boynton Decl. ¶ 5 (moved to Kansas in 2014). Four of the named Plaintiffs did not attempt to register until sometime in the year 2014. *See* Ex. 2, Fish Decl. ¶ 7; ECF No. 20-3, Ex. 3, Ortiz Decl. ¶ 10; Ex. 6, Stricker Decl. ¶ 6; Ex. 6, Boynton Decl. ¶ 6. Two only learned that there was a problem with their voter registrations when they tried vote in the November 2014 election. *See* Ex. 5, Stricker Decl. ¶¶ 10-14; Ex. 6, Boynton Decl. ¶¶ 7-10. Others only definitively learned that they were on the suspense list in 2015. *See* Ex. 6, Boynton Decl. ¶ 10 (state officials did not advise Boynton that he was missing documentary proof of citizenship and his prior vote had not been counted until early 2015); Ex. 7, Hutchinson Decl. ¶¶ 11-15 (Plaintiff attempted to comply with the DPOC law by renewing his expired passport and bringing it to the DMV in summer 2015 and was advised that he had done everything necessary to complete the voter registration

process, but then learned later that he was still suspended); Ex. 3, Ortiz Decl., ¶¶ 10-11 (Plaintiff did not receive notice from state officials that he was in suspense until September 2015, almost a year after submitting his registration). The named Plaintiffs' circumstances are illustrative of the fact that they, along with many other motor-voter registrants, have been striving to navigate Defendants' bureaucratic maze of restrictions and misinformation. Rather than immediately running into court they have attempted in good faith to comply with the law where possible.

Finally, one of the challenged provisions in this case, the 90-Day Purge Rule, was not implemented until October 2015. Prior to that time, suspended registrants could potentially resolve their status by contacting state election officials and submitting documentary proof of citizenship up until the election. When the 90-Day Purge Rule became effective in October 2015, Defendant Kobach made it clear that suspended motor-voter registrants—including several Plaintiffs, *see* Ex. 3, Ortiz Decl. ¶ 13; Ex. 4, Bucci Decl. ¶ 14; Ex. 5, Stricker Decl. ¶ 16; Ex. 6, Boynton Decl. ¶ 11—would be purged after remaining in suspense for 90 days, and would then have to reinitiate the registration application process again from the beginning. The Plaintiffs sent their NVRA notice letter one month later, in November 2015, waited the requisite 90 days under the NVRA's notice provision and filed suit on the first day possible in February 2016. ECF No. 1, Complaint. Under the circumstances, there is no valid argument that Plaintiffs have unduly delayed seeking relief.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE NVRA PRECLUDES DEFENDANTS FROM REQUIRING DOCUMENTARY PROOF OF CITIZENSHIP FROM MOTOR-VOTER REGISTRANTS.

Defendants raise a variety of statutory and constitutional arguments as to the proper interpretation of Section 5 of the NVRA, but they all boil down to a single proposition: that a State retains unfettered discretion to impose whatever additional requirements the State itself

deems necessary for assessing the voting eligibility of motor-voter registrants. *See, e.g.*, Kobach PI Opp'n at 32 ("*what is 'necessary' is defined by the State*"); *id.* at 48 ("For an application submitted at the DMV, *it is the State . . . that makes the determination of what information is necessary*" (internal quotation marks and citation omitted;emphasis added)). But their position—which would grant Kansas unlimited discretion to impose any proof of eligibility requirements on motor-voter applicants—cannot be squared with the plain text of the NVRA, relevant case law, or the express statutory purpose of the NVRA.

A. Congress Made Clear that State Documentary Proof of Citizenship Requirements Are Preempted by Section 5 of the NVRA.

The Supreme Court has explained that Elections Clause grants Congress "'authority to provide a complete code for federal elections,' including, as relevant here . . . regulations relating to 'registration.'" *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013) ("*ITCA*") (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). There is no dispute amongst the parties that, in enacting the NVRA, Congress exercised its plenary authority to provide for rules governing registration for federal elections, such that "the NVRA preempts state laws that conflict with its provisions." Kobach PI Opp'n at 6. The central question in this case is one that Defendants attempt to evade in its entirety: whether requiring a motor-voter applicant to submit documentary proof of citizenship before being registered to vote in federal elections exceeds the "*minimum* amount of information necessary to . . . (i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20504(c)(2)(B) (emphasis added). If the DPOC requirement exceeds this "minimum amount of information necessary," then it is preempted by the NVRA. As detailed in Plaintiffs' moving papers and described in further detail below, the NVRA's text and legislative history conclusively establish that the

DPOC requirement is unlawful as applied to motor-voter registrants.

1. Documentary Proof of Citizenship Exceeds the "Minimum Amount of Information" Necessary for State Election Officials to Assess the Eligibility of Motor-Voter Registrants.

Section 5 provides that States "may require only 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). It further provides that the motor-voter registration application contain an attestation under penalty of perjury that an applicant is a U.S. citizen; once an applicant does so, she or he has provided proof of citizenship.[5] 52 U.S.C. § 20504(c)(2)(C). The word "minimum" means "[t]he least possible quantity or degree" or "[t]he lowest degree or amount reached or recorded; the lower limit of variation." American Heritage Dictionary (5th ed. 2015). An original citizenship document such as a passport or birth certificate would represent *additional* proof of citizenship beyond the attestation provided under the statute, and thereby exceeds the "minimum amount" of proof provided under the statute.

Fixating on the phrase "enable State election officials to assess [voter] eligibility," Kobach PI Opp'n at 32, Defendants argue that Section 5 permits States to decide for themselves what information is "necessary" for assessing a motor-voter applicant's eligibility to vote,

[5] The NVRA's legislative history demonstrates that Congress understood this attestation to be proof sufficient for purposes of registration. *See* S. Rep. No. 103-6, at 11 (1993) (the Act "provides sufficient safeguards to prevent noncitizens from registering to vote" by requiring voter registration applicants to sign a sworn attestation that they satisfy the eligibility requirements, combined with existing safeguards around driver's license applications at DMVs: "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."); H.R. Rep. No. 103-9, at 7-8 (1993) ("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.").

including citizenship.[6] But that misconstrues the obvious function of the subsection where "State election officials" appears. The purpose of 52 U.S.C. § 20504(b)(2)(B) is to expressly *limit* the manner in which officials may "assess the eligibility" of voter registration applicants, restricting officials to requiring "only the minimum amount of information necessary." In essence, Defendants' interpretation of the statute would require rewriting the statute as follows: "The voter registration application portion of an application for a State motor vehicle driver's license . . . may require ~~only the minimum amount of~~ [any] information [that the State deems] necessary to . . . enable State election officials to assess the eligibility of the applicant." In addition to inserting words not present in the statute, the Defendants would wholly disregard the operative text and central legal question at issue in this case: what is the "minimum amount of information necessary" to enable state elections officials to assess the eligibility of applicants. Because Defendants do not advance an interpretation of the word "minimum" that would give it any effect, they read it out of the NVRA and render it a nullity, in violation of "a cardinal principle of statutory construction . . . [to] give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted); *see also Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous.").

[6] Defendant Kobach goes so far as to assert that Plaintiffs have "purposefully and misleadingly omit[ted] the words 'State election officials' when they quote this portion of the NVRA" in their brief. But Plaintiffs clearly quoted the full language the statute Defendants claim was omitted, both in their brief and in their Complaint. *See* Pls.' Opening Br. at 4-5 (stating that Section 5 of the NVRA provides that the motor-voter application "form 'may require only the minimum amount of information necessary to . . . *enable State election officials* to assess the eligibility of the applicant.'" (emphasis added) (quoting 52 U.S.C. § 20504(c)(2)(B))); 1st Am. Compl. ¶¶ 3, 33, 79.

