

Nos. 14-3062, 14-3072

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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KRIS W. KOBACH, *et al.*,  
Plaintiff-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  
Case No. 5:13-cv-4095

—————  
**AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. AND  
ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF  
APPELLEES AND AFFIRMATION**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for *amici* state that Judicial Watch, Inc. and the Allied Educational Foundation are non-profit organizations. They have no stock or parent corporation. As such, no public company owns 10% or more of their stock.

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the Act, Federal Election Commission, January 1, 1994,  
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## OTHER AUTHORITIES

- Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, “Noncitizens Under Age 35: 2010–2012,” American Community Survey Briefs (Feb. 2014), available at <http://www.census.gov/prod/2014pubs/acsbr12-06.pdf> .....11
- Associated Press, “Investigation Sought of Non-Citizen Voting in Michigan,” (Dec. 7, 2013), available at <http://detroit.cbslocal.com/2013/12/07/investigation-sought-of-non-citizen-voting-in-michigan/> .....12
- Chris Brennan and Catherine Lucey, “Philly election official details examples of voter fraud,” Philadelphia Daily News (July 19, 2012), available at [http://articles.philly.com/2012-07-19/news/32731301\\_1\\_voter-fraud-voter-id-law-voters-cast-ballots](http://articles.philly.com/2012-07-19/news/32731301_1_voter-fraud-voter-id-law-voters-cast-ballots) .....12
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- Rasmussen Reports, “New Low: 39% Think U.S. Elections Are Fair,” (Aug. 16, 2013), available at [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2013/new\\_low\\_39\\_think\\_u\\_s\\_elections\\_are\\_fair](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair) .....7

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Eric Shawn, “Non-citizens caught voting in 2012 presidential election in key swing state,” Fox News, (Dec. 18, 2013), available at <http://www.foxnews.com/politics/2013/12/18/non-citizens-caught-voting-in-2012-presidential-election-in-key-swing-state/> .....12

Simon Thompson, “Voting Rights: Earned or Entitled?,” Harvard Political Review (Dec. 3, 2010), available at <http://harvardpolitics.com/united-states/voting-rights-earned-or-entitled/> .....3

Hans A. von Spakovsky, “The Threat of Non-Citizen Voting,” Legal Memorandum No. 28, The Heritage Foundation, (July 10, 2008), available at <http://www.heritage.org/research/reports/2008/07/the-threat-of-non-citizen-voting> .....12

## INTERESTS OF THE *AMICI*<sup>1</sup>

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan educational organization that seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in various federal courts on a number of occasions. Judicial Watch is also engaged in a multi-year legal effort to ensure that states are keeping their voter registration lists accurate and current as required by Section 8 of the National Voter Registration Act (“NVRA”). On behalf of its members, Judicial Watch recently concluded litigation against the chief state election officials in Indiana and Ohio concerning their obligations under Section 8 to maintain accurate voter lists.

The Allied Educational Foundation (“AEF”) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in numerous federal courts. In addition, AEF regularly participates in election law matters before federal courts, and since 2012 has appeared as an

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.



*amicus* in election integrity cases in Tennessee, Virginia, and North Carolina. AEF has also filed *amicus* briefs in election law cases advocating the protection of citizens' rights to participate in elections and to have their votes counted in ballot initiative and referendum measures.

In the course of participating in the above-described election integrity litigation, *amici* have developed a perspective and expertise concerning election law which they believe will be helpful to this Court. *Amici* are concerned that the relief requested by Appellants in this case, if granted, would have a chilling effect on voter confidence in the integrity of elections in Kansas and Arizona, as well as nationwide. If Kansas and Arizona cannot verify the citizenship of those registering to vote, citizens may have their votes cancelled out by unlawful ballots cast in the names of noncitizens. The mere threat of this outcome will undermine voters' confidence that elections are being conducted fairly and honestly.

