No. 16-5196

In the U.S. Court of Appeals for the District of Columbia Circuit

LEAGUE OF WOMEN VOTERS, *ET AL.*,
Plaintiffs/Appellants,

v.

BRIAN D. NEWBY, *ET AL.*,
Defendants/Appellees,

and

SECRETARY OF STATE OF KANSAS, *ET AL.*,
Intervenors-Defendants/Appellees,

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, No. 1:16-cv-00236 (HON. RICHARD J. LEON)

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF THE KANSAS APPELLEE IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("EFELDF") states that (a) EFELDF is a non-profit, tax-exempt corporation under §501(c)(3) of the Internal Revenue Code with no parent corporation; (b) no publicly traded entity – or any other entity – holds a ten-percent ownership interest in EFELDF; and (c) EFELDF is an education and legal defense fund that advocates for traditional American values and constitutional government, including – as relevant here for the elections on which the Nation has based its political community – governmental efforts both to reduce voter fraud and to maximize voter confidence in the electoral process.

Dated: August 8, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("EFELDF") presents the following certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

EFELDF adopts Appellee Kansas Secretary of State's statement of parties and *amici*, with the addition of EFELDF's appearing as an *amicus* in this appeal.

B. Rulings under Review

EFELDF adopts Appellants' statement of rulings under review.

C. Related Cases

EFELDF adopts the Appellants' statement of related cases.

Dated: August 8, 2016

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GLOSSARY

Acronym	Phrase
APA	Administrative Procedure Act, 5 U.S.C. §§551-706
DOJ	Department of Justice
EAC	Election Assistance Commission
EFELDF	Eagle Forum Education & Legal Defense Fund
FEC	Federal Election Commission
ITCA	Inter Tribal Council of Arizona, Inc.
ITCA	*Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013)
NVRA	National Voter Registration Act, 52 U.S.C. §§20501-20511

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit corporation headquartered in Saint Louis, Missouri, files this brief with the consent of the parties.[1] Since its founding in 1981, EFELDF has consistently defended not only the Constitution's federalist structure, but also its limits on both state and federal power. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Following on *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247 (2013) ("*ITCA*"), this litigation concerns States' ability to enforce their unquestioned constitutional control over voter qualifications under the National Voter Registration Act, 52 U.S.C. §§20501-20511 ("NVRA"), a statute that Congress enacted using its authority under the Elections Clause to regulate the time, place, and manner of federal elections. U.S. CONST. art. I, §4, cl. 2. Acting through the ministerial action

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

of its Executive Director, the Election Assistance Commission (collectively, "EAC") approved the inclusion in the state-specific instructions for the "Federal Form" – which EAC maintains under the NVRA, 52 U.S.C. §20508(a)(2) – of state-law requirements that applicants seeking to register to vote provide evidence of their U.S. citizenship. *See, e.g.*, K.S.A. §25-2309(l). Various plaintiffs, including the League of Women Voters and various state chapters (collectively, the "Leagues") and other organizations challenged EAC's action for violating not only NVRA but also the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and sought a preliminary injunction. Over EAC's objection, the federal Department of Justice ("DOJ") took the unusual position of supporting the Leagues against its ostensible clients. The Kansas Secretary of State (hereinafter, "Kansas") intervened to defend that state's interest in EAC's action. The district court denied the Leagues' motion for a preliminary injunction, based only on the Leagues' failure to establish irreparable harm. This interlocutory appeal follows. *Amicus* EFELDF adopts the facts as stated in Kansas's brief (at 4-12, 48-49, 57).

Constitutional Background

Our Constitution establishes a federalist structure of dual state-federal sovereignty. *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002) (the states entered the federal union "with their sovereignty intact"). Under the Supremacy Clause, of

course, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof[,] … shall be the supreme law of the land …, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. But federalism's central tenet permits and encourages state and local government authority under the "counter-intuitive" idea "that freedom was enhanced by the creation of two governments, not one." *U.S. v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Thus, state governments retain their roles under the Constitution as separate sovereigns.

