No. 16-3147

In the
United States Court of Appeals
for the Tenth Circuit

STEVEN FISH, *ET AL.*,
Plaintiffs-Appellees,

v.

KRIS KOBACH,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Kansas, No. 16-cv-2105-JAR-JPO
The Honorable Julie A. Robinson

Brief *Amicus Curiae* of English First Foundation, English First, U.S. Justice Foundation, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center in Support of Defendant-Appellant and Reversal

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/s/ Herbert W. Titus
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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*, English First Foundation, English First, U.S. Justice Foundation, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center, are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici curiae* are concerned with the integrity of elections as well as matters related to illegal immigration.

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONSTRUED NVRA TO REQUIRE STATE ELECTION OFFICIALS TO "ACCEPT," RATHER THAN "ASSESS," THE ELIGIBILITY OF MOTOR VOTER APPLICANTS TO REGISTER TO VOTE.

The district court readily understood the principal charge plaintiffs leveled against the Kansas statute — that the documentary proof of citizenship required by Kansas was precluded by the words "minimum" and "necessary," as they appear in the following provision of the National Voter Registration Act of 1993 ("NVRA"):

> The voter registration application portion of an application for a State motor vehicle driver's license…
> (B) may require only the **minimum** amount of information **necessary** to…
> (ii) enable **State election officials to assess the eligibility of the applicant** and to administer voter registration and other parts of the election process… [NVRA, section 5(c); *see* Fish v. Kobach, 2016 U.S. Dist. LEXIS 64873,*50 (hereafter cited as "Fish") (emphasis added).]

And the district court likewise made clear that it understood that the Kansas Secretary of State had urged "the Court to focus on the phrase 'necessary to enable **State election officials to assess the eligibility of the applicant**,'" not just the one word — "minimum." *Id.* at *54 (emphasis added).

However, in its lengthy opinion, the district court did not devote any effort to analyzing the NVRA enabling clause — as if the meaning of "minimum" and "necessary" could be deciphered in isolation from their object. Yet, it is self-evident from the text that it is a "State election official" — and not the applicant himself — who is to review and make an independent assessment of the applicant's eligibility, before placing that applicant on the State's official voting rolls.

If the district court were correct — that the only basis on which the State election official was allowed to "assess the eligibility of the applicant" was the applicant's attestation under penalty of perjury (*id.* at *70) — there could be no **assessment**, but only **acceptance**. If the state election official was required to accept the representation made by the applicant, then truly the State official would be powerless "to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," as the statute envisions. Nevertheless, the district court completely barred the State election official from requiring submission of any information of the kind "necessary" for a state election official to make a proper assessment. Thus, the State election official would be unable to administer the election process in a manner that could

assure the people of Kansas that only qualified voters were registered to vote — a precondition to the integrity of any election.

Instead, after recognizing the importance placed on the duty "to assess the eligibility of the applicant" as urged by the Secretary of State, the district court followed one rabbit trail after another in its effort to find some rationale offered by the plaintiffs on which it could base its strained reading of the statute. Unsurprisingly, the court agreed with virtually every argument advanced by plaintiffs — such as the Kansas law being "burdensome, confusing, and inconsistently enforced" (*id.* at *62) and causing "difficulty" in compliance (*id.* at *64) — generic phrases which could describe untold numbers of state and local laws across the country.

The words "minimum" and "necessary" would not be surplusage because, assuming, *arguendo*, that the restrictive language of NVRA cited above extends beyond the information on the motor voter form,[2] one could postulate a scenario under which a valid claim based on those requirements could exist. If the Kansas statute required multiple forms of documentary proof of citizenship, one could

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[2] The Kansas Secretary of State makes a compelling showing that this provision of the law relates only to the motor voter form, and not to all aspects of the relationship of a person to a State. *See* Appellant's Br. at 24-26.

argue that those multiple forms of proof would require more than the "minimum" amount of information necessary in order for the State election official "to assess the eligibility of the applicant." However, no such claim could exist under the Kansas statute, which allows submission of any one of 13 forms of documentary proof of citizenship and, even failing those, provides other alternatives. K.S.A. § 25-2309(l)-(m). Plaintiffs do not contend that too many documents are required. Rather, they contend that State election officials have no entitlement to even a scintilla of documentation of citizenship to make the "assessment" which NVRA contemplates would be made.

