No. 16-05196

IN THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE

Plaintiffs-Appellants

v.

BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendant-Appellees

and

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION

Defendant-Intervenors

APPELLANTS' REPLY TO RESPONSES TO MOTION TO EXPEDITE

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INTRODUCTION

Appellee-Intervenors' opposition to the expediting of this appeal amounts to an unsupported, and unsupportable, assertion that it is too late to provide Appellants with the relief they want. In essence, Appellee-Intervenors attempt to capitalize on the district court's inordinate delay in issuing its decision on the preliminary injunction motion, and to compound that delay with a remand to the district court for its failure to address the probability of success on the merits. Appellee-Intervenors' argument stands equitable jurisprudence on its head. As Appellee-Intervenor Kobach, the Kansas Secretary of State, has himself conceded in other litigation, there is still time for effective preliminary relief to issue in order to protect the registration rights of voters and the organizational rights of plaintiffs before the pending November elections.

Appellee-Intervenors do not dispute that tens of thousands of voters stand to be disenfranchised as the direct result of Executive Director Newby's facially unlawful actions—a result that would cripple the efforts of Appellant voter registration organizations. Nor do Appellee-Intervenors offer any explanation of how Mr. Newby's actions comport with even the most basic requirements of the Administrative Procedure Act ("APA"). In contrast, Appellants have demonstrated irreparable harm, and a clear right to expedited relief.

Inexplicably, Appellee-Intervenors make much of the Department of Justice's ("Department" or "DOJ") forthright recognition that Executive Director Newby's actions were legally invalid, and thus indefensible. DOJ's position buttresses the need for expediting this appeal, and for the issuance of preliminary relief.

At the same time, Appellee-Intervenors continue to plead unfamiliarity with longstanding precedent of the Election Assistance Commission ("EAC")—precedent that has been recognized by the Supreme Court, and that Appellee-Intervenor Kobach helped to form in prior litigation. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014). Mr. Kobach's trivialization of the burdens of being required to present citizenship documents in order to register to vote led the district court to reach a wholly unsupportable legal and evidentiary conclusion that even Executive Director Newby did not reach, and which the EAC has long held to the contrary—that documentary proof of citizenship is not burdensome to voter applicants.

Despite Appellee-Intervenors' protestations, this case can be resolved well in advance of the elections, in accordance with the Supreme Court's directions, and a remand to the district court for an expression of that court's position on the

merits is particularly inappropriate here. That court has already consumed almost four crucial months in the issuance of its decision denying the preliminary injunction motion. Moreover, the position taken by both sets of Intervenors is contrary to the position they took below that their participation in the case would result in no delay in the proceedings. Dkt. 24 at 3 (PILF will "participate in the case on the schedule that will be established for the existing parties" and "will avoid unnecessary delays."); Dkt. 20 at 18-19 ("no . . . delay will result from [Mr. Kobach's] intervention"). By filibustering Appellants' preliminary injunction motion, Appellee-Intervenors work to preserve the current unlawful regime to their own benefit.

Finally, and more fundamentally, this Court "accords expedited consideration to a case when required to do so by statute, ***or*** when the Court grants a motion for expedition." U.S. Court of Appeals for the D.C. Circuit, *Handbook of Practice and Internal Procedures* at 33 (Mar. 1, 2016) ("*Handbook*") (emphasis added). Here, under both statute and Circuit Rules, expedition of this appeal is ***mandatory***. This fundamental precept of federal appellate procedure, however, is entirely lost on Appellee-Intervenors, who argue that expedited review in this Circuit "is granted 'very rarely.'" AI Br. at 6 (quoting *Handbook* at 33). In doing so, Appellee-Intervenors argue that "Appellants must provide 'strongly compelling' reasons to justify deviation from the Court's ordinary case

management procedures." *Id.* (quoting *Handbook* at 33). But Appellants must make such a "strongly compelling" case for expedition ***only*** "[w]hen expedition is ***not*** required by statute." *Handbook* at 33 (emphasis added). Under statute and Circuit Rules "appeals from any action for temporary or preliminary injunctive relief" are accorded expedited treatment as a matter of course. *Handbook* at 19; *see also* D.C. Cir. Rule 47.2(a). Thus, Appellee-Intervenor's arguments against expedition here, where such treatment is ***mandatory***, are meritless.

Thus, Appellants respectfully submit that this Court should hear their appeal on an expedited basis, as required by statute, and adopt the proposed schedule included in their Emergency Motion to Expedite.

ARGUMENT

1. Expedited Briefing and Consideration is Mandatory In This Case

Both federal law and D.C. Circuit Rules ***mandate*** expedited briefing and consideration of "appeals from any action for temporary or preliminary injunctive relief." *Handbook* at 19; *see also* 28 U.S.C. § 1657(a) ("[E]ach court of the United States … ***shall*** expedite the consideration of … any action for temporary or preliminary injunctive relief … ." (emphasis added)). Appellee-Intervenors do not, and cannot, dispute that Appellants' appeal is from the district court's denial of their request for preliminary injunctive relief. No further showing from Appellants

is necessary for this Court to expedite review of this case; expedited review is ***required***. Appellee-Intervenors' protestations otherwise, therefore, are mere surplusage.