2. The Legislative History of the NVRA Demonstrates that Congress Clearly Intended to Preclude State Documentary Proof of Citizenship Requirements.

If there were any remaining uncertainty about what "minimum amount of information" means under the NVRA, Congress removed it by rejecting the Simpson Amendment, which was offered "to ensure that States will continue to have the right, if they wish, to require documents to verify citizenship." 139 Cong. Rec. 5098-99 (Mar. 16, 1993). As explained in the House-Senate Conference Committee Report, Congress rejected that amendment, because it determined that it was "not necessary or consistent with the purposes of this Act." H.R. Conf. Rep. No. 103-66, at 23. Thus, "Congress'[s] rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006). Contrary to Defendant Kobach's assertions, this is not a situation where Congress was "silen[t] regarding proof of citizenship." Kobach PI Opp'n at 35. Rather, it is difficult to imagine Congress speaking more clearly than it did on the specific issue of documentary proof of citizenship when it rejected the Simpson Amendment. *Cf. EAC*, 772 F.3d at 1195 n.7 ("Both houses of Congress debated and voted . . . and ultimately rejected such a proposal" to allow states to require documentary proof of citizenship from NVRA applicants).

Ignoring the Simpson Amendment entirely (which is never even mentioned in Defendants' briefs) and the Conference Committee Report's rejection of it, Defendant Kobach cites the earlier House Report to the NVRA, which states that, under the NVRA, "election officials continue to make determinations as to applicant's eligibility, such as citizenship," and argues that this passage evinces Congressional intent to permit states to assess eligibility however they see fit. Kobach PI Opp'n at 38 (quoting H.R. Rep. No. 103-9, at 8-9). Defendants' reliance on the House Report is unavailing for two reasons. *First*, the House Report cited by Defendant Kobach *preceded* the Conference Committee Report. That is, even if Defendant

Kobach's interpretation of the House Report were correct—and, as explained below, it is not—it would be superseded by Congress's clearly-stated intent in the Conference Report to prohibit states from imposing a documentary proof of citizenship requirement on motor-voter registrants.

Second, the passage from the House Report quoted by Defendant Kobach does not indicate that Congress conferred limitless discretion upon States to demand whatever proofs of citizenship they deem necessary. This is clear in the context of the passage quoted by Defendant Kobach: the immediately preceding sentences, which Defendant Kobach conveniently omits, state that, "[a]lthough the application for voter 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 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. The same issue 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. Thus, in both the Senate and House Report, Congress 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" in favor of DMV employees. H.R. Rep. No. 103-9, at 8. But that is a very different proposition from the one Defendants advance here, *i.e.*, that States remain free under the NVRA to assess eligibility however they see fit, including by imposing additional requirements regarding proof of voter eligibility beyond a sworn attestation, such as the DPOC requirement at issue in this case. The Conference Committee Report makes plain that Congress rejected that view.[7]

[7] Defendants' interpretation of the House Report is further undermined by the *ITCA* decision. In

Ultimately, Defendants' view of the NVRA misapprehends the balance of federal and state authority struck by Congress. The NVRA was not enacted, as Defendants seem to believe, to reauthorize States' preexisting discretion to structure their voter registration processes as they see fit. If that were the case, no federal legislation would have been necessary, because States already had default authority to establish procedures for elections, including by establishing voter registration at motor vehicle offices. *See ITCA*, 133 S. Ct. at 2253 (observing that States are vested with "default . . . responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." (citation omitted)). Rather, Congress passed the NVRA to *override* existing election laws by establishing three methods of registration across the country (through DMVs; with a simple mail-in form; and through public assistance offices), and to set forth in detail certain requirements with respect to those channels of registration.

B. Governing Case Law Establishes that Section 5 Preempts States from Requiring Documentary Proof of Citizenship from Motor-Voter Registrants.

1. *ITCA* and *Kobach v. EAC* Confirm that a Documentary Proof of Citizenship Requirement Exceeds the Minimum Amount of Information Necessary for State Election Officials to Assess Citizenship.

The *ITCA* and *EAC* cases compel the same conclusion. These two cases represent the culmination of years of litigation over the question whether States can require NVRA applicants to produce documentary proof of citizenship in order to become registered to vote in federal

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ITCA, the Supreme Court observed that though the Federal Form prevented Arizona from demanding documentary proof of citizenship as a condition of registration, States retained the ability to "make determinations as to [an] applicant's eligibility, such as citizenship," H.R. Rep. No. 103-9, at 8, on the *back end* by "deny[ing] registration based on *information in their possession establishing the applicant's ineligibility*." *ITCA*, 133 S. Ct. at 2257 (alteration in original). There is therefore no conflict between the language from the House report Defendants cite and a restriction limiting States to relying on a sworn attestation of citizenship.

elections. In both cases, Arizona and Kansas raised an argument analogous to the one Defendants make here: that the NVRA does not prevent States from demanding documentary proof of citizenship as a condition of registering to vote. In both cases, Arizona and Kansas lost. Given that the Supreme Court and Tenth Circuit have already required States to rely on sworn attestations of citizenship for certain voter registration applicants under the NVRA—namely, those using the federal mail-in voter registration form (the "Federal Form") under Section 6 of the NVRA, 52 U.S.C. § 20505—States cannot exceed that "minimum" for motor-voter registrants under Section 5 of the same statute.

Defendant Kobach repeatedly states the obvious proposition that *ITCA* and *EAC* were not decided under the Section 5 motor-voter provisions of the NVRA, but under a different section of the statute, Section 6, 52 U.S.C. § 20505, which relates to the federal mail-in voter registration application form. *See, e.g.*, Kobach PI Opp'n at 37 ("it should be pointed out that the section of the NVRA discussed in *ITCA* concerns the Federal Form"). But that self-evident observation misses the point: the *logic* of these decisions—which required states to register certain NVRA applicants based on a sworn attestation of citizenship—compels the conclusion that the documentary proof of citizenship requirement at issue in this case exceeds the "minimum amount of information" that states may request from motor-voter applicants pursuant to Section 5 of the statute.

In *ITCA*, the Supreme Court held that the "NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form," which required nothing more than a sworn attestation to establish an applicant's citizenship. 133 S. Ct. at 2257.[8] *ITCA* left open the option for States to bring a constitutional challenge against the

[8] As Defendant Kobach notes, the Federal Form has recently been modified "to require

omission of a documentary proof of citizenship requirement in the Federal Form. *See id.* at 2259. Defendant Kobach then brought precisely such a challenge, and lost: The Tenth Circuit, in *EAC*, held 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 (second emphasis added). These authorities establish as a matter of precedent that a sworn attestation of citizenship is the "minimum amount of information" necessary to assess eligibility. As the Tenth Circuit made clear in *EAC*, the federal government may validly compel States to register Federal Form applicants based solely on an attestation of citizenship; anything above and beyond an attestation—including a documentary proof of citizenship requirement—exceeds that "minimum," and violates the NVRA.

2. Defendants' Interpretation of the NVRA as Granting States Unfettered Discretion to Impose Proof of Citizenship Requirements Was Rejected in *ITCA*.

