

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.,
Respondents.

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

**Brief of the American Civil Rights Union as
Amicus Curiae in Support of Petitioners**

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Interests of *Amicus Curiae*¹

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J.

¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky, and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections.

Summary of the Argument

In 2004, Arizona voters approved Proposition 200, which addresses the serious problem of noncitizen registration and voting by requiring applicants to provide documentary evidence of citizenship in order to register and vote in federal and state elections. A.R.S. § 16-166(F). Similarly, in 2011, the Kansas Legislature passed the “Secure and Fair Elections Act,” which, *inter alia*, provides that an applicant must provide satisfactory evidence of United States citizenship in order to register to vote.

At the suggestion of this Court in *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013) (“*ITCA*”), Arizona and Kansas (hereinafter, “the States”) requested that the Election Assistance Commission (“EAC”) modify the state-specific instructions on the Federal voter registration form (hereinafter, “the Federal Form”). Proceeding under dubious authority in the absence of any commissioner,² the Acting Executive Director of the

² Under the EAC’s authorizing statute, the EAC can act “only with the approval of at least three of its members.” 52 U.S.C. § 20928.

EAC made the determination that the additional instructions were not “necessary” to the States’ assessment of voter eligibility. Appendix to Petitioners’ Petition for Writ of Certiorari (“App.”) at 106. In so doing, the Acting Executive Director found that the States’ evidence of over 200 specific cases of noncitizen voter registration “fail[ed] to establish that the registration of noncitizens is a significant problem in either state.” App. at 113.

Amicus files this brief in support of Petitioners’ petition for writ of certiorari (“Petition”) for two reasons: (1) the EAC’s determination, reinstated by the Tenth Circuit, constitutes a usurpation of a power guaranteed to the States by the Constitution of the United States and (2) to present clear evidence that the Federal Form has failed to prevent noncitizen registration.

Argument

I. The States’ Requests to Modify Their State-Specific Instructions for the Federal Form Concern the Qualification of Voters.

Kansas’s and Arizona’s requested modifications to their state-specific instructions that implemented qualifications found in state law establishing who may vote in their elections. Only those applicants who present the necessary documentary proof of citizenship along with the Federal Form are registered and qualified to vote. Proof of citizenship is thus, by definition, a “qualification” for voting. Those who cannot establish they are citizens are not qualified to vote.

The States, not Congress (and certainly not the Acting Executive Director of EAC), have the sole

authority to establish voter qualifications, including the power to ensure that the franchise is exercised only by citizens. The Tenth Circuit’s decision effectively reads that traditional state power out of the Constitution and hands it to an employee at the EAC, a small, federal commission that was designed primarily to assist the States in producing voter registration forms. This Court should grant the Petition in order to restore power to the States to set qualifications of voters as intended by the Framers.

A. The power to prescribe the qualifications and registration of voters is expressly reserved to the States by the Federal Constitution.

The Federal Constitution grants the States the power to control *who* may vote in federal elections. This power is not implied, but is expressly provided by the Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures). The plain meaning of these Constitutional provisions is clear: “The Framers did not intend to leave voter qualifications to Congress.” *ITCA*, 133 S.Ct. at 2263 (Thomas, J., dissenting).

The Constitution’s Election Clause gives Congress only limited power with respect to regulations concerning the “Times, Places, or Manner” of holding federal elections, or in other words, *how* elections are held. U.S. Const., Art. I, § 4, cl. 1; *ITCA*, 133 S.Ct. at 2257 (“[T]he Elections Clause empowers Congress to regulate *how* federal

elections are held, but not *who* may vote in them.”). Congress’s power to regulate *how* elections are held, however, is only superior to the State’s power to do the same when they differ. That is, Congress’s regulations “supersede those of the State which are inconsistent therewith.” *Id.* at 2254. As this Court reaffirmed in *ITCA*, “Times, Places, and Manner” encompasses regulations “relating to ‘registration’ of voters. *Id.* at 2253 (internal citations omitted).

