No. 14-1164

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the court of appeals correctly uphold the decision of the U.S. Election Assistance Commission, that modifying the state-specific instructions on the federal mail voter registration form to include Arizona's and Kansas's state law requirements that applicants provide documentary proof of citizenship was not "necessary" for those States to enforce their voter eligibility qualifications pursuant to the National Voter Registration Act?

PARTIES TO THE PROCEEDINGS

Petitioners, the State of Kansas, the State of Arizona, Kansas Secretary of State Kris W. Kobach, and Arizona Secretary of State Michele Reagan, were the appellees in the court below. Respondents, the United States Election Assistance Commission and the acting Executive Director and Chief Operating Officer of the United States Election Assistance Commission Alice Miller, were appellants in the court below. Respondents, Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; Steve Gallardo; Project Vote, Inc.; League of Women Voters of the United States; League of Women Voters of Arizona; League of Women Voters of Kansas; Valle del Sol; Southwest Voter Registration Education Project; Common Cause; Chicanos por La Causa, Inc.; Debra Lopez, were intervenors-appellants in the court below.

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INTRODUCTION

Certiorari is not warranted in this case for three reasons. *First*, there is no "important federal question" presented because the decision below is correct and faithfully applies this Court's decision in *ITCA*. This Court has already resolved the issues in this matter and need not hear them again. *Second*, there is no circuit split on the issues. *Third*, the States' petition presents arguments not raised below, which makes the questions improper for consideration on certiorari.

STATEMENT OF THE CASE

From its enactment in 1993 to the time of this Court's decision in *Arizona v. Inter Tribal Council of Arizona,* 133 S. Ct. 2247 (2013) ("*ITCA*"), the National Voter Registration Act ("NVRA") has been interpreted consistently in accordance with its primary stated purpose: to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1).

Congress sought to fulfill this purpose in part by ensuring that states could not disenfranchise voters with discriminatory or burdensome registration requirements. *See ITCA*, 133 S. Ct. at 2255. Recognizing this goal and the need to protect the "integrity of the electoral process," 52 U.S.C. § 20501(b)(3), Congress debated and voted on the specific question of whether to permit states to require documentary proof of citizenship in connection with the National Mail Voter Registration Form ("Federal Form"), and, striking a balance among the statute's purposes, ultimately rejected such a proposal. *See* S. Rep. No. 103-6 (1993); 139 Cong. Rec. 5098 (1993); H.R. Rep. No. 103-66, at 23

(1993) ("Conf. Rep."); 139 Cong. Rec. 9231-32 (1993). In particular, the final Conference Committee Report concluded that a documentary proof of citizenship requirement was "not necessary or consistent with the purposes of this Act" and "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the [Act's] mail registration program." Conf. Rep. at 23-24 (1993).

This purpose was also recognized by the Federal Election Commission ("FEC"), which was initially responsible for maintaining the Federal Form. Although not faced with the question of documentary proof of citizenship, in drafting the rules that created the form, the agency noted that some of the information required by states on their individual voter registration forms, "while undoubtedly helpful, might not be considered 'necessary' as the term is used in the NVRA." 58 Fed. Reg. 51,132 (Sept. 30, 1993) (Advanced Notice of Proposed Rulemaking). The agency determined that:

> The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form.

59 Fed. Reg. 32,316 (June 23, 1994). The current Federal Form remains consistent with this design, and its state-specific instructions inform every

registrant in both Arizona and Kansas that he or she must be a citizen of the United States.

In 2006, Arizona requested that the Election Assistance Commission ("EAC"), which assumed the FEC's responsibility for the Federal Form, modify the state-specific instructions to include Arizona's new documentary proof-of-citizenship requirement, which was enacted by Proposition 200 in 2004. The EAC denied this request on multiple occasions, including by multiple 2-2 votes of the agency's commissioners. *See, e.g.*, Election Assistance Comm'n, Public Meeting (Mar. 20, 2008), *available at* http://www.eac.gov/assets/1/Events/minutes%20public%20meeting%20march%2020%202008.pdf (denying Arizona's request by a 2-2 tally vote).