2. Expedited Briefing and Consideration Will Reduce Irreparable Injury to Appellants

Even indulging Appellee-Intervenors' contention that Appellants were *required* to "demonstrate that … delay will cause irreparable injury" in order for this Court to expedite review of this case, Appellee-Intervenors' argument is unavailing. Appellee-Intervenors argue that the harm alleged by Appellants will not be remedied by expedited review of this case. However, Appellant-Intervenors' myopic focus on the simplest interpretation of Appellants' claims overlooks the ongoing nature of the harm contemplated. Appellants claim both an injury that is keyed to the exact dates of the November elections, including the voter registration deadline of October 19 in Kansas, and an injury that is continuous, which grows each day that the challenged decision is allowed to stand. Increasing civic awareness and participation, and helping voters to register, are among the core mission activities of the Appellant organizations. The unnecessary burden imposed by Executive Director Newby, and allowed to continue by the district court, has injected confusion into the voter registration process in three states—and has done so at a crucial time in the election process, threatening the

ability of tens of thousands of citizens to participate in the November presidential elections. Despite Appellants' best efforts, fewer voters are being registered, with each successful registration at greater cost, and many eligible citizens will be denied their fundamental right to vote if the content of the Federal Form that governed registration for 20 years is not restored.

To support the position that expedited review is purposeless, Appellee-Intervenors erroneously rely on the notion that no relief can possibly be granted to remedy Appellants' injury in advance of the November federal elections. In contrast, Appellants favor an accelerated briefing schedule, and advocate for expedited hearing and consideration, such that relief can be granted at the earliest opportunity. Voter registration is a constant process, regardless of election dates; once an opportunity to help a voter register is missed due to the unlawful proof of citizenship requirement, that opportunity is irretrievably lost. The earlier relief can be granted, the more citizens Appellants can successfully help to register.[1]

[1] Appellee-Intervenors argue that the League of Women Voters of Kansas has not demonstrated irreparable injury, because it does not itself conduct voter registration drives, relying on an excerpt of a deposition transcript, taken out of context. AI Br. at 9. However, the rest of that testimony indicates that (1) the local leagues of the Kansas League do conduct such drives, and (2) the Kansas League gives guidance, education, and training to the local leagues in that regard, all supportive of the irreparable harm the Kansas League will suffer. Ex. 3 to AI Br.

Moreover, an order from this Court could be issued in time to impact the upcoming federal elections and prevent thousands of eligible citizens from being denied their right to vote. As Appellee-Intervenor Kobach recently noted in his own request to expedite an appeal in a parallel proof of citizenship case before the Tenth Circuit, "[a]s long as an opinion can be issued by October 21, 2016, Kansas can ensure compliance for those affected voter applicants. . . ." Exhibit 1, *Fish v. Kobach*, Appellants' Mtn. for Expedited Review at 8.[2] Kobach seeks expedited review before the Tenth Circuit in hopes of reimplementing burdensome voter registration requirements on the eve of elections, and yet derides the importance of this appeal which could restore the fundamental voting rights of thousands of citizens. Appellants submit that expedited review is both warranted and necessary given the rights at stake.

3. Appellee-Intervenors Do Not Dispute the Merits of Appellants' Claims

Appellee-Intervenors base the entirety of their opposition here on the supposed impracticability of an expedited briefing schedule, and an alleged lack of irreparable harm to Appellants absent relief from this Court. Tellingly, Appellee-Intervenors do not dispute the importance of this case to the ongoing election process, nor do they attempt to argue that Executive Director Newby's actions did

[2] While such measures will only remedy the suspended registration of those who have submitted a registration form in Kansas, that relief alone will restore the right to vote for thousands of otherwise-eligible citizens.

not violate the APA. Instead they rely on the district court's inappropriate and conclusory assumption that providing proof of citizenship documentation does not present a notable burden—despite ample record evidence to the contrary, which the district court simply failed to address. Appellee-Intervenors repeatedly trivialize Appellants' claims as "ambiguous harm related to 'voter registration activity.'" AI Br. at 4. However, as has been continually noted by Appellants, the core purpose of Appellants' organizations is to increase voter turnout and help eligible citizens through the voter registration process. Appellants have clearly documented the burdensome impact the newly-implemented proof of citizenship requirements have had on would-be registrants. The requirements particularly harm those in rural or impoverished communities who lack the means to attain citizenship documents, as well as married women whose current last names may not match their records, and college students newly of age to vote, but who do not have their birth certificates or passports away from home. Burdens on voter registration necessarily equate to burdens on the organizations who work to help citizens register. With the addition of the proof of citizenship requirements, Appellants must expend more time and resources per successful registration, which negatively impacts their ability to conduct successful registration drives and activities on the whole. Because these substantial economic harms are unrecoverable under the APA, Appellants have irrefutably suffered irreparable

harm. *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C.), *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010) (economic harm irreparable under the APA).[3]

4. The Department of Justice's Concession to a Preliminary Injunction Buttresses the Need for Expediting this Appeal

Why Appellee-Intervenors believe that Appellees' concession of the appropriateness of a preliminary injunction is an argument against expediting this appeal is baffling. Instead of recognizing that concession as a persuasive point demonstrating the probability of success on the merits, Appellee-Intervenors, as did the trial court, attempt to use it, improperly, to sideline the Department of Justice from this case. The opposite is the case: Appellees' concession of the need for a preliminary injunction mandates expedition of this appeal.

