No. 14-1164

In the Supreme Court of the United States

KRIS W. KOBACH, KANSAS SECRETARY OF STATE; MICHELE REAGAN, ARIZONA SECRETARY OF STATE; STATE OF KANSAS; STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *ET AL.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 202-355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

The court of appeals held that the U.S. Election Assistance Commission ("EAC") did not abuse its discretion in denying Arizona's and Kansas's requests that the EAC modify the federal mail voter registration form ("Federal Form") to include their state law requirements that registration applicants provide evidence of citizenship in the state-specific instructions that accompany the Federal Form. The questions presented are the following:

1. Whether Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution require the EAC to defer to the States' determination that provision of documentary evidence of citizenship is necessary to enforce the States' voter qualifications.
2. Whether Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution permit a dual voter rolls system in which some voters who are qualified to vote for federal office holders are not also qualified to vote for those "in the most numerous branch of the state legislature."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

No. 14-1164

In the Supreme Court of the United States

KRIS W. KOBACH, KANSAS SECRETARY OF STATE; MICHELE REAGAN, ARIZONA SECRETARY OF STATE; STATE OF KANSAS; STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *ET AL.*,

Respondents.

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

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("Eagle Forum") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both State and

[1] *Amicus* files this brief with all parties' consent, with 10 days' prior written notice; *amicus* have lodged with the Clerk the parties' written consent to the filing of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and their counsel – contributed monetarily to preparing or submitting the brief.

federal power. To help preserve integrity of the elections on which the Nation has based its political community, Eagle Forum has supported reducing voter fraud and maximizing voter confidence in the electoral process. Eagle Forum participated as *amicus curiae* in the Tenth Circuit. For all the foregoing reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

This litigation asks whether Arizona and Kansas (collectively, the "States") may enforce their state-law requirements that, before being registered to vote, applicants demonstrate their U.S. citizenship via some concrete means beyond self-certifying their citizenship on a form. Respondents are defendants Election Assistance Commission and its acting Executive Director (collectively, "EAC") and various intervenors (collectively, "ITCA") who were plaintiffs in *Arizona v. Inter Tribal Council of Ariz., Inc.,* 133 S.Ct. 2247 (2013) ("*ITCA*").

For the most part, this litigation simply picks up where *ITCA* left off, following the procedural path that this Court identified in *ITCA,* 133 S.Ct. at 2260. In addition, this litigation also presents merits issues that *ITCA* did not address, including the level of deference to afford EAC's construction of NVRA and the implementing regulations that EAC enforces.

The parties dispute whether the States' evidence-of-citizenship requirements are "necessary" under the National Voter Registration Act, 52 U.S.C. §§20501-20511 ("NVRA"), and the States ask whether federal authority under the Elections Clause, U.S. CONST. art. I, §4, cl. 2, even applies to

state requirements to document citizenship as a condition to register to vote. Because the registration requirements were not then in the "Federal Form" under NVRA, *ITCA* raised primarily the procedural question whether NVRA preempted Arizona's ability to require evidence of citizenship *outside* NVRA's Federal Form, notwithstanding NVRA's requirement to "accept and use" the Federal Form. Now that the States have requested that EAC add their evidence-of-citizenship requirements to the Federal Form, procedure will give way to the substantive merits.

Constitutional Background

Our Constitution establishes a federalist structure of dual state-federal sovereignty. *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990); *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 751-52 (2002) (states entered the union "with their sovereignty intact"). Under the Supremacy Clause, of course, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof[,] … shall be the supreme law of the land …, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. But federalism's central tenet permits and encourages state and local government authority under the "counter-intuitive" idea "that freedom was enhanced by the creation of two governments, not one." *U.S. v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous

advantages." *Wyeth v. Levine,* 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Thus, state governments retain their roles under the Constitution as separate sovereigns.

Since the Founding, the Constitution's Elector-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each state. U.S. CONST. art. I, §2, cl. 2.[2] In addition, the Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2.