Arizona subsequently attempted to set aside Federal Form applications without documentary proof of citizenship, but in 2013, this Court ruled that the NVRA required Arizona to accept and use the Federal Form for voter registration. In its ruling, this Court rejected Arizona's argument that, in order to enforce its voter qualifications, the State should be allowed to require Federal Form registrants to provide documentation of U.S. citizenship in addition to the Federal Form. The Court explained that "the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *ITCA,* 133 S. Ct. at 2255. The decision instructed that, if Arizona wanted to include its documentation requirements on the Federal Form, the State needed to make that

request to the EAC and then challenge any denial of the request under the Administrative Procedure Act.

A. The States' Laws and Failure to Demonstrate Necessity

The laws at issue in Arizona and Kansas require individuals to present certain forms of documentary proof of citizenship when registering to vote. Arizona's Proposition 200 requires local election officials to "reject any application for [voter] registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Only certain forms of documentary proof of citizenship, such as a "legible photocopy of the applicant's birth certificate," passport, or naturalization papers, qualify as "satisfactory evidence." *Id*. Kansas enacted a similar law that directs election officials to reject voter registration applications that fail to provide satisfactory evidence of United States citizenship. Kan. Stat. Ann. § 25-2309(l). As with Arizona's law, only particular forms of documentary proof of citizenship qualify as satisfactory evidence. *Id*.

After *ITCA*, Arizona and Kansas (the "States") informed the EAC that their state laws required documentary proof of citizenship to register to vote, and requested that the EAC modify the Federal Form accordingly. After the agency deferred this request, the States filed suit in the District of Kansas, which directed the EAC to act on the matter. In evaluating the States' request, the agency concluded that the Federal Form itself contains a number of mechanisms to verify citizenship, and that the States themselves had several alternative means

to verify citizenship, including coordinating records with driver's license agencies, reviewing information provided by potential jurors, and crosschecking information with two different databases (the federal "SAVE" database and the multistate "EVVE" database). *See* App. 106-09, 117-22. The agency concluded that the States' proffered evidence did not demonstrate that their documentary proof requirements were necessary to enforce their voter eligibility requirements, as required under the NVRA for the Federal Form to be amended. *See* App. 109-17.

Subsequently, the district court—misreading both the NVRA and *ITCA*—accepted the States' argument that the EAC must automatically rubberstamp any state's proposed addition of a documentary proof-of-citizenship requirement to the Federal Form.

B. The Decision Below Properly Applies Established Law

The Tenth Circuit reversed, and in doing so properly applied the NVRA and this Court's other precedents. In *ITCA*, this Court made clear that Arizona needed to demonstrate that its procedure was "necessary" to enforce its voter eligibility requirements. The States have not done so in this case. Disregarding clear language in *ITCA*, the States claim they have no obligation to demonstrate that their procedures are necessary to enforce their voter qualifications, and instead that the EAC must change the Federal Form to include any state registration procedure a state may adopt. But this Court already foreclosed that argument in *ITCA*, when it required the States to make a showing of

necessity before the EAC. And as both the EAC and Tenth Circuit found, the States have not been precluded from enforcing their eligibility requirements, and have ample means to obtain the necessary information to do so.

REASONS FOR DENYING THE WRIT

There is no circuit split or important question of federal law at issue in this case, and therefore no basis for granting a writ of certiorari. In *ITCA*, this Court set forth the governing legal standards and resolved the issues that the States now seek to relitigate. This Court directed the States to the EAC for any further proceedings. The EAC then applied the standards set forth in *ITCA* in a carefully reasoned, forty-six page decision following a notice-and-comment process. The district court erroneously reversed the EAC's decision based on the bare conclusion that the States' enactment of documentary proof-of-citizenship laws was sufficient to demonstrate that documentary proof was necessary to enforce their U.S. citizenship eligibility requirements. The court of appeals properly reversed, approving of the EAC's decision and concluding that the district court failed to follow this Court's roadmap in *ITCA*.

ITCA also explained the distinction between Congress's authority under the Elections Clause and Arizona's authority under the Qualifications Clause. Under the Elections Clause, Congress is empowered to regulate the "Times, Places, and Manner" of federal elections, which has long been understood to grant Congress broad authority to regulate voter registration in federal elections. U.S. Const. Art. I. §

4, cl.1;, *accord ITCA*, 133 U.S. at 2258 (quoting Federalist No. 60, at 371 (A. Hamilton)). The Qualifications Clause, along with the Seventeenth Amendment, allows each State to prescribe voter qualifications. U.S. Const. Art. I, § 2, cl.1; U.S. Const. amend. XVII; *ITCA*, 133 S. Ct. at 2258.

