Nos. 14-3062, 14-3072

In the United States Court of Appeals for the Tenth Circuit

KRIS W. KOBACH, *ET AL.*
Plaintiffs-Appellees,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *ET AL.*,
Defendants-Appellants,

and

PROJECT VOTE, INC., *ET AL.*,
Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, CIVIL ACTION NO. 5:13-CV-04095-EFM-DJW, HON. ERIC F. MELGREN

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: July 7, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), *amicus curiae* Eagle Forum Education & Legal Defense Fund states that it is not aware of any related cases pending in this or any other Circuit. The litigation that culminated in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013), arguably qualifies as a prior appeal under Rule 28.2(C)(1).

Dated: July 7, 2014

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GLOSSARY

Acronym	Phrase
APA	Administrative Procedure Act, 5 U.S.C. §§551-706
EAC	Election Assistance Commission
NVRA	National Voter Registration Act, 42 U.S.C. §§1973gg to 1973gg-10
ITCA	Inter Tribal Council of Arizona, Inc.
ITCA	*Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013)

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation headquartered in Saint Louis, Missouri, files this brief with the consent of the parties.[1] Since its founding in 1981, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both state and federal power. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, Eagle Forum has a direct and vital interest 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 applicants demonstrate their U.S. citizenship via some concrete means in addition to self-certifying their citizenship on a form, before they are registered to vote. On the surface, this litigation simply picks up where *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013) ("*ITCA*"), left off, following the path that the Supreme Court identified in *ICTA*. *See* 133 S.Ct. at 2260. In fact, however, this litigation presents different issues in a

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

procedural context that is sufficiently different to raise merits issues that *ITCA* did not address, much less resolve. All parties[2] ask whether the States' registration requirements are "necessary" under the National Voter Registration Act ("NVRA"), and the States ask whether federal authority under the Elections Clause, U.S. CONST. art. I, §4, cl. 2, even apply 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 only the procedural question whether NVRA could preempt Arizona's procedure for enforcing state law, in alleged contravention of preemptive procedural rules issued by Congress (namely, the requirement to accept the Federal Form). Now that the States seek to add their registration requirements into the Federal Form, procedure must give way to the merits.

This and the related *ITCA* litigation raise three fundamental issues in our democracy: (1) the fundamental right of citizens both to vote and to avoid dilution of their votes by non-citizens who fraudulently or mistakenly register to vote; (2) the division of power between the states and Congress on the fundamental issue of voter qualifications and electoral procedures; and (3) the constitutional and statutory analysis that federal courts use to weigh the divisions between the states

[2] Appellants are the defendants Election Assistance Commission and its acting Executive Director (collectively, "EAC") and intervenors, who were plaintiffs in the *ITCA* litigation (collectively, "ITCA").

and Congress in our federalist system of dual sovereignty.

The Supreme Court resolved the first issue when *ITCA* reached it in an interlocutory appeal in *Purcell v. Gonzalez*, 549 U.S. 1 (2006),[3] and made a start at resolving the second and third issues in *ITCA*. This litigation now calls on this Court and possibly the Supreme Court to finish the analysis.

Before assessing the appropriate state-federal balance under the relevant constitutional provisions involved here, *amicus* Eagle Forum first considers how our Nation got to the point where numerous, demonstrated *non-citizens* registered to vote. Voting is the most fundamental element of our citizenship, and it defines our political community and nationhood. Voter fraud "'debase[s] or dilute[es] … the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Purcell*, 549 U.S. at 4 (*quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (states have an interest in preventing voter fraud and ensuring voter confidence). As in life, the first step in resolving the problem is to admit that there

[3] In *Purcell*, the Supreme Court vacated a preliminary injunction against Proposition 200, finding that Arizona "indisputably has a compelling interest in preserving the integrity of its election process." 549 U.S. at 4 (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). "[T]he political franchise of voting … is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Non-citizen 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.

is a problem.

In enacting NVRA, Congress laudably sought to expand voter registration among eligible citizens. While "even rational restrictions on the right to vote [can be] invidious if they are *unrelated to voter qualifications*, *Crawford*, 553 U.S. at 189 (emphasis added), Proposition 200 and the companion Kansas statute address the single-most fundamental voter qualification of all: citizenship. *Reynolds*, 377 U.S. at 554-55 (collecting cases). Indeed, 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, and apart from how this Court must balance deference to federal agencies under separation of powers versus deference to the states under federalism, Congress could not plausibly have intended to prevent sovereign states from ensuring that only citizens register to vote.

