Nos. 14-3062, 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

On Appeal from the United States District Court
for the District of Kansas
District Court No. 5:13-cv-4095

BRIEF OF AMICI CURIAE STATES OF GEORGIA AND ALABAMA IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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INTEREST OF THE AMICI CURIAE

The Georgia and Alabama legislatures, like the legislatures of Kansas, Arizona, and other states, have passed laws requiring documentary proof of citizenship from those seeking to register to vote. *See* O.C.G.A. §21-2-216(g); Ala. Code § 31-13-28(c). The Georgia and Alabama laws are materially identical to the Kansas and Arizona laws at issue in this case. Like all sovereign states, Georgia and Alabama have an interest in enforcing their duly enacted laws. Georgia, for example, has requested that the Elections Assistance Commission ("Commission" or "EAC") update the state-specific instructions attached to the Federal Form required by the National Voter Registration Act ("NVRA"), 42 U.S.C. §1973gg *et seq.*, so that those instructions accurately describe Georgia law. The Commission denied Georgia's request, after initially stating that it could not make a determination on the request because it lacked a quorum of commissioners.

ARGUMENT

In order to avoid the prospect of an unconstitutional interpretation of the National Voter Registration Act, the Elections Assistance Commission is required to include state-specific instructions on voter requirements on the Federal Form for voter registration. The United States Constitution explicitly provides in the Qualifications Clause that the States, not Congress, determine *"who* may vote in [federal elections]." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct.

2247, 2257 (2013) (quoting U.S. CONST. art. I, §2, cl. 1 and U.S. CONST. amend. XVII). Numerous States have established by law that only those persons who present proof of citizenship are eligible to vote. *See, e.g.*, O.C.G.A. §21-2-216(g). The federal government may not impede those state requirements. "Since the power to establish voting requirements is of little value without the power to enforce those requirements…it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 2258. The Commission would have this Court interpret both the Commission's authority and the NVRA in a way that unconstitutionally supplants the Qualifications Clause. Based on the text of the Constitution and the Supreme Court's guidance in *Inter Tribal Council*, this Court should affirm the ruling of the District Court.

I. THE CONSTITUTION EXPLICITLY RESERVES TO STATES THE POWER TO ESTABLISH VOTER QUALIFICATIONS IN FEDERAL ELECTIONS.

The Commission argues that the NVRA permits it, as a federal administrative agency, to "itself" determine whether a state law requirement "is 'necessary' for States to assess eligibility or administer elections." EAC Br. at 15, *Kobach* et al. *v. U.S. Election Assistance Committee*, *appeal docketed*, Nos. 14-3062, 14-3072 (10th. Cir. Mar. 28, 2014). That construction is completely at odds

with the text of the Constitution and ignores the Supreme Court's straightforward guidance in *Inter Tribal Council*.

A. The Qualifications Clause Ensures that States Retain the Power to Establish and Define the Electorate.

Under the Constitution, States are entrusted with the power to determine voter qualifications. The Qualifications Clause provides that:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

U.S. CONST. art. I, §2, cl. 1. The Seventeenth Amendment uses identical language to describe the exclusive grant to the States the power to set voter qualifications in U.S. Senate elections. *Id.* amend. XVII, cl 1.

Taken together, these constitutional provisions (collectively "the Qualifications Clause") grant exclusively to the States the power to establish voter qualifications in federal elections. Congress, therefore, cannot legislate with the purpose or effect of establishing voter qualifications in federal elections. "[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257 (emphasis original); *see also Oregon v. Mitchell, 400 U.S. 112, 210* (1970) (Harlan, J., concurring in part and dissenting in part) ("It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely

nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.").

Granting to the States the exclusive power to establish voter qualifications reflects the Framers' considered judgment about the proper balance of power between the States and the federal government; indeed, this provision was likely necessary to ensure ratification. *See* J. Story, Commentaries on the Constitution of the United States 216, 218-19 (abridged ed. 1833).

