No. _____

In the Supreme Court of the United States

KRIS W. KOBACH, Kansas Secretary of State;
MICHELE REAGAN, Arizona Secretary of State;
STATE OF KANSAS; STATE OF ARIZONA,
Petitioners

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court of appeals held that the U.S. Election Assistance Commission ("EAC") did not abuse its discretion in denying Arizona's and Kansas's requests that the EAC modify the federal mail voter registration form ("Federal Form") to include their state law requirements that registration applicants provide evidence of citizenship in the state-specific instructions that accompany the Federal Form. The questions presented are the following:

1. Whether Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution require the EAC to defer to the States' determination that provision of documentary evidence of citizenship is necessary to enforce the States' voter qualifications.

2. Whether Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution permit a dual voter rolls system in which some voters who are qualified to vote for federal office holders are not also qualified to vote for those "in the most numerous branch of the state legislature."

PARTIES TO THE PROCEEDINGS

Petitioners are the State of Kansas, the State of Arizona, the Kansas Secretary of State Kris W. Kobach, and the Arizona Secretary of State,[1] and were the plaintiffs-appellees in the court below. Respondents, the United States Election Assistance Commission and the acting Executive Director and Chief Operating Officer of the United States Election Assistance Commission Alice Miller, were defendants-appellants in the court below. Respondents, Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; Steve Gallardo; Project Vote, Inc.; League of Women Voters of the United States; League of Women Voters of Arizona; League of Women Voters of Kansas; Valle del Sol; Southwest Voter Registration Education Project; Common Cause; Chicanos por La Causa, Inc.; Debra Lopez, were defendant intervenors-appellants in the court below.

[1] Michele Reagan is the current Arizona Secretary of State and is substituted for Ken Bennett, the former Arizona Secretary of State, under Supreme Court Rule 35.3.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of Kansas, State of Arizona, Kansas Secretary of State Kris W. Kobach, and Arizona Secretary of State Michele Reagan, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order denying rehearing is not reported and reproduced in the appendix ("App.") hereto at App. 131. The opinion of the Tenth Circuit is reported at 772 F.3d 1183 and reproduced in the appendix hereto at App. 1-31. The opinion of the District Court for the District of Kansas is reported at 6 F. Supp.3d 1252 and reproduced at App. 32-70. The Election Assistance Commission memorandum denying Petitioners' request is reproduced at App. 71-130.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 7, 2014. The Petitioners timely filed for Panel Rehearing on December 22, 2014. The Tenth Circuit denied Panel Rehearing on December 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 1 provides that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Article I, Section 4, Clause 1 provides that "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The Seventeenth Amendment to the Constitution provides that "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."

Arizona Revised Statute § 16-166(F) provides that

> The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
>
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

Kansas Statutes Annotated § 25-2309(l) provides that

The 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. Evidence of United States citizenship as required in this section will be satisfied by presenting one of the documents listed in paragraphs (1) through (13) of subsection (l) in person at the time of filing the

application for registration or by including a photocopy of one of the following documents with a mailed registration application. After a person has submitted satisfactory evidence of citizenship, the county election officer shall indicate this information in the person's permanent voter file. Evidence of United States citizenship shall be satisfied by providing one of the following, or a legible photocopy of one of the following documents:

(1) The applicant's driver's license or nondriver's identification card issued by the division of vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship;

(2) the applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or secretary of state;

(3) pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport;

(4) the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the

certificate of naturalization is verified with the United States bureau of citizenship and immigration services by the county election officer or the secretary of state, pursuant to 8 U.S.C. § 1373(c);

(5) other documents or methods of proof of United States citizenship issued by the federal government pursuant to the immigration and nationality act of 1952, and amendments thereto;

(6) the applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number;

(7) the applicant's consular report of birth abroad of a citizen of the United States of America;

(8) the applicant's certificate of citizenship issued by the United States citizenship and immigration services;

(9) the applicant's certification of report of birth issued by the United States department of state;

(10) the applicant's American Indian card, with KIC classification, issued by the United States department of homeland security;

(11) the applicant's final adoption decree showing the applicant's name and United States birthplace;

(12) the applicant's official United States military record of service showing the applicant's place of birth in the United States; or

> (13) an extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

Other pertinent provisions of Title 52 of the United States Code are reproduced in the Appendix.