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) (the states entered the federal 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.[4] 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."

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

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 [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. 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. The difficult question that *ITCA* did not fully resolve is whether enforcement provisions like the States' requirements here are procedural registration provisions that fall within the Elections Clause or provisions that fall within the Voter-Qualification Clause.[5]

[5] The Founders were clear that power over voter qualifications was "no part of the power to be conferred upon the national government." THE FEDERALIST NO. 60, at 369 (C. Rossiter ed. 1961) (Hamilton). Consistent with the Elections Clause's

Statutory Background

In 1993, Congress enacted NVRA to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(a), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3). Although NVRA also addresses registering in person and registering in conjunction with applying for a driver's license, 42 U.S.C. §§1973gg-2(a), 1973gg-3, 1973gg-5, this litigation concerns only NVRA's provisions for registration by mail. 42 U.S.C. §§1973gg-2(a)(2), 1973gg-4.

With respect to registration by mail, NVRA directs EAC to adopt a mail voter registration application form ("Federal Form"), 42 U.S.C. §1973gg-7(a)(2), which the states "shall accept and use." 42 U.S.C. §1973gg-4(a)(1). In addition, the states also may develop their own forms that meet the criteria of §1973gg-7(b). Chief among those criteria is the criterion that the form "may require only such identifying information … and other information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1).

Under NVRA's very limited delegation to EAC, that agency "shall not have any authority to issue any rule, promulgate any regulation, or take any other action

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plain language, the Supreme Court has recognized that Hamilton's remarks reflect the clause's focus on *procedural* issues. *U.S. Term Limits v. Thornton*, 806 U.S. 779, 833-34 (1995).

which imposes any requirement on any State or unit of local government, except to the extent permitted under [42 U.S.C. §1973gg-7(a)].” 42 U.S.C. §15329. The referenced section provides the following delegation to EAC:

> The Election Assistance Commission —
>
> (1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);
>
> (2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;
>
> (3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations or improvements in Federal and State procedures, forms, and other matters affected by this Act; and
>
> (4) shall provide information to the States with respect to the responsibilities of the States under this Act.

42 U.S.C. §1973gg-7(a). Significantly, “[a]ny action [that EAC] is authorized to carry out under this Act may be carried out only with the approval of at least three of its members.” 42 U.S.C. §15328.

In 2004, the people of Arizona passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, which requires *inter alia* that applicants seeking to register to vote provide proof of U.S. citizenship. ARIZ. REV. STAT. §16-166(F). Similarly, in 2011, Kansas enacted the Secure and Fair Elections Act,

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." K.S.A. §25-2309(l).[6]

Regulatory Background

NVRA's implementing regulations do not define or even use the word "necessary," do not delegate any authority to EAC staff, and do not provide for hearings on the record or otherwise. *See* 11 C.F.R. pt. 9428. The regulations do 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).

In seeking input on the States' request to add their requirements to the state-specific section of the Federal Forum, EAC released a notice requesting public comment, without noticing a hearing. 78 Fed. Reg. 77,666 (2013). In its order denying the States' request (hereinafter, the "Order"), EAC purported to act through the signature of its Acting Executive Director without any commissioners approving or rejecting the Acting Executive Director's actions.

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts in the States' brief (at 1-11). In 2005,

[6] Because Arizona was a "covered jurisdiction" for purposes of the federal Voting Rights Act, 42 U.S.C. §§1973-1973q, Arizona sought and received preclearance from the Department of Justice before Proposition 200 could take effect. *See Purcell,* 549 U.S. at 2-3.

jury commissions in two Arizona counties alone identified approximately 200 non-citizens registered to vote. Similarly, Kansas identified 20 noncitizens registered to vote. The Federal Form requires applicants to attest to their eligibility to register, but does not require proof of an applicant's attestation. Given the prevalence of non-citizen registration in the States, further proof 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 42 U.S.C. §1973gg-7(b)(1).

