Nos. 14-3062 and 14-3072

In the United States Court of Appeals
For the Tenth Circuit

KRIS W. KOBACH, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, et al.,

Defendant-Appellants,

and

PROJECT VOTE, INC., et al.,

Intervenor–Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, NO. 5:13-cv-4095,
THE HONORABLE ERIC F. MELGREN

VALLE DEL SOL INTERVENOR–APPELLANTS' SEPARATE BRIEF ON THE EFFECT OF THE EAC'S INABILITY TO ACT WITHOUT A QUORUM

ORAL ARGUMENT REQUESTED

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
Nina Perales (Tex. Bar No. 24005046)
Ernest Herrera (N.M. Bar No. 144619)
110 Broadway, Suite 300
San Antonio, Texas 78205
Phone: 210-224-5476

O'MELVENY & MYERS LLP
Linda Smith (Cal. Bar No. 78238)
Adam P. KohSweeney (Cal. Bar No. 229983)
J. Jorge deNeve (Cal. Bar No. 198855)
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035
Phone: 310-246-6801

Additional Counsel Appear on Next Page

HUSCH BLACKWELL LLP
Jeffrey J. Simon (Kansas S. Ct. No. 15231)
Judd M. Treeman (Kansas S. Ct. No. 25778)
4801 Main Street
Suite 1000
Kansas City, MO 64112
Phone: 816-329-4711

Attorneys for Intervenor–Appellants **Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc.,** and **Debra Lopez**

CERTIFICATE OF REASONS FOR SEPARATE BRIEFING

Pursuant to Tenth Circuit Rule 31.3(B), the Valle del Sol Intervenor–Appellants submit the following reasons for filing a separate brief:

1. The Valle del Sol Intervenor–Appellants join in full the primary brief submitted by all Intervenor–Appellants (the "Intervenor-Appellants Opening Brief" or "Joint Brief"). The Valle del Sol Intervenor–Appellants write separately to address a single threshold issue not covered in the Joint Brief: Whether the U.S. Election Assistance Commission had authority to address the States' requests to modify the Federal Form. This threshold issue was raised below and addressed but not resolved in the district court's opinion, and it is not discussed in the Joint Brief.

2. Separate briefing by the Valle del Sol Intervenor–Appellants is the most appropriate means to provide this Court with analysis and citations of relevant authority for this issue.

Dated: May 27, 2014

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
By *s/ Nina Perales*
Nina Perales (Tex. Bar No. 24005046)
Ernest Herrera (N.M. Bar No. 144619)
110 Broadway, Suite 300
San Antonio, Texas 78205
Phone: 210-224-5476
Facsimile: 210-224-5382

O'MELVENY & MYERS LLP
By *s/ Linda Smith*
Linda Smith (Cal. Bar No. 78238)
Adam P. KohSweeney (Cal. Bar No. 229983)
J. Jorge deNeve (Cal. Bar No. 198855)
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035
Phone: 310-246-6801
Facsimile: 310-246-6779

HUSCH BLACKWELL LLP
Jeffrey J. Simon (Kansas S. Ct. No. 15231)
Judd M. Treeman (Kansas S. Ct. No. 25778)
4801 Main Street
Suite 1000
Kansas City, MO 64112
Phone: 816-329-4711
Facsimile: 816-983-8080

Attorneys for Intervenor–Appellants **Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc.,** and **Debra Lopez**

CORPORATE DISCLOSURE STATEMENT

The Valle del Sol Intervenor–Appellants adopt and incorporate the relevant portion of the Corporate Disclosure Statement included in the joint Intervenor-Appellants' Opening Brief.

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DISCLOSURE OF PRIOR OR RELATED APPEALS

This brief is filed on behalf of Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and Debra Lopez in *Kobach v. Inter Tribal Council of Arizona, et al.*, No. 14-3062, and *Kobach v. Election Assistance Commission*, No. 14-3072, which this Court has consolidated for appeal.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Kansas had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because this matter arises under the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq*., and the Elections Clause of the United States Constitution, U.S. CONST. art. I, § 4, cl. 1.

This Court has jurisdiction over these appeals pursuant to 28 U.S.C. § 1291 as an appeal from the district court's final order of March 19, 2014, granting in part Plaintiffs' Motion for Judgment.

ISSUES PRESENTED FOR REVIEW

The Valle del Sol Intervenor–Appellants adopt and incorporate in full the Issues Presented for Review included in the joint Intervenor-Appellants' Opening Brief. Supplementing those issues is a single additional, preliminary question:

1. Did the district court err in reviewing the merits of a purported agency decision that, because it was made without the statutorily required quorum, was void and therefore could not be reviewed on the merits under the Administrative Procedure Act?

STATEMENT OF THE CASE

The Valle del Sol Intervenor–Appellants adopt and incorporate in full the Statement of the Case included in the joint Intervenor-Appellants' Opening Brief, and supplement it with the following Statement:

The preliminary issue before the district court was whether the EAC's lack of a quorum rendered the Acting Executive Director's decision void and unreviewable under the APA. The EAC has a strict quorum requirement, but lacks a single commissioner. *See* 42 U.S.C. § 15328. Under 5 U.S.C. § 706(2), if the agency acted without authority, the only action the district court could take in reviewing the purported agency decision was to set it aside as void, without passing judgment on the merits of the case. Likewise, the district court could not compel agency action under Section 706(1) because Congress committed the

control of the Federal Form's contents to the discretion of a quorum of EAC commissioners.

Instead of first ruling on the issue of agency authority and whether it could review the merits of the case, the district court found it "unnecessary to address [the Acting Executive Director's] authority to act . . . because the Court's decision would be the same if a full commission had voted 4-0 to deny the states' requests." Aplt. App. at 1428. It then went on to stand in the shoes of the agency and render an opinion on the merits. This was an impermissible advisory opinion in violation of the APA's limits of judicial authority and in violation of the doctrine of separation of powers. The Valle del Sol Intervenor–Appellants respectfully request that the Court vacate the district court's order and enter an order remanding the case with instructions for the district court to remand the case to the EAC to await the reestablishment of an EAC quorum.

STATEMENT OF THE FACTS

The Valle del Sol Intervenor–Appellants adopt and incorporate in full the Statement of the Facts included in the joint Intervenor-Appellants' Opening Brief.

SUMMARY OF THE ARGUMENT

The district court reversibly erred by reviewing the merits of a purported agency decision that, because it was made without the statutorily required quorum, was void and therefore not reviewable under the Administrative Procedure Act.[1] The APA, which "sets forth the full extent of judicial authority to review executive agency action," *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 513 (2009), grants courts two powers of judicial review, and two alone. ***First***, if the agency in question has acted, the courts may "set aside" actions that were made without authority or contrary to law. 5 U.S.C. § 706(2). ***Second***, if the agency has not acted, the courts may "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). If there is no valid agency action to review on the merits, or if the agency action is not one that can be compelled, judicial review is not available under the APA. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) [hereinafter *SUWA*] ("[T]he only agency action that can be compelled under the APA is action legally *required*." (emphasis original)).

Although the National Voter Registration Act (NVRA) empowers the U.S. Election Assistance Commission (EAC) with discretionary authority to "prescribe

[1] The Valle del Sol Intervenor–Appellants join the joint Intervenor-Appellants' Opening Brief in full, and submit this Separate Brief to raise one additional reason why the district court's ruling was incorrectly decided and should be vacated.

the contents of th[e] Federal Form," *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2251 (2013) [hereinafter *ITCA*], the EAC may only act through a quorum of commissioners. 42 U.S.C. § 15328. Because the EAC lacked a quorum when it purported to exercise its discretion to act on the States' requests to modify the Federal Form, there was no valid agency action for the district court to review on the merits. Furthermore, because Congress empowered the EAC with ***discretionary*** power to modify the Federal Form, and that discretion could only be exercised through a quorum of commissioners, the district court lacked the power to compel the agency to rule on the States' requests. *See SUWA*, 542 U.S. at 64–65 (stating that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*," that is, a "ministerial or non-discretionary act" (emphasis original, quotation and citation omitted)).

As a result, because the EAC's action is void and could not be reviewed on the merits, and because the district court lacked statutory authority to compel the EAC to accede to the States' requests, the district court erred in rendering a decision on the merits of those requests under the APA, and its opinion should be vacated. Moreover, for the same reasons the States could not prevail on their APA claims even if APA review was available, as explained in the joint Intervenor-Appellants' Opening Brief, the States' purported constitutional claim also fails.

Because the EAC can take no action on the States' request to alter the Federal Form unless and until the EAC regains a quorum of commissioners, the status quo, which all of the States have followed for the last 20 years since the creation of the Federal Form, must continue. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010) ("We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. But until [Congress acts], Congress' decision to require . . . a Board quorum of three[] must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.").

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation *de novo*. *United States v. Porter*, 745 F.3d 1035, 1040 (10th Cir. 2014) (quoting *United States v. Nacchio*, 573 F.3d 1062, 1087 (10th Cir. 2009)). Likewise, under the APA, this Court reviews the district court's decision *de novo*. *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 428 (10th Cir. 2011). This includes the question of whether the agency acted within the scope of its authority. *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209, 1227 (10th Cir. 2011).

II. THE STATES' SUIT IS UNREVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT BECAUSE THE EAC LACKED A QUORUM

A. The District Court Failed To Consider The Threshold Issue That The EAC's Acting Executive Director Lacked The Authority To Render A Decision On The States' Requests

In its March 19 Order, the district court did not determine whether the EAC's Acting Executive Director had the authority to decide whether to accept or reject the States' proposed changes to the Federal Form. Aplt. App. at 1428. Where an agency is subject to an express quorum requirement, as the EAC is, the question whether a particular individual is authorized to exercise the agency's authority is a threshold matter that must be decided before a district court may review the agency's "decision" under the APA. *See* 42 U.S.C. § 15328; *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir. 2013); *Paulsen v. Remington Lodging & Hospitality, LLC*, No. 13-cv-2539 (JFB) (WDW), 2013 WL 4119006, at *7 (E.D.N.Y. Aug. 14, 2013). As the Supreme Court has held, before reviewing an agency decision on the merits, "[t]he court is first required to decide whether the [Agency] acted within the scope of [its] authority." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971).

Instead of making this threshold determination, the district court stated it did not need to resolve the issue because its "decision would be the same if a full commission had voted 4-0 to deny the states' request." Aplt. App. at 1428. By

skipping the threshold agency authority issue, the district court failed to realize that the lack of a valid agency action deprived it of the ability to conduct any review at all of the merits of the States' APA claim. *Cf. Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.").

The EAC's Acting Executive Director could not issue a decision on the States' requests to modify the Federal Form. When Congress created the EAC and empowered it with the discretionary authority to prescribe the contents of the Federal Form, it decided that the agency would consist of "four members appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 15323. It also required that "[a]ny action which the [EAC] is authorized to carry out under this chapter may be carried out *only with the approval of at least three of its members*."[2] *Id.* § 15328 (emphasis added).

[2] Section 802 of the Help America Vote Act ("HAVA") transferred all the Federal Election Commission's original responsibilities of administering the portion of the NVRA dealing with the Federal Form to the EAC. *See* 42 U.S.C. § 15532. Section 15328's reference to actions "under this chapter" includes all of the functions that the EAC currently performs in connection with the Federal Form pursuant to Section 15532.

There is no dispute that all four of the EAC's commissioner positions were vacant at the time of the States' initial requests and are still vacant, and thus that the agency lacks a quorum. *See* Aplt. App. at 342–43 (letter from EAC declining to act on the States' requests because of the lack of a quorum). It is also well-settled that a federal commission subject to a statutory quorum requirement cannot legally act without a quorum. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010). Thus, when the district court ordered the EAC to issue a final agency action regarding the States' requested changes to the Federal Form, the EAC lacked a quorum, had no authority to act, and was unable to rule on the States' requests.[3] Aplt. App. at 545–46.

Compelled by an order of the district court, the Executive Director purported to issue a full decision on behalf of the EAC and rejected the States' proposed modifications. Aplt. App. at 1274–1319. While she claimed authority to do so under a 2008 delegation of authority by a previous quorum of EAC commissioners,

[3] Although the district court had the authority to remand the case to the agency, it had no authority to compel the agency to take a "final agency action" on a discretionary matter when the agency lacked a quorum of commissioners. *See* Aplt. App. at 545–46; 5 U.S.C. § 706(1); *SUWA*, 542 U.S. at 64–65. Intervenor–Appellants maintain their prior positions that the district court correctly remanded the issue to the agency, but that the agency had no authority to act on the States' request. *See* Aplt. App. at 1383–89. In Intervenor–Appellants' view, remand was proper so that the EAC could, in the first instance, have recognized its inability to act and thus persisted in its previous position of declining to rule on the States' requests.

see id. at 1288–89, the HAVA's statutory quorum requirement prevents such delegations. 42 U.S.C. § 15328; *see also Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121–22 (1947). The quorum provision thus precludes the EAC from authorizing the Acting Executive Director to decide issues of broad policy concern for the agency. *See New Process Steel*, 130 S. Ct. 2635, 2644, 2651 (2010) (holding that the plain language of the NLRB's quorum provision, which authorizes the Board to delegate its powers only to a "group of three or more members," does not authorize a valid delegation to two members). If Congress had intended to give the EAC the ability to delegate its decisionmaking powers to the Executive Director despite the plain language of Section 15328, it certainly knew how to do so. *See, e.g.*, 29 U.S.C. § 153(b) (expressly providing that the NLRB can delegate any or all of its powers to a subgroup of at least three of its members).

In addition, regardless of whether the 2008 delegation to the Executive Director was valid when it was enacted by a quorum of commissioners, it is not valid now. In *New Process Steel*, the Supreme Court expressly rejected allowing a delegation that would continue in perpetuity after the expiration of a quorum: "[the delegation provision], as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died." *New Process Steel*, 130 S. Ct. at 2645. Congress requires all commissioners of the EAC—two of which are selected for appointment by

Democrats and two of which are selected for appointment by Republicans—to be "appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 15323(a)(1). The quorum provision thus prevents the Acting Executive Director, who is not subject to Senate confirmation, from acting alone on behalf of the EAC when Congress clearly intended at least three members who had been vetted by the political process to be responsible for exercising the EAC's discretionary authority over the contents of the Federal Form.

B. Because The EAC Decision Was Void, It Could Be "Set Aside" On That Basis Alone, And Merits Review Was Therefore Unavailable Under 5 U.S.C. § 706(2).

Because the Executive Director lacked the authority to render a decision on the States' requests on behalf of the EAC, there was nothing for the district court to review and set aside on the merits under the APA. Moreover, because the EAC's powers over the Federal Form are discretionary, the district court had no authority to order the agency to accede to the States' requests when the agency lacked a quorum. As a result, the district court's opinion, which purported to review the agency's decision under principles of administrative law, exceeded the authority of the federal courts under the APA and should be vacated.

The APA itself "sets forth the full extent of judicial authority to review executive agency action." *Fox Television Stations*, 556 U.S. at 513. In relevant part, 5 U.S.C. § 706 sets the extent of allowable judicial review:

> *To the extent necessary to decision and when presented*, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> . . .
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. § 706 (emphasis added). If, as in this case, there is a question of whether an agency acted "in excess of statutory jurisdiction, authority, or limitations" under Section 706(2)(C), binding Supreme Court case law requires the reviewing court to resolve the question of statutory authority first, and to reach the merits of the agency's decision *only* if it first determines that the agency had authority to act:

> The court is first required to decide whether the Secretary acted within the scope of his authority. This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion. . . . Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Overton Park, 401 U.S. at 415–16; *see Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) ("When reviewing a particular

agency action challenged under § 706(2) of the APA, the court is first required to decide whether the agency acted within the scope of its authority." (quotation and citation omitted)). This is only logical. As this Circuit has held, review under Section 706(2)(A) "focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Without a valid agency action—and thus a valid decisionmaking process—for the court to examine, there are no merits to review under 5 U.S.C. § 706(2), and the merits are neither "presented" nor "necessary to decision." 5 U.S.C. § 706.

Moreover, the district court violated the doctrine of separation of powers by ruling on the merits without first addressing the issue of authority. Although the agency's decision was void because it lacked a quorum of commissioners, the district court nevertheless addressed the merits of the States' request. In effect, instead of reviewing a valid agency decision, the only way merits review is permissible under Section 706(2), the court addressed the merits in the first instance and substituted its own judgment for that of the agency: "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate, the administrative process, for the purpose of the rule is to avoid propelling the court into the domain which Congress has set aside

exclusively for the administrative agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *see also Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981). And, as the D.C. Circuit has expressly held, courts are forbidden from acting in an agency's stead because they are to act as courts, not as agencies. *See Aera Energy LLC v. Salazar*, 642 F.3d 212, 224 (D.C. Cir. 2011) (holding that, where an agency has been "prevent[ed] . . . from performing its statutorily prescribed duties," courts should not "stand in the agency's shoes and take over its decision making function").

Without a valid agency action to review on the merits, the only permissible ruling the district court could have issued under Section 706(2) would have been to vacate the EAC Memorandum of Decision as void and dismiss the case as unreviewable under the APA.

C. The District Court Lacked Authority To Compel The EAC To Act Under 5 U.S.C. § 706(1) Because Congress Granted The EAC Discretionary Authority Over The Federal Form And Forbade The EAC From Acting Without A Quorum

The district court erred by compelling the EAC to act under Section 706(1), which allows courts to compel agency action that has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In its March 19 Order, the district court, citing Section 706(1) as the basis of its authority, "order[ed] the EAC to add the language requested by Arizona and Kansas to the state-specific instructions of the federal mail voter registration form immediately." Aplt. App. 1448–49. But as

noted above, the Supreme Court has held that both the "unlawfully withheld" and "unreasonably delayed" prongs of Section 706(1) are limited so that courts may compel only those actions that agencies are "legally *required*" to take, that is, "ministerial or non-discretionary act[s]." *SUWA*, 542 U.S. at 63–64 (emphasis original, citation and quotation omitted). This restriction is a necessary result of the doctrine of separation of powers, and functions "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66; *see Brown*, 656 F.2d at 566; *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995). Accordingly, there are two reasons why the district court exceeded its authority in ordering the EAC to act under Section 706(1).

