No. 14-1164

In the Supreme Court of the United States

KRIS W. KOBACH, KANSAS SECRETARY OF STATE, ET AL., PETITIONERS

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Qualifications Clause of the Constitution, Art. I, § 2, Cl. 1, and the Seventeenth Amendment require the United States Election Assistance Commission, in prescribing the contents of the national mail voter registration form, to completely defer to the determinations of Arizona and Kansas that provision of documentary evidence of citizenship with the form is necessary to enforce the States' voter qualifications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 772 F.3d 1183. The opinion of the district court (Pet. App. 32-70) is reported at 6 F. Supp. 3d 1252. The decision of the United States Election Assistance Commission (Pet. App. 71-130) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2014. A petition for rehearing was denied on December 29, 2014. The petition for a writ of certiorari was filed on March 21, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, § 4, Cl. 1. "Times, Places, and Manner," this Court has explained, "are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,'" including, as relevant here, "regulations relating to 'registration.'" *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (*ITCA*) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)).

Although the Elections Clause confers on Congress broad authority to establish rules for "notices, registration, [and] supervisions of voting," *Smiley*, 285 U.S. at 366, it does not permit Congress to set the qualifications for voters in federal elections. *ITCA*, 133 S. Ct. at 2258. Rather, the Qualifications Clause, U.S. Const. Art. I, § 2, Cl. 1, of the Constitution provides that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," and the Seventeenth Amendment establishes the same requirement for senatorial elections. See *ITCA*, 133 S. Ct. at 2258. Accordingly, voter qualifications for federal elections are governed by state law.

b. Congress exercised its authority under the Elections Clause to enact the National Voter Registration

Act of 1993 (NVRA), 52 U.S.C.A. 20501 *et seq.*,[1] which "requires States to provide simplified systems for registering to vote in federal elections." *Young* v. *Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted). Congress enacted the statute 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." 52 U.S.C.A. 20501(a)(3). Popularly known as the "Motor Voter Act," the NVRA establishes three methods by which citizens may register to vote in federal elections (in addition to whatever methods a State might otherwise provide): (i) simultaneously with a motor vehicle driver's license application; (ii) by mail application; or (iii) through public assistance and disabilities agencies and additional state-designated locations. 52 U.S.C.A. 20503(a).

As relevant here, the NVRA provides that, "in consultation with the chief election officers of the States," the United States Election Assistance Commission (EAC or Commission) "shall develop a mail voter registration application form for elections for Federal office." 52 U.S.C.A. 20508(a)(2).[2] The national mail

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[1] The NVRA was previously codified at 42 U.S.C. 1973gg *et seq.* The Help America Vote Act of 2002 (HAVA), 52 U.S.C.A. 20901 *et seq.*, discussed below, was previously codified at 42 U.S.C. 15301 *et seq.* In 2014, the relevant provisions were subject to an editorial recodification that is not yet reflected in a published version of the United States Code. This brief will cite the United States Code Annotated (U.S.C.A.) for ease of reference. All such citations refer to the 2015 edition of the U.S.C.A. The recodification made no substantive changes.

[2] As originally enacted in 1993, the NVRA required the Federal Election Commission (FEC) to prescribe the form. HAVA trans-

voter registration form now maintained by the EAC is commonly referred to as the "Federal Form."

The NVRA specifies the information that the EAC may require applicants to furnish on the Federal Form. In particular, the form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), 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." 52 U.S.C.A. 20508(b)(1). The Federal Form must, however, include a statement that "specifies each eligibility requirement (including citizenship)"; "contains an attestation that the applicant meets each such requirement"; and "requires the signature of the applicant, under penalty of perjury." 52 U.S.C.A. 20508(b)(2). Under the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, the form must additionally include two specific questions, along with check boxes, for the applicant to indicate whether she meets the U.S. citizenship and age requirements to vote, as well as instructions not to complete the form if the answer to either question is no. See 52 U.S.C.A. 21083(b)(4)(A).