SUMMARY OF ARGUMENT

Because EAC lacks the quorum of commissioners required to take any action allowed under NVRA, all of EAC's actions here are a legal nullity (Section I.A). As a consequence of that, neither this Court nor the District Court can defer to the null EAC actions, which therefore trigger *de novo* review under the Administrative Procedure Act ("APA") (Section I.B). In any event, the narrow scope of EAC's NVRA delegation and the dubious constitutional basis of the federal government regulating state voter-eligibility rules under the procedural requirements of the Elections Clause all combine to counsel for not deferring to EAC's administrative construction and instead for the judiciary's interpreting the Constitution (Section I.C).

Factually, the existence of numerous ineligible non-citizens registered to

vote demonstrates beyond cavil that more rigor is required for NVRA checks on voter eligibility and that the States' measures are necessary and reasonable (Section II.A). Legally, EAC's position is unsupportable. An NVRA enacted as EAC interprets it not only would be an unconstitutional federal regulation of voter qualifications under the Elections Clause (Section II.B.2) but also therefore trigger various canons of statutory construction that would counsel against that construction (Section II.B.1). For that reason, the Court should interpret NVRA consistent with its plain text and the implementing regulations to allow the States' requested relief, contrary to EAC staff's interpretation (Section II.B.3).

ARGUMENT

I. EAC'S FINDING ON THE LACK OF "NECESSITY" FOR THE STATE REQUIREMENTS IS NOT ENTITLED TO DEFERENCE

Amicus Eagle Forum's only disagreement with the States' brief is one of emphasis, not substance. Whereas the States argue that EAC lacked authority to enter the Order as the States' *last* argument, States' Br. at 59-60, *amicus* Eagle Forum makes it the *first* argument. As explained in this section, the unlawfulness of EAC's actions – and the resulting nullity of those actions – have implications not only for the merits but also for the standard of review under the APA. EAC claims deference under *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984), but the question whether *lawful* EAC action would qualify for *Chevron* deference – as

opposed to the lesser *Skidmore* deference[7] – is entirely beside the point. EAC's action is a legal nullity, so the federal courts must treat EAC's failure to grant the States relief as a constructive denial of their request.

A. EAC Lacks the Quorum of Commissioners Required for EAC to Take Any Lawful Action, So Federal Courts Must Act in the Absence of Lawful EAC Action

As indicated above, EAC is without authority to act absent "the approval of at least three of its members," 42 U.S.C. §15328, and EAC has had no members since 2011. App. 53, ¶ 27; App. 284, ¶¶ 25–27. If the statute itself is not facially clear that EAC thus lacks authority to act, the Supreme Court has 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).[8] In directing EAC either to take final agency action or be deemed to have

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[7] Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), courts defer to an agency interpretation based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." By contrast, under *Chevron*, courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration as delegated by Congress (*Chevron* prong two), unless the Court can interpret the statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron*, 467 U.S. at 842-44, 865-66. As explained in Section II.B.1, *infra*, this Court can resolve the issues here under *Chevron* prong one, which would obviate the need for deference, even if *Chevron* applied.

[8] Under the National Labor Relations Act, the National Labor Relations Board has five members and requires a three-member quorum. 29 U.S.C. §153(a)-(b).

denied the States' requests constructively, *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (discussing constructive denial); *ITCA*, 133 S.Ct. at 2260 (same), the District Court did not elevate – and could not have elevated – one EAC staffer to the status of three EAC commissioners. 42 U.S.C. §15328; *cf. U.S. v. Eaton*, 169 U.S. 331, 343 (1898) ("Because 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"). Rather, the District Court was giving EAC a deadline by which it could act *lawfully* or be deemed to have denied the States' requests.

Through no fault of EAC staff, EAC is without power to act. Under the APA, however, EAC's inaction is *constructively* final action, 5 U.S.C. §706(1) (court may compel action unlawfully withheld), and federal courts have no obligation to wait further:

> Nothing in *Chevron* suggests that a court should hesitate to decide a properly presented issue of statutory construction in hopes that the agency will someday offer its own interpretation.

Consolidation Coal Co. v. Fed'l Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1080 n.8 (D.C. Cir. 1987). Given that the States' requests present not only statutory issues but also constitutional issues, judicial action is all the more pressing and all the more removed from whatever EAC might say if it had a quorum: "The power to interpret the Constitution … remains in the Judiciary." *City*

of Boerne v. Flores, 521 U.S. 507, 524 (1997); *see also* App. 1436 & n.57 (collecting cases for the proposition that the "canon of constitutional avoidance trumps *Chevron* deference"). Indeed, withholding relief to which the States are entitled through any election cycle would constitute constructive denial *now*, even if EAC were able to act later. *Colorado v. Dep't of Interior*, 880 F.2d 481, 485-86 (D.C. Cir. 1989); *Hercules, Inc., v. EPA*, 938 F.2d 276, 282 (D.C. Cir. 1991).[9] In short, nothing compels the federal courts to await anything further from EAC or to give *EAC staff's* findings any deference.