Arizona’s proof-of-citizenship law was scrutinized under the Election Clauses’ dual regime in this Court’s *ITCA* decision. The issue in *ITCA* was whether Arizona’s law that required election officials to “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship”—including the Federal Form—is inconsistent with the instruction of the National Voter Registration Act of 1993 (“NVRA”), that States “accept and use” the Federal Form. *Id.* at 2251. This Court decided that issue in the affirmative. As the district court in this case recognized, the NVRA’s mandate that states “accept and use” the Federal Form is an exercise of “Congress’ power to regulate voter registration under its broad authority to regulate the manner of holding elections,” i.e., the “how” of elections. App. at 43. Arizona’s law permitted election officials to “reject” altogether the Federal Form—or not “accept and use” it—and thus, pursuant to the Election Clause, Arizona’s law must give way because Congress’s regulation concerning registration via the Federal Form is superior. *ITCA*, 133 S.Ct. at 2257.

The *ITCA* opinion also reaffirms the States’ exclusive constitutional authority to determine *who*

may vote, or voter qualifications—which Congress may not preempt. *ITCA*, 133 S.Ct at 2258 (“Nothing in [the Election Clause] lends itself to the view that voting qualifications in federal elections are to be set by Congress”)(internal citations omitted). This case concerns a voter qualification—the “who,” not the “how,” of elections.

Arizona and Kansas have determined that proof of citizenship is, as outlined in Section 9 of the NVRA, “necessary to enable the appropriate State election official to assess the eligibility of the applicant.” 52 U.S.C. § 20508(b)(1). Therefore, as this Court outlined in *ITCA*, Arizona and Kansas have requested that the EAC “alter the Federal Form to include information the State deems necessary to determine eligibility.” 133 S.Ct. at 2259.

Lastly, *ITCA* acknowledged that “the power to establish voting requirements is of little value without the power to enforce those requirements.” 133 S.Ct. at 2258. When a small and nearly powerless federal agency renders a state qualification meaningless, the Qualifications Clause has been offended. Accordingly, the Constitutional power to set voter qualifications must include the power to verify whether those qualifications are satisfied, *id.* at 2264 (Thomas, J., dissenting), lest the States’ Constitutionally granted authority is merely aspirational.

The Tenth Circuit’s decision reads the States’ authority to determine voter qualifications out of the Constitution by giving the EAC’s Acting Executive Director unilateral and arbitrary power to prevent the States from enforcing state qualifications. App.

at 21-25. The district court prudently recognized the serious Constitutional problem posed by such a framework.

By denying the states' request to update the instructions on the federal form, the EAC effectively strips state election officials of the power to enforce the states' voter eligibility requirements. Thus, the EAC decision has the effect of regulating *who* may vote in federal elections—which *ITCA* held that Congress may not do.¹¹

App. at 47.

The Tenth Circuit believed that this Court's instruction that "a State may *request* that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility," indicates that the EAC may exercise discretion in implementing the Petitioners' request. App. at 23-24 (emphasis added). Yet the NVRA does not require a "request." In fact, the regulations merely require each chief state election official to "notify" the EAC of "any change to the state's voter eligibility requirements." 11 C.F.R. § 9428.6(c). And the regulations are silent as to discretion. Accordingly, the district court recognized that the

[N]atural[] reading [of] these regulations together suggests that 1) a state may have additional voter eligibility requirements, 2) a state must inform the EAC of its voter eligibility requirements, and 3) the EAC must list those requirements in the state-specific

instructions.¹ This scheme suggests that state and federal laws can coexist, thus there is no conflict. And if there is no conflict, there is no preemption.

App. at 64. Worst of all, the Tenth Circuit allows a federal employee to arbitrarily nullify the power of a state under the Qualifications Clause. The district court properly understood the federalist structure provided in the Constitution.

