IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, KANSAS SECRETARY OF STATE;	)	
KEN BENNETT, ARIZONA SECRETARY OF STATE;	)	
THE STATE OF KANSAS;	)	
THE STATE OF ARIZONA;	)	
Plaintiffs,	)	
vs.	)	Case No. 13-4095-EFM-DJW
THE UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al*.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' NOTICE OF ADVERSE AGENCY DECISION AND MOTION FOR RELIEF

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I. The EAC has a nondiscretionary duty to modify the State-specific instructions of the Federal Form as requested by Plaintiffs.

Previously Plaintiffs filed a Motion for Preliminary Injunctive Relief (ECF No. 16), a Brief in Support of Plaintiffs' Motion for Preliminary Injunctive Relief (ECF No. 17), and subsequently a Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunctive Relief (ECF No. 101). In these filings, Plaintiffs provided extensive legal argument and authority establishing that Defendants are under a nondiscretionary duty to modify the State-specific instructions of the Federal Form as requested by Plaintiffs. The present Motion for Relief hereby incorporates by reference these filings, and the arguments and authorities contained therein.

A. The NVRA must be interpreted as allowing the States to determine what information is necessary to enable State election officials to assess the eligibility of Federal Form applicants.

In reviewing an agency's interpretation of a statute, a court must first "determine 'whether Congress has directly spoken to the precise question at issue.'" *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Housing & Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009) (quoting *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). If congressional intent as to the interpretation of the statute is clear and unambiguous, the court need not proceed any further in its analysis, as it must give effect to the statute as Congress intended. *See, e.g., id.* at 1240; *Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007). "To ascertain whether Congress had an intent on the precise question at issue, courts should employ traditional tools of statutory construction [which] include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004) (internal citations and quotation marks omitted).

To determine whether congressional intent is unambiguous, a court must first look to the plain language of the statute. *See, e.g., United Keetoowah Band*, 567 F.3d at 1241; *Wedelstedt*, 477 F.3d at 1165. The NVRA provides that the Federal 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). The clear implication of that language is that state election officials, who are responsible for assessing the eligibility of applicants, will determine what information is necessary to determine eligibility. The EAC Decision incorrectly concluded that it is for the EAC, and not the States, to determine what information is necessary. EAC Decision at 22-23, 26.

In their initial Brief (ECF No. 17) and Reply Brief (ECF No. 101), Plaintiffs provided legal arguments and authorities showing that, in order to construe the NVRA in a constitutional manner, § 1973gg-7(b)(1) must be interpreted as allowing the States to determine what information is necessary to enable State election officials to assess the eligibility of Federal Form applicants. See ECF No. 17 at 7-21, ECF No. 101 at 7-20. The Plaintiffs incorporate herein those arguments and authorities, and submit that they conclusively show that Plaintiffs are entitled to relief on constitutional principles alone. In addition, Plaintiffs are entitled to relief under the NVRA's plain language and the rules of statutory construction.

1. The Court must interpret the NVRA as a whole to determine congressional intent.

Should the court determine that the plain meaning of the statute's text alone does not demonstrate the clear and unambiguous intent of Congress, the court must also look to the statute's "structure, purpose, history, and relationship to other statutes" to determine congressional intent before deciding that the statute is ambiguous. *Habert*, 391 F.3d at 1147.

When other sections of NVRA are read in conjunction with the section at issue here, congressional intent becomes even clearer. In addition to prescribing the contents of the Federal Form, the NVRA requires that "[e]ach State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license." 42 U.S.C. § 1973gg-3(c)(1). Regarding the contents of the voter registration application portion of an application for a State driver's license, the voter registration application

"may require only the minimum amount of *information necessary to… enable State election officials to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-3(c)(2)(B) (emphasis added). The language from § 1973gg-3(c)(2)(B) is nearly identical to that found in § 1973gg-7(b)(1), and yet the NVRA does not give the EAC any authority to regulate the contents of the voter registration application portion of the States' driver's license application form. *Cf. Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1131 (10th Cir.2011) (quoting *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994)) ("A core tenant of statutory construction is that 'identical words used in different parts of the same act are intended to have the same meaning'"). Rather, the States are left to develop the voter application portion of their driver's license application forms under § 1973gg-3(c)(2)(B) as they deem necessary, without any second-guessing by the federal government. The United States Supreme Court adopted this interpretation of § 1973gg-3(c)(2) in *Young v. Fordice*, 520 U.S. 273 (1997), where the Court noted that the driver's license application portion of the NVRA "still leaves room for policy choice. The NVRA does not list, for example, all the other information that the State may or may not provide or request." *Id.* at 286.