The Federal Form also contains state-specific instructions, which inform residents of each State what additional information they must provide and where to submit the form. *ITCA*, 133 S. Ct. at 2252.[3] Those

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ferred to the EAC all functions previously exercised by the FEC under 52 U.S.C.A. 20508(a). 52 U.S.C.A. 21132.

[3] See EAC, *National Mail Voter Registration Form*, http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited May 21, 2015).

instructions account for the possibility that different States may establish different voter qualifications and therefore that registration requirements may vary among States. Each set of state-specific instructions must be approved by the EAC. See *ITCA*, 133 S. Ct. at 2252.

The NVRA requires States to "accept and use" the Federal Form in registering voters for federal elections. 52 U.S.C.A. 20505(a)(1). States may also create their own state-specific voter registration forms to register voters for both state and federal elections. *ITCA*, 133 S. Ct. at 2255 (citing 42 U.S.C. 1973gg-4(a)(2), now codified at 52 U.S.C.A. 20505(a)(2)). The state-developed forms may require information that the Federal Form does not require. *Ibid.* But the Federal Form "provides a backstop" that "guarantees that a simple means of registering to vote in federal elections will be available" regardless of how States design their own forms. *Ibid.*

2. In 2004, Arizona voters approved a ballot proposition amending Arizona's election laws to require applicants for voter registration to furnish documentary proof of U.S. citizenship. Ariz. Rev. Stat. Ann. § 16-166(F) (2015). Such documentary proof is not required by a federal statute or by the Federal Form. Accordingly, Arizona asked the EAC to incorporate its documentation requirement into the Federal Form's state-specific instructions for Arizona. Pet. App. 7. The EAC's Executive Director denied the request. *Ibid.* The full Commission then rejected Arizona's request to reconsider that determination by a 2-2 vote. *Ibid.* (By statute, the EAC requires three votes to act. 52 U.S.C.A. 20928.) Arizona nevertheless contended that it could lawfully reject applicants who registered

for federal elections through the Federal Form if they did not comply with the state-law documentation requirement.

Arizona's documentation requirement was then challenged in federal court. Pet. App. 7. This Court ultimately held in *ITCA* that the NVRA "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." 133 S. Ct. at 2260; accord *id.* at 2261 (Kennedy, J., concurring). A "state-imposed requirement of evidence of citizenship not required by the Federal Form," the Court explained, "is inconsistent with the NVRA's mandate that States 'accept and use' the Federal Form." *Id.* at 2257 (internal quotation marks omitted).

In the course of its discussion, the Court rejected the argument that its construction of the NVRA raised serious constitutional doubts because it could "preclude[] a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258-2559. The Court explained that, under the procedures set out in the NVRA, "a State may request that the EAC alter the Federal Form to include 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 [APA], 5 U.S.C. §§ 701-706." *Id.* at 2259. In the APA action, the Court further explained, a State "would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include [the State's] concrete evidence requirement on the Federal Form." *Id.* at 2260. In

addition, the Court said, a State could argue that the EAC's rejection of its request was "arbitrary" in light of the Commission's treatment of other similarly situated States. See *ibid.*

3. a. After this Court's decision in *ITCA*, Arizona (a petitioner here) again asked the EAC to amend the Federal Form's state-specific instructions to conform to Arizona's documentary proof-of-citizenship requirements. Pet. App. 8. Kansas (the other State petitioner here), which in 2011 had enacted a documentary proof-of-citizenship requirement, Kan. Stat. Ann. § 25-2309 (West 2012), made a similar request. Pet. App. 8. The EAC initially deferred ruling on those requests because it lacked a quorum of Commissioners. *Ibid.*

Petitioners then filed suit in the United States District Court for the District of Kansas against the Commission and its Acting Executive Director, alleging that the EAC's failure to act on their requests violated the APA and that the NVRA is unconstitutional to the extent that it bars them from enforcing their documentation requirements. Pet. App. 8. Four groups of individuals and organizations intervened as defendants. After the government indicated its view that the Acting Executive Director of the EAC could lawfully act on the States' requests, the district court remanded to the EAC with an order to issue a final decision by January 17, 2014. D. Ct. Doc. No. 114 (Dec. 13, 2013); see Def.'s Opp. to Mot. for Prelim. Inj., D. Ct. Doc. No. 92, at 17 & n.10 (Nov. 27, 2013).

