

Nos. 14-3062 and 14-3072

**In the United States Court of Appeals
For the Tenth Circuit**

KRIS W. KOBACH, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, et al.,
Defendants-Appellants

AND

PROJECT VOTE, INC., et al.
Intervenors-Appellants.

*Appeals from Order Granting in Part Plaintiffs' Motions for Judgment,
Entered on March 19, 2014, by the United States District Court
For the District of Kansas, Case No. 13-cv-4095-EFM-TJJ,
The Honorable Eric F. Melgren.*

**BRIEF OF COMMUNITY VOTER REGISTRATION ORGANIZATIONS
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the undersigned *amici curiae* state that Rock the Vote, Voto Latino, Protecting Arizona's Family Coalition, Nonprofit VOTE, Fair Share, and the Fair Share Education Fund 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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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of organizations engaged in community-based voter registration activities as *amici curiae* in support of appellants.

Collectively, these organizations educate about, and assist with, voter registration for eligible persons and for underrepresented portions of the electorate in particular. In that capacity, amici organizations have a special interest and an expertise concerning voter registration efforts and the detrimental effect of laws imposing burdensome documentation requirements on the ability of qualified citizens to register to vote.

Rock the Vote is a nonprofit, nonpartisan organization dedicated to engaging young people in our nation's democracy. Its principal activities include assisting young voters with registering to vote and getting young voters out to the polls. It also engages in widespread public education efforts, including public service announcements, voter information distribution led by community street teams, and a highly trafficked website at www.rockthevote.com that offers extensive voting and election information and online opportunities to register to vote using the federal voter-registration form. Millions of young Americans have registered to vote via Rock the Vote, and in 2012 nearly 15,000 Rock the Vote voter-registration applications were submitted in Arizona and over 6,500 in Kansas.

Voto Latino is a national non-partisan organization that focuses on the civic engagement of American Latinos. It is dedicated to bringing new and diverse voices into the political process by engaging youth, media, technology, and celebrities to promote positive change. Voto Latino has assisted more than 225,000 young Latinos to register to vote.

Protecting Arizona's Family Coalition is a non-partisan alliance of health and human service groups throughout Arizona. Collectively, its members have an estimated 20,000 staff, board members, and volunteers who serve more than 1.5 million people. It provides voter engagement resources to assist its members in empowering the populations they serve to register and vote.

Nonprofit VOTE is a national non-partisan organization that partners with America's non-profits to help them integrate voter engagement into their ongoing activities and services. It provides education and guidance to non-profits through its webinars, online resource center, newsletter, and blog. Its national partners include Big Brothers Big Sisters, the Boys & Girls Clubs of America, the National Association of Community Health Centers, and the Military Voter Protection Project.

Fair Share is a national non-profit that organize Americans in support of economic fairness, including in Arizona, where the organization does business as Arizona Fair Share. Through door-to-door community outreach and grassroots

lobbying, it advocates for the economic interests and democratic rights of working families.

Fair Share Education Fund is a non-partisan, non-profit organization that promotes economic fairness and sustainability through independent research, practical ideas, effective educational campaigns, and grassroots outreach. More than 165,000 voter registration applications from individuals in six different states were collected and submitted by Fair Share Education Fund in 2012.

The parties have consented to the filing of any brief of an amicus curiae in this matter, and notices reflecting their consent have been sent to the Clerk for filing.

CERTIFICATE OF COUNSEL

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

The exclusion of eligible citizens from the political process is one of the most serious and stubborn problems in our democracy. Census data indicate that fewer than two-thirds of adult citizens nationwide are registered to vote. More troublingly, registration rates are significantly lower for particular groups, including low-income persons, racial and ethnic minorities, the young, and naturalized citizens. Arizona and Kansas are not exceptions to the national picture: Their registration rates, both overall and for racial and ethnic minorities and younger citizens, mirror that of the United States as a whole.

Community-based voter-registration drives play an essential role in combatting this problem. The National Voter Registration Act (“NVRA”), enacted to increase the number of registered and participating voters in Federal elections, facilitates community-based voter-registration drives through the use of a uniform federal mail-in voter-registration form (the “Federal Form”), “with particular emphasis on making the [form] available for organized voter registration programs.” 42 U.S.C. § 1973gg-4(b).¹ Community-based voter registration is important to the NVRA’s aims for one simple reason: It works. By taking

¹ See also S. Rep. No. 103-6 (1993), at 12 (“Mail registration is an effective means for increasing the voter rolls because . . . it permits organizations to go to the voter with organized registration drives. Mail registration is convenient for the voter, for registration drive organizers and for voter registrars as well.”); H.R. Rep. No. 103-9 (1993), at 10.

registration to prospective voters—holding registration drives in community gathering spots such as schools, churches, local festivals, and even movie theaters—it eliminates many of the commonly cited barriers to registration, including lack of time, mobility impairments, and lack of understanding of the registration process.

