

No. 14-1164

IN THE
Supreme Court of the United States

KRIS W. KOBACH, *ET AL.*,
Petitioners,

v.

U.S. ELECTION ASSISTANCE COMMISSION, *ET AL.*,
Respondents.

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

**BRIEF OF AMICI CURIAE JUDICIAL
WATCH, INC. AND ALLIED EDUCATIONAL
FOUNDATION IN SUPPORT OF PETITIONERS**

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INTERESTS OF THE *AMICI CURIAE*¹

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability 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 *amicus curiae* in this Court on a number of occasions.

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 this Court on a number of occasions.

Amici believe that the decision by the U.S. Court of Appeals for the Tenth Circuit raises important issues of constitutional law and federal election law which should be heard by this Court. In particular, *amici* are concerned that the Tenth Circuit’s ruling, if allowed to stand, will undermine voter confidence in the integrity of elections. If states cannot verify

¹ Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that all parties received timely notice of the intent to file this brief, and all parties granted consent. In addition, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

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, discouraging those voters from voting at all and thereby burdening their right to vote. As this Court has explained, public confidence in the integrity of elections encourages citizen participation in the democratic process. *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008). Conversely, a lack of faith in electoral integrity undermines confidence in the system and discourages citizen participation in democracy.

For these and other reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision misstates the Constitution's balance of power between the federal government and the states regarding elections, ignoring this Court's instructions in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) ("ITCA"). In ITCA, this Court held that the states' constitutional power to establish voter qualifications necessarily includes the power to enforce voter qualifications. The Tenth Circuit's decision will thwart the states' efforts to comply with the election integrity provisions of the National Voter Registration Act of 1993 ("NVRA") and undermine confidence in elections.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit’s Decision Violates Both the Constitution and This Court’s Holding in *ITCA*.

The Tenth Circuit’s decision is contrary to the U.S. Constitution. The framers of the Constitution carefully balanced federal and state powers and responsibilities relating to federal elections. This was accomplished by giving the states the power to determine voter eligibility under the *Qualifications Clause*, U.S. Const., Art. 1, sec. 2, cl. 1, while giving Congress the power to dictate the time, place, and manner of states’ administration of federal elections under the *Elections Clause*, U.S. Const. Art. 1, sec. 4, cl. 1.

By preventing Arizona and Kansas from implementing their proof-of-citizenship voter registration laws, the Tenth Circuit has used the *Elections Clause* to contravene the *Qualifications Clause*. The Tenth Circuit mischaracterizes the constitutional question as one of whether the *Qualifications Clause* “trumps” the *Elections Clause*. *Kobach v. United States Election Assistance Comm’n*, 772 F.3d 1183, 1198-1199 (10th Cir. 2014). However, these two clauses, properly construed, do not conflict in the way the Tenth Circuit imagines. As this Court has explained, “the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them.” *ITCA*, 133 S. Ct. at 2257. “Since the power to establish voting requirements is of little value without the power to

enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.” *Id.* at 2258-59.

The Tenth Circuit has now put those “serious constitutional doubts” squarely before this Court. Specifically, the Tenth Circuit has now created a conflict between the *Elections Clause* and the *Qualifications Clause* by holding that the former empowers the federal government to refuse to allow otherwise-lawful state voter qualification laws. *Kobach*, 772 F.3d at 1198-1199. Importantly for this case, there is no question that Kansas’ and Arizona’s imposition and enforcement of a citizenship qualification for voting in federal elections is lawful. In fact, it is a federal crime for noncitizens to knowingly misrepresent their citizenship status either to register or to 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 U.S. state),² it is also a violation of *state* law for noncitizens to vote in federal elections.

Indeed, the Constitution has been amended three times to limit the states’ *Qualifications Clause* powers in certain ways, but each amendment

² 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/>.

specifically preserved the states' power to limit voting to U.S. citizens. The Fifteenth, Nineteenth, and Twenty-Sixth amendments to the Constitution prevented states from disqualifying any voters over 18 years of age or on the basis of race or sex. But each of these amendments used identical language to clarify that states retained the power to restrict voting to U.S. citizens, stating: “[T]he right of *citizens* of the United States to vote [...] shall not be denied or abridged...” U.S. Const. amends. XV, XIX, and XXVI (italics added). Accordingly, three times in the past 150 years when amending the Constitution – in 1870, 1920, and 1971 – the American people used language clarifying that they were *not* limiting the states' powers to restrict voting to citizens.