INTRODUCTION

This Petition concerns Kansas and Arizona's endeavor to enforce their state registration laws by following this Court's guidance in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) ("*ITCA*"). In *ITCA*, this Court held that the phrase "accept and use" in the National Voter Registration Act ("NVRA") "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." *Id.* at 2260. Therefore, no State (in that instance Arizona) could "reject" a Federal Form that was properly completed. *Id.* at 2258-60. At issue was Arizona's law that requires voter registration applicants to provide satisfactory evidence of citizenship at the time of registration. Arizona Revised Statutes ("A.R.S.") § 16-166(F). *ITCA* did not invalidate this Arizona law and, indeed, specifically held that "Arizona may . . . request anew that the [U.S. Election Assistance Commission] EAC include [its evidence-of-citizenship] requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedures Act." *ITCA*, 133 S. Ct. at 2260.

In 2011, Kansas enacted a law similar to A.R.S. § 16-166(F), Kansas Statutes Annotated ("K.S.A.") § 25-

2309, requiring voter registration applicants to provide satisfactory evidence of citizenship. Arizona and Kansas both followed this Court's roadmap laid out in *ITCA* and requested that the EAC modify the Federal Form to include the individual States' evidence-of-citizenship requirements in the state-specific instructions. The EAC then refused to make the requested modifications, declaring that the States' requirements were not "necessary." App. 105-106. While the district court recognized the EAC's refusal as *ultra vires* and ordered the EAC to make the requested changes "immediately," App. 69, the Tenth Circuit reversed the district court, interpreting the NVRA as giving the EAC this extraordinary power to second-guess the States' decision-making in setting and enforcing the qualifications of electors. The Tenth Circuit's holding is at odds with this Court's *ITCA* holding.

The result of the Tenth Circuit's opinion is that in Arizona and Kansas two sets of electors now exist—one set that may vote in both state and federal elections and a second set that may vote in federal elections only. In Kansas, the number of electors that comprise the "federal only" list, that is, electors who used the Federal Form to register, but did not provide proof of citizenship as required by state law, is comprised of 363 individuals. In Arizona, that list currently stands at 1,982 individuals. Certiorari must be granted to ensure that Article I, Section 2, Clause 1 and the Seventeenth Amendment of the Constitution are not violated.

If the writ is not granted, then the federal elections in 2016 will be conducted in a manner that is not

consistent with these constitutional provisions – with separate voter rolls consisting of federal-election-only electors. If it happens that any federal races in the States of Arizona or Kansas are close, then the validity of the votes cast by federal-election-only electors may be decisive in the outcome. If the States are correct, then those electors are not qualified, and their votes should not be counted. Such a constitutional and electoral crisis can and should be averted by granting the writ in this case.

STATEMENT OF THE CASE

1. The NVRA and the EAC.

Congress enacted the NVRA to establish procedures to "increase the number of *eligible* citizens who register to vote" in federal elections, "to protect the integrity of the electoral process," and "to ensure that accurate and current voters rolls are maintained." 52 U.S.C. § 20501 (formerly 42 U.S.C. § 1973gg) (emphasis added).[2] The NVRA requires each State to permit applicants to register to vote in elections for federal office by any of three methods: simultaneously with a driver's license application ("motor voter"), in person, or by mail. *Id.* § 20503. The NVRA regulates the forms that the States must use for voter registration for federal elections. The forms "may require only such . . . identifying information . . .and other information . . . as is necessary to enable the appropriate state election

[2] The NVRA (formerly 42 U.S.C. §§ 1973gg to 1973gg-10) has been reclassified to 52 U.S.C. §§ 20501 to 20511 and the Help America Vote Act ("HAVA") (formerly 42 U.S.C. §§ 15301 to 15545) has been reclassified to 52 U.S.C. §§ 20901 to 21145. The Petition will use the current statutory citations.

official to assess the eligibility of the applicant." *Id.* § 20504 (motor voter); § 20505 (requiring the States to "accept and use" the Federal Form and allowing them to develop a state form, both of which meet the requirements of 52 U.S.C. § 20508(b)). The NVRA also provides that the registration forms "shall include" a statement that "specifies each eligibility requirement (including citizenship);" "contains an attestation of eligibility;" "and requires the applicant's signature under penalty of perjury." *Id.* §§ 20504, 20505, 20508(b). Lastly, the NVRA provides that the forms "may not include any requirement for notarization or other formal authentication." *Id.* §§ 20504, 20505, 20508(b).