B. The EAC is limited to prescribing the contents of the Federal Form in connection with the States.

The stark juxtaposition between the Constitutional authority of the States to set voter qualifications and the clear limited purpose of the EAC further supports *amicus's* position.

The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the [NVRA].

52 U.S.C. § 20929. Section 9 of the NVRA provides that the EAC “shall develop a mail voter registration form for elections” in consultation with chief state election officials. 52 U.S.C. § 20508(a)(2). Section 9(b) lays out the “contents” of the Federal Form. 52 U.S.C. § 20508(b). EAC’s authority with regard to the Federal Form is strictly limited to the four corners of the form itself. Neither Arizona nor Kansas have requested that the EAC change the “contents” of the Federal Form or asked to enforce

state laws that “reject” the Federal Form, as in *ITCA*, or to change the citizenship question that currently exists on the top, left-hand corner of the Federal Form as required by the Help America Vote Act of 2002, 52 U.S.C. § 20901 *et seq.* (“HAVA”). Arizona and Kansas are simply asking the EAC to change the instructions for their states to reflect the actual qualifications to vote, as the EAC previously did for a “similar instruction requested by Louisiana,” *ITCA*, 133 S.Ct. at 2260.

The webpage of the EAC concerning the Federal Form already accommodates state-specific qualifications. The “Register to Vote” webpage³ specifically warns applicants in bold-faced font that:

You must follow the state-specific instructions listed for your state. They begin on page 3 of the form and are listed alphabetically by state.

The Federal Form is followed by 17 pages of state-specific instructions reflecting qualifications. This includes the instructions for the state of Louisiana on page nine—inserted by the EAC—that inform Louisiana residents using the Federal Form that if they do not have a Louisiana driver’s license, special identification card, or a social security number, they will have to attach additional proof of identification to the Federal Form to complete their registration. This Louisiana qualification that the EAC previously listed in the state-specific

³ Register to Vote, Election Assistance Commission, http://www.eac.gov/voter_resources/register_to_vote.aspx

instructions for the Federal Form is no different from the instructions that Arizona and Kansas are asking the EAC to list in their state-specific qualifications. The EAC may no more refuse to print the Petitioners' qualifications than the reader's desktop printer may refuse to print this brief.

II. The Federal Form Has Failed to Prevent Noncitizens from Registering to Vote and Casting Ballots.

The basic Federal Form, as constituted by the EAC, has failed to prevent noncitizen registration. The States' requested modifications to the Federal Form are therefore *necessary* to combat the serious problem of noncitizen registration and voting. Following this Court's instruction to show that "a mere oath will not suffice to effectuate [the state's] citizenship requirement," *ITCA*, 133 S.Ct. at 2260, the States provided evidence of noncitizen registration in their respective states. *See, e.g.*, App. at 109-112. According to this Court in *ITCA*, the EAC was then "under a nondiscretionary duty" to provide state-specific instructions that will satisfy the state's requirement. *ITCA*, 133 S.Ct. at 2260.

Yet the EAC was unmoved by the clear evidence that the Federal Form was insufficient. According to the Acting Executive Director of the EAC, "[t]he Federal Form already provides safeguards to prevent noncitizens from registering to vote." App. at 106. Those "safeguards" include a checkbox at the top of the form, the words "For U.S. Citizens" on the cover page, and an attestation of citizenship by the signature box. *Id.*

These so-called “safeguards” on the Federal Form have unequivocally failed to prevent noncitizens from registering to vote or from actually voting.

A. Noncitizens are registering and voting.

In addition to the examples provided by the States to the EAC, *amicus* would draw the Court’s attention to other known examples of noncitizen registration and voting.