B. EAC's Findings of Fact Are Reviewable *De Novo* under the APA

Although EAC argues for review under the substantial-evidence standard, EAC Br. at 39, quite the opposite is true. Under the circumstances here, review of factual issues is *de novo* under 5 U.S.C. §706(2)(F), which provides for setting aside agency findings "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." *Id.* As explained in Section II.A, *infra*, EAC's findings cannot survive that review.

By way of background, APA review of factual issues typically involves

[9] In *Colorado*, the D.C. Circuit foreclosed the agency's reliance on a potentially curative future agency action because the applicable milestone for acting had passed and "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." 880 F.2d at 485-86; *accord Hercules*, 938 F.2d at 282. The improper registrations flowing onto the States' voter rolls are a present injury for the 2014 elections.

review under APA's arbitrary-and-capricious test, *Camp v. Pitts*, 411 U.S. 138, 140-42 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-16 (1971), with the substantial-evidence test's applying only to review of records with formal hearings. *Camp v. Pitts*, 411 U.S. at 141-42; *Petchem, Inc. v. Federal Maritime Comm'n*, 853 F.2d 958, 962 (D.C. Cir. 1988); 5 U.S.C. §706(2)(E).[10] By the same token, the Supreme Court's precedents make *de novo* review atypical:

> *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

Overton Park, 401 U.S. at 415; *accord NVE Inc. v. HHS*, 436 F.3d 182, 189-90 (3d Cir. 2006); *Woods v. Fed'l Home Loan Bank Bd.*, 826 F.2d 1400, 1408 (5th Cir. 1987); *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-40 & nn.39-40 (D.C. Cir. 1976); *Upjohn Mfg. Co. v. Schweiker*, 681 F.2d 480, 483 (6th Cir. 1982). Because the decision whether to grant or deny the States' request qualifies as an APA

[10] In any event, the APA's levels of review are "cumulative," so that a finding supported by substantial evidence in the record nonetheless can be arbitrary and capricious, "for example, because it is an abrupt and unexplained departure from agency precedent." *Petchem*, 853 F.2d at 962 n.5 (*quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed'l Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.)).

adjudication,[11] the first prong of this test applies if "the agency factfinding procedures are inadequate." Insofar as EAC is and was statutorily unable to make any findings whatsoever, 42 U.S.C. §15328, this *particular* EAC proceeding was clearly "inadequate" and thus required the District Court to find facts *de novo*, even if a similar EAC proceeding with a quorum otherwise would be adequate.[12]

Because of *this EAC proceeding's* anomalous quorum-less nature, this Court may decide not to assess whether *state-specific EAC proceedings generally* are reviewed *de novo*. Nonetheless, *ITCA* itself suggests *de novo* review:

> Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form.

ITCA, 133 S.Ct. at 2260 (*citing* 5 U.S.C. §706(1)). For its part, *amicus* Eagle Forum respectfully submits that review should be *de novo*, even when EAC has a

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[11] An APA adjudication "means [the] agency process for the formulation of an order," 5 U.S.C. §551(7), where an order "means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. §551(6).

[12] The question of *de novo* review often concerns not whether the court defers to the agency's findings but whether the parties are limited to the record submitted before the agency. *See, e.g., Envt'l Defense Fund, Inc. v. Costle,* 657 F.2d 275, 284-85 (D.C. Cir. 1981). That issue is not presented here because the parties agreed to confine themselves to the record before EAC.

quorum.[13] *See* Section I.C, *infra*.

C. EAC's Position on "Necessity" Does Not Command Deference

Even assuming *arguendo* that EAC could act decisively and lawfully on the States' requests, reviewing federal courts still would not owe deference to EAC's finding state protections of the integrity of elections "unnecessary" for at least three reasons.