An early draft of the Constitution gave the states authority over voter qualifications, "subject to the proviso that these qualifications might 'at any Time be altered and superseded by the Legislature of the United States.'" 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153 (1911). The Committee on Detail struck that proviso and replaced it with the proviso tying voter qualifications to the most numerous branch of the state legislature. *Id.* at 164. A subsequent attempt to restore congressional oversight of voter qualifications was rejected as well. *Id.* at 201. As Madison explained, however, "[t]he qualifications of electors and elected

---

[2] The Seventeenth Amendment extended this requirement to voter qualifications for elections for Senators. U.S. CONST. amend. XVII, cl. 2.

[are] fundamental articles in a Republican [Government] and ought to be fixed by the Constitution," and "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution." *Id.* at 249-50. Granting to the States the exclusive power to establish voter qualifications reflects the Framers' considered judgment about the proper balance of power between the States and the federal government; indeed, this provision was likely necessary to ensure ratification. *See* J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 216, 218-19 (abridged ed. 1833).

In light of the history, *ITCA* and the parties here all agree that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." 133 S.Ct. at 2258. This litigation asks whether the States' evidence-of-citizenship requirements are procedural registration provisions within federal time-place-and-manner authority or voter-qualification provisions under the States' exclusive power.

Factual Background

Amicus Eagle Forum adopts the facts in the States' petition (at 8-17, 26). The Federal Form requires applicants to attest to their eligibility to register, but does not require proof of an applicant's attestation. In 2005, jury commissions in two Arizona counties identified approximately 200 non-citizens registered to vote, and many of them in fact voted. Kansas identified 20 noncitizens registered to vote. Whether because these noncitizens (and others like them) do not understand the Federal Form or because they want to register illegally, noncitizens

are using the Federal Form to register to vote. Given the prevalence of non-citizen registration in the States, further proof of citizenship objectively and self-evidently "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration" under the terms of 52 U.S.C. §20508(b)(1).

Although voter fraud – "vote early, and vote often" – has a storied past in urban machine politics, *Barr v. Chatman,* 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968) (poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election), the problem is not confined to the past. For example, responding to claims that thousands of fraudulent ballots were cast in the 2004 election in Milwaukee, a police investigation found that "more ballots [were] cast than voters recorded." SPECIAL INVESTIGATIONS UNIT, MILWAUKEE POLICE DEP'T, REPORT ON THE INVESTIGATION INTO THE NOV. 2, 2004 GENERAL ELECTION IN THE CITY OF MILWAUKEE, at 5 (2008). An important aspect of this litigation is that – after looking only at a small subset of voters called to jury service who declined to serve – there is evidence of a significant number of registered noncitizens. In the 2014 election, fewer than 200 votes decided the race for Arizona's Second Congressional District, which shows that these noncitizens could affect an election.

SUMMARY OF ARGUMENT

In Section I, *amicus* Eagle Forum argues that – far from deciding the substantive preemption merits against Arizona, as the Tenth Circuit understood, Pet. App. 21a, this Court's *ITCA* decision held that

NVRA requires Arizona and the other states to work within NVRA's *procedures*. Under that reading, *ITCA* left open the substantive merits, although strongly hinting that EAC's position *might* violate the Constitution and *did* raise sufficiently serious constitutional doubt to warrant a more conservative analysis by EAC.

In Section II, Eagle Forum addresses the various, complex legal issues relevant to answering the States' first question presented: whether EAC must defer to the States' determinations on the need for evidence of citizenship as a condition to register to vote. Specifically, Eagle Forum argues that: (a) this Court should defer to the States' traditional authority and should not defer to EAC's construction of either NVRA or the Constitution; (b) Congress would lack authority to enact the NVRA regime that EAC seeks to enforce; (c) EAC's interpretations violate EAC's own regulations; and (d) EAC's finding of non-necessity for the States' evidence-of-citizenship requirements is arbitrary and capricious.

