No. 20-109

In the Supreme Court of the United States

SCOTT SCHWAB, SECRETARY OF STATE OF KANSAS,
PETITIONER

v.

STEVEN WAYNE FISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OKLAHOMA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia.[1] Amici States have the constitutional authority to set voter qualifications for federal elections in their States. U.S. Const. art. I, § 2, cl. 1; *id.* amend. XVII. All States require voters to be citizens, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 38-39 (2013) (Alito, J., dissenting), and all States except for North Dakota require voters to be registered.[2]

Amici States have important and compelling interests in deterring and detecting voter fraud, as well as safeguarding voter confidence and promoting the integrity of elections. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191, 197 (2008) (plurality op.); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). They accomplish those goals through a variety of laws aimed at ensuring that only qualified voters register to vote and cast a ballot.

If followed by other circuits, the Tenth Circuit's reasoning would allow courts to undermine Amici States' judgment regarding how best to verify and enforce voter qualifications. The balancing approach used by the Tenth Circuit (and others) to address constitutional challenges

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On August 21, 2020, counsel of record for all parties received notice of amici's intention to file this brief.

[2] Election Administration & Voting Survey, 2018 Comprehensive Report, at 2 n.1, available at https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

to election laws leads to judicial second-guessing of state policy decisions. And the Tenth Circuit's interpretation of the National Voter Registration Act infringes the States' constitutional authority to set and enforce voter qualifications. Amici States, therefore, have an interest in ensuring that this Court (1) utilizes the proper constitutional test to determine the validity of state election laws, and (2) permits congressional interference in state election processes only as authorized by the Constitution.

SUMMARY OF ARGUMENT

I. Despite an evidentiary record similar to that in *Crawford*, the Tenth Circuit reached the opposite conclusion regarding the constitutionality of Kansas's voter-registration law requiring documentary proof of citizenship. It did so by applying a "flexible" "sliding scale" test that purports to balance a law's burdens against the State's interests—a test that it derived from the plurality opinion in *Crawford*. And the Tenth Circuit is not alone in doing so. Many circuit courts read this Court's precedent to require a balancing of burdens and interests when election laws are challenged.

But using a freestanding balancing test has not brought stability or predictability to election-law jurisprudence. Two courts can look at the same law and reach opposite conclusions. Plaintiffs can argue that commonplace laws are too burdensome. Election laws can stand or fall based on where an individual judge decides to place a burden on the sliding scale. As a result, States are left without any certainy about which election laws will be permissible.

The Court has rejected a freestanding balancing test in other constitutional contexts. It should take the opportunity to do the same here and adopt the two-tier

test urged by Justice Scalia in his *Crawford* concurrence. While Kansas's law passes either constitutional standard, litigants would benefit from clearer and more objective guidance from the Court concerning which election laws pass constitutional muster.

II. In addition to erroneously weighing the burdens and interests of Kansas's voter-registration law, the Tenth Circuit also erred in granting Congress the ability to alter Kansas's legislative judgment about who is qualified to vote. The Constitution grants States—not Congress—the exclusive authority to set voter qualifications for federal elections. That authority necessarily includes the ability to enact voter-registration requirements to verify and enforce those qualifications. To hold otherwise would allow Congress to effectively override state legislative choices by mandating whom States must register to vote.

Yet the Tenth Circuit's interpretation of the NVRA limits Kansas's ability to verify and enforce its voter qualifications. Rather than a straightforward reading that harmonizes the NVRA's text and Kansas's law, the Tenth Circuit's interpretation is unnecessarily complicated, forces Kansas to meet a court-created test untethered to the NVRA's text, and creates significant constitutional questions. The Court should grant the petition and reverse the Tenth Circuit's judgment.

ARGUMENT

I. The Court Should Clarify That Election Laws Are Not Subject to a Freestanding Balancing Test.

While there is no question that States may enact laws to safeguard the integrity of their elections, "the most effective method of preventing election fraud may well be debatable." *Crawford*, 553 U.S. at 196 (plurality op.).