The Federal Form consists of the general application instructions, the form itself, and the state-specific instructions. 11 C.F.R. § 9428.3(a). The EAC's regulations mandate that "[t]he state-specific instructions *shall* contain . . . information regarding the state's specific voter eligibility and *registration requirements*." *Id.* (emphasis added). The EAC requires that state election officials report and update it on the State's unique voter registration eligibility requirements for the purpose of including and updating any requirements set forth in the state specific component of the Federal Form. *Id.* § 9428.6.

The EAC has the responsibility of updating the Federal Form, in consultation with the States' chief election officers. *Id.* § 20508(a)(2). The EAC consists of four commissioners whom the President appoints based on the recommendations from the leaders of the majority and minority political parties in both chambers of Congress. 52 U.S.C. § 20923.

The EAC's authority is limited: it has no authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State . . . except to the extent permitted under section 20508(a) of this title." 52 U.S.C. § 20929. Section 20508(a) gives the EAC authority over the Federal Form and to submit reports to Congress. Under 52 U.S.C. § 20928, the Commission may take action with the approval of "at least three of its members."

2. Arizona's Evidence-of-Citizenship Requirement.

In 2004, Arizona voters passed A.R.S. § 16-166(F), which requires applicants to provide evidence of citizenship in order to register to vote. *ITCA*, 133 S. Ct. at 2252. The statute was part of an initiative designed in part "to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day." *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006).

In most instances, applicants can show evidence of citizenship by providing a driver's license number or naturalization number. A.R.S. § 16-166(F). Alternatively, applicants can use copies of birth certificates or passports. *Id.*

After the enactment of A.R.S. § 16-166(F) but before it went into effect, Arizona requested the EAC to include its evidence-of-citizenship requirement on the state-specific instructions for the Federal Form. *Gonzalez v. Ariz.*, 435 F.Supp.2d 997, 999 (D. Ariz. 2006). The then-EAC Executive Director did not

approve Arizona's request because he found that federal law preempted the state law requirement. *Id.*

Before A.R.S. § 16-166(F) went into effect, various plaintiffs challenged the validity of A.R.S. § 16-166(F) claiming, among other claims, that the NVRA preempted the statute. *Id.* The district court denied their request for a temporary restraining order, finding no preemption. *Id.* at 1004. Arizona again requested that the EAC modify its state-specific instructions. *ITCA*, 133 S. Ct. at 2259-60. This time the Commission members voted—two voted in favor of amending the instructions and two voted against it—but took no action to amend Arizona's state-specific instruction. *Id.*

In *ITCA*, this Court held that Arizona could not, consistent with the NVRA's "accept and use" language, reject a Federal Form because the applicant did not provide documentary evidence of citizenship but could renew its request for approval of its state-specific instructions. *Id.* at 2260. Accordingly, Arizona renewed its request to the EAC. App. 35. Acting Executive Director Miller responded, stating that the EAC staff cannot process Arizona's request due to the lack of a quorum on the Commission. *Id.*

3. Kansas's Evidence-of-Citizenship Requirement.

In 2011, while *ITCA* was being litigated, Kansas enacted the "Secure and Fair Elections Act" ("SAFE Act") to amend, among other election provisions, registration requirements in Kansas. K.S.A. § 25-2309. Subsection (l) requires election officials to "accept any completed application for registration, but [provides that] an applicant shall not be registered until the

applicant has provided satisfactory evidence of United States citizenship." It enumerates thirteen different documents that constitute satisfactory evidence of citizenship. *Id.*