In Section III, Eagle Forum addresses the more simple argument needed to answer the States' second question presented: whether the Voter Qualification Clause allows separate voter rolls for the most numerous branch of the state legislature and for federal elections. While the second question presented may seem a mere afterthought to the consequential flow of arguments that surround the first question presented, the second question reduces EAC's position to absurdity (*i.e.,* demonstrates its impossibility by *reductio ad absurdum*). Insofar as nothing in the Elections Clause even remotely gives

Congress the authority to regulate *state* elections, and the States now have different rolls of voters for state and federal office, EAC's actions and inaction have had the effect of undermining one of the great compromises that the Founders made in allocating authority between the States and the Congress in our federalist structure. Because state and federal elections must use the same electorate, and because Congress lacks authority to regulate *state* elections, EAC clearly lacks authority to cause the disparity in state and federal electorates by denying the States' request to incorporate State requirements into the NVRA-mandated Federal Form.

ARGUMENT

I. THE TENTH CIRCUIT MISUNDERSTOOD A PURELY PROCEDURAL ASPECT OF *ITCA* AND THUS MISREAD WHAT WAS ESSENTIALLY A REMAND TO BE A MERITS HOLDING AGAINST ARIZONA

Although the Tenth Circuit viewed *ITCA* as having decided the substantive preemption merits *against* the States' position, Pet. App. 21a,[3] nearly the opposite is true. *Amicus* Eagle Forum respectfully submit that the Tenth Circuit simply misunderstood the Administrative Procedure Act ("APA") setting behind the *ITCA* majority's Solomonic decision to note the serious constitutional questions raised by the ITCA-EAC merits position,

[3] Specifically, the Tenth Circuit believed that it was "compelled by *ITCA* to conclude that the NVRA preempts Arizona's and Kansas' state laws insofar as they require Federal Form applicants to provide documentary evidence of citizenship to vote in federal elections." *Id.*

but then to allow Arizona to re-commence the APA procedural path to putting its evidence-of-citizenship requirements on the Federal Form *via* NVRA, not outside of NVRA.

Procedurally, under the Election Clause, *ITCA* required Arizona to "accept and use" the Federal Form for registration purposes, without any state-law overlay:

> We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is "inconsistent with" the NVRA's mandate that States "accept and use" the Federal Form.

ITCA, 133 S.Ct. at 2257. Quite contrary to the Tenth Circuit's reading, however, *ITCA* left open the very likely possibility that NVRA and the constitutional provisions would allow or even compel the use of Arizona's evidence-of-citizenship requirements on the Federal Form via the state-specific requirements.

Read this way, *ITCA* merely decided that this Court would avoid resolving the constitutionally questionable ITCA-EAC position under the doctrine of constitutional avoidance, 133 S.Ct. at 2258-59, when the Court more easily could interpret NVRA to require Arizona (and now also Kansas) first to go through the procedural step of asking EAC to provide the requested relief, potentially making it unnecessary to resolve the constitutional question. *Id.* If that appears to elevate procedure over substance, there are two reasons to read *ITCA* that way.

First, procedure matters in its own right: the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. U.S.,* 318 U.S. 332, 347 (1943), and "'procedural rights' are special." *Lujan v. Defenders of the Wildlife,* 504 U.S. 555, 572 n.7 (1992). EAC was not itself a party to *ITCA* and the six-year window for challenging EAC's denial of Arizona's 2005 request has passed. 28 U.S.C. §2401(a). Given the *ITCA* decision's unmistakable focus on administrative procedure, 133 S.Ct. at 2260 & n.10, the majority appears to have viewed return to EAC as necessary to re-initiate the opportunity for judicial review if EAC refused the requested relief. *See, e.g., Auer v. Robbins,* 519 U.S. 452, 458 (1997); *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.,* 834 F.2d 191, 195-96 (D.C. Cir. 1987) ("*NLRBU*"). For denials of administrative relief that are either *ultra vires* or arbitrary, the *Auer-NLRBU* process of asking the agency to revisit a past decision creates a new opportunity to seek judicial review. Essentially, EAC's denying relief constitutes a new "final agency action" under the APA, which starts a new six-year window for judicial review.