Relying on its authority under the Elections Clause, Congress enacted the NVRA to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1). With the same constitutional grounding, Congress created the Election Assistance Commission, which exercised its valid delegation of Congressional authority to reject the States' requests to modify the Federal Form to include their state-specific registration requirements to provide documentary proof of citizenship. The United States Court of Appeals for the Tenth Circuit unanimously upheld that decision, upholding the EAC's conclusion that documentary proof of citizenship was not necessary to enforce the States' voter qualification of United States citizenship. The States nonetheless maintain that the EAC had no authority to reject their requests and was, in fact, under a "nondiscretionary duty" to modify the Federal Form to reflect the States' documentary proof of citizenship registration requirement merely because they enacted statutes requiring documentary proof of citizenship.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. This Court will consider a grant of certiorari where there is a circuit split on an issue, or where there is an "important federal question" decided in a way that

conflicts with relevant decisions of this Court. Sup. Ct. R. 10(a), (c). Neither circumstance is presented in this case, and so certiorari is not warranted.

A. No "Important Federal Question" Is Raised By This Case

The Tenth Circuit's unanimous decision is firmly rooted in this Court's *ITCA* precedent, which definitively answered the federal question raised by the States. That answer governs this case, and the decision below does not "conflict[] with relevant decisions of this Court." Sup. Ct. R. 10(c). Certiorari is therefore not warranted.

1. The Tenth Circuit Followed This Court's Roadmap Laid Out In *ITCA*

In *ITCA*, this Court reaffirmed Congress's broad authority to regulate federal elections. For more than a century, this Court has consistently held that the "substantive scope" of the Elections Clause is "broad," *ITCA*, 133 S. Ct. at 2253, and invests Congress with "a general supervisory power over the whole subject" of federal elections. *Ex Parte Siebold*, 100 U.S. 371, 387 (1879). "'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as the States do not contest, regulations relating to 'registration.'" *ITCA*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Congress's authority to regulate federal elections extends to "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and

publication of election returns." *Smiley*, 285 U.S. at 366. And as *ITCA* clarified, "the States' role in regulating congressional elections . . . has always existed subject to the express qualification that it 'terminates according to federal law.'" *ITCA*, 133 S. Ct. at 2257 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). Simply put, there is very little that Congress cannot regulate with respect to federal elections, including registration.

In *ITCA*, this Court not only reaffirmed Congress's broad authority to regulate federal elections, it also identified "alternative means" for the States to attempt to influence registration procedures, by seeking changes to the Federal Form to incorporate their state-specific requirements. *ITCA*, 133 S. Ct. at 2259. Instead of permitting the States to hijack the EAC's authority to "develop" the Federal Form and manage its contents, *see* 52 U.S.C. § 20508(a)(2), (b)(1), this Court explained that the States "may ***request*** that the EAC alter the Federal Form to include the information the State deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act." *ITCA*, 133 S. Ct. at 2259 (emphasis added). If the EAC ultimately rejected the request, under the APA the States would then "have the opportunity to ***establish*** in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement." *Id.* at 2260 (emphasis added).

The Tenth Circuit adhered faithfully to this Court's century of precedent and its decision in *ITCA*, noting that *ITCA* serves as a staunch

reminder that "when Congress acts pursuant to the Elections Clause, courts should not assume reluctance to preempt state law." App. 22. Yet this improper outcome is precisely what the States seek to accomplish through this Petition. They argue that "[i]t would have made no sense for this Court to suggest this very lawsuit if the result was to deny the States" the ability to alter the registration requirements for the Federal Form. Pet. 18. But the opposite is true; APA review would make no sense if the EAC were required to accept the State's request *ab initio*. Indeed, APA review could not exist if the EAC acted as a rubber stamp for the States' demands, for there could never be a rejection to review. The Tenth Circuit correctly recognized the impossibility of the States' argument as well: "This would, of course, have rendered the Court's suggested option of appellate review both unnecessary and inapplicable." App. 6-7.