The Court's holding in *ITCA* goes even further, plainly rejecting Defendants' interpretation of the statute advanced in this case. In *ITCA*, the Supreme Court interpreted "State election official" language in Section 9 of the NVRA, 52 U.S.C. § 20508(b)(1), that is nearly identical to the statutory language Defendants rely upon here. Section 9 provides that the "the

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documentary proof of citizenship." Kobach PI Opp'n at 14. Contrary to Defendant's Kobach's implied assertion, however, this is not due to the fact that the EAC now has a "quorum of commissioners," but rather due to the unauthorized unilateral actions of the Executive Director of the EAC, who is a former colleague of Defendant Kobach. *See* Opening Br. at 11 n.5 (citing statement of EAC Commissioner Tom Hicks strongly objecting to the unauthorized change of the form). *See also* "Bromance Between Kris Kobach and Brian Newby Leads to Attack on Voting Rights," *Kan. City Star*, Apr. 1, 2016, http://www.kansascity.com/opinion/editorials/article69509812.html. In any event, regardless of the *current* content of the Federal Form, *ITCA* makes clear that States are required to accept and use a Federal Form that "forbids" a State from requiring more than a sworn attestation of citizenship. 133 S. Ct. at 2257. Anything above that clearly exceeds the "minimum" necessary to assess citizenship.

Federal Form 'may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" *ITCA*, 133 S. Ct. at 2259 (quoting Section 9 of the NVRA, now codified at 52 U.S.C. § 20508(b)(1)). In interpreting that statutory language, the Supreme Court rejected the view, expressed by Justice Alito's dissent, "that the [NVRA] lets States decide for themselves what information 'is necessary . . . to assess the eligibility of the applicant'" by requiring that "applicants provide supplemental information when appropriate." *Id.* at 2274 (Alito, J., dissenting). If Defendants' interpretation of the statute were correct, then Justice Alito's view would have prevailed, and *ITCA* would have been decided differently: that is, if the phrase "necessary for state election officials" meant that states could "decide for themselves what information is necessary" to assess the eligibility of Federal Form applicants, then the Court *would have held that Arizona is permitted to require documentary proof of citizenship* from Federal Form registrants.

As the Tenth Circuit has explained, *ITCA* represents "one of those instances in which the dissent clearly tells us what the law is not." *EAC*, 772 F.3d at 1188. Given that the Supreme Court has already held that, under Section 9 of the NVRA, States lack unfettered discretion to determine what information "is necessary to enable the appropriate State election official to assess the eligibility of [a Federal Form] applicant," 52 U.S.C. § 20508(b)(1), the States similarly lack such discretion under the parallel language of Section 5 concerning motor voter applicants, *see* 52 U.S.C. § 20504(c)(2)(B).[9] Indeed, Plaintiffs' position in this case is *stronger* than that of

[9] Defendants' position that States may determine whether they are in compliance with the requirements of the NVRA is further undermined by the fact that courts have long refused to defer to state agencies interpretation of federal statutes. *See Amisub (PSL), Inc. v. Colo. Dep't of*

the Federal Form applicants in *ITCA* because Congress placed the strictest limits on what States may require of motor-voter applicants. The word "minimum" does not appear in the Federal Form provision of the NVRA or anywhere else in the statute other than Section 5, and it signifies that the motor-voter registration application process must be the most accessible form of registration under the statute, at least with respect to the degree of information that states may require regarding the voting eligibility of an applicant. *See Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990) (when interpreting a statute, "if a word is used in one phrase but omitted in another, the two phrases are intended to mean something different.").

3. *Young v. Fordice* Does Not Support Defendants' Interpretation of the Statute.

Defendants' wholesale reliance on *Young v. Fordice*, 520 U.S. 273 (1997), *see* Kobach PI Opp'n at 39, is entirely misplaced because they have misconstrued the decision. *Young* makes *no mention whatsoever* of whether States may impose documentation requirements concerning proof of voter eligibility (such as citizenship) above and beyond a sworn attestation, and does not in any way purport to interpret the critical statutory language at issue in this case. *Young* concerned the narrow question whether Section 5 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10304, required covered states to obtain federal approval (or "preclearance") for plans or procedures to implement the requirements of the NVRA. The Court held that such preclearance is required, noting that NVRA implementation is not a purely ministerial act, because states have some "policy choice" in terms of implementing the statute. *Young*, 520 U.S. at 286.

In particular, *Young* observed that "[t]he NVRA does not list, for example, all the other information the State may—or may not—provide or request." 520 U.S. at 286. The Court gave one example of information that States may or may not provide during the motor-voter

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Soc. Servs., 879 F.2d 789, 795-96 (10th Cir. 1989) (holding that a "state agency's determination of procedural and substantive compliance with federal law is not entitled to . . . deference").

registration process: "whether or not to tell the applicant that registration counts only for federal elections," which is something not expressly addressed in the NVRA. *Id.* Similarly, nine states currently request that voters provide information about their racial background when registering to vote.[10] And Kansas itself also apparently requests additional information not expressly set forth in the NVRA, such as whether a registration applicant has registered before. *See* Ex. 14, Caskey Dep., at 17:15–18:6. But from the fact that states retain discretion to request *some* additional information not specified in the NVRA, it does not follow that they can request *any* information during that process. Indeed, the Supreme Court "recognize[d] that the NVRA imposes certain mandates on States, describing those mandates in detail." *Young*, 520 U.S. at 286. Thus, while the NVRA is silent as to, for example, whether States may request information about a motor-voter applicant's race—and thus does not necessarily prohibit states from requesting that information—the statute places specific, detailed restrictions on the range of information that States may request concerning a motor-voter applicant's *eligibility*: namely, an attestation of citizenship, and nothing more. States retain some "policy choice[s]" under the NVRA, but demanding documentary proof of citizenship is not one of them.

C. Defendants' Hodge-Podge of Other Statutory and Constitutional Arguments Are Precluded by Controlling Authority or Are Otherwise Unavailing.

Defendants raise a variety of other arguments in support of their view that states have unlimited discretion to impose any requirements on motor-voter registrants; none have any merit.

[10] *See* U.S. Election Assistance Commission, *Register to Vote in Your States By Using this Postcard Form and Guide*, Mar. 1, 2006, http://www.eac.gov/assets/1/Page/National%20Mail%20Voter%20Registration%20Form%20-%20English.pdf. These nine states that request race information are: Alabama (p. 3), Florida (p. 6), Georgia (pp. 6-7), Louisiana (p. 9), Mississippi (p. 11), North Carolina (pp. 14-15), Pennsylvania (p. 16), South Carolina (pp. 16-17), and Tennessee (p. 17).

1. The Motor-voter Registration Application is Not a "State Form," but a Registration Method Mandated by Congress and Regulated by the Text of the NVRA.

Defendants' assertion that "[t]he DMV Application Form Is Designed by the State, to Accomplish the Purposes of the State," Kobach PI Opp'n at 31, is a variation of their same misguided argument that States have unfettered discretion to require whatever information they deem necessary from motor-voter registrants, and is erroneous for all of the reasons set forth above. Congress did not create the motor-voter registration system and mandate its use nationwide for federal elections to "Accomplish the Purposes of the State," Kobach PI Opp'n at 31, but rather to accomplish *federal* purposes expressly outlined by Congress in 52 U.S.C. § 20501, including to "increase the numbers of eligible citizens who register to vote" and to remove barriers to voter registration caused by "unfair registration laws."