Second, the *ITCA* decision's equally unmistakable focus on the doctrine of constitutional avoidance makes clear that the Court did not, in fact, decide the NVRA or constitutional merits *against* Arizona. Instead, the majority explained that, if the NVRA did not provide a means to add Arizona's evidence-of-citizenship requirements to the Federal Form, the Court instead would have had to determine whether Arizona's rival NVRA interpretation was "*fairly*

possible" and thus could avoid the "serious constitutional doubt" that would result from NVRA's "preclud[ing] a State from obtaining the information necessary to enforce its voter qualifications." *ITCA,* 133 S.Ct. at 2258-59 (emphasis in original). That caution should have put EAC on notice that it was treading on thin constitutional ice, but EAC and the Tenth Circuit ignored it. Given the current state of affairs, *see* Section III, *infra,* it is now clear that this Court either must reverse EAC's denial of relief under the APA or, instead, revisit whether NVRA indeed requires the States to "accept and use" the Federal Form without state-law overlays.

II. THIS LITIGATION PRESENTS THE ONLY VEHICLE FOR CHALLENGING EAC'S FLAWED INTERPRETATION OF FEDERAL AUTHORITY OVER STATES' ELECTOR-QUALIFACTION RULES

The States' first question presented – whether EAC must defer to the States' determinations on the need for evidence of citizenship – includes numerous issues of constitutional, statutory, regulatory, and administrative law, which *amicus* Eagle Forum addresses here. While some of these issues were not present in *ITCA,* some were. Apart from the importance of both elections and federalism in our national life, one of the most pressing reasons for this Court to grant review is to ensure that *ITCA* is understood. For their part, EAC, ITCA, and the Tenth Circuit panel understand *ITCA* as deciding the merits of the case against Arizona – as opposed to merely requiring the States to follow the NVRA process – whereas the States and Eagle Forum read

ITCA as all but foreclosing the EAC's reading of NVRA, given the constitutional – as well as statutory and regulatory – problems with EAC's reading. With so wide a gulf in understanding of what this Court held, the Court's work here clearly is not yet done.

A. This Court Should Defer to the States on Voter Qualifications and Elections' Time, Place, and Manner

Before reaching the merits, this Court should clarify the deference due to state laws in evaluating congressional regulation of elections' time, place, and manner under the Elections Clause. In *ITCA*, this Court rejected the "presumption against preemption" in elections cases,[4] holding that "[we] have never mentioned such a principle in our Elections Clause cases." *ITCA,* 133 S.Ct. at 2256 (*citing Ex parte Siebold,* 100 U.S. 371, 384 (1880)). Standing alone, this language from *ITCA* fails to adequately address the deference due to state laws under the Elections Clause. As explained below, this Court's Election-Clause precedents require clear statements from Congress before displacing state authority, even if that canon is a weaker strain of deference than a full-fledged presumption against preemption.

---

[4] When the "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *ITCA,* 133 S.Ct. at 2256.

1. Even With No Presumption Against Preemption, the Canons of Statutory Construction Favor the States

In the *Siebold* decision that *ITCA* cites, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with State laws." *Siebold,* 100 U.S. at 393. Similarly, in another Elections-Clause case, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections and "consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." *U.S. v. Bathgate,* 246 U.S. 220, 225-26 (1918); *U.S. v. Gradwell,* 243 U.S. 476, 485 (1917). In the Election-Clause context, *Siebold, Gradwell,* and *Bathgate* make clear that federal courts construing federal statutes will continue to defer to state authority, even without the presumption against preemption.