Since the Founding, the Constitution's Voter-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each state. U.S. CONST. art. I, §2, cl. 2.[2] In addition, the Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of

[2] The Seventeenth Amendment extended this same requirement to voter qualifications for elections for Senators. U.S. CONST. amend. XVII, cl. 2.

"Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2. The Founders were clear that power over voter qualifications was "no part of the power to be conferred upon the national government." THE FEDERALIST NO. 60, at 369 (C. Rossiter ed. 1961) (Hamilton). Consistent with the Elections Clause's plain language, the Supreme Court has recognized that Hamilton's remarks reflect the clause's focus on *procedural* issues. *U.S. Term Limits v. Thornton*, 806 U.S. 779, 833-34 (1995).

An early draft of the Constitution gave the states authority over voter qualifications, "subject to the proviso that these qualifications might 'at any Time be altered and superseded by the Legislature of the United States.'" 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153 (1911). The Committee on Detail struck that proviso and replaced it with the proviso tying voter qualifications to the most numerous branch of the state legislature. *Id.* at 164. A subsequent attempt to restore congressional oversight of voter qualifications was rejected as well. *Id.* at 201. As Madison explained, "[t]he qualifications of electors and elected [are] fundamental articles in a Republican [Government] and ought to be fixed by the Constitution," and "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution." *Id.* at 249-50. In light of the history, *ITCA* and the parties here all agree that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." 133 S.Ct. at 2258. *ICTA*

further recognized the importance of the NVRA's not preventing enforcement of state voter-qualification rules: "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 2258-59.

As part of the plenary authority over voter qualifications, a state "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). "[T]he political franchise of voting … is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Non-citizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4. In the course of this litigation, it has been established that numerous non-citizens have registered to vote under the lax system that the NVRA established. *See* Kansas Br. at 48-49, 57. Voter fraud "'debase[s] or dilute[es] … the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Purcell*, 549 U.S. at 4 (*quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (states have an interest in preventing voter fraud and ensuring voter confidence). At least as it concerns the state interests at issue here, then, this

litigation concerns important constitutional issues of state sovereignty and electoral integrity.

Statutory Background

In enacting NVRA, Congress laudably sought to expand voter registration among eligible citizens. While "even rational restrictions on the right to vote [can be] invidious if they are *unrelated to voter qualifications*," *Crawford*, 553 U.S. at 189 (emphasis added), the state voter-qualification rules here address the single-most fundamental voter qualification of all: citizenship. *Reynolds*, 377 U.S. at 554-55 (collecting cases). Indeed, nothing in NVRA prohibits states from using reasonable, proactive additional measures when faced with non-citizen registration. Apart from whether Congress would have the authority to preempt state action here, and apart from how federal courts must balance deference to federal agencies under separation of powers versus deference to the states under federalism, Congress could not plausibly have intended to prevent sovereign states from ensuring that only citizens register to vote.

In 1993, Congress enacted NVRA to promote the right of eligible citizens to vote in federal elections, 52 U.S.C. §20501(b)(1), while at the same time "protect[ing] the integrity of the electoral process." 52 U.S.C. §20501(b)(3). Although NVRA also addresses registering in person and registering in conjunction with applying for a driver's license, this litigation concerns only NVRA's provisions

for registration by mail. 52 U.S.C. §§20503(a)(2), 20505.

With respect to registration by mail, NVRA directs EAC to adopt a mail voter registration application form ("Federal Form"), 52 U.S.C. §20508(a)(2), which the states "shall accept and use." 52 U.S.C. §20505(a)(1). In addition, the states also may develop their own forms that meet the criteria of §20508(b), which include the criterion that the form "may require only such identifying information … and other information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 52 U.S.C. §20508(b)(1).