The Framers viewed the power to define voter qualifications as a fundamental article of republican government, and rightly recognized that Congress could "by degrees subvert the Constitution" if it was given the power to regulate who could vote in federal elections. 2 Records of the Federal Convention of 1787, p. 250 (M. Farrand rev. 1966). In the Federalist Papers, both Alexander Hamilton and James Madison warned against leaving "open for the occasional regulation of the Congress" the establishment of voter qualifications. THE FEDERALIST No. 52 (J. Madison); *accord* THE FEDERALIST No. 60 (A. Hamilton). Granting to the States the exclusive right to define the federal electorate ensured that Congress could not subvert the Constitution by defining in a particular way the pool of eligible voters. *See* 2 Records of the Federal Convention of 1787 at 250; *see also* THE FEDERALIST No. 52 (J. Madison).

Of course, the Framers did not leave the States with unfettered discretion to define the federal electorate. The Constitution instead tied *federal* voter qualifications to *state* voter qualifications: Federal electors "shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. CONST. art. I, §2; *id*. amend. XVII. Tethering the definitions of the federal and state franchise ensured that the States would not impose improper restrictions on voter eligibility in federal elections; under the compromise established in the Qualifications Clause, doing so would also impede the ability of voters to participate in state and local elections. *See* THE FEDERALIST NO. 52 (J. Madison).

The Commission's refusal to update the state-specific instructions in order to reflect lawful changes in the States' voter qualifications is thus inconsistent with the Framers' intent that the States have exclusive power to set voter qualifications. Not only did the Framers expressly recognize that different States would implement different voter qualifications, they wanted the States to retain the power to do so; retention by the States of that power was in fact necessary to the ratification of the Constitution. "To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." THE FEDERALIST NO. 52 (J. Madison). The Commission's interpretation would read

the Qualifications Clause out of the Constitution, a result that is not supported directly or indirectly in the text.

B. The Elections Clause Does Not Permit Congress to Preempt State Law as to Lawful Voter Qualifications.

The Constitution also grants to the States the power to set the "times, places and manner" of federal legislative elections, subject to congressional veto. The Elections Clause provides that:

> The 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 choosing Senators.

U.S. CONST. art. I, §4.

The Elections Clause addressed the Framers' concerns that the States, if given exclusive power over the mechanics of federal elections, might simply refuse to hold them. *See id.* In practice, the refusal by the States to hold federal elections would prevent the formation of a federal legislature and render the federal government powerless. By granting the States primary responsibility over federal elections, but permitting the federal government to preempt state law as to the "times, places and manner" of federal elections, the Framers protected the States' interests in defining the electorate while also ensuring that the federal legislature elections would actually take place. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995) ("The Convention debates make clear that the Framers'

overriding concern was the potential for States' abuse of the power to set the "Times, Places and Manner" of elections.").

The fact that the Elections Clause grants Congress the power to preempt state law as to the "times, places and manner" of federal elections does not give Congress control over other aspects of federal elections. To be sure, courts have interpreted the Elections Clause to give Congress broad power over the mechanics of federal elections. But they have also emphasized that congressional power over federal elections is not unlimited. This Court, for instance, has noted that the Elections Clause confers on the States "a power restricted to the *procedural* regulation of the times, places and manner of elections." *Campbell v. Davidson*, 233 F.3d 1229, 1232 (10th Cir. 2000) (emphasis added); *see also Cook v. Gralike*, 531 U.S. 510, 523-26 (2001)("manner" in Elections Clause does not extend to laws that seek to affect electoral outcomes). The ability to provide procedural direction cannot be expanded to encompass the substantive aspects of voter qualification that have been committed to the States.

Smiley v. Holm does not demand a different result. *Smiley* involved congressional redisticting; not once did the Court mention the Qualifications Clause, much less contemplate how that clause foreclosed the exercise of federal power over voter qualifications in federal elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). Although the *Smiley* court wrote that the Elections Clause