First, EAC's narrow delegation does not support the *Chevron* deference to which EAC claims an entitlement. Quite simply, the EAC delegation lacks *Chevron*'s breadth: "Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. §7601(a)(1) (delegation in *Chevron*). By contrast, EAC's authority is narrowly prescribed, 42 U.S.C. §15329, and in pertinent part tied to consultation with state election officers. 42 U.S.C. §1973gg-7(a)(1)-(2). Indeed, as explained in the next point, the issue that the parties dispute arguably lies within the state power, not the federal power.

Second, the Congress that delegated power to EAC lacked constitutional

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[13] Under the APA's legislative history, *de novo* review was intended to apply to all instances without a formal hearing. S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at 214 (1946) (hereinafter, "APA LEG. HIST.") ("[t]he sixth category, respecting the establishment of forts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to [5 U.S.C. §§556-557]"); *see also* APA LEG. HIST. at 39-40, 279, 370 (same).

power to regulate the substance of voter eligibility, which the Voter-Qualification Clause confers exclusively upon the states. U.S. CONST. art. I, §2, cl. 2. By contrast, to the extent that – *and only to the extent that* – a particular question falls within the Elections Clause authority that Congress exercised in NVRA, the exercised federal power displaces the corresponding state power under the Elections Clause. *Compare* U.S. CONST. art. I, §4, cl. 1 (state power) *with id.* art. I, §4, cl. 2 (federal power). EAC action cannot expand the scope of NVRA beyond what Congress enacted under the Elections Clause, and neither Congress nor EAC can rely on the Elections Clause to displace the states' powers under the Elector-Qualifications Clause. *ITCA*, 133 S.Ct. at 2258. If the disputed issue – the requirement that prospective voters present proof of their citizenship – is a voter qualification, it falls outside the power of Congress (and thus EAC) to regulate.

Third, relying on various canons of statutory construction, *see* Section II.B.1, *infra*, the constitutional merits tilt sufficiently to the States to foreclose *Chevron* deference to EAC. For example, as the District Court pointed out, the "canon of constitutional avoidance trumps *Chevron* deference." App. 1436 & n.57 (collecting cases). As explained in Section II.B.1, *infra*, moreover, other canons of construction lead to the same conclusion. In *Chevron* parlance, then, the Court can resolve these questions at *Chevron* step one, which obviates the need to defer to administrative constructions.

II. EAC'S FINDING OF "NECESSITY" IS UNSTAINABLE ON THE MERITS UNDER VARIOUS CRITERIA IN 5 U.S.C. §706

APA review provides both factual and legal bases for a reviewing court to reverse or vacate EAC's action. 5 U.S.C. §706(2)(A)-(C), (F). As explained in the next two sections, EAC's action would be insupportable both factually and legally, if EAC had the quorum required to act at all. Because EAC lacks the authority to act, however, this Court should compel EAC to act based on EAC's having "unlawfully withheld" action on the States' requests. 5 U.S.C. §706(1).

A. Factually, EAC's Findings Are Unsustainable under Both "Arbitrary and Capricious" Review and *De Novo* Review

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 manageable (*e.g.,* 200 voters in two Arizona 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 demonstrated, that is more than enough to change the course of an election.

Remarkably, EAC relies on 1990s testimony to defend its head-in-the-sand response to the States' post-2000 evidence that the Federal Form's checkboxes and

signature requirements are insufficient to prevent fraud. *See* EAC Br. at 35-36; *accord* ITCA Br. at 54-55. It does not really matter whether Congress and EAC were lied to or simply mistaken in the early 1990s. Instead, what matters is that neither Congress in NVRA nor EAC and its predecessor in NVRA regulations foreclosed the relief that the States now request. Specifically, although Congress declined expressly to allow the type of relief that the States request (based on the 1990s-era information cited by EAC and ITCA), neither NVRA nor the implementing regulations prohibit the relief that the States request. As such, the States deserve to have their requests considered under today's evidence, not under testimony that is 20 years old.

Indeed, responsible "agency interpretation is not instantly carved in stone [and] to engage in informed rulemaking, [agencies] must consider varying interpretations … on a continuing basis." *Chevron*, 467 U.S. at 863-64. Here, the States have introduced evidence that ineligible voters ignore the citizenship requirements, however presented, and unlawfully become registered voters. EAC quibbles that the States have not proved that these illegal voters used the Federal Form, EAC Br. at 38, but the point is that the illegal voters evaded the current registration regime, which makes the States' new, more-rigorous registration requirements "necessary."