The decision of the district court, that the Secretary of State must be required to "accept" a naked or unsupported representation of U.S. citizenship rather than perform his duty to "assess the eligibility of the applicant" as NVRA describes it, is baseless, and must be rejected.

II. THE COURT BELOW MISTAKENLY CONSTRUED THE MOTOR VOTER REGISTRATION REQUIREMENTS.

A. The Court's Construction of the NVRA Is Nonsensical.

In the court below, Plaintiffs insisted that, "of the three registration methods provided for in the NVRA, Congress intended for motor voter registration to involve the least possible barriers." *See* Fish at *54. And the

district court agreed, construing NVRA to require state election officials to accept as true any motor voter applicant's signed attestation that he is a United States citizen entitled to vote in federal elections in that state. *See id.* at *70. Because NVRA also requires that the applicant attest to U.S. citizenship under penalty of perjury, and because NVRA provides that the state "may require only the minimum amount of information necessary to … enable State election officials to assess the eligibility of the applicant," the sworn attestation foreclosed any further inquiry by the State into the applicant's claim of United States citizenship. *Id.* at *5. The court reasoned:

> there is at least one less burdensome alternative to assessing United States citizenship – an attestation along with an applicant's signature under penalty of perjury. The NVRA requires that the attestation and signature under penalty of perjury be included on every motor voter application. It also requires that the application include all eligibility requirements, including citizenship. [*Id.* at *70.]

According to the district court's reading of the statute, once the motor voter applicant completes the application to register, he must be automatically be registered to vote, leaving the State with only one option to enforce its law that only United States citizens may vote in a federal election: "[T]he State can prosecute noncitizens who register to vote under K.S.A. § 25-2416." *Id.* at *70. However, this section of the Kansas Code requires proof that the person charged

"vot[ed] or attempt[ed] to vote without being qualified," as "a citizen of the United States." *See id.* § 25-2416(a)(2). But any such prosecution would be problematic under the ruling of the district court, because any Kansas motor voter — who has attested that he is a United States citizen and sworn to that attestation under penalty of perjury — has been deemed to be a United States citizen. *See* Fish at *75. Prosecution under § 25-2416 can only be for voting or attempting to vote, not merely for registering fraudulently. Moreover, once registered to vote, the State might very well be precluded by a federal district court from removing the applicant from the voter rolls prior to an election on any ground other than the one specified in NVRA. Furthermore, even if a person could be prosecuted under this statute, or under K.S.A. § 21-5903 (the state's perjury statute), the horse would be already out of the barn. The Kansas law would have prevented such registration and vote by requiring Documentary Proof of Citizenship ("DPOC"). Surely, Congress did not intend to tie the hands of the States to prevent **ineligible** voters by requiring more than a motor voter's say so.

B. The Court's Construction Is Contrary to the NVRA Text.

As the Kansas Secretary of State has demonstrated in his opening brief, not only does "the district court's novel interpretation of the NVRA … yield[] an absurd result" by granting motor voters "rights superior to those of an individual who registers by mail, in person, or via the internet,"[3] the court's interpretation of NVRA yields a result contrary to the purposes of NVRA, as reflected in the relevant statutory text.

As the district court acknowledged, "[t]he NVRA has four stated purposes," two of which have to do with (i) increasing the number of registered voters and (ii) enhancing voter participation in the electoral process, and the other two of which address (iii) protecting the integrity of the electoral process and (iv) ensuring the accuracy of voter registration rolls. *See* Fish at *4. The first two goals (increasing the number of voter registrants and enhancing voter participation) specify that such increases and enhancements must be composed of only "**eligible citizens**." Otherwise, the **integrity** of the electoral process would be compromised and the voter registration rolls would be **inaccurate.**

[3] Appellant's Br. at 50.