As the Election Assistance Commission (“EAC”) found, on the basis of a well-developed administrative record, Kansas’s and Arizona’s effort to require documentary proof of citizenship when voters use the Federal Form frustrates the purpose and operation of the NVRA in part because the documentation requirement interferes with the community-based voter registration efforts the NVRA aims to facilitate. Indeed, documentary proof-of-citizenship laws are an assault on community-based registration methods. By requiring that voter-registration applications be accompanied by one of a specified list of documents proving the citizenship status of the applicant, these laws make it immensely more difficult for community-based registration to take place. A significant portion of the eligible population in Kansas and Arizona does not have the necessary documentation, and many forms of acceptable documentation—birth certificates, passports, naturalization documents, and the like—are not commonly carried by individuals in their daily lives. Because community-based registration efforts overwhelmingly rely on approaching individuals who did not plan in advance to

register at that time or location, the documentation requirement makes it impossible for groups engaged in those efforts to assist many otherwise eligible and willing citizens to register to vote. And even when a prospective registrant does happen to be carrying one of the required documents, logistical hurdles—ranging from an inability to photocopy documents on the spot to an unwillingness to hand over sensitive identification documents to registration drive volunteers—greatly hinder community-based registration efforts.

Because the individuals most likely to be unregistered are also disproportionately likely to lack acceptable documentation of citizenship (or lack ready access to those documents when approached at a community-based registration event), previously effective efforts to reach these voters through community-based registration are stymied by documentary proof-of-citizenship requirements. Groups engaged in community-based voter registration in Arizona and Kansas have already felt these effects. Evidence in the administrative record in this case, as well as the experiences of the signatories to this brief, demonstrates that documentary proof-of-citizenship requirements make registration efforts more difficult, less effective, and more expensive. Contrary to the command of the NVRA, these requirements unduly impair voter registration when tens of millions of eligible persons remain unregistered to vote.

The EAC's rejection of the states' requests to encroach upon the NVRA and to hinder community-based voter registration efforts is reasonable and within its authority, and it should be affirmed.²

I. COMMUNITY-BASED REGISTRATION EFFORTS ARE A CRITICAL AND EFFECTIVE MECHANISM TO INCREASE VOTER PARTICIPATION.

Since the enactment of the NVRA, community-based voter-registration drives have become an important tool in increasing voter participation, particularly among members of underrepresented groups, such as racial and ethnic minorities and young people.

A. Proof-of-Citizenship Requirements Impair Efforts to Register Voters, Especially Efforts by Community-Based Registration Organizations.

The inclusion of additional State-specific documentary (and other) proof-of-citizenship instructions on the Federal Form would impede community-based registration efforts because they require potential new registrants to produce forms of identification—such as a driver's license, a current U.S. passport, a birth certificate, naturalization documents, or certain Bureau of Indian Affairs and tribal identification documents—that many people do not carry with them and that many

² The signatory amici take no position as to whether, in the absence of commissioners, the EAC's executive director had the authority to render a final decision on behalf of the Commission or whether the executive director's decision is reviewable under the Administrative Procedure Act.

other people do not possess at all. Importantly, the experience with documentary proof-of-citizenship requirements in Kansas and Arizona has already exposed such requirements' severe negative consequences on efforts to increase voter registration.³ Those consequences are contrary to the purposes of the NVRA. The EAC was well within its authority in rejecting their inclusion in the Federal Form.

1. Appellees' Proof-of-citizenship laws Require Documents that Many People Do Not Carry on Their Persons and Indeed May Not Possess at All.

The documentation requirements Kansas and Arizona seek to have incorporated into the Federal Form manifestly inhibit effective community-based voter registration efforts. It is easy enough to see why: The laws of those states require potential registrants to produce papers that many people do not possess at all or do not carry with them as they conduct their day-to-day affairs—precisely when registration drives seek to reach them.

A driver's license that evidences citizenship is the most common form of accepted documentation.⁴ However, according to census data, large numbers of

³ Arizona's proof-of-citizenship law was enacted in 2004 as part of Proposition 200 and became effective in 2005. Kansas's law was enacted in 2011 and became effective on January 1, 2012. Ariz. Rev. Stat. § 16-166. Kan. Stat. Ann. § 25-2309; 2011 Kansas Laws Ch. 56 (H.B. 2067).

⁴ Both Kansas and Arizona currently require documentation of citizenship or immigration status to obtain a driver's license or non-driver identification card. Arizona has required such documentation since 1996 and Kansas since 2007. 1996 Ariz. Sess. Laws, Ch. 230, §§ 5-7; 2007 Kansas Laws Ch. 160 (S.B. 9). Thus, driver's license records can be used to

eligible voters in both Kansas and Arizona do not possess a driver's license issued by their state. And while both Kansas and Arizona will accept licenses from other states if the license indicates citizenship on its face, no state's licenses currently meet this requirement, including those issued by Arizona and Kansas.⁵ Moreover, even many Arizonans who have an Arizona driver's license do not have a license that evidences citizenship and therefore cannot use it as documentation; prior to 1996, Arizona did not require driver's license applicants to provide proof that they were lawfully present in the United States.⁶ Thus, licenses issued prior to that date cannot be used to fulfill the State's documentation requirement.⁷ Similar problems confront citizens who obtained their driver's licenses before they were naturalized because Motor Vehicle Department records reflect citizenship status on the date the license was issued, unless the licensee requests an updated license by providing their naturalization certificate and paying a fee.⁸

verify citizenship, at least as of the time of licensing. Kansas and Arizona licenses do not, on their face, document citizenship status, however.