The point is not to quibble with *ITCA* with respect to the presumption against preemption, but rather to recognize the deference to state law is a tool of statutory construction, even without relying on the presumption against preemption: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same); *see also ITCA,* 133 S.Ct. at 2273 (Alito, J., dissenting) (*citing* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527,

540 (1947)). Here, of course, there is no evidence that Congress intended to deny states the ability to combat voter fraud (or voter mistake), and neither this Court nor EAC should interpret NVRA otherwise.

The alternative – as happened in the Tenth Circuit – is the type of "freewheeling judicial inquiry" that "undercut[s] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted). As *ITCA,* 133 S.Ct. at 2258-59, makes clear, moreover, not only reviewing courts at "step one" (*i.e.,* traditional tools of statutory construction) under *Chevron U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837 (1984), but also implementing agencies must include the doctrine of constitutional avoidance in their assessment and implementation of federal statutes.

2. EAC's Executive Director Lacks Authority to Establish Binding Precedent and, As Such, Warrants No Deference

Even if EAC – whether as an agency or as a five-person commission – were entitled to deference, its executive director is not. Instead, for EAC to act lawfully, three commissioners must support the action: "Any action which the Commission is authorized to carry out under this Act may be carried out *only* with the approval of at least three of its members." 52 U.S.C. §20928 (emphasis added); *accord* 42 U.S.C. §15328 (2006). Because Congress did not delegate any authority to the EAC actors

here, their actions and inaction are not entitled to deference.

If the statute itself is not facially clear that EAC thus lacks authority to act, this Court made clear under similar circumstances that agencies without a required quorum cannot exercise their statutory powers. *New Process Steel, L.P. v. NLRB,* 560 U.S. 674, 687-88 (2010). The Tenth Circuit attempted to evade the quorum issue by citing a *New Process Steel* footnote on delegations to the National Labor Relations Board's regional directors and sub-groups, *see* Pet. App. 18a-19a, but the statute there is entirely different from NVRA in that it allows such sub-delegations. *Compare* 29 U.S.C. §153(b) *with* 52 U.S.C. §20928; *cf. U.S. v. Eaton,* 169 U.S. 331, 343 (1898) ("[b]ecause the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official").[5]

---

[5] Because the APA authorizes reviewing courts to remedy action unlawfully withheld, 5 U.S.C. §706(1), EAC's inability to take lawful action provides no barrier to a court's ordering the EAC staff to take the States' requested action. The possibility of future action applicable to future elections does not withdraw the final nature of EAC's inaction with respect to impending elections, even if EAC would be able to act later for future elections. *Colorado v. Dep't of Interior,* 880 F.2d 481, 485-86 (D.C. Cir. 1989) ("even if [the agency] promulgates additional ... rules sometime in the future, petitioners' claim that the existing final regulations are unlawful remains reviewable by this court"); *Hercules, Inc., v. EPA,* 938 F.2d 276, 282 (D.C. Cir. 1991).

The Tenth Circuit found EAC's rejection of the States' requests consistent with EAC regulations and with EAC's 2006 rejection of Arizona's 2005 request to add its evidence-of-citizenship requirements, Pet. App. 27a, but EAC rejected Arizona's 2005 request by a deadlocked 2-2 vote. Pet. at 73a. The Tenth Circuit also viewed this precedent as having locked EAC into the same conclusion this time, lest a reviewing court find EAC to have changed course without explaining its departure. Pet. App. 27a-28a. Both arguments are nonsense.

First, the 2-2 EAC decision in 2006 was not a binding precedent because the EAC deadlocked. Generally, a "plurality opinion [does] not represent the views of a majority of the [reviewing authority, which is] not bound by [a plurality's] reasoning." *Altria Group, Inc. v. Good,* 555 U.S. 70, 96 (2008). Moreover, as indicated, in both 2006 and now, NVRA precludes EAC's taking any action without "the approval of at least three of its members" 42 U.S.C. §15328 (2006); 52 U.S.C. §20928. As such, the 2006 action cannot bind the EAC or register as administratively significant to a reviewing court.