The district court further acknowledged, "[t]he NVRA seeks to achieve **these objectives** by creating national registration requirements for federal elections through three methods," one of which is for States to provide for "applying to register [to vote] simultaneously when applying for a drivers' license." *See id.* at *4 (emphasis added). Thus, the court noted, "the NVRA requires that every application for a driver's license … 'shall **serve** as an **application for voter registration** with respect to elections for Federal office.'" *See id.* at *4-*5 (emphasis added).

As for "[t]he voter registration application portion of an application for a State motor vehicle driver's license," the NVRA posts a list of "may nots" and "mays." The State may **not** require on the application "any information that duplicates information required in the driver's license portion of the form," but **may** require a "second signature or other information necessary," including a statement that:

- "states each **eligibility requirement** (including citizenship);
- contains an **attestation** that the applicant meets each such requirement; and
- requires a **signature** of the applicant under penalty of **perjury**." (Emphasis added.)

Additionally, the application for voter registration "**may** require **only** the **minimum** amount of information necessary to —

- prevent duplicate voter registrations; and
- enable **State election officials** to **assess** the **eligibility** of the **applicant**…. (Emphasis added.)

As the court below found, the Kansas motor voter application form complied with the NVRA in that the form contained both the required "attestation" of United States citizenship and signature under penalty of perjury, but, by insisting upon documentary proof of such citizenship, Kansas did not comply with the NVRA, having requested more than the minimum amount of information necessary to enable the State's election officials to assess the eligibility of motor voter applicants. *See id.* at *70. The court erred.

First, the court erroneously considered that "an attestation along with an applicant's signature under penalty of perjury" provided "at least one less burdensome alternative to assessing United States citizenship," and thus, **eligibility** to vote. *Id.* However, the attestation and sworn statements were all that is "necessary" for the DMV officials to determine that the applicant met all the NVRA requirements of a motor voter **application** to register to vote. But the

attestation and sworn statement is **not** all that is "necessary" for state election officials to "**assess the eligibility** of the applicant" to be **registered** to vote. By misusing the attestation and sworn statement requisites to serve **both** (i) the purpose of determining the sufficiency of the **application** to register **and** (ii) the assessment of the **eligibility** of the applicant to be placed on the voter registration rolls, the court wrote the separate and independent eligibility requirement out of the statute.

Second, the court mistakenly assumed that since "[t]he evidence shows that the DMV clerks currently ask applicants if they are United States citizens, and they [in turn] check a box if the applicant responds affirmatively," it is not "necessary" for the state election officials to require documentary proof of eligibility to vote. Fish at *70-*71. But this view disregards the plain language of the NVRA, which contemplates that the required "information" is to be weighed as to whether it would "enable State election officials," NOT DMV clerks, to "assess the **eligibility** of the **applicant**." (Emphasis added.) The DMV clerks check only the **sufficiency** of the **application**. Again, the court's view cancels out key language in the NVRA, and thus violates the canon that

every word and every provision is to be given effect. A. Scalia & B. Garner, Reading Law at 174 (West: 2012).

III. THE DISTRICT COURT'S EFFORT TO MINIMIZE THE PROBLEM OF VOTING BY NONCITIZENS WAS UNAVAILING.

After laying out the Kansas statutory scheme, the district judge reviewed selected portions of evidence submitted at a hearing, in search of the "facts," stating:

> [P]rior to the effective date of the SAFE Act, eleven noncitizens successfully registered to vote in Sedgwick County [and there were identified] nineteen other cases of noncitizens registering to vote prior to 2013 [of which] three actually voted, two in 2004 and one 2009. [*Id.* at *15-*16.[4]]

The district court did not explain why data from only one county was provided, but the brief of the Secretary of State provides the apparent answer that in all of Kansas, only one county — Sedgwick County — "has been systematically tracking registration by noncitizens." *Id.* at *55 n.16. Additionally, the district court did not even mention the record evidence cited by the Secretary of State, that in just one of 105 Kansas counties, after the SAFE Act went into effect, 14 noncitizens were prevented from registering. Appellant's Br. at 55.