⁵ Ariz. Rev. Stat. § 16-166(F)(1).

⁶ See State of Ariz. Office of the Att'y Gen., *Att'y Gen. Op. re: Identification Requirements for Voter Registration* (hereinafter Ariz. AG Op.), at 3 (2005), available at <https://www.azag.gov/sites/default/files/I05-001.pdf>.

⁷ See Aplt. App. 1166. The number of individuals with Arizona licenses issued prior to 1996 is likely significant because under Arizona law, driver's licenses once issued are valid until the license-holder reaches the age of 65. Ariz. Rev. Stat. § 28-3171(A).

⁸ Joint Appendix, *Arizona v. The Inter Tribal Council of Arizona, Inc.* (U.S. Supreme Court, No. 12-71), 2012 WL 6198263 (hereinafter "ITCA JA"), at *262. Moreover, naturalized citizens are often unaware that they need to update their licenses before

Moreover, the other acceptable forms of documentation—such as a U.S. passport, a birth certificate, naturalization documents, or certain Bureau of Indian Affairs and tribal identification documents—pose problems for community-based registration drives simply because individuals are less likely to possess them or be able to use them to fulfill the documentation requirements. With regard to U.S. passports, for example, the State Department reports that there were approximately 113 million passports in circulation in 2012.⁹ The total citizen population in 2010 was almost 287 million, meaning that only 39% of U.S. citizens held passports.¹⁰ Moreover, passport ownership is strongly correlated with both income and education level, meaning that the underrepresented populations typically targeted by community-based voter registration efforts are less likely to hold valid passports than other groups.¹¹

Birth certificates, while held by more individuals, pose their own problems. For example, some groups of citizens born outside of hospitals—including people

registering to vote because, while Arizona internally designates licenses as belonging to non-citizens, that designation does not appear on the license itself. Ariz. AG Op. at 3.

⁹ See U.S. Dep't of State, *Passport Statistics*, available at <http://travel.state.gov/content/passports/english/passports/statistics.html>.

¹⁰ U.S. Census Bureau, Table: Selected Population Profile in the United States, 2009-2011 Am. Cmty. Survey 3-Year Estimates, available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹¹ See, e.g., Richard Florida, "America's Great Passport Divide," *The Atlantic* (Mar. 15, 2011), available at <http://www.theatlantic.com/national/archive/2011/03/americas-great-passport-divide/72399/>.

born in rural areas or on Native American reservations—are less likely to have received birth certificates.¹² Elderly citizens are also unlikely to be able to rely on a birth certificate to satisfy documentation requirements because birth certificates were not consistently generated until sometime in the 1930s.¹³ Nationwide, fewer than half of voting age women who have ready access to their birth certificates have ones that reflect their current legal names.¹⁴

Community-based registration organizations also confront serious obstacles in assisting persons who might need to rely on a certificate of naturalization for documentation of their citizenship. For example, because of complexities in Arizona’s procedures, individuals naturalized prior to approximately 1975, who do not have an alien registration number on their certificates of naturalization,¹⁵ cannot register by mail—which is how many community-based organizations register voters. Instead, they must present the original certificate to the county recorder for inspection, which requires that the individual actually appear at the office in person during business hours.

¹² See Brennan Center for Justice, *Proof of Citizenship* 1 (Sept. 2006), available at <http://www.brennancenter.org/analysis/policy-brief-proof-citizenship>.

¹³ See Corey Dade, “Why New Photo ID Laws Mean Some Won’t Vote,” NPR (Jan. 28, 2012), available at <http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote>.

¹⁴ Brennan Center for Justice, *Citizens Without Proof* 2 (Nov. 2006), available at <http://www.brennancenter.org/analysis/citizens-without-proof>.

¹⁵ ITCA JA at *251 n.5.

Even when individuals possess one of the required forms of documentation, aside from driver's licenses, they do not routinely keep them on their persons. Few people carry a birth certificate, passport, naturalization documents, or tribal documentation.¹⁶ In fact, some people keep their birth certificates or passports in safe deposit boxes, requiring a trip to the bank during regular business hours to access them. Likewise, students who move for school may leave important paperwork at their parents' homes and be unable to register until they retrieve it. Furthermore, even if an individual has the necessary documentation with her when approached at a registration drive, she may be unwilling to provide her birth certificate or passport to a stranger, given very legitimate concerns that it will be lost or stolen or that identity theft will occur.¹⁷

2. The States' Proof-of-citizenship Requirements Have Already Adversely Affected Community-Based Voter Registration Efforts.