5. That the District Court Failed to Address the Probability of Success on the Merits Supports Expediting this Appeal

[3] Appellee-Intervenors cite *Wisconsin Gas Company v. FERC*, 758 F.2d 669 (D.C. Cir. 1985) for the proposition that Appellants' economic losses are not irreparable. AI Br. at 7. But Appellee-Intervenors ignore the fact that, unlike in *Wisconsin Gas*, Appellants' economic losses are irreparable because they are unrecoverable under the APA. *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) ("We are mindful of the precedents that declare that 'economic loss does not, in and of itself, constitute irreparable harm,'" but those precedents "rest on the assumption that the economic losses are recoverable." (distinguishing *Wisc.Gas*, 758 F.2d at 674)).

Appellee-Intervenors appear to concede that the district court erred in failing to address the probability of success on the merits. On its face, this is a potent argument favoring expediting this appeal, particularly in light of the district court's almost four month delay in issuing its decision on the motion. Inexplicably, Appellee-Intervenors argue that, rather than taking this appeal at all, this Court should remand the issue to the district court.

In this regard, Appellee-Intervenors rely on *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006). However, there the Court simply indicated that, in that case, a remand was appropriate, not that it was appropriate in *all* cases. Indeed, the Court indicated its awareness that, "because our review of the legal findings supporting a district court's preliminary injunction determination is de novo, the absence of legal findings does not necessarily preclude us from undertaking appellate review." 454 F.3d at 294. In *Chaplaincy*, unlike here, there was no specific time deadline, as there is here, necessitating expediting the appeal – and this Court ruled on the irreparable harm issue before deciding to remand the remaining issues.

Moreover, remand to the district court is particularly inappropriate in this case. The district court took four months after hearing to rule solely on the irreparable harm component of Appellants' request for preliminary injunctive

relief. Further delay is unacceptable and will waste the potential days Appellant registration organizations have left to help voters without access to proof of citizenship register for the upcoming election. Such a delay would moot Appellants' case with the simple passage of time, frustrating their right to seek effective judicial relief.

Nonetheless, the district court casually determined that requiring proof of citizenship to exercise the fundamental right to vote is "probably no more difficult than it would be to satisfy the citizenship requirements necessary to obtain a U.S. passport to travel abroad." Mem. Op. at 22 n.20.

For these reasons, this case should not be remanded to the district court for consideration of the merits of Appellants' claims.

6. Appellee-Intervenors' Proposed Briefing Schedule Is Unreasonable

Finally, Appellee-Intervenors balk at Appellants' proposed briefing schedule on the inflated and inaccurate grounds that they alone are acting to defend Appellees in this action, as the DOJ has allegedly failed to mount an adequate defense. Appellee-Intervenors claim that the time allotted for their response is inadequate, and go on to claim a full 21 days after the receipt of both Appellants' and Appellees' brief to submit their own. Further, Appellee-Intervenors' proposed schedule actually allots a total of 28 days for their own briefing. Thus, they

propose that Appellants submit the principal brief less than a week from today, that Appellees respond two weeks later, and then allow themselves—the *intervenors* in this matter—the entire month of August to complete briefing. Such a schedule lacks any logical basis, and the Appellee-Intervenors' espoused unavailability to complete briefing within a reasonably expedited time frame due to involvement in another expedited litigation should carry no weight with this Court. The Appellee-Intervenors' participation in the matter below was subject to their representations to the Court that they would not engage in delaying tactics, and as such should not be allowed to delay an important case that will impact the fundamental voting rights of thousands of citizens across three states.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that their Emergency Motion to Expedite be granted.

July 12, 2016

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on the 12th day of July, 2016, they caused one copy each of the foregoing APPELLANTS' REPLY TO RESPONSES TO MOTION TO EXPEDITE, to be served by the Court's ECF system on the following:

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EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3147

STEVEN WAYNE FISH, *et al.*,

Appellees,

v.

KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas, *et al.*,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOTION OF THE KANSAS SECRETARY OF STATE FOR EXPEDITED CONSIDERATION, STAY PENDING APPEAL, AND EMERGENCY MOTION FOR ADMINISTRATIVE STAY PENDING DISPOSITION OF THE MOTION FOR STAY

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INTRODUCTION AND BACKGROUND

The Kansas Secretary of State (the "Secretary") respectfully seeks a stay pending appeal of a preliminary injunction issued by the U.S. District Court for the District of Kansas. The preliminary injunction prohibits the State from enforcing its proof of citizenship requirement for voter registrants, if those voters register at the Division of Motor Vehicles ("DMV"). It compels the state to retroactively change the existing status of some 18,000 voter registration applicants, and create a confusing set of procedures that will affect up to 32,000 additional applicants before November. The Secretary also seeks an emergency administrative stay until this Court disposes of the motion for stay pending appeal. Finally, the Secretary asks this Court to consider this important appeal on an expedited basis, with oral argument this summer. This relief will maintain the status quo until this Court can consider this appeal, which is likely to succeed.