Too often, however, those debates end up as constitutional challenges in which judges are required to become "entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Dem. Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016). "But the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a *legislative* judgment . . . ." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (emphasis added). The balancing approach employed by lower courts, though, moves that judgment to the judicial branch.

Invoking Justice Stevens's plurality opinion in *Crawford*, the Tenth Circuit purported to "balance" the burden of providing documentary proof of citizenship with Kansas's interests in electoral integrity, accuracy, voter confidence, and prevention of voter fraud. *Fish v. Schwab*, 957 F.3d 1105, 1121-36 (10th Cir. 2020) (*Fish III*). As Kansas demonstrated in its petition, the Tenth Circuit erred in concluding that the burdens of Kansas's law outweighed the interests it furthered. Pet. 16-24.

But the Tenth Circuit should never have been weighing the burdens of the law against Kansas's interests in the first place—the Kansas Legislature already did that. Instead, because Kansas's documentary-proof-of-citizenship requirement imposes only "reasonable, nondiscriminatory restrictions" on the right to vote, Kansas's important regulatory interests should have been sufficient to survive the constitutional challenge. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Yet, like multiple other circuits around the country, the Tenth Circuit read the Court's opinion in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and the plurality opinion in *Crawford* together to establish a flexible, sliding-scale balancing test for laws that impact voting or

elections. *Fish III*, 957 F.3d at 1121-27; *see also Gill v. Scholz*, 962 F.3d 360, 363-65 (7th Cir. 2020); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012). Courts should not use a freestanding balancing test to determine the constitutionality of state election laws, as such tests lead to inconsistent and unpredictable results. This case presents an opportunity for the Court to clarify the proper constitutional test.

A. The Court's election-law precedent lacks clarity.

In cases involving First or Fourteenth Amendment challenges to election laws, circuit courts typically begin with *Anderson*:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

Upholding Indiana's voter-identification law in *Crawford*, the six Justices in the majority had different views of *Anderson*'s language. The three-Justice plurality opinion authored by Justice Stevens followed what it called the "balancing approach" of *Anderson*. *Crawford*,

553 U.S. at 190 (plurality op.). As described by Justice Stevens, any burden on voting, no matter how slight, must be justified by "relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Three Justices concurred in the judgment in an opinion authored by Justice Scalia, which condemned the "amorphous flexible standard" in *Anderson* and concluded that the Court in *Burdick* had "forged" *Anderson* into "something resembling an administrable rule." *Id.* at 204-05 (Scalia, J., concurring in the judgment). Under Justice Scalia's approach, election laws are subject to a two-tier analysis: "a deferential 'important regulatory interests standard' for nonsevere, nondiscriminatory restrictions," and "strict scrutiny for laws that severely restrict the right to vote." *Id.* at 204 (citing *Burdick*, 504 U.S. at 433-34); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (identifying same test).

Many circuits consider Justice Stevens's plurality opinion controlling. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1222 n.31 (11th Cir. 2020); *Fish III*, 957 F.3d at 1123; *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 387 (9th Cir. 2016). Thus, they subject election laws to a "flexible" "sliding scale" "balancing" test that "weighs" various burdens against state interests. *Fish III*, 957 F.3d at 1121 ("weigh[ing]" burdens against government interests); *Ohio Dem. Party*, 834 F.3d at 627 ("flexible balancing approach"); *Dudum v. Arntz*, 640 F.3d 1098, 1114 n.27 (9th Cir. 2011) ("sliding-scale balancing analysis").

But balancing the pros and cons of a given law is not a judicial analysis. And, as shown below, it does not lead

to uniformity in decisions or predictability in outcomes. The Court should take this opportunity to clarify that election laws are not subject to a freestanding balancing analysis.