Rather, the Court's direction that the States return to the EAC and renew their requests for the EAC to alter the Federal Form confirms that the EAC determines what information is "necessary" to include on the Federal Form: if the EAC rejected the States' request, the States could seek APA review, where they would have the opportunity to establish that the state-specific registration requirements for documentary proof of citizenship are necessary to enforce their citizenship requirements, and that the NVRA "precluded [the] State[s] from obtaining the information necessary to enforce [their] voter qualifications." *ITCA*, 133 S. Ct. at 2258-59. Only upon successfully "establish[ing] in a reviewing court that a mere oath will not suffice" for the States to

enforce their citizenship qualification would the EAC be under a "nondiscretionary duty to include [the State's] concrete evidence requirement on the Federal Form." *Id.* (citing 5 U.S.C. § 706(1)).

The EAC did reject the States' request to change the Federal Form. Having specifically found that the States had several "alternative means" to enforce their citizenship qualification, the EAC determined that their documentary proof-of-citizenship registration requirements were not "necessary" to include in the Federal Form. App. 117-123. The States then sought review under the APA. But despite this Court's explicit instructions, the States made no attempt to demonstrate that their proof-of-citizenship requirements were necessary to enforce their voter qualifications of U.S. citizenship. Rather, the States argued exclusively (and convinced the district court) that the EAC was "under a nondiscretionary duty" to modify the Federal Form. App. 68-69. But the Tenth Circuit properly corrected this error, finding that the EAC was under no such nondiscretionary duty because each State failed to "support its position with evidence that will survive the evaluation of a reviewing court . . . that excluding the requested text would preclude the state from enforcing its voter qualifications." App. 24.

The States now try to justify their deficient efforts by claiming for the first time that "[p]rior to requesting that the EAC modify the Federal Form, [the States] already determined" that the registration requirements were necessary based on "firsthand experience." Pet. 26. But this Court had instructed the States to make the case before the

EAC, and if the EAC rejected it, to "***establish*** in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement." *ITCA*, 133 S. Ct. at 2260 (emphasis added). Unlike the States, the Tenth Circuit adhered to this Court's direction:

> Under the Court's approach, the EAC has a duty to include a state's requested text on the Federal Form only if a reviewing court holds, after conducting APA review, that excluding the requested text would preclude the state from enforcing its voter qualifications. . . . [The district court's] holding is inconsistent with the Supreme Court's statements that states must 'request' (rather than direct) the EAC to include the requested text, and must 'establish' (rather than merely aver) their need for it.

App. 24.

2. The States Improperly Conflate Voter Eligibility Requirements With Voter Registration Procedures

The States also attempt to escape the clear instruction of *ITCA* by arguing that the Tenth Circuit's opinion "evade[s] important constitutional restraints" by regulating the procedures by which the States seek to enforce their voter qualification of United States citizenship. Pet. 20. "If the Elections Clause trumped the Qualifications Clause," they argue, "then Congress could simply override any state voter qualification, rendering the Qualifications Clause a nullity." Pet. 21. But the States

misapprehend the relationship between the Elections Clause and the Qualifications Clause.

As noted above, both *Smiley* and *ITCA* confirmed that Congress has broad substantive authority to establish voter registration procedures. *ITCA*, 133 S. Ct. at 2268; *Smiley*, 285 U.S. at 366. While the Qualifications Clause grants the States exclusive authority to set their own voter eligibility requirements, this Court was very clear that "the States' role in regulating congressional elections . . . has always existed subject to the express qualification that it 'terminates according to federal law.'" *ITCA*, 133 S. Ct. at 2257-58 (quoting *Buckman Co.*, 531 U.S. at 347). Thus, the Elections Clause does indeed trump the Qualifications Clause in one important area: regulating procedural requirements (including registration) of congressional elections. But an important line cannot be crossed: Congress cannot "preclude[] a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2258-59. Doing so would "raise serious constitutional doubts." *Id.* So long as Congress—or the EAC and the Tenth Circuit's affirmation of the EAC's congressional authority—does not preclude the States from enforcing their voter qualifications, no serious constitutional doubts are raised by congressional regulation of voting registration procedures.

The States assert that the Tenth Circuit's opinion precludes them from enforcing their voter qualification when instead it merely regulates a voting registration procedure per "validly conferred" congressional authority. *See ITCA*, 133 S. Ct. at

2259. But as this Court determined, the qualification at issue is U.S. citizenship, not the documents that can help prove citizenship: "We resolve this case on the theory on which it has hitherto been litigated: that citizenship (not registration) is the voter qualification Arizona seeks to enforce." *Id.* at 2259 n.9.