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[4] The Court also mentioned in passing testimony about 50 apparent noncitizens being registered to vote and actually voting in a referendum in 1997 involving hog farming. *Id.* at *16.

The district judge did not appear to be concerned about noncitizens registering or voting. To be sure, the court recounted the testimony of an expert witness, Dr. Lorraine Minnite, that there was "no evidence of a persistent problem of noncitizens fraudulently voting in Kansas." *Id.* at *17.[5] But it really should not be the burden of the Secretary of State to establish such a "persistent problem of noncitizens fraudulently voting." *Id.* The question should have been whether Congress could be understood to preempt Kansas law to prevent Kansas from maintaining the integrity of the voter lists by preventing the registration of any noncitizens (who are not eligible to vote under federal law[6] or state law[7]) to ensure the integrity of both federal and state elections in Kansas, without denying eligible voters the exercise of the franchise. Thankfully, the Secretary of State is not so cavalier in his administration of state law governing voter registration. The Secretary of State properly understands the problem to be that allowing

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[5] Then, buried in a footnote, the court tried to separate its decision from virtually all of the findings of Dr. Minnite, as "the Court finds her general discussion of voter fraud is not relevant." *Id.* at *17 n.28. Further, the court said that her testimony to a similar effort was rejected by another federal district court. *Id.*

[6] *See* 18 U.S.C. § 611.

[7] *See* K.S.S. § 25-2416.

noncitizens to register has the effect of "diluting the votes of Kansas citizens when noncitizens voted." Appellant's Br. at 7.

The history of American elections continuously reminds us of the importance of every single vote. Indeed, there actually was a congressional race that was decided by one vote: in 1910, New York's 36th Congressional District was won with 20,685 votes, with the loser receiving 20,684 votes.[8] There have been similarly close votes in state and local elections, including several ties. Within this Circuit, in 2006, Oklahoma House District 25 was decided by just two votes out of 9,590 cast.[9] Just last year, an election for Mississippi House District 79 resulted in exactly 4,589 votes being cast for each of the major two parties' candidates. The tie was broken by lot: a traditional drawing of straws.[10] A "persistent problem of noncitizens fraudulently voting" is required neither to

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[8] http://www.ourcampaigns.com/RaceDetail.html?RaceID=713323.

[9] *See* W. Jenny Jr., Edmond Sun, "Single Votes Add Up to Win Elections," (Nov. 11, 2006), http://www.edmondsun.com/opinion/single-votes-add-up-to-win-elections/article_62e9c36f-8dda-565d-8f55-f540b897a518.html.

[10] *See* New York Times, "Democrat Wins Mississippi House Race After Drawing Straw," (Nov. 20, 2015), http://www.nytimes.com/2015/11/21/us/mississippi-house-race-comes-down-to-one-deciding-straw.html. That election provided greater significance to the entire state of Mississippi because, if the Republican candidate had won, the Republicans would have had a three-fifths supermajority in the state House, the threshold needed to pass revenue-related bills.

change the outcome of many elections nor to compromise the integrity of elections in Kansas.[11]

IV. AS APPLIED BY THE DISTRICT COURT BELOW, NVRA IS AN UNCONSTITUTIONAL EXERCISE OF POWER IN VIOLATION OF ARTICLE I, SECTION 2, CLAUSE 1 OF THE CONSTITUTION.

Relying heavily upon the Supreme Court's decision in Arizona v. Inter Tribal Council of Ariz., Inc., 133 S.Ct. 2247, 2253 (2013) ("ITCA"), the district court "determine[d] that because the Kansas DPOC law conflicts with §5(c)(2)(B) of the NVRA, federal law preempts the Kansas DPOC." Fish at *75. To reach this conclusion, the court turned to the Elections Clause as the source of Congressional power to regulate federal elections, including the power to effect the registration of voters. *See* Fish at *75-*76. That provision reads:

> 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. Constitution, Article I, Section 4.]

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[11] Additionally, in Kansas, major elections which are decided by 1/2 of 1 percent of the total number of votes cast can result in a recount of ballots at the request of a losing candidate, with the costs of the recount being borne by the state. *See* K.S.A. § 25-3107(d). Thus, in close races, the harm to Kansas (and its citizens) of noncitizens voting may not change the outcome of an election, but it could trigger significant costs where a right to a recall is asserted.