### **ARGUMENT**

It is a federal crime for noncitizens to knowingly misrepresent their citizenship status to register or cast a vote for candidates in federal elections. 18 U.S.C. § 611; 18 U.S.C. § 911; 18 U.S.C. § 1015(f). In Arizona and Kansas (and

every other state),<sup>2</sup> it is also a violation of state law for noncitizens to vote in federal elections. The U.S. Constitution's *Qualification Clause* gives states the power to enact laws prohibiting noncitizens from voting in both state *and federal* elections. U.S. Const. art. I, § 2, cl. 1. The U.S. Election Assistance Commission ("EAC") – apparently uninterested in federal law enforcement – now seeks to prevent states from enforcing their own lawfully enacted statutes designed to ensure that voter-qualification laws are followed.

The EAC's interpretation of the NVRA disregards the importance of election integrity and of preventing noncitizen voter registration. The EAC ignores both general and specific language in the NVRA which dictates that election integrity concerns must be balanced evenly with concerns over ballot access. The EAC pays no heed to Congress' concern that voter fraud – as well as the widespread perception that officials do not care about such fraud – corrodes Americans' faith in electoral institutions and diminishes their confidence that elected officials deserve to hold the offices that they occupy. Had the EAC fairly considered these things, it would have been compelled to reach a different conclusion regarding the proper interpretation of the NVRA. Its interpretation is impermissible under *Chevron* and this Court should overturn it.

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<sup>2</sup> Derek T. Muller, "Invisible Federalism and the Electoral College," 44 Ariz. St. L.J. 1237, 1275-1276 (Fall 2012); *see also* Simon Thompson, "Voting Rights: Earned or Entitled?" Harvard Political Review (Dec. 3, 2010), available at <http://harvardpolitics.com/united-states/voting-rights-earned-or-entitled/>.

**I. The NVRA Protects Election Integrity, Which is Necessary for the Nation to Have Confidence in the Legitimacy of its Elected Leaders**

As *amicus* Judicial Watch explained in the comments it filed with the EAC in the agency proceedings, the EAC's decision will thwart the states' efforts to comply with the election integrity provisions of the NVRA. The NVRA is not a statute solely focused on ballot access, as the EAC wrongly implies throughout its decision. *See infra*, Section II. Rather, the NVRA reflects a compromise designed both to increase lawful voter registration and to increase the integrity of elections by ensuring that voter rolls are accurate and contain only eligible voters. The NVRA was enacted "to establish procedures that will increase the number of eligible citizens who register to vote," as well as to "protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (3)-(4).

To accomplish these goals, Section 6 of the NVRA, 42 U.S.C. § 1973gg-4, was passed to expand opportunities to register to vote by requiring states to allow citizens to register by mail, along with Section 7 of the NVRA, 42 U.S.C. § 1973gg-5, which requires states to allow citizens to register to vote at public assistance agencies. As counterparts to these provisions, Section 5 of the NVRA, 42 U.S.C. § 1973gg-3, requires states to use their driver's license records to ensure the accuracy and currency of voter registration lists, and Section 8 of the NVRA, 42 U.S.C. § 1973gg-6, was designed to increase the integrity of elections by

requiring states to maintain accurate voter rolls that contain only the names of eligible voters. The NVRA's ballot access and election integrity provisions function as counterparts. The law represents a carefully crafted compromise by Congress to increase both voter registration *and* the integrity of voter lists.

According to the NVRA Senate Report:

An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis. The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud.<sup>3</sup>

Beyond preventing voter and election fraud, a key purpose of the NVRA's election integrity provisions is to protect citizens' *confidence* that elections are being conducted fairly and honestly. As a federal district court in Indiana recently explained:

[Citizens] who are registered to vote in Indiana are injured by Indiana's failure to comply with the NVRA list maintenance requirements because that failure "undermin[es] their confidence in the legitimacy of the elections held in the State of Indiana and thereby burden[s] their right to vote."... As the Supreme Court has recognized, "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds

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<sup>3</sup> S. Rep. 103-6 at 17-18, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess., reprinted in "Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples," Appendix C, Senate Committee Report on the Act, p. C-10, Federal Election Commission (Jan. 1, 1994), available at <http://www.eac.gov/assets/1/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf>.

distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”

*Judicial Watch, Inc. v. King*, 2012 U.S. Dist. Lexis 174360, \*12-13 (S.D. Ind., Dec. 10, 2012) (internal citations omitted). As the court observed, a lack of confidence in the electoral process deters voters from voting in the first place, because no one wants to waste time casting a ballot in an election where fraudulent ballots are counted the same as valid ones.