B. Freestanding balancing tests lead to inconsistent results.

The Court has rejected a balancing analysis in other constitutional contexts, and for good reason: balancing requires courts to act as legislatures and leads to inconsistent and unpredictable results. In the election-law realm, courts are called upon to balance electoral integrity, prevention of fraud, costs, ease of voting, political expression, voter confusion, and access to the ballot, to name only a few. Inevitably, different judges will reach different conclusions. As one judge recently noted, this test "risks trading precise rules and predictable outcomes for the imprecision and unpredictability of how the judicial-assignment wheel turns." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment). Similar facts should lead to similar results, but that does not hold when the constitutional test lacks objective limits. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment) (arguing that the plurality opinion's approach provides "no certainty" to litigants).

1. The Court has rejected balancing tests in other circumstances.

The Court has been critical of balancing tests in other constitutional contexts, as such tests require courts to "act as legislators, not judges." *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment). For example, the Court recently rejected a test that would have required courts to

balance the benefits and burdens of laws that impact abortion. *Id.* at 2135-39; *see id.* at 2182 (Kavanaugh, J., dissenting) ("[F]ive members of the Court reject the . . . cost-benefit standard."). As the Chief Justice explained, it is not "plausible" to "objectively assign weight" to the variety of values at issue, and there is "no meaningful way to compare them if there were." *Id.* at 2136 (Roberts, C.J., concurring in the judgment). And as Justice Brennan recognized, balancing tests are often "brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will." *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part).

Relatedly, balancing tests lead to inconsistent results, as their vague standards are "manipulable," *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (regarding Confrontation Clause). Rejecting the use of a "judge-empowering interest-balancing inquiry" in the Second Amendment context, the Court noted that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008); *see also Crawford*, 541 U.S. at 67-68 (noting that "replacing categorical constitutional guarantees with open-ended balancing tests" does "violence to their design").

The lack of predictability resulting from a freestanding balancing test "can come as no surprise" as "judges retreat to their underlying assumptions or moral intuitions when deciding whether a burden is undue." *June Med.*, 140 S. Ct. at 2180 (Gorsuch, J., dissenting). In sum, when the legal test devolves into a "balancing of all the factors involved," "equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system,

impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

2. Circuit courts have reached inconsistent conclusions about election laws under a balancing test.

a. When federal courts employ a balancing analysis, "some courts wind up attaching the same significance to opposite facts, and even attaching the opposite significance to the same facts." *June Med.*, 140 S. Ct. at 2180 (Gorsuch, J., dissenting) (cleaned up). With respect to election laws, courts do not uniformly assess the weight of a given law's burden on the constitutional rights at issue or the importance of the state interests justifying it. Using the balancing analysis, different panels within the same circuit can reach opposite conclusions on the constitutionality of the same law.

For example, two different panels of the Sixth Circuit reached opposite conclusions regarding Michigan's law eliminating straight-ticket voting. The first panel declined to stay a preliminary injunction, concluding that hypothetical longer lines and voter confusion required more than a rational basis to justify the law—even though most States did not use straight-ticket voting. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 663-65 (6th Cir. 2016). But two years later, after a trial on the merits, a different panel of the Sixth Circuit stayed the district court's permanent injunction, finding the same hypothetical burdens to be "minimal" and concluding that Michigan's justifications far exceeded the rational basis necessary to sustain the law. *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 349-50 (6th Cir. 2018).

The Seventh Circuit's approach to ballot-access cases also reflects this problem. One panel of the Seventh Circuit held that Illinois' 5% signature requirement for access to the ballot was not "severe" and could be justified by the "speculative concern" that too many candidates would cause voter confusion. *Tripp v. Scholz*, 872 F.3d 857, 864-66 (7th Cir. 2017). But earlier this year, another panel of the Seventh Circuit reversed a district-court decision upholding the same law, concluding that "the burden the 5% signature requirement imposes on candidates (and possibly the interests Illinois possesses in regulating those candidates) varies between elections and between districts." *Gill*, 962 F.3d at 365-66.