Under NVRA's very limited delegation to EAC, that agency "shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under [52 U.S.C. §20508(a)]," 42 U.S.C. §15329, which include that "in consultation with the chief election officers of the States, [EAC] shall develop a mail voter registration application form for elections for Federal office." 52 U.S.C. §20508(a)(2). Significantly, "[a]ny action [that EAC] is authorized to carry out under this Act may be carried out only with the approval of at least three of its members." 42 U.S.C. §15328.

Regulatory Background

Under NVRA's implementing regulations, 11 C.F.R. pt. 9428, the "state-

specific instructions shall contain … information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. §9428.3(b).

STANDARD OF REVIEW

In seeking to reverse the district court's denial of a preliminary injunction, the Leagues must meet a familiar – and strict – test for that extraordinary remedy:[3]

> A plaintiff seeking a preliminary injunction *must* establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). Appellate courts review the grant or denial of preliminary relief for abuse of discretion, but a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

SUMMARY OF ARGUMENT

The Leagues are unlikely to prevail on the merits because: (1) they lack standing to assert the voting rights of absent third parties (Section I.A.2) and unnamed members (Section I.A.1), and their financial injuries are self-inflicted unless they can establish that such financial injuries are within NVRA's zone of interests (Section I.A.3); (2) prior EAC actions cannot and do not establish binding

[3] As an "extraordinary" remedy, a preliminary injunction "is not a remedy which issues as of course." *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982).

precedent for notice-and-comment procedures (Section I.B); and (3) constitutional avoidance requires this Court to accept EAC's reasonable interpretation of NVRA and the regulations over the Leagues' contrary interpretation of NVRA, which would render NVRA unconstitutional for relying on Congress's purely procedural Election Clause authority to violate the states' substantive Voter-Qualification Clause authority (Section I.C.2-I.C.3).

The Leagues cannot establish irreparable injury because their economic loss is neither significant nor sufficiently certain, and they lack standing to press the voting rights of unnamed members or third parties (Section II). The equities tip in Kansas's favor because the Leagues' weak showing on the merits denies them an equitable claim (Section III). Finally, the public interest favors Kansas not only because the public interest collapses to the merits (which favor Kansas), but also because Kansas's interests – electoral integrity, state sovereignty – easily trump the Leagues' purely economic claims (Section IV).

ARGUMENT

I. THE LEAGUES ARE UNLIKELY TO PREVAIL ON THE MERITS.

Although this Court need not reach the merits, the Leagues cannot establish the likelihood of prevailing on the merits that the first preliminary-injunction criterion requires. First, the Leagues lack an Article III case or controversy, which would prevent not only this Court but also the district court from reaching the merits.

But even if the Leagues had standing, their claims under the APA and NVRA lack merit. Accordingly, the Leagues cannot establish a likelihood of prevailing on the merits.

A. The Leagues and other plaintiffs lack standing for the rights that they seek to vindicate.

Before a federal court can even consider the merits, plaintiffs must establish their standing to obtain a preliminary injunction, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), and they must do so for each claim raised and each form of relief requested: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Here, the Leagues' self-inflicted financial expenditures are not injuries at all, and the Leagues lack third-party standing to assert the voting rights of third parties.

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). In addition to this constitutional baseline, standing doctrine also includes prudential

elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). With that background, *amicus* EFELDF demonstrates that the Leagues lack standing for the claims that they seek to assert here.

1. Associational plaintiffs cannot win injunctive relief on behalf of unnamed members.

At the outset, the Leagues and other institutional plaintiffs cannot rely on their alleged – but unnamed – members to establish standing: "a statistical probability of injury to an unnamed member is insufficient to confer standing on the organizations." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 244 (D.C. Cir. 2015) (*citing Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) *and Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 821 (D.C. Cir. 2006)). "When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured." *Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). "This is not the same as evidence identifying members that have suffered the requisite harm from the [agency action]." *Swanson Grp.*, 790 F.3d at 244 (internal quotations omitted). The Leagues and other groups fail to establish that they have affected members.