The negative consequences of documentary proof-of-citizenship requirements on the success of community-based voter-registration drives are not just hypothetical. The experience of voter registration organizations operating under Proposition 200 in Arizona strongly suggests that including proof-of-citizenship instructions on the Federal Form will hinder community-based voter-

¹⁶ See, e.g., ITCA JA at *272 (Findings of Fact and Conclusions of Law, *Gonzalez v. Arizona*, No. 06-CV-01268 (Aug. 20, 2008) (summarizing testimony of Debra Lopez, an experienced community-based voter registration activist and volunteer)).

¹⁷ See Declaration of Lydia Camarillo (Jan. 3, 2104), ¶ 16, Aplt. App. 881, 884.

registration drives and prevent eligible citizens from registering to vote. The impact of Arizona's proof-of-citizenship requirement is a harbinger of how these efforts will be affected should the EAC be compelled to include Arizona's and Kansas's proof of citizenship instructions on the Federal Form. According to documents in the record, after the law went into effect, registration through community-based voter drives dropped 44% in Arizona's largest county.¹⁸ Representatives of several of the intervenors in this case testified that they encountered or likely would encounter difficulty in registering individuals who did not have any of the acceptable forms of documentation or who did not have their documents with them when they attempted to register.¹⁹ The organizations also testified that because Kansas's and Arizona's laws require photocopies of certain types of documentation, effective registration outreach requires the group to have a copier or scanner on site. This requirement both restricts the types of locations where drives can be held and increases the cost of conducting such events. The costs of copying documents are compounded by the additional time—and therefore additional resources—needed to explain registration requirements, assist with

¹⁸ See Aplt. App. 1127; *see also* The State of the Right to Vote After the 2012 Election, Hearing Before the Senate Comm. on the Judiciary, 112th Cong. (Dec. 19, 2012) (statement of Nina Perales), Aplt. App. 905-19.

¹⁹ See, e.g., Aplt. App. 749-51, 881-86; *accord id.* at 888-891 (Kansas proof of citizenship requirement will make it more difficult for community-based organization to conduct voter-registration drive).

filling out forms, track down or copy necessary documentation, and follow-up on applications. Indeed, several groups testified that they encountered so many difficulties in registering individuals under Proposition 200 that they drastically reduced or ceased entirely their voter registration efforts in Arizona after its passage.²⁰

Many of the signatories to this brief likewise have experienced significant difficulty in conducting registration drives in Arizona following the passage of Proposition 200, difficulty that was relieved through use of the current version of the Federal Form. Rock the Vote, for example, conducts voter registration in every state but North Dakota (which does not have a voter registration requirement). It targets young people ages 18 to 29, who are less likely to be registered than older individuals. In Arizona alone, nearly 15,000 Rock the Vote voter-registration applications were submitted in 2012. Most of Rock the Vote's registration occurs via the group's online tool, which applicants can access on a computer, tablet, or smartphone. That tool asks applicants to answer a series of questions and then uses the answers to automatically populate the federal voter-registration form for them. In most states, after completing their forms, the applicants are prompted to print them out, sign them, and mail them in. They are also automatically emailed a reminder to print and mail the form, are sent a second reminder a few days later,

²⁰ *E.g.*, Aplt. App. 750.

and—if they do not appear on the registration roll within two weeks—they are added to a list for follow-up by telephone. In a few states, applicants can choose to submit their forms electronically directly to the state’s online voter registration system; Rock the Vote is currently working to expand this electronic submission option to other states, including Arizona and Kansas.

If documentation of citizenship is necessary, then Rock the Vote’s online registration tool would need to include the additional steps of instructing applicants on how to obtain the necessary documentation, find a photocopier, and make copies of the necessary documents. Based on Rock the Vote’s experience, additional documentation requirements would dramatically reduce the effectiveness of its online registration tool, which targets young individuals who do most things electronically and whose everyday lives do not involve obtaining, printing, or mailing physical documents. If the additional hurdle of locating a photocopier and the required documentation is added to the process, it is less likely that applicants will follow through and complete their registrations.

The impact of documentary proof-of-citizenship requirements can also be seen in the numbers of individual voters they have affected. During the twenty months following the enactment of Arizona’s Proposition 200 in January 2005, at least 31,500 registration applications were denied because of a failure to meet the

law's requirements.²¹ Of those 31,500 individuals whose application for registration was initially denied, only about 11,000 were later able to register successfully—the remaining 20,000 individuals did not subsequently make it onto the rolls. Notably, the Hispanic population was overrepresented relative to its share of the population in the group of individuals whose registration applications were initially denied and to an even greater degree in the subset of individuals who did not subsequently register successfully.²² In contrast to the more than 20,000 likely legitimate voters who have been disenfranchised as a result of Proposition 200, Arizona has identified at most 196 individuals on its voter roles who may be (though it is far from clear they in fact are) non-citizens.²³ Likewise, in the first year after Kansas's proof-of-citizenship requirement went into effect, over 20,000 voter-registration applications (out of a total of 72,000) were initially rejected for failure to provide proof of citizenship, and approximately 12,500 voters remain unable to vote, most of them very likely eligible citizens.²⁴ In contrast, only 21 possible non-citizens have been found on Kansas's voter registration rolls.²⁵

²¹ Expert Report of Louis Lanier, Aplt. App. 999, 1001.