b. After soliciting public comments, Pet. App. 76-77, the EAC, through its Acting Executive Director, denied the States' requests. *Id.* at 71-130. The EAC first determined that it had authority to act on the

requests notwithstanding the absence of a quorum. *Id.* at 95. It then explained that under the NVRA, as construed by this Court in *ITCA*, "the EAC is obligated to grant [the States'] requests only if it determines, based on the evidence in the record, that it is necessary to do so in order to enable state election officials to enforce their states' voter qualifications." *Id.* at 105.

Applying that standard, the Commission found that petitioners' documentation requirements are not necessary. Pet. App. 105-123. It explained that "a written statement made under penalty of perjury is considered reliable evidence for many purposes," including probable-cause affidavits, tax returns, and amnesty applications. *Id.* at 107. It further explained that "[t]he overwhelming majority of jurisdictions in the United States have long relied on sworn statements similar to that included on the Federal Form to enforce their voter qualifications" and that petitioners had presented no evidence showing "that this reliance has been misplaced." *Ibid.* Based on the evidence in the record, the Commission found that "the possibility of potential fines, imprisonment, or deportation (as set out explicitly on the Federal Form) appears to remain a powerful and effective deterrent against voter registration fraud." *Id.* at 108.

The Commission assumed for the sake of argument that petitioners' evidence had established that 196 noncitizens had been registered to vote in Arizona and 21 noncitizens had been registered to vote in Kansas. Pet. App. 113. But it found that evidence insufficient "to demonstrate that the States' requests must be granted in order to enable them to assess the eligibility of Federal Form applicants." *Id.* at 114. The

Commission noted that the evidence at most demonstrated that 0.007% and 0.001% of Arizona and Kansas registrants, respectively, were noncitizens, and it observed that "the administration of elections, like all other complex functions performed by human beings, can never be completely free of human error." *Id.* at 114-115. The EAC then explained that "the States have a myriad of means available to enforce their citizenship requirements without requiring additional information from Federal Form applicants," including criminal prosecution and comparison of voter responses to state and federal databases. *Id.* at 118-123. And it further concluded, "[b]ased on th[e] evidence" in the record, that "granting the States' requests would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA." *Id.* at 125; see *id.* at 124-126.

c. Petitioners sought review of the EAC's determination in the district court. See Pet. App. 32-70. The court assumed, without deciding, that the Acting Executive Director was authorized to make the decision on behalf of the EAC. *Id.* at 40. But it held that the EAC was legally required to incorporate the States' documentation requirements into the Federal Form's state-specific instructions regardless of whether the Commission reasonably concluded that the requirements were not necessary to verify voter eligibility. In the district court's view, "Congress has not preempted state laws requiring proof of citizenship through the NVRA." *Id.* at 68. Because petitioners had "established that their state laws require their election officials to assess the eligibility of voters by examining proof of their U.S. citizenship beyond a mere oath," the court held that "the EAC is under a

nondiscretionary duty to include the states' concrete evidence requirement in the state-specific instructions on the federal form." *Id.* at 68-69 (internal quotation marks omitted).

4. The court of appeals reversed. Pet. App. 1-31.

a. As a threshold matter, the court of appeals held that the Acting Executive Director's decision on the States' requests, which was issued in conformity with a subdelegation of authority in a 2008 policy adopted by the EAC when it had a quorum, was final and procedurally valid. Pet. App. 10-20.[4] That holding is not challenged here.

b. The court of appeals then rejected petitioners' arguments on the merits.

i. The court of appeals first held that the district court's conclusion that the EAC is "compulsorily mandated to approve state-requested changes to the Federal Form" was "plainly in conflict" with this Court's holding in *ITCA*. Pet. App. 6, 21; see *id.* 20-25. *ITCA*, the court of appeals explained, held that a State could ask the EAC to include in the Federal Form's state-specific instructions "information that the State deems necessary" and could "challenge the EAC's rejection of that request in a suit under the [APA]." *Id.* at 23 (brackets in original) (quoting *ITCA*, 133 S. Ct. at 2259). "The Court's ruling," the court of appeals continued, "would make no sense if the EAC's duty was nondiscretionary." *Id.* at 24. The court