Defendant Kobach's particular statutory argument—*i.e.*, that the motor-voter registration process employs a "state form" over which States may exercise absolute dominion—should be rejected for the additional reason that it conflates the provisions of two different sections of the NVRA that employ different language. Defendant Kobach quotes *ITCA*'s observation that "States may create their own registration forms which can be used to register voters in both state and federal elections and 'may require information the Federal Form does not.'" Kobach PI Opp'n at 48 (quoting *ITCA*, 133 S. Ct. at 2255). But he then asserts—without any authority—that the motor-voter registration form is such a "state form," over which the state may exercise unfettered discretion. *See* Kobach PI Opp'n at 48-49. Defendant Kobach's error here stems from a misleading omission: the passage from *ITCA* that he quotes does *not* refer to the motor-voter registration application under Section 5 of the NVRA and makes no mention of it. Instead, it refers to Section 6 of the NVRA, codified at 52 U.S.C. § 20505 (formerly 42 U.S.C. § 1973gg–4(a)(2)), which is titled "Mail Registration," *see ITCA*, 133 S. Ct. at 2255, and which establishes

a process by which individuals, apart from interacting with a state office like a DMV, may fill out a simple form and register to vote by mail at their own convenience. Section 6 provides for two separate mail-in voter registration forms that voters can use: the Federal Form, which was originally prescribed by the Federal Elections Commission, and now the U.S. Election Assistance Commission, 52 U.S.C. § 20505(a)(1); and a separate state mail-in registration form, which states "State may develop and use" "[i]n addition" to the Federal Form, 52 U.S.C. § 20505(a)(2). Critically, the subsection addressing the state mail-in form, 52 U.S.C. § 20505(a)(2), does not contain express restrictions regarding the range of information regarding eligibility that may be required from applicants. Justice Scalia's opinion in *ITCA* therefore observed that the statute places no express restrictions on the range of information that states may require on their own state mail-in forms, and explained that the state mail-in form "may require information the Federal Form does not." *ITCA*, 133 S. Ct. at 2255.

The motor-voter provision of Section 5, by contrast, *includes* such express limitations: most significantly, Section 5 permits states to request only the "minimum amount" of information necessary to enable state elections officials to assess the eligibility of applicants. 52 U.S.C. § 20504(c)(2)(B). That difference is dispositive. Where, as 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." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (citation omitted). In light of the absence of express limitations on the type of information that may be required from state mail-in form applicants under Section 6, the presence of such restrictions with respect to what the state may require from motor-voter applicants under Section 5 must be given effect by this Court to preclude application of the DPOC law to motor-voter applicants.

2. The Motor-Voter Form is an "Application"—But State Election Officials Are Not Free to Discard It.

Plaintiffs agree with Defendants that the motor-voter registration form is an "application form" that must be reviewed by the Secretary of State's office before an individual is registered to vote. *See* 52 U.S.C. § 20504(c)(1). Where the parties disagree is over Defendants' contention that the NVRA invests State election officials with unlimited discretion to reject "applications" for any reason they deem appropriate. The NVRA directs states to accept motor-voter registration application forms that are complete under the terms of the statute, and affords States no discretion to reject such forms based on separate state-based requirements: "in the case of registration with a motor vehicle application," the NVRA imposes a duty that "each State *shall . . . 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) (emphasis added).

Nevertheless, Defendants erroneously claim that "nothing in NVRA states or even suggests that the information contained on the application form must be treated by the State as *sufficient* to register the voter." Kobach PI Opp'n at 31. But as discussed directly above, that is precisely what 52 U.S.C. § 20507(a)(1)(A) states. Any other approach would render the NVRA's motor-voter provisions a nullity because States could circumvent them by rejecting such applications at their discretion, including based on an applicant's failure to submit information that is forbidden on the motor-voter application itself. If the motor-voter registration process under Section 5 were interpreted to permit States to reject application forms 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 2257 (alternation in original)

(quoting 52 U.S.C. § 20501(b) (formerly 42 U.S.C. § 1973gg(b))).[11]

It would also be a recipe for disaster and confusion. Citizens would not know when submitting a valid and complete application at a DMV whether they would ever satisfy whatever subsequent requirements the Secretary of State's office later decided to spring on the applicant. Indeed, this is exactly what occurred to some of the named Plaintiffs in this case who completed the motor-voter application and were told they had provided everything needed to register but then showed up to the polls only to learn they could not vote. Ex. 5, Stricker Decl. ¶¶ 8-14; Ex. 6, Boynton Decl. ¶¶ 6-10. The NVRA is designed to streamline and simplify the registration process; it does not authorize States to hide the ball from applicants or create phases of the registration process where States may demand new information. In enacting the NVRA, Congress could not have intended the incoherent result Defendants propose here. *See 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").

The NVRA does not permit a State to evade its obligations under 52 U.S.C. § 20507 by manipulating the definition of when a voter is deemed an "applicant" versus a "registrant." The Sixth Circuit reached a similar conclusion in *U.S. Student Association Foundation v. Land*:

> [W]e do not agree that state law must be used to define 'registrant.' . . . While the

[11] Indeed, Defendants' position has no logical stopping point. If a State may reject motor-voter applications based on any requirements that the State deems necessary, there is no limit on what States can do: States could require not just one, but two or even three different citizenship documents before permitting new applicants to register to vote; they could even require an applicant to obtain affidavits from other citizens as supporting witnesses to confirm the applicant's eligibility to vote, which was in fact a common practice in the Jim Crow South. *See United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (challenging Alabama statute requiring voter registration applicant 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 voter "registrar 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.").

> NVRA allows states to have their own eligibility requirements and registration procedures and policies, it places limits on those policies. . . . If states could define 'registrant,' they could circumvent the limitations of the NVRA by simply restricting the definition, and hence the federal protections of the NVRA, to a very limited class of potential voters. A federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses. If we were to adopt defendants' view, states could completely ignore the requirements of the [52 U.S.C. § 20507]. We refuse to import such a reading to this statute.

546 F.3d 373, 382-83 (6th Cir. 2008). The same analysis applies here. Defendants may not evade the NVRA's statutory obligations by redefining the meaning of "registrant" to incorporate the documentary proof of citizenship requirement.

3. Defendants' Argument that Congress Lacks Constitutional Authority to Preempt State Documentary Proof of Citizenship Laws Has Been Squarely Rejected by the Supreme Court and the Tenth Circuit.

Finally, Defendants raise a constitutional avoidance argument: that reading the NVRA according to its plain terms to preclude the imposition of a DPOC requirement on motor-voter registrants would infringe on the State's constitutional authority to set qualifications for voting. *See* Kobach PI Opp'n at 40-45. But that argument has already been rejected by the Supreme Court and the Tenth Circuit;[12] the latter explained in *EAC* that, although States set the qualifications for voting (such as citizenship), "[i]n *ITCA*, the Court clearly held that Congress'[s] Election Clause powers preempt state laws governing the 'Times, Places, and Manner' of federal elections, including voter registration laws" governing how applicants may

[12] As elsewhere, the view espoused by Defendants here is one that was set forth in *ITCA*'s *dissent*, which a majority of the Court *rejected*. *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 for voters in federal elections, *which necessarily includes the related power to determine whether those qualifications are satisfied*." (emphasis added)). Indeed, Defendants' *amicus* the Public Interest Legal Foundation ("PILF") even goes so far as to explicitly cite Justice Thomas's dissent on this point. *See* ECF No. 80, Amicus Br. of PILF in Opp'n to Mot. for Prelim. Inj. ("PILF Br."), at 3 (quoting *ITCA*, 133 S. Ct. at 2263 (Thomas, J., dissenting)). Once again, "[t]his is one of those instances in which the dissent clearly tells us what the law is not." *EAC*, 772 F.3d at 1188.

establish proof of citizenship. *EAC*, 772 F.3d at 1199 (citing *ITCA*, 133 S. Ct. at 2253). As the Tenth Circuit explained further, "the *ITCA* Court reaffirmed that the United States has authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections (*i.e.*, *that documentary evidence of citizenship may not be required*)." *EAC*, 772 F.3d at 1195 (second emphasis added) (citing *ITCA*, 133 S. Ct. at 2257-58).[13] A State is not the "exclusive arbiter[] of whether a procedural requirement precludes the enforcement of a voter qualification." *EAC*, 772 F.3d at 1196.