In any event, the same analysis can and should be applied to the supposed

deterrent effect of EAC's checkbox and signature requirements: how many of the 200-some non-citizens who unambiguously registered to vote were deported for violating federal law? Given the current immigration influxes, it is evident that the Administration will not deport those who violate this Nation's immigration laws. Alternatively, some of the unlawful non-citizen voters may have registered because they believe that they are citizens or do not understand the Federal Form. Even if the Administration posed a credible threat of enforcement, that threat would not reach those who register mistakenly. If nothing else, independent State verification is "necessary" to protect against such mistakes.

B. Legally, EAC's Withholding the States' Requested Relief Both Violates NVRA and Exceeds Federal Elections-Clause Authority

Although EAC and ITCA appear to view *ITCA* as having decided that NVRA preempts Arizona's Proposition 200, the Supreme Court merely held that Arizona could not enforce Proposition 200 outside of NVRA's preemptive procedural requirement to "accept and use" the Federal Form:

> 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. That leaves open the substantive possibility that NVRA would enable Arizona to import Proposition 200 into NVRA's Federal Form via the state-specific requirements and thereby comply with the NVRA procedural

rules within the power of Congress under the Elections Clause. Because they were not before the *ITCA* court, *ITCA* did not resolve the more important and more difficult questions of (1) whether the registration requirements are "necessary," (2) who decides necessity, and (3) whether these state requirements fall under the Voter-Qualification Clause or the Elections Clause.

Quite the contrary to ITCA's and EAC's position, *ITCA* held open a viable path for Arizona to return to court by first seeking administrative relief from EAC. ITCA misconstrues that requirement by arguing that "*ITCA* made clear that the EAC – not Arizona or a reviewing court – decides what is "necessary" under NVRA in the first instance." ITCA Br. at 29. Particularly with the *ITCA* decision's focus on administrative procedure, 133 S.Ct. at 2260 & n.10, it is more likely that the majority viewed return to EAC as necessary to re-initiate the opportunity for judicial review if EAC refused the requested relief. *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*").[14] The States' visit to EAC was more a box-checking exercise for renewed judicial review than an actual hope for agency relief.

[14] By the time the *ITCA* litigation concluded, the statute of limitations had run on challenging EAC's prior denial of relief. The *Auer-NLRBU* process of going back to an agency creates a new opportunity to seek judicial review of denials.

1. Whether under a Presumption against Preemption or Other Canons of Statutory Construction, the States Have the Better Argument on the Merits

Although *ITCA* disavowed a presumption against preemption for express preemption under Elections-Clause legislation like NVRA, 133 S.Ct. at 2256, that does not free EAC's preemptive interpretation from similar canons of statutory construction. All of these canons work against EAC's interpretation that threatens to displace the States' Voter-Qualification Clause authority under the Elections Clause. Obviously, where a state's laws actually conflict with an act of Congress properly issued under the Elections Clause, the state law is preempted. *McPherson v. Blacker*, 146 U.S. 1, 40-41 (1892) ("[i]n this respect it is in conflict with the act of congress, and must necessarily give way"); *ITCA*, 133 S.Ct. at 2257-58. Here, however, NVRA's meaning and application are less clear than in the simple procedural issue presented in *ITCA*, and courts necessarily look to the canons of statutory construction to determine what Congress would have meant by its text.

By way of background, under the presumption against preemption, federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995). When this "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). Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). Although it rejected that framework for Elections-Clause legislation, *ITCA* did not disavow its prior Elections-Clause precedents.

In both *Ex parte Siebold*, 100 U.S. 371, 393 (1880), and *U.S. v. Bathgate,* 246 U.S. 220, 225 (1918), the Supreme Court applied a preemption analysis that was deferential to state power in cases under the Elections Clause, requiring a clear federal statement and presuming that the federal government acted with deference to state laws. In *Siebold,* 100 U.S. at 393, 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." Similarly, in *Bathgate,* 246 U.S. at 225-26, 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." Both of these decisions remain good law, which *ITCA* sought to enforce, not overturn.

These Elections-Clause precedents are similar not only to the presumption against preemption but also to the canons against repeals by implication, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original), and against upsetting the federal-state balance. *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). Because they announce essentially the same standard as the presumption against preemption, these canons should guide a reviewing court to the same place, provided the statutory text does not (as it does not here) decide the issue. *See ITCA*, 133 S.Ct. at 2257 ("there is no compelling reason not to read Elections Clause legislation simply to mean what it says").