Regarding early voting, the Sixth Circuit affirmed the preliminary injunction of an Ohio law that shortened early voting by three days for non-military voters, holding that Ohio failed to present evidence sufficient to justify its interests. *Obama for Am. v. Husted*, 697 F.3d 423, 428-36 (6th Cir. 2012). But it later upheld a law shortening Ohio's early-voting period by six days, noting that Ohio did not have to "*prove*" its interests with evidence and that legislative findings were sufficient. *Ohio Dem. Party*, 834 F.3d at 632.

The divergent results that judges reach concerning the same laws demonstrate that the balancing test is a "dangerous tool." *Daunt*, 956 F.3d at 424 (Readler, J., concurring in the judgment). "In sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them." *Id.* The Court should cabin that discretion by rejecting the freestanding balancing analysis currently used by courts.

b. Justice Scalia warned in *Crawford* that the lack of certainty and predictability in the plurality's balancing approach would lead to "constant litigation" as "potential

allegations of severe burden are endless." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment). This prediction has been borne out in recent years, as plaintiffs increasingly seek to use the balancing approach as a least-restrictive-means test for election laws.

As one example, when Ohio decided to reduce early voting from 35 to 29 days, plaintiffs argued that Ohio's previous grant of 35 days created a "federal floor that Ohio may add to but never subtract from." *Ohio Dem. Party*, 834 F.3d at 623. The court rejected this "astonishing proposition," reasoning that this theory "would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." *Id.*

In an attempt to increase voter turnout, California adopted a program authorizing certain counties to send mail-in ballots to all residents, rather than only to those who requested them, with the remaining counties authorized to opt in to the program two years later. *Short v. Brown*, 893 F.3d 671, 674 (9th Cir. 2018). Plaintiffs in the counties that were not initially part of the program sued, arguing that California's decision to implement the program in stages diluted their votes, as it was more burdensome to request a mail-in ballot. *Id.* at 675. The Ninth Circuit affirmed the denial of a preliminary injunction, noting that "the [plaintiffs'] reading of the Supreme Court's voting cases would essentially bar a state from implementing any pilot program to increase voter turnout." *Id.* at 679.

Texas requires all individuals who register to vote to fill out and sign a written voter-registration application. Tex. Elec. Code § 13.002(b). Yet a Texas district court

ruled that it was unconstitutionally burdensome to require individuals who renew their driver's licenses online to register the same way; instead, the court ordered Texas to update its technology to allow those individuals to register to vote online by checking a single box. Second Ord. Granting Mot. for Prelim. Inj. at 57-62, *Stringer v. Hughs*, No. 5:20-cv-00046-OLG (W.D. Tex., entered Aug. 28, 2020); *Stringer v. Pablos*, 320 F. Supp. 3d 862, 897-900 (W.D. Tex. 2018), *rev'd and remanded sub nom. Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019) (lack of standing); *see also Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment) (noting that "one can predict lawsuits demanding that a State adopt voting over the Internet").

Election law is "an area where the dos and don'ts need to be known in advance of the election." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment). But the freestanding balancing test creates the capacity for constant litigation and uncertainty over the outcome of those challenges. Clarity from the Court is needed.

C. The Court should clarify the constitutional test for election laws.

As demonstrated above, a freestanding or sliding-scale balancing test is unworkable. It does not produce consistent or predictable results, to the detriment of States and voters. Unless the Court wishes to revisit its election-law jurisprudence entirely, it should follow the two-tier system laid out in Justice Scalia's *Crawford* concurrence.

While Kansas's documentary-proof-of-citizenship law passes either constitutional test, the results are clearer and cleaner under the two-tier approach. *See id.* at 204 (citing *Burdick*, 504 U.S. at 433-34). Requiring individuals who seek to register to vote to provide one of

thirteen forms of proof of citizenship is a "nonsevere, nondiscriminatory restriction"—it applies to everyone and imposes the minimal burden of providing evidence of citizenship. Pet. 17-23. And it is justified by Kansas's "important regulatory interests" in enforcing its citizenship qualification, promoting electoral integrity, and preventing fraud.