Similarly, § 1973gg-4(a)(2) recognizes the States' right to develop and use their own forms that meet all the criteria in § 1973gg-7(b) for the registration of voters in elections for Federal office. Section 1973gg-7(b)(1), authorizes the States to include information "necessary to enable the appropriate State election official to assess the eligibility of the applicant." As recognized in *Arizona v. Inter Tribal Council of Ariz., Inc.*, __ U.S. __, 133 S. Ct. 2247 (2013) ("*Inter Tribal Council*"), "[t]hese state-developed forms may require information the Federal Form does not. (For example, unlike the Federal Form, Arizona's registration form includes Proposition 200's proof-of-citizenship requirement)." 133 S. Ct. at 2255. Thus, the States also

have the sole prerogative under § 1973gg-4(a)(2) to determine what information is necessary to enable the assessment of applicants' eligibility.

Despite the clear meaning of §§ 1973gg-3(c)(2)(B) and 1973gg-4(a)(2), which allow the States to determine what information is necessary to assess applicants' eligibility, the EAC Decision misconstrued the identical language in § 1973gg-7(b)(1) as conferring upon the EAC the discretion to determine what information is necessary to assess that same eligibility. However, "[a]bsent some very good reason to conclude that Congress intended [the identical language] to have two different meanings within the very same act, such a tortured interpretation should be avoided." *Wyodak Res. Dev't Corp.*, 637 F.3d at 1131.

Further, the NVRA explicitly forbids the States from including "any requirement for notarization or other formal authentication" on their State-developed registration forms under § 1973gg-4(a)(2)[1]. Generally, under the doctrine of *expressio unius est exclusio alterius*, a statute that explicitly prohibits one thing does not implicitly prohibit another. *Bruesewitz v. Wyeth, LLC*, __ U.S. __, 131 S. Ct. 1068, 1076 (2011) (such a legislative decision represents "deliberate choice, not inadvertence"). Therefore the EAC cannot interpret the NVRA to confer upon itself the power to prohibit additional requirements.

2. The NVRA's legislative history does not support the EAC's interpretation of the NVRA.

The EAC Decision asserts that the NVRA's legislative history supports its determination that the NVRA authorizes the EAC to determine what information is necessary to assess eligibility under § 1973gg-7(b)(1) and prohibits the States from requiring evidence of

[1] The EAC Decision concludes that "requiring additional proof of citizenship would be tantamount to requiring 'formal authentication' of an individual's voter registration application." EAC Decision at 21, FN 9. However, requiring an applicant to provide satisfactory evidence of eligibility is simply not "authentication," which refers to proving that the submitted application is in fact that of the applicant. *See* BLACK'S LAW DICTIONARY 142 (8th ed.2004) (defining "authentication" as "1. Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved. 2. Specif., the assent to or adoption of a writing as one's own"). *See also* BLACK'S LAW DICTIONARY 142 (8th ed.2004) (defining "authenticate" as "1. To prove the genuineness of (a thing). 2. To render authoritative or authentic, as by attestation or other legal formality.")

citizenship. In support, the EAC Decision cites H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.), wherein a conference committee rejected a Senate amendment to the NVRA bill that would have provided that nothing in the NVRA shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant. EAC Decision at 20. However, the EAC Decision ignores other relevant portions of the NVRA's legislative history suggesting that Congress recognized the States' rights to require such documentation. For example, the bill's sponsor, Senator Ford, objected to the same proposed Senate amendment on the ground that it was "redundant" since "there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship." 139 Cong. Rec. 5099. So, the legislative history cited by the EAC is distorted.