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[4] On January 13, 2015, three EAC commissioners were sworn in following their nomination by the President and confirmation by the Senate. See EAC, *Commissioners*, http://www.eac.gov/about_the_eac/commissioners.aspx (last visited May 21, 2015). 160 Cong. Rec. S6933 (daily ed. Dec. 16, 2014).

explained that, contrary to the States' view, under *ITCA* "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." *Ibid.* It accordingly held that the district court had erred in concluding that "the states' averment that their requested text is necessary for enforcement was, on its own, sufficient to impose a nondiscretionary duty on the EAC." *Ibid.*

ii. The court of appeals rejected petitioners' contention that the EAC's decision was arbitrary and capricious. See Pet. App. 25-28. The court determined that "[t]he [Acting] Executive Director supported her conclusion in detail with evidence in the record, rationally connected that evidence to the conclusions that she drew, and was fully consistent with the EAC's own regulations and prior reasonable interpretation of the NVRA in its 2006 response to Arizona." *Id.* at 27. The court noted in particular that the Acting Executive Director had "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." *Ibid.* The court therefore held that "[t]he states have failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications" without adding the documentation requirement to the Federal Form. *Ibid.* Indeed, the court continued, "[e]ven if we credited all of [the States'] criticisms of the [Acting] Executive Director's decision, the states simply did not provide the EAC enough factual evidence to support their preferred outcome." *Id.* at 28.

iii. Finally, the court of appeals rejected various constitutional claims raised by petitioners. Pet. App. 29-31. As relevant here, the court held that their argument that States have exclusive authority under the Qualifications Clause and the Seventeenth Amendment to establish the documentation necessary for registration for federal elections was foreclosed by this Court's decision in *ITCA*. *Id.* at 30. And the court rejected the related argument that "the EAC's refusal to modify the Federal Form unconstitutionally precludes [the States] from enforcing their laws intended to prevent noncitizens voting," noting its prior conclusion that the EAC's finding that state-law documentation requirements are unnecessary was reasonable and supported by substantial evidence. *Id.* at 30-31.

ARGUMENT

Petitioners challenge the court of appeals' holding that, under this Court's decision in *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (*ITCA*), the EAC has "discretion to reject [State] requests" to add documentation requirements to the Federal Form, "subject to judicial review of its decisions under the APA." Pet. App. 25. Their contention lacks merit. This Court squarely held in *ITCA* that the EAC has authority under the Elections Clause and the NVRA to approve each state-specific instruction before it is included on the Federal Form and that the NVRA preempts state laws to the extent that they require Federal Form applicants to provide documentation beyond that required by the Federal Form. The Court further held that States dissatisfied with the EAC's determination may challenge it in an APA suit. As the court of appeals recognized, peti-

tioners' position that the EAC is required to incorporate any state-law registration requirement into the Federal Form is irreconcilable with *ITCA*'s holding. Petitioners do not claim, moreover, that the decision below conflicts with the holding of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly held that under this Court's decision in *ITCA*, the EAC is not required to incorporate a state-law registration requirement into the Federal Form merely because a State requests that the Commission do so.

a. This Court held in *ITCA* that because the NVRA requires States to "accept and use" the Federal Form for registration for federal elections, a State may not refuse to register an applicant who submits a completed Federal Form on the ground that the applicant did not submit other documentation. 133 S. Ct. at 2254-2257, 2260. The Court noted, however, that serious constitutional doubts would arise if federal law barred States from obtaining information necessary to verify state-law voter qualifications, such as the requirement that a registered voter be a U.S. citizen. See *id.* at 2258-2259. But the Court explained that because the NVRA requires the EAC to solicit on the Federal Form all information "necessary to enable the appropriate State election official to assess the eligibility" of registration applicants, see 52 U.S.C.A. 20508(b)(1), that constitutional question was not implicated by its interpretation of the statute. 133 S. Ct. at 2259.