empowered the federal government to enact comprehensive elections legislation, including in the area of voter "registration," the Court's statement was dicta, and in any event is true in a more limited sense than is suggested by the Commission. *See Smiley,* 285 U.S. at 366. The States do not dispute that the federal government can direct that its Federal Form be accepted as a means of voter registration. The question is whether the federal government can direct the substantive *qualifications* for voter registration, not one particular *means* of voter registration. And in any event, the Supreme Court has, since *Smiley*, recognized that the Elections Clause does not confer a federal power to regulate voter qualifications. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Setting that recognition aside, even if the Elections Clause *were* broad enough to support the proposition that Congress could establish its own set of voter qualifications, doing so would violate the Qualifications Clause. Though the "Constitution is filled with provisions that grant Congress[] specific power to legislate in certain areas . . . these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). As such, Congress cannot legislate under the Elections Clause with the purpose or effect of establishing voter qualifications. *See Inter Tribal Council*, 133 S.Ct. at 2258; *see also Mitchell, 400 U.S. at 210* (1970) (Harlan, J., concurring in part and

dissenting in part). The *Inter Tribal Council* case expressly confirms that Congress may regulate federal elections only to the extent that its legislation does not impinge upon the powers of the States to set lawful[1] voter qualifications: "Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S.Ct. at 2257 (emphasis in the original).

The interaction between the Qualifications Clause and the Elections Clause reflects a careful compromise intended to protect the integrity of both the States and the federal government. As the Supreme Court has stated, "One cannot read the Elections Clause as treating implicitly what these other constitutional provision regulate explicitly." *Inter Tribal Council*, 133 S.Ct. at 2258. To import into the Elections Clause a federal power that is granted to the States in the Qualifications

[1]In addition to the Elections Clause's grant to Congress the power to preempt state law as to the "times, places and manner" of federal elections, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments impose specific, narrow limitations on the powers of the States to prescribe voter qualifications. The Amendments ban disenfranchisement on the basis of "race, color or previous condition of servitude," "sex," and, for those who are 18 years of age or older, "age," respectively. U.S. CONST. amend. XV; id. amend. XIX; id. amend. XXVI. The States retain broad power under the Qualifications Clause to set and to enforce voter qualifications as long as their requirements do not discriminate on the basis of a class protected by the aforementioned amendments. Here, the Commission does not contend that the requested updates to the state-specific instructions would discriminate on any basis protected by law, and thus these amendments are irrelevant to this appeal. The argument to the contrary by *amici* House Democrats — at its core, that penumbral emanations from these amendments mysteriously grant the Commission authority over voter qualifications beyond the scope of the amendments —is flatly absurd.

Clause would do violence to the structure and purpose of the two provisions, as well as to meaningful state prerogatives retained under the Constitution.

II. THE COMMISSION'S INTERPRETATION OF THE NVRA UNCONSTITUIONALLY SUPPLANTS THE QUALIFICATIONS CLAUSE.

The *Inter Tribal Council* decision avoided the question of whether the NVRA's "accept and use" provision violated the Qualifications Clause because it expressly described a process whereby the the Commission could alter the state-specific instructions on the Federal Form to include information "*that the State deems necessary to determine eligibility*." 133 S. Ct at 2259 (emphasis added). Georgia and Alabama, like Kansas, Arizona, and other states, have decided that proof of citizenship is necessary for State election officials to determine voter eligibility. *See, e.g.*, O.C.G.A. §21-2-216(g)(1) (stating that the board of registrars shall not determine the eligibility of the applicant until and unless satisfactory evidence of citizenship is supplied by the applicant). The Commission may disagree with the decision of the state legislatures to impose such a requirement, but the Constitution does not allow it to substitute its own judgment for those of the States. Yet despite clear guidance to the contrary from the *Inter Tribal Council* decision, the Commission asserts the unconstitutional position that "the Commission must itself" determine necessity. *See* EAC Br. at 15.

The Commission admits that "the Constitution leaves to the States alone the authority to set substantive qualifications for voting," but argues that it may nonetheless decide how—indeed, whether—the states enforce those requirements. EAC Br. at 16; *see also* House Democrats Br. at 8 (stating that any conflict with respect to the *means of enforcing* voter qualifications—as opposed to the *setting* of voter qualifications—must be resolved in favor of federal law).