First, because the EAC's power over the Form's contents is discretionary, the States' requested changes were not "ministerial" or "non-discretionary." Although the States have repeatedly argued that the EAC has a "nondiscretionary" duty to modify the Federal Form, *ITCA* itself recognizes that the EAC's authority to modify the Federal Form is "validly conferred discretionary executive authority." *ITCA*, 133 S. Ct. at 2259; Intervenor-Appellants' Opening Brief at 66. In fact, aside from three specific items that the NVRA mandates the EAC include on the Federal Form, *see* 42 U.S.C. § 1973gg-7(b)(2), the NVRA otherwise states

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." 42 U.S.C. § 1973gg-7(b)(1). This language, which leaves the word "necessary" undefined, is prototypical discretionary language that contrasts sharply with the mandatory language of Section 1973gg-7(b)(2).

Under normal circumstances, that is, if an EAC quorum existed, a court could likely order the agency to take action on the States' requests without telling it *how* it had to act or *what* result it had to reach. Even if the language of Section 1973gg-7(b)(1) is "mandatory as to the object to be achieved" it nonetheless "leaves [the agency] a great deal of discretion in deciding how to achieve it." *SUWA*, 542 U.S. at 66. As *SUWA* stated, if a statute has a mandatory goal but the method of achieving that goal is left up to the agency, the reviewing court can at most order the agency "to take action upon a matter, without directing *how* it shall act." *Id.* at 64 (emphasis original, quotation and citation omitted); *see id.* at 65 (noting that a statute ordering regulations to be established within six months "would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations"). Consequently, because the power Congress delegated to the EAC to

control the content of the Federal Form is a discretionary one, the district court erred by ordering the EAC to accede to Plaintiffs' request.

Second, the court could not compel the agency to act on the States' requests (either affirmatively or otherwise) because the EAC could not lawfully act without a quorum, and thus the agency's action was not *unlawfully* withheld or *unreasonably* delayed.[4] In *SUWA*, Justice Scalia made clear that agency action that is not "legally required" cannot be "unlawfully" withheld, and that "a delay cannot be unreasonable with respect to action that is not required." *SUWA*, 542 U.S. at 63 & n.1. Far from "unlawfully" withholding or "unreasonably" delaying review, the EAC is *prohibited* from acting without a quorum, and thus its failure to make a valid agency action in response to the States' requests is both lawful and reasonable.

The EAC is the only body with discretion to act on the States' requests. The EAC's Acting Executive Director did not have authority to render a decision on those requests. Therefore, this suit is unreviewable under the APA, and the district court ignored the threshold issue of agency authority and acted outside its own statutory authority by purporting to review the void EAC action. The district court's ruling should be vacated and remanded with instructions to enter an order

[4] For this reason, the district court also overstepped its authority when, in its December 13, 2013 remand order, it gave the EAC "instructions that it render a final agency action." Aplt. App. at 545–46.

of dismissal on the APA claims until such time as the EAC has impaneled a quorum of commissioners and can rule on the States' request in the first instance.

III. THE STATES' PURPORTED CONSTITUTIONAL CLAIM FAILS BECAUSE THEY HAVE NOT MET THEIR BURDEN TO ESTABLISH THAT THE CURRENT FEDERAL FORM PRECLUDES THEM FROM OBTAINING INFORMATION NECESSARY TO ENFORCE THEIR CITIZENSHIP QUALIFICATION

With judicial review of the EAC's decision unavailable, the States' only potentially remaining claim is their purported constitutional claim brought under the Tenth Amendment, a claim that the district court expressly stated it did not address. This claim, if it exists, must also fail because the States have failed utterly to satisfy the steep evidentiary burden established by the United States Supreme Court.[5] In *ITCA*, the Court, after noting the distinction between voter *qualifications* and voting time, place, and manner *regulations*, noted, without ruling on the issue, that "it would raise serious constitutional doubts if a federal [time, place, or manner] statute ***precluded*** a State from obtaining the information ***necessary*** to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2258–59 (emphasis added). The Court then stated in dicta, after noting the EAC's potential

[5] The Valle del Sol Intervenor–Appellants incorporate in full the joint Intervenor-Appellants' Opening Brief's arguments regarding the burden of proof the States must meet to prevail: that they are "precluded" from obtaining "necessary" information. Intervenor-Appellants' Opening Brief at 27–44. In this section, the Valle del Sol Intervenor–Appellants write separately only to show that the same demanding standards applicable on APA review would also be applicable to the States' purported constitutional claim.

quorum difficulties, that if APA review were unavailable and the Federal Form could not be changed by the EAC due to an inability to act, the States "***might*** then be in a position to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form." *Id.* at 2260 n.10 (emphasis added).

ITCA makes clear that adjudicating this constitutional question would be a fact-intensive, evidentiary determination that places the burden of proof on the States (who are the Plaintiffs and bear the ultimate burden of proof). *Id.* at 2260. *ITCA* also shows that this burden is a high one. The States must prove they are "precluded" from obtaining "necessary" information—not that obtaining the information will be made less convenient or more expensive, or that the desired information is merely useful, but that they are and will continue to be *precluded* from obtaining *necessary* information if their requested instructions are not added to the Form. This standard is demanding, but rightfully so. If it were not, it would function to "permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form. If that is so, the Federal Form ceases to perform any meaningful function, and would be a feeble means of "'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *ITCA*, 133 S. Ct. at 2255–56 (quoting 42 U.S.C. § 1973gg(b)).

The record is clear that the States cannot meet their burden of proof. The joint Intervenor-Appellants' Opening Brief correctly outlines the numerous ways and reasons why Plaintiffs cannot prove that documentary proof of citizenship is "necessary" such that without it they would be precluded from enforcing their citizenship voter qualification, and this brief incorporates that analysis. Intervenor-Appellants' Opening Brief at 27–44. The States cannot prevail on their purported constitutional claim.

CONCLUSION

For all the foregoing reasons, this Court should vacate the district court's ordering the EAC to add the States' requested language to the Federal Form.

Dated: May 27, 2014

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
By *s/ Nina Perales*
Nina Perales (Tex. Bar No. 24005046)
Ernest Herrera (N.M. Bar No. 144619)
110 Broadway, Suite 300
San Antonio, Texas 78205
Phone: 210-224-5476
Facsimile: 210-224-5382

O'MELVENY & MYERS LLP
By *s/ Linda Smith*
Linda Smith (Cal. Bar No. 78238)
Adam P. KohSweeney (Cal. Bar No. 229983)
J. Jorge deNeve (Cal. Bar No. 198855)
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035
Phone: 310-246-6801
Facsimile: 310-246-6779

HUSCH BLACKWELL LLP
Jeffrey J. Simon (Kansas S. Ct. No. 15231)
Judd M. Treeman (Kansas S. Ct. No. 25778)
4801 Main Street
Suite 1000
Kansas City, MO 64112
Phone: 816-329-4711
Facsimile: 816-983-8080

Attorneys for Intervenor–Appellants **Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc.,** and **Debra Lopez**

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. This appeal addresses the ability of United States citizens to register to vote in Kansas and Arizona, and is especially important in light of the upcoming 2014 elections. The principles applied here may also impact future litigation in this and other circuits. Given the stakes, counsel would appreciate the opportunity to address any questions the Court might have.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 4,761 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: May 27, 2014

s/ Linda Smith

Linda Smith (Cal. Bar No. 78238)
Attorney for Intervenor–Appellants
Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and **Debra Lopez**

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Microsoft Forefront software and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

Dated: May 27, 2014

s/ Linda Smith

Linda Smith (Cal. Bar No. 78238)
Attorney for Intervenor–Appellants
Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and **Debra Lopez**

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2014, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to all counsel of record.

In addition, I certify that on the 28th Day of May, 2014, I will serve seven paper copies of the same by overnight mail to the Court and one paper copy to each of the following counsel of record:

Michele L. Forney
Office of the Attorney General for the State of Arizona
1275 West Washington Street
Phoenix, AZ 85007

Thomas E. Knutzen
Kansas Secretary of State
120 SW 10th, 1st Floor
Topeka, KS 66612

Sasha Samberg-Champion
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station, P.O. Box 14403
Washington, DC 20044-4403

John A. Freedman
Arnold & Porter
555 12th Street, NW
Washington, DC 20004

Michael C. Keats
Kirkland & Ellis
601 Lexington Avenue
New York, NY 10022

Mark A. Posner
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Dated: May 27, 2014

s/ Linda Smith

Linda Smith (Cal. Bar No. 78238)
Attorney for Intervenor–Appellants
Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and **Debra Lopez**

ADDENDUM PURSUANT TO TENTH CIRCUIT RULE 28.2 (A)

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, *et al.*, *Plaintiffs*, v. UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*, *Defendants.*	CIVIL ACTION NO. 5:13-CV-4095-EFM-DJW

NOTICE OF FILING OF FINAL AGENCY ACTION

Pursuant to the Court's December 13, 2013, order remanding the matter to the United States Election Assistance Commission ("EAC") for final agency action, ECF No. 113, Defendants EAC and Alice Miller, Acting Executive Director of the EAC, respectfully give notice of their filing of the EAC's January 17, 2014, Memorandum of Decision Concerning State Requests to include Additional Proof of Citizenship Instructions on the National Mail Voter Registration Form, Docket No. EAC-2013-0004 ("Decision"). This Decision constitutes final agency action with respect to the administrative issues presented by Kansas and Arizona in this civil action.

Respectfully submitted this 17th day of January, 2014.

BARRY R. GRISSOM
United States Attorney
District of Kansas

JON FLEENOR
Assistant United States Attorney
500 State Avenue, Suite 360
Kansas City, Kansas 66101
Telephone: (913) 551-6531
Fax: (913) 551-6541
Email: Jon.Fleenor@usdoj.gov

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division

STUART F. DELERY
Assistant Attorney General
Civil Division

s/ Bradley E. Heard
T. CHRISTIAN HERREN, JR.
RICHARD A. DELLHEIM
BRADLEY E. HEARD
DAVID G. COOPER
Attorneys, Voting Section
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4196
Fax: (202) 307-3961
E-mail: Bradley.Heard@usdoj.gov

s/ Felicia L. Chambers
JOHN R. GRIFFITHS
FELICIA L. CHAMBERS
Attorneys, Federal Programs Branch
Civil Division
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, N.W., Room 7728
Washington, D.C. 20530
Telephone: (202) 514-3259
Fax: (202) 616-8470
Email: Felicia.Chambers@usdoj.gov

CERTIFICATE OF SERVICE

This certifies that I have this day filed the within and foregoing **Notice of Filing of Final Agency Action** electronically using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record through the Court's electronic filing system.

This 17th day of January, 2014.

s/ Bradley E. Heard
BRADLEY E. HEARD
Civil Rights Division
U.S. Department of Justice
Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4196
Facsimile: (202) 307-3961
E-mail: Bradley.Heard@usdoj.gov

U. S. ELECTION ASSISTANCE COMMISSION
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (DOCKET NO. EAC-2013-0004)

The United States Election Assistance Commission (hereinafter "EAC" or "Commission") issues the following decision with respect to the requests of Arizona, Georgia, and Kansas (hereinafter, collectively, "States") to modify the state-specific instructions on the National Mail Voter Registration Form ("Federal Form"). Specifically, the States request that the EAC include in the applicable state-specific instructions on the Federal Form a requirement that, as a precondition to registering to vote in federal elections in those states, applicants must provide additional proof of their United States citizenship beyond that currently required by the Federal Form. For the reasons set forth herein, we deny the States' requests.[1]

I. INTRODUCTION

A. State Requests

1. Arizona

In 2004, Arizona voters approved ballot Proposition 200 amending Arizona's election laws, as relevant here, by requiring voter registration applicants to furnish proof of U.S. citizenship beyond the attestation requirement of the Federal Form. Ariz. Rev. Stat. Ann. § 16-

[1] As explained below, this decision follows a court order in *Kobach v. EAC*, No. 5:13-cv-4095 (D. Kan. Dec. 13, 2013) remanding the matter to the agency and a subsequent request for public comment. The undersigned Acting Executive Director has determined that the authority exists to act on the requests and therefore issues this decision on behalf of the agency.

166(F). According to the state law, a county recorder must "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." *Id.*

On March 6, 2006, the Commission, acting through its Executive Director, denied Arizona's original 2005 request to include additional proof of citizenship instructions on the Federal Form, finding, *inter alia*, that the form already required applicants to attest to their citizenship under penalty of perjury and to complete a mandatory checkbox indicating that they are citizens of the United States. EAC000002-04. Further, the Commission observed that Congress itself had found that a documentary proof-of-citizenship requirement was "not necessary or consistent with the purposes of" the National Voter Registration Act ("NVRA"). *Id.*

In July 2006, after receiving several letters of protest from Arizona's Secretary of State, the EAC's then-chairman requested that the EAC commissioners accommodate the State by reconsidering the agency's final decision and granting Arizona's request. EAC000007-08, EAC00000011, EAC00000013-14. On July 11, 2006, the EAC commissioners denied the chairman's motion for an accommodation by a tie vote of 2-2. EAC000010.[2]

Subsequently, Arizona refused to register Federal Form applicants who did not provide the documentation required by Proposition 200. Private parties filed suit against Arizona, challenging Arizona's compliance with the NVRA. In June 2013, the Supreme Court ruled that the NVRA preempts inconsistent state law and states must accept and use the Federal Form to register voters for federal elections without requiring any additional information not requested on the Form. *Arizona* v. *Inter Tribal Council of Arizona, Inc.*,__ U.S. __, 133 S. Ct. 2247, 2253-60 (2013) (hereinafter "*Inter Tribal Council*"). The Court further stated, "Arizona may, however,

[2] Arizona did not seek to challenge the EAC's final decision on the 2006 request under the APA, and the time for doing so has now expired. *See* 28 U.S.C. § 2401(a).

request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act." *Id*. at 2260.

On June 19, 2013, Arizona's Secretary of State again requested that the EAC include state-specific instructions on the Federal Form relating to Arizona's proof-of-citizenship requirements. On July 26, 2013, Arizona's Attorney General submitted a follow-up letter in support of the state's request. EAC000034-35; EAC000044-46. In a letter dated August 13, 2013, the Commission informed Arizona that its request would be deferred until the reestablishment of a quorum of EAC commissioners, in accordance with the November 9, 2011, internal operating procedure issued by the EAC's then-Executive Director, Thomas Wilkey ("Wilkey Memorandum"). EAC000048. That memorandum set forth internal procedures for processing state requests to modify the state-specific instructions on the Federal Form, instructing that "[r]equests that raise issues of broad policy concern to more than one State . . . be deferred until the re-establishment of a quorum [of EAC commissioners]." EAC000049-50.

2. Georgia

By letter dated August 1, 2013, Georgia's Secretary of State requested, *inter alia*, that the EAC revise the Georgia state-specific instructions of the Federal Form due to a 2009 Georgia law that requires voter registration applicants to provide "satisfactory evidence of United States citizenship so that the board of registrars can determine the applicant's eligibility." EAC001856-57; Ga. Code Ann. § 21-2-216(g). The Commission responded to Georgia's request on August 15, 2013, by informing the state that its request would be deferred in accordance with the Wilkey Memorandum. EAC001859-60.

3. Kansas

On August 9, 2012, Kansas's Election Director requested, *inter alia*, that the EAC provide an instruction on the Federal Form that "[a]n applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote." EAC000099; Kan. Stat. Ann. § 25-2309(*l*). The EAC responded to the state by letter dated October 11, 2012, indicating that a decision on Kansas's request regarding proof of citizenship would be deferred in accordance with the Wilkey Memorandum. EAC000101-02.

On June 18, 2013, after the Supreme Court decision in *Inter Tribal Council*, Kansas Secretary of State Kris Kobach renewed the state's August 9, 2012, request to provide an instruction on the Federal Form regarding the state's proof of citizenship requirements. EAC000103. In a follow-up August 2, 2013 letter, Mr. Kobach clarified that he had instructed county election officials to accept the Federal Form without proof of citizenship, but that those registrants would be eligible to vote only in federal elections. EAC000112-13. The EAC again deferred Kansas's request in accordance with the Wilkey Memorandum. EAC000116-17.

Kansas and Arizona subsequently filed suit against the EAC in the United States District Court for the District of Kansas, challenging the EAC's deferral of these requests. *See Kobach* v. *EAC*, No. 5:13-cv-4095 (D. Kan. filed Aug. 21, 2013). On December 13, 2013, the district court remanded the Kansas and Arizona matters to the EAC with instructions to render a final agency action by January 17, 2014.[3] The Georgia request is not part of this pending federal

[3] Although the EAC's Executive Director had been delegated the authority to act for the Commission in responding to the States' requests, the current Acting Executive Director initially followed her predecessor's internal operating procedure (i.e., the Wilkey Memorandum), which stated that such requests should be deferred until there was a quorum of commissioners available to provide additional policy guidance. The Acting Executive Director believed that deferring the requests in accordance with the Wilkey Memorandum was the prudent course, and in the pending litigation the Commission argued that the district court should give deference to her decision. The district court determined that the Commission had unreasonably delayed in deciding Arizona's and Kansas's requests and therefore directed the Commission to take final action on those requests by January 17, 2014.

court litigation; however, as it presents similar issues, the Commission proceeds to take final action on that request as well.