D. The DPOC Law Is Contrary to the Express Statutory Purposes of the NVRA.

Defendants' DPOC Law cannot be reconciled with the express statutory purposes of the NVRA. The text of the NVRA lays out three findings and four purposes. The findings are:

> (1) the right of citizens of the United States to vote is a fundamental right,
> (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
> (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a). The four purposes of the statute are:

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

52 U.S.C. § 20501(b). The DPOC law disrupts all four of these purposes.

[13] For the same reasons, Defendant Kobach is wrong when he claims he will have to establish a system where separate state and federal voter qualifications exist. First, as explained *infra* § VII, nothing compels Defendant Kobach to enact a labyrinthine dual registration system for federal and state elections. But even if he chose to do so, the qualification (citizenship) would remain the same under both systems. Only the manner and procedural requirement for verifying citizenship would be different. *See EAC*, 772 F.3d at 1195.

Increasing Registration and Enhancing Participation. There is no real dispute that the DPOC Law is contrary to the first two statutory purposes of the NVRA. Defendants offer no evidence contesting the analysis provided by Plaintiffs' expert, Dr. Michael McDonald, that for thousands of Kansans, the DPOC law causes "an immediate and a long-term harm on the likelihood of . . . participat[ion] in the political process," and that "these harms will disproportionally be borne by young people and registrants unaffiliated with a political party," *i.e.*, precisely the groups of Kansans who are already much less likely to register to vote and likely to be deterred by additional hurdles to registration. Ex. 1, McDonald Rep., at 3. The latest evidence obtained from Defendants in discovery confirms these facts: although voters from the ages of 18-29 are only 14.9% of registered voters in Kansas, they make up *more than 58% of motor-voter applicants on the latest suspense list* produced by Defendants (*i.e.*, as of March 31, 2016). *See* Ex. 15, McDonald Suppl. Rep., at 6.[14] Defendants also offer no rebuttal to Dr. McDonald's testimony that "voting is habitual," that the DPOC requirement "disrupt[s]" the formation of that habit in young voters, and that it that "leads younger people [to be] more inclined to simply not vote at all," both in current and in future elections. Ex. 1, McDonald Rep., at 20, 22 (citation & internal quotation marks omitted).

Ignoring the direct effect of the DPOC Law, Defendants suggest that the law is not contrary to the NVRA's purpose of enhancing participation because Kansas engages in other practices, such as "permit[ting] voter registration on the internet," which have coincided with "increased voter turnout from 2010 to 2014." *See* Kobach PI Opp'n at 46. Of course, the fact that Defendants engage in some affirmative registration practices like online registration does not

[14] Dr. McDonald's Supplemental Report evaluates suspended and purged voters who applied to vote at DMV Offices, those who applied using the DMV's Online Address Change of Address form, and those who applied using the Motor Vehicle Online Registration system. Ex. 15, McDonald Suppl. Rep., at 5-6.

give them license to violate the NVRA—and Defendants cite no authority for that proposition. More fundamentally, it is both misleading and inappropriate to attempt to assess the impact of the DPOC law by mechanically comparing overall turnout rates across elections. As explained by Dr. McDonald in his Supplemental Report, doing so is misleading because total turnout in a single election is influenced by many factors that operate independently of the legal regime. *See* Ex. 15, McDonald Suppl. Rep., at 2-4. For example, in 2014 the Gubernatorial and U.S. Senate elections in Kansas were much more competitive than they were in 2010, which tends to encourage turnout. In 2014, polls before the election showed incumbent Governor Brownback trailing his challenger by two percentage points, while incumbent Senator Pat Roberts was behind by 0.8%; in 2010, by contrast, the Gubernatorial and U.S. Senate candidates were far less competitive, as the winners in both races prevailed by more than 30 percentage points. *See id.* at 3-4. It is hardly surprising that turnout was higher in 2014 (by about one percentage point, from 49.7% to 50.8%, *id.* at 3); but the fact that more people overall were motivated to turn out in 2014 does not refute the fact that many *other voters* were prevented from voting that year. In fact, it is uncontested that Plaintiffs Fish, Boynton, and Stricker were all interested in participating in the 2014 elections in part because they were so pivotal, but were deterred or blocked from doing so by the DPOC Law. *See* Ex. 2, Fish Decl. ¶ 13; Ex. 5, Stricker Decl. ¶¶ 6, 10-17; Ex. 6, Boynton Decl. ¶¶ 7-12.

Moreover, fixating exclusively on total turnout levels is inappropriate in light of the precise purposes of the NVRA. In enacting the NVRA, Congress intended not only to increase the overall number of registered voters but also to assist "various groups" whose participation was obstructed by "discriminatory and unfair registration laws." 52 U.S.C. §§ 20501(b)(2), (a)(3). Young voters are among those whom Congress specifically sought to reach with the

NVRA, noting in the Senate Report that motor-voter registration is "an effective means of reaching groups of individuals generally considered hard-to-reach for voting purposes, *such as the youngest voting age population who generally have drivers licenses*." S. Rep. No. 103-6, at 5 (emphasis added). And here, Defendants have offered no evidence to dispute the testimony of Plaintiffs' expert that the DPOC law disproportionately impacts young voters. It is therefore not a defense to assert, as Defendants do, that some Kansans are able to comply with the DPOC law. "The goal of the NVRA was to streamline the registration process for all applicants; the fact that [a DPOC requirement] only *partially* undermines this goal does not make it harmonious with the NVRA." *Gonzalez v. Arizona*, 677 F.3d 383, 401 (9th Cir. 2012) (emphasis in original).

Election Integrity and Accuracy of Voter Registration Rolls. Contrary to Defendants' assertions, it does not "go[] without saying" that the DPOC Law protects election integrity or enhances accuracy of the voter rolls, Kobach PI Opp'n at 47; rather, the evidence here shows that the DPOC Law undermines or fails to advance the third and fourth purposes of the NVRA.

First, the DPOC Law is entirely unnecessary for election integrity, as Defendants have failed to refute testimony from Plaintiffs' expert, Dr. Lorraine Minnite, that there is no "empirical evidence to suggest that non-citizen registration and voting are problems of any significance in the state." ECF No. 20-9, Ex. 9, Expert Report of Lorraine C. Minnite, Feb. 25, 2016 ("Minnite Rep."), at 1. Defendants offer only a handful of examples—most of them from years ago – of alleged noncitizen registration and/or voting. This is the same sort of evidence that the Tenth Circuit rejected when it observed that Defendant Kobach had failed to produce evidence that a "substantial number of noncitizens have successfully registered" to vote in Kansas. *EAC*, 772 F.3d at 1197-98. First, as evidence of the supposedly "persistent problem" of noncitizen registration, Kobach PI Opp'n at 9, Defendant Kobach trots out an incident involving

agricultural workers in Seward County that occurred *nearly 20 years ago*, *see id.* at 9, 49; Ex. 9, Minnite Rep., at 22-23. But as Dr. Minnite explained, the sum total of evidence of noncitizen voting in the incident in question amounts to nothing more than innuendo: an "anonymous phone call" to the County Clerk, who subsequently discovered several voter registration forms listing apparently non-existent addresses, and observed voters who "were unable to understand enough English to read [a] ballot question." Ex. 9, Minnite Rep., at 23. It goes without saying that U.S. citizens may sometimes need language assistance when voting,[15] and while a voter registration form with a bad address is troubling, it is not itself evidence that a registrant is a *noncitizen*. In any event, the incident in question yielded no prosecutions, and there is no evidence that any of the individuals involved—even if they were noncitizens— registered to vote at a DMV.