In such circumstances, however, federal courts require specific names to

ensure that the parties include an affected person, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990), at least when association membership alone does not itself establish individual injury. *Summers*, 555 U.S. at 498-99 ("requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity") (emphasis in original). Vis-à-vis the allegedly affected voting rights, at least, the Leagues or other institutional plaintiffs cannot contend that their entire memberships are denied the ability to register.

2. The Leagues lack third-party standing to assert voting rights.

The Leagues cannot assert the rights of absent citizens whom the Leagues hope to meet someday and register. *See* Kansas Br. at 21. While some relationships might support third-party standing, the same is simply not true all hypothetical relationships between the Leagues and the citizens that the Leagues might meet in the *future*: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski*, 543 U.S. at 131 (emphasis in original). Citizens do not have regular, ongoing relationships with the Leagues analogous to existing attorney-client relationships.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called

clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). After *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, the Leagues lack third-party standing to assert other peoples' voter-registration rights. The Leagues' implicit invocation of third-party standing fails under *Kowalski*.

3. The Leagues' self-inflicted financial injuries cannot establish standing.

Under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989); *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). Here, the Leagues and other institutional plaintiffs are voluntarily expending resources in the voter-registration context, which is an entirely voluntary choice. Indeed, as Kansas explains, EAC's action may even make the Leagues' actions less expensive. *See* Kansas Br. at 19-20. Under the circumstances, the Leagues' financial injuries do not support standing for the claims that the Leagues presses.

Although it cannot statutorily waive the Article III minima for standing, Congress can statutorily eliminate the judiciary's merely *prudential* limits on standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982) (when a statute extends "standing under [a section] … to the full limits of Art. III," "courts

accordingly lack the authority to create prudential barriers to standing in suits brought under that section"); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1335-36 (D.C. Cir. 1986). Because Congress has not done so here, the Leagues must also satisfy prudential standing.

Relying on *Havens* and its progeny, lower courts – including this Court – have found standing for organizational plaintiffs that divert their resources to combat a statute:

> *Havens* held that an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.

Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008) (*citing Havens*, 455 U.S. at 379); *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) ("the organization's allegations [about diverted resources] … constituted a sufficient injury in fact based on the defendant company's having perceptibly impaired the organization's ability to provide counseling and referral services") (internal quotations omitted). Given that diverted resources would typically constitute self-inflicted injuries, *amicus* EFELDF respectfully submits that that analysis overstates the standing found in *Havens*.

By way of background, *Havens* concerned an organizational plaintiff's statutory standing to sue under §812 of Fair Housing Act ("FHA"), which creates a right – applicable to individuals *and associations* – to truthful, non-discriminatory

information about housing:

> [§804(d)] states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in [§812(a)] of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because FHA extends "standing under § 812 … to the full limits of Art. III," "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," *Havens*, 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and typical statute lack several critical criteria from *Havens*.

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right … the alleged deprivation of [those rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to any rights related to its diverted resources.

Second, and related to the first issue, the injury that an organizational plaintiff

claims must align with the other components of its standing, *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, with typical statutes and typical organizational plaintiffs, the statute will not create rights even *remotely* related to private spending.

Third, and perhaps most critically, the FHA statutorily eliminates prudential standing. *Havens*, 455 U.S. at 372. When a plaintiff – whether individual or organizational – sues under a statute that does not eliminate prudential standing, that plaintiff cannot bypass prudential limits on standing. Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action. But that clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). For FHA standing and *Havens* to apply, plaintiffs need – and usually do not have – a statute where Congress collapses prudential limits out of the standing inquiry.

As applied here, Kansas questions the League's standing to raise third parties' voting rights, Kansas Br. at 21, and the Leagues claim that Congress contemplated their private spending in enacting the NVRA. Leagues Br. at 7. Assuming *arguendo*

that the Leagues could convince this Court that their financial injuries fall within the NVRA's zone of interests, that would not establish the Leagues' third-party standing to litigate third parties' voting rights. *See Mountain States*, 92 F.3d at 1232. Thus, even assuming *arguendo* that the Leagues or other organizational plaintiffs could establish Article III standing based on their merely economic cost of compliance, they cannot turn around and claim to assert third parties' voting rights to fit within NVRA's zone of interests.