This case challenges Kansas's 2011 law requiring that all newly-registering voters provide proof of citizenship to register to vote. K.S.A. § 25-2309(l). The law provides that applicants registering to vote must provide any of thirteen documents proving their United States citizenship. *Id.* If a Kansas agency already possesses evidence of the applicant's citizenship (e.g., a birth certificate held by the Kansas Department of Health and Environment Office of Vital Statistics) the Secretary of State's Office will obtain the evidence on the applicant's behalf if able. Also, an applicant can obtain without charge a replacement Kansas birth certificate for voter registration purposes. KS.A. § 25-2358. If an applicant does not possess any of the thirteen documents, then the applicant may

demonstrate citizenship by presenting other evidence (e.g., an affidavit of a sibling or school records) to the State election board. K.S.A. § 25-2309(m).

The Appellees in this case, five citizens who applied to register to vote at the DMV but declined to provide proof of citizenship, make an argument that no State has accepted, and no Article III court has embraced, until now. They claim that the National Voter Registration Act of 1993 (NVRA) prohibits a State from requiring proof of citizenship from any person who applies to register to vote at the DMV. The NVRA does not mention proof of citizenship at all. Moreover, their novel reading of the NVRA effectively creates a special privilege that people who apply to register at the DMV enjoy over people who apply by mail or who apply in person at any other government office– DMV applicants need not provide proof of citizenship, whereas the other applicants must do so, if state law so requires. No Member of Congress described the NVRA as having this effect. If the holding of the court below is sustained on appeal, it will cause an earthquake upsetting the administration of elections across the country.

On May 17, 2015, the district court adopted Appellees' novel interpretation of the NVRA and issued a preliminary injunction mandating that the Secretary, and effectively all 105 Kansas county election officers, register (for federal elections only) every individual who has applied to register to vote at a Kansas DMV office since January 1, 2013, and has not provided proof of citizenship as required by K.S.A. § 25-2309(l). Ex B at 66. The district court denied the Secretary's motion for stay; however, in order to give this Court time to consider granting a stay pending appeal, the district court stayed its preliminary injunction until June 14, 2016. Ex. A at 15.

To avoid massive voter confusion and an overhaul of the entire Kansas voter registration and election process within six months of a presidential election, the Secretary asks this Court to stay the district court's preliminary injunction pending appeal and for expedited consideration. The district court's decision on the merits is likely to be reversed, for reasons described in summary fashion in this motion. This court should accordingly preserve the status quo by issuing a stay and expediting this appeal.

ARGUMENTS AND AUTHORITIES

I. Legal Standard.

The purpose of a stay pending appeal is "to preserve the status quo pending appellate determination." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). The movant must satisfy the same four-part test applicable to preliminary injunctions: (1) strong showing of likelihood of success on the merits, (2) the risk of irreparable harm in the absence of a stay, (3) the risk of substantial injury to other interested parties if the stay is granted, and (4) the risk of harm to the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citation and internal quotation marks omitted). The probability of success factor "is somewhat relaxed" if the party seeking a stay demonstrates that the three harm factors "tip *decidedly* in its favor." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir.2003). In such cases, the movant is deemed to have satisfied the likelihood of success factor if [it] shows "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for

litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020 (citation omitted). The Secretary has a strong likelihood of success on the merits.

II. The Balance of the Harms Weighs Decidedly in Favor of Appellants.

A. Appellant would suffer irreparable harm if a stay is not granted.

In order to obtain a stay pending appeal, the movant must show irreparable harm--"certain, great, actual and not theoretical" injury. *Heideman*, 348 F.3d at 1189 (citation and internal quotation marks omitted). Irreparable harm would occur in three ways.

First, the Secretary has a strong interest in enforcing the laws passed by the Kansas Legislature and in ensuring fair and honest elections. *Heideman*, 348 F.3d at 1191; *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). The Supreme Court has recognized the significant public interest in preventing voter fraud and increasing confidence in the integrity of elections. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 194-97 (2008). The threat of noncitizens registering to vote in Kansas is not hypothetical. Evidence from just one of Kansas's 105 counties demonstrated that prior to K.S.A. § 25-2309(l) going into effect, eleven noncitizens successfully registered to vote; and after it went into effect another fourteen were prevented from registering. *See* Ex. O. A stay is necessary to keep this protection in place and to maintain public confidence.

Second, the Secretary and the counties will suffer the irreparable harm of having to overhaul the State's entire voter registration system during a presidential election year. Ex. C ¶ 7-9, 11. Compliance with the preliminary injunction would require county officials to work an extraordinary number of hours manually changing tens of thousands of individual voter records one by one. Ex. D, ¶¶ 8-9, Ex. E ¶ 19, Ex. G, ¶¶ 4-5. It is not

a "wholly automated process" as the district court stated. Ex. B at 62. Although the Secretary's Office could in half a day modify the Election and Voter Information System ("ELVIS") database to comply with the preliminary injunction and notify the counties of the change, Ex. D, ¶ 7, a more time-consuming task ensues thereafter. The 105 county election officers would be required to work more than a thousand hours to manually open and change approximately 17,000 individual voter records. Ex. D, ¶¶ 8-9; Ex. G. ¶ 4. After that, notice must be sent to each of up to 50,000 applicants informing them that, while they are no longer required to provide proof of citizenship to vote in federal elections, they still must provide proof of citizenship to vote in state and local elections. Additionally, the Secretary of State's Office must modify the notice distributed to every voter registration applicant who applies to register to vote at the DMV. Ex. D, ¶ 7.