Further, the House Report stated that "[t]he Committee is particularly interested in ensuring that election officials continue to make determinations as to the applicants' eligibility, such as citizenship, as are made under current law and practice," and specified that "[a]pplications should be sent to the appropriate election official for the applicant's address in accordance with *the regulations and laws of each State*." H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993) *reprinted at* 1993 U.S.C.C.A.N 105, 112 (emphasis added). Furthermore, the House Report specifically stated that the "States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill." *Id.* at 113.

Thus, the legislative history cited in the EAC Decision is incomplete and not dispositive. In any event, legislative history is only helpful if it explains something that is in the law, not something that is not in the law. The Supreme Court has made clear that little can be inferred from a congressional omission. *Brown v. Gardner*, 513 U.S. 115, 121 (1994) ("[C]ongressional silence lacks persuasive significance") (internal quotation marks omitted). If the point to be made is not anchored in the text of the statute, then it is entitled to no weight. *See Shannon v. United States*, 512 U.S. 573, 583 (1994).

3. Nothing in the NVRA indicates the EAC was granted the authority to undertake the quasi-judicial functions it undertook in rendering the EAC Decision.

The NVRA must be interpreted as allowing the States, and not the EAC, to determine the information that is necessary to assess eligibility under § 1973gg-7(b)(1) because the NVRA contains no statutory provisions delegating to the EAC the authority to undertake the quasi-judicial and high-level policymaking functions it undertook in rendering the EAC Decision. "An agency's power is not greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The APA provides that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be… in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). This subsection of the APA "authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 876 (8th Cir.2013) (citations omitted) (hereinafter "*Iowa League*"). When analyzing a challenge to agency action under § 706(2)(C) of the APA, the court utilizes the framework from *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), under which:

> [A] reviewing court must first ask whether Congress has directly spoken to the precise question at issue… If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress... But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible... In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning–or ambiguity–of certain words or phrases may only become evidence when placed in context… In addition, [the court] must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (internal citations omitted) ("*Brown & Williamson*"). Likewise, "a court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course

of the statute's daily administration." *Brown & Williamson*, 529 U.S. at 159 (quoting Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L. Rev. 363, 370 (1986)).

The NVRA did not confer upon the EAC the authority to adjudicate Plaintiffs' requests in quasi-judicial fashion, nor to engage in the high-level policymaking functions it undertook in rendering the EAC Decision. Nothing in the NVRA suggests that the EAC is to receive "evidence," determine the scope of the States' constitutional rights, make broad policy determinations, or make findings of fact. Rather, the NVRA's delegation is extremely narrow, contained in one subsection of one statute of the NVRA, § 1973gg-7(a)(1), and referring to only two responsibilities (to develop the Federal Form and to submit certain reports to Congress) as enumerated in two other subsections, § 1973gg-7(a)(2) and (3). Comparing the magnitude of the questions presented to the narrow delegation of rulemaking authority in § 1973gg-7(a)(1), and placing that subsection in the context of the entire NVRA, it is clear that Congress did not delegate to the EAC the authority to engage in the quasi-judicial functions that it utilized to render the EAC Decision. Moreover, broad policy-making authority is required in order to define what information is "necessary" to assess eligibility as that phrase is used in § 1973gg-7(b)(1). Consequently, the NVRA cannot be read as conferring upon the EAC the authority to determine what information is necessary to assess eligibility, but must be interpreted as reserving that authority to the States. The EAC Decision is therefore *ultra vires*, and must be set aside under the APA, 5 U.S.C. § 706(2)(C).

B. The EAC's own regulations require the EAC to include state-specific instructions that reflect the States' respective voter qualification and registration.

The EAC Decision was unlawful, arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(1) and (2)(A), because the EAC Decision failed to follow its own regulations. Generally speaking, an agency's interpretation of its own regulation is to be given deference. *Utah Envtl Congress v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007). However, an agency's interpretation of its own regulation must be rejected when it is

unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning. *Id.* (citation omitted). It is arbitrary, capricious, an abuse of discretion, and not in accordance with law for an agency to fail to comply with its own regulations. *Via Christi Reg'l Med. Center, Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (citations omitted) ("*Via Christi*"). Indeed, courts "must… be careful not to disrupt the plain language of the regulation itself," and if an agency "wants to take a position that is inconsistent with existing regulations, then [the agency] must promulgate new regulations under the notice-and-comment provisions of the APA." *Id.* at 1272-73 (citations omitted). Indeed, deferring to an agency's interpretation of an unambiguous regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cnty*, 529 U.S. 576, 588 (2000).