Contrary to petitioners' view, *ITCA* did not hold that in determining whether information is necessary to evaluate an applicant's eligibility to register, the EAC must blindly defer to a State's determination of what information is necessary to verify voter eligibil-

ity. It held just the opposite: that, consistent with the text of the NVRA, the EAC must make its own determination about whether the particular information is necessary, and that the Commission's determination may be challenged in court under the APA. 133 S. Ct. at 2259-2260. In such an APA challenge, the Court explained, a State "would have the opportunity *to establish* in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include [the] concrete evidence requirement on the Federal Form." *Id.* at 2260 (emphasis added). And the State would also have the opportunity to challenge as "arbitrary" an EAC decision to exclude information the State deemed necessary when the Commission had included similar information requested by other States. *Ibid.*

The import of that discussion is that when challenging the EAC's rejection of a documentation requirement, a State must "establish," under the APA standards of judicial review, 5 U.S.C. 706, that the Federal Form is insufficient to enforce a voter qualification without the additional documentation or that the EAC's decision was somehow "arbitrary" in light of the Commission's treatment of another State's request. But if a State's mere demand that the Federal Form include a particular documentation requirement were alone legally sufficient to require the EAC to amend the state-specific instructions, the Court's discussion would have made "no sense." Pet. App. 24. The State would have no need to establish that "a mere oath will not suffice," nor would it have need to compare its treatment to the treatment of other States. The course of proceedings that the Court's

opinion described—an agency decision followed by judicial review under the APA—necessarily contemplates that the EAC's rejection of a State request could comply with the APA. Indeed, the entire discussion would have been superfluous if the Court believed that the mere fact that a State lodges a request requires the Commission, as a matter of law, to incorporate the state-law requirement into the Federal Form. See Pet. App. 25.

More broadly, were the district court correct that the Court's decision in *ITCA* left open the possibility that the EAC merely "perform[s] the ministerial function of updating the [state-specific] instructions to reflect each state's laws," Pet. App. 69, the Court's preemption holding would have been almost trivial. Although the NVRA would "preclude[] [a State] from requiring a Federal Form applicant to submit information beyond that required by the form itself," 133 S. Ct. at 2260, a State could readily circumvent that limitation simply by filing a demand with the EAC to incorporate the same information into the Federal Form's state-specific instructions. And if that were so, the Court would have been incorrect that the Federal Form "provides a backstop" for registration "[n]o matter what procedural hurdles a State's own form imposes," *id.* at 2255, because any state-law procedural hurdles would be automatically incorporated into the Federal Form upon the State's demand. In dissent, Justice Thomas likewise made clear that he understood the majority to hold that the EAC had the authority to "withhold [its] approval" of a particular request. *Id.* at 2270 (Thomas, J., dissenting). There is no other sensible way to read the Court's opinion.

Accordingly, the court of appeals correctly held that "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." Pet. App. 24. No such duty arises here, because the court of appeals held that the EAC had reasonably found that the documentation requirements are not necessary to verify the citizenship of registration applicants and that "the states simply did not provide the EAC enough factual evidence to support their preferred outcome." *Id.* at 25-28.

b. Petitioners advance a number of objections to the court of appeals' straightforward application of *ITCA*. None has merit.

i. Petitioners contend (Pet. 22) that *ITCA* "strongly suggested that the Federal Form must include what the *State* deems necessary, not what the *EAC* deems necessary." For the reasons discussed above, no part of the Court's analysis or holding supports that reading. The passages that petitioners quote stand only for the proposition that all information necessary to establish state-law voter qualifications must be included on the Federal Form. They do not support the view that in making that necessity determination, the EAC must completely defer to state law. Although the Court stated that "a State may request that the EAC alter the Federal Form *to include information the State deems necessary*," Pet. 22 (quoting *ITCA*, 133 S. Ct. at 2259), it made clear that the EAC would make its own judgment about whether the request should be granted, and a State would have the opportunity "to establish" in a reviewing court that the