Similarly, the Tenth Circuit's opinion reflects the fact that the qualification at issue is United States citizenship, not the documentary proof of that citizenship:

> Even as the *ITCA* Court reaffirmed that the United States has the authority under the Elections Clause to set ***procedural*** requirements for registering to vote in federal elections (*i.e.*, that documentary evidence of citizenship may not be required), it noted that individual states retain the power to set ***substantive*** voter qualifications (*i.e.*, that voters be citizens).

App. 22-23. Thus, "serious constitutional doubts" would only be raised if the States "could prove that federal requirements precluded it from obtaining information necessary to enforce its qualifications." App. 23. Again, as this Court explained, only if the States could, under the APA, "establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement" would the EAC be required to include the States' documentary proof-of-citizenship requirements in the Federal Form. *ITCA*, 133 S. Ct. at 2260. But the States were ***unable*** to establish that documentary proof of citizenship was necessary and are therefore wrong to

claim that the Tenth Circuit "disregarded this Court's guidance on the subject." Pet. 21. In fact, as both the EAC and the Tenth Circuit concluded, the States had ample means to obtain the necessary information to enforce their qualification that only United States citizens register to vote. Specifically, the Tenth Circuit noted that the EAC's "decision discussed in significant detail no fewer than five alternatives to requiring documentary evidence of citizenship that states can use to ensure that noncitizens do not register using the Federal Form." App. 27; *see also* App. 117-23. Thus the States clearly failed to meet the burden set in *ITCA* to overcome the EAC's decision. *ITCA*, 133 S. Ct. at 2260.

The States' own voter registration laws demonstrate the distinction between a voter qualification and the procedural means of proving it. For example, Kansas's constitution provides that "every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Kan. Const. art. 5 § 1. Only after establishing the ***qualification*** of U.S. citizenship for qualified electors does the constitution detail—in a separate provision—that the legislature may provide for "proper proofs" of the right to vote." Kan. Const. art. 5 § 4. U.S. citizenship clearly is the qualification; the manner of proving that qualification is merely a registration procedure.

Once the distinction between voter qualifications and voting registration procedures is properly understood, and the Elections Clause and

Qualifications Clause no longer are conflated, it is clear that there is no conflict of "statutory and constitutional construction" as the States claim. Pet. 20. Nor is the Qualifications Clause "render[ed] . . . mere surplusage" to make it "form without substance." Pet. 20; *Cohens v. Virginia*, 19 U.S. 264, 300 (1821) (internal quotation marks and citation omitted). The Elections Clause and Qualifications Clause separately enable the states and Congress with different powers to regulate aspects of elections. But there is no doubt that the States' regulatory power "'terminates according to federal law'" in federal elections so long as the States are not precluded from enforcing their voter eligibility requirements. *ITCA*, 133 S. Ct. at 2257-58 (quoting *Buckman Co.*, 531 U.S. at 347).

3. The Tenth Circuit's Opinion Comports with the NVRA

The Tenth Circuit's opinion not only respects this Court's instructions in *ITCA*, but it is also compelled by the NVRA itself. The NVRA and the Federal Form were intentionally created to prevent the enactment and enforcement of laws that make voter registration more difficult. Congress commissioned the Federal Form as a response to "discriminatory and unfair registration laws and procedures" imposed by certain states, with the express goal of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(a)(3), (b)(1). The Tenth Circuit's decision ensures that the Federal Form fulfills this purpose.

With this stated goal in mind, *ITCA* recognized that "the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *ITCA*, 133 S. Ct. at 2255. The States' documentary proof-of-citizenship requirements are nothing if not "procedural hurdles."

ITCA also held that the NVRA prevents Arizona "from requiring a Federal Form applicant to submit information beyond that required by the form itself." 133 S. Ct. at 2260. As the Court explained, 52 U.S.C. § 20505(a)(1) of the NVRA directs states to "accept and use" the Federal Form to register voters, without requiring any additional information or documentation beyond that required by the Form itself. 133 S. Ct. at 2259-60. Section 20508, in turn, enumerates what must be included in the Federal Form and directs the EAC to develop and maintain the Federal Form. That section also circumscribes the content of the Federal Form by declaring that it "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." 52 U.S.C. § 20508(b)(1) (emphases added).