B. EAC did not violate the APA's procedural requirements.

The Leagues raise several procedural complaints about the process under which EAC acted, but this Court should reject them. EAC followed the procedures it always has followed for approving state-specific instructions and explained itself vis-à-vis not only *ICTA* but also any prior contrary precedent.[4]

1. EAC's actions did not require notice and comment.

The Leagues attempt to saddle EAC with following the notice-and-comment process that EAC – acting through DOJ, *see* Kansas Br. at 8 – followed on the prior

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[4] The Leagues complain that EAC's analysis of its action constitutes a post-hoc rationalization, Leagues Br. at 21, which this Court should disregard even if the memorandum were a post-hoc rationalization. When it believes that "there was a 'non-trivial likelihood' the Commission would be able to state a valid legal basis for its rule," this Court has "remand[ed] without vacating" the agency action. *In re Core Communs., Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008). Taking that path here would deny – or at least defer – the Leagues' day in court by returning this issue to EAC for EAC to issue the same memorandum it already has issued. That would serve no meaningful purpose.

iteration before EAC. The Leagues' arguments have several defects:

- First, assuming *arguendo* that EAC intended to bind itself, EAC would have needed to follow APA notice-and-comment rulemaking, *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982) (agency "not required by law to promulgate any rules limiting its discretion [but] was nonetheless bound by [APA] when it decided to do so"), which it did not.
- Second, and related to the first, when an agency accepts comments in a non-rulemaking context, that does not elevate the agency action to the status of an APA rulemaking.[5] *Nat'l Tour Brokers Ass'n v. U.S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("agency may not introduce a proposed rule in [the] crabwise fashion" of discussing the issue in a *Federal Register* preamble).
- Third, the Leagues' attempt to bind EAC with prior proposals – which were never finalized – ignores that mere notices of proposed rulemaking cannot set binding precedent or command deference. *Matter of Appletree Markets, Inc.*,

[5] The decision whether to grant or deny a state's request is an APA adjudication, not a rulemaking An APA adjudication "means [the] agency process for the formulation of an order," 5 U.S.C. §551(7), where an order "means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. §551(6).

19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000).

- Fourth, even assuming that DOJ's takeover of EAC qualified as lawful, that type of temporary, special-circumstance delegation cannot elevate the delegate (DOJ) to the delegator's (EAC's) stature. *U.S. v. Eaton*, 169 U.S. 331, 343 (1898). As such, the prior DOJ action cannot qualify as EAC precedent, much less as binding EAC precedent.

For all these reasons, the Leagues' notice-and-comment arguments lack merit.

2. EAC's action is not "ad hocery."

The Leagues complain that EAC acted differently on this Kansas request than EAC acted on the prior Kansas request, which implicates the "core concern" that this Court, when petitioned with charges of arbitrary and capricious administrative action, must assure that federal agencies follow a principled "legal theory" and avoid mere "ad hocery." *Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir. 1989). EAC avoids ad hocery here for several reasons, including the fact that EAC explains its departure from the prior disapproval – which DOJ, not EAC adopted – and provides precisely the principled legal rationale that *Pacific Northwest Newspaper Guild* and its progeny require.

Specifically, for EAC "to reverse its position in the face of a precedent it has not persuasively distinguished [would be] quintessentially arbitrary and capricious." *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999). "[T]he core concern underlying the prohibition of arbitrary and capricious agency action is that agency ad hocery is impermissible." *Ramaprakash v. Fed. Aviation Admin. & Nat'l Transp. Safety Bd.*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (internal quotations omitted); *ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[w]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious"). As indicated, EAC coherently explained that its actions to approve state-specific instructions to implement state law are ministerial acts that the Executive Director can take without setting EAC policy that would require a vote of the Commissioners. *See* JA:791. This is all that Circuit precedent requires.