The Kansas Secretary of State's Office asked the EAC to modify the Kansas-specific instructions for the Federal Form to include, among other changes, an instruction requiring registration applicants to provide qualifying evidence of citizenship. App. 33. Acting Director Miller responded that the EAC would make some of the requested modifications but postponed the request concerning Kansas's proof-of-citizenship requirement until a quorum was established. *Id.*

After the Court decided *ITCA,* the Kansas Secretary of State renewed Kansas's request for modification of the state specific instructions. *Id.* Miller responded that the EAC must defer Kansas's request, like Arizona's, "until the re-establishment of a quorum." *Id.* at 36.

4. The EAC and District Court Decisions.

After the EAC refused to add Kansas's and Arizona's evidence-of-citizenship requirements, Kansas, Arizona, and their Secretaries of State (collectively "the States") brought suit against the EAC. *Id.* This litigation was suggested by *ITCA* in the event that the EAC refused to make the requested modifications to the state-specific instructions to the Federal Form. 133 S. Ct. 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. *See* 5 U.S.C. § 706(1)"). The States requested that the court order the EAC to modify the state-specific instructions to require applicants to submit evidence of citizenship in accordance with Kansas and Arizona law. *Id.* They argued that the EAC's failure to act violated the APA and that the NVRA was unconstitutional to the extent it authorized the EAC to refuse requirements that the States determined were necessary to enforce their voting qualifications. *Id.*

The district court remanded the matter to the EAC with instructions to render final agency action. *Id.* at 1258. The EAC then issued notice that it would do so and requested public comment on whether it should make the form changes the States demanded.[3] After receiving comments, Acting Executive Director Miller reversed her previous determination that the EAC Commissioners must approve the States' request for modification of the state-specific instructions and now decided that she had the authority to make this determination based on a 2008 Policy that delegated responsibility to the Executive Director to maintain the Federal Form consistent with the NVRA and EAC Regulations and policies. App. 87-95. Miller denied

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[3] The EAC received 423 comments of which over 380 supported the States' request to update the federal form. App. 76-77; *see also* National Mail Voter Registration Form Public Comments *available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=EAC-2013-0004*) (EAC website puts the number of total comments at 427). The EAC did not seek notice and comment when Louisiana previously requested modification to the Federal Form. App. 126-128.

the States' requests.[4] She determined that the Federal Form provides the States with the necessary means for assessing applicants' eligibility, that the States' requested evidence-of-citizenship instructions were not "necessary" to enforce the States' voter qualifications. App. 38, 105-123. The EAC identified "alternative means" that it deemed sufficient to enforce each States' citizenship qualifications. *Id.* at 117-123.

The States filed a Motion for Judgment, asking the district court to review the EAC's decision. *Id.* at 38. The district court granted in part the States Motion and ordered the EAC to add the language requested by the States. App. 69. The court recognized that the States' evidence-of-citizenship requirements implicated "the States' exclusive authority to set voter qualifications" because that authority "necessarily includes the power to enforce those qualifications." *Id.* at 68. However, instead of reaching the question of whether Congress has the authority to preempt the States' evidence-of-citizenship requirements, the court found that the NVRA required the EAC to develop regulations in consultation with the States and that EAC's regulations required the EAC to include state-specific instructions that are necessary to enable the appropriate state election official to assess the eligibility of the applicant. App. 61-64. The court thus held that the EAC was "under a nondiscretionary duty to include the states' concrete evidence requirement in the state-specific instructions on the federal form." *Id.*

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[4] In addition to Kansas and Arizona, the EAC considered and denied Georgia's request that its statutory evidence-of-citizenship requirement, Ga. Code Ann. § 21-2-21(g), be included on its state-specific instructions.

at 68-69 (internal quotations omitted). The district court found that the EAC was required to do so "because the states have established that a mere oath will not suffice to effectuate their citizenship requirement." App. 68. The district court also held that "the EAC's declaration that it alone has the authority to determine what is necessary information is without legal support and is incorrect" in light of *ITCA* characterizing "proof of citizenship as 'information the State deems necessary to determine eligibility.'" App. 67 (quoting *ITCA*, 133 S. Ct. at 2259).