But the Tenth Circuit, utilizing the balancing approach, concluded the burden was "significant," which was somewhere between "severe" and "nonsevere," requiring application of a "heightened scrutiny" test. *Fish III*, 957 F.3d at 1127-28 & n.6. It therefore required "concrete evidence" that the law furthered Kansas's interests. *Id.* at 1133. But as Kansas explained in its petition, the evidence of burden is nearly identical to that in *Crawford*, and the state interests are the same. Pet. 17-23. Yet the balancing approach enabled the Tenth Circuit to reach a decision at odds with *Crawford*.

States should be able to enact reasonable, nondiscriminatory election regulations without fear that one or more judges will disagree with their policy choices. "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment). The balancing approach allows courts to second-guess state legislative choices. The Court should take this opportunity to clarify the constitutional test and restore consistency and predictability to this area of law.

II. The Tenth Circuit's Interpretation of the NVRA Unconstitutionally Limits the States' Authority to Set Voter Qualifications.

Under the Voter Qualifications Clause and Seventeenth Amendment, States have the exclusive authority to set voter qualifications for federal elections. U.S. Const. art. I, § 2, cl. 1 ("[T]he Electors [for the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII (same for electors of Senators). There is no question that these provisions exclude congressional regulation of voter qualifications: "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." *Inter Tribal*, 570 U.S. at 16 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)).

Despite the Constitution's exclusive grant of authority over voter qualifications to the States, the Tenth Circuit held that Congress diminished that authority through the NVRA, thereby restricting Kansas from verifying voter qualifications unless it met a court-created standard akin to strict scrutiny. *Fish III*, 957 F.3d at 1138; *Fish v. Kobach*, 840 F.3d 710, 738-39 & n.14 (10th Cir. 2016) (*Fish I*). The Tenth Circuit concluded this interference was justified under the Elections Clause, which allows Congress to regulate the time, place, and manner of elections. *Fish III*, 957 F.3d at 1136-37. But Congress's Elections Clause authority does not extend to determining *who* can vote or *who* can be registered—that authority lies with the States.

The Court need not reach the constitutional question of where to draw the line between the Elections Clause and the Voter Qualifications Clause. Kansas's petition demonstrates that, contrary to the Tenth Circuit's opinion, the text of the NVRA permits Kansas to enforce its documentary-proof-of-citizenship requirement with respect to motor-voter registrations. Pet. 24-31. The Court should grant the petition and adopt Kansas's statutory interpretation, avoiding any doubts about the constitutionality of the NVRA. If it cannot avoid the question, however, it should hold that the NVRA's limitations on voter registration are unconstitutional.

A. States have the exclusive constitutional authority to set voter qualifications.

There is "no doubt" that States may establish "qualifications for the exercise of the franchise." *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (holding that "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised"). When urging the States to ratify the Constitution, Alexander Hamilton explained that prescribing voting qualifications "forms no part of the power to be conferred upon the national government." *Inter Tribal*, 570 U.S. at 17 (quoting The Federalist No. 60, at 371 (A. Hamilton) (C. Rossiter ed., 1961)). James Madison agreed, noting that "[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." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 228 (1986) (quoting The Federalist No. 52, at 354 (J. Madison) (J. Cooke ed., 1961)); *see also id.* at 227 (stating that the purpose of the Voter Qualifications Clause was to "avoid the consequences of declaring a single standard

for exercise of the franchise in federal elections"). Indeed, federal control over who may vote has come in the form of constitutional amendments, not statutes passed by Congress. *See* U.S. Const. amends. XV, XIX, XXIV, XXVI; *see also Katzenbach v. Morgan*, 384 U.S. 641, 646 (1966) (noting that a State may not base voter qualifications on a ground forbidden by the Constitution).