Adding force to this point, the U.S. Supreme Court has explained that ensuring that elections are legitimate with verifiable results has a value that is separate from the laudable goal of preventing voter fraud:

[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

*Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008). The Court expressly noted that the record contained “no evidence of [voter impersonation] fraud actually occurring in Indiana,” but held nevertheless that Indiana still had a strong interest in preventing voter fraud because fraud had occurred “in other parts of the country” and “the risk of voter fraud [is] real [and] it could affect the outcome of a close election.” *Crawford*, 553 U.S. at 194-196.<sup>4</sup>

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<sup>4</sup> There are, in fact, many documented cases of noncitizens casting fraudulent ballots in recent U.S. elections. See discussion *infra* at note 10.

It is necessary for states to restore the American public's confidence that elections are honest by enforcing election integrity laws. Large segments of the American public have recently expressed their dismay with various aspects of our electoral system. A poll from August of 2013 reported that only 39% of Americans believe elections are fair.<sup>5</sup> In 2012, another poll reported that more than two-thirds of registered voters thought voter fraud was a problem.<sup>6</sup> In 2008, when a poll asked respondents around the world whether they had "confidence in the honesty of elections," 53% of Americans said that they did not.<sup>7</sup> This data reveals a startling lack of confidence in our own electoral institutions. Rejecting the EAC's decision and upholding states' authority to take measures to ensure that only eligible U.S. citizens can vote will help to restore Americans' faith in the integrity of our elections and the legitimacy of our elected government.

## **II. The EAC's Decision Ignores the Election Integrity Language and Purpose of the NVRA**

The EAC also has ignored the direction of Congress. Specifically, the EAC has fundamentally misread the NVRA as a whole and, in particular, Section

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<sup>5</sup> Rasmussen Reports, "New Low: 39% Think U.S. Elections Are Fair" (Aug. 16, 2013), available at [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2013/new\\_low\\_39\\_think\\_u\\_s\\_elections\\_are\\_fair](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair).

<sup>6</sup> Kevin Robillard, "Poll: 36% say voter fraud major issue," Politico (Oct. 26, 2012), available at <http://www.politico.com/news/stories/1012/82936.html>.

<sup>7</sup> Magali Rheault and Brett Pelham, "Worldwide, Views Diverge About Honesty of Elections" (Nov. 3, 2008), available at <http://www.gallup.com/poll/111691/worldwide-views-diverge-about-honesty-elections.aspx>.

9(b)(1). As discussed above in Section I, the NVRA was a grand compromise designed to increase both ballot access and election integrity. The EAC errs by focusing on only half of that equation, discounting the NVRA's purpose "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(3)-(4). Only by reading the goal of election integrity out of the NVRA can the EAC reach its preferred interpretation. The EAC barely considers the NVRA's emphasis on election integrity and voter confidence, using the words "integrity" and "confidence" only once each in its entire 46-page opinion. EAC Memorandum of Decision, Jan 17, 2014 ("EAC Decision") at 8.

It is apparent throughout its decision that the EAC is only concerned with one of the two main purposes of the NVRA: ballot access. *See* EAC Decision at 12 ("...Congress enacted the NVRA in 1993 in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office."); EAC Decision at 41 ("...Congress enacted the NVRA in part to "increase the number of eligible citizens who register to vote in elections for Federal office" and to "enhance[] the participation of eligible citizens as voters in elections for Federal office." In enacting the statute, Congress found that "the right of citizens of the United States to vote is a fundamental right" and that "it is the duty of the Federal,

State, and local governments to promote the exercise of that right.”) (internal citations omitted); EAC Decision at 42 (“It is also clear from the text of the NVRA that one purpose of the state’s mail registration provision is to facilitate voter registration drives.”).