Defendant Kobach next points to "thirty-seven specific cases" of alleged non-citizen registration or attempted registration that occurred more recently (*i.e.*, since 2000). Kobach PI Opp'n at 49. He also has produced affidavits and documents that purport to identify a smattering of additional supposed incidents of noncitizen registration, none of which alter Dr. Minnite's conclusion that there is not a significant problem of noncitizen registration in Kansas. *See* Supplemental Report of Lorraine C. Minnite, Apr. 12, 2016 ("Minnite Suppl. Rep."), filed concurrently herewith as Ex. 16. Moreover, Defendant Kobach neglects to mentions that, out of the paltry number of supposed noncitizens registrations he has identified, only *three* cases involved registration at the DMV, and that *none of those individuals ever voted*. *See* Pls.' Opening Br. at 32 (citing Ex. 9, Minnite Rep., at 28-29, Appendix D). That is hardly surprising, as the registration process at DMVs has in place numerous safeguards—such as requiring the applicant to present in person to a state official—that render it more secure than other modes of registration. *See* S. Rep. No. 103-6, at 5

[15] Indeed, the Voting Rights Act specifically protects the voting rights of individuals who are not proficient in English. *See, e.g.*, 52 U.S.C. §§ 10303(e), (f).

("Driver license applications require most of the information needed to determine the eligibility of a voting registration applicant, and include the additional protection of a photograph.").

It is telling that, despite his prosecutorial authority, Defendant Kobach has not prosecuted a single instance of noncitizen voting.[16] Even the handful of improper noncitizen registration applications that have occurred appear mainly to have resulted from omissions or mistakes by *government officials themselves*. *See* Ex. 16, Minnite Suppl. Rep., at 4. Kansas state law requires driver's license applicants, including renewal applicants, to submit documentary proof of legal presence, which will identify the applicant as a U.S. citizen or not. The fact that the Department of Revenue has waived that requirement for license renewals, and that DMV employees apparently sometimes offer voter registration to first-time license applicants who have *self-identified* as non-citizens are issues within the state's own control. *See* Pls.' Opening Br. at 33 (citing ECF No. 20-10, Ex. 10, Tr. of TRO/Prelim. Inj. Hr'g, in which Defendant Kobach acknowledged that DMV employees erroneously offer voter registration to noncitizens); Dep. of Tabitha Lehman, Apr. 6, 2016 ("Lehman Dep."), at 63:20–64:13, filed concurrently herewith as Ex. 17 (acknowledging that DMV is mistakenly offering voter registration to people who self-identify as non-citizens); *see also* Ex. 16, Minnite Suppl. Rep., at 4 (describing noncitizens who affirmatively indicated that they had been mistakenly registered and requested that their registrations be canceled).[17] The appropriate solution to mistakes like these is for the

[16] Of the six total prosecutions that Mr. Kobach has brought, none are for noncitizen voting; and charges against one Defendant were recently dismissed on the eve of trial. *See* Yael T. Abouhalkah, "Kris Kobach is Incompetent in Kansas and a National Disgrace, Too," *Kan. City Star*, Apr. 8, 2016, http://www.kansascity.com/opinion/opn-columns-blogs/yael-t-abouhalkah/article70776837.html.

[17] It is telling that, in discussing what *amicus* PILF describes as the "problem of noncitizen voting that plagues states nationwide," PILF Br. at 2, PILF's first example is of thirteen noncitizens who registered in Harris County, Texas, in which ten of the thirteen "actually checked 'no' on the citizenship question" (four of the ten checked "no," while six checked "no"

state to train its workers to follow the law, not to impose additional restrictions that disenfranchise thousands of voters. Indeed, there are ample alternative means available to prevent noncitizen registration. *See ITCA*, 133 S. Ct. at 2257 ("[W]hile the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" (citation omitted; alteration in original)); *EAC*, 772 F.3d at 1199 (noting "at least five alternate means available to enforce" laws against noncitizen registration).

Second, every time that a voter who has complied with the requirements of the NVRA is needlessly blocked from the polls, it damages the integrity of the election system. Rather than enhancing the accuracy of the voting rolls, the DPOC Law complicates the voter registration system unnecessarily. For example, State Elections Director Bryan Caskey submitted an affidavit in another matter stating that, over a three-week period in February, approximately two-thirds of voter registration applicants did not submit DPOC with their voter registration applications. *See* Aff. of Bryan Caskey, *League of Women Voters v. Newby*, No. 16-cv-236 (D.D.C. Feb. 21, 2016), ECF No. 27-1, at ¶ 13, filed concurrently herewith as Ex. 18 (noting that, of more than 22,000 submitted voter registration applications between February 1, 2016 and February 21, 2016, only 7,444 applications were completed with accompanying DPOC). The voting rolls in Kansas are in chaos right now *because* of the DPOC Law, the implementation of which requires a complex process of initially placing approximately *two-thirds of voter registration applications* on a "suspense" list, and then moving those voters to "active" or "canceled" depending upon

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and "yes"), while "the remaining three left the checkbox blank entirely"—meaning that local elections officials should never have registered these applicants in the first place, because they either self-identified as noncitizens or failed to identify themselves as citizens. *Id.* at 5.

their subsequent submission of DPOC.

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE DPOC LAW UNLAWFULLY REQUIRES "DUPLICATE" INFORMATION.

Section 5 provides that a motor-voter registration form "may not require any information that duplicates information required in the driver's license portion of the form" other than a signature. 52 U.S.C. § 20504(c)(2)(A). Defendants are in violation of that prohibition because the Kansas driver's license application process already requires documentary proof of legal presence, *see* Kan. Stat. Ann. § 8-240(b)(2), which for any citizen will be a citizenship document like a birth certificate or a passport that is also sufficient to satisfy the DPOC requirement for voter registration. *Compare* Kan. Dep't of Revenue, *Driver's License Proof of Identity*, www.ksrevenue.org/dmvproof.html (listing documents that satisfy the proof of legal presence requirement for obtaining a driver's license) *with* Kan. Stat. Ann. § 25-2309(*l*) (listing documents that satisfy the DPOC requirement for voter registration). In other words, any citizen applying for a Kansas driver's license must, by necessity, show DPOC in order to receive the license. *See* Pls.' Opening Br. at 23-24. And yet Defendants frequently require such individuals to show documentary proof of citizenship *twice* in order to register to vote: once at the DMV in the course of the driver's license application process, and again to an elections official in order to complete the voter registration process.

Defendants raise two arguments: that the Individual Plaintiffs supposedly lack standing to bring this claim because the only one of them who was an initial applicant for a Kansas driver's license (Mr. Boynton), supposedly declined to register to vote; and that DPOC does not constitute "information" for purposes of the statute. Defendants are wrong on both counts.

A. Plaintiffs Have Standing to Bring Their Duplication Claim.

The Individual Plaintiffs have standing for this duplication claim for two reasons. *First*, Kansas law requires proof of legal presence (which, for citizens, means DPOC) both when initially applying for a driver's license as well as when renewing. *See* Kan. Stat. Ann. §§ 8-240(b)(2), 8-247(d)(1). In practice, the Department of Revenue has waived that requirement for license renewals, *see* Pls. Opening Br. at 21-22, perhaps out of recognition that such requirements are cumbersome and would result in fewer successful license renewals. But that fact is irrelevant: the voter registration portion of the motor-voter process clearly requires information (DPOC) that "duplicates information" which, under Kansas state law, is already "required in the driver's license portion of the form." *See* 52 U.S.C. § 20504(c)(2)(A). Any motor-voter applicant in Kansas therefore has standing to bring this claim, including the various Individual Plaintiffs who applied to register to vote in the course of renewing their licenses (*e.g.*, Mr. Ortiz, Mr. Fish, Ms. Bucci, and Mr. Stricker).