In Sedgwick County alone, there are 7,205 people currently affected by the district court's decision. Ex. G, ¶ 4. Not included are the additional registrants who apply at the DMV but fail to provide proof of citizenship between now and November 8, 2016. *Id*. Approximately 17,562 minutes (or 293 hours – nine full days of work by four staff members doing nothing else) will be required to comply with the preliminary injunction and change the applicants' ELVIS records. And it will cost $3,590 just for the initial mailing in Sedgwick County. *Id*., ¶¶ 4, 6. Then, the same number of hours and costs would be required if the district court were reversed on appeal. Similar administrative nightmares would be present in the other 104 counties.

Third, the voter confusion that will ensue if the preliminary injunction is not stayed cannot be overstated. This is particularly true if the Secretary prevails on appeal.

The counties would have to send a new, contradictory notice to each voter informing him that he is no longer registered to vote in federal elections and that proof of citizenship is still required. This would be the third in a series of contradictory sets of notices the voters receive. Voter registrants will be confused by multiple registration status modifications , yo-yoing back and forth in the months before a presidential election. This confusion will greatly impede the Secretary's and the counties' efficient administration of the election in a presidential election year.

B. Opposing Parties will not be Harmed if the Stay is Granted.

Next, this Court must look to injuries Appellees would suffer if a stay were granted, *Nken*, 556 U.S. at 434, and determine whether the injuries to Appellant absent a stay outweigh such Appellees' injuries. *Heideman*, 348 F.3d at 1190. In balancing those harms, the Court is required to consider in favor of Kansas "[t]he presumption of constitutionality" that attaches to all laws. *Id.* at 1190-91; *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824) (a "general *prima facie* presumption in favour of the constitutionality of every act of a State Legislature" exists). In the present case, no evidence in the record shows a stay would cause any harm to Appellees (or to other citizens in Kansas).

1. Granting a Stay Would Have No Affect the Individual Appellees' Ability to Register to Vote or to Actually Vote

Granting a stay would have no effect on any of the individual Appellees' ability to register to vote in Kansas for the upcoming federal elections. Appellees Fish, Hutchinson, Boynton, and Stricker all provided copies of their documentary proof of citizenship through discovery and testified at their depositions that they could complete a

new voter registration form if they chose to do so. Ex. I at 78-80, Ex. J at 53-54, Ex. K at 76-77, Ex. L at 66-73. For them, the only thing that is preventing them from registering to vote (and voting in upcoming elections) is their stated decision *not* to register to vote at this time. As to Appellee Bucci, she confirmed that although she lacked documentary proof of citizenship and did not wish to obtain a replacement birth certificate, she could and would provide evidence through K.S.A. 25-2309(m) to verify her citizenship prior to the election. Ex. M at 48-51. She also stated that after learning of this safety net for citizens lacking applicable documents, she no longer opposed the proof-of-citizenship requirement. *Id.* at 115-16. Thus, the individual Appellees have confirmed they all can and will register to vote prior to the 2016 elections without any preliminary injunction.

2. Granting a stay would not prevent other citizens from registering

The district court also considered what effect that K.S.A. § 25-2309(l) had on DMV registration applicants not before the court, citing nothing in the record regarding their situations. Ex. B at 39-40. Indeed, the only evidence regarding Kansans other than the five named Appellees strongly supports the Secretary's position. A survey of 500 Kansans found that lack of proof of citizenship did not hinder a single respondent's ability to register or vote. Ex. O (Hans von Spakovsky Expert Report). Only one individual queried in that survey stated that he lacked a K.S.A. § 25-2309(l) compliant document, and that individual was already registered to vote. *Id.* at 31.[1]

[1] Of those respondents contacted who were not registered to vote, every person had documentary proof of citizenship in his or her possession; and not one of them stated that the requirement to provide documentary proof of citizenship prevented them from registering to vote. Ex. O at 15.

Moreover, Appellees have failed to identified any Kansas citizens at all who lack documentary proof of citizenship *and* cannot register to vote under K.S.A. 25-2309(m). Yet, in the absence of any evidence, the district court simply assumed that such a person exists; and the court ordered Kansas to overhaul its entire voter registration procedures based on an entirely hypothetical case. *See* Ex. B at 66.

3. In 2014 a Stay Was Granted at a Similar Point on the Election Calendar

In 2014, a similar stay was granted when the District of Kansas issued an injunction requiring that the proof-of-citizenship information be included in the Kansas-specific instructions of the National Mail Voter Registration Form. The timetable was remarkably similar to that in the instant case. In order to preserve the status quo, this Court granted a stay pending appeal on May 19, 2014. The case was placed on an expedited briefing schedule and orally argued on August 25, 2014. This Court issued its opinion on November 7, 2014, a date that is one day prior to this year's November 8 election. *Kobach v. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014). In like manner, the Secretary requests expedited consideration of the instant case. As long as an opinion can be issued by October 21, 2016, Kansas can ensure compliance for those affected voter applicants if this Court affirms the decision of the district court below.

C. The District Court Erred by Disregarding Appellees' Delay

Appellees filed their case on February 18, 2016. But the proof-of-citizenship requirement had already been in effect for more than three years (since January 1, 2013), and the act that created the legal requirement was *enacted nearly five years earlier* (on

April 18, 2011). Moreover, each Appellee was given an *individualized notice* of the requirement when they applied to register to vote. The first Appellee, Hutchinson, was sent this notice in May of 2013—nearly three years prior to filing. Thus, taking into account the NVRA's 90 day requirement, appellees delayed 55 months after enactment of the proof-of-citizenship requirement and 30 months after individualized notice.[2] The 2014 election cycle passed without even filing a 90-day NVRA notice letter. A lawsuit challenging the law could have been filed as early as July 2011.