As the District Court held, App. 1436 & n.57, the canon of constitutional avoidance is another canon that helps courts choose from between two possible constructions, and this canon is one that *ITCA* endorsed. 133 S.Ct. at 2258-59. Significantly, all of these presumptions are means of defeating agency claims to

Chevron deference because they decide the case at *Chevron* step one, using traditional tools of statutory construction. *See* App. 1436 & n.57 (collecting cases on constitutional avoidance). As explained in the next two sections, these canons help interpret NVRA to preserve state power under the Voter-Qualification Clause from NVRA's encroachment under the Elections Clause.

2. EAC's Interpretation of NVRA Violates the Constitution

EAC's interpretation of NVRA would enable Congress to dilute the States' reasonable voter-qualification measures by purporting to classify those measures as merely procedural measurements, when in fact NVRA's purportedly procedural alternative measure sets a different substantive standard. The Elections Clause does not give Congress that power, and therefore Congress could not give EAC that power.

When faced with a population with either a willingness to commit perjury or the lack of sophistication to understand the simple Federal Form, the States' new voter-qualification standards are an objective measure that the federal checkbox-signature procedure simply is not. The unmodified power of the states to set elector qualifications in one section of Article I is not diminished by the limited power of Congress to regulate the "time, place, and manner" of elections in a different section of Article I. *Compare* U.S. CONST. art. I, §2, cl. 2 *with id.* art. I, §4, cl. 2. As Justice Harlan explained, "'[i]t is difficult to see how words could be clearer in

stating what Congress can control and what it cannot control" and "nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'" *ITCA*, 133 S.Ct. at 2258 (*quoting Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)). Congress lacks the authority under the Elections Clause to dilute the States' unquestioned authority under the Voter-Qualifications Clause by requiring a less-efficacious measure of citizenship – NVRA's discredited checkbox-and-signature approach – to assess compliance with the States' voter-qualification requirements.[15]

3. EAC's Interpretation of NVRA Violates NVRA

Although the foregoing arguments may be necessary to respond to the arguments put forward by EAC and ITCA, this Court could focus on something far simpler: NVRA and its implementing regulations appear to allow the relief that the States request. First, NVRA 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." 42 U.S.C. §1973gg-7(b)(1) (emphasis added). Second, the implementing regulations provide that the "state-specific instructions *shall contain … information regarding the state's specific voter eligibility and*

[15] Arizona did not press this issue in *ITCA* until its reply brief in the Supreme Court, 133 S.Ct. at 2259 n.9, and the Supreme Court did not consider it. *Id.* Here, by contrast, the substantive merits are before this Court and the States press them.

registration requirements." 11 C.F.R. §9428.3(b) (emphasis added). As the States point out, the use of similar wording with similar results in other parts of NVRA further support this position. *See* States' Br. at 30.

With respect to the Conference report suggesting that the States' request was neither necessary nor consistent with NVRA *in 1993*, H.R. Rep. No. 103-66, at 23 (1993); 139 Cong. Rec. 9231-32 (1993), the States have now demonstrated non-citizen registration *in 2014*, which makes these measures "necessary." Given NVRA's twin goals of electoral integrity and expanded registration, the appearance of non-citizen voters makes *any* action potentially inconsistent with NVRA. EAC's course of doing nothing plainly weakens electoral integrity, 42 U.S.C. §1973gg(b)(3); *Purcell*, 549 U.S. at 4, and the State's course of requiring proof of citizenship allegedly dampens registration. Given NVRA's balance between electoral integrity and expanding registration for *eligible* voters, 42 U.S.C. §1973gg(a), however, the States' actions are an eminently reasonable response to manifest non-citizen registration. Moreover, the States' response is entirely within the text of the statute and regulations, which is particularly important when EAC's rival position would raise serious concerns about NVRA's constitutionality. *See* Section II.B.1, *supra*.

CONCLUSION

This Court should affirm the District Court's judgment.

Dated: July 7, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,812 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

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1. The foregoing brief complies with the privacy requirements of Tenth Cir. Rule 25.5 because the brief does not contain any private information that that rule would require to be redacted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Service on all other parties to this action has occurred via electronic means.

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