No. 20-109

In the Supreme Court of the United States

SCOTT SCHWAB, *IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF KANSAS*,

Petitioner,

v.

STEVEN WAYNE FISH, *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 PETITIONER

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QUESTIONS PRESENTED

The Kansas Constitution establishes United States citizenship as a qualification to vote and directs the Legislature to provide for proof of eligibility. Thus, when an applicant in Kansas registers to vote, Kansas law requires "satisfactory evidence of United States citizenship." Kan. Stat. Ann. §25-2309(l).

The questions presented are:

1. Whether the United States Constitution prohibits Kansas from requiring applicants to provide proof of United States citizenship when registering to vote.
2. Whether Section 5 of the National Voter Registration Act of 1993, 52 U.S.C. §20501, et seq., prohibits Kansas from requiring motor-voter applicants to provide proof of United States citizenship when registering to vote.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, EFELDF has consistently defended not only the Constitution's federalist structure, but also the Constitution's limits on both State and federal power. To help preserve the integrity of the elections on which the Nation has based its political community, EFELDF has supported reducing voter fraud and maximizing voter confidence in the electoral process. For all the foregoing reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

This litigation asks whether Kansas may enforce its state-law requirement that, before being registered to vote, applicants demonstrate their U.S. citizenship via documentary proof of citizenship ("DPOC") or other Kansas statutory means beyond self-attesting their citizenship on the forms approved under the National Voter Registration Act, 52 U.S.C. §§20501-20511 ("NVRA"). This litigation thus raises voter-qualification issues raised, but not resolved, in *Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. 1 (2013) ("*ITCA*"). Respondents are six individuals

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[1] *Amicus* files this brief with all parties' written consent and 10 days' prior written notice. 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 its counsel – contributed monetarily to preparing or submitting the brief.

and the League of Women Voters of Kansas (hereinafter "Plaintiffs").

The Tenth Circuit found the DPOC requirement a violation of the Equal Protection Clause under the *Anderson-Burdick* balancing test described in Justice Stevens' plurality decision in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008),[2] and preempted by the NVRA, which requires registration applications to include "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)(ii). Consequently, the Tenth Circuit affirmed an injunction against using the DPOC law to register voters for state elections.

Constitutional Background

The Constitution establishes a federalist structure of dual state-federal sovereignty. *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, 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.*

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[2] *See Crawford*, 553 U.S. at 189-90 (*citing Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)) (plurality opinion of Stevens, J.).

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.[3] 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. As Madison explained, "[t]he qualifications of electors and elected [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." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249-50 (1911). Granting to the States the exclusive power to establish voter qualifications reflects the Framers' considered judgment about the proper balance of

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

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).

Statutory Background

In 1993, Congress enacted the NVRA. PUB. L. NO. 103-31, 107 Stat. 77 (1993). As relevant here, Section 5 of the NVRA indicates that the "voter registration application portion of an application for a State motor vehicle driver's license … 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)(ii).

In 2011, Kansas enacted the Secure and Fair Elections Act, 2011 Kan. Sess. Laws 56, which requires state and county officials to "accept any completed application for registration, but … [to withhold] regist[ration] until the applicant has provided satisfactory evidence of United States citizenship." KAN. STAT. ANN. §25-2309(l).

Factual Background

Amicus EFELDF adopts the facts in the State's petition (at 1-11) and supplements those facts with respect to the criteria for obtaining replacement birth certificates from Maryland and with respect to the history of fraudulent voter registration.