Not once in its ruling does the EAC describe the other equally important purposes of the NVRA – protecting election integrity and ensuring that voter rolls are accurate and contain only eligible voters. 42 U.S.C. § 1973gg(b)(3)-(4). By ignoring the other purposes of the statute, the EAC adopts a lopsided approach that treats disenfranchisement by fraud and the loss of public confidence in elections as irrelevant. *See supra*, Section I; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”) (internal citations omitted).

Furthermore, Section 9(b)(1) of the NVRA specifically provides that the federal form must include information “necessary” not only for state officials “to assess the eligibility of voters,” but also information that is necessary for state officials “to administer voter registration.” 42 U.S.C. § 1973gg-7(b)(1). The latter phrase is neither ambiguous nor an afterthought. Section 8 of the NVRA is titled, “Requirements with respect to administration of voter registration.” 42 U.S.C. § 1973gg-6. NVRA Section 8 requires states to “conduct a general program that



makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters” and “to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office.” 42 U.S.C. §§ 1973gg-6(a)(4), 1973gg-6(b). The EAC refused to consider whether proof of citizenship was “necessary” for state officials to administer accurate voter rolls as required by NVRA Section 8. As explained below, this omission does violence to the congressionally intended scope of the NVRA and to the ability of states to administer the statute’s provisions.

The NVRA Section 8 obligation that states maintain accurate voter rolls requires states to prevent noncitizens from *registering* to vote. As a federal district court recently explained, NVRA Section 8 mandates that states take necessary measures to keep noncitizens off of the voter registration lists:

Both sides agree that a state can remove an improperly registered noncitizen. . . For noncitizens, the state’s duty is to maintain an accurate voting list. *See, e.g.*, 42 U.S.C. § 1973gg-6(b). **A state can and should do that on the front end, blocking a noncitizen from registering in the first place.** And if a state finds it has made an error--or a number of errors--and wishes to correct the problem, it should do so well in advance [of a federal election].

*United States v. Florida*, 870 F. Supp. 2d 1346, 1351 (N.D. Fla. 2012) (emphasis added). The NVRA’s broad language demonstrates that states’ obligation to maintain accurate voter rolls carries with it the implicit requirement to ensure that *only* eligible voters are on the rolls. The EAC’s interpretation of the statute fails to

account for this crucial legislative goal, and will put Kansas and Arizona in jeopardy of violating their obligations under NVRA Section 8.

### **III. Even Low Levels of Noncitizen Registration and Voting Disenfranchise U.S. Voters and Can Alter the Outcome of Elections**

Under the NVRA, it is both reasonable and necessary for states to ensure that noncitizens do not register to vote. The EAC erred in concluding otherwise. According to a report from U.S. Census Bureau, in 2012 there were approximately 22 million noncitizens (both lawfully and unlawfully present) in the U.S. out of a total population of 311 million.<sup>8</sup> This means that roughly 6 percent of the U.S. population lacks citizenship – or about 1 in 17 people. It is well established, moreover, that Arizona has one of the highest non-citizen populations in the United States, and Kansas, in part due to particular industries in the southwestern part of the state, also has a sizable noncitizen population.<sup>9</sup> In light of these facts, for the EAC to deem these states’ precautions as “unnecessary” strains the meaning of the word.

As the EAC acknowledges, both Kansas and Arizona submitted evidence that noncitizens have registered to vote regardless of the requirement to affirm

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<sup>8</sup> Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, “Noncitizens Under Age 35: 2010–2012,” American Community Survey Briefs, p. 2 (Feb. 2014), available at <http://www.census.gov/prod/2014pubs/acsbr12-06.pdf>.