Second, a supervening event in the form of the *ITCA* decision authoritatively calls EAC's action into "serious constitutional doubt," 133 S.Ct. at 2258-59, and informs federal agencies that "validly conferred discretionary executive authority is properly exercised … to avoid serious constitutional doubt." *Id.* at 2259. It would be a remarkable profile in recalcitrance for an agency – when presented that caution – to stand by prior agency action, even if the

prior action had met all of the procedural requirements for valid action.

Along the same lines, the Tenth Circuit's suggestion that EAC could not change course without an explanation is in considerable tension with this Court's recent rejection of similar arguments from the D.C. Circuit on whether courts can engraft additional procedural hurdles to agency action, beyond the APA's requirements. *Perez v. Mortgage Bankers Ass'n,* 135 S.Ct. 1199, 1206 (2015) (*citing Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 524 (1978)). For all of these reasons, *this* EAC action would not warrant deference, even if general EAC action would.

3. EAC Deserves No Deference Because Congress Lacks Constitutional Authority to Preclude the States' Use of Evidence-of-Citizenship Tests

Congress obviously could not delegate authority to EAC that Congress itself lacks. For that reason – namely, that Congress itself lacks authority to reject an evidence-of-citizenship requirement, *see* Section II.B, *infra* – EAC lacks authority to command this Court's deference. With regard to deference, this Court does not defer to administrative constructions of the Constitution. *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997) ("[t]he power to interpret the Constitution … remains in the Judiciary"). Thus, this Court must evaluate the constitutional merits without deferring to EAC's interpretations.

B. Congress Would Lack Authority to Enact the NVRA that EAC Seeks to Enforce

The State laws at issue involve the single-most fundamental voter qualification of all: citizenship, *Reynolds v. Sims,* 377 U.S. 533, 554-55 (1964) (collecting cases), and the States' undisputed "power to establish voting requirements is of little value without the power to enforce those requirements." *ITCA,* 133 S.Ct. at 2258. This Court now must resolve the "serious constitutional doubts," *id.,* that federal interference with that State enforcement would pose. Although Congress did not intend NVRA to pose the obstacle that EAC staff has posed to these State laws, *amicus* Eagle Forum respectfully submit that Congress would lack that authority if Congress had had that intent.

The States have exclusive authority on voter qualifications, U.S. CONST. art. I, §2, cl. 2; *Id.* amend. XVII, cl. 2, and "nothing in [the Constitution] lends itself to the view that voting qualifications in federal elections are to be set by Congress." *ITCA,* 133 S.Ct. at 2258 (interior quotations omitted). The only power that Congress has is the power to amend state regulation of federal elections' time, place, and manner. U.S. CONST. art. I, §4. "[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *ITCA,* 133 S.Ct. at 2257 (emphasis in original).

> One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. "It is difficult to see how words

> could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress."

Id. at 2258 (*quoting Oregon v. Mitchell,* 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)). EAC and ITCA cannot contend otherwise.

The Founders made clear that voter qualifications were "no part of the power to be conferred upon the national government," THE FEDERALIST NO. 60, at 369 (C. Rossiter ed. 1961) (Hamilton), which – together with the Constitution's text – this Court has recognized to limit Congress to "procedural regulations." *U.S. Term Limits v. Thornton,* 514 U.S. 779, 833-34 (1995). *Amicus* Eagle Forum respectfully submits that EAC's limiting the States' ability to enforce voter-qualification rules at the "front door" of voter registration impairs State enforcement of those voter qualifications.[6]

While the Election Clause's time-place-and-manner "scope is broad," *ITCA,* 133 S.Ct. at 2253, it does not extend outside the time-place-and-manner realm into voter qualifications. *Id.* at 2258. The "Constitution is filled with provisions that grant

---

[6] The Tenth Circuit referenced the procedure-substance distinctions drawn in litigation under the Rules Enabling Act, 28 U.S.C. §2072, Pet. App. 23a & n.8, but conflicts between state and federal law there differ profoundly from conflicts between two provisions of the same *federal* Constitution, one of which gives all voter-qualification power to the States.