The EAC's regulation states, "[t]he 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.*" 11 C.F.R. § 9428.3(b) (emphasis added). This regulation unambiguously uses mandatory language requiring the EAC to include state-specific instructions that reflect the respective voter qualification and registration laws of the States.[2]

Plaintiffs' laws require voter registration applicants utilizing the Federal Form to provide satisfactory proof-of-citizenship before being registered to vote in any election, including elections for Federal office. K.S.A. 25-2309(a) and (l); A.R.S. § 16-166(F). Yet, the EAC determined that 11 C.F.R. § 9428.3(b) did not obligate the EAC to include Plaintiffs' requested instructions on the Federal Form. After noting that the NVRA only concerns voter registration for elections for Federal office, the EAC Decision states:

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[2] The EAC's regulation is consistent with its predecessor, the Federal Election Commission's (FEC) implementation guidelines. The National Clearinghouse on Election Administration, Implementing the National Voter Registration Act of 1993: Requirements, Isssues, Approaches, and Examples (Jan. 1, 1994) *available at http://www.eac.gov/assets/1/Page?Implementing%20the%20NVRA%201993%20Requirements%20Issues%20Approaches%20Examples%20Jan%20Jan%201%201994.pdf*. In the guidelines, the FEC highlighted Congress's desire to avoid a construction of the NVRA that would displace the role of state officials with respect to voter registration.

> 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.

EAC Decision at 45. Thus, the EAC essentially determined the regulation to be inapplicable because the EAC itself believes Plaintiffs' proof-of-citizenship requirement to be unnecessary. But the regulation requires the EAC to include instructions reflecting the States' voter registration requirements regardless of the EAC's whim. The Plaintiffs' statutory proof-of-citizenship requirement is not any less of a requirement simply because the EAC does not think the requirement is necessary. Under § 9428.3(b), the EAC must include the requirement on the Kansas- and Arizona-specific instructions of the Federal Form. The EAC's determination to the contrary was arbitrary, capricious, an abuse of discretion, and not in accordance with law, and should therefore be set aside.

II. Even if the EAC has discretion to decide whether the grant Plaintiffs' requests, the EAC Decision is *ultra vires* because the EAC Decision is the type of agency action required to be approved by three commissioners.

The EAC Decision is also *ultra vires* because it was rendered by the EAC's Acting Executive Director, Defendant Alice Miller (hereinafter "Miller"), and because it was rendered at a time that the EAC had no commissioners. Any action the EAC is authorized to carry out may be carried out only with the approval of at least three of its members. 42 U.S.C. § 15328. This includes the responsibility of developing and maintaining the Federal Form pursuant to the NVRA. 42 U.S.C. § 15532.

At the time of the EAC Decision, the EAC had no commissioners. Nevertheless, Miller determined that "EAC staff" (i.e., Miller herself) had the authority to act on all state requests for modifications to the state-specific instructions of the Federal Form. EAC Decision at 15. As previously argued by Plaintiffs, the EAC is under a nondiscretionary duty to include state-

specific instructions reflecting the voter qualification and registration laws of the States. Thus, Plaintiffs agree that Miller could have performed the nondiscretionary and ministerial duty of including the state-specific instructions requested by Plaintiffs.