²² *Id.*

²³ Aplt. App. 1154-56.

²⁴ Aplt. App. 1366-69.

²⁵ Aplt. App. 1156.

In sum, proof-of-citizenship requirements make community-based registration less effective and more costly for groups engaged in those efforts. Many eligible individuals cannot be registered through community-based registration drives, either because they do not have any acceptable form of documentation or because they do not have the documentation with them when approached at a registration drive. In the latter situation, some individuals need assistance to retrieve or copy their documents, while others leave to retrieve them and fail to return. Thus, proof-of-citizenship requirements greatly increase the burdens on community-based registration organizations—by requiring additional time to assist each applicant and imposing the cost of photocopying documents (either commercially or by bringing a portable copier to a registration drive)—while also substantially reducing the number of eligible voters who can be reached through registration drives conducted by such organizations.

B. Many Qualified Citizens Are Not Registered to Vote, and Community-Based Registration Efforts Are a Critical and Effective Mechanism to Increase Voter Participation.

Voter registration rates in the United States remain stubbornly low and some population groups, such as communities of color, low-income citizens, the young, and naturalized citizens have even lower registration rates. Community-based voter registration efforts are designed to reach those groups that are underrepresented on our registration rolls. They aim to eliminate the most

common barriers to registration by going to potential voters and facilitating the registration process—including by explaining the requirements and providing assistance filling out forms. It is these very efforts that will be impeded should this Court require the EAC to grant the states’ requests.

1. In Arizona and Kansas, Voter Registration Rates Are Low and Some Groups Are Significantly Underrepresented in the Electorate.

The registered voter populations in Arizona and Kansas are substantially smaller than the qualified voter pool, and the problem is measurably worse among groups historically underrepresented in the electorate. For example, in Arizona in 2012, only 65.2% of voting age citizens were registered to vote.²⁶ For Black and Hispanic citizens in Arizona, registration rates were even lower: only 58.6% of Black citizens and 52.2% of Hispanic citizens were registered to vote, compared with 70.5% of White, non-Hispanic citizens.²⁷ Age also played a significant role, with only 55.3% of 18-24 year-old Arizonans registered to vote.²⁸ Kansas fares only slightly better. In 2012, 74.4% of Kansas citizens were registered to vote but

²⁶ U.S. Census Bureau, *Voting and Registration in the Election of November 2012 – Detailed Tables* (hereinafter “*Voting and Registration*”), Table 4a (2012), available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html>.

²⁷ *Id.*, Table 4b.

²⁸ *Id.*, Table 4c.

only 62.5% and 50% of Black and Hispanic citizens, respectively, were registered.²⁹

Nationally, the picture is similar. In 2012, only 71.2% of voting-age citizens reported being registered to vote.³⁰ Again, race and ethnicity were significant factors, especially in the case of Hispanic citizens: 73.7% of White, non-Hispanic citizens were registered compared with 73.1% of Black citizens, and only 58.7% of Hispanic citizens.³¹

Income is also strongly associated with registration rates. Nationally, only 61.8% of voting-age citizens with a family income of less than \$20,000 were registered in 2012, while 87.1% of those with a family income of \$150,000 or more were registered.³² Finally, there is a substantial disparity in registration rates of native-born versus naturalized citizens. Seventy percent of native-born citizens of voting age reported being registered in 2012, compared with only 62.1% of naturalized citizens.³³

That the United States has a serious problem with voter registration is particularly clear when one considers the registration rates in other democracies.

²⁹ *Id.*, Tables 4a and 4b.

³⁰ *Id.*, Table 4a.

³¹ *Id.*, Table 4b.

³² *Id.*, Table 7.

³³ *Id.*, Table 11.

In Great Britain, for example, 97% of eligible voters were registered in 2008.³⁴ In Canada and Germany, 93% of eligible voters were registered, as were 92% in Australia and 91% in France.³⁵ And despite historical disenfranchisement of the majority of its population and continuing high rates of poverty and illiteracy, South Africa had a 77% registration rate in 2009.³⁶ The fact that the United States consistently experiences voter registration rates far below comparative national figures—while seeking a representative government—demonstrates that our country can ill afford to retrench on access to voter registration. To the contrary, additional barriers to registration absolutely must be avoided.

2. Community-Based Initiatives Play a Crucial Role in Increasing Voter Registration Rates.

Data suggests that a significant portion of those individuals who have not registered to vote might do so if they had improved access to or education about voter registration. When asked by the Census Bureau in 2008 why they did not register, 14.7% of nonregistrants reported that they had not met registration deadlines, 6% cited permanent illness or disability, 4.2% said that they did not

³⁴ Jennifer S. Rosenberg and Margaret Chen, *Expanding Democracy: Voter Registration Around the World* 3 (June 2009), available at <http://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world>.