The district court found that Plaintiff Bucci – a Maryland native and fulltime Kansas employee – "cannot afford the cost of a replacement birth certificate from Maryland and she credibly testified

that spending money to obtain one would impact whether she could pay rent." Pet. App. 133a-34a. Maryland's Department of Public Health allows ordering a replacement birth certificate online or by mail. Maryland Dep't of Health, *Request Birth Certificates*.[4] To obtain a replacement birth certificate, the applicant must submit two of the following forms of identification,

- Pay stub
- Current car registration
- Bank statement
- Letter from a government agency requesting a vital record
- Lease/rental agreement
- Utility bill with current address
- Copy of income tax return/W-2 form

Maryland Dep't of Health, *ID Requirements*.[5] "At least one of these documents must contain [the applicant's] current mailing address." *Id.* The process costs $10.00 by mail, $11.75 online, or $18.75 online with expedited shipping. Maryland Dep't of Health, *Fees*.[6] *Crawford* recognized that courts take judicial notice of the burdens that voters face, *Crawford*, 553 U.S. at 199 (Stevens, J.), and *amicus* EFELDF respectfully submits that the Maryland process described above –

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[4] https://health.maryland.gov/vsa/Pages/birth.aspx (last visited Sept. 2, 2020).

[5] https://health.maryland.gov/vsa/Pages/idreqs.aspx (last visited Sept. 2, 2020).

[6] https://health.maryland.gov/vsa/Pages/fees.aspx (last visited Sept. 2, 2020).

costing between $10.00 and $18.50 – is judicially noticeable.[7]

The NVRA's "Federal Form" requires applicants to attest to their eligibility to register but does not require proof to support that 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 undisputed evidence that non-citizens registered to vote, proof of citizenship beyond the Federal Form's attestation objectively "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).

While Plaintiffs and the Tenth Circuit view the noncitizen-registration problem as inconsequential, 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 is many, many times the number who came forward. As the 2000 presidential election and the 2014 Arizona House election[8]

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[7] *See Fourth Corner Credit Union v. FRB*, 861 F.3d 1052, 1064 n.1 (10th Cir. 2017) (government agency websites); *New York Indians v. U.S.,* 170 U.S. 1, 32 (1898) (public documents).

[8] In the 2014 election, 161 votes decided the race for Arizona's Second Congressional District. Brian C. Kalt, *Unconstitutional*

demonstrated, that is more than enough to alter the results of an election.

Although voter fraud 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. 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) ("more ballots [were] cast than voters recorded"). "It remains true … that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years." *Crawford*, 553 U.S. at 195 (footnotes omitted) (plurality opinion of Stevens, J.). Finally, while a decision in this case would come too late to resolve the issue for the 2020 election, the issue of voter fraud shows no signs of abating with the push for expanded voting by mail in response to the COVID-19 pandemic.

SUMMARY OF ARGUMENT

Competing election-integrity and voter-access issues raise important questions that warrant this Court's review, even without a split in circuit authority. *See* Section I.

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but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing, 81 BROOKLYN L. REV. 441, 499 n.288 (2016).

On the equal-protection merits, this Court need not resolve the validity of the *Anderson-Burdick* balancing test. First, no Plaintiff has standing to assert an equal-protection injury, and – in any event – the challenged Kansas law should survive a facial challenge, even assuming that some Plaintiffs had standing. *See* Section II.A. Alternatively, this Court could apply that balancing test to hold that the Kansas law meets that test. *See* Section II.B. Finally, the Court could reject Justice Stevens' *Crawford* plurality for the reasons argued in Justice Scalia's *Crawford* plurality, which is tied more closely to equal-protection precedent and is more workable. *See* Section II.C.

On the NVRA merits, the Tenth Circuit misreads *ITCA* to hold *against* the States on the very issue that *ITCA* found constitutional doubt *in favor of* the States' view. *See* Section III.A. Indeed, insofar as this case addresses state standards for voter qualification in state elections, Congress has no authority to write the preemptive NVRA that the Tenth Circuit imagines. *See* Section III.B. Given the States' unquestioned primacy on voter qualifications, this Court should defer to the States – not to the NVRA – on the voting-qualification issues relevant here. *See* Section III.C. Finally, with that background, the NVRA does not preempt Kansas law: DPOC is "necessary" to prevent noncitizen registration, and the Tenth Circuit's invention of atextual NVRA requirements is improper under canons of statutory construction and the deference that courts owe to States in this field. *See* Section III.D.