The Federal Form is a single page that is detached from its application instructions and placed in the mail. It does not require applicants to submit any documentation demonstrating United States citizenship. *See ITCA*, 133 S. Ct. at 2256, 2259-60; 11 C.F.R. § 9428.4. Rather, it requires voter registration applicants to attest—under penalty of

perjury—that they are U.S. citizens and provides a further checkbox to affirm the same. 52 U.S.C. § 21083(b)(4); 11 C.F.R. § 9428.4(b). To ensure that registrants understand the gravity of the attestation, the Federal Form contains information about "the penalties provided by law for submitting a false voter registration application," which include fines, imprisonment, and deportation for non-citizens. 11 C.F.R. § 9428.4(b). In developing and maintaining the Federal Form, the EAC did not include a documentary proof-of-citizenship requirement, finding such a requirement to be duplicative and inconsistent with the NVRA's language and purpose. *Cf.* 59 Fed. Reg. 32,316 (June 23, 1994) ("The issue of U.S. citizenship is addressed within the oath required by the [NVRA] and signed by the applicant under penalty of perjury.").

In light of this statutory framework, the Supreme Court held that Arizona's documentary proof-of-citizenship requirement was preempted by the NVRA's mandate that States "accept and use" the Federal Form. *See ITCA*, 133 S. Ct. at 2260. Arizona was thus prohibited from requiring a Federal Form applicant to submit information beyond that which is (1) specifically enumerated in the NVRA, or (2) otherwise determined by the EAC to be "necessary" to assess voter eligibility. Indeed, this is clear from the language of the statute itself. The NVRA provision at issue states that the EAC "may require ***only*** such identifying information . . . as is ***necessary*** to enable the appropriate State election official to assess the eligibility of the applicant . . . ." 52 U.S.C. § 20508(b)(1) (emphases added). By providing that the EAC "may require

only" such information as is necessary, Congress prohibited the EAC from including that information unless it is necessary. Thus, Congress not only authorized the EAC to determine whether the information is necessary, it imposed a ***duty*** on the EAC to do so.

Guided by the Court's "exhaustive examination of the NVRA," the Tenth Circuit was "compelled by *ITCA* to conclude that the NVRA preempts Arizona's and Kansas' state laws" requiring registrants to provide documentary proof-of-citizenship. App. 20-21. This conclusion was both appropriate and necessary. Anything less would undermine the fundamental purpose of the NVRA and the Federal Form.

Quite simply, the only difference between the Federal Form and the changes the States seek is that they seek to ***impose*** a procedural hurdle that Congress intentionally chose not to require voter registration applicants to clear. As the Tenth Circuit noted, "permitting such state alterations threaten[s] to eviscerate the [Federal] Form's purpose of 'increas[ing] the number of eligible citizens who register to vote.'" App. 22 (quoting *ITCA*, 133 S. Ct. at 2256); 52 U.S.C. 20501(b)(1). Unless the EAC finds that the information is "necessary" to enforce the States' voter qualifications, the Federal Form must remain free of the State's "procedural hurdles," as Congress intended. *See ITCA*, 133 S. Ct. at 2255. The Tenth Circuit's decision affirming the EAC's decision was thus not only appropriate, but it was necessary to comply with the NVRA.

B. No Division Among The Circuits Exists

This case is also not appropriate for certiorari review because no division exists among the circuits, and as the States themselves acknowledge, "[a] circuit split is not likely to materialize anytime soon." Pet. 34-35. No court of appeals has found that the NVRA requires the EAC to adopt a state-specific documentary proof of citizenship requirement for voter registration.

The Tenth Circuit's decision follows *ITCA* and its backdrop of well-established precedent affirming Congress's—and by delegation, the EAC's —regulatory authority over voter registration and other election related procedures. *See, e.g., Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (affirming Congress's authority to determine the process for voter registration); *Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (explaining the NVRA "does not unconstitutionally impinge upon Michigan's sovereignty by affecting state election procedures"); *Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (federal alteration of registration procedures is "exactly what is contemplated by Article 1 section 4."). The Tenth Circuit's opinion also is consonant with the decisions of other courts of appeals that have soundly rejected attempts by states to read terms of the NVRA out of existence to allow states to impose policies otherwise inconsistent with the NVRA. *See, e.g., U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (NVRA properly

regulates voting procedures "and by so doing overrides state law inconsistent with its mandates").