A party's delay in bringing an action weighs heavily against any finding of irreparable harm. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) (preliminary injunction not justified when plaintiffs delayed three years before filing suit). Plaintiffs "delay in filing … vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of Earth*, 434 U.S. 1310, 1313 (1977). Appellees' delay of multiple years is far beyond what Article III courts have permitted when issuing preliminary injunctive relief. *See Weight Watchers Int'l v. Luigino's* 423 F.3d 137, 144 (2d Cir. 2005**) (**"We have found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm that is essential to the issuance of a preliminary injunction.") (citation omitted). The

[2] The 90 day provision requires a would-be plaintiff to first contact the chief election official of the State to notify him or her of the alleged violation of the NVRA, and to give the official 90 days to correct any alleged violation. 52 U.S.C. § 20510(b)(1)-(2).

district court erred by disregarding this extraordinary delay of multiple years.[3] This alone is sufficient reason to reverse its preliminary injunction.

D. Implementation of the Court's Preliminary Injunction Harms the Public Interest By Creating Unprecedented Voter Confusion

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014). Those words could not ring truer in the instant case. To protect the public interest, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (citation omitted). If not stayed pending appeal, the preliminary injunction will cause great confusion for voters during the 2016 election cycle, regardless of whether the district court's decision is reversed, for three reasons.

First, without a stay, the preliminary injunction would require each of the 105 county election officers to send notice to each individual in their respective county who currently has an incomplete or cancelled DMV voter registration application due to lack of proof of citizenship. The notice would inform the individual that (1) he or she is now eligible to vote in federal elections, but (2) he or she cannot vote in any state elections until he or she provides K.S.A. § 25-2309(l) documentation. This notice would

[3] The district court attempted to excuse this delay by saying that the database management regulation of K.A.R. § 7-23-15 took effect on October 1, 2015. But that regulation *did not in any way create or alter the proof-of-citizenship requirement*. Indeed the district court did *not* enjoin the regulation. *See* Ex. B at 59.

contradict the multiple notices already sent to applicants informing them of their obligation to satisfy the proof of citizenship requirement. Thus, after these voters have received numerous notices stating that they are not registered to vote, they would receive a notice stating that they can vote in some elections but not others. On top of that, under K.A.R. § 7-23-15, many of these applications would still be canceled with respect to state elections. Thus, these individuals would be told that they must submit a new registration application with documentary proof of citizenship to register to vote for offices for state elections, but do nothing to vote in federal elections.

The district court brushed aside this confusion by simply assuming that "easily understood" notices in the mail are always opened, carefully read, and fully understood. Ex. A at 9. But the court disregarded the evidence in the record that the Appellees themselves either ignored or did not read the multiple notices they were sent. See Ex. I at 46-51, Ex. J at 36-37, Ex. K at 51-54, Ex. L at 57-61. None of those notices were returned undeliverable. Moreover, even if every notice were read in full by every applicant, the repeated modifications of status would still be confusing.

Second, if that were not confusing enough to individuals affected by the district court's preliminary injunction, if this Court reverses the preliminary injunction then those same voters would become even more confused. The county election officers would be required to send out a subsequent notice to the up-to-50,000 individuals who received the previous notice, stating that those individuals are now *not* registered to vote in federal or state elections. In total, those individuals would receive not two, but three sets of conflicting notices. The first notices (informing them of current requirements) they have

already received, the second set of notices would go out if the preliminary injunction is not stayed, and the third set would attempt to explain that K.S.A. 25-2309(l) is once again fully in effect, and that the applicants' registrations are incomplete again.

This scenario will result in extraordinary confusion on November 8, 2016, if the district court's preliminary injunction is not stayed. Based on the sworn testimony in this case, many people would likely go to the polls on election day believing they *were* registered to vote based on the second set of notices they received, when in fact an additional notice had been sent informing them that they were not registered to vote in any election. This would result in unprecedented confusion and delays at polling places during a Presidential Election. Ex. D, ¶ 14. Because the district court's order is likely to be reversed for the reasons summarized below, this scenario is likely to occur.

Third, the 105 county election offices required to implement preliminary injunction will be especially burdened. Consequently they will find it difficult to effectively mitigate the widespread voter confusion caused by the preliminary injunction. Many of the individuals who received these contradictory notices would call the election offices to find out which notice was correct. Consequently, the numbers of phone calls would increase dramatically during a time that is already the most difficult during each two-year federal election cycle. Ex. G, ¶ 8. The perennial voter confusion about which polling place to go to and about advance voting would be compounded exponentially by up to 50,000 voters receiving contradictory notices due to the preliminary injunction.

Finally, it must be remembered that this preliminary injunction occurs during a *Presidential election cycle*. Presidential elections, by their nature, generate the largest

voter turnout. On average, an additional 400,000 Kansans vote in presidential elections as compared to non-presidential elections. Ex. D, ¶ 5. Because the presidential election in November is likely to generate extremely high turnout, the probability of severe confusion at the polls and longer wait times for all Kansas voters is significant. These problems can be avoided if the preliminary injunction is stayed pending appeal. Finally, even if this Court were to *affirm* and issue a decision as late as October 21 (a few weeks sooner than this Court's decision in 2014) the affected individuals could still be registered vote for federal office on November 8, 2016.