According to the court below, the NVRA mandated the registration of any motor voter applicant who had attested that he was a United States citizen if that attestation was affirmed by the applicant by his sworn statement under pain of perjury. *See* Fish at *75-*76.

In response, the Secretary of State asserted that the NVRA mandate, as construed and applied by the court, would "infringe on Kansas's right under the Qualifications Clause,"[12] which confers upon the states the power to set the qualifications of the electors to federal office, so long as those qualifications are the same as those "requisite for Electors of the most numerous Branch of the State legislature." *Id.* at *76-*77.

On appeal, the Secretary of State has repeated this claim, asserting that the ITCA opinion (upon which the court below had relied), ruled that "'the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.'" Appellant's Br. at 40. By not allowing the State to require any documentary proof of United States citizenship to assess the eligibility of a motor voter applicant, the Secretary contends, Kansas has been precluded from exercising any effective means to enforce its citizenship

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[12] *See* Article I, Section 2, Clause 1.

qualification, and thereby, its constitutionally vested power to see that such qualification is not compromised. *Id.* at 42-43.

In contrast to the district court's interpretation of the motor voter application that it does not permit additional requirements of proof of citizenship, the Supreme Court in ITCA observed that the Federal Form used by persons seeking to register by mail or in person allowed for additional state requirements for such proof of citizenship. *See* ITCA at 2258-59. Had that avenue been closed to the State, ITCA would have found that the Federal Form mandate unconstitutionally precluded the State from enforcement of its voter qualifications, running afoul of the Qualifications Clause. *Id.* ("it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications"). "Happily," the ITCA Court said, "we are spared that necessity, since the statute [governing the Federal Form] provides another means by which Arizona may obtain information needed for enforcement." *Id.* at 2259.

In an effort to squeeze its ruling — that Kansas could not go outside of the NVRA application form to verify the motor voter applicant's claim of U.S. citizenship — under the umbrella of ITCA, the court superficially suggested that

the sworn attestation itself "does not alter the citizenship qualification set by the State of Kansas, nor does it make it impossible for the State to enforce that qualification." Fish at *81. However, unlike the NVRA Federal Form statute, the district court read the NVRA motor voter registration statute to provide no way other than the applicant's attestation and sworn signature to "enable State election officials [not only] to assess the eligibility of the applicant [but] to administer voter registration and other parts of the election process." *See* Fish at *54, *59-*60.

Undeterred by this critical difference between registration by the Federal Form administered by a federal agency and registration by the motor voter form administered by State officials, the district court insisted that the State had other avenues to protect its constitutionally vested powers to set the qualification of electors. But the only "other way" suggested by the court was the "attestation of citizenship coupled with the applicant's signature under penalty of perjury" already mandated by NVRA! *See* Fish at *81. The court's suggestion is chimerical, unworthy of any consideration.

Additionally, the district court appeared to believe that, since the NVRA does not limit the State's power to set qualifications for electors for state and

local offices, the only adverse effect on the power of Kansas would be the need to set the voter qualifications to keep two sets of books, one for electors eligible to vote in federal elections and the other to vote in state and local elections. Fish at *84. But such a dual system would disregard the very purpose of the Qualifications Clause, which is to deny to the Congress the power to set the qualifications of its own electors. *See* ITCA at 2258. According to the district court, the "only difference" would be an administrative one that arises from having to keep two separate books. *See* Fish at *82.

To the contrary, the administrative headaches and expenses of two sets of books would drive the States to conform to the registration process mandated by NVRA. Although not legally required, as the court below observed, "the two-tiered system" that results is **not** of "the State's own making," as the court below found. *Id.* at *84. After all, it is federal law, not state law, that is the supreme law of the land. But federal law is supreme only if enacted pursuant to the Constitution, not in opposition to it. *See* U.S. Constitution, Article VI.