C. EAC did not violate the NVRA's substantive requirements.

On the NVRA merits, the Leagues face the formidable task of justifying why this Court should ignore not only EAC's principled action but also the canon of constitutional avoidance to deny Kansas the ability to enforce its voter-qualification rules. The Leagues do not come close to carrying those two heavy burdens.

1. NVRA's legislative history does not support the Leagues.

Citing NVRA's conference report, H.R. Rep. No. 103-66, at 23 (1993), the

Leagues argue that these types of state rules were neither necessary nor consistent with NVRA *in 1993*, Leagues Br. at 6-7, but Kansas has now demonstrated non-citizen registration *today*, Kansas Br. at 48-49, 57, which makes these measures "necessary." Given NVRA's twin goals of electoral integrity and expanded registration, the appearance of non-citizen voters makes *any* action potentially inconsistent with NVRA. Doing nothing would weaken electoral integrity, 52 U.S.C. §20501(b)(3); *Purcell*, 549 U.S. at 4, and requiring proof of citizenship allegedly dampens registration. Given NVRA's balance between electoral integrity and expanding registration for *eligible* voters, 52 U.S.C. §20501(b), however, Kansas's action is an eminently reasonable response to manifest non-citizen registration.[6] Moreover, the States' response is entirely within the text of the statute and regulations, which is particularly important when the Leagues' rival position raises serious concerns about NVRA's constitutionality. *See* Section I.C.3, *infra*. In any event, the legislative history explains that Congress did not mean to rule out voter-qualification provisions. *See* Kansas Br. at 51 n.16.

2. Nothing requires that this Court wait for an EAC majority.

Although the Leagues argue that an EAC majority has never adopted an EAC

[6] When faced with a population with either a willingness to commit perjury or the lack of sophistication to understand the simple Federal Form, the States' new voter-qualification standards are an objective measure of voter qualification. By contrast, the federal checkbox-signature procedure is clearly inadequate.

position on state voter-qualification rules like Kansas's law, the same is true in reverse: an EAC majority has never ruled against such laws, either. This Court need not stay its hand to await an EAC majority ruling that may never come:

> Nothing in *Chevron* [*U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984)] suggests that a court should hesitate to decide a properly presented issue of statutory construction in hopes that the agency will someday offer its own interpretation.

Consolidation Coal Co. v. Fed'l Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1080 n.8 (D.C. Cir. 1987). Given that Kansas's request presents not only statutory and regulatory issues but also constitutional issues, judicial action is all the more pressing and all the more removed from whatever the full EAC might say: "The power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). Thus, if it accepted the Leagues' view, this Court would need to evaluate the constitutional issues raised in Section I.C.3, *infra*.

Amicus EFELDF respectfully submits that that constitutional analysis is not needed, however, because – as EAC's Executive Director and Kansas explain – EAC and its predecessor have issued binding regulations that set EAC policy for the Executive Director to implement, without further action by the full EAC. *See* Kansas Br. at 38-39. Thus, this Court could focus on something far simpler: NVRA and its implementing regulations allow the relief that EAC provided. First, NVRA allows "other information … as is necessary to enable the appropriate *State election official*

to assess the eligibility of the applicant and to administer voter registration." 52 U.S.C. §20508(b)(1) (emphasis added). Second, the implementing regulations provide that the "state-specific instructions *shall contain … information regarding the state's specific voter eligibility and registration requirements.*" 11 C.F.R. §9428.3(b) (emphasis added). As EAC explained, that is a ministerial determination that does not require setting further EAC policy. JA:789. The only task is for EAC – acting permissibly and ministerially through its Executive Director – to determine, in consultation with Kansas, what Kansas law requires.