Second, it is undisputed that two of the Individual Plaintiffs submitted DPOC at DMV offices, and yet were still blocked from registering to vote and placed on the suspense list, with instructions that they would not be registered to vote unless they showed DPOC a second (*i.e.*, duplicative) time. *See* Ex. 6, Boynton Decl. ¶¶ 6, 10; Ex. 7, Hutchinson Decl. ¶¶ 14-15.[18] In particular, Defendants do not dispute that Mr. Boynton was an initial applicant for and successfully obtained a Kansas driver's license in 2014, producing a birth certificate in the process. *See* Ex. 6, Boynton Decl. ¶ 6. Indeed, as a U.S. citizen who was a first-time Kansas

[18] Plaintiffs' Opening Brief mistakenly identifies Plaintiff Stricker as an initial applicant for a Kansas driver's license. *See* Pls.' Opening Br. at 24. That was an error, as Mr. Stricker, when he sought a new driver's license upon moving back to Kansas, was apparently treated by the DMV as an applicant for a license renewal because he held a Kansas license when he previously lived in the state.

driver's license applicant, he could not have successfully obtained a license without showing DPOC. Defendants assert that DMV records indicate that Mr. Boynton declined to register to vote, *see* Kobach PI Opp'n at 4-5, but those records are clearly erroneous: they are contradicted by Mr. Boynton's own testimony that he asked to register to vote while applying for a driver's license. *See* Ex. 6, Boynton Decl. ¶ 6. In any event, Defendants do not dispute that Mr. Boynton's name was placed on the list of suspended voter registration applicants, *see id.* ¶ 10, which, according to the Kansas Elections Director, would have been impossible if Mr. Boynton had declined to register to vote, because a driver's license applicant's name will only appear in the state voter registration system if that person requests to register to vote. *See* Ex. 14, Caskey Dep., at 25:18–26:1. Accordingly, because Mr. Boynton undoubtedly produced DPOC in the course of applying for a driver's license and requested to register to vote in the process, Plaintiffs have standing to pursue their duplication claim.

B. The Documentary Proof of Citizenship Law, On Its Face and In Practice, Violates the Prohibition on Duplicative Information.

Defendants do not dispute that, on its face, Kansas law directly contradicts the NVRA's prohibition on requiring duplicative information, providing that "[t]he voter registration section of the [NVRA] application . . . [m]ay require . . . information that duplicates, or is in addition to, information in the driver's license or nondriver's identification card section of the application . . . to enable Kansas election officials to assess the eligibility of the applicant." Kan. Stat. Ann. § 25-2352(b)(1). Defendants nevertheless claim that DPOC is not "information" "in the driver's license portion of the form," and therefore can be requested multiple times during the course of the motor-voter registration process. *See* Kobach PI Opp'n at 34. That argument is foreclosed by *ITCA*, where the Court explained that a DPOC requirement constitutes a request for "information" within the meaning of the statute. In rejecting Arizona's position that, under the

NVRA, it could impose DPOC requirements on Federal Form applicants, *ITCA* observed that "Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of *information* the State requires . . . . If that is so, the Federal Form ceases to perform any meaningful function." 133 S. Ct. at 2256 (emphasis added).

Accordingly, to the extent a State's driver's license application process requires applicants to submit DPOC, Section 5 of the NVRA prohibits the State from requiring that motor-voter applicants submit DPOC a second time in order to become registered to vote. Because Kansas does so, it is violating the NVRA.

V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE 90-DAY PURGE RULE VIOLATES THE NVRA.

Section 8 of the NVRA permits the removal of individuals from a state's list of registered voters under only limited circumstances, none of which is the failure to provide DPOC. 52 U.S.C. §§ 20507(a)(3)-(4). Defendants assert that they are not in violation of Section 8 because, in their view, the 90-Day Purge rule "only affects *applicants* who are not yet registered voters." Kobach PI Opp'n at 52. That argument, however, presupposes the answer to Plaintiffs' claim that the DPOC Law is preempted by Section 5 of the NVRA. If Plaintiffs' are correct that motor-voter applicants cannot be required to show DPOC in order to register to vote—and Plaintiffs have made that showing, *see, supra*, § III—then such registrants cannot be removed from the list of voters who are registered to vote in federal elections based on the failure to submit DPOC. Defendants do not dispute this point.[19]

[19] Nor can Defendants later argue that they have authority to purge motor-voter registrants who fail to submit DPOC because such voters are not registered for state elections. Once an applicant has complied with the registration requirements set forth in the NVRA, states are obliged to register those voters; states cannot avoid their NVRA obligations to such applicants simply by redefining what it means to be "registered" under state law. *See U.S. Student Ass'n Found.*, 546 F.3d at 382-83. Indeed, Defendant Kobach's argument that purged motor-voter registrants are merely "canceled" is a purely semantic distinction. Bryan Caskey's testimony confirms that the

VI. DEFENDANT JORDAN IS A PROPER PARTY TO THIS LITIGATION.

Defendant Jordan's responsive briefing repeats a single point in many different ways: that Plaintiffs should not have brought suit against him because he has no involvement in administering voter registration or the enforcement of the DPOC law.[20] That is wrong. The *motor-voter provisions* of the NVRA create a voter registration system jointly administered by the DMV and the Secretary of State's office. *See generally* 52 U.S.C. § 20504 (outlining responsibilities for State motor vehicle authorities, including accepting and transmitting voter registration applications to the appropriate State election official within 10 days of receipt). As the Kansas Director of Elections explained in an affidavit submitted by Defendant Kobach, the DMV assists in the administration of the DPOC law through "an interagency practice whereby the DMV sends verification of documentary proof of citizenship to the relevant county election official." *See* ECF No. 58-3, Kobach Ex. A, Caskey Aff. ¶ 24. The DMV is intimately involved not just in motor-voter registration but also in the enforcement of the DPOC Law: DMV employees certify whether motor-voter applicants have submitted DPOC and send those certifications to elections officials, who do not directly review DPOC submitted by motor-voter registrants, but instead rely on the DMV certification forms. Ex. 14, Caskey Dep., at 31:15–

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only reason anyone is ever removed from the Secretary of States's registration database is by being "canceled"— even if the voter has died or moved out of state. *See* Ex. 14, Caskey Dep., at 47:17–49:5 (noting that voter registrations are designated "cancel[ed]" due to "voter request," if a "voter has moved [to a] new jurisdiction," if a voter is "deceased," or is "convicted of a felony"). There is no substantive difference between Defendants' use of the term "canceled" and the term "purged" as used by the NVRA.

[20] Defendant Jordan makes a host of overlapping arguments related to immunity, failure to state a claim, and procedural objections that are duplicative of contentions he raises in his separate motion to dismiss, and will be appropriately addressed in Plaintiffs' response. Plaintiffs note, however, that immunity defenses do not apply in this case because Plaintiffs solely seek prospective injunctive relief from Defendant Jordan in his official capacity. *Cf. Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 866 (10th Cir. 2003) (citation omitted) (setting out four-part test for application of *Ex Parte Young*).

32:16. Defendant Jordan is therefore a proper—and necessary—Defendant in this case.

In mandating voter registration at DMVs, Congress intended to provide for voter registration through a single point of contact with the State. This is not happening in Kansas; indeed, because the DMV is not transferring DPOC for at least some motor-voter registrants to the appropriate elections official, even *some individuals who comply with the DPOC requirement* still end up on the suspense list are being required to provide such documentation *twice* in order to register to vote, including Plaintiffs Boynton and Hutchinson. *See supra*, § IV.A.