The States' authority to set voter qualifications necessarily includes the power to enforce or verify those qualifications, as "the power to establish voting requirements is of little value without the power to enforce those requirements." *Inter Tribal*, 570 U.S. at 17; *see also* 1 Joseph Story, Commentaries on the Constitution of the United States § 430, at 412-13 (1833) ("In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself."). It would, therefore, "raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Inter Tribal*, 570 U.S. at 17; *id.* at 23 (Thomas, J., dissenting) (noting that the States' authority under the Voter Qualifications Clause "necessarily includes the related power to determine whether those qualifications are satisfied"). Those constitutional doubts counsel in favor of adopting Kansas's interpretation of the NVRA (which is the correct interpretation regardless), rather than deciding whether a portion of the NVRA is unconstitutional.

B. The Tenth Circuit's interpretation of the NVRA infringes on the States' authority.

1. Congress enacted the NVRA pursuant to the Elections Clause, which grants state legislatures the authority to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives"

unless Congress "make[s] or alter[s] such Regulations." U.S. Const. art. I, § 4, cl. 1; *Inter Tribal*, 570 U.S. at 14 (treating the NVRA as "Elections Clause legislation"). Designed to "increase the number of eligible citizens who register to vote," but also to "protect the integrity of the electoral process," 52 U.S.C. § 20501(b), the NVRA issues a variety of commands to the States, ranging from combining driver's license and voter-registration applications, *id.* § 20504, to requiring use of a federal mail-in voter-registration form, *id.* § 20505, to creating procedures for updating voter rolls, *id.* § 20507.

But while "the Elections Clause empowers Congress to regulate *how* federal elections are held," it does not give Congress the power to determine "*who* may vote in them." *Inter Tribal*, 570 U.S. at 16. That authority is vested exclusively in the States. Interpreted broadly, however, the NVRA's commands encroach on that authority.

The Court has previously recognized that the NVRA raises constitutional questions about Congress's authority to regulate voter registration, but it has avoided confronting that question directly. Addressing the NVRA's impact on Ohio's process of removing voters from its rolls, the Court "assume[d] for the sake of argument that Congress has the constitutional authority to limit voting eligibility requirements in the way [the plaintiffs] suggest." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846 n.5 (2018). Because the Court held that Ohio's procedures were consistent with the NVRA, *id.* at 1846, it did not address the question of Congress's authority.

Five years earlier, the Court considered whether a different provision of the NVRA required Arizona to accept federal mail-in voter-registration forms even though the forms did not include Arizona's documentary-

proof-of-citizenship requirement. *Inter Tribal*, 570 U.S. at 4-5. Although it concluded that Arizona was required to accept the federal forms, the Court recognized the Voter Qualifications Clause created a potential constitutional obstacle. *Id.* at 17-18. Notably, Arizona "d[id] not contest" that the Elections Clause permitted Congress to regulate voter registration. *Id.* at 9. So the Court was not required to decide when congressional regulation of voter registration crosses the line from permissible time-place-and-manner legislation to impermissible voter-qualification legislation.[3]

Thus, it remains an open question whether Congress can use its Elections Clause authority to force a State to register voters—thereby qualifying them to vote—despite the voters' failure to satisfy state-law requirements. The Court side-stepped that issue in *Inter Tribal*, explaining that Arizona could still seek to enforce its requirement by petitioning the Election Assistance Commission to add Arizona's documentary-proof-of-citizenship requirement to the federal form. *Id.* at 18-20. The provision of the NVRA at issue here, 52 U.S.C. § 20504, does not permit Kansas to petition the EAC for relief, so that constitutional safety valve is unavailable in this case.

2. Under the NVRA, the voter-registration portion of a driver's license application "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." *Id.* § 20504(c)(2)(B). The application must also include an "attestation that the

[3] The Court has previously listed "registration" among the election procedures that Congress may regulate under the Elections Clause, but that statement was dictum. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932).

applicant meets each [eligibility] requirement." *Id.* § 20504(c)(2)(C)(ii). Combining the NVRA's minimum-information requirement with its attestation requirement, the Tenth Circuit concluded that, with respect to "motor-voter" applications, States must accept an individual's attestation as sufficient proof that he meets the eligibility requirements to vote. *Fish III*, 957 F.3d at 1138; *Fish I*, 840 F.3d at 738.