V. THE DISTRICT COURT'S DECISION RESTS UPON AN UNCONSTITUTIONAL PREMISE OF CONGRESSIONAL AUTHORITY OVER PRESIDENTIAL ELECTIONS.

A. NVRA Cannot Be Justified as an Exercise of Power under Article I, Section 4, Clause 1.

Purporting to take action over the "manner" of the election of persons to federal office, Congress enacted the NVRA, establishing rules governing the registration of voters in federal elections — including the election of the President and Vice President of the United States. Typically, supporters of federal oversight of the manner by which persons are elected to federal office cite Article I, Section 4, Clause 1, as the source of congressional authority over "the times, places and manner" of holding federal elections.

However, as the Supreme Court has recently observed: "The Clause empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding **congressional elections**." ICTA at 2253 (emphasis added). This was not a slip of the pen, the Court stating several times in its opinion that the power conferred on Congress by Article I, Section 4 did not

extend to "federal elections" generally, but only to "the time, place, and manner of electing **Representatives and Senators**."[13] *Id.* at 2253 (emphasis added).

Yet, the Supreme Court majority wrongfully assumed that, because the NVRA was enacted pursuant to Article I, Section 4, Clause 1, it pre-empted state law, even though the state law that was pre-empted governed the manner by which the **President and Vice President** were elected along with the members of the U.S. Senate and the House of Representatives. As Justice Thomas noted in his dissent:

> NVRA's 'accept and use' requirement applies to *all* federal elections, even presidential elections…. This Court has recognized, however, that 'the state legislature's power to select the manner for appointing [presidential] electors is plenary….' Constitutional avoidance is especially appropriate in this area because the NVRA purports to regulate **presidential elections**, an area over which the Constitution gives Congress **no authority whatsoever**." [ITCA at 2268 n.2 (Thomas, J., dissenting) (citing Bush v. Gore, 531 U.S. 98, 104 (2000)) (emphasis added).]

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[13] *See also* "The Clause's substantive scope is broad." "'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for **congressional elections**.'" *Id.* at 2253 (emphasis added). "The power of Congress over the 'Times, Places and Manner' of **congressional elections** 'is paramount….'" *Id.* (emphasis added).

B. NVRA Is Precluded by Article II, Section 1, Clause 2.

Not only is NVRA outside the legislative authority of Congress, but also it directly conflicts with Article II, Section 1, Clause 2, which confers upon the legislatures of each state the power to determine the "manner" by which the electors for President and Vice President are to be "appointed":

> Each State shall appoint, **in such Manner[14] as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. [Article II, Section 1 (emphasis added).]

Notably, unlike Article I, Section 4, which provides for congressional oversight of State legislative policy governing the times, places, and manner of the election of members of Congress, there is no enumerated power vested in Congress to oversee the fifty State legislatures concerning the election of the President and Vice President. To the contrary, Article II, Section 1, Clause 5 limits Congress's power only to "determin[ing] the Time of chusing the Electors,

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[14] This Congressional power over the "Manner" of the election of the President and Vice President also is limited by two other Constitutional provisions: (a) the constitutional prohibition against the appointment of any person who is a "Senator or Representative, or … hold[er][of] an Office of Trust or Profit under the United States" as an Elector; and (b) the Twelfth Amendment that sets forth in great detail the manner by which the Electors cast their ballots for President and Vice President, the counting of those votes, and the means by which a tie vote is to be resolved.

and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

According to Alexander Hamilton, this limit upon the powers of Congress with respect to the election of the President was deliberate — to ensure that the President was not elected according to rules promulgated by Congress, lest the former be too dependent upon the latter. By stripping Congress of the power to govern the election of the President, the President would be directly elected by the people through electors "chosen by the people for [that] special purpose…." Excluding members of Congress from serving as members of the electoral college, the founders also divested Congress of any power over the manner of the President's election, determining that "the executive should be independent for his continuance in office, on all but the people themselves." In fact, the electoral college was devised as a buffer between the people and Congress to guard against the risk of corruption of the presidency by Congressional regulation of the process by which the President and his running mate are elected. *See* A. Hamilton, *Federalist No. 68*, The Federalist at 351-55 (G. Carey & J. McClellan, eds., Liberty Fund: 2001).