<sup>9</sup> See Henry J. Kaiser Family Foundation, “Population Distribution by Citizenship Status,” available at <http://kff.org/other/state-indicator/distribution-by-citizenship-status/> (last visited July 1, 2014).

citizenship on the mail-in form. EAC Decision at 31-33. In response, the EAC dismissed this documented illegality as not “significant” enough to warrant greater enforcement. EAC Decision at 33. In the EAC’s own words: “[T]he EAC finds that the small number of registered noncitizens that Arizona and Kansas point to is not cause to conclude that additional proof of citizenship must be required of applications for either state to assess their eligibility...” EAC Decision at 35.<sup>10</sup>

In so ruling, the EAC undermines one of the NVRA’s two core purposes: the prevention of illegal voter registrations, not only for the sake of preventing fraud but also to protect voters’ confidence in honest elections. *See supra* Sections I and II. The EAC is not at liberty to contradict this congressional instruction, and the

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<sup>10</sup> The experience in Arizona and Kansas is not unique. Noncitizens have registered and voted in a number of recent U.S. elections. *See* Hans A. von Spakovsky, “The Threat of Non-Citizen Voting,” Legal Memorandum No. 28, The Heritage Foundation, (July 10, 2008) (documenting multiple noncitizen votes, along with a 2005 GAO finding that perhaps 3 percent of 30,000 persons called for jury duty from voter registration rolls in a single district court were not U.S. citizens), available at <http://www.heritage.org/research/reports/2008/07/the-threat-of-non-citizen-voting>; Associated Press, “Investigation Sought of Non-Citizen Voting in Michigan,” (Dec. 7, 2013) (10 noncitizens alleged to have voted in Michigan elections), available at <http://detroit.cbslocal.com/2013/12/07/investigation-sought-of-non-citizen-voting-in-michigan/>; Eric Shawn, “Non-citizens caught voting in 2012 presidential election in key swing state,” Fox News, (Dec. 18, 2013) (at least 17 noncitizens voted in Ohio in the 2012 presidential election), available at <http://www.foxnews.com/politics/2013/12/18/non-citizens-caught-voting-in-2012-presidential-election-in-key-swing-state/>; Chris Brennan and Catherine Lucey, “Philly election official details examples of voter fraud,” Philadelphia Daily News (July 19, 2012) (“The report found seven registered voters who cast ballots in the past decade — including one this year — despite not being U.S. citizens.”), available at [http://articles.philly.com/2012-07-19/news/32731301\\_1\\_voter-fraud-voter-id-law-voters-cast-ballots](http://articles.philly.com/2012-07-19/news/32731301_1_voter-fraud-voter-id-law-voters-cast-ballots).

EAC is wrong to cite the relatively low volume of proven illegal registrants in Arizona and Kansas as diminishing their “significance.” A bipartisan panel convened to examine the existence and impact of voter fraud, the Carter-Baker Commission, had this to say about the size of the voter fraud relative to its “significance”:

While the Commission is divided on the magnitude of voter fraud — with some believing the problem is widespread and others believing that it is minor — there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system.<sup>11</sup>

And such “close elections” occur all the time. In January of this year, Ohio Secretary of State Jon Husted released remarkable statistics showing that, in 2013, 35 local races and 8 local ballot issues were decided in that state either by *one* vote, or by a coin-flip following an electoral *tie*.<sup>12</sup> Illegal voting at any level can change the outcome of elections. And there is no acceptable amount of fraud. Efforts like those of Arizona and Kansas to eliminate illegal voter registrations fall squarely

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<sup>11</sup> See Report of The Commission on Federal Election Reform, Jimmy Carter and James A. Baker, III (Co-Chairs), “Building Confidence in U.S. Elections,” American University’s Center for Democracy and Election Management, pp. 18-19 (Sept. 2005), available at [http://www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf).