B. Summary of Public Comments

On December 19, 2013, the EAC issued a Notice and Request for Public Comment ("Notice") on the Arizona, Georgia, and Kansas requests. EAC210-11; 78 Fed. Reg. 77666 (Dec. 24, 2013). The Commission also emailed its public comment request to its list of NVRA stakeholders and published the Notice on its website. In response to its request, the Commission received 423 public comments: one on behalf of the Arizona Secretary of State, one from the Kansas Secretary of State, twenty-two from public officials at thirteen different agencies at various levels of government, 385 from individual citizens, four from the groups of individuals and advocacy organizations that intervened in the pending lawsuit, and ten from other advocacy groups.[4] Neither the Georgia Secretary of State nor any other Georgia state official submitted comments.

1. Arizona submission

The Office of the Solicitor General for the State of Arizona submitted Arizona's comments in support of its request to add Arizona's documentary proof of citizenship requirements to its state-specific instructions on the Federal Form. EAC001700-02. Arizona included in its submission: Proposition 200, the initiative passed by the Arizona electorate establishing the voter registration citizenship requirements at issue here, EAC001626-30; the 2004 official canvassing showing the percentage of the electorate that voted in favor of Proposition 200, EAC001632-49; and the district court's findings of fact and conclusions of law

[4] The above count excludes one comment which was a prank and three sets of supporting documents that were uploaded as separate comments. Thus, the website through which the public commenting process is managed shows a total of 427 comments received. *See* http://www.regulations.gov/#!documentDetail;D=EAC-2013-0004-0001.

in *Gonzales v. State of Arizona*, Civ. Action No. 06-128 (D. Ariz. Aug. 20, 2008) (ECF No. 1041) (district court case culminating in *Arizona v. ITCA*), denying a permanent injunction against the enforcement of Arizona's documentary proof of citizenship requirements, EAC001651-99. Arizona also submitted declarations of various Arizona state and county officials purporting to demonstrate the undue burden that would result from the maintenance of a dual voter registration system (i.e., maintaining separate voter registration lists for federal elections and state elections), which Arizona argues would be required by Arizona law if the EAC does not accede to Arizona's request, and instances in which the Arizona officials indicate they determined that non-citizens had registered to vote, or actually had voted. EAC001703-48. Finally, Arizona submitted documents showing that the Department of Defense Federal Voting Assistance Program granted Arizona's request to add Arizona's documentary proof of citizenship requirements to the Federal Post Card Application, a voter registration and absentee ballot application created under the Uniformed and Overseas Citizens Absentee Voting Act. EAC001749-1802.

2. Kansas submission

The Kansas Secretary of State reiterated Kansas's request that the EAC include the state's documentary proof of citizenship requirements on the Federal Form, based on the Secretary's view that under the Supreme Court's decision in *Inter Tribal Council*, the EAC has a non-discretionary duty under the U.S. Constitution to do so. EAC000563-65; EAC000578-610. Kansas provided affidavits and supporting documents from various state and local election officials that purport to demonstrate the number of non-citizens who illegally registered to, and did, vote in Kansas elections and to support Kansas's position that additional proof of citizenship is necessary to enforce its voter qualification requirements. EAC000611-68. Kansas further

argued that unless the EAC adds the requested language to the Federal Form, the state will be required to implement a costly dual registration system.

3. *Kobach v. EAC* intervenor submissions

The four groups of individuals and advocacy organizations that intervened as defendants in the pending litigation each submitted public comments in response to the EAC's Notice. EAC000710-20, EAC000723-51, EAC000754-887 (League of Women Voters group); EAC000910-1256, EAC001260-1542 (Valle del Sol group); EAC001809-26 (Project Vote); EAC001546-94 (ITCA group). The League of Women Voters and Valle del Sol groups argued that the EAC lacks authority to grant the states' requests because it lacks the requisite quorum of commissioners. The Valle del Sol and Project Vote groups argued that the requested changes were inconsistent with the NVRA's purpose and that the states had not demonstrated a need for additional proof of citizenship to prevent fraudulent registrations. Project Vote contended that the documentary requirements would burden voter registration applicants, reduce the number of eligible voters, and violate the NVRA's prohibition on formal authentication of eligibility requirements. The Inter Tribal Council of Arizona group conceded that the EAC has authority to grant or deny the states' requests, but agreed with the other intervenor-defendant groups that the states have not demonstrated the necessity for their instructions because they have other means of verifying voter eligibility.

4. Other advocacy group submissions

Of the ten comments from advocacy groups that have not intervened in the pending litigation, four supported and six opposed the states' requests. True the Vote cited to voter registration processes in Canada and Mexico to support its claim that the instructions at issue are necessary for the states to assess voter eligibility and suggested that the requested state-specific instructions would lead to greater perceived legitimacy in the electoral process. EAC000707-09.

Similarly, Judicial Watch argued that if the EAC failed to update the form, it would undermine Americans' confidence in the fairness of U.S. elections and thwart states' ability to comply with the provisions of Section 8 of the NVRA regarding maintenance of voter rolls. EAC000474-80. Judicial Watch and the Federation for American Immigration Reform both suggested that the denial of the states' requests would hinder individual states' ability to maintain the integrity of elections. EAC001605-09. The Immigration Reform Law Institute argued that the EAC should grant the states' requests because, in its view, the Supreme Court ruling in *Inter Tribal Council* requires it to do so. EAC001543-45.

The ACLU was one of seven non-intervenor advocacy groups that opposed the states' requests. It argued that the documentation requirement would be overly burdensome, would violate the NVRA, and would discourage voter registration. EAC000888-96. The Asian American Legal Defense and Education Fund argued that Arizona, Georgia, and Kansas have histories of discrimination against Asian Americans, and argued that the true intent of the states' laws was to disenfranchise eligible citizens. EAC001598-1603. The Coalition of Georgia Organizations contended that the additional requirements would make the registration process harder instead of simplifying it, as they contend the NVRA intended. EAC001838-40.

Communities Creating Opportunity argued that the proposed requirement would adversely impact vulnerable and marginalized communities (low-income and people of color) the most. Further, the group asserted that the requested change would be costly and unnecessary, and would complicate, delay, and deter participation in the electoral process. EAC000699-700. Demos pointed to the decrease in voter registration since the enactment of Arizona's Proposition 200 and contended that the requested instructions would impair community voter registration drives by requiring documents that many citizens do not generally carry with them and may not

possess at all. EAC000900-07. The League of United Latin American Citizens ("LULAC") shares that view and cited data purporting to show the small number of voter fraud cases between 2000 and 2011 in Arizona compared to the millions of ballots cast in that timeframe. EAC000701-03.

5. State and local official submissions

Officials from Arizona's Apache (EAC000560-61), Cochise (EAC000218), Mohave (EAC000226-34) and Navajo (EAC000219) counties and Kansas's Ford (EAC000220), Harvey (EAC000421-23), Johnson (EAC001831-33) and Wyandotte (EAC001258-59) counties urged the EAC to grant the States' requests. Angie Rogers, the Commissioner of Elections for the Louisiana Secretary of State, supported the States' requests because she believes states have "the constitutional right, power and privilege to establish voting qualifications, including voter registration requirements[.]" EAC000216.

Rep. Martin Quezada of the Arizona House of Representatives and defendant-intervenor Sen. Steve Gallardo of the Arizona State Senate opposed Arizona's request because they contend that the warnings and advisories contained on the Federal Form already deter non-citizens from voting, that there is no evidence of voter registration fraud, and that the requirement for additional proof of citizenship would burden citizens who do not possess the documents and would contravene the NVRA's goal of creating a uniform, national voter registration process. EAC000704-05; EAC001618-21. Mark Ritchie, the Minnesota Secretary of State, asserted that some senior citizens in Minnesota do not have and cannot obtain proof of citizenship, that the expense of obtaining relevant documents might be tantamount to a poll tax, and that implementing the States' proposals in his state would make it more difficult for citizens to register and could be an equal protection violation. EAC001804. U.S. Representative Robert Brady of Pennsylvania argued that the States' requests are an attempt to disenfranchise eligible

voters and that the Federal Form already adequately requires applicants to affirm their citizenship. EAC001595.

6. Individual citizen submissions

Of the 385 citizen comments, the vast majority of which were made by Kansas residents, 372 were in favor of the States' requests. Several respondents expressed "high support" for the requests as crucial to preventing voter fraud, and argued that failure to grant the requests would create "havoc" in future elections, presumably because the States may be required to create separate registration databases for federal and state registrants. Others argued that the right to vote should not be hindered by what they consider incorrect and outdated state-specific instructions. Other citizens expressed the desire for elections to be orderly and their view that the EAC's denial of the States' requests would violate what they believe is the States' exclusive power to set voter qualifications. Hans A. von Spakovsky, an attorney, former member of the Federal Election Commission, and former local election official in Fairfax County, Virginia, argued that the EAC has no authority to refuse to approve state-specific instructions that deal with the eligibility and qualification of voters and that extant citizenship provisions on the Federal Form have been ineffective in discouraging non-citizens from illegally registering and voting. EAC000680-85.

Thirteen citizen commenters opposed the States' requests because they believed that the proposals were unconstitutional, would limit and suppress the vote of certain classes of disadvantaged Americans, would make the voting process more restrictive, would discourage legitimate voters from voting, and were otherwise unnecessary.

II. CONSTITUTIONAL, STATUTORY, AND REGULATORY BACKGROUND

A. Constitution

The Qualifications Clause of the United States Constitution, Art. I, § 2, cl. 1, provides that in each state, electors for the U.S. House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." *See also* U. S. Const. amend. XVII (same for the U.S. Senate). This clause and the Seventeenth Amendment long have been held to give exclusive authority to the states to determine the qualifications of voters for federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258.

By contrast, the Elections Clause of the Constitution provides that "[t]he 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 chusing Senators." U.S. Const. art. I, § 4, Cl. 1. In *Inter Tribal Council*, the Supreme Court held that the Election Clause's "substantive scope is broad." *Inter Tribal Council*, 133 S. Ct. at 2253. "'Times, Places, and Manner,' [the Supreme Court has] written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, *as relevant here . . . regulations relating to 'registration.'*" *Id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added)). Thus, in its latest decision on the Elections Clause, the Supreme Court reaffirmed its long held determination that the Elections Clause gives Congress plenary authority over voter registration regulations pertaining to federal elections. Although the states remain free to regulate voter registration procedures for state and local elections,[5] they must yield to federal regulation of voter

[5] Such regulations, however, may not violate other provisions of the Constitution, such as by discriminating against United States citizens on the basis of their race, color, previous condition of servitude, sex, or age over 18 years. U.S. Const. amends. XIV, XV, XIX, XXVI.

registration procedures for federal elections. *Id.*; *see also Cook v. Gralike,* 531 U. S. 510, 523 (2001); *Roudebush v. Hartke,* 405 U.S. 15, 24 (1972).

B. National Voter Registration Act and Help America Vote Act

Exercising its authority under the Elections Clause, Congress enacted the NVRA in 1993 in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 42 U.S.C. § 1973gg(a)(3). As originally enacted, the NVRA assigned authority to the Federal Election Commission "in consultation with the chief election officers of the States" to "develop a mail voter registration application form for elections for Federal office" and to "prescribe such regulations as are necessary to carry out" this responsibility, and further provides that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [FEC]." 42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2). The FEC undertook this responsibility, in consultation with the States, and issued the original regulations on the Federal Form in 1994. NVRA Final Rule Notice, 59 Fed. Reg. 32,311 (June 23, 1994). In the Help America Vote Act of 2002 ("HAVA"), all of the NVRA functions originally assigned to the FEC were transferred to the EAC. 42 U.S.C. § 15532. Congress mandated in part the contents of the Federal Form and explicitly limited the information the EAC may require applicants to furnish on the Federal Form. In particular, the form "may require *only* such identifying information . . . *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Further, it "may not include any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). The Federal Form must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)"; "contains an attestation that the applicant meets each such requirement"; and "requires the signature of the

applicant, under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2). Additionally, pursuant to HAVA, the Federal Form must include two specific questions and check boxes for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 42 U.S.C. § 15483(b)(4)(A).

C. The Federal Form

Pursuant to its rulemaking authority, the EAC has promulgated the requirements for a Federal Form that meets NVRA and HAVA requirements. *See* 11 C.F.R. part 9428 (implementing regulations); 42 U.S.C. §§ 1973gg-7(a), 15329. The form consists of three basic components: the application, general instructions, and state-specific instructions. 11 C.F.R. §§ 9428.2 (a), 9428.3 (a); *see also* EAC000073-97. The application portion of the Federal Form "[s]pecif[ies] each eligibility requirement," including "U.S. Citizenship," which is "a universal eligibility requirement." 11 C.F.R. § 9428.4(b)(1). To complete the form, an applicant must sign, under penalty of perjury, an "attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements." 11 C.F.R. §§ 9428.4(b)(2), (3). The state-specific instructions for Arizona, Georgia and Kansas include the requirement that applicants be United States citizens. *See* EAC000081, EAC000083, EAC000085.

Neither the NVRA nor the EAC regulations specifically provide a procedure for states to request changes to the Federal Form. The NVRA simply directs the EAC to develop the Federal Form "in consultation with the chief election officers of the States." 42 U.S.C. §§ 1973gg-7(a)(2). To that end, the regulations provide that states "shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements[.]" 11 C.F.R. § 9428.6(c). The regulations leave it solely to the EAC's discretion whether and how to incorporate those changes. Indeed, the Supreme Court has described the EAC's authority and

duty to determine the contents of the Federal Form, including any state-specific instructions included therein, as "validly conferred *discretionary* executive authority." *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis added). Thus, the EAC is free to grant, deny, or defer action on state requests, in whole or in part, so long as its action is consistent with the NVRA and other applicable federal law. The EAC (and before it the FEC) received and acted upon numerous requests over the years from States to modify the Federal Form's State-specific instructions in various respects.

III. THE COMMISSION'S ABILITY TO ACT ON THE REQUESTS IN THE ABSENCE OF A QUORUM OF COMMISSIONERS

Sections 203 and 204 of HAVA provide that the Commission shall have four members, appointed by the President with the advice and consent of the Senate, as well as an Executive Director, General Counsel, and such additional personnel as the Executive Director considers appropriate. 42 U.S.C. §§ 15323, 15324. Section 208 of HAVA provides that "[a]ny action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members." *Id.* § 15328. Finally, Section 802(a) of HAVA directs that the functions previously exercised by the Federal Election Commission under Section 9(a) of the NVRA, *id.* § 1973gg-7(a), would be transferred to the EAC. *Id.* § 15532.

All four of the appointed commissioner seats are currently vacant. Accordingly, several commenters have suggested that the EAC presently lacks the authority, in whole or in part, to act on the States' requests for modifications to the state-specific instructions on the Federal Form.[6] Notably, the States do not assert that the Commission currently lacks authority to act on their

[6] The Valle del Sol group of commenters, for example, asserts the Commission's staff cannot take any action on the requests in the absence of a quorum. *See* EAC001448-55. The League of Women Voters and Project Vote commenters, by contrast, argue that the Commission's staff may act to deny the requests and thus maintain the Federal Form as it stands, but not to grant them and thus change the Form. *See* EAC000764-66; EAC001810-13.

requests; indeed, the States believe that the EAC has a nondiscretionary duty to grant their requests. EAC000564-65, EAC000593-97. As explained below, under current EAC policy, as previously established in 2008 by a quorum of EAC commissioners, EAC staff has the authority to act on all state requests for modifications to the instructions on the Federal Form.

A. The 2008 Roles and Responsibilities Policy Delegates Federal Form Maintenance Responsibilities to the Executive Director.

In 2008, the three EAC commissioners who were then in office unanimously adopted a policy entitled, "The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission." *See* EAC000064-72 ("R&R Policy"). This policy "supersede[d] and replace[d] any existing EAC policy that [was] inconsistent with its provisions." EAC000072. "The purpose of the policy," according to the commissioners, was "to identify the specific roles and responsibilities of the [EAC's] Executive Director and its four Commissioners in order *to improve the operations of the agency*." EAC000065 (emphasis added).

The commissioners were well aware of and cited to the general quorum requirements contained in Section 208 of HAVA, as well as the notice and public meeting requirements contained in the Government in the Sunshine Act, 5 U.S.C. § 552b(a)(2), which apply whenever a quorum of commissioners meets to discuss official agency business. EAC000065. Further, the commissioners were cognizant of the practical reality that, "[u]ltimately, if all functions of the Commission (large and small) were performed by the commissioners, the onerous public meeting process would make the agency unable to function in a timely and effective matter [sic]. Recognizing these facts, HAVA provides the EAC with an Executive Director and staff. (42 U.S.C. § 15324)." EAC000065. Finally, the commissioners recognized that "HAVA says little about the roles of the Executive Director and the Commissioners," but that "a review of the

statute, the structure of the EAC and EAC's mission suggest a general division of responsibility" among them, whereby the commissioners would set policy for the agency, and the Executive Director would implement that policy and otherwise take operational responsibility for the agency. EAC000065.

More specifically, under the R&R Policy, the commissioners are responsible for developing agency policy, which is defined as "high-level determination, setting an overall agency goal/objective or otherwise setting rules, guidance or guidelines at the highest level." EAC000064. The Commission "only makes policy through the formal voting process" of the commissioners. *Id.* Among the policy matters specifically reserved to the commissioners, for example, are "[a]doption of NVRA regulations" and "[i]ssuance of Policy Directives." EAC000065.

The EAC commissioners delegated the following responsibilities (among others) to the Executive Director under the R&R policy: "[m]anage the daily operations of EAC consistent with Federal statutes, regulations, and EAC policies"; "[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners"; "[a]nswer questions from stakeholders regarding the application of NVRA or HAVA consistent with EAC's published Guidance, regulations, advisories and policy"; and "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." EAC000070-71.