Instead, in making her determination, Miller engaged in a quasi-judicial analysis of the facts and evidence submitted, relying on a policy adopted by three EAC commissioners in 2008 entitled, "The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission" (hereinafter "the R&R Policy"). EAC Decision at 15; AC000065-72. Notably, the R&R Policy itself demonstrates that Miller was without authority to issue the EAC Decision.[3]

The R&R Policy states that the "Commissioners shall take action in areas of policy," recognizing that such action may be carried out only with the approval of at least three commissioners. EAC000065. The R&R Policy states, "[p]olicy is a high-level determination, setting an overall agency goal/objective or otherwise setting rule, guidance or guidelines at the highest level… The EAC only makes policy through the formal voting process." *Id*. Additionally, the R&R Policy requires the approval of three commissioners for the "[a]doption of NVRA regulations, voluntary guidance under HAVA Section 311, Voluntary Voting System Guidelines, program manuals and other policies of general applicability that impact parties outside of the EAC." EAC000066. Conversely, the R&R Policy purports to delegate authority to the Executive Director to "[m]aintain the [Federal Form] consistent with the NVRA and EAC Regulations and policies." EAC000071. The EAC Decision was a "high-level determination," and the R&R Policy thus required such a decision to be approved by three commissioners.

Miller incorrectly concludes that she is following EAC policy determinations when she rejected Arizona's and Kansas's requests to include their proof-of-citizenship requirements in the state-specific instructions. EAC Decision at 22-23. Miller states that the Commission members'

[3] Furthermore, before the Court remanded this matter to the EAC, Miller stated that the EAC could not make such a decision for the very reason that it "appear[ed] to raise issues of broad policy concern to more than one state" and therefore had to be deferred until there was a quorum. EAC000048, EAC000111.

two-to-two tie vote in 2006, which resulted in the Commission being unable to take action on Arizona's request that the Commission include its proof of citizenship requirement in the state-specific instructions, "established a governing policy for the agency." EAC Decision at 23. As explained above, the Commission could not establish such a governing policy without the concurrence of three members of the Commission, which it did not have.

Likewise, the NVRA provides that the EAC shall "prescribe regulations as are necessary" to maintain the Federal Form. 42 U.S.C. § 1973gg-7(a)(1) and (a)(2). In promulgating 11 C.F.R. § 9428.3(b), the EAC established a policy that it shall include "information regarding voter eligibility and registration requirements" in the state-specific instructions. Under this policy, the staff must include state requirements in the state-specific instructions as a ministerial responsibility. But, because the EAC Decision is contrary to 11 C.F.R. § 9428.3(b), the R&R Policy required the EAC Decision to be approved, if at all, by three commissioners.

In any event, the R&R Policy cannot circumvent the statutory requirement that the EAC develop the Federal Form only upon the approval of at least three members. 42 U.S.C. § 15328. "When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate 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) (citations omitted). Here, however, there is affirmative evidence of contrary congressional intent. The EAC's quorum requirement utilizes strict language, requiring a three-member supermajority to take any action. Likewise, the EAC can consist of no more than two members affiliated with the same political party. 42 U.S.C. § 15323(b). These statutory restrictions on the exercise of the EAC's authority show clear Congressional intent against subdelegation.

The R&R Policy's subdelegation is also invalid because of the nature of the authority it purports to subdelegate. The EAC's responsibility to develop the Federal Form is one of only four explicit statutory responsibilities under the NVRA, § 1973gg-7(a)(1)-(4). Yet Miller

fulfilled this core NVRA responsibility with no supervision. See *U.S. Telecom Ass'n*, 359 F.3d at 565 (one reason for presumption of validity of subdelegation to federal officer or agency is that "responsibility–and thus accountability–clearly remain with the federal agency"). Congress would not have restricted the EAC's authority as described above if it intended to allow subdelegation to an acting executive director. *See New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674, 687 (2010); 42 U.S.C. § 15328. To the extent the R&R Policy purported to subdelegate quasi-judicial authority to Miller to maintain the Federal Form, that subdelegation was not supported by statutory authority and the EAC Decision is therefore *ultra vires.*

III. Even if the EAC could exercise discretion without a quorum of commissioners, the EAC Decision is not in accordance with law because it contains findings and conclusions without articulating a standard of proof.

An agency's failure to properly articulate or apply the correct legal standard underlying its final agency action requires reversal. *See Mountain Side Mobile Estate P'ship v. Sec'y of Housing & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995) (holding that, when reviewing an agency's decision, "[t]he failure to apply the correct legal standard or to provide this court with a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal") (internal citations and quotation marks omitted).