One example that demonstrates how the so-called citizenship checkbox “safeguard” at the top of the Federal Form is ineffective comes from Harris County, Texas. (Exhibit A. Thirteen Federal Forms from the Harris County Tax Assessor Collector.)⁴ Four of the individuals actually checked “no” on the citizenship question,⁵ six checked “no” *and* “yes,”⁶

⁴ *Amicus* has requested to lodge the exhibit, cited herein, with the Clerk pursuant to Supreme Court Rule 32.3. The exhibit is also available online at <http://publicinterestlegal.org/cases/acru-amicus/>. *Amicus* redacted all street addresses and birthdates. This is but a small sample from one county registrar and does not represent a nationwide study.

⁵ Bayron Leo Castro (VUID #117187524), Giovanna Guzman (VUID #1171828471), Marta D. Morales (VUID #009429514), and Rodrigo Salazer (VUID #1171853313) all marked “NO” to the question, “Are you a United States Citizen?” Exhibit A at 1-4.

⁶ Gregorio Matias (VUID #1171964586), Pedro Morin (VUID #1171874884), Chong Wang (VUID #1171938695), Sanchez R. Sanrbez (VUID # 1172025775), Suadoca Eliser (VUID #1171743204), and Oswald Hernandez (VUID #1171961390) marked “NO” (as well as “Yes”) to the question, “Are you a United States Citizen?” Exhibit A at 5-10.

and the remaining three left the checkbox blank entirely.

Yet *each one was registered to vote* by the local state government officials. These defective forms and the resulting voter registration numbers (VUID) associated with them were a small sample of materials collected through public information requests by the Houston-based voter's rights organization True the Vote. In an unrelated matter, the former Voter Registrar for Harris County, Texas (the county in which Houston is situated) testified before the U.S. Committee on House Administration in 2006 and stated that while the extent of illegal voting by foreign citizens in the county was impossible to determine, "it has and will continue to occur." Noncitizen Voting and ID Requirements in U.S. Elections: Hearing Before the Committee on House Administration, 109th Cong. (2006) (statement of Paul Bettencourt, Harris County Tax Assessor-Collector and Voter Registrar), *see also* Testimony of Hans A. von Spakovsky, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and the Subcommittee on Health Care, Benefits, and Administrative Rules at 8-9 (February 12, 2015), *available at* <http://oversight.house.gov/wp-content/uploads/2015/02/Testimony-of-Hans-von-Spakovsky-2-12-15.pdf> (hereinafter "Mr. von Spakovsky Testimony").⁷

⁷ Petitioner Kris W. Kobach testified before the same committee on the problem and reality of noncitizen registration and voting. Testimony of Kris W. Kobach, House of Representatives, Committee on Oversight and Government

An example of the inadequacy of the affirmation of citizenship oath “safeguard” involves a Bosnian citizen who “readily admitted registering and voting.” But he did “not read the section of the voter registration form that includes the affirmations of citizenship.” *Guilty Pleas Resolve All Five Voter Fraud Convictions in Iowa*, DESMOINES REGISTER.COM (Dec. 15, 2013).

Michigan Secretary of State Ruth Johnson asked her attorney general to investigate “10 people who aren’t U.S. citizens but have voted in past Michigan elections.” *Michigan Investigation Sought of Non-Citizen Voting*, ASSOCIATED PRESS (Dec. 6, 2013). And Ohio Secretary of State Jon Husted announced that he had found that 17 noncitizens “illegally cast ballots in the 2012 presidential election.” Eric Shawn, *Non-citizens Caught Voting in 2012 Presidential Election in Key Swing State*, FOX NEWS (Dec. 18, 2013). There is evidence in big and small elections, from admitted noncitizen voting in the Compton, California mayoral race, Daren Briscoe, *Noncitizens Testify They Voted in Compton Elections*, L.A. Times (Jan. 23, 2002), at B5, to hundreds of votes by noncitizens in the 1996 congressional contest between Republican incumbent Bob Doman and Democratic challenger Loretta Sanchez, Mr. von Spakovsky Testimony at 5.

Reform, Subcommittee on National Security and the Subcommittee on Health Care, Benefits, and Administrative Rules at 1-3 (February 12, 2015), *available at* <http://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf>.