E. Probability of Success on the Merits

Given that the first three factors tip decidedly in favor of the Secretary, a more "relaxed showing" of "probability of success" applies. *Heideman*, 348 F.3d at 1189. To satisfy that standard, "probability of success is demonstrated when the petitioner seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Mainstream Mktg.*, 345 F.3d at 853 (*quoting Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-7 (10th Cir. 2001). The Secretary is likely to prevail, due to five significant errors by the district court.

At the outset, it must be noted that the district court's opinion is based entirely on the following NVRA subsection, which simply describes what information persons using DMV voter registration applications can be required to write on the form:

> The voter registration application portion . . . may not require any information that duplicates information required in the driver's license portion (other than a second signature or other information necessary under

> subparagraph (C)) [and] may require only the minimum amount of information necessary to . . .
> (i) prevent duplicate voter registrations; and
> (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."

52 U.S.C. § 20504(a)(2)(B). Nowhere is proof of citizenship prohibited.

1. The District Court Erred by Failing to Follow Young v. Fordice

Of considerable importance in interpreting this statutory language is the Supreme Court's holding in *Young v. Fordice*, 520 U.S. 273 (1997). Referring to the same DMV provisions of the NVRA, the Supreme Court held:

> [The NVRA] says that States cannot force drivers' license applications to submit the same information twice (on license applications and again on registration forms). … Nonetheless, implementation of the NVRA is not purely ministerial. The NVRA still leaves room for policy choice. *The NVRA does not list, for example, all the other information the State may—or may not—provide or request.*

Id. at 286 (emphasis added). This holding from *Young* contradicts the district court's view that the DMV provisions of the NVRA prevent Kansas from requesting "other information" outside of the minimal address and identity on the form. *See id.* The most natural reading of this holding is that States are permitted to require documentary proof of citizenship in addition to the information that the applicant places on the form itself.

The district court tried to justify its departure from *Young* by saying, "[T]he Court in *Young* did not say that the States have unfettered discretion under the NVRA to request information…." Ex. D at 35. But that is beside the point. *Young* said that the NVRA is *silent* on what other information can be requested outside the form. The district court's cramped reading of *Young* is an erroneous one. Indeed, the Supreme Court's phrase "all

the other information" indicates strongly that there is *no* constraint in the NVRA over what additional information a State may request beyond the information on the form. This is clearly a substantial question on which the Secretary is likely to prevail.

2. The District Court Erred by Failing to Recognize That "Minimum Amount of Information Necessary" Refers Only to Information Provided On the Form Itself

On this issue as well, the holding of the district court is likely to be reversed on appeal. The plain meaning of the NVRA's text does not support it. The phrase "may require only the minimum amount of information necessary" comes in the section describing "[t]he voter registration application *portion of an application* for a State motor vehicle driver's license." 52 U.S.C. § 20504(c)(2) (emphasis added). The context of that section describes what must be written *on the face of the form*. The intent of the NVRA in this section was to avoid compelling the applicant to complete an excessively long or "duplicat[ive]" form. 52 U.S.C. § 20504(c)(2)(A).[4] It says nothing about documentary proof of citizenship required of registrants that may be required *separate from* the form.

Further underscoring this point is the parenthetical at the end of the same sentence: "(other than a second signature or other information necessary under subparagraph (C))" *Id*. A signature is provided "in" the form. The other information described in subparagraph (C) is information "in" the form, specifically a statement of eligibility requirements and an attestation (with signature) that the applicant meets those requirements. *See* 52 U.S.C. § 20504(c)(2)(C). One cannot place one's birth certificate

[4] The NVRA was enacted in 1993, before the internet and when virtually all DMV applications were on paper.

or passport "in" the form. The NVRA was intended to make it possible to fill out a driver's license application form while simultaneously filling out a voter registration application form. *See* 52 U.S.C. § 20504(c). The NVRA simply does not speak to the question of providing a document that is entirely *outside* of the information written in the spaces on the form. Indeed, the Supreme Court came to the same conclusion in *Young*. 520 U.S. at 286. The district court misread the NVRA in this regard.

3. The District Court Erred by Ignoring the Plain Statement Rule

It is a fundamental principle of preemption that the sovereign authority of a State must never be deemed preempted unless Congress clearly and unmistakably indicated its intent to preempt the state laws at issue. The Supreme Court has repeatedly recognized this principle. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) *quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). If a federal statute does not unmistakably declare that a specific type of State law is preempted, then a court must interpret the statute so as not to displace the State law.

The plain statement rule is especially important where the federal statute at issue goes to the structure of representative government. "In a recent line of authority, we have acknowledged the unique nature of state decisions that 'go to the heart of representative

government.'" *Id*. (*quoting Sugarman v. Dougall*, 413 U.S. 643, 647 (1973)). "Such power inheres in the State by virtue of its obligation … 'to preserve the basic conception of a political community.' And this power and responsibility of the State applies … *to the qualifications of voters*…." *Will*, 491 U.S. at 65 (*quoting Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)) (emphasis added). Thus, the plain statement rule, which applies in all preemption cases, applies with particular force when voter qualifications are at issue.