Here, the Tenth Circuit is in harmony with its sister circuits. It even corrects the errant district court's decision, bringing this case in line with precedent from other jurisdictions. Simply put, no court has concluded—as the States now seek—that the Qualifications Clause grants states the power to modify the registration requirements for the Federal Form. There is therefore no circuit split to resolve.

C. This Case Is Not One Of "Great National Importance" Creating A "Constitutional Crisis" That Will Call Into Question The Validity Of The 2016 Election In Kansas And Arizona

In a final attempt to obtain a grant of certiorari from this Court, the States claim that the Tenth Circuit's opinion created a "crisis" in their jurisdictions that requires redress from this Court. But the supposed "harm" identified by the States is nothing more than a product of their own concoction.

The States lament that the Tenth Circuit's opinion caused the creation of two separate voter rolls in Kansas and Arizona: one for voters qualified to vote in state elections, and another for voters who are qualified to vote only in federal elections. *See* Pet. 31. This purportedly creates a "direct conflict with Article I, Section 2, Clause 1, and of the Seventeenth Amendment." *Id.* Article I, Section 2, Clause 1 of the Constitution requires that "the Electors in each State shall have the Qualifications requisite of Electors of the most numerous Branch of

the State Legislature." U.S. Const. Art. I. § 2, cl. 1. The Seventeenth Amendment requires that the Electors for federal elections shall have the same qualifications as the electors for state elections. *See* U.S. Const. amend. XVII. The States argue that by affirming the EAC's rejection of the States' requests to include their documentary proof of citizenship requirements in the Federal Form, the Tenth Circuit hijacked the States' "power to determine who is qualified to vote," restricting it "to setting qualifications for electors in state elections" only. Pet. 33.

As an initial matter, the States raise this issue of dual registration rolls and a potential conflict with the 2016 election for the first time in their Petition. This Court has repeatedly stated that an issue not raised before the district court or the court of appeals cannot be raised for the first time in a Petition for Writ of Certiorari. *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Illinois v. Gates*, 462 U.S. 213, 222-23 (1983); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (explaining that a question "not raised in the Court of Appeals . . . is not properly before us"). Because the States failed to raise the issue of dual voter rolls in the courts below, they waived the right to raise the issue in their Petition

More fundamentally, the States' purported "crisis" is merely a product of their own design. As previously explained, the voter qualification at issue is United States citizenship, not the documentary proof required to prove the citizenship. The States' determination of voter eligibility—that only United States citizens are able to vote—remains

undisturbed. Furthermore, the States have already demonstrated that separate rolls are wholly unnecessary. As the EAC reasonably found based on the administrative record, and the Tenth Circuit explicitly noted, the States' election officials can—and have—verified citizenship without the documentary proof they purport to need. *See* App. 27, 117-23.

With the States' authority to set and enforce voter qualifications unimpeded, and with demonstrated alternatives available for the States to verify citizenship, the consequences of a decision to maintain dual voter rolls fall squarely on the States. There is no need for the States to maintain dual voter rolls because they have alternative means available to verify that those registered to vote in federal elections are, in fact, United States citizens, and are therefore eligible to vote in ***all*** elections. And if the dual voter rolls eventually play a role in the 2016 election, as the States warn, it will be due to the States' own choices. "[I]n *ITCA*, the Court stated that the states must carry their burden 'to establish in a reviewing court that a mere oath will not suffice.' Generalized complaints that the memorandum's suggested approaches present logistical difficulties do not meet *ITCA's* standard." App. 27 (quoting *ITCA*, 133 S. Ct. at 2260). There simply is no basis for the States to claim that their own decision to establish that dual voter rolls are of such great national importance that they requires the attention of this Court, especially when the dual rolls purportedly create a "conflict" entirely by design.

CONCLUSION

Unable to demonstrate that their documentary proof-of-citizenship registration requirements are "necessary" to enforce the qualification that only United States citizens register to vote, the States fail to show why the Tenth Circuit's decision was incorrect. As no important federal question is raised, no circuit split exists, and no national issue is created by the Tenth Circuit's sound decision, this Petition should be denied.

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Respectfully submitted,

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