Federal courts have refused to uphold agency action if a law or regulation does not set forth the requisite standard of proof to be applied and the agency has failed to sufficiently articulate the standard of proof that it applied to evaluate the evidence. *See Mori v. Dep't of Navy*, 731 F. Supp. 2d 43, 49 (D.D.C. 2010) (finding that, because the agency failed to identify the standard of proof it used, "the court is unable to evaluate what standard of proof the [agency] applied; as a consequence, it is also unable to determine whether the [agency's] chosen standard was appropriate or whether the [agency] properly applied that standard."). Without an articulated standard of proof, a reviewing court must not uphold an agency's action.

Because Congress did not intend for the EAC to be an agency empowered to conduct fact-finding related to a State-specific instruction, the NVRA does not articulate a standard of proof. Nevetheless, the EAC decision purports to weigh evidence, make factual findings, and draw conclusions based on its factual findings. EAC Decision at 29-30, 31, 33, 36, 37, 40, 42, and 43. However, the EAC Decision does not articulate the standard of proof that Miller applied when she was making such findings and conclusions. Instead, the EAC Decision contains statements such as:

> 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. *Id.* at 29-30 (emphasis added).
>
> The above methods *appear* to provide effective means for identifying individuals whose citizenship status may warrant further investigation. *Id.* at 40 (emphasis added).
>
> Such burdens do not enhance voter participation, and they *could* result in a decrease in overall registration of eligible citizens. *Id.* at 42 (emphasis added).
>
> 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. *Id.* at 43 (emphasis added).

The above statements demonstrate that not only did the EAC Decision fail to articulate a standard of proof, but in many instances it failed to apply any standard at all. The EAC Decision eviscerates Plaintiffs' constitutional authority to establish and enforce voter qualifications. Such an invasion into a state's sovereignty cannot be based on a mere appearance or possibility.

IV. Even if the EAC could exercise discretion without a quorum of commissioners, the EAC abused its discretion, and its decision was arbitrary and capricious.

A reviewing court may set aside an agency action if it finds the action to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency:

> (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1273 (10th Cir. 2013) (quotation omitted).

A. The EAC acted arbitrarily and capriciously by ignoring or discounting relevant evidence submitted by Plaintiffs while readily adopting evidence submitted by the Intervenors.

The EAC failed to evenhandedly evaluate all of the evidence submitted by the parties. Instead, Acting Executive Director Miller ignored, discounted, and misconstrued relevant evidence submitted by Plaintiffs, while at the same time readily adopting unsupported assertions submitted by the Intervenors. Therefore, the EAC Decision was arbitrary and capricious.

1. The EAC Decision ignored, discounted, and misconstrued evidence submitted by Arizona.

The EAC Decision began with a summary of the history of the respective States' requests. EAC Decision at 1-5. That summary lacks some important information and includes some improper inferences. First, the EAC Decision incorrectly implies that private parties filed their lawsuits against Arizona after the EAC's tally vote and further implies that then-Arizona Secretary of State Jan Brewer repeatedly "protest[ed]" the EAC's decision without a basis for seeking reconsideration. *Id.* at 1-2. The full and correct chronology of events, however, demonstrates that Secretary Brewer had reason for her repeated requests.

On December 12, 2005, Arizona first requested inclusion of the proof-of-citizenship requirement in Arizona's state-specific instructions based on its newly enacted citizen initiative Proposition 200 ("Prop 200"). EAC000002. On March 6, 2006, then-Executive Director Thomas Wilkey, on behalf of the Commission, denied Arizona's request. EAC000002-04. On March 13, 2006, Secretary Brewer wrote to the then-Chairman, Paul DeGregorio, to inform him

that she and the Arizona Attorney General's Office disagreed with the conclusion that the March 6 letter conveyed and that it provided questionable legal support for that conclusion. EAC000007-08. Secretary Brewer also provided additional information that she had not previously provided to the EAC, that is, that the Department of Justice had expressed no objection to Prop 200 through the preclearance review process. *Id.*