EAC's decision should be overturned under the APA as arbitrary agency decisionmaking because the Federal Form's oath requirement is insufficient to verify voter eligibility or because the Commission otherwise acted arbitrarily. See *ITCA*, 133 S. Ct. at 2259-2260.

ii. Petitioners also rely (Pet. 23-26) on various provisions of the NVRA and EAC regulations. Those arguments are not fairly encompassed by the questions presented, which ask only whether the Constitution compels the EAC to defer to the States' determination about what information must be included on the Federal Form. See Pet. i. But in any event, those arguments suffer from the same basic flaw as petitioners' reading of *ITCA*: They assume that because information necessary to verify voter qualifications must be included on the Federal Form, the EAC must blindly defer to the States' determination about what is necessary, rather than make its own judgment. The NVRA expressly provides, however, that the EAC, not individual States, will determine the contents of the Federal Form in light of the statutory standards: "The Election Assistance Commission * * * in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office," 52 U.S.C.A. 20508(a)(2), which must include all necessary information, 52 U.S.C.A. 20508(b)(1); *ITCA*, 133 S. Ct. at 2259. "Consultation" does not mean "complete deference," and this Court clearly recognized in *ITCA* that it is the EAC that must make the necessity determination, subject to judicial review. Any other view

would render the Court's opinion largely academic. See p. 15, *supra*.[5]

Petitioners recycle (Pet. 24-25) an argument that this Court expressly rejected in *ITCA*: that because States may develop their own registration forms that voters can use to register for both state and federal elections, the NVRA must give States the authority to dictate the contents of the Federal Form. As discussed above, the Court explained in *ITCA* that under the NVRA, "States retain the flexibility to design and use their own registration forms, but 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." 133 S. Ct. at 2255. Petitioners' contention that States should be able to dictate the contents of the Federal Form, just as they determine the contents of state-developed forms, cannot be squared with that discussion.

Indeed, it is not only that the EAC is *authorized* to make an independent necessity determination; the EAC would *violate* the NVRA were it to incorporate a state-law documentation requirement into the Federal Form that the Commission found was unnecessary to

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[5] Similarly, the EAC regulations that petitioners cite do not say that the EAC must completely defer to a State's determination about what information is necessary. The regulations provide that the "state-specific instructions" must include "information about the state's specific voter eligibility and registration requirements." 11 C.F.R. 9428.3(b). That statement does not purport to require the Commission to incorporate any registration requirement that a State requests. Rather, it merely acknowledges that the Commission will approve state-specific registration requirements that meet the statutory necessity standard.

verify voter eligibility. The NVRA states that the Commission "may require *only*" information that is necessary, 52 U.S.C.A. 20508(b)(1) (emphasis added), which acts as "a ceiling" with respect to the contents of the Federal Form, *ITCA*, 133 S. Ct. at 2259. Were the Commission to automatically adopt any state-law registration requirement, no matter how unnecessary and onerous, it would violate that statutory command, and it would undermine the basic purpose of the NVRA to eliminate "unfair registration laws and procedures," 52 U.S.C.A. 20501(a)(3).

iii. Finally, petitioners argue (Pet. 19) that the court of appeals "incorrectly found that the States' Qualifications Clause authority does not trump Congress's Elections Clause authority." See Pet. 19-21, 28. The court of appeals, however, adhered precisely to the constitutional framework set out in *ITCA*. Under that framework, States have authority under the Qualifications Clause to set voter eligibility requirements, but the federal government has plenary authority to set the registration requirements for federal elections, including what information is necessary to verify that a voter meets the State-established eligibility requirements. *ITCA*, 133 S. Ct. at 2253-2254, 2257-2258. The Court recognized that it would raise a serious constitutional question if Congress were to establish registration procedures that are insufficient to verify a voter's eligibility under state law. *Id.* at 2258-2259. But the Court held that the NVRA raises no constitutional doubt because the statute requires the EAC to incorporate into the Federal Form all information that it determines is necessary to verify voter eligibility, a determination that is subject to judicial review under the APA. *Id.* at 2260.