<sup>12</sup> Press Release, “Secretary of State Husted Reminds Ohioans: One Vote Matters,” Ohio Secretary of State’s Office (Jan. 13, 2013), available at <https://www.sos.state.oh.us/SOS/mediaCenter/2014/2014-01-13.aspx>.

within the NVRA's directives to the states, and are of critical importance to the sound functioning of American democracy.

#### **IV. The EAC's Ruling is Unlawful Under Both the Constitutional Avoidance Doctrine and *Chevron***

*Amici* agree with the District Court's holding that the EAC is not entitled to *Chevron* deference under the doctrine of constitutional avoidance, and that the EAC's interpretation of the NVRA is unlawful under that doctrine. *See* District Court Memorandum and Order, March 19, 2014 ("Order") at 14-16, 26-27. But even if the EAC's interpretation were entitled to deferential review from the courts, it should still be overturned because the EAC's interpretation of the NVRA is flawed in two ways. First, the EAC's interpretation of what is "necessary" under NVRA Section 9 is an impermissible construction of the statute. Second, the EAC's interpretation of the extent of its own authority to judge what is "necessary" and what is not is incorrect.

Where a statute is silent or ambiguous as to a specific question, courts will evaluate whether an agency's interpretation "is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The EAC's interpretations do not constitute "permissible constructions" of the NVRA under *Chevron* and so must be overturned. "[W]here Congress has established an ambiguous line, the agency can go no further than the

ambiguity will fairly allow.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The EAC’s interpretations of the NVRA, and of NVRA Section 9(b)(1) in particular, are flawed. Under the NVRA, the EAC must create a mail-in voter registration form in consultation with the states, which all states must use to allow citizens to register to vote in federal elections. 42 U.S.C. §§ 1973gg-7(a)(2), 1973gg-4(a)(1). Section 9 of the NVRA specifies that this federal mail-in registration form:

[M]ay 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 and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1) (emphasis added).

The EAC’s determination that Arizona’s and Kansas’ rules are not “necessary” to determine eligibility under the NVRA is not a permissible construction of the word when considering both the overall purposes of the NVRA and the citizenship qualification in question. As previously discussed, the EAC’s interpretation of what was “necessary” for state officials to assess qualifications slights the NVRA’s emphasis on election integrity, ignores the prevalence of noncitizens in the U.S., discounts the impact of illegal ballots, and disregards the consequences to voter confidence of preventing states from enforcing election integrity measures. *See supra* at Sections I, II, and III. Since the NVRA has the

dual purpose of protecting both election integrity and ballot access, and since the EAC's ruling only takes into account one of those two purposes, its ruling does not "provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . ." *Chevron*, 467 U.S. at 866 (internal citations omitted).

Indeed, the EAC did not even consider whether proof of citizenship was "necessary" for the other purpose specifically outlined in Section 9(b) – the administration of voter registration, which includes maintaining accurate and current voter rolls. *See supra* at pp. 9-11; 42 U.S.C. § 1973gg-7(b)(1) and 42 U.S.C. §§ 1973gg-6, 1973gg-6(a)(4), 1973gg-6(b). Accordingly, the EAC's interpretation of "necessary" disregards relevant language both in the context of the entire NVRA and in the specific context of Section 9(b)(1).

Beyond the EAC's erroneous interpretation of what is "necessary" for the states to assess eligibility, the EAC's interpretation of its own authority to make that assessment is also flawed. As the District Court concluded, the NVRA reserves to the states the power to determine what is "necessary" to enforce voter eligibility requirements. Order at 25 ("Thus, a natural reading of the statute suggests that a state election official maintains the authority to assess voter eligibility and that the federal form will require the information necessary for the official to make that determination.").