³⁵ *Id.*

³⁶ *Id.*; see also CIA, *The World Factbook* (reporting a poverty rate of 50% and a literacy rate of 86.4% in South Africa, compared with a poverty rate of 15.1% and a literacy rate of 99% in the United States), available at <https://www.cia.gov/library/publications/the-world-factbook/>.

know where or how to register, and 1.4% cited difficulty with English as the reason they had not registered.³⁷ Hispanic registrants were more likely to report that they did not register because they had not met registration deadlines, did not know where or how to register, or had difficulty with English, Black non-registrants disproportionately cited registration deadlines or a permanent illness or disability, and Asian non-registrants were far more likely to report difficulty with English as the reason they had not registered.³⁸ Similarly, in a 2006 survey conducted by the Pew Institute and the Associated Press, 19% of nonregistrants said that they had not registered because they were too busy or just had not done it, 17% said they had recently moved, and 4% cited illness or disability as the reason.³⁹

Community-based voter registration efforts are designed precisely to make voter registration easier and more convenient. They aim to eliminate the most common barriers to registration by going to potential voters and facilitating the

³⁷ Thom File and Sarah Crissey, U.S. Census Bureau, *Voting and Registration in the Election of November 2008* 14 (July 2012), available at <http://www.census.gov/prod/2010pubs/p20-562.pdf>.

³⁸ *Id.*; see also Tova Wang and Youjin B. Kim, *From Citizenship to Voting: Improving Voter Registration for New Americans* 10-11 (Dec. 2011), available at <http://www.demos.org/publication/citizenship-voting-improving-registration-new-americans>.

³⁹ The Pew Research Center For The People & The Press, *Regular Voters, Intermittent Voters, and Those Who Don't: Who Votes, Who Doesn't, And Why* 4 (Oct. 2006), available at <http://www.people-press.org/files/legacy-pdf/292.pdf>.

registration process—including by explaining the requirements and providing assistance filling out forms. These efforts contrast with traditional registration methods, which require voters themselves to know how to locate the correct forms or to identify and travel to one of the government offices that provides registration forms.

Community-based registration efforts have proven highly effective at reaching these unregistered citizens, and thus provide an important complement to the other voter registration mechanisms embodied in the NVRA.⁴⁰ In fact, “[f]rom 2000 to 2008, community-based groups registered tens of millions of new voters, including close to nine million in 2008 alone.”⁴¹ These efforts came from non-partisan groups as well as organizations across the political spectrum. Presidential campaigns, large national organizations, and small local groups—many targeting specific, underrepresented segments of the population—held voter-registration drives at locations ranging from churches to senior centers to farmers’ markets to school campuses.

⁴⁰ In 2010, for example, less than half of voters reported that they had registered at their DMV or at a government voter registration office. U.S. Census Bureau, *Voting and Registration*, Table 12.

⁴¹ NAACP, *Defending Democracy: Confronting Modern Barriers to Voting Rights in America* 15 (2012) (citing U.S. Census Bureau, *Voting and Registration*, Table 14), available at <http://action.naacp.org/page/-/Defending%20Democracy%2C%20Final%20Version.pdf>.

A significant portion of voters have registered through community-based methods. In 2012, 5.5% of the electorate reported registering at a school, hospital, or on campus, while an additional 5.0% reported using a registration booth.⁴² Moreover, 13.1% of registrants reported registering by mail. Because community-based registration efforts overwhelmingly use mail-in applications, some significant number of these registrations is likely attributable to community-based voter registration efforts.

Among groups with low registration rates, community-based registration methods played an even more important role. Black, Asian, and Hispanic citizens all reported higher than average use of school, hospital, and on-campus registration methods (7.4%, 6.4%, and 8.1%, respectively), as well as higher than average use of registration booths (8.1%, 6.4%, and 6.9%, respectively). Naturalized citizens also reported greater usage of community-based methods of registration than did native-born citizens. And finally, among people aged 18 to 24—the age group for which registration rates are lowest—13.9% of registered voters reported registering at a school, hospital, or on campus.

Not surprisingly given their success, federal law favors registration drives. In fact, as one federal court has recognized:

⁴² U.S. Census Bureau, *Voting and Registration*, Table 12.

the NVRA encourages voter-registration drives; the NVRA requires a state to accept voter-registration applications collected at such a drive and mailed in to a voter registration office; the NVRA gives a voter-registration organization like each of the plaintiffs here a “legally protected interest” in seeing that this is done; and when a state adopts measures that have the practical effect of preventing an organization from conducting a drive, collecting applications, and mailing them in, the state violates the NVRA.⁴³

Another court—noting the expressive and associational rights implicated by voter registration activities—applied heightened scrutiny to efforts to curb them.⁴⁴

These decisions acknowledge that community-based voter registration efforts are an important mechanism of enfranchisement, and one that the NVRA itself has enshrined as an indispensable part of the electoral process.