3. The Leagues' interpretation of NVRA raises serious constitutional questions that would undermine NVRA's lawfulness.

If this Court were to accept the Leagues' rejection of EAC's views of its own regulations, this Court would then need to consider whether the NVRA, as thus interpreted, violates the states' authority under the Voter-Qualification Clause. If it went down that path, this Court would need to hold the NVRA unconstitutional, which would conflict with constitutional avoidance doctrine. *ITCA*, 133 S.Ct. at 2258-59 (courts should interpret statutes to avoid serious constitutional issues).

Specifically, the Congress that delegated power to EAC lacked constitutional power to regulate the substance of voter eligibility, which the Voter-Qualification Clause confers exclusively upon the states. U.S. CONST. art. I, §2, cl. 2. By contrast, to the extent that – *and only to the extent that* – a particular question falls within the

Elections Clause authority that Congress exercised in NVRA, the exercised federal power displaces the corresponding state power under the Elections Clause. *Compare* U.S. CONST. art. I, §4, cl. 1 (state power) *with id.* art. I, §4, cl. 2 (federal power). EAC action could not expand NVRA's scope beyond what Congress enacted under the Elections Clause, and neither Congress nor EAC can rely on the Elections Clause to displace the states' powers under the Voter-Qualifications Clause. *ITCA*, 133 S.Ct. at 2258. The disputed practice here – namely, requiring proof of citizenship from applicants seeking to register to vote – is a voter qualification, and it thus falls outside the power of Congress (and thus EAC) to regulate.

Although the Leagues appear to view *ITCA* as having decided that NVRA preempts state requirements like Kansas's law, *ITCA* merely held that states could not enforce such requirements outside of NVRA's preemptive *procedural* requirement to "accept and use" the Federal Form:

> We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is "inconsistent with" the NVRA's mandate that States "accept and use" the Federal Form.

ITCA, 133 S.Ct. at 2257. That left open the substantive possibility that NVRA would enable states to import their voter-qualification laws into NVRA's Federal Form via the state-specific requirements and thereby comply with NVRA's procedural rules – which are within the power of Congress under the Elections Clause – without taking

away from the states' exclusive voter-qualification authorities.[7]

II. THE LEAGUES HAVE NOT SUFFERED IRREPERABLE INJURY.

The district court denied the Leagues a preliminary injunction because they failed to establish the type of irreparable harm needed for that extraordinary relief. Although the irreparable-harm and standing inquiries overlap, *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995), plaintiffs must show even more to establish irreparable harm requires. *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) ("to show irreparable harm, a plaintiff must do more than merely allege harm sufficient to establish standing") (internal quotations and alternations omitted). For at least two reasons, this Court can affirm the denial of interim relief for the lack of irreparable harm alone.

First, mere "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. Fed'l Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). As *amicus* EFELDF explains, the Leagues have standing – *if at all* – only for their financial injuries. *See* Section I.A, *supra*. Nor can the Leagues

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[7] Quite contrary to the Leagues' position, *ITCA* held open a viable path for states to seek relief from EAC. Particularly with the *ITCA* decision's focus on administrative procedure, 133 S.Ct. at 2260 & n.10, the majority clearly viewed return to EAC as necessary to re-initiate the opportunity for judicial review if EAC refused the requested relief. *Auer v. Robbins*, 519 U.S. 452, 458 (1997); *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195-96 (D.C. Cir. 1987). Given the constitutional questions presented by a contrary ruling, EAC had no authority to the relief that Kansas requested.

show standing for economic injury, then claim a preliminary injunction based on injuries that they lack standing to assert. *See Mountain States*, 92 F.3d at 1232. In sum, the Leagues' alleged injuries are not the type of claims that typically warrant a preliminary injunction.

Second, "the injury must be both certain and great." *Wisconsin Gas*, 758 F.2d at 674. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id.* (emphasis in original). As Kansas has explained, it is not clear that the challenged action will increase – as opposed to decrease – the burdens on the Leagues. Kansas Br. at 20. The Leagues' defects with regard to standing, *see* Section I.A, *supra*, are thus even more fatal here: "without adequate proof of a threatened injury, plaintiff lacks both standing and an adequate basis in equity for an injunction." *Taylor*, 56 F.3d at 1508. This Court must deny a preliminary injunction because the Leagues have not established that they need one.