The Executive Director was further directed to "issue internal procedures which provide for the further delegation of responsibilities among program staff and set procedures (from

planning to approval) for all program responsibilities."[7] EAC000072. Finally, while the R&R policy directs the Executive Director to keep the commissioners informed of "all significant issues presented and actions taken pursuant to the authorities delegated [by the R&R policy]," it also specifically provides that "*the commissioners will not directly act on these matters.*" *Id.* (emphasis added). Rather, the commissioners will use the information provided by the Executive Director to "provide accurate information to the media and stakeholders" and to determine "when the issuance of a Policy Directive is needed to clarify or set policy." *Id.*

B. The Commissioners' Delegation of Federal Form Maintenance Responsibilities to EAC Staff is Presumptively Valid Under Federal Law and Does Not Contravene HAVA.

The three EAC commissioners' unanimous adoption of the 2008 Roles and Responsibilities policy, wherein agency policy implementation and operational responsibilities (including Federal Form maintenance responsibilities) were delegated to the Executive Director, was "carried out . . . with the approval of at least 3 of [the EAC's] members," as required by Section 208 of HAVA. As a general matter, "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004). "Express statutory authority is not required for delegation of authority by an agency; delegation generally is permitted where it is not inconsistent with the statute." *National Ass'n of Psychiatric Treatment Centers for Children v.*

[7] The Valle del Sol commenters mistakenly cite to the 2011 Wilkey Memorandum as the source of the Executive Director's authority to act on requests for modifications to the Federal Form's instructions. EAC001448-55. In fact, the Executive Director derives authority to act on Federal Form maintenance matters from the 2008 R&R policy. The 2011 Wilkey Memorandum was merely an internal operating procedure that described how the then-executive director sought to exercise and delegate (or temporarily refrain from acting upon) the responsibilities that the Commission had delegated to him. That memorandum did not and could not have limited the scope of the commissioners' original delegation to the Executive Director, which included plenary authority to implement the EAC's NVRA regulations and NVRA and HAVA requirements, and to maintain the Federal Form consistent therewith.

Mendez, 857 F. Supp. 85, 91 (D.D.C. 1994); *accord Ashwood Manor Civic Ass'n v. Dole*, 619 F. Supp. 52, 65-66 (E.D. Pa. 1985).

In the absence of an express statutory authorization for an agency to delegate authority to a subordinate official, one must look to "the purpose of the statute" to determine the parameters of the delegation authority. *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996). Obviously, "[i]f Congress clearly expresses an intent that no delegation is to be permitted, then that intent must be carried out." *Ashwood Manor Civic Ass'n*, 619 F. Supp. at 66. On the other hand, in the absence of a specific statutory prohibition or limitation of an agency's delegation authority, the default rule is that an agency can do so. *See, e.g., Loma Linda University v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (upholding delegation of HHS Secretary's statutory review authority to subordinate official where "Congress did not specifically prohibit delegation").

As the EAC commissioners themselves recognized in the R&R policy, "HAVA says little about the roles of the Executive Director and the Commissioners," but the statute and the EAC's structure suggest that there should be a "general division of responsibility" as between the commissioners and the Executive Director. EAC000064. Additionally, HAVA contains no provisions which speak directly to the issue of delegation. As Congress noted, HAVA was enacted, in part, "to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs." H.R. Rep. No. 107-730, at 2 (Oct. 8, 2002) (Conf. Rep.). There is nothing about that statutory purpose that suggests that it would be inappropriate for the EAC to delegate agency functions to the agency's staff. Indeed, as the EAC commissioners acknowledged, such division of responsibilities would "improve the operations of the agency"

and avoid creating situations where the agency was "unable to function in a timely and effective [manner]."

Thus, the delegations of authority to the Executive Director in the R&R policy do not appear to conflict with HAVA. In particular, the existence of a quorum provision in Section 208 of HAVA does not prohibit the Commission from delegating administrative and implementing authority to its subordinate staff, so long as such delegation of authority is "carried out . . . with the approval of at least 3 of its members," as it was in this instance. *Cf.* 42 U.S.C. § 15328.[8] The R&R policy does not cede policymaking authority to EAC staff; rather, it directs the staff to "implement and interpret" the agency's policies consistent with federal law and EAC regulations.

Included within the general duty to implement and interpret the agency's policies is the specific duty to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." EAC000072. "Maintain" means "to keep (something) in good condition by making repairs, correcting problems, etc." *See* Merriam-Webster Online, http://www.merriam-webster.com/dictionary/maintain (last visited Jan. 12, 2014). In the context of the Federal Form, "maintain" includes making such changes to the general and state-specific instructions as is necessary to ensure that they accurately reflect the requirements for registering to vote in federal elections.

[8] In similar circumstances, courts have upheld agency delegations of authority to subordinate staff, even when, at the time the staff takes the action in question, the agency lacks its statutorily required quorum. *See, e.g.*, *Overstreet v. NLRB*, 943 F. Supp. 2d 1296, 1297-1303 (D.N.M. 2013) (upholding NLRB general counsel's limited exercise of agency's enforcement authority, pursuant to a previous delegation by a qualifying quorum, and stating that such prior delegation "survives the loss of a quorum"); *California Livestock Prod. Credit Ass'n v. Farm Credit Admin.*, 748 F. Supp. 416, 421-22 (E.D. Va. 1990) (agency's sole board member was authorized to act, even in absence of statutorily required quorum based on previous delegation of authority by a qualifying quorum).

The EAC's regulations do not prescribe and have never prescribed the text of the Federal Form's general and state-specific instructions. Rather, they mandate that in addition to the actual application used for voter registration, the Federal Form shall contain such instructions, and they partially define what should be included within those instructions. *See* 11 C.F.R. § 9428.3. EAC staff (and before it, FEC staff) has always had the responsibility and discretion to develop and, where necessary, revise and modify the text of the Federal Form's instructions in a manner that comports with the requirements of federal law and the EAC's regulations and policies. That remains the case whether or not a quorum of commissioners exists at any given time.

Having determined, based on the foregoing, that the Commission has the authority to act on these requests even in the absence of a quorum of commissioners, we proceed to address the merits of the States' requests.

IV. ANALYSIS

A. Congress Specifically Considered and Rejected Proof-of-Citizenship Requirements When Enacting the NVRA.

In determining whether and how to implement state-requested revisions to the Federal Form, the EAC has been guided in part by the NVRA's legislative history. When considering the NVRA, Congress deliberated about—but ultimately rejected—language allowing states to require "presentation of documentary evidence of the citizenship of an applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA that included this language, the conference committee determined that such a requirement was "*not necessary* or consistent with the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs . . . ." *Id.* (emphasis added). Congress's rejection of the very requirement

that Arizona, Georgia, and Kansas seek here is a significant factor the EAC must take into account in deciding whether to grant the States' requests. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the [States] urge[] here weighs heavily against the [States'] interpretation.").[9]

B. The Requested Proof-of-Citizenship Instructions Are Inconsistent With the EAC's NVRA Regulations.

In promulgating regulations under the NVRA, the FEC "considered what items are deemed necessary to determine eligibility to register to vote and what items are deemed necessary to administer voter registration and other parts of the election process in each state." 59 Fed. Reg. 32311 (June 23, 1994) (NVRA Final Rules). The FEC observed that it was "charged with developing a single national form, to be accepted by all covered jurisdictions, that complies with the NVRA, and that . . . specifies each eligibility requirement (including citizenship)." Further, while determining that the "application identify U.S. Citizenship (the only eligibility requirement that is universal)," the FEC rejected public comments proposing that naturalization information be collected by the Federal Form because the basis of citizenship was deemed irrelevant. As the FEC explained:

> The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words "For U.S. Citizens Only" will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include th[e] additional requirement [that the Federal Form collect naturalization information].

59 Fed. Reg. at 32316. Furthermore, in response to other public comments suggesting that states could simplify their eligibility requirements so that they can be listed on the Federal Form along

[9] In addition to Congress's specific rejection of the type of instructions the States now seek, the text of the statute as enacted prohibits the Federal Form from requiring "formal authentication." 42 U.S.C. § 1973gg-7(b)(3). As Project Vote notes in its comment, requiring additional proof of citizenship would be tantamount to requiring "formal authentication" of an individual's voter registration application. EAC001820-21.

with citizenship, the FEC expressed a concern not to "unduly complicate the application" in light of the "variations in state eligibility requirements[.]" *Id.* at 32314.

As a result of HAVA, the FEC and the EAC engaged in joint rulemaking transferring the NVRA regulations from the FEC to the EAC, but made "no substantive changes to those regulations." 74 Fed. Reg. 37519 (July 29, 2009). Accordingly, the FEC and the EAC, in their implementing regulations, specifically considered and determined, in their discretion, that the oath signed under penalty of perjury, the words "For U. S. Citizens Only" and later the relevant HAVA citizenship provisions, *see* 42 U.S.C. § 15483(b)(4)(A) (adding to the Federal Form two specific questions and check boxes indicating the applicant's U.S. citizenship), were all that was necessary to enable state officials to establish the *bona fides* of a voter registration applicant's citizenship. Thus, granting the States' requests here would contravene the EAC's deliberate rulemaking decision that additional proof was not necessary to establish voter eligibility.

C. The Requested Proof-of-Citizenship Instructions Are Inconsistent With the EAC's Prior Determinations.

In addition, the EAC, both by the staff and a duly-constituted quorum of commissioners, has already denied the very same substantive request that is at issue here. As set forth above, by letter dated March 6, 2006, the Commission rejected Arizona's December 2005 request to add its citizenship documentation requirement to the state-specific instructions for the Federal Form. EAC000002-04. We explained that the "NVRA requires States to both 'accept' and 'use' the Federal Form," and that "[a]ny Federal Registration Form that has been properly and completely filled out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." EAC000004. We concluded that a "state may not mandate additional registration procedures that condition the acceptance of the Federal Form." *Id.*

Arizona's then-Secretary of State, Jan Brewer, wrote several letters of protest to the EAC's then-Chairman, Paul DeGregorio, who recommended to his fellow commissioners that they grant Arizona an "accommodation" and include Arizona's proof of citizenship requirements in the state-specific instructions on the Federal Form. *See* EAC000007-08, EAC000011, EAC000013-14. The four sitting Commissioners rejected Chairman DeGregorio's proposal by a 2-2 vote. EAC000010. By virtue of this decision not to amend the decision, the EAC established a governing policy for the agency, consistent with the NVRA, HAVA, and EAC regulations, that the EAC will not grant state requests to add proof of citizenship requirements to the Federal Form.

The States' current requests for inclusion of additional proof-of-citizenship instructions on the Federal Form are substantially similar to Arizona's 2005 request. (Indeed, Arizona's request is essentially the same request, involving the exact same state law.) As discussed herein, the States have not submitted sufficiently compelling evidence that would support the issuance of a decision contrary to the one that the Commission previously rendered with respect to Arizona in 2006.

D. The Supreme Court's Inter-Tribal Council *Opinion Guides the EAC's Assessment of the States' Requests.*

As noted above, several organizations challenged Arizona's implementation of its proof-of-citizenship requirement, culminating in the Supreme Court's 2013 ruling in *Inter Tribal Council*, 133 S. Ct. 2247. It is clear from *Inter Tribal Council* that the EAC's task in responding to the States' requests is to determine whether granting their requests is necessary to enable state officials to assess the eligibility of Federal Form applicants.

1. The scope of the Elections Clause is broad.

The Supreme Court began its analysis in *Inter Tribal Council* by observing that the Elections Clause "imposes the duty . . . [on States] to prescribe the time, place, and manner of electing Representatives and Senators" but "confers [on Congress] the power to alter those regulations or supplant them altogether." *Id.* at 2253. "The Clause's substantive scope is broad," the Court continued. "'Times, Places, and Manner' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . , regulations relating to 'registration.'" *Id.* at 2253 (citing, *inter alia*, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

2. The NVRA requirement that states accept and use the Federal Form preempts the States' proof-of-citizenship requirements.

Having established that the Elections Clause empowers Congress to regulate voter registration procedures for federal elections, the Court examined the text of the NVRA's provisions governing the Federal Form. It noted that in addition to creating the Federal Form and requiring states to "accept and use" it, the statute also authorizes states "to create their own, state-specific voter-registration forms, which can be used to register voters in both state and federal elections." *Id.* at 2255 (citing 42 U.S.C. § 1973gg-4(a)(2)). Any state form must "meet all of the criteria" of the Federal Form "for the registration of voters in elections for Federal office." 42 U.S.C. §§ 1973gg-4(a)(2). The authority given to states to develop their own form for use in state and federal elections "works in tandem with the requirement that States 'accept and use' the Federal Form. States retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: No matter what procedural hurdles a state's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *Id.* at 2255.

Thus, the Court "conclude[d] that the fairest reading of the [NVRA] 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." *Id.* at 2257. The Court also noted that "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Id.* at 2257 (citing Brief of the United States as *Amicus Curiae* at 24).

3. The NVRA provisions governing the contents of the Federal Form are consistent with the Constitution's allocation of power over federal elections.

In reaching its ruling, the Court was cognizant of the Constitution's clauses in Article I and the Seventeenth Amendment empowering states to set voter qualifications for federal elections. "Prescribing voting qualifications," it stated, "'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Id.* at 2258 (quoting The Federalist No. 60, at 371 (A. Hamilton)). The Court characterized the voter qualification clauses and the Elections Clause as an "allocation of authority" that "sprang from the Framers' aversion to concentrated power." *Id.* at 2258.

In other words, the Court recognized some potential tension between the Elections Clause and the voter qualification clauses. In particular, it noted that "[s]ince 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.

The Court concluded, however, that the NVRA, as interpreted by the United States, did not run afoul of this limitation on Congress's power because it compels the Federal Form to require from applicants "such . . . information . . . as is necessary to enable the appropriate State

election official to assess the eligibility of the applicant . . . ." 42 U.S.C. § 1973gg-7(b)(1); *see Inter Tribal Council*, 133 S. Ct. at 2259. As a result of this requirement, the Court concluded, "a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility" and may challenge a rejection of such a request under the Administrative Procedure Act. *Id.* at 2259. Therefore, "no constitutional doubt is raised" by the statute. *Id.* at 2259.

4. The EAC is bound by both the NVRA and the Court's opinion in *Inter Tribal Council* to determine whether the States' requests are necessary to enable them to assess the eligibility of Federal Form applicants.

As described above, while Congress provided that the EAC must consult with the nation's chief state election officials in the development of the Federal Form, it is the EAC that ultimately has the responsibility and discretionary authority to determine the Federal Form's contents, to prescribe necessary regulations relating to the Federal Form, and to "provide information to the States with respect to the responsibilities of the States under [the NVRA]." *Id.* § 1973gg-7.

This discretionary authority, however, is limited by the terms of the statute, which provide, among other things, that the Federal Form may only require from applicants "such . . . information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant . . . ." *Id.* § 1973gg-7(b)(1).

Kansas and Arizona argue that the Constitution's voter qualification clauses as interpreted by the Court in *Inter Tribal Council* bestow on the EAC a nondiscretionary duty to grant the States' requests and relieve the agency of its obligation to develop the form consistent with the NVRA's limitations. EAC000564, EAC000593-97. However, neither the language of the Constitution nor of *Inter Tribal Council* supports such an argument.

First, the States claim that the Constitution "expressly" grants to states "the power to establish *and enforce* voter qualifications for federal elections" and does so "to the exclusion of Congress." EAC000590 (emphasis added). To the contrary, nothing in the Constitution prohibits the federal government from also enforcing state-established voter qualifications relating to federal elections, so long as the states are not precluded from doing so. Second, the Court describes the NVRA's delegation of authority to the EAC to develop the Federal Form subject to the prescribed limitations as "validly conferred discretionary executive authority." *Id.* at 2259. The Court uses this phrase in approving the United States' interpretation of the NVRA as requiring the Federal Form to contain the information necessary to enable states to enforce their voter qualifications, as well as limiting the Form to that information. *See id.* at 2259. In the EAC's judgment, the States attempt to impose an unnatural reading on the Court's language. Furthermore, the language of the NVRA confers on the agency the authority and the duty to exercise its discretion in carrying out the statute's provisions. The agency will not adopt such a strained reading of this brief passage to circumvent statutory language by which it would otherwise be bound.

We conclude that the States' contention that the EAC is under a nondiscretionary duty to grant their requests is incorrect. Rather, as the Court explained in *Inter Tribal Council*, the EAC is obligated to grant such requests only if it determines, based on the evidence in the record, that it is necessary to do so in order to enable state election officials to enforce their states' voter qualifications. If the States can enforce their citizenship requirements without additional proof-of-citizenship instructions, denial of their requests for such instructions does not raise any constitutional doubts.

E. The Requested Proof-of-Citizenship Instructions Would Require Applicants to Submit More Information Than is Necessary to Enable Election Officials to Assess Eligibility.

The States' primary argument in support of their requests is that the EAC is under a constitutional, nondiscretionary duty to grant those requests, *see* EAC000563-65, which as discussed above, is incorrect. However, both Arizona and Kansas also indicate that they believe their requested changes are necessary to enforce their citizenship requirements and not merely a reflection of their legislative policy preferences. *See* EAC000044-46, EAC000564. Therefore, to ensure that the Federal Form continues to comply with the constitutional standard set out in *Inter Tribal Council* and the statutory standard set out in the NVRA, the Commission must consider whether the States have demonstrated that requiring additional proof of citizenship is necessary for the States to enforce their citizenship requirements. For the reasons discussed below, we conclude that the States have not so demonstrated.