The Tenth Circuit's holding not only creates a conflict between the *Elections Clause* and the *Qualifications Clause*, it also puts the NVRA in conflict with the *Qualifications Clause*. Because the NVRA was enacted pursuant to Congress' *Elections Clause* powers, see *ITCA*, 133 S. Ct. at 2256-2257, the analysis of both conflicts is similar. Essentially, the Tenth Circuit reads the NVRA as permitting the U.S. Election Assistance Commission (“EAC”) to deny states' enforcement of their lawful voter qualifications – which again requires reading the *Elections Clause* as conflicting with, and prevailing over, the *Qualifications Clause*. *Kobach*, 772 F.3d at 1199 (characterizing the question as whether “states' Qualifications Clause powers trump Congress' Elections Clause powers.”).

The Tenth Circuit’s inversion of *ITCA*’s constitutional analysis is insupportable. 133 S. Ct. at 2257, 2558-59. This Court was correct the first time in holding that states may decide what information they need to enforce their voter qualification laws, while the federal government may only deny states’ requests for registration information unrelated to voter qualifications. *Id.* Under this Court’s reading, both constitutional clauses exist in harmony and neither trumps the other. *Id.*; see also Petition for Writ of Certiorari, No. 14-1167, at 20-21 (filed March 21, 2015). As the *ITCA* ruling explains, the EAC, vested through the NVRA with Congress’ *Elections Clause* power, only has the authority to refuse states’ request for voter registration information when it is unrelated to qualifications concerning voting (like information about marital status or height), as such requests bear on the *manner* in which voters are registered. *ITCA*, 133 S. Ct. at 2259; see also *Kobach v. United States Election Assistance Comm’n*, 6 F. Supp. 3d 1252, 1269-1270, n. 104 (D. Kan. 2014), citing *Final Rules: National Voter Registration Act of 1993*, 59 Fed. Reg. 32311, 32316-17 (FEC 1994). This is the constitutional bright line between federal and state election power, and it preserves both the *Elections Clause* and the *Qualifications Clause*.

II. The States’ Ability to Prevent Noncitizen Voting is a Matter of Great Public Importance.

The Tenth Circuit’s decision undermines Kansas’ and Arizona’s ability to protect the integrity of

federal elections in their states, which ultimately will discourage their citizens from engaging in the democratic process. Election integrity is not just a concern of the states; it was also a primary concern of Congress in enacting the NVRA. The NVRA was enacted “to establish procedures that will increase the number of eligible citizens who register to vote” and to “enhance[] the participation of eligible citizens as voters,” on the one hand; and to “protect the integrity of the electoral process” and to “ensure that accurate and current voter registration rolls are maintained,” on the other. 52 U.S.C. § 20501(b)(1) - (b)(4).

To accomplish these two equally important goals, the NVRA contains provisions designed both to increase eligible citizen participation and to increase citizens’ confidence in the integrity of elections. Section 6 of the NVRA, 52 U.S.C. § 20505, which requires states to allow citizens to register by mail, and Section 7, 52 U.S.C. § 20506, which requires states to allow citizens to register at public assistance agencies, were included to expand the opportunities to register to vote. Section 5 of the NVRA, 52 U.S.C. § 20504, which requires states to use driver’s license records to ensure the accuracy and currency of voter registration lists, and Section 8, 52 U.S.C. § 20507, which requires states to maintain accurate voter rolls that contain only eligible voters, were included to enhance electoral integrity.

The NVRA's ballot access and election integrity provisions function as counterparts. As Congress explained in enacting the NVRA:

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.³

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

³ S. Rep. 103-6 at 17-18, 103rd Cong., 1st 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/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf>.

elections held in the State of Indiana and thereby burden[s] their right to vote.”...

Judicial Watch, Inc. v. King, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) (internal citations omitted). As that district court observed, a lack of confidence in the electoral process deters voters from voting in the first place. *Id.* This is because voters do not want to waste time voting in an election where fraudulent ballots may be cast and counted. Accordingly, both the NVRA’s voter access provisions and its election integrity provisions ultimately function to increase voter turnout.