Congress[] specific power to legislate in certain areas … [but] these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). Put simply, "the specific governs the general." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992). As such, federal time-place-and-manner legislation cannot have either the purpose or effect of establishing voter qualifications. *ITCA,* 133 S.Ct. at 2258. But that is precisely what EAC's interpretation of NVRA does.

With a large cohort of noncitizen residents who – for whatever reason – register to vote in significant numbers, the Federal Form's checkbox-signature approach is simply not the same qualitative test as the States' evidence-of-citizenship tests. Federal time-place-and-manner authority cannot supersede or dilute the States' voter-qualification authority by compelling the use of a less-efficacious measure of citizenship – NVRA's discredited checkbox-and-signature approach – to assess compliance with the States' voter-qualification requirements.[7]

Polemical opponents of ballot-integrity efforts complain that such efforts seek to solve a problem that does not exist, but this litigation makes the problem clear. While EAC views the problem as

---

[7] Because Arizona did not press this issue in *ITCA*, this Court did not consider it there. *ITCA*, 133 S.Ct. at 2259 n.9. Here, by contrast, the substantive merits are before this Court, and the States press them. As explained in Section III, *infra,* the differential state-versus-federal voting rolls that result here effectively ends the inquiry.

manageable (*e.g.,* 200 voters in two counties), the problem is massive. If one discounts for jurors who declined to seek excusal for their non-citizen status and the many more registered voters who simply were not called to jury duty in the relevant timeframe, the number of non-citizen voters in Arizona is many, many times the 200 who came forward. As the 2000 presidential election and the 2014 Arizona House election demonstrated, that is more than enough to alter the results of an election. With the 2016 election on the horizon, *amicus* Eagle Forum respectfully submit that few if any other cases on this Court's docket are as important to our Nation as the States' challenge to EAC's overreach.

C. This Court and the States Should Be Able to Expect EAC to Follow Its Own Regulations

This Court and the States should have been able to rely on EAC to comply with NVRA's implementing regulations when evaluating the States' evidence-of-citizenship requirements, but EAC deviated from those regulations. That provides a basis to reverse EAC's actions.

Under both the APA and the Due Process Clause, "it is incumbent upon agencies to follow their own procedures," *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *cf. Service v. Dulles,* 354 U.S. 363, 388-89 (1957), until the agency amends its rules by the same notice-and-comment procedures, 5 U.S.C. §553(b)-(c), by which the agency adopted those rules in the first place. *FCC v. Fox TV Stations, Inc.,* 556 U.S. 502, 549 (2009). An agency's action must stand or fall

with the current version of its regulations, which EAC's actions did not follow.

NVRA's implementing regulations provide, without qualification, that the "state-specific instructions shall contain … information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. §9428.3(b). For that reason alone, the States should prevail over EAC's refusal to add their evidence-of-citizenship requirements to the Federal Form. Unlike today's EAC, the 1994 NVRA implementing regulations are premised on constitutional reasoning on the division of state and federal authority over elections. *City of Boerne,* 521 U.S. at 524 (judiciary interprets the Constitution); *ITCA,* 133 S.Ct. at 2258-59 (agencies must interpret laws with the doctrine of constitutional avoidance); *accord* Pet. App. 51a & n.57 (district court).

Indeed, NVRA itself allows "other information … as is necessary to enable the appropriate *State election official* to assess the eligibility of the applicant *and to administer voter registration.*" 52 U.S.C. §20508(b)(1) (emphasis added). This too displaces EAC from the decisionmaking role it seeks: it suffices that *States* need the information to administer registration under state law. Indeed, the agency that promulgated NVRA's implementing regulations understood the limits on its role, as made clear by the example of the Federal Form's including required state-specific data on race and ethnicity. *See* 59 Fed. Reg. 32,311, 32,316 (1994). Those state data requirements are no more "necessary" under EAC's self-aggrandizing interpretation of NVRA

than the States' evidence-of-citizenship requirements are today.