Defendant Jordan's response is to pass the buck to Defendant Kobach, asserting that "everything went well when all these Plaintiffs attempted to apply to register to vote at Kansas DOV offices. . . . They left DOV believing themselves to be registered to vote." Jordan PI Opp'n at 13. But Defendant Kobach tries to shift the blame *back* to the DMV, noting that it is responsible for sending verification of DPOC to elections officials, and attributing failures in registering individuals to vote to "error[s]" by "DMV clerk[s]." Kobach PI Opp'n at 33. Ultimately, Defendants share joint responsibility for these failures, and both must be part of a solution that ensures that all motor-voter registrants who comply with the procedures outlined in the NVRA are properly registered to vote.[21]

VII. THE REMAINING EQUITABLE FACTORS STRONGLY WEIGH IN FAVOR OF INJUNCTIVE RELIEF.

The difference in comparative harm between Plaintiffs and Defendants is stark. Thousands of eligible citizens face disenfranchisement in the upcoming 2016 elections, while

[21] Jordan also argues that he did not receive adequate notice as required under the NVRA. This argument is incorrect, both factually and legally. First, the provision Jordan relies upon requires that notice be sent to the Kansas Secretary of State alone. *See* 52 U.S.C. § 20510(b)(1) ("A person who is aggrieved by a violation of this chapter may provide written notice of the violation *to the chief election official* of the State involved." (emphasis added)). Second, Jordan was in fact expressly copied on the notice letter Plaintiffs sent. *See* ECF No. 1-1, Notice Letter, Ex. A. to Complaint, at 7 (copying Jordan and the Kansas Attorney General).

Defendants complain of limited administrative burdens.

Administrative Burdens. Defendants protest that an injunction will impose "severe and expensive administrative burdens," by requiring elections officials to go through the list of suspended voters and to change the status of affected motor-voter applicants from suspended or canceled to "active." Kobach PI Opp'n at 54. But Kansas Elections Director Bryan Caskey admitted that it will take only approximately one hour to identify all of the motor-voter registrants who have been blocked by the DPOC requirement. *See* Ex. 14, Caskey Dep., at 80:7–81:17 (confirming that it takes "approximately 30 minutes" to generate a list of all motor-voter applicants currently on the suspense list due to the DPOC requirement); *id.* at 85:11–86:12 (confirming that it will take another 30 minutes to do the same thing for motor-voter applicants who registrations have been canceled due to the DPOC requirement). Once that task is complete, all that is required for relief is for Defendants to change the status of these applicants to active voters, and to cease enforcing the DPOC requirement on motor voter registrants. To the extent that this process is in any way cumbersome administratively, the balance of harm clearly favors Plaintiffs, whose fundamental right to vote is at stake. *See Obama for Am.*, 697 F.3d at 436 (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 justify any restrictions on voting. *See, e.g.*, *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006) ("Governments almost always attempt to justify their conduct based on cost and administrative convenience."), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007).

Mailing Costs. Defendants complain that, if relief is ordered, they will incur costs informing voters that their registrations have been completed. But they ignore the fact that the state already incurs significant costs informing motor-voter applicants that their registrations

have been suspended due to the DPOC law—and that those costs would be reduced going forward if fewer voters were placed on suspense as a result of the relief sought by Plaintiffs. *See* Ex. 17, Lehman Dep., at 30:4-7 (acknowledging that, if there were fewer voters placed on suspense, the state would spend less money spent on mailings to voters). Defendants also protest that some number of voters on the suspense list may have moved since submitting their registration forms, citing a "study" in which Sedgwick County attempted to contact the voters who had submitted "the oldest 700 incomplete applications and found that *over thirty percent* had moved." Kobach PI Opp'n at 56-57. But that is irrelevant for several reasons. *First*, Kansas does not prohibit registrants from voting simply because they have moved: if a registrant moves after submitting a voter registration, the registrant "can still vote . . . at the precinct assigned to your old address," and submit a new voter registration form at the time of voting.[22] In other words, every affected motor-voter applicant—even if they have moved within the state—is still entitled to relief in this case. *Second*, taking Defendants' assertion at face value, almost 70% of the affected voters remain at the same address and are properly registered there. *See* Ex. 17, Lehman Dep., at 41:20-23. *Third*, this "study" of a single county is highly unreliable at best—there is no basis for assuming that its results are representative of the suspense list as a whole; and the fact that it was limited to the "oldest" applications on suspense almost certainly skews the results, because as more time passes, people are more likely to have moved.

Two-Tiered Elections. Defendants also protest that a preliminary injunction "would

[22] *See* Kansas Secretary of State, "How Do I Register?: Moving Issues," Vote Kansas, http://www.voteks.org/before-you-vote/how-do-i-register.html (explaining that registrants who move within the same county "can still vote a complete ballot at the precinct assigned to [their] old address" but "will be required to complete a new voter registration application"), and that registrants who move to a different county in Kansas "will need to vote at the precinct assigned to your old address" and "will be required to complete an affidavit of former precinct residence and a new voter registration application.").

compel the State to administer a two-tiered election with a massive number of federal-only voters." Kobach PI Opp'n at 55. But that is also a problem of Defendants' own making, one that they could easily avoid. Contrary to Defendant Kobach's assertions, it is not true that "Kansas law requires" a two-tiered system in which some NVRA registrants are permitted to vote for federal offices only, *id.*; in fact, a Kansas state court recently ruled that Defendant Kobach's two-tiered voting system *violates state law* and that under Kansas state law all registrants—even those who register under different procedures prescribed by the NVRA—must be registered to vote in state as well as federal elections. *See Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Jan. 15, 2016).[23] If Defendant Kobach complied with this decision, the "problem" of a two-tiered system would vanish. In any event, by Defendant Kobach's own admission, Kansas is *already* operating a dual registration and did so during the 2014 election cycle. *See* Kobach PI Opp'n at 55-56. Whether or not relief is granted in this case will not change that fact one way or the other.

Non-Citizen Voting. Defendant Kobach's exaggerations about the threat of noncitizen voting are addressed *supra*, § III.D. But even taking his unsubstantiated assertions at face value, the handful of cases of noncitizen registration identified by Defendants cannot outweigh the disenfranchisement of 16,000 Kansans who motor-voter registrations have been suspended or canceled due to the DPOC law, particularly given that Defendants do not assert that any of these Kansans are noncitizens.

State Sovereignty and the Public Interest. Undoubtedly, the State has an interest in the enforcement of its laws. But under the Supremacy Clause, state enactments must give way to the

[23] The question of whether the two-tiered voting system is permitted in Kansas is a pure question of state law and therefore is not at issue in this case. *See Belenky v. Kobach*, No. 13-4150-EFM-KMH, 2014 WL 1374048, at *3-4 (D. Kan. Apr. 8, 2014).

requirements of federal law, including with respect to voter registration under the NVRA. *See ITCA*, 133 S. Ct. at 2253 (the Elections Clause grants Congress plenary "'authority to provide a complete code for federal elections,' including, as relevant here . . . regulations relating to 'registration.'" (quoting *Smiley*, 285 U.S. at 366)). As another court hearing a request for preliminary relief under the NVRA held, "[t]he public has an interest in seeing that the State . . . complies with federal law, especially in the important area of voter registration." *Cox*, 324 F. Supp. 2d at 1369. Indeed, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

CONCLUSION

For all of the foregoing reasons, Defendants' application of the DPOC law to motor-voter registrants should be preliminarily enjoined.

Dated this 12th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 12th day of April, 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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