And those are just a few examples of how the Federal Form has failed to prevent noncitizen registration and voting. A 2005 Report from the Government Accountability Office found that up to three percent of the 30,000 individuals chosen for jury duty from voter registration rolls in just one U.S. district court over a two-year period were not U.S. citizens. Government Accountability Office, *Elections: Additional Data Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists* 42 (2005), available at www.gao.gov/assets/250/246628.pdf. According to a study released in 2014 by several professors at Old Dominion University and George Mason University, approximately 6.4% of noncitizens voted in 2008 and 2.2% of noncitizens voted in 2010. Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do noncitizens vote in U.S. elections?*, *Electoral Studies* 36 (2014) 149-157. Mr. von Spakovsky outlines more examples in Chapter Five of his book *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (Encounter Books, 2012).

The extent of noncitizen registration and voting is not easily quantified. According to Mr. von Spakovsky,

Obtaining an accurate assessment of the size of this problem is difficult. There is no systematic review of voter registration rolls by most states to find noncitizens, and the relevant federal agencies—in direct violation of federal law—have either refused to cooperate with those few state election officials who seek to verify the citizenship

status of registered voters or put up burdensome red tape to make such verification difficult.

Mr. von Spakovsky Testimony at 6. While how many noncitizens are registering and voting may not be readily ascertainable, one thing is sure—it is happening. And it is happening despite the Federal Form’s “safeguards.”

B. The United States Justice Department has failed to enforce noncitizen voting prohibitions.

Compounding the problem of noncitizen registration is the current Justice Department’s failure to prosecute noncitizens caught participating in American elections. The current Department of Justice has shown itself to be impotent on enforcing federal laws that criminalize noncitizen registration and voting. *See* 52 U.S.C. § 20511(2) (fraudulent registration and voting under the NVRA); 18 U.S.C. § 1015(f) (false claims to register or vote); 18 U.S.C. § 911 (false claim of citizenship); and 18 U.S.C. § 611 (voting by aliens). For example, True the Vote notified the Justice Department regarding the thirteen Federal Forms from Harris County, Texas discussed above but no known action has been taken. *See, e.g.,* Kerry Picket, *Former DOJ Official: Non-Citizens Registered to Vote through Motor Voter Registration Forms* (April 8, 2015), available at <http://dailycaller.com/2015/04/08/former-doj-official-non-citizens-registered-to-vote-through-motor-voter-registration-forms/> and Hans A. von Spakovsky, *Election Fraud Uncovered by Patriotic Citizens...Who Promptly Get Sued* (October 23, 2010), available at

<http://pjmedia.com/blog/election-fraud-uncovered-by-patriotic-citizens-who-promptly-get-sued/>.

Unfortunately, that inaction is not an isolated occurrence. According to Mr. von Spakovsky:

In 2011, when I was still on the Fairfax County Electoral Board in Virginia, we discovered 278 individuals who had registered to vote despite telling the Virginia Department of Motor Vehicles that they were not U.S. citizens. 117 of those noncitizens had “a history of voting in Virginia.”¹ We provided that information to both the U.S. Attorney for the Eastern District of Virginia and the Public Integrity Section of the Justice Department. No action was taken to either investigate or prosecute these cases.

Mr. von Spakovsky Testimony at 4. The Justice Department did not always largely ignore alien voting in American elections. In previous decades, the Justice Department prosecuted noncitizens for registering and voting in Alaska, Colorado, Florida, and North Carolina. Criminal Division, Public Integrity Section, U.S. Department of Justice, Election Fraud Prosecutions & Convictions: October 2002-September 2005 (2006).

The current Justice Department’s lack of action on noncitizen voting bolsters the urgent need for the measures adopted by Arizona and Kansas.

Conclusion

The Petition should be granted to ensure that the States retain their constitutional authority over voter qualifications so they may address the serious and increasingly prevalent issue of noncitizen registration and voting.

Respectfully submitted,

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