On May 9, 2006, a group of plaintiffs, many of which are Intervenors in this matter, sued the State of Arizona and election officials from each of its fifteen counties in the U.S. District Court for the District of Arizona in *Gonzalez v. State of Arizona*, No. CV06-1268-PHX-ROS. On May 24, 2006, a second group of plaintiffs, again many of which are Intervenors here, sued Secretary Brewer in the same court in *Inter Tribal Council of Arizona, Inc. v. Brewer*, No. CV06-1362-PCT-JAT. On June 6, 2006, those two cases were consolidated under the *Gonzalez* case number. The court heard oral argument on the plaintiffs' motion for temporary restraining order against implementation of Prop 200 and denied that motion on June 19, 2006. *See* Excerpted Docket for *Gonzalez* (hereinafter "Gonzalez Docket"), D. Ariz. Cause No. CV06-1268 at ECF No. 68 attached hereto; *see also* Declaration of Ken Bennett, ECF 21, at ¶ 13.

On the very next day, Secretary Brewer wrote again to the EAC and specifically noted that the district court had denied the motion for temporary restraining order, holding that the NVRA did not preempt Prop 200's proof-of-citizenship requirement. EAC000013-16. Thereafter, the Commission divided two-to-two on Arizona's request. EAC000020. This meant that no action could be taken under U.S.C. § 15328, which requires approval of at least three Commissioners.

The EAC Decision again improperly slanted the evidence or simply ignored evidence when discussing Arizona's position that the Federal Form's sworn statement is insufficient. The EAC suggested that Arizona's sole source of support for this argument is U.S. Supreme Court Justice Scalia's statement at oral argument. EAC Decision at 29. While Justice Scalia's

statement is correct, Arizona also provided District Court Judge Silver's factual findings and legal conclusions (hereinafter "the 8/20/08 Order"), denying the plaintiffs' motion for permanent injunction in the *Gonzalez* case. EAC001651-99. Other parties also submitted those same findings and conclusions as part of their submissions to the EAC during the public comment period. EAC000839-87, 1298-346.

The district court held a six-day bench trial to determine whether to permanently enjoin enforcement of Prop 200. EAC001651-52; Gonzalez Docket at ECF Nos. 942, 945, 967, 975, 978, and 982. The *Gonzalez* plaintiffs asserted that Prop 200's proof-of-citizenship requirement violated the Equal Protection Clause, First Amendment, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq. EAC001652. The court denied relief on all of the claims. EAC001679-99. In doing so, the court held that Prop 200 serves the important governmental interests of preventing voter fraud and maintaining voter confidence. EAC001684-85. The court then stated that "[b]ecause [p]laintiffs have not demonstrated that Proposition 200 is excessively burdensome, the State's important regulatory interests are [] sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." EAC001685 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008)).

In the August 20, 2008 Order, the court summarized all of the evidence submitted over a six-day bench trial. EAC001652-77. The court noted that 208 individuals in Pima and Maricopa Counties had their voter registrations cancelled after they swore under oath to the respective jury commissioners that they were not citizens.[4] EAC001666. This evidence demonstrates that for at least 208 individuals in two of Arizona's fifteen counties, the threat of a conviction for perjury was not enough to prevent them from falsely declaring their non-citizenship in order to get out of

[4] The EAC Decision, at 39, noted the existence of this evidence as a suggestion for enforcement opportunities, but disregarded the same evidence when talking about Arizona's determination that an oath is insufficient.

participating in jury service. For this, and other reasons, Arizona citizens initiated and voted in favor of Prop 200 to require affirmative proof of citizenship, not just a sworn statement, in order to register to vote. The EAC Decision ignores this evidence.

Further, the EAC Decision and several of the voter advocacy groups opposing Plaintiffs' requests in their public comments to the EAC cited the 8/20/08 Order for the statements that over 30,000 people were initially unable to register because of Proposition 200's requirement; that subsequently approximately 11,000 of those applicants were able to register successfully; and that approximately 20% of the remaining 20,000 unsuccessful applicants were Latino. EAC Decision at 41; EAC001664, -717, -749, -772, -904, -1461. Because it did not support the rejection of Plaintiffs' request, neither the EAC Decision nor the advocacy groups bothered to include the court's conclusion after receiving *all of the evidence*: The *Gonzalez* plaintiffs failed to demonstrate "that the persons rejected [those same 20,000 individuals] are in fact eligible to vote." EAC001682.