1. The Federal Form currently provides the necessary means for assessing applicants' eligibility.

The Federal Form already provides safeguards to prevent noncitizens from registering to vote. The Form requires applicants to mark a checkbox at the top of the Form answering the question, "Are you a citizen of the United States of America," and directs applicants (in bold red text) that they must not complete the Form if they check "No" in response to the question. Should applicants proceed to complete the application, they are also required to sign at the bottom of the Form an attestation that "I am a United States citizen" and "The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." EAC000078. In addition, the cover page for the Form states in large, boldface type, "For U.S. Citizens." EAC000073.

In Arizona's correspondence with the EAC and in the States' brief filed in *Kobach v. EAC*, the States argue that a sworn statement such as that required by the Federal Form is "virtually meaningless" and "not proof at all." EAC000045; EAC000605. In support of this argument, the States rely on a remark made by a Supreme Court justice during oral argument in *Inter Tribal Council*. However, remarks by justices at oral argument have no force of law and cannot serve as the basis for this agency's decision-making.

In fact, a written statement made under penalty of perjury is considered reliable evidence for many purposes. *See, e.g.*, Fed. R. Civ. P. 56(c)(1)(A) (permitting parties in civil cases to cite written affidavits or declarations in support of an assertion that a fact is not in genuine dispute); *United States v. Reed*, 719 F.3d 369, 374 (5th Cir. 2013) (criminal defendant's affidavit "constitutes competent evidence sufficient, if believed, to establish" facts in support of his ineffective assistance of counsel claim); *United States v. Haymond*, 672 F.3d 948, 959 (10th Cir. 2012) (FBI agent's affidavit provided sufficient evidence of probable cause to search criminal defendant's home); *Siddiqui v. Holder*, 670 F.3d 736, 742-743 (7th Cir. 2012) (amnesty applicant may satisfy his burden of proof by submitting credible affidavits sufficient to establish the facts at issue); 26 U.S.C. § 6065 (requiring any tax return, declaration, statement, or other document required under federal internal revenue laws or regulations to be made under penalty of perjury).

The overwhelming majority of jurisdictions in the United States have long relied on sworn statements similar to that included on the Federal Form to enforce their voter qualifications, and the EAC is aware of no evidence suggesting that this reliance has been misplaced. As discussed below, the evidence submitted by Arizona and Kansas in connection with their requests does not change this conclusion. Rather, the EAC finds that the possibility of

potential fines, imprisonment, or deportation (as set out explicitly on the Federal Form) appears to remain a powerful and effective deterrent against voter registration fraud. As several commenters note, Arizona, Kansas, and Georgia all relied on such sworn statements for many years prior to their recent enactment of additional requirements. EAC000769; EAC001816-17.

Additionally, two commenters note that Arizona election officials have previously recognized that the benefit to a non-citizen of fraudulently registering to vote is distinctly less tangible than the loss of access to his or her home, job, and family that would come with deportation. *See* EAC001820; EAC001558 (citing Letter from Office of the Secretary of State of Arizona, July 18, 2001, Joint Appendix at 165-66, *Inter Tribal Council*, 133 S. Ct. 2247 (No. 12-71), 2012 WL 6198263 ("It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.")); *see also* EAC001558-59, EAC001571 (citing 30(b)(6) Dep. of Maricopa County Elections Dep't (through Karen Osborne) at 29:16-23, Jan. 14, 2008, *Gonzalez v. Arizona*, No. 06-CV-1268 (D. Ariz.) ("I cannot believe that [any noncitizen] would want to jeopardize their situation after having lived here for many years, make their reports every year to the INS, pay their taxes, and do everything, I cannot believe that they would want to jeopardize, especially at the cost of a felony, and then the thought of not being able to stay and not get citizenship . . . .")).

Finally, as also noted by one commenter, Arizona and Kansas still accept sworn statements as sufficient for certain election-related purposes—for example, for an in-county

change of address in Arizona,[10] an in-state change of address in Kansas,[11] or an application for permanent advance voting status in Kansas due to disability.[12] EAC000893.

The EAC finds that the evidence in the record is insufficient to support the States' contention that a sworn statement is "virtually meaningless" and not an effective means of preventing voter registration fraud.

2. Evidence submitted by Arizona and Kansas

In further support of their requests, Arizona and Kansas submit evidence in the form of declarations and affidavits by several state and county election officials, letters from the Kansas Secretary of State referring several matters to county attorneys, and documents reflecting heavily redacted voter registration and motor vehicle records. EAC001738-40, EAC000611-68. Georgia did not submit any evidence or arguments in support of its request other than a description of its voter registration procedures, either at the time of its request or in response to the EAC's Notice requesting public comment. EAC001856-57. With the exception of the referral letters and documents reflecting voter registration and motor vehicle records at EAC000629-68, all of the evidence submitted by Arizona and Kansas was included in public court filings prior to the start of the public comment period.[13] The evidence is summarized as follows:

Arizona

- According to an election official in Maricopa County, Arizona, between 2003 and 2006, at least 37 individuals contacted the recorder's office in Maricopa County and indicated that they were in the process of applying for U.S. citizenship, but were found to have previously registered to vote in Arizona. EAC001739 ¶ 8.

[10] *See* http://www.azsos.gov/election/VoterRegistration.htm.

[11] *See* http://www.kssos.org/forms/Elections/voterregistration.pdf.

[12] *See* Kan. Stat. § 25-1122d(c); http://www.kssos.org/forms/Elections/AV2.pdf.

[13] *See Kobach v. EAC*, No. 13-CV-4095 (D. Kan.), ECF Nos. 19, 20, 25, 101-1, 103.

- According to the Maricopa County election official, in 2005, the recorder's office in Maricopa County referred evidence to the county attorney indicating that some individuals who had registered to vote in the county may have been noncitizens. To the best of the official's recollection, there were 159 individuals implicated. A large number of these individuals had submitted statements to the jury commissioner that they were not citizens. The county attorney brought felony charges against ten noncitizens for filing false voter registration forms. EAC001740 ¶ 10.

Kansas

- According to an election official in the Kansas Secretary of State's office, the office is able to review state driver license data to determine whether individual registrants may have been unlawfully registered to vote. For example, in 2009 and 2010, the office obtained a list of individuals who had obtained temporary driver's licenses in Kansas, which are issued only to noncitizens, and compared that list to its list of registered voters. EAC000611 ¶ 2.

- According to the Kansas election official, upon comparing the temporary license and voter lists in 2009, the Kansas Secretary of State's office identified 13 individuals who had been issued temporary driver's licenses and were also registered to vote. EAC000611-12 ¶ 3. One of these individuals provided a naturalization number on his/her voter registration application. EAC000619 ¶¶ 3-4.

- According to referral letters sent in 2009 by the Kansas Secretary of State to four county attorneys, the information for these 13 individuals matched on name, date of birth, and last four digits of social security number. EAC000632; EAC000637; EAC000640; EAC000659. Documentation provided with the letters indicates that 9 of these individuals had submitted completed Kansas Voter Registration Application forms, EAC000634, -38, -42, -44, -46, -48, -61, -63, -66, and 2 had submitted voter registration applications through the Division of Motor Vehicles, EAC000650, -54. The documents do not indicate how the remaining 2 individuals registered.

- According to the Kansas election official, upon comparing the temporary license and voter lists in 2010, the Kansas Secretary of State's office identified 6 individuals who had been issued temporary driver's licenses and were registered to vote. EAC000620 ¶ 5. No additional information about these individuals has been submitted.

- According to the Kansas election official, in 2010, the election commissioner for Sedgwick County, Kansas, notified the Kansas Secretary of State's office that he had been contacted by the U.S. Department of Homeland Security and provided the name of a noncitizen who was found to have registered to vote in Kansas. EAC000612 ¶ 4.

- According to the election commissioner for Sedgwick County, Kansas, in 2013, her office received a voter registration application submitted through the Kansas Division of Motor Vehicles by an individual who subsequently informed the office that he/she is not a U.S. citizen. EAC000625-26.

- According to the county clerk for Finney County, Kansas, in 2013, an individual submitted to her office a completed and signed Kansas Voter Registration Application form along with copies of a foreign birth certificate and a U.S. Permanent Resident Card. EAC000627-31.

The States argue that this evidence demonstrates that requiring additional proof of citizenship is necessary to enable them to enforce their citizenship requirements. EAC000564. However, we conclude that this is incorrect because (a) the evidence fails to establish that the registration of noncitizens is a significant problem in either state, sufficient to show that the States are, by virtue of the Federal Form, currently precluded from assessing the eligibility of Federal Form applicants, and (b) the evidence reflects the States' ability to identify potential non-citizens and thereby enforce their voter qualifications relating to citizenship, even in the absence of the additional instructions they requested on the Federal Form.

The States argue that the evidence submitted demonstrates generally that noncitizens have registered to vote in Arizona and Kansas, EAC000605, and specifically that 20 noncitizens have registered to vote in Kansas, EAC000564-65. Several commenters question the reliability of the States' contentions.[14] For present purposes, however, we assume that Arizona has demonstrated that 196 noncitizens were registered to vote in that state and that Kansas has demonstrated that 21 noncitizens were registered to vote or attempted to register in that state.

[14] The commenters point to two specific shortcomings: (1) they note that statements made to a jury commissioner are not always reliable, since some citizens may falsely claim to be non-citizens in order to avoid jury service, EAC001560, EAC001589; EAC001475, EAC001145; and (2) they point out that it is possible that the driver license database information that Kansas relied upon may include citizens who became naturalized after obtaining their license, EAC001560-61; *see also* EAC001473-74.

This data nevertheless fails to demonstrate that the States' requests must be granted in order to enable them to assess the eligibility of Federal Form applicants.

At the time Kansas's new proof-of-citizenship requirement took effect in January 2013, there were 1,762,330 registered voters in the state.[15] Thus Kansas's evidence at most suggests that 21 of 1,762,330 registered voters, approximately 0.001 percent, were unlawfully registered noncitizens around the time its new proof-of-citizenship requirement took effect. EAC001561-62; *see also* EAC000770; EAC001472.

At the time Proposition 200 took effect in January 2005, there were 2,706,223 active registered voters in Arizona.[16] Thus Arizona's evidence at most suggests that 196 of 2,706,223 registered voters, approximately 0.007 percent, were unlawfully registered noncitizens around the time that Proposition 200 took effect. EAC001561.

There were 1,598,721 active registered voters in Maricopa County at this time,[17] so these 196 noncitizens comprised just 0.01 percent of registered voters in Maricopa County, also a very small percentage. *See* EAC000770; EAC001475. Additionally, as noted in one comment, during the *Inter Tribal Council* litigation, election officials from three other Arizona counties gave deposition testimony stating that they were not able to find any evidence of noncitizens registering to vote between 1996 and 2006. EAC001476, EAC001236-46.

By any measure, these percentages are exceedingly small. Certainly, the administration of elections, like all other complex functions performed by human beings, can never be

[15] *See* State of Kansas Office of the Secretary of State, 2013 January 1st (Unofficial) Voter Registration Numbers, *available at* http://www.kssos.org/elections/elections_registration_voterreg.asp (last visited Jan. 12, 2014).

[16] *See* State of Arizona Registration Report, January 2005, http://azsos.gov/election/voterreg/2005-01-01.pdf.

[17] *See* State of Arizona Registration Report, January 2005, http://azsos.gov/election/voterreg/2005-01-01.pdf.

completely free of human error. In the context of voter registration systems containing millions of voters, the EAC finds that the small number of registered noncitizens that Arizona and Kansas point to is not cause to conclude that additional proof of citizenship must be required of applicants for either state to assess their eligibility, or that the Federal Form precludes those states from enforcing their voter qualifications.

Our conclusion that some level of human error is inevitable is reinforced by the evidence Kansas submitted suggesting that three noncitizens have registered to vote by submitting applications through the state's Division of Motor Vehicles. As one comment notes, Kansas requires driver's license applicants to provide documentation of their citizenship status. EAC001559-60 (citing http://www.ksrevenue.org/dmvproof.html). Thus, these registrants were already required to show, apparently at the time they were applying to register to vote (in connection with their simultaneous driver license transaction), the type of citizenship evidence the States now seek to require and yet they were still offered the opportunity to register to vote and their registrations were still accepted, both presumably as a result of human error. These cases provide no support for the proposition that Kansas's requested instruction is necessary to enable it to enforce its citizenship requirement.

Finally, we note, as have several commenters, that the proof-of-citizenship laws enacted in Arizona, Kansas, and Georgia all exempt individuals who were registered at the time the laws took effect from complying with the new proof-of-citizenship requirements. These laws therefore treat previously registered voters differently from voters yet to register, but the States have not provided any evidence suggesting that voters attempting to register before the laws took effect were any more or less likely to be noncitizens than those attempting to register after the laws took effect. This suggests that the information required by the Federal Form has

historically been considered sufficient to assess voter eligibility, even in the recent past. EAC001817. In conjunction with the paucity of evidence provided by the States regarding noncitizens registering to vote, this aspect of the laws suggests that the new requirements reflect the States' legislative policy preferences and are not based on any demonstrated necessity. EAC001562; EAC000892.

3. Additional evidence noted by comments

Several comments note evidence of noncitizens registering to vote in other states. *See, e.g.*, EAC001607-08; EAC001544; EAC000683-84. Other comments note that efforts in other states have identified only small numbers of noncitizens on the voter rolls, *see* EAC1474-75, and that voter fraud generally is rare, *see* EAC001620. The evidence submitted does not suggest that there have been significant numbers of noncitizens found to have registered to vote in other states. Rather, the evidence appears similar in magnitude to that which Arizona and Kansas have submitted. In any event, we find that the limited anecdotal evidence from other states does not establish that Arizona, Kansas, and Georgia will be precluded from assessing the eligibility of Federal Form applicants if the Commission denies their requested instructions.

4. Additional means of enforcing citizenship requirements

Occasional occurrences of unlawful registrations are no more reflective of the inefficacy of the existing oaths and attestations for voter registration than are the occasional violations of any other laws that rely primarily on oaths and attestations, such as those prohibiting the filing of false or fraudulent tax returns. As long as a state is able to identify illegal registrations and address any violations (whether through removal from the voter rolls, criminal prosecution, and/or other means), and the occurrence of such violations is rare, then the state is able to enforce its voter qualifications. And as the Supreme Court noted in *Inter Tribal Council*, nothing

precludes a State from "deny[ing] registration based on information in their possession establishing the applicant's ineligibility." *Inter Tribal Council*, 133 S. Ct. at 2257.[18]

As discussed below, the States have a myriad of means available to enforce their citizenship requirements without requiring additional information from Federal Form applicants.

a) Criminal prosecution

Section 8 of the NVRA mandates that states inform voter registration applicants of the "penalties provided by law for submission of a false voter registration application." 42 U.S.C. § 1973gg-6(a)(5)(B). Section 9 of the NVRA and EAC regulations likewise require that information regarding criminal penalties be provided on the Federal Form "in print that is identical to that used in the attestation portion of the application." *Id.* § 1973gg-7(b)(4)(i); 11 C.F.R. § 9428.4(b)(4). Federal law and the laws of Arizona, Georgia, and Kansas all impose serious (usually felony-level) criminal penalties for false or fraudulent registration and voting.[19] Additionally, unlawful registration or voting by a non-citizen can result in deportation or inadmissibility for that non-citizen. *See* 8 U.S.C. §§ 1227(a)(3)(D), (a)(6), 1182(a)(6)(C)(2), (a)(10)(D).

[18] The converse is also true: absent any evidence in the state's possession that contradicts the specific information on the voter registration application, to which the applicant has attested under penalty of perjury, the registration official should accept the sworn application as sufficient proof of the applicant's eligibility and register that applicant to vote in Federal elections in accordance with Section 8(a)(1) of the NVRA. *See* 42 U.S.C. § 1973gg-6(a)(1) (requiring States to "ensure that any eligible applicant is registered to vote" in Federal elections "if the valid voter registration form of the applicant" is submitted or received by the close of registration).

[19] *See, e.g.*, 18 U.S.C. § 1015(f) (false claim of citizenship in connection with voter registration or voting; imprisonment for 5 years and a $250,000 fine); 42 U.S.C. § 15544(b) (same); 18 U.S.C. § 611 (Class A misdemeanor penalty for voting by aliens; imprisonment for 1 year and a $100,000 fine); 42 U.S.C. § 1973gg-10(2) (false or fraudulent registration or voting generally; imprisonment for 5 years and a $250,000 fine); 18 U.S.C. § 911 (false and willful misrepresentation of citizenship; imprisonment for 3 years and a $250,000 fine); Ariz. Rev. Stat. §§ 16-182 (false registration; class 6 felony), 16-1016 (illegal voting; class 5 felony); Ga. Code Ann. §§ 21-2-561 (false registration; felony; imprisonment for 10 years and a $100,000 fine), 21-2-571 (unlawful voting; felony; imprisonment for 10 years and a $100,000 fine); Kan. Stat. §§ 25-2411 (election perjury; felony), 25-2416 (voting without being qualified; misdemeanor).

The evidence submitted by Arizona and Kansas shows that the States are able to enforce their voter qualifications through the initiation of criminal investigations and/or prosecutions under their state criminal laws, where necessary. EAC000632-68; EAC001738-40. To be sure, the numbers of these criminal investigations and prosecutions appear to be quite small; however, there is no evidence in the record to suggest that the small number of criminal referrals is attributable to anything other than the strength of the deterrent effect resulting from the existence of these criminal laws.[20] Indeed, as the ITCA commenters point out, Arizona officials have previously acknowledged this very fact. EAC001558-60 & n.12.

b) Coordination with driver licensing agencies

One available measure is suggested by Kansas's own evidence describing procedures to identify potential non-citizens on its voter rolls by comparing the list with a list of Kansas residents who hold temporary driver's licenses issued to noncitizens. EAC000611-12 ¶¶ 2-3; EAC000620 ¶ 5. Using accurate, up-to-date, and otherwise reliable data, this procedure could potentially be applied to prospective registrants. Indeed, Section 202 of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312-15 (2005), requires state driver licensing agencies that wish for their IDs to be honored by federal agencies to collect documentary proof of citizenship for U.S. citizens, verify it, and retain copies of it in their databases.[21] Section 303 of HAVA requires that voter registrants provide their driver's license number or the last four digits

[20] The ITCA commenters also note that the vast majority of these criminal investigations do not result in prosecutions. EAC001559-62.