To accomplish these two ends of popular sovereignty and separation of powers, Article II, Section 1 places in the State legislatures the power to determine the manner of the President's election. The Supreme Court recognized this key role when it ruled that the manner of selection of presidential electors was "placed absolutely and wholly with the legislatures of the several States" and that this "power and jurisdiction of the State" was "so framed that Congressional and Federal influence might be excluded." McPherson v. Blacker, 146 U.S. 1, 34-36 (1892).

As Justice Joseph Story points out in his Commentaries on the Constitution, the Constitution's drafters specifically rejected a plan whereby Congress would determine the rules and regulations by which the President and Vice President would be chosen. 2 J. Story, Commentaries on the Constitution § 1455 (5th. ed. 1891). They did so for two main reasons.

First, to **maintain the independence of the executive** offices of the President and Vice President, the founders thought it best that the manner of election be by a body — the Electoral College — the sole purpose of which was to elect the two officers without regard to any legislative agenda that a particular Congress might have. 2 Story Commentaries at § 1456.

Second, by such an election by an **independent body** with no legislative agenda of its own, the election of the President and Vice President would be protected from "intrigues and cabals … of artful and designing" members of Congress seeking a President and Vice President who would be most pliable to their legislative agenda. *Id*.

In short, by vesting the manner of election of the President and Vice President in the state legislatures, the Constitution was designed to prevent the President from "becom[ing] the mere tool of the dominant party in Congress … bound down to an entire subserviency to their views." 2 Story Commentaries at § 1456. In other words, the state-controlled Electoral College was deliberately established as a **bulwark against corruption by Congress**, diffusing the power to determine the manner of election of the President and Vice President among the legislatures of the several states so as to prevent the concentration of power in one body, a competing one at that. *See id.*

C. Correctly Decided Precedents Offer No Support for NVRA.

The assumption that Congress has the same power over elections for President and Vice President as it has over elections for members of Congress is ill founded. To be sure, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme

Court observed that "[t]he constitutional power of Congress to regulate **federal elections** is well established and is not questioned by any of the parties in this case." *Id.*, 424 U.S. at 13 (emphasis added). But the Court referred to Article I, Section 4 — the grant of power to Congress "to regulate elections of members of the Senate and House of Representatives." It did not — indeed could not — rely upon this constitutional provision for the proposition that Congress had comparable power to regulate the elections of President and Vice President. Instead, the Court simply assumed that it "has … recognized broad congressional power to legislate in connection with the elections of the President and Vice President…." Buckley, 424 U.S. at 13 n.16.

This claim of unenumerated power went unchallenged in Buckley, the Court observing that "[t]he constitutional power of Congress to regulate federal elections … is not questioned by any of the parties in this case." Buckley, 424 U.S. at 13. Thus, the Court dealt with the issue in a footnote, citing earlier cases affirming the power of Congress to regulate elections to Congress pursuant to Article I, Section 4 and elections of the President and Vice President pursuant to Burroughs v. United States, 290 U.S. 534 (1934).

In Burroughs, the Court rejected the contention that Article II, Section 1 posed any barrier to a "congressional act [that] seeks to preserve the purity of presidential and vice presidential elections." Burroughs, 290 U.S. at 544. Then, without citing any enumerated power vesting any power in Congress over the presidential and vice presidential elections, the Court ruled that Congress has the plenary power to pass appropriate legislation: (a) "to safeguard [the important and vital election of the President and Vice President] from the improper use of money to influence the result is [that election as an exercise of] the power of self protection"; and (b) "to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." Burroughs, 290 U.S. at 545. By disregarding the textual commitment of the manner of the election to the state legislatures, and the lack of any textually enumerated power granted to Congress to regulate presidential and vice presidential elections, the Court completely disregarded the fact that the mode of election of the only elected federal executive officials was deliberately chosen to keep Congress from using its legislative power to corrupt that process.