According to the Tenth Circuit, any requirement beyond attestation exceeds the "minimum amount of information necessary" unless the State first establishes that a "substantial number" of ineligible individuals are voting. *Fish III*, 957 F.3d at 1138; *Fish I*, 840 F.3d at 739. But even if Kansas showed a substantial number of ineligible voters, it would likely still have to prove that nothing less than documentary proof of citizenship would suffice to enforce its eligibility requirements. *Fish I*, 840 F.3d at 738 n.14; *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1100 (D. Kan. 2018) (*Fish II*). In short, Kansas must meet a court-created strict-scrutiny-like standard in order to enforce its voter qualifications as it sees fit.

The Tenth Circuit brushed aside any concerns that its interpretation infringed Kansas's authority under the Voter Qualifications Clause. *Fish I*, 840 F.3d at 748-50. The court reasoned that, because Kansas did not prove a "substantial number" of noncitizen voters, Kansas was currently able to set and enforce its citizenship qualification. *Id.* at 748-49. No additional documents from potential voters were necessary. But the court made no attempt to justify its reasoning under the text of the Constitution, which does not condition the States' voter-qualification authority on any quantum of evidence, much less a State's ability to identify an indeterminate number of ineligible voters.

The Tenth Circuit also relied on *Inter Tribal* but failed to acknowledge that the NVRA provision there contained an administrative process to protect States' rights—a process that is absent here. *Inter Tribal*, 570 U.S. at 18-20; *Fish I*, 840 F.3d at 750. Instead, Kansas's only option to enforce its voter qualifications for motor-voter applicants is to satisfy the court-created substantial-number test that appears nowhere in the text of the NVRA. Neither Congress nor the courts have the authority to demand that of the States.

C. The Court should interpret the NVRA to avoid the constitutional problem.

Limiting the States' ability to verify their voters' qualifications infringes the States' constitutional authority under the Voter Qualifications Clause. And to the extent Congress has reached outside of its time-place-and-manner authority to issue commands to the States, it is unlawful commandeering. *See, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1475-76 (2018). Because Kansas is not the only State with a documentary-proof-of-citizenship requirement, the Court should take the opportunity to resolve this issue now. *See* Ala. Code § 31-13-28(c)-(l); Ariz. Rev. Stat. § 16-166(F); Ga. Code § 21-2-216(g).

The Court has previously interpreted the NVRA to avoid the constitutional issues inherent in the law. *Husted*, 138 S. Ct. at 1846 (finding Ohio law consistent with the NVRA); *Inter Tribal*, 570 U.S. at 17-18 (identifying an administrative procedure to protect the States' authority). The Court should continue that trend in this case by adopting the statutory interpretation offered by Kansas. That interpretation is correct, and it avoids creating any doubts about the constitutionality of the NVRA. Pet. 24-31; *see I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Harmonizing the NVRA and Kansas's documentary-proof-of-citizenship requirement is straightforward. The NVRA purports to limit the voter-registration portion of a state driver's license application to 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)(ii). Under Kansas law, documentary proof of citizenship is necessary to complete the voter-registration process. *See* Kan. Stat. § 25-2309(*l*) (requiring evidence of citizenship to complete voter registration). Thus, by definition, documentary proof of citizenship is the "minimum amount of information necessary" to "assess the eligibility" of a potential voter and "administer voter registration" in Kansas.

While the NVRA envisions a uniform registration process, there is no indication that Congress intended to nationalize the substantive requirements of voter registration. As the Court has already recognized, "[t]he 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." *Young v. Fordice*, 520 U.S. 273, 286 (1997). That tracks the relevant constitutional provisions: Congress may regulate, at most, the time, place, and manner of registration, but it may not regulate who is qualified to register (and vote). That power remains with the States.

Kansas's construction of the NVRA best interprets its text and avoids creating any doubt about whether Congress overstepped its constitutional bounds. The Court should grant the petition and reverse the Tenth Circuit's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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