ARGUMENT

I. THE PETITION RAISES IMPORTANT ISSUES OF FEDERAL LAW.

In our Democracy with a federalist structure, the twin issues of voter access versus voter fraud and state voter-qualification laws versus federal voter-registration requirements indisputably qualify as "important question[s] of federal law" under this Court's Rule 10(c). With the 2020 election and all future elections on the horizon, *amicus* EFELDF respectfully submit that few if any other cases on this Court's docket are as important to our Nation as this challenge to the Tenth Circuit's overreach.

In the voting-rights context, the ballot-integrity interests that Kansas seeks to protect would qualify as important, even if Kansas had *no evidence* of impermissible voting and registration. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Crawford*, 553 U.S. at 189 (plurality opinion of Stevens, J.). As signaled in the Factual Background, *supra* at 7, voter fraud not only has existed in both the distant and recent past but also threatens the future. 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. Noncitizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at, 196 (plurality opinion of Stevens, J.). Because this case would resolve vital

voter-qualification issues left open in *ITCA*, this Court should review this case to resolve those open issues.

II. THE PANEL'S FLAWED EQUAL PROTECTION ANALYSIS WARRANTS THIS COURT'S REVIEW.

This Court should reverse the equal-protection holding under one of three tiers of analysis: (1) no Plaintiff has shown an Article III case or controversy; (2) the lower courts misapplied the *Anderson-Burdick* balancing test from Justice Stevens' *Crawford* plurality opinion; or (3) the Court should adopt the equal-protection analysis in Justice Scalia's rival *Crawford* plurality opinion. Whichever path the Court picks, however, the Tenth Circuit's analysis cannot stand.

A. Article III does not support the equal protection holding.

Plaintiffs lack both Article III standing and a basis for a facial attack on Kansas law. Under either of those failings, this Court could set aside the Tenth Circuit's decision without either affirming or rejecting the *Anderson-Burdick* balancing test from Justice Stevens' *Crawford* plurality opinion.

1. Plaintiffs lack standing for equal-protection injuries.

Under Article III, federal courts must focus on the cases or controversies presented by affected parties. U.S. CONST. art. III, §2. "All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative

judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984) (interior quotation omitted). Federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Plaintiffs thus have the burden to show Article III jurisdiction, which Plaintiffs cannot do for alleged equal-protection injuries.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III, that is, a legally cognizable "injury in fact" that (a) constitutes "an invasion of a legally protected interest," (b) is caused by the challenged action, and (c) is redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992) (interior quotation marks omitted). Moreover, self-inflicted injuries do not establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (avoidable losses insufficient for standing). All injuries here are either moot or self-inflicted, which cannot satisfy Article III.

Although Kansas suggests that Mr. Fish and Ms. Bucci – out of the 30,732 allegedly affected voters – could not afford a birth certificate, Pet. 21, Mr. Fish obtained one (mootness), Pet. App. 133a, and Ms. Bucci was simply wrong about the cost ($10) of a Maryland birth certificate. *Compare* Pet. App. 133a-34a *with* notes 4-7, *supra*, and accompanying text. Similarly, another Plaintiff claimed he could not get

access to his birth certificate from his parents to register to vote but did so easily when he needed it to join the Navy. *See* Pet. 5. The claimed injuries and barriers here obviously were pretextual and willfully self-inflicted.

To allow these Plaintiffs to press their self-inflicted or wholly imagined injuries makes a mockery of Article III. In essence, the lower courts' decisions give Plaintiffs a heckler's veto over a reasonable state law designed to avoid demonstrable instances of noncitizens registering to vote. *Cf. Zivotofsky v. Kerry*, 576 U.S. 1, 65 (2015) (Roberts, C.J., dissenting). Even for *bona fide* interest groups – such as the Sierra Club in environmental matters – Article III does not provide a forum for airing "abstract social interests." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). The lower court erred in allowing this litigation to proceed.