Nowhere in the NVRA did Congress declare that a State may not require proof of citizenship when a voter applies to register at a DMV. Rather than limit itself to the text, the district court looked to unstated congressional intent to bar proof of citizenship in the phrase "minimum … necessary." Doing so ignores the plain statement rule.

Instead of applying the plain statement rule, the district court undertook a subjective and fact-bound inquiry weighing registration by non-citizens in Kansas versus the supposed burden that the proof of citizenship law imposes. Such an inquiry necessarily varies from state to state, and it depends heavily on a court's inquiry into policies. This inquiry is exactly what the Supreme Court has insisted *should never occur in preemption cases*. Preemption requires the binary application of prohibitions unambiguously described by Congress. It must be clear what is, and what is not, preempted. Otherwise a judicial exploration into congressional objectives, rather than the application of an clear statement in the law, will result. Courts must not engage in "'a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S.

582, 607 (2011) (*quoting Gade v. National Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring). Unfortunately that is what the district court did. Because of this fundamental error, this appeal is likely to succeed and a stay is warranted.

4. The District Court Erred by Defining "Necessary" Subjectively

Once the district court departed from the plain statement rule, its decision strayed from statutory text. The district court engaged in an extensive discussion of what might be considered a "necessary" state law to enforce a citizenship qualification. *See* Ex. 42-44. In so doing, the district court selected a subjective definition, rather than an objective one. Within the context of the NVRA, it is possible to define this word either subjectively or objectively:

- The subjective definition: "*Better than all other policy options, and without an adequate substitute policy*."
- The objective definition: "*Required by state law*."

These definitions are quite different. The former is a subjective judgment about good policy and bad policy choices when attempting to limit registration to United States citizens; whereas the latter is an objective statement of what state law requires. The latter is a superior definition. It is a more natural reading of the plain text of the NVRA, and it is more easily administered by an Article III court.

First, consider the wording of the NVRA. The NVRA states that the DMV form may require: "only the minimum amount of information … necessary to … *enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process*…" 52 U.S.C. § 20504(c)(2)(B)

(emphasis added). The context of the sentence makes clear that whether something is necessary or not is defined by what the State election official is required to obtain in order to comply with state law. That is the natural reading of "administering voter registration and other parts of the election process." Administering a process entails complying with relevant laws.

Second, the objective definition of what is "necessary" is more consistent with the proper role of an Article III court. If the subjective definition is used, then a court must wade into the policy realm and decide whether or not the benefit of requiring proof of citizenship outweighs the costs of doing so. That is exactly what the district court did in its order. Ex. D at 37 (opining that the proof-of-citizenship requirement is "burdensome" and "confusing."), 41 (performing a cost-benefit analysis), 42 (weighing efficacy of alternatives), 43 (concluding that there has not been enough fraud to "justif[y]" the requirement). These are policy questions on which reasonable people may disagree. Consequently they are legislative in nature and not appropriate for judicial determination. For this reason as well, this appeal is likely to succeed.

5. The District Court Erred by Disregarding the Evidence That Noncitizens Have Registered to Vote and Have Voted

Finally, even if this Court were to adopt the subjective definition applied by the district court, under that definition it is clear that proof of citizenship *is* the minimum requirement necessary. The subjective definition of "necessary" begs the question: necessary to accomplish what? What is intended to be accomplished is the prevention of noncitizens from registering to vote. It was demonstrated that in Sedgwick County alone,

there were eleven noncitizens who successfully registered in a short span of years despite the attestation and signature requirement being in place. Of those, three voted. Ex. N (chart). If multiple noncitizens are successfully defying that alternative mechanism for enforcing the citizenship qualification, then another mechanism is "necessary" to ensure that only citizens are able to register to vote. On this question as well, this appeal is likely to succeed.

These are not the only issues that the Secretary will present to this Court on appeal. But they are undeniably ones that meet the standard for the issuance of a stay. There are multiple issues of statutory interpretation in this case, and it would be prudent to prevent the massive disruption caused by the district court's preliminary injunction until this Court has had an opportunity to weigh in on these questions.

CONCLUSION

For the reasons stated above, the Secretary's motion for stay pending appeal should be granted. In addition, the Secretary requests an emergency administrative stay, in the event that this Court is not able to review and decide whether or not to issue the stay by June 14—the date set by the district court for Appellants to obtain a stay pending appeal. Finally, the Secretary requests expedited briefing and consideration of this case. Although the normal briefing schedule would place the due date of the Secretary's principal brief in mid-July, the Secretary is prepared to file the brief by July 1, or earlier if the Court so orders.

Respectfully submitted this 28th day of May, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 28th day of May, 2016, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Garrett Roe
Garrett Roe, #26867
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ECF CERTIFICATE OF COMPLIANCE

I, Garrett Roe, counsel for Secretary Kobach hereby certifies that the above document and any exhibits attached there to comply with the required privacy redactions. I further certify that any hard copies submitted of this filing will be exactly the same. And finally, I certify that this document was scanned for viruses with Symantec Endpoint Protection, Version 12.1.5, last updated on May 27, 2016, and, according to the program, the submission is free of viruses.

/s/ Garrett Roe
Counsel for Defendant Kansas Secretary of State Kris Kobach