[21] Georgia and Kansas have reported that they are fully compliant with the REAL ID Act. *See* Department of Homeland Security, *REAL ID Enforcement in Brief* (Dec. 20, 2013), http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20131220.pdf (last accessed Jan. 12, 2014). And while Arizona has not yet reported its full compliance with the REAL ID Act, Arizona law nevertheless mandates that the state may not "issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D); Ariz. Dep't of Transp., Motor Vehicle Div., *Identification Requirements*, Form 96-0155 R09/13, http://www.azdot.gov/docs/default-source/mvd-forms-pubs/96-0155.pdf?sfvrsn=2 (last accessed Jan. 12, 2014).

of their Social Security number if they have one, and mandates that state election agencies coordinate with state driver licensing agencies to share certain database information relevant to voter registration. 42 U.S.C. § 15483. While HAVA does not require states to seek to verify citizenship as part of database comparisons, states have the discretion to undertake such a comparison as an initial step in identifying possible non-citizens, bearing in mind that the information in driver license databases may be older than that in voter registration databases.[22]

c) Comparison of juror responses

Another measure is suggested by Arizona's submission: using information provided to a jury commissioner. A person's response under oath to a court official that he or she is not a citizen would certainly provide probable cause for an election official to investigate whether the person, if registered as a voter, does not meet the citizenship qualification. Such responses relating to citizenship therefore provide election officials with another means of enforcing their voter qualifications.

d) The SAVE database

The United States Citizenship and Immigration Services agency maintains a database of the immigration/citizenship status of lawful noncitizen and naturalized citizen residents of the United States. *See* USCIS, *SAVE Program*, http://www.uscis.gov/save (last accessed Jan. 12, 2014). Government agencies may apply to use and access the federal SAVE database as one potential means of attempting to verify applicants' immigration/citizenship status under appropriate circumstances. *Id.* Several Arizona county election offices are already using this database to attempt to verify citizenship of voter registration applicants. EAC000771.

[22] As the ITCA commenters note, a driver's citizenship status at the time he or she initially applies for a driver's license is not necessarily determinative of his or her citizenship status at the time of that driver's registration to vote. EAC001560-61.

e) Requesting and verifying birth record data

The National Association for Public Health Statistics and Information Systems (NAPHSIS), a national association of state vital records and public health statistics offices, has developed and implemented an electronic system called Electronic Verification of Vital Events (EVVE). The EVVE system allows member jurisdictions to immediately confirm birth record information for citizens virtually anywhere in the United States. Currently 50 of 55 U.S. states and territories are either online or in the process of getting online with the EVVE birth record query system.[23] Thus, to the extent election officials are unable to confirm an applicant's oath and attestation of citizenship on the voter registration application through coordinating with a driver licensing bureau or using the SAVE Database, they could follow up directly with the affected applicant and request additional information that would enable them to make a query through the EVVE system (such as place of birth, mother's maiden name, etc.).

The above methods appear to provide effective means for identifying individuals whose citizenship status may warrant further investigation.[24]

In conclusion, the Commission finds, based on the record before it, that the States are not "precluded…from obtaining the information necessary to enforce their voter qualifications," and that the required oaths and attestations contained on the Federal Form are sufficient to enable the States to effectuate their citizenship requirements. *Cf. Inter-Tribal Council*, 133 S. Ct. at 2259-60. Thus, the States have not shown that the EAC is under a "nondiscretionary duty," *id.* at

[23] *See* NAPHSIS, *EVVE Vital Records Implementation: Birth Queries (December 2013)*, http://www.naphsis.org/about/Documents/EVVE_Implementation_Dec_2013%20Birth%20Queries%20with%20years.pptx (last accessed Jan. 12, 2014).

[24] Federal law also provides states with additional tools for verifying voter registration applications by mail. The NVRA allows states to require first-time registrants by mail to vote in person the first time (with limited exceptions). 42 U.S.C. § 1973gg-4(c). HAVA also requires states to take certain verification steps with regard to first time registrants by mail (with limited exceptions). 42 U.S.C. § 15483.

2260, to include the States' requested instructions despite Congress's previous determination, when it enacted the NVRA, that such instructions are generally "*not necessary* or consistent with the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs…." H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).

F. The Requested Changes Would Undermine the Purposes of the NVRA.

1. The States' requested changes would hinder voter registration for Federal elections.

As discussed above, Congress enacted the NVRA in part to "increase the number of eligible citizens who register to vote in elections for Federal office" and to "enhance[] the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b). In enacting the statute, Congress found that "the right of citizens of the United States to vote is a fundamental right" and that "it is the duty of the Federal, State, and local governments to promote the exercise of that right." *Id.* § 1973gg(a).

The district court in the *Inter Tribal Council* litigation found that between January 2005 and September 2007, over 31,000 applicants were "unable (initially) to register to vote because of Proposition 200." *Gonzalez v. Arizona*, No. 06-CV-1268, slip op. at 13 (D. Ariz. Aug. 20, 2008), EAC001663. The court further found that of those applicants, only about 11,000 (roughly 30 percent) were subsequently able to register. *Id.* at 14, EAC001664. Several comments provide additional evidence showing that implementation of Arizona's and Kansas's heightened proof-of-citizenship requirements has hindered the registration of eligible voters for federal elections. The requirements impose burdens on all registrants, and they are especially burdensome to those citizens who do not already possess the requisite documentation.

EAC001821-23; EAC001465-71; EAC000771-73; EAC001563; EAC000705; EAC000895; EAC000901-07; EAC001620; EAC001804; EAC001839; EAC001601, EAC001603. Such burdens do not enhance voter participation, and they could result in a decrease in overall registration of eligible citizens. *See, e.g.*, EAC0001823 (referencing news reports that since Kansas's law took effect in January 2013, between 17,000 to 18,500 applicants have been placed in "suspense" status, mostly because of failure to satisfy the new citizenship proof requirements).

Based on this evidence, the EAC finds that granting the States' requests would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA.

2. The States' requested changes would thwart organized voter registration programs.

It is also clear from the text of the NVRA that one purpose of the statute's mail registration provisions is to facilitate voter registration drives. Specifically, Section 6(b) requires state election officials to make mail voter registration forms, including the Federal Form, "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." 42 U.S.C. § 1973gg-4(b); *see also Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (NVRA encourages and protects community-based voter registration drives and obligates states to register eligible citizens if their valid registration forms are received by the registration deadline, thus "limit[ing] the states' ability to reject forms meeting [the NVRA's] standards").

A number of comments state that the heightened proof of citizenship requirements imposed by Arizona and Kansas have led to a significant reduction in organized voter registration programs during the time those requirements have been in effect. The comments indicate that this is due primarily to the logistical difficulties in providing the required proof,

even for those that already possess it. EAC000772, EAC000710-19, EAC000737-42; EAC001466-67, EAC001469-70, EAC001176-80; EAC001620; EAC001825; EAC000904-07.

Based on the evidence submitted, the EAC finds that granting the States' requests could discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form.

G. The Requested Proof-of-Citizenship Instructions Are Not Similar to Louisiana's Request for Modifications to the State-Specific Instructions.

Arizona and Kansas contend that it would be unfair or arbitrary for the Commission to approve Louisiana's 2012 request to modify the Federal Form's state-specific instructions to include HAVA-compliant language, and not to approve Arizona's and Kansas's requests to include additional proof-of-citizenship instructions.[25] In August 2012, the EAC approved Louisiana's July 16, 2012, request to amend the state-specific instructions for Louisiana to provide that if the applicant lacks a Louisiana driver's license or special identification card, or a Social Security number, he or she must attach to the registration application a copy of a current, valid photo identification, or a utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the applicant. EAC000167-71.

HAVA provides that federal voter registration applicants must provide their driver's license number, if they have one, or the last four digits of their Social Security number. 42 U.S.C. § 15483(a)(5)(A)(i). If they do not provide such information at the time of registration and they are registering by mail for the first time in a state, they will generally be required to show one of the following forms of identification the first time they vote in a federal election, irrespective of state law: a "current and valid photo identification" or "a copy of a current utility

[25] The Louisiana Secretary of State's Office supports the States' requests in this regard. EAC000216.

bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *Id.* § 15483(b)(2)(A). One of the ways voters who register by mail can fulfill the HAVA ID requirement is to submit a copy of one of the HAVA-compliant forms of identification with their registration application. *Id.* § 15483(b)(3)(A).

Louisiana's request to modify the state-specific instructions thus largely flowed from HAVA's identification requirements.[26] By contrast, the States' requests here seek to require federal voter registration applicants to supply additional proof of their United States citizenship beyond the oaths and affirmations already included on the Federal Form, even though such a requirement had already specifically been rejected by Congress when it enacted the NVRA. These are fundamentally different types of requests, and the EAC does not act unfairly and arbitrarily by reasonably treating them differently.

H. The Decision by the Federal Voting Assistance Program to Grant Arizona's Request Has No Bearing on the States' Requests to the EAC.

Arizona notes that after passage of Proposition 200, the Federal Voting Assistance Program ("FVAP") at the Department of Defense granted its request to add instructions regarding its proof-of-citizenship requirement to the Federal Post Card Application, a voter registration and absentee ballot application form for overseas citizens developed pursuant to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff(b)(2). EAC001702, EAC001750-51. However, the UOCAVA is a separate statute from the NVRA and contains no language similar to the NVRA's limitation that the Federal Form "may require only

[26] The League of Women Voters' comments argue that Louisiana's requested instructions regarding HAVA ID, *see* EAC000168, 000196, and the relevant portions of the Louisiana Election Code, *see* La. Rev. Stat. § 18:104(A)(16), (G), are not in full compliance with HAVA or the NVRA. EAC000760. The EAC will consider the issues the comments have raised. After consulting with Louisiana officials, the Commission will consider whether there are necessary and appropriate modifications to item 6 of the state-specific instructions for Louisiana on the Federal Form to clarify any lingering confusion and to ensure the instruction is in full compliance with the requirements of HAVA relating to federal elections.

such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). The FVAP's decision therefore has no bearing on the States' requests to the EAC.

I. The EAC's Regulations Do Not Require Inclusion of State-Specific Instructions Relating Only to State and Local Elections.

Finally, Kansas contends that the EAC is required by its own regulations to include information relating to the state's proof-of-citizenship requirements. EAC000565. Specifically, Kansas invokes 11 C.F.R. § 9428.3(b), which provides that "the [Federal Form's] state-specific instructions shall contain . . . information regarding the state's specific voter eligibility and registration requirements." By the terms of the NVRA, the Federal Form is a "mail voter registration application form *for elections for Federal office*." 42 U.S.C. § 1973gg-7(a)(2) (emphasis added). Thus, the EAC's regulatory provision quoted above can only require the Form's state-specific instructions to include voter eligibility and registration requirements relating to registration *for Federal elections*.

As discussed above, the Commission has determined, in accordance with Section 9 of the NVRA and EAC regulations and precedent, that additional proof of citizenship is not "necessary . . . to enable the appropriate State election official to assess the eligibility of the applicant," *cf.* 42 U.S.C. § 1973gg-7(b)(1), and will not be required by the Federal Form for registration for federal elections. Accordingly, the EAC is under no obligation to include Kansas's requested instruction because it would relate only to Kansas's state and local elections.

V. CONCLUSION

For the foregoing reasons, the Commission **DENIES** the States' requests.

Final Agency Action: This Memorandum of Decision shall constitute a final agency action within the meaning of 5 U.S.C. § 704. Notice of the issuance of this decision will be published in the Federal Register and posted on the EAC's website, and copies of this decision will be served upon the chief election officials of the States of Arizona, Georgia, and Kansas, as well as all parties to the pending *Kobach v. EAC* litigation in the U.S. District Court for the District of Kansas.

Done at Silver Spring, Maryland, this 17th day of January, 2014.

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

BY: 

Alice P. Miller
Chief Operating Officer and
Acting Executive Director

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, *et al.*,

Plaintiffs,

vs.

THE UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,

Defendants.

Case No. 13-cv-4095-EFM-TJJ

MEMORANDUM AND ORDER

Does the United States Election Assistance Commission ("EAC") have the statutory and constitutional authority to deny a state's request to include its proof-of-citizenship requirement in the state-specific instructions on the federal mail voter registration form? The Plaintiffs—Arizona and Kansas and their secretaries of state—say it does not, and have asked this Court to order the EAC to add the requested language immediately. Because the Court finds that Congress has not preempted state laws requiring proof of citizenship through the National Voter Registration Act, the Court finds the decision of the EAC denying the states' requests to be unlawful and in excess of its statutory authority. Since the Court's decision turns on the plain statutory language, the Court need not resolve the question of whether the Constitution permits the EAC, or Congress, to disregard the states' own determination of what they require to satisfactorily determine citizenship. Therefore, the Court orders the EAC, or the EAC's acting

executive director, to add the language requested by Arizona and Kansas to the state-specific instructions on the federal mail voter registration form, effective immediately.

I. Factual and Procedural Background

In 2011, the Kansas Legislature amended Kansas Statutes Annotated § 25-2309 to require any person applying to vote provide satisfactory evidence of United States citizenship before becoming registered. In August 2012, Brad Bryant, the Kansas election director, requested that the EAC make three revisions to the national voter registration form's state-specific instructions to reflect changes in Kansas' voter registration law. The third request was for the EAC to provide an instruction to reflect the new proof-of-citizenship requirement that was effective January 1, 2013. In October 2012, Alice Miller—the EAC's acting executive director and chief operating officer—informed Bryant that the EAC would make the first two changes but postponed action on the proof-of-citizenship requirement until a quorum was established on the commission. All four of the EAC's commissioner positions were vacant at the time, and they remain vacant now.

In 2013, a similar proof-of-citizenship requirement under Arizona voter registration law was addressed by the United States Supreme Court. In *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"),[1] the Supreme Court addressed the question of whether an Arizona statute that required state officials to reject a federal voter registration form unaccompanied by documentary evidence of citizenship conflicted with the National Voter Registration Act's mandate that Arizona "accept and use" the federal form.[2] In June 2013, the Supreme Court held that the NVRA precluded Arizona from requiring that anyone registering to vote using the

[1] 133 S. Ct. 2247 (U.S. 2013).

[2] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (U.S. 2013).

federal voter registration form submit information beyond that required by the form itself.[3] In so ruling, the Court concluded, "Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act."[4]

The day after the *ITCA* decision, Kansas Secretary of State Kris Kobach renewed Kansas' request that the EAC include state-specific instructions on the federal form to reflect Kansas' proof-of-citizenship requirement.[5] Two days after the *ITCA* decision, Arizona's Secretary of State, Ken Bennett, made a similar request, asking that the EAC include instructions to reflect Arizona's proof-of-citizenship requirements as outlined in Arizona Revised Statutes Annotated § 16-166(F).[6] In August 2013, Miller informed Kobach and Bennett that the EAC staff was constrained to defer acting on the states' requests until the EAC has a quorum of commissioners.[7] Miller's letters indicated that her decision was based on a 2011 memorandum,

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[3] *Id. at* 2260.

[4] *Id.*

[5] Doc. 95, at 6. Specifically, Kobach requested the following sentence be added to the instructions: "To cast a regular ballot an applicant must provide evidence of U.S. citizenship prior to the election day." Doc. 95, Exh. 1, at 2.

[6] Doc. 80, at 2-3. Arizona's requested language is more extensive:

> "If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or non-operating identification issued after October 1, 1996, write the number in box 6 on the front of the federal form. This will serve as proof of citizenship and no additional documents are needed. If not, you must attach proof of citizenship to the form. Only one acceptable form of proof is needed to register to vote."

The proposed language then lists five acceptable forms of proof of citizenship, such as birth certificate, passport, naturalization documents, and tribal number or tribal documentation. *Id.*

[7] In August 2013, Georgia made a similar request to change the state-specific instructions to reflect its proof-of-citizenship law passed in 2009. Similarly, Miller informed the Georgia secretary of state that she lacked authority to make the change in the absence of a quorum of commissioners. Doc. 132, Exh. 17, at 57-58. Georgia is not a party to this lawsuit, and its request is not before this Court.

prepared by former EAC executive director Thomas Wilkey, that established an internal procedure to deal with requests to change the state-specific instructions in the absence of a quorum of commissioners. The Wilkey memorandum, which was directed to the EAC staff, stated, "Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum."[8]

On August 21, 2013, this lawsuit was filed against the EAC and Miller, challenging the EAC's deferral of the states' requests. The Complaint was brought by four plaintiffs—Kobach, Bennett, the State of Kansas, and the State of Arizona. The Plaintiffs sought a writ of mandamus to order the EAC or Miller to modify the state-specific instructions of the federal mail voter registration form to require applicants residing in Kansas and Arizona to submit proof-of-citizenship documents in accordance with Kansas and Arizona law. Similarly, the Plaintiffs asked this Court to enjoin the EAC and its officers from refusing to modify the instructions. The Plaintiffs sought a finding that the EAC's failure to act was agency action unlawfully withheld or unreasonably delayed. Further, the Plaintiffs requested that this Court declare the NVRA unconstitutional as applied and declare that the Wilkey memorandum is an unlawful regulation.