Congress enacted NVRA to promote the right of eligible citizens to vote in federal elections, 52 U.S.C. §20501(b)(1), while at the same time "protect[ing] the integrity of the electoral process." *Id.* at §20501(b)(3). Nothing in NVRA prohibits states from using reasonable, proactive additional measures when faced with non-citizen registration. Apart from whether Congress would have the authority to preempt the States' actions here, Congress could not plausibly have intended to prevent sovereign states from ensuring that only citizens register to vote. EAC's predecessor understood that in 1994, and the regulations continue to reflect that today, notwithstanding EAC's contrary position.

D. EAC's Finding on the Lack of Necessity for the States' Requirements Cannot Be Sustained on the Merits under the APA

Aside from the complex legal theories on dividing courts' deference and constitutional power between state and federal actors, this case and EAC's task could have been very simple: the old Federal Form allowed noncitizens to register to vote. As a factual matter for EAC's purposes, it does not much matter whether those registrations resulted from dishonesty or ignorance. It is enough that they happened. With responsible and responsive agencies, an "agency interpretation is not instantly carved in stone;" instead, "to engage in informed rulemaking, [agencies] must consider varying interpretations … on a continuing basis." *Chevron,* 467 U.S. at 863-64. The hope that a mere attestation would suffice has

now been rather clearly disproved. EAC must now follow through on its commitment to this Court in *ITCA,* 133 S.Ct. at 2259: "necessary information which *may* be required *will* be required" (emphasis in original). EAC should stop dragging its feet and do its job, nationwide.

III. THE EXISTENCE OF SEPARATE STATE AND FEDERAL LISTS OF ELECTORS DEMONSTRATES THAT EAC'S POSITION MUST GIVE WAY TO THE STATES

In this Section III, *amicus* Eagle Forum answers the States' second question presented: essentially, whether the Voter Qualification Clause allows the separate voter rolls that have developed for the most numerous branch of each State's legislature vis-à-vis those for federal elections. The obvious answer is "no," and the only two possible implications are that EAC has the authority to require the States to use EAC's federal electorate in the States' state-law elections or that EAC lacks authority to deny the States' state-specific requests.

The division of federal and state authority over the electorate was a key area of dispute during the Constitutional Convention. As Madison explained, "[t]o have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." THE FEDERALIST NO. 52, at 323 (Madison). In a hallmark of federalism, the Founders resolved the impasse by allowing states to set their own voter qualifications, but requiring use of those qualifications in federal elections as well:

> The electors … are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

THE FEDERALIST NO. 57, at 349 (Madison). Where such "language was clearly the result of a compromise," courts must "give effect to the [terms] as enacted." *Mohasco Corp. v. Silver,* 447 U.S. 807, 818-19 (1980). Indeed, *ITCA* recognized that the Founders resolved the issue "by *tying* the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures," thereby avoiding a federal government "too dependent on the State governments." 133 S.Ct. at 2258 (emphasis added). Although no one argues that Congress – much less EAC – has the authority to regulate *state* elections, 52 U.S.C. §20503(a), the clear result of EAC's intransigence over the Federal Form has been the creation of different federal and state electorates in the States, precisely contrary to the compromise that the Founders built into the Election and Voter Qualification Clauses.

When theories lead to absurd results, one must either accept the absurdity or reject the theories. *Corley v. U.S.,* 556 U.S. 303, 317 n.6 (2009). From the Founders through *ITCA,* federal electors have been required to be the same electors who vote for the most numerous branch of the State legislature, U.S. CONST. art. I, §2, cl. 2, but that is not true under EAC's regime. The States plainly have authority to keep doing what they are doing with respect to *state* elections, which means that EAC's interpretation of NVRA as to *federal* elections plainly is absurd.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

April 23, 2015

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*