Accordingly, the EAC was correct in finding that Kansas’s and Arizona’s requested modifications to the Federal Form would undermine such efforts by incorporating additional identification requirements into the Federal Form, and its decision should be affirmed.

⁴³ *League of Women Voters of Fla. V. Browning*, 863 F.Supp.2d 1155, 1163 (N.D. Fla. 2012); see also *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (“Nowhere does the NVRA prohibit or regulate voter-registration drives; rather, it impliedly encourages them.”).

⁴⁴ See *Project Vote v. Blackwell*, 455 F.Supp.2d 694, 700-01 (N.D. Ohio 2006).

II. THE ELECTIONS CLAUSE OF THE CONSTITUTION PERMITS CONGRESS TO PRESCRIBE A FEDERAL VOTER-REGISTRATION FORM THAT DOES NOT REQUIRE DOCUMENTARY PROOF OF CITIZENSHIP.

In granting to the EAC the power to prescribe the contents of the Federal Form, including what information is necessary to assess a voter's eligibility for registration purposes, Congress acted well within the authority granted to it in the Elections Clause of the Constitution to regulate the times, places and manner of federal elections. In rejecting Kansas's and Arizona's requests to modify the Federal Form, the EAC has not exercised this authority in a way that infringes the states' prerogative to set and enforce voter qualifications, because numerous mechanisms for deterring voter fraud and enforcing voter qualifications remain available to the states. Accordingly, this court should affirm the EAC's decision.

The Elections Clause of the Constitution grants to Congress the power to regulate "The Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const., Art. I, § 4, cl. 1. The Clause has been interpreted to confer on Congress broad supervisory authority over the administration of federal elections.⁴⁵ "Times, Places, and Manner," . . . are comprehensive words, which embrace authority to provide a complete code for congressional elections,

⁴⁵ *Ex parte Siebold*, 100 U.S. 371, 387 (1879); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793-94 (7th Cir. 1995) ("[T]he 'Manner' of holding elections has been held to embrace the system for registering voters.").

including . . . regulations relating to ‘registration.’”⁴⁶ As numerous courts have held, the NVRA as a whole and the specific provisions relating to the development of a federal voter-registration form prescribe “regulations relating to registration” and therefore fall within the scope of the Elections Clause.⁴⁷

A. The District Court’s Construction of the NVRA’s Federal Form Provision Is Contrary to the Statutory Language and Purpose.

Here, the district court declined to reach the question whether the NVRA’s federal form provisions unconstitutionally deprive states of the ability to enforce their voter qualifications. It did so by resorting to a stilted construction of the NVRA that requires the EAC to accede to any change to the Federal Form that a state claims is necessary for it to enforce its voter qualifications, regardless of the impact of the change on the NVRA’s clearly stated goals. This construction of the NVRA is at odds with the statute’s plain language and undermines its purposes. It must be rejected.

The NVRA plainly assigns to the EAC the authority to prescribe the contents of the Federal Form and gives it discretion to determine what information

⁴⁶ *Arizona v. The Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (internal quotation marks removed); *Edgar*, 56 F.3d at 793-94 (“[T]he ‘Manner’ of holding elections has been held to embrace the system for registering voters.” (citing *Smiley*, 285 U.S. at 366)).

⁴⁷ *See, e.g., Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (holding that the NVRA “fits comfortably within [the] grasp” of the Elections Clause); *Edgar*, 56 F.3d at 793-96.

is necessary for states to enforce their voter qualifications. 42 U.S.C. § 1973gg-7(b)(1)(a). This authority allows the EAC to effectuate the NVRA’s goals of increasing voter registration and participation by, *inter alia*, enabling community-based voter-registration drives. If this Court believes this interpretation of the NVRA’s federal form provisions—which is the only plausible one—raises a doubt as to the statute’s constitutionality, for the reasons explained below, that doubt must be resolved in favor of Congress and the EAC.

B. The Elections Clause Empowers Congress to Specify What Information is Necessary to Assess Voter Qualifications for Purposes of Voter Registration.

Sections 6 and 9 of the NVRA, which authorize the EAC to prescribe the contents of the Federal Form and to determine what information is necessary to assess voter eligibility, are within Congress’s power under the Elections Clause.⁴⁸ The Elections Clause gives Congress broad authority to superintend the voter registration process. This authority has been held to include aspects of that process that implicate voter qualifications. In *Edgar*, for example, the Seventh Circuit endorsed Congress’s authority to prescribe procedures for the removal of voters who have changed residence from state voter registration lists, notwithstanding that

⁴⁸ See 42 U.S.C. § 1973gg-4(a)(1) (“Each State shall accept and use the mail voter-registration application form prescribed by [the EAC]”); 42 U.S.C. § 1973gg-7(a) (The EAC, “in consultation with the chief election officers of the States, shall develop a mail voter-registration application form for elections for Federal office.”).

residency is, in every state, a qualification for voting.⁴⁹ The NVRA's assignment of the power to determine what information is necessary for states to assess a voter's citizenship, like the establishment of procedures for enforcing state residency requirements, relates to the voter registration process and therefore falls squarely within the scope of the Elections Clause.