2. <u>Even if some would-be voters have standing, facial relief is overbroad.</u>

Even if there were evidence of a Plaintiff injured under Article III, facial invalidation of Kansas's law would not be the appropriate remedy: "A facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202 (interior quotations omitted) (plurality opinion of Stevens, J.). Certainly, Plaintiffs failed to "establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). "The fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* For that reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v.*

Carhart, 550 U.S. 124, 168 (2007) (interior quotation marks and alterations omitted), and the relief here should have reflected the lack of widespread – if any – cognizable injury from Kansas's law.

B. *Crawford* does not support the panel's *Anderson-Burdick* analysis.

As Kansas explains, the Kansas law here is similar to the law upheld in *Crawford*: the law is facially neutral, minor in its overall burdens, and justified by ballot-integrity concerns. *See* Pet. 17-23. Given the incongruity of the two results, this Court should clarify the *Anderson-Burdick* balancing test, if indeed that is the controlling test.

C. This Court should revisit the *Crawford* plurality's *Anderson-Burdick* analysis.

Two three-justice plurality opinions constituted the *Crawford* majority, and Justice Scalia rejected Justice Stevens' concept of a balancing test under *Anderson* and *Burdick*. *See Crawford*, 553 U.S. at 204-05 (plurality opinion of Scalia, J.). *Amicus* EFELDF respectfully submits that this Court should adopt Justice Scalia's approach as more consistent with equal-protection precedents.

As Justice Scalia explained, *Burdick* changed the *Anderson* approach: "*Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule." *Id.* at 205. Under *Burdick*, courts engage in a two-track test: (1) ask whether the burden on voting is severe, and (2) apply strict scrutiny only for laws that severely restrict voting. *Id.* With respect to considering burdens on voting, courts under *Burdick* do so "categorically and [without] consider[ing] the peculiar circumstances of

individual voters or candidates." *Id.* at 206. For facially neutral laws enacted without invidious intent, any other course "effectively turn[s] back decades of equal-protection jurisprudence," *id.* at 207, by allowing disparate-impact claims.

Of course, the Equal Protection Clause does not prohibit disparate impacts. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Simply put, the Clause prohibits discrimination *because of* race or other protected status through purposeful discrimination and disparate treatment, not disparate impacts. In other words, it prohibits actions taken *because* of the protected status, not those taken merely *in spite of* that status. *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001); *Feeney,* 442 U.S. at 279. Plaintiffs have not identified any class that suffers that type of impermissible discrimination.[9]

For example, Kansas's DPOC requirement might possibly impact – say – the young more than it impacts the old. Similarly, it might impact non-Kansans who move to Kansas more than it impacts lifelong Kansans who register for the first time. But, in all cases, the Kansas law is facially neutral with respect to age, length of residency, and all other factors except the date of a person's first registering to

[9] For example, in *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Because women then represented less than 2% of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney*.

vote in Kansas.[10] The law applies just as much to a 90-year-old first-time applicant – whether native Kansan or not – as it does to an 18-year-old first-time native applicant or out-of-state student like Plaintiff Bednasek. Like Massachusetts in *Feeney,* Kansas has acted *because of* permissible criteria, which is not unlawful discrimination.

Analyzing a different constitutional context, the Chief Justice recently forcefully rejected pitting impacts on individual rights versus a statute's goals under "a grand balancing test in which unweighted factors mysteriously are weighed." *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2135 (2020) (interior quotations omitted) (Roberts, C.J., concurring in the judgment). As the Chief Justice explained, that effort is outside the judicial role, even if interpreting constitutional text:

> There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like judging whether a particular line is longer than a particular rock is heavy. Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other

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[10] Grandfather clauses like the one at issue here do not themselves trigger elevated scrutiny, *New Orleans v. Dukes*, 427 U.S. 297, 305-06 (1976); *Sklar v. Byrne*, 727 F.2d 633, 639 (7th Cir. 1984), and the DPOC requirement applies neutrally *vis-à-vis* any class except the "before" and "after" classes created by the Kansas law's effective date.