Petitioners' argument that this framework violates the Qualifications Clause and the Seventeenth Amendment appears to rest on the erroneous premise that voter qualifications, such as citizenship, residency, or mental competence, are legally equivalent to the *means* by which voters prove their qualifications through the registration process, such as a sworn statement or documentary proof. See Pet. 32-33. In holding that the NVRA preempts state-law registration requirements for federal elections, this Court necessarily rejected that view in *ITCA*. As the Court explained, although the Elections Clause does not authorize Congress to decide *who* may vote in federal elections, it does "empower[] Congress to regulate *how* federal elections are held." *ITCA*, 133 S. Ct. at 2257. That includes the "authority to provide a complete code for congressional elections," including "regulations relating to 'registration.'" *Id.* at 2253 (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)).

Petitioners' contrary view would prove too much. Because Congress has no power to set qualifications for voters at all, even the basic Federal Form requirement (regardless of whether it is exclusive of state-law registration requirements) would be unconstitutional if the means by which voters establish their qualifications were themselves considered "qualifications" within the meaning of the Qualifications Clause and the Seventeenth Amendment. That conclusion could not be reconciled with the preemption holding of *ITCA* that the NVRA's Federal Form requirement displaces state-law requirements.

Petitioners relatedly argue (Pet. 31) that it violates the "design" of the Qualifications Clause and the Seventeenth Amendment to have a "different set of re-

quirements for registering for federal congressional elections than those for registering for state legislative elections," framing that contention as a separate question presented. See Pet. i, 25-31. But it is a natural consequence of this Court's longstanding interpretation of the Elections Clause as giving the federal government plenary control over registration for federal elections—an interpretation reaffirmed in *ITCA*, see 133 S. Ct. at 2253—that the requirements for registration for federal elections may differ from the requirements for registration for state elections. Indeed, the Court's conclusion in *ITCA* that the Federal Form "provides a backstop" for federal registration regardless of "what procedural hurdles a State's own [registration] form imposes," *id.* at 2255, presupposes that the registration requirements for federal and state elections can be different, and that as a result there may be differences in the two voter rolls. Those differences arise not because there are different qualifications for the two types of elections, but because the federal and state governments have reached different determinations about what information must be solicited from registration applicants to confirm that they meet the uniform qualifications.

2. Petitioners advance no sound basis for further review. They do not claim that the decision below conflicts with a decision of another court of appeals, and, for the reasons explained above, the relevant holding of the court of appeals follows directly from the Court's holding and analysis in *ITCA*. Nor have they sought review in this Court of the factbound question whether the EAC reasonably concluded that the documentary-proof requirements are not necessary to verify applicants' eligibility to vote, despite

isolated criticisms of the EAC's factual determinations (see Pet. 27, 30). Pet. App. 25-28; see Pet. i.[6] Likewise, petitioners have not challenged the court of appeals' holding that the Acting Executive Director had authority to render the decision and that her action was procedurally valid. See Pet. App. 10-20. Petitioners have therefore forfeited those challenges. Sup. Ct. R. 14.1(a).

Petitioners contend (Pet. 34-35) that "time is of the essence" because "[t]here is no other case making its way through the inferior courts concerning this issue" and "[a] circuit split is not likely to materialize anytime soon." Far from supporting further review, the likelihood that no conflict of authority will arise underscores that the framework established by *ITCA*—an independent EAC determination followed by judicial review under the APA—is clear from the Court's opinion.

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[6] Even were the argument preserved, there would be no substantial basis to review the court of appeals' conclusion that "the states simply did not provide the EAC enough factual evidence to support their preferred outcome." Pet. App. 28. Despite questions raised about the reliability of petitioners' evidence, the EAC assumed for the sake of argument that they had demonstrated that some noncitizens in Arizona and Kansas had registered to vote or had attempted to do so. *Id.* at 113 & n.14. Even so, the EAC reasonably concluded that the "exceedingly small" percentages of noncitizens allegedly registering to vote in those States "is not cause to conclude that additional proof of citizenship must be required of applicants for either state to assess their eligibility," particularly in light of various alternative means of verifying citizenship. *Id.* at 115.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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