The Supreme Court has already rejected the Commission's argument. *See Inter Tribal Council* at 2258 (stating "the power to establish voting requirements is of little value without the power to enforce those requirements"). The *Inter Tribal Council* decision provided the Commission with a roadmap for how it may exercise its legitimate authority in a way that does not "raise serious constitutional doubts," 133 S. Ct. at 2258-59. Remarkably, the Commission has chosen to ignore that guidance. In denying the requested changes to the state-specific instructions, the Commission has unconstitutionally exceeded its authority under the Elections Clause and has impinged upon the constitutional authority of Kansas, Arizona, Georgia, Alabama, and other states to prescribe lawful voter qualifications. The District Court was correct to order the Commission to include the requested state-specific instructions and should be affirmed.

III. THE AUTHORITY OF THE COMMISSION SHOULD BE NARROWLY CONSTRUED HERE TO AVOID A CONSTITUTIONALLY PROBLEMATIC INTERPRETATION OF THE NVRA.

The Commission's assertion that "the Commission itself" determines whether a duly enacted State law can be enforced is astonishing. EAC Br. at 15. As described above, this interpretation is clearly at odds with the Qualifications Clause, and elevates the policy preferences of a federal administrative agency over those of state legislatures entrusted with the power to determine voter qualifications. The lower court, recognizing the incompatibility of the Commission's position with the Qualifications Clause, as well as the direction provided by the United States Supreme Court in *Inter Tribal Council*, chose to interpret the Commission's authority in a manner that avoided a direct conflict with the Qualifications Clause. That approach is the best way to resolve this tension.

In choosing between two plausible interpretations of a statute, one of which would raise serious constitutional doubts, the canon of constitutional avoidance requires the court to adopt the interpretation that does not raise constitutional doubts. *See Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."); *Edward J. DeBartolo Corp. v. Florida*

Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 575 (1988). The canon of constitutional avoidance applies not only when an interpretation would render the statute unconstitutional but also when an interpretation would raise serious questions about the constitutionality of the statute. *Blodgett*, 275 U.S. at 148 (Holmes, J., concurring) ("Even to avoid a serious doubt the rule [of constitutional avoidance] is the same."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979)(declining to interpret a federal statute in a manner that would raise "difficult and sensitive" questions about the constitutionality of the statute).

The Commission's interpretation of the NVRA does precisely what the *Inter Tribal Council* court warned would "raise serious constitutional doubts": It infringes on the constitutional power of the States to set their own voting qualifications. The Supreme Court has strongly suggested that the Commission would act unconstitutionally if it interpreted the NVRA as giving it the statutory authority to deny a state's request to update the state-specific instructions. *See Inter Tribal Council*, 133 S.Ct. at 2258-59 ("Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."). Such a position would render state power over voter qualifications illusory. What's more, interpreting the NVRA to give the

Commission the sole authority to determine when a state's lawful voter qualifications are satisfied would effectively "read Article I, §2, out of the Constitution." *Inter Tribal Council*, 133 S.Ct. at 2264 (Thomas, J., dissenting). On the other hand, interpreting the NVRA as giving the Commission a non-discretionary duty to update the state-specific instructions in order to accurately reflect lawful state provisions on voter qualification would avoid such a conflict between the NVRA and the Qualifications Clause.

CONCLUSION

The Commission's interpretation of the NVRA is inconsistent with the text of the Qualifications Clause and with the principles of federalism underlying our republic. To avoid raising serious doubts about the constitutionality of the NVRA, this Court should affirm the district court's decision requiring the Commission to defer to the States on voter qualification standards.

Dated: July 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) because it contains 3,374 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: July 7, 2014

/s/Dennis Dunn
Dennis Dunn

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF OF *AMICUS CURIAE* STATES OF GEORGIA AND ALABAMA IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION, prepared for submission via ECF, does not involve any required privacy redactions and does not include any attached written documents that were filed with the Clerk, is an exact copy of the written document filed with the Clerk of the Tenth Circuit Court of Appeals, and has been scanned with Symantec Endpoint Protection, version 12.1.4013.4013. According to the software program, the document is virus-free.

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I further certify that on July 7, 2014, I caused the foregoing BRIEF OF *AMICUS CURIAE* STATES OF GEORGIA AND ALABAMA IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system. I certify that counsel for the parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. In addition, I certify that on July 7, 2014, I will serve seven paper copies of the same by UPS delivery to the Court.

Dated: July 7, 2014

/s/Dennis Dunn
Dennis Dunn