> than an unanalyzed exercise of judicial will in the guise of a neutral utilitarian calculus.

Id. at 2136 (interior quotations and citations omitted). Especially where – for minor, neutral, and widely shared burdens – the balancing test would overturn the Court's holdings against disparate-impact claims, this Court should not rewrite the Equal Protection Clause under the guise of interpreting it.

III. THE PANEL'S FLAWED PREEMPTION ANALYSIS WARRANTS THIS COURT'S REVIEW.

However this Court resolves or narrows the Tenth Circuit's equal-protection analysis, the Court should reject the Tenth Circuit's atextual reading of the NVRA.

A. The Tenth Circuit misreads *ITCA* as a merits holding against DPOC.

Although the Tenth Circuit viewed *ITCA* as having decided the substantive preemption merits *against* Kansas,[11] nearly the opposite is true. *Amicus* EFELDF respectfully submits that the Tenth Circuit misunderstood the administrative setting behind the *ITCA* majority's Solomonic decision to note the serious constitutional questions raised by the respondents' merits position, but then to allow Arizona to re-commence the administrative path to putting its

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[11] Specifically, the Tenth Circuit relied on Circuit precedent 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." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1194 (10th Cir. 2014).

DPOC requirements on the Federal Form *via* the NVRA, not outside of it.

Procedurally, under the Election Clause, the NVRA required Arizona to "accept and use" the Federal Form for registration purposes, without any state-law overlay. *ITCA,* 570 U.S. at 15. Quite contrary to the Tenth Circuit's reading, however, *ITCA* left open the likely possibility that the NVRA and constitutional provisions would allow or even compel the use of Arizona's DPOC requirements on the Federal Form via the state-specific requirements.

Read this way, *ITCA* merely decided that this Court would avoid resolving the respondents' constitutionally questionable position under the doctrine of constitutional avoidance, 570 U.S. at 17-19, when the Court more easily could interpret the NVRA to require Arizona first to go through the procedural step of asking a federal agency 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,* 504 U.S. at 572 n.7. The federal government was not itself a party to *ITCA* and the six-year window for challenging a federal denial of Arizona's 2005 request has passed. 28 U.S.C. §2401(a). Given the *ITCA* decision's unmistakable focus on administrative procedure, 570 U.S. at 19 & n.10, the majority appears to have viewed an

administrative re-start as necessary to allow judicial review. *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.

Second, *ITCA*'s equally unmistakable focus on the doctrine of constitutional avoidance makes clear that the Court did not, in fact, *decide* the NVRA or the constitutional merits *against* Arizona. Instead, the majority explained that, if the NVRA did not provide a means to add Arizona's DPOC 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 the NVRA's "preclud[ing] a State from obtaining the information necessary to enforce its voter qualifications." *ITCA,* 570 U.S. at 17-18 (emphasis in original). That caution should have put the Tenth Circuit on notice that it was treading on thin constitutional ice, but the Tenth Circuit ignored it. Because the Tenth Circuit has now ruled on the issue, avoidance is no longer an option.

B. Congress would lack authority to enact the Tenth Circuit's version of the NVRA.

Kansas's DPOC law involves the single most fundamental voter qualification of all: citizenship. *Reynolds v. Sims,* 377 U.S. 533, 554-55 (1964) (collecting cases). Moreover, the States' undisputed "power to establish voting requirements is of little

value without the power to enforce those requirements." *ITCA,* 570 U.S. at 17. This Court now must resolve the "serious constitutional doubts," *id.,* that federal interference with that State enforcement would pose. Although Congress did not intend the NVRA to pose the obstacle that Plaintiffs and the Tenth Circuit put forward, *amicus* EFELDF respectfully submits 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,* 570 U.S. at 16 (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,* 570 U.S. at 16 (emphasis in original). "One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly." *Id.* Plaintiffs 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* EFELDF respectfully submits that limiting the States' ability to enforce

voter-qualification rules at the "front door" of voter registration impairs State enforcement of those voter qualifications.