This 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). Even though there was “no evidence of [voter impersonation] fraud actually occurring in Indiana,” the Court recognized

Indiana's strong interest in preventing fraud. Voter 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.

It is necessary for states to restore the American public's confidence in the basic honesty of elections by enforcing election integrity laws. Large segments of the American public have expressed their dismay with various aspects of our electoral system. A poll from August of 2013 reported that only 39% of Americans believe that elections are fair.⁴ In 2012, another poll reported that more than two-thirds of registered voters thought voter fraud was a problem.⁵ 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.⁶ These surveys reveal a startling lack of confidence in our own electoral institutions. Rejecting the Tenth Circuit's decision and upholding states' authority to take measures to ensure that only eligible U.S. citizens can vote will help to

⁴ 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.

⁵ Kevin Robillard, "Poll: 36% say voter fraud major issue," Politico (Oct. 26, 2012), available at <http://www.politico.com/news/stories/1012/82936.html>.

⁶ 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>.

restore Americans' faith in the integrity of our elections and the legitimacy of our elected government.

The Tenth Circuit erred in concluding that Kansas and Arizona were required to produce some additional "proof" of their need for citizenship information. *Kobach*, 772 F.3d at 1196 (claiming a state must "prove that [the EAC's refusal] precluded it from obtaining information necessary to enforce its qualifications."). Those states' constitutional authority and their concern with electoral integrity were reason enough to act. But further, there is a demonstrable need for the measures they took. According to a report from the 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.⁷ This means that roughly 7 percent of the modern U.S. population lacks citizenship – or about 1 in 14 residents. It is well established, moreover, that Arizona has one of the highest noncitizen populations in the United States; and that Kansas, in part due to the demographics of certain industries in the southwestern part of the state, also has a sizable noncitizen population.⁸

⁷ 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>.

⁸ Henry J. Kaiser Family Foundation, "Population Distribution by Citizenship Status," available at <http://kff.org/other/state-indicator/distribution-by-citizenship-status/> (visited April 17, 2015).

There are many documented cases of noncitizens casting fraudulent ballots in U.S. elections.⁹ Indeed, a recent study concluded that noncitizen voting was relatively common. A poll of noncitizens showed that about 25% of U.S. noncitizens were registered to vote in 2010, and that 6.4% had voted in 2008 and 2.2% had voted in 2010.¹⁰ These findings suggest that the impact on American elections could be profound. The Tenth Circuit's view that precautions against noncitizen voters are not "necessary" is unfounded. *Kobach*, 772 F.3d at 1196-1197.

The Tenth Circuit's decision threatens to diminish Americans' confidence in their own elections. The harm that results will be significant regardless of the frequency with which voter fraud occurs. A bipartisan panel convened to examine the existence and impact of voter fraud, the Carter-Baker Commission, had this to say about the frequency of voter fraud relative to its "significance":

While the Commission is divided on the
magnitude of voter fraud — with some

⁹ 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>.

¹⁰ J.T. Richman, *et al.*, "Do non-citizens vote in U.S. elections?," *Electoral Studies*, vol. 36, pp. 149–157 (Dec. 2014), at p. 152, Tables 1 and 2, available at <http://www.sciencedirect.com/science/article/pii/S0261379414000973>.

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.¹¹

Such “close elections” occur all the time. Ohio Secretary of State Jon Husted released remarkable statistics showing that, in 2013, 35 local races and 8 local ballot issues were decided in his state either by *one* vote, or by the toss of a coin following an electoral *tie*.¹²

Illegal voting at any level can change the outcome of elections. And there is no acceptable amount of fraud. Arizona’s and Kansas’ efforts to prevent the registration of ineligible voters fall squarely within those states’ constitutional authority, are a necessary part of their efforts to

¹¹ 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.

¹² 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/media/Center/2014/2014-01-13.aspx>.

comply with the NVRA, and are of critical importance to the sound functioning of American democracy.

This Court should address the critical issues raised by this appeal.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for Writ of Certiorari to review the Tenth Circuit's ruling.

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