In December 2013, this Court granted four motions for leave to intervene. The first motion was granted to a group that includes the Inter Tribal Council of Arizona, Inc., the Arizona Advocacy Network, the League of United Latin American Citizens of Arizona, and Steve Gallardo. The second motion granted was to Project Vote, Inc. The third motion was granted to the League of Women Voters of the United States, the League of Women Voters of Arizona, and the League of Women Voters of Kansas. The fourth motion was granted to a group

[8] Doc. 95, Exh. 1, at 8-9.

that includes Valle del Sol, the Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and Debra Lopez. These organizations and individuals, with the exception of the League of Women Voters of Kansas and the League of Women Voters of the United States, were plaintiffs in *ITCA*.[9]

On December 13, 2013, this Court found that there had been no final agency action on the states' requests by the EAC. The Court expressed doubt about the agency's ability to act without commissioners but ordered that the agency be provided with the opportunity to address these matters, including the matter of the agency's ability to make a ruling on this issue. Accordingly, the Court remanded the matter to the EAC with instructions that it render a final agency action no later than January 17, 2014. On that date, Miller issued a 46-page decision purportedly on behalf of the EAC denying the states' requests. The EAC decision concluded, among other things, that the EAC has the authority to determine what is necessary for a state election official to assess the eligibility of those applying to register to vote. Based on this authority, the EAC decision then concluded that requiring an applicant to provide proof of citizenship beyond signing an oath was not necessary for a state election official to assess whether the applicant is a U.S. citizen.

Two weeks later, the Plaintiffs filed a Motion for Judgment asking this Court to review the EAC's decision under the Administrative Procedure Act, issue a writ of mandamus ordering the EAC to make the changes to the instructions, and declare the EAC's denial a violation of the states' constitutional rights. After a status conference, the Court ordered that its review would be limited to the agency record. After oral argument on February 11, 2014, the motion is ripe.

[9] Doc. 105, at 3-4.

II. Legal Standard

Plaintiffs bring this action under the Administrative Procedure Act, which subjects federal agency action to judicial review.[10] Under APA review, the reviewing court must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action."[11] The APA gives the reviewing court the authority to compel agency action unlawfully withheld or unreasonably delayed.[12] The only agency action that can be compelled is action legally required.[13] This means that a court is limited to compelling an agency to perform a ministerial or nondiscretionary act, or in other words, a discrete agency action that it is required to take.[14]

The reviewing court also has authority to "hold unlawful and set aside agency action, findings, and conclusions found to be

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[15]

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[10] 5 U.S.C. § 706; *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1573 (10th Cir. 1994).

[11] 5 U.S.C. § 706.

[12] 5 U.S.C. § 706(1).

[13] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

[14] *Id*. at 64.

[15] 5 U.S.C. § 706(2).

The Court must review the entire administrative record or those parts of it cited by a party, and due account must be taken of the rule of prejudicial error.[16] If the agency action is upheld, it must be upheld for the reasons articulated by the agency.[17] Ordinarily, the APA standard of review is a deferential one, but courts do not afford any deference to an agency interpretation that is clearly wrong or where Congress has not delegated administrative authority to the agency on the particular issue.[18]

III. Analysis

As an initial matter, the Court is skeptical that Miller has authority to make this decision for the EAC. The Court notes that Miller herself initially thought that she couldn't make this decision and informed the states in her letters that whether to add the instructions was a policy question that must be decided by the EAC commissioners.[19] However, the Court finds it unnecessary to address Miller's authority to act as acting executive director because the Court's decision would be the same if a full commission had voted 4-0 to deny the states' requests. For the purposes of the following analysis, the Court assumes—without deciding—that Miller is authorized to make the decision on behalf of the EAC.

This Court's review of the EAC's decision to deny the states' requests to change the instructions of the federal form hinges on the answer to two questions. First, does Congress have the constitutional authority to preempt state voter registration requirements? And, if so, has Congress exercised that authority to do so under the National Voter Registration Act?

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[16] 5 U.S.C. § 706(2).

[17] *See Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004).

[18] *Mission Group Kansas, Inc. v. Spellings*, 515 F. Supp. 2d 1232, 1235 (D. Kan. 2007).

[19] Doc. 80, Exh. 1, at 1; Doc. 95, Exh. 1, at 1, 6.

A. Constitutional framework

The Constitution gives each state exclusive authority to determine the qualifications of voters for state and federal elections.[20] Article I, section 2, clause 1—often called the Qualifications Clause—provides that the voters for the U.S. House of Representatives in each state shall have the same qualifications required for voters of the largest branch of the state legislature.[21] The Seventeenth Amendment adopts the same requirement for voters for the U.S. Senate.[22] The U.S. Supreme Court has read these provisions to conclude that the states, not Congress, set the voter qualifications for federal elections.[23]

But the Constitution does give Congress the power to regulate how federal elections are held.[24] Article I, section 4, clause 1—often called the Elections Clause—provides: "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 chusing Senators."[25]

In other words, the States have the initial authority to determine the time, place, and manner of holding federal elections, but Congress has the power to alter those regulations or

[20] *ITCA*, 133 S. Ct. at 2257-58.

[21] U.S. Const. art. I, § 2, cl. 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[22] U.S. Const. amend XVII, cl. 2 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

[23] *ITCA*, 133 S. Ct. at 2258.

[24] *Id.* at 2257.

[25] U.S. Const. art. I, § 4, cl. 1.

supplant them altogether.[26] In practice, this means that the States are responsible for the mechanics of federal elections, but only so far as Congress chooses not to preempt state legislative choices.[27] In *ITCA*, the U.S. Supreme Court stated that the scope of the Elections Clause is broad, noting "'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.'"[28]

ITCA decided, among other things, that Congress has the power to regulate voter registration and that Congress exercised that power through the NVRA. In *ITCA*, the issue was whether federal law preempted Arizona law on how the federal voter registration form was to be treated by state election officials.[29] The NVRA provided that each state must "accept and use" the federal mail voter registration form.[30] Meanwhile, Arizona law specified that a county election official must "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[31] Specifically, *ITCA* decided that the NVRA's "accept and use" provision preempted Arizona's requirement that an election official must "reject" a federal form without proof of citizenship.[32] Therefore, *ITCA* validates Congress'

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[26] *ITCA*, 133 S. Ct. at 2253.

[27] *Id*.

[28] *Id*. (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

[29] *Id*. at 2254 ("The straightforward textual question here is whether Ariz. Rev. Stat. Ann. § 16-166(F), which requires state officials to 'reject' a Federal Form unaccompanied by documentary evidence of citizenship, conflicts with the NVRA's mandate that Arizona 'accept and use' the Federal Form.").

[30] 42 U.S.C. § 1973gg-4(a)(1).

[31] Ariz. Rev. Stat. Ann. § 16-166(F).

[32] *ITCA*, 133 S. Ct. at 2260.

power to regulate voter registration under its broad authority to regulate the manner of holding elections.

But *ITCA* also strongly indicated that this broad power is not unlimited. The opinion emphasizes that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[33] Indeed, as all parties here concede, nothing in the Elections Clause "lends itself to the view that voting qualifications in federal elections are to be set by Congress."[34] The Court concluded, "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[35] On this point, the Court was unanimous.[36] In other words, the States' exclusive constitutional authority to set voter qualifications necessarily includes the power to enforce those qualifications.[37]

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[33] *Id*. at 2257.

[34] *Id*. at 2258.

[35] *Id*. at 2258-59.

[36] *See id*. at 2264 (Thomas, J., dissenting) ("For this reason, the Voter Qualifications Clause gives States the authority not only to set qualifications but also the power to verify whether those qualifications are satisfied."); *id*. at 2273 (Alito, J., dissenting) (noting that "the Constitution reserves for the States the power to decide who is qualified to vote in federal elections" and that "a federal law that frustrates a State's ability to enforce its voter qualifications would be constitutionally suspect").

[37] *But see Smiley*, 285 U.S. at 366. The Court provided more explanation in *Smiley*:

> The subject-matter is the 'times, places and manner of holding elections for senators and representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places

This premise suggests that Congress has no authority to preempt a State's power to enforce its voter qualifications. The *ITCA* opinion stops short of making this declaration, choosing to avoid resolving this constitutional question because of Arizona's ability to renew its request to change the instructions on the federal form and pursue this action.[38] But there are indications in the opinion and in oral argument that imply that state authority may have prevailed if the Court had been forced to resolve this constitutional question.[39] In the *ITCA* opinion, the Court acknowledged that "serious constitutional doubts" would be raised if the NVRA precluded Arizona "from obtaining the information necessary to enforce its voter qualifications."[40] Then, the Court referred to this action challenging the EAC's denial of Arizona's request as an "alternative means of enforcing its constitutional power to determine voter qualifications."[41] The Court also suggested that Arizona may have "a constitutional right to demand concrete evidence

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> and manner of holding elections,' and involves lawmaking in its essential features and more important aspect.

This passage could be read to stand for the idea that the "manner of holding elections" is comprehensive enough to include the power to enforce voter qualifications, which could be regulated by Congress. But as Justice Thomas points out, and the parties concede, this passage is dicta. See *ITCA*, 133 S. Ct. at 2268 (Thomas, J., dissenting). In any event, the majority opinion deliberately did not include this passage from *Smiley*, other than to acknowledge that voter registration is included within the broad scope of the Elections Clause. *See id*. at 2253 (majority opinion).

[38] See *ITCA*, 133 S. Ct. at 2259 ("Happily, we are spared that necessity, since the statute provides another means by which Arizona may obtain information needed for enforcement.").

[39] At oral argument, Justice Scalia, who authored the majority opinion in *ITCA*, expressed concern multiple times about Arizona's failure to challenge the EAC's 2-2 vote in 2005 that resulted in no action being taken on Arizona's initial request to add identical proof-of-citizenship language. Transcript of Oral Argument at 9, 11, 15-16, 18, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71). Justice Scalia expressed skepticism about how the EAC would fare in such a challenge under the APA. *Id*. at 56-57 ("So you're going to be—in bad shape—the government is going to be—the next time somebody does challenge the Commission determination in court under the Administrative Procedure Act.").

[40] *ITCA*, 133 S. Ct. at 2258-59.

[41] *Id*. at 2259.

of citizenship apart from the Federal Form."[42] These statements intimate that the Court may have declared the NVRA's "accept and use" provision unconstitutional if Arizona had exhausted its administrative remedies through the EAC. By denying the states' request to update the instructions on the federal form, the EAC effectively strips state election officials of the power to enforce the states' voter eligibility requirements. Thus, the EAC decision has the effect of regulating *who* may vote in federal elections—which *ITCA* held that Congress may not do.[43]

On one hand, the *ITCA* decision acknowledges the broad scope of Congress' power under the Elections Clause, which includes the authority of the NVRA to preempt state law regarding voter registration. But the *ITCA* opinion also emphasizes the States' exclusive constitutional authority to set voter qualifications—which Congress may not preempt—and appears to tie that authority with the power of the States to enforce their qualifications. Ultimately, the *ITCA* opinion avoids definitively answering this constitutional question in favor of allowing Arizona to pursue the course of action leading to this lawsuit. Similarly, this Court also finds that it need not answer the question of whether Congress may constitutionally preempt state laws regarding proof of eligibility to vote in elections. Answering this constitutional question is unnecessary because the Court finds in the next section that Congress has not attempted to preempt state laws requiring proof of citizenship through the text of the NVRA.

B. Statutory framework

If the Court found that Congress had preempted state law regarding the procedure for determining qualifications for voter registration through the NVRA, serious constitutional

[42] *Id*. at 2260 n.10.

[43] *Id*. at 2257 ("Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.").

questions about Congress' authority to do so would have to be addressed.[44] As noted above, one question is whether the scope of the Elections Clause is broad enough to give Congress the authority to regulate voter registration. If that question were answered in the affirmative, which *ITCA* did, a second question arises of whether such congressional authority could be exercised by delegating authority to the EAC to decide what may or may not be included on the state-specific instructions of the federal form. In *ITCA*, the U.S. Supreme Court declined to definitively answer this second question but declared that serious constitutional doubts exist.[45] Instead, the Court suggested that Arizona could make another request and pursue this lawsuit if that request were denied.[46] That is the procedural posture presented to this Court today. This action for review of agency action was brought after the EAC acting executive director declined to make the changes requested by Arizona and Kansas.

However, this Court concludes that it does not need to answer the constitutional question either. The U.S. Supreme Court has advised that " '[I]t is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[47] Where possible, this Court will construe a federal statute to avoid serious constitutional doubt.[48] That means, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of

[44] *Id*. at 2258-59.

[45] *Id*.

[46] *Id*. at 2259-60.

[47] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

[48] *See Stern v. Marshall*, 131 S. Ct. 2594, 2605 (U.S. 2011).

its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."[49] The prevailing interpretation, however, may not be "plainly contrary to the intent of Congress."[50] This canon of constitutional avoidance in statutory interpretation is based on the reasonable presumption that Congress did not intend to enact a statute that raises serious constitutional doubts.[51] Thus, this Court's duty is to adopt the construction that avoids doubtful constitutional questions.[52]

In *ITCA*, the Court concluded, "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[53] Here, the EAC's decision to deny the states' requested instructions has precluded the states from obtaining proof of citizenship that the states have deemed necessary to enforce voter qualifications. Therefore, the EAC's interpretation of the NVRA raises the same serious constitutional doubts as expressed in *ITCA*.

The canon of constitutional avoidance also comes into play as this Court considers the degree of deference to give the EAC decision. Normally, courts may owe deference—often referred to as *Chevron* deference—to an agency's construction of a statute that it administers when the statute is silent or ambiguous on the issue in question and the agency's reading is a

[49] *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *see also Almendarez-Torres v. U.S.*, 523 U.S. 224, 238 (1998) ("Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional."); *U.S. v. La Franca*, 282 U.S. 568, 574 (1931) ("The decisions of this court are uniformly to the effect that 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'").

[50] *Miller v. French*, 530 U.S. 327, 341 (2000).

[51] *Clark*, 543 U.S. at 381.

[52] *Jones v. U.S.*, 529 U.S. 848, 857 (2000).

[53] *ITCA*, 133 S. Ct. at 2258-59.

"permissible construction of the statute."[54] But when an administrative interpretation of a statute invokes the outer limits of congressional power, there should be a clear indication that Congress intended that result.[55] The assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority is heightened if the agency's interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power.[56]

Circuit courts have concluded that the canon of constitutional avoidance trumps *Chevron* deference owed to an agency's interpretation of a statute.[57] This conclusion has been held to be true in the context of federal election law.[58] Here, the U.S. Supreme Court has indicated that an interpretation of the NVRA that keeps a state from obtaining the information necessary to enforce its voter qualifications raises "serious constitutional doubts."[59] Such an interpretation alters the federal-state framework by permitting federal encroachment on the traditional state

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[54] *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

[55] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

[56] *Id.* at 173; *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.").

[57] *See, e.g.*, *Hernandez-Carrera*, 547 F.3d at 1249 ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."); *Union Pacific Railroad Company v. United States Department of Homeland Security*, 738 F.3d 885, 893 (8th Cir. 2013) ("Constitutional avoidance trumps even *Chevron* deference, and easily outweighs any lesser form of deference we might ordinarily afford an administrative agency."); *Rural Cellular Ass'n v. F.C.C.*, 685 F.3d 1083, 1090 (D.C. Cir. 2012) ("Because the 'canon of constitutional avoidance trumps *Chevron* deference, we will not accept the Commission's interpretation of an ambiguous statutory phrase if that interpretation raises a serious constitutional difficulty.") (citation omitted); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) ("*Chevron* principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe.").

[58] See *Chamber of Commerce of U.S. v. Federal Election Com'n*, 69 F.3d 600, 605 (D.C. Cir. 1995) (holding that FEC was not entitled to *Chevron* deference with regard to its interpretation of the Federal Election Campaign Act because the FEC's interpretation of statutory language raised "serious constitutional difficulties").

[59] *ITCA*, 133 S. Ct. at 2258-59.

power to establish and enforce voting requirements.[60] And critically, the NVRA lacks a "clear and manifest" statement that Congress intends to intrude into the states' authority to enforce voting requirements or even that the EAC has broad discretion to decide what goes in the state-specific instructions.[61] Therefore, the Court finds that the EAC decision is not entitled to *Chevron* deference in this case.

As noted earlier, when a federal statute raises serious constitutional doubts, then this Court first must determine whether a construction of the statute is fairly possible to avoid the constitutional question. Here, this Court need not resolve the constitutional question because Congress has not clearly exercised its preemption power on this issue, even assuming it has preemption power on this issue, in the NVRA. The text of the NVRA provides: "The Election Assistance Commission—in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office."[62] The statute also allows the EAC to prescribe regulations necessary to carry out this provision, again "in consultation with the chief election officers of the States."[63] As a result, the EAC has adopted the following regulation concerning the state-specific instructions at issue here: "The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and *information regarding the state's specific voter eligibility and registration requirements*."[64]

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[60] *See Solid Waste*, 531 U.S. at 172.

[61] *See Rapanos*, 547 U.S. at 738.

[62] 42 U.S.C. § 1973gg-7(a)(2).

[63] 42 U.S.C. § 1973gg-7(a)(1).

[64] 11 C.F.R. § 9428.3(b) (emphasis added).

The NVRA includes the following provisions concerning the contents of the mail voter registration form:

> The mail voter registration form developed under subsection (a)(2) of this section—
> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
> (2) shall include a statement that—
> (A) specifies each eligibility requirement (including citizenship);
> (B) contains an attestation that the applicant meets each such requirement; and
> (C) requires the signature of the applicant, under penalty of perjury;
> (3) may not include any requirement for notarization or other form authentication."[65]

Again, the question here is whether these provisions of the NVRA preempt Arizona and Kansas laws that require that residents applying to vote provide documentary proof of U.S. citizenship as part of the voter registration process. In *Gonzalez v. Arizona*, which was affirmed by *ITCA*, the Ninth Circuit provided a test to determine whether federal law preempts state law under the Elections Clause.[66] The U.S. Supreme Court neither adopted nor rejected the Ninth Circuit's test in *ITCA*, but this Court finds it useful here.