Contrary to the EAC's characterization, this holding does not reduce the EAC's role to merely that of a "rubber-stamp" which must approve all state requests to add registration requirements to the federal form. Appellate Brief of the EAC, filed May 21, 2014, at 15. As the District Court observed, the EAC's predecessor agency – the Federal Election Commission – has in the past lawfully exercised its authority under the NVRA to exclude information from the federal form. For instance, the EAC "considered but excluded from the federal form requests for information deemed unnecessary to assess voter eligibility such as occupation, physical characteristics, and marital status." Order at 24, *citing Final Rules: National Voter Registration Act of 1993*, 59 Fed. Reg. 32311, 32316-17 (FEC 1994). The Supreme Court in *Inter Tribal* preserved the EAC's ability to prevent states from acquiring additional information in ways that do not help them assess eligibility. *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2259 (2013). Accordingly, the EAC may still refuse a states' request to include information unrelated to eligibility such as voters' height, as at least one party suggested back in 1994. 59 Fed. Reg. at 32316-17. The District Court correctly acknowledged that the EAC is not powerless to determine what is and is not a valid voter qualification under *Inter Tribal*. Order at 24-25.

Accordingly, the role the NVRA reserves for the EAC is to determine whether the information a state seeks is either needed "to assess eligibility" or is



instead irrelevant for that purpose. Kansas and Arizona both have interests in actively enforcing their own eligibility laws for elections, which prohibit noncitizens from casting ballots. Arizona's and Kansas' rules are unquestionably lawful pursuant to the states' unambiguous powers under the *Qualifications Clause*,<sup>13</sup> and the NVRA plainly expresses that the states alone decide voter qualifications for federal elections. *See* Order at 22-25. Accordingly, the EAC's interpretation of its own authority went "further than the [statutory] ambiguity will fairly allow" when it attempted to prevent states from enforcing lawful voter qualifications. *City of Arlington*, 133 S. Ct. at 1874.

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<sup>13</sup> The *Amicus* Brief of Representatives Nancy Pelosi, *et al.* filed with this Court on June 3, 2014 ("Pelosi Brief") tries to minimize the importance of the *Qualifications Clause* by discussing certain constitutional amendments which limit the states' ability to set voter qualifications. Pelosi Brief at 17-19. However, a closer look at these amendments shows that they actually undercut the Pelosi *amici's* argument. Of all the voter qualifications the Constitution prohibits states from using – race, sex, age over 18 – citizenship status is not one of them. The Constitution has been amended three times specifically to limit the qualifications that states may set for voters, but it has never been amended to prohibit states from preventing noncitizens from voting. Indeed, the three amendments the Pelosi Brief cites – the Fifteenth, the Nineteenth, and the Twenty-Sixth – all use the same language: "the right of **citizens** of the United States to vote [...] shall not be denied or abridged" based on race, sex, or age over 18, respectively. Three times in the past 150 years when amending the Constitution – in 1870, 1920, and 1971 – the American people used language clarifying that that they were not extending voting rights to noncitizens.

## CONCLUSION

For the foregoing reasons, *amici* respectfully requests that this Court affirm the District Court's order.

Dated: July 7, 2014

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d), because it contains 5,847 words, less than half of the 14,000 words permitted for a principal brief of a party, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type.

Dated: July 7, 2014

*s/ Chris Fedeli*

## CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that a copy of the foregoing Amicus Brief, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk of the 10th Circuit Court of Appeals.

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/s/ Bradley J. Schlozman

**CERTIFICATE OF SERVICE AND ELECTRONIC FILING**

I certify that the electronic version of the foregoing *Amicus Curiae Brief of Judicial Watch, Inc. and Allied Educational Foundation in Support of Appellees and Affirmation*, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, and is an exact copy of the paper copies that will be submitted to the Tenth Circuit Court of Appeals.

I further certify that on July 7, 2014, I caused the foregoing *Amicus Curiae Brief of Judicial Watch, Inc. and Allied Educational Foundation in Support of Appellees and Affirmation* to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the appellate CM/ECF system. I certify that counsel for the parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. In addition, I certify that on July 7, 2014, I will serve seven paper copies of the same by overnight delivery to the Court.

Dated: July 7, 2014

s/ Bradley J. Schlozman