The court of appeals reversed. App. 31. Without addressing the EAC's own inconsistent positions regarding the staff's authority to address States' requests to include evidence-of-citizenship requirements in the state-specific instructions, the court determined that the EAC Commissioners had the authority to sub-delegate its authority to maintain the Federal Form, including rejecting requests for state-specific instructions that pertained to enforcing voter eligibility requirements. *Id.* at 11-20. On the merits, the court concluded that it was "compelled by *ITCA* to conclude that the NVRA preempts Arizona's and Kansas's state laws insofar as they require Federal Form applicants to provide documentary evidence of citizenship to vote in federal elections." *Id.* at 21. In reaching this conclusion, the court ignored the language in the NVRA that requires the EAC to include information that "is necessary to enable the appropriate state election official to assess the eligibility of the applicant" and EAC's regulations that require the EAC to include relevant state-specific instructions. Instead, the court reasoned that this Court had indicated in *ITCA* that the States must

prove to the EAC that documentary evidence of citizenship was necessary to enforce their citizenship qualifications. *Id.* at 23-24.

The court held that the EAC did not abuse its discretion in concluding that the States did not meet "their evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form." *Id.* at 27. The court held that the NVRA granted the EAC broad discretion to determine what information is necessary for state officials to assess voter eligibility. *Id*. at 25, 30-31. The court found that because the EAC had identified "alternatives to requiring documentary evidence of citizenship" that it believed were available to the States "to ensure that noncitizens do not register using the Federal Form," the EAC was under no duty to modify the Federal Form. *Id.* at 27.

Finally, the court rejected the States' argument that under the Qualifications Clause, Congress could not preempt States' laws enabling enforcement of their voter qualifications because it concluded that *ITCA* precluded the argument: "With the Supreme Court's recent precedent squarely against their position, we cannot accept Kobach's and Bennett's contention that states' Qualifications Clause powers trump Congress' Elections Clause powers." *Id*. at 30.

Granting the writ is necessary to remove the roadblock that the Tenth Circuit's opinion creates in the path laid out by this Court in *ITCA* and to ensure that the NVRA is implemented in a manner that comports with Article I, Section 2, Clause 1 and the Seventeenth Amendment of the United States

Constitution. It is also necessary to ensure that the 2016 elections are not conducted with separate voter rolls consisting of electors who are qualified to vote in all elections, versus electors who are qualified to vote in federal elections only – a scenario created by the EAC that plainly contradicts Article I, Section 2, Clause 1 and the Seventeenth Amendment.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Opinion Conflicts with *ITCA* Because It Gives the Federal Government, Not the States, the Authority to Enforce Voter Qualifications.

Certiorari must be granted because the Tenth Circuit Opinion conflicts with *ITCA* by reading the Election Clause as giving Congress the authority to trump a State's decision as to what information is necessary to enforce voter qualifications.

This Court's suggestion in *ITCA* that Arizona should re-request the EAC to modify the Federal Form was born out of the tension between two conclusions reached by this Court. First, this Court concluded that the NVRA required Arizona to "accept and use" the Federal Form regardless of whether it included the proof of citizenship sought by the State. *Id*. at 2257. But second, this Court also concluded that Congress has no power to "prescrib[ing] voter qualifications" or "preclude[] a State from obtaining the information necessary to enforce its voter qualifications." *Id*. at 2258-59. These two conclusions were in obvious tension. The Court suggested this very lawsuit as the way to reconcile these competing conclusions: "Happily, we are spared that necessity [of deciding whether the

NVRA is constitutional], since the statute provides another means by which Arizona may obtain information needed for enforcement." *Id*. at 2259.

This Court apparently expected that the EAC would grant Arizona's request. If not, then the State could take the EAC to court: "[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." *Id.* 2260. That is exactly what Arizona and Kansas did. The reviewing court – the district court below – found that the States had exercised their sovereign authority to make that determination and that the EAC was under a nondiscretionary duty to add the proof-of-citizenship requirement to the Federal Form instructions for those two States. It would have made no sense for this Court to suggest this very lawsuit if the result was to deny the States their right to have the state-specific instructions to the Federal Form modified to reflect state laws regarding proof-of-citizenship.