Highly summarized, the Ninth Circuit examined U.S. Supreme Court precedent in *Ex Parte Siebold*[67] and *Foster v. Love*[68] addressing Elections Clause preemption.[69] In finding there

[65] 42 U.S.C. § 1973gg-7(b).

[66] 677 F.3d 383, 393-94 (9th Cir. 2012).

[67] 100 U.S. 371 (1879).

[68] 522 U.S. 67 (1997).

[69] *Gonzalez*, 677 F.3d at 393-94.

is no presumption against preemption under the Elections Clause, the Ninth Circuit noted that in *Siebold* the Court compared the relationship between state and federal election laws to prior and subsequent laws passed by the same legislature.[70] In that way, a state law—like a prior existing law—is allowed to stand if a federal law—like a subsequently passed law—does not alter it.[71] The Ninth Circuit also noted that *Foster* clarified what constitutes a conflict between state and federal law under the Elections Clause.[72] The Ninth Circuit then articulated the following test:

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.[73]

In *Gonzalez*, the Ninth Circuit considered the conflict between the NVRA's "accept and use" provision and Arizona's requirement to "reject any application" without documentary proof of citizenship.[74] The Ninth Circuit concluded that the two laws covered the same subject matter and did not operate harmoniously when read together naturally. As a result, the Ninth Circuit

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[70] *Id*. at 393.

[71] *Id*.

[72] *Id*.

[73] *Id*. at 394 (Citations omitted).

[74] *Id*. at 398.

concluded that Arizona's law was preempted by the NVRA, as applied to the federal form, under Congress' power under the Elections Clause.[75] This result was affirmed by *ITCA*.[76]

Here, it is not as clear which provisions of Arizona and Kansas law and the NVRA are alleged to be in conflict. The EAC decision enumerated nine reasons to deny the states' requests but didn't directly address preemption other than to restate that *ITCA* was decided based on preemption.[77] Here, Arizona law states that "[t]he county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[78] Similarly, Kansas law states that "[t]he county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship."[79] Both statutes list evidence that would satisfy the proof-of-citizenship requirements.[80] In *ITCA*, the question was whether the Arizona law conflicted with the NVRA's requirement that the states "accept and use" the federal form, and the answer was yes.[81]

In this case, the Court considers the question of whether there is a conflict between state and federal law as it pertains to adding information to the federal form's state-specific

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[75] *Id*. at 403.

[76] *ITCA*, 133 S. Ct. at 2260.

[77] Memorandum of Decision, Doc. 129, Exh. 1, at 24-25.

[78] Ariz. Rev. Stat. Ann. § 16-166(F).

[79] Kan. Stat. Ann. § 25-2309(l).

[80] Ariz. Rev. Stat. Ann. § 16-166(F)(1)-(6); Kan. Stat. Ann. § 25-2309(l)(1)-(13). In Arizona, satisfactory evidence includes a driver's license or state-issued identification, birth certificate, passport, naturalization documents, or tribal number. The Kansas statute lists the same evidence plus other documents that indicate place of birth or citizenship such as adoption records, military records, and hospital records.

[81] *ITCA*, 133 S. Ct. at 2260.

instructions. First, the Court considers the state and federal laws together as one system of federal election procedures.[82] Then the Court determines whether the state laws complement or conflict with the NVRA.[83] A conflict exists only if the state and federal law cannot coexist.[84] To make this determination, the Court considers whether the NVRA addresses the same subject as the state laws.[85] Ultimately, the Court may find that the NVRA supersedes state law if they do not operate harmoniously in one procedural scheme.[86] For the immediate purpose of making this comparison, the Court is setting aside the question of whether the Congress constitutionally can supersede state law on this narrow issue.

It is clear that the text of the NVRA does not addresses the same subject as the states' laws—documentary proof of citizenship. In fact, Miller's August 2013 letter to Kobach deferring action states that "citizenship documentation is not addressed in the National Voter Registration Act of 1993 or the Help America Vote Act of 2002 and the inclusion of such information with the Federal Form as it is currently designed constitutes a policy question which EAC Commissioners must decide."[87] The statute requires the applicant's signature that attests that the applicant meets each eligibility requirement, including citizenship.[88] Notably, the NVRA

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[82] *See Gonzalez*, 677 F.3d at 394.

[83] *Id.*

[84] *See Siebold*, 100 U.S. at 386 ("The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties.").

[85] *See Gonzalez*, 677 F.3d at 394.

[86] *Id.*

[87] Doc. 95, Exh. 1, at 6-7.

[88] 42 U.S.C. § 1973gg-7(b)(2)(A)-(C).

expressly prohibits the notarization or other formal authentication of the applicant's signature.[89] So if a state would decide to require a notarized signature on either a state or federal voter registration form, that state law would be preempted by the clear text of the NVRA as it pertains to federal elections.[90] In turn, that means that the EAC would have statutory authority to deny a state's request to include a notarization requirement in the state-specific instructions.

But the NVRA does not include a similar clear and manifest prohibition against a state requiring documentary proof of citizenship.[91] In fact, the NVRA does not address documentary proof of citizenship at all, neither allowing it nor prohibiting it.[92] Therefore, the Court must find that the NVRA is silent on the subject. Because Congress has not addressed the same subject as the state law, there is no basis to determine that the NVRA has preempted Arizona or Kansas law

[89] 42 U.S.C. § 1973gg-7(b)(3) ("The mail voter registration form developed under subsection (a)(2) of this section—may not include any requirement for notarization or other formal authentication.").

[90] *See* 42 U.S.C. § 1973gg-4(a)(2) ("In addition to accepting and using the [federal mail voter registration form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office."). Because the notarization prohibition is included among the criteria in Section 1973gg-7(b), even a state-developed form could not include a notarization requirement and be used to register an applicant for federal elections.

[91] The Court acknowledges that the EAC decision contains a footnote noting that the NVRA prohibits "formal authentication" and that requiring additional proof of citizenship would be "tantamount to requiring 'formal authentication' of an individual's voter registration application." Memorandum of Decision, Doc. 129, Exh. 1, at 21 n.9. The Court rejects this suggested interpretation. As noted above, the Court reads the statute in the context of prohibiting formal authentication of the applicant's signature.

[92] The EAC decision considered the NVRA's legislative history to be a significant factor in justifying denial, finding that Congress considered and rejected proof-of-citizenship requirements when enacting the NVRA in 1993. Memorandum of Decision, Doc. 129, Exh. 1, at 20-21. According to the EAC decision, Congress considered including language that would allow states to require documentary evidence of citizenship (a requirement that no state had at the time) and decided not to include such language in the NVRA. *Id*. at 20. In its motion, the Plaintiffs point to other parts of the legislative history that purport to show that the NVRA's sponsor argued that the proposed language was unnecessary as redundant because nothing in the NVRA prevented a state from requiring proof of citizenship. Doc. 140, at 8-9. Either way, the Court is not impressed with the legislative history presented in the absence of statutory language addressing the subject. See *U.S. v. Cheever*, 423 F. Supp. 2d 1181, 1191 (D. Kan. 2006) (noting that "it can be a dangerous proposition to interpret a statute by what it does *not* say" and that "[s]uch a negative inference is a weak indicator of legislative intent."). The Court finds it unnecessary to consider the legislative history here. *See Shannon v. U.S.*, 512 U.S. 573, 583 (1994) (noting that courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point).

on the subject of documentary proof of citizenship. If the federal and state laws operate harmoniously in one scheme for federal voter registration, then Congress has not exercised its power to alter state law under the Elections Clause.[93] If that is the case, state and federal law may coexist.[94]

The better question here, then, is whether the text of the NVRA authorizes the EAC to deny a state's request to list its statutory registration requirement on the federal form's state-specific instructions. The NVRA authorizes the EAC to "develop" the federal form and contemplates cooperation with state officials to do so.[95] Similarly, the NVRA authorizes the EAC to "prescribe such regulations as are necessary" to develop the form, again, "in consultation with the chief election officers of the States."[96]

The state-specific instructions at issue here are authorized by such a regulation.[97] The regulation describes the mandatory contents of the instructions: "The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements."[98] The regulations contemplate that a state may have additional

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[93] See *Siebold*, 100 U.S. at 384 ("There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature."); *see also Gonzalez*, 677 F.3d at 394.

[94] *See Siebold*, 100 U.S. at 383 ("If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject.").

[95] 42 U.S.C. § 1973gg-7(a)(2) ("The Election Assistance Commission—in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office.").

[96] 42 U.S.C. § 1973gg-7(a)(1).

[97] 11 C.F.R. § 9428.3(a).

[98] 11 C.F.R. § 9428.3(b).

eligibility requirements that must be listed in the instructions. The regulation dictates that the form shall also: "(1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompany state instructions."[99] The regulations also address the mechanics of how the EAC acquires each state's specific voter eligibility information and registration requirements from state election officials:

> (a) Each chief state election official shall certify to the Commission within 30 days after July 25, 1994:
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> (1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including *but not limited to* the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is closed primary state.
>
> . . .
>
> (c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section."[100]

A natural reading of the regulations suggests that the EAC anticipated that a state may change its voter eligibility requirements and outlined a procedure for the state's chief election official to notify the EAC of any such change. And under 11 C.F.R. § 9428.3(b), the state-specific instructions must contain each state's specific voter eligibility and registration requirements. Notably, the regulations require a state election official to "notify" the EAC of any change. The regulations do not require the state official to "request" that the EAC change the

[99] 11 C.F.R. § 9428.4(b)(1). Alabama, Florida, and Vermont require that the applicant swear or affirm an oath containing specific language. State Instructions, Doc. 95, Exh. 4, at 3, 6, 18. Louisiana requires that documentary proof of the applicant's name and address must be attached if the applicant does not have a driver's license, identification card, or social security number. State Instructions, Doc. 95, Exh. 4, at 9.

[100] 11 C.F.R. § 9428.6(a), (c) (emphasis added).

instructions, and the regulations are silent as to the discretion, if any, that the EAC has to decline to make changes to the state-specific instructions.[101] Therefore, naturally reading these regulations together suggests that 1) a state may have additional voter eligibility requirements, 2) a state must inform the EAC of its voter eligibility requirements, and 3) the EAC must list those requirements in the state-specific instructions.[102] This scheme suggests that state and federal laws can coexist, thus there is no conflict. And if there is no conflict, there is no preemption.

The NVRA, in Section 1973gg-7(b)(1), mandates that the federal form "may require only such" information "as is necessary to enable the appropriate State election official to assess the eligibility of the applicant."[103] In other words, the federal form may not require unnecessary information. For example, the Federal Election Commission—the EAC's predecessor—considered but excluded from the federal form requests for information deemed unnecessary to assess voter eligibility such as occupation, physical characteristics, and marital status.[104] In *ITCA*, the U.S. Supreme Court noted that Section 1973gg-7(b)(1) "acts as both a ceiling and a floor with respect to the contents of the Federal Form," and concluded that necessary information

[101] The EAC decision recognizes that "[n]either the NVRA nor the EAC regulations specifically provide a procedure for states to request changes to the Federal Form." Memorandum of Decision, Doc. 129, Exh. 1, at 13. The EAC decision also acknowledges the states' duty to notify the EAC of changes but concludes, "The regulations leave it solely to the EAC's discretion whether and how to incorporate these changes." *Id*. However, there is no discretionary language in the regulations supporting this conclusion. Notably, the administrative record includes a public comment from a former commissioner of the Federal Election Commission (the predecessor agency to the EAC) who opined that "the EAC has no authority to refuse to approve state-specific instructions that deal with the eligibility and qualifications of voters." Doc. 132, Exh. 5, at 13-17.

[102] 11 C.F.R. § 9428.6(c); 11 C.F.R. § 9428.3(b). As noted earlier, there is one limited exception. The EAC would not be obligated to list a state's notarization requirement in the instructions because the NVRA expressly prohibits notarization, preempting any potential change in state law on the subject. 42 U.S.C. § 1973gg-7(b)(3).

[103] 42 U.S.C. § 1973gg-7(b)(1).

[104] 59 Fed. Reg. 32311, 32316-17 (1994).

that *may* be required *will* be required.[105] Thus, a natural reading of the statute suggests that a state election official maintains the authority to assess voter eligibility and that the federal form will require the information necessary for the official to make that determination. This leads to the conclusion that, consistent with the determination of both states' legislatures, proof of citizenship is necessary to enable Arizona and Kansas election officials to assess the eligibility of applicants under their states' laws.

In contrast, the EAC decision concludes that proof of citizenship, beyond signing the form, is not necessary for state election officials to assess the eligibility of applicants.[106] The EAC determined that it has discretionary authority to decide what information will be on the federal form and its instructions because of the NVRA's language that the EAC's duty is to "develop" the federal form.[107] As a result, the EAC decision concludes that the federal form already provides all that is necessary for state officials to assess eligibility and that the states' proposed instructions will require more information than is necessary.[108]

The EAC decision asserts that the EAC has the discretionary authority to determine whether the requests to change the instructions are necessary to enable the states to assess voter eligibility. The EAC decision does not cite the NVRA or its regulations in baldly stating:

> We conclude that the States' contention that the EAC is under a nondiscretionary duty to grant their requests is incorrect. Rather, as the Court explained in *Inter Tribal Council*, the EAC is obligated to grant such requests only if it determines, based on the evidence in the record, that it is necessary to do so in order to enable state election officials to enforce their states' voter qualifications. If the States can

[105] *ITCA*, 133 S. Ct. at 2259.

[106] Memorandum of Decision, Doc. 129, Exh. 1, at 28-41.

[107] *Id*. at 13.

[108] *Id*. at 28-31.

> enforce their citizenship requirements without additional proof-of-citizenship instructions, denial of their requests for such instructions does not raise any constitutional doubts.[109]

The EAC decision provides no citation or analysis of how *ITCA* leads to Miller's conclusion that the EAC has the authority to decide what is necessary. Nor is there express language in the NVRA or in the *ITCA* opinion granting the EAC such broad authority to determine what information is necessary for a state official to enforce voter qualifications. Again, a natural reading of the statute in question supports the conclusion that state election officials maintain authority to determine voter eligibility. In *ITCA*, the Court characterizes proof of citizenship as "information the State deems necessary to determine eligibility."[110] As a result, the EAC's declaration that it alone has the authority to determine what is deemed necessary information is without legal support and is incorrect.

Further, the U.S. Supreme Court characterizes the EAC as having "a nondiscretionary duty" to include Arizona's proof-of-citizenship requirement in the instructions if Arizona can establish in this Court "that a mere oath will not suffice to effectuate its citizenship requirement."[111] So, at the least, the *ITCA* opinion establishes that there is a point at which the EAC loses whatever discretion it possesses to determine the contents of the state-specific instructions.

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[109] *Id*. at 27.

[110] *ITCA*, 133 S. Ct. at 2259 ("Since, pursuant to the Government's concession, a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act, no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading.") (citations omitted).

[111] *Id*. at 2260 ("Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form.").

Here, Arizona and Kansas have established that their state laws require their election officials to assess the eligibility of voters by examining proof of their U.S. citizenship beyond a mere oath. The EAC decision makes the case that the states have other means available to enforce the citizenship requirement.[112] But the Arizona and Kansas legislatures have decided that a mere oath is not sufficient to effectuate their citizenship requirements and that concrete proof of citizenship is required to register to vote. Because the Constitution gives the states exclusive authority to set voter qualifications under the Qualifications Clause, and because no clear congressional enactment attempts to preempt this authority, the Court finds that the states' determination that a mere oath is not sufficient is all the states are required to establish.

Therefore, the Court finds that Congress has not preempted state laws requiring proof of citizenship through the NVRA. This interpretation is not "plainly contrary to the intent of Congress" because the NVRA is silent as to the issue.[113] Consistent with *ITCA*, because the states have established that a mere oath will not suffice to effectuate their citizenship requirement, "the EAC is therefore under a nondiscretionary duty" to include the states' concrete evidence requirement in the state-specific instructions on the federal form.[114]

C. The EAC Decision Constitutes Agency Action Unlawfully Withheld

As a result, the EAC's nondiscretionary duty is to perform the ministerial function of updating the instructions to reflect each state's laws. Accordingly, the Court finds that the EAC's refusal to perform its nondiscretionary duty to change the instructions as required constitutes

[112] Memorandum of Decision, Doc. 129, Exh. 1, at 36-41.

[113] *See Miller*, 530 U.S. at 341.

[114] *See ITCA*, 133 S. Ct. at 2260.

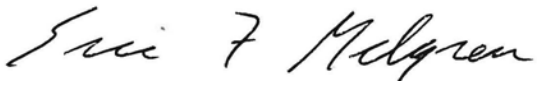
agency action unlawfully withheld.[115] The Court orders the EAC to add the language requested by Arizona and Kansas to the state-specific instructions of the federal mail voter registration form immediately.

Because the Court has declined to reach the constitutional question, the Court denies the Plaintiffs' requests to declare that the states' constitutional rights were violated by the EAC's refusal to change the instructions. In addition, the Court dismisses Plaintiffs' Motion for Preliminary Injunction (Doc. 16) as moot.

IT IS ACCORDINGLY ORDERED on this 19th day of March, 2014, that the Plaintiffs' Motion for Judgment (Doc. 139) is hereby **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction (Doc. 16) is **DENIED** as moot.

IT IS SO ORDERED.



ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

[115] *See* 5 U.S.C. § 706(1).