2. The EAC Decision ignored and discounted evidence submitted by Kansas.

The EAC concluded that Kansas failed "to establish that the registration of noncitizens is a significant problem … sufficient to show that [Kansas], by virtue of the Federal Form, currently [is] precluded from assessing the eligibility of Federal Form applicants. EAC Decision at 33. In drawing this conclusion, Miller compared the total number of registered voters in Kansas as of January 2013 (1,762,330), to the number of noncitizens that Kansas identified as having registered to vote or attempted to register to vote (21). *Id*. at 34. Miller then summarily determined that the number of noncitizens who registered to vote or attempted to register to vote was insignificant. *Id*.

However, Kansas submitted an affidavit by Brad Bryant, Kansas Elections Director, that included a statement explaining that Kansas has very few tools to identify noncitizens after they are registered to vote. EAC000620. Mr. Bryant further states that the number of noncitizens

who have registered to vote is likely to be much higher than the number of instances reported in the affidavit. *Id.* In another affidavit, Mr. Bryant provides a statement explaining that the only means of effectively ensuring that voter registration applicants are citizens is to obtain proof-of-citizenship at the time of registration. EAC000616. The EAC Decision contains no indication that acting Executive Director Miller took these statements into consideration when she concluded that noncitizens registering to vote in Kansas is not a significant problem.

3. The EAC readily adopted conclusory statements submitted by the Intervenors.

The EAC found that "granting the State's requests would likely hinder eligible citizens from registering to vote in federal elections." EAC Decision at 42. This finding was based on multiple statements submitted by the Intervenors and other commenters. *Id.* Such comments asserted that some citizens lack the required proof-of-citizenship documents and will therefore be prevented from registering to vote in federal elections. EAC001821-23, -1465-71, -771-73, -1563, -705, -895, -901-07, -1620, -1804; -1839; -1601, -1603. However, the majority of the comments simply assert that eligible citizens will be unable to register to vote without identifying any eligible applicants that have been denied the right to vote. Indeed, the commenters only identify one citizen that has allegedly been unable to register to vote. EAC001470.

Furthermore, the EAC Decision refers to the number of voter registration applicants in Arizona and Kansas who have submitted applications without proof of citizenship as evidence that proof-of-citizenship requirements unduly hinder the voter registration process. EAC Decision at 41-42. However, the EAC failed to consider such numbers in the appropriate context. In Kansas, the total number of voter registration applicants from January 1, 2013 to January 21, 2014 was 72,999. Bryant Affidavit at ¶ 2. 52,035 of those 72,999 have already provided proof-of-citizenship. *Id.* at ¶ 3. Furthermore, roughly 7,700 additional applicants will become registered pursuant to the Kansas Secretary of State's diligent efforts to obtain proof-of-

citizenship. *Id.* at ¶ 4. Therefore, approximately 81% of all individuals who have submitted an application since January 1, 2013, have or will shortly become registered to vote. The remaining 19% have the right to take as long as they want before faxing, emailing, or sending their document in. But the fact that they have delayed does not demonstrate any hindrance.

B. The EAC acted arbitrarily and capriciously by basing its action on incorrect conclusions.

The States possess the exclusive authority to establish and enforce voter qualifications. *Inter Tribal Council*, 133 S. Ct. at 2258-59. Nevertheless, the EAC Decision concluded that Arizona and Kansas have alternative means by which they can enforce their voter qualifications and that therefore the EAC has discretion to enforce *State* voter qualifications. EAC Decision at 27, 36. This interpretation of "necessary" under § 1973gg-7(b)(1) is fallacious because it holds that no requirement can be necessary when unreliable alternative means of obtaining the information exist. Finally, the EAC cannot have discretion to enforce State voter qualifications because the Constitution does not confer such a power on the federal government. *Inter Tribal Council*, 133 S. Ct. at 2258-59.

Respectfully submitted this 31st day of January, 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 31st day of January, 2014, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

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