III. THE BALANCE OF EQUITIES TIPS IN KANSAS'S FAVOR.

The third preliminary-injunction criterion is the balance of equities, which tips against the Leagues here because of their weak showing on the merits. Thus, the truism that governments have no interest in enforcing unlawful agency action does not apply where the plaintiff is unlikely to prevail in establishing the challenged action's unlawfulness. Here, assuming *arguendo* that the Leagues even have a claim

on the merits *at all*, their weak showing on the merits weighs heavily against them.

IV. THE PUBLIC INTEREST FAVORS KANSAS.

The fourth preliminary-injunction criterion is the public interest. The Leagues cannot meet this criterion for two primary reasons: (1) the Leagues are not likely to prevail on the merits, which nullifies their claim to a public interest, and (2) their merely economic concerns pale in comparison to Kansas's sovereign and electoral interests. For these reasons, this Court should affirm the district court's denial of a preliminary injunction, even if the Leagues could establish irreparable harm.

First, in litigation like this, where the parties dispute the lawfulness of agency action, this last criterion collapses into the merits, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4, because there is a "greater public interest in having governmental agencies abide by [applicable] laws that govern their … operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4 ("[t]he public interest may be declared in the form of a statute"). If the Court sides with Kansas on the merits of EAC's action, the public interest will tilt decidedly toward them: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

Second, when the opposing parties put forward "competing claims of injury, the traditional function of equity has been to arrive at a nice adjustment and reconciliation between the competing claims." *Romero-Barcelo*, 456 U.S. at 312 (internal quotations omitted). Here, Kansas has legitimate interests in its sovereignty and the political and policy compromises represented in its duly enacted electoral laws. *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("the good faith of a state legislature must be presumed"). Quite simply, the League's financial interests do not stack up vis-à-vis Kansas's sovereign interest in policing voter qualifications and ensuring the integrity of elections.

Specifically, Kansas seeks to exercise its sovereign right to control voter qualifications. U.S. CONST. art. I, §2, cl. 2; *Purcell*, 549 U.S. at 4 ("[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government"); *see Crawford*, 553 U.S. at 189 (states have an interest in preventing voter fraud and ensuring voter confidence); *Moore v. Brown*, 448 U.S. 1335, 1339 (U.S. 1980) (Powell, J., Circuit Justice) (under the public-interest criterion, "altering the voting system established by [state] law … is a substantial intrusion on local self-government"). Against those important interests, the Leagues press only a financial injury.[8] Kansas's legitimate fears about the integrity of elections easily trump the

[8] As indicated, it is unclear whether the Leagues have standing *at all*, but it is clear that they lack standing to assert voting rights or anything else beyond the

Leagues' economic burdens. *See Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980) (irreparable intangible public injuries outweigh private economic burdens). Regardless of what a partisan DOJ argues in purported defense of a non-partisan independent agency, EAC has simply gotten out of Kansas's way by granting a ministerial request that the federal government has no authority to deny to Kansas.

In such public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public interest component can deny a plaintiff relief that courts otherwise might provide in purely private litigation:

> [W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.

Id. For all these reasons, denying a preliminary injunction struck a "nice adjustment" between the parties' respective interests. *Romero-Barcelo*, 456 U.S. at 312.

For the foregoing reasons, *amicus* ELELDF respectfully submits that this final

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marginal – and speculative – increased costs of compliance that they claim. *See* Section I.A, *supra*.

criterion should favor Kansas and affirming EAC's action.

CONCLUSION

This Court should affirm the District Court's entry of a preliminary injunction.

Dated: August 8, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system and, pursuant to the Court's expedited briefing order, delivered seven paper copies to the Court via messenger by noon on the same day. Service on all other parties to this action has occurred via electronic means.

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