While the Election Clause's time-place-and-manner "scope is broad," *ITCA,* 570 U.S. at 8, it does not extend outside the time-place-and-manner realm into voter qualifications. *Id.* at 17-18. The "Constitution is filled with provisions that grant 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). Because "the specific governs the general," *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992), federal time-place-and-manner legislation cannot have either the purpose or effect of establishing voter qualifications. *ITCA,* 570 U.S. at 17. But that is precisely what Tenth Circuit's interpretation of the NVRA does.

With a large cohort of noncitizen residents who – for whatever reason – register to vote, the NVRA's checkbox-signature approach is simply not the same qualitative test as Kansas's DPOC test. 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 – the NVRA's discredited checkbox-and-signature approach – to assess compliance with the States' voter-qualification requirements.

C. Federal courts should defer to States on Voter-Qualification and Time-Place-and-Manner issues.

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,[12] holding that "[we] have never mentioned such a principle in our Elections Clause cases." *ITCA,* 570 U.S. at 13 (*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.

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

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[12] 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).

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 a 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,* 570 U.S. at 43 (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 no court can credibly interpret the 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,* 563 U.S. 582, 607 (2011) (interior quotations omitted). Congress obviously could not delegate authority under the NVRA that Congress itself lacks. Because Congress itself lacks that authority, *see* Section III.B,

supra, a federal agency's interpretations under the NVRA does not warrant deference. Moreover, courts do 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 itself.

D. The NVRA does not preempt Kansas law.

Aside from the complex legal theories on dividing courts' deference and constitutional power between state and federal actors, the NVRA aspect of this case is simple: The Federal Form allows noncitizens to register to vote. As a factual matter, it does not matter whether those registrations result from dishonesty or ignorance. It is enough that they happen. The congressional hope circa 1993 that an attestation would suffice has now been clearly disproved. Under *ITCA,* "necessary information which *may* be required *will* be required." 570 U.S. at 19 (emphasis in original). Accordingly, at least with respect to state elections, nothing in the NVRA precludes Kansas from requiring DPOC.

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). 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." 570 U.S. at 17 (emphasis added). Congress lacks the authority to regulate *state* elections and has not purported to do so. *See* 52 U.S.C. §20503(a). To hold otherwise, the Tenth Circuit rewrote the NVRA by adding several layers of analysis and criteria that are wholly absent from the statute itself. *See* Pet. 25-31. This Court should reject that judicial legislation.

Although Kansas notes three NVRA departures in its petition, *id.*, *amicus* EFELDF addresses only one: the judicial adoption of a strict-scrutiny test as an interpretation of "minimum amount of information necessary" in 52 U.S.C. §20504(c)(2)(B). *See id.* at 27-29. While voting is a fundamental right, not every voting-related law impinges a fundamental right or triggers strict scrutiny. *See*, *e.g.*, *McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 807-09 (1969); *Rosario v. Rockefeller*, 410 U.S. 752, 767 (1973) (Powell, J., dissenting) (decrying the use of rational-basis test to evaluate restrictions on voter registration). With no protected classes affected or

invidious discrimination found, courts assess the reasonableness of voting rules by a law's anticipated impact on the *typical* voter, not by its extreme impact on an unusually impacted voter. *Burdick,* 504 U.S. at 436-37. Only when that burden becomes "severe" does strict scrutiny apply. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (*citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Outside that scenario, states have "broad power" to regulate election processes, *id.* (*quoting Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)), which includes voter-registration criteria. *See*, *e.g.*, *Rosario*, 410 U.S. at 761-62. Of course, if registration fell outside the states' powers under the Elections Clause, the NVRA would be wholly outside the power of Congress for the same reason. For these reasons, it is simply fanciful for the Tenth Circuit to read into the NVRA a strict-scrutiny requirement.

Congress does not presume to reverse important Supreme Court decisions *sub silentio*. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (repeals by implication disfavored); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). It falls to this Court to ensure that the lower federal courts do not do so, either.

CONCLUSION

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

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