In Burroughs, the Court paid absolutely no attention to either McPherson v. Blacker, 146 U.S. 1 (1892), or to the text and its history and purpose as set

forth by Hamilton in the *Federalist* and Story in his Commentaries. Instead, the Court substituted its own views.

Yet according to the Supreme Court, in cases decided both before and after Burroughs, the people do not directly elect the President and the Vice President. They elect electors, who are not federal, but state, officers. *See* In re Green, 134 U.S. 377 (1890) ("Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are … the people of the States when acting as electors of representatives in Congress."); *see also* Ray v. Blair, 343 U.S. 214, 224-25 (1952) ("The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen.")

And 13 years prior to Burroughs, four justices on the Supreme Court struck down a federal law limiting contributions and expenditures in Congressional elections on the grounds that there was "no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from [Article I] Section 4." Newberry

v. United States, 256 U.S. 232, 249 (1921). Holding to the constitutional premise of enumerated powers, these four justices ruled that the "authority to regulate the manner of holding [elections] gives no right to control" activities that are "prerequisites to elections or [that] may affect their outcome — voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate…." *Id.*, 256 U.S. at 257.

In his Commentaries on the Constitution, Justice Story remarked that the framers deliberately chose not to impose a standard of election uniformity among the several states, but rather chose to accommodate a "mixed system, embracing and representing and combining distinct interests, classes and opinions." *See* 1 Story Commentaries §§ 581-85. Thus, there is **not one** national election for President; rather, there are **many**. This view of Congress as a legislature of enumerated, not plenary power, was effectively disregarded in Burroughs, without any authority either in the constitutional text or in the Court's precedents. Indeed, Ex Parte Yarbrough, 110 U.S. 651 (1884), relied explicitly upon the text of Section 5 of the Fourteenth Amendment as justifying Congress to enact a law to protect an elector from a conspiracy to intimidate him on account of race from

participating in the election of the President and Vice President. Had there been no Fourteenth Amendment to sustain the Congressional exercise of power, then Congress would not have been constitutionally authorized to act. *See* Slaughter-House Cases, 83 U.S. 36 (1873).

In 2000 the Court had occasion to revisit the power of state legislatures over the manner by which the President and Vice President are elected. In Bush v. Gore, 531 U.S. 98 (2000), six members of the Court on both sides of the case emphasized the **role conferred on state legislatures** in the manner by which the President and Vice President are elected. In a concurring opinion, two of those Justices (Scalia and Thomas) subscribed to strong statements of the "broad" powers conferred by the Constitution upon state legislatures in the manner by which such officers are chosen. *See* Bush v. Gore, 531 U.S. at 112-14 (Rehnquist, C.J., concurring). Additionally, in four dissenting opinions, Justices Stevens, Souter, Ginsburg, and Breyer chided the majority for not being true to their federalist convictions that the manner of presidential and vice presidential elections are, as Justice Stevens put it, the "primary responsibility" of the States. Indeed, both the concurring justices and three of the dissenting justices relied upon the over-100-year old McPherson precedent affirming that Article II,

Section 1 vests power in the state legislatures even to eliminate the popular election of the President and Vice President in their respective states. *See* Bush v. Gore, 531 U.S. at 113, 123, citing McPherson v. Blacker.

Surely, the state legislatures retain the expressly vested power to regulate the manner of election of the President and Vice President, including the process by which persons are registered to vote for those two offices. It is time for the courts to recognize this constitutional fact and return the power to regulate the election of the President and Vice President to the legislatures of the States where the power constitutionally belongs.

CONCLUSION

For the foregoing reasons, the decision of the district court granting a preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of English First Foundation, *et al.*, in Support of Defendant-Appellant and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,459 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point CG Times.

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Dated: July 8, 2016

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of English First Foundation, *et al.*, in Support of Defendant-Appellant and Reversal, was made, this 8th day of July 2016, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that with respect to the foregoing Brief *Amicus Curiae* of English First Foundation, *et al.*, in Support of Defendant-Appellant and Reversal, all required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with scanning program Symantec Endpoint Protection, version 12.1.6, most recently updated on July 6, 2016, and according to the program, the file is free from viruses.

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