C. Kansas and Arizona Have Not Been Precluded from Enforcing Their Voter Qualifications.

Congress's authority under the Elections Clause is, of course, "subject . . . to the reservation to the states of the power to fix the qualifications for voters [in federal elections]." ⁵⁰ A proper exercise of the power conferred by the Elections Clause, however, does not become invalid merely because it has an indirect effect on a state's ability to enforce its voter qualifications.⁵¹

[T]he [NVRA] may, as the state argues, make it more difficult to enforce some of the qualifications But the existence of such effects cannot by itself invalidate the law. Such effects are bound to follow from any effort to make or alter state regulations of the times, places, and manner of conducting elections, including the registration phase.⁵²

In other words, while states can and do use the voter registration process to enforce their voter qualifications, states' right to enforce voter qualifications does not

⁴⁹ *Edgar*, 56 F.3d at 794.

⁵⁰ *Edgar*, 56 F.3d at 794.

⁵¹ *Id.*

⁵² *Edgar*, 56 F.3d at 794-95.

entitle them to demand a federal voter registration procedure that, in their view, would make enforcement more effective or efficient. Only if the federal law has the purpose or effect of wholly precluding a state from enforcing its qualifications may it be said to intrude on the state's prerogative under the Constitution's qualifications clauses⁵³ to set voter qualifications.⁵⁴

Neither the Federal Form provisions of the NVRA nor the EAC's refusal to include the instructions requested by Kansas and Arizona in any way alter the voter qualifications Kansas and Arizona have established (nor, for that matter, do Arizona's and Kansas's documentary proof-of-citizenship requirements). Moreover, they do not prevent Kansas and Arizona from enforcing their qualifications in any number of ways, as is well documented in the record. First, states can cross-reference voter-registration applications with other government databases that contain citizenship information, such as driver's license databases, tax records, the federal immigration database, or the nationwide vital statistics database operated by the National Association for Public Health Statistics and Information Systems. Both Kansas and Arizona in fact used motor vehicle

⁵³ U.S. Const., Art. I, § 2; *Id.*, Amdt. 17.

⁵⁴ *Cf. Edgar*, 56 F.3d at 795 (“If Illinois could show that the [NVRA] had been designed with devilish cunning to make it impossible for the state to enforce its voter qualifications, or that whatever the motives of the draftsmen the law would have that consequence, we might have a different case.”); *accord Inter Tribal Council*, 133 S.Ct. at 2258-59 (“[I]t would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.”).

department records to identify a number of alleged non-citizens on their voter registration lists, enabling them to enforce their voter qualifications by cancelling the registrations.⁵⁵

Second, the threat of criminal prosecution and deportation has a deterrent effect that serves to prevent ineligible individuals from registering. The criminal penalties for filing a false voter-registration application are severe, and the effectiveness of this deterrent is apparent from the evidence Kansas and Arizona submitted to the EAC. For example, an Arizona elections official stated that in 2005, a total of 159 individuals who had denied that they were citizens in jury records were referred to the local district attorney for possible prosecution, and that after investigation, charges were brought against only 10 of them.⁵⁶ These low numbers suggest that the deterrent effect of prosecution is highly effective at preventing non-citizens from registering. The threat of deportation may provide an even stronger deterrent than prosecution for many non-citizens.⁵⁷

⁵⁵ Because listing a driver's license number on the voter-registration forms is an acceptable form of proof of citizenship under Arizona's proof-of-citizenship law, it is unclear how a change to the Federal Form would have had any effect on the state's ability to enforce its voter qualifications in these cases. *See* Ariz. Rev. Stat. § 16-166(F)(1). In fact, in most of the instances of alleged non-citizen registrations in which the form used could be determined, the registrant used the state form. *See* Aplt. App. 1305.

⁵⁶ *See* Aplt. App. 1305.

⁵⁷ *See, e.g.*, Letter from Jessica Funkhouser, State Elections Director, July 18, 2001, Aplt. App. 1026 ("In 2001, the Arizona State Elections Director wrote that: 'It is generally believed that the strong desire to remain in the United States and fear of deportation

As reflected in the exceedingly small number of non-residents who allegedly sought to register, the EAC's denial of Kansas's and Arizona's request to include their documentary proof-of-citizenship requirements on the federal form has not precluded the states from enforcing their voter qualifications. Accordingly, Congress's delegation of the power to prescribe the contents of the Federal Form to the EAC, and the EAC's exercise of that power, are a constitutional exercise of the authority granted by the Elections Clause. The EAC's denial of Kansas's and Arizona's request should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the district court's interpretation of the NVRA as requiring EAC to accept any alteration to the Federal Form requested by the states must be rejected and the EAC's action in refusing the states' requested modifications must be affirmed.

outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.'").

Dated: June 3, 2014

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 6,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: June 3, 2014

s/ Stuart C. Naifeh
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I hereby certify that on June 3, 2014, I electronically filed the foregoing BRIEF OF AMICI CURIAE with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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