In *ITCA,* this Court indicated that the doctrine of constitutional avoidance demanded that the NVRA be interpreted to preserve the States' authority to enforce their voter qualifications as they see fit. *Id*. at 2259. But the Tenth Circuit has plowed straight into the constitutional quagmire that this Court sought to avoid. In so doing, the Tenth Circuit has improperly rendered *ITCA* largely nugatory. *See Agostini v. Felton*, 521 U.S. 203, 258 (1997) (Lower "courts must follow the Supreme Court case which directly controls,

leaving to this Court the prerogative of overruling its own decisions.") (Ginsburg, J. dissenting) (citation omitted).

A. The Tenth Circuit Incorrectly Found that the States' Qualification Clause Authority Does Not Trump Congress's Elections Clause Authority.

ITCA made clear that the States possess the sole authority to set the qualifications for voting: "[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *ITCA*, 133 S. Ct. at 2257 (emphasis in original). Indeed, the Court emphasized the clarity of the constitutional line: "'It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'" *Id.* at 2258 (quoting *Oregon v. Mitchell,* 460 U.S. 112, 210 (1970)). Therefore, the Court readily concluded that "[p]rescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *ITCA*, 133 S. Ct. at 2258 (quoting *The Federalist No. 60*, at 371 (A. Hamilton)).

Importantly, *ITCA* also held that the States possess the power to enforce those qualifications. *Id.* ("Since the power to establish voting requirements is of little value without the power to enforce those requirements . . . it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.").

The Elections Clause vests with the States the "default" authority to set the "Times, Places, and Manner" for holding congressional elections and authorizes Congress to preempt the States' authority, except as to the places for choosing Senators. *ITCA*, 133 S. Ct. at 2253 (quoting Art. I, § 4, Cl. 1). Although Congress's Election Clause authority is broad, *Smiley v. Holm*, 285 U.S. 355, 366 (1932), it is a "grant of authority to issue procedural regulations, and not a source of power to . . . *evade important constitutional restraints*," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995).

In reviewing the authority granted to the States and the federal government in these clauses, *ITCA* clarified that it is the State's Qualifications Clause authority (which is more specific) that trumps the general language of the Elections Clause. "One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly." *ITCA*, 133 S. Ct. 2258; *see also id.* at 2266 (Thomas, J. dissenting) ("Article I, § 4, also cannot be read to limit a State's authority to set voter qualifications because the more specific language of Article I, § 2, expressly gives that authority to the States.") (citation omitted).

This construction of the two clauses is consistent with other canons of statutory and constitutional construction. It avoids a reading that would render the Qualifications Clause mere surplusage. It is well established that the Constitution cannot be interpreted to render a "clause 'mere surplusage,' to make it 'form without substance.'" *Cohens v. Virgina*, 19 U.S. 264, 300 (1821) (quoting *Marbury v. Madison*, 5 U.S. 137, 174 (1803)); *see also U.S. v. Munoz-Flores*, 495 U.S. 385,

396-97 (1990). If the Elections Clause trumped the Qualifications Clause, then Congress could simply override any state voter qualification, rendering the Qualifications Clause a nullity.

This construction is also consistent with the Framers' intent. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Dep't*, 476 U.S. 573, 584-85 (1986) ("Our task, then, is to reconcile the interests protected by the two constitutional provisions."). The Elections Clause protects the federal government's interest in ensuring States will hold elections, while the Qualifications Clause protects the Framers' interest in decentralized power, while simultaneously not "render[ing the federal government] too dependent on the State governments." *ITCA*, 133 S. Ct. at 2258 (internal quotations marks omitted). The interplay of the two clauses ensures that federal elections will be held and that any individual who is a qualified elector for the most numerous branch of the state legislature will simultaneously be a qualified elector for congressional elections. *See* Art. I, § 2, Cl. 1; Amend. XVII.

The panel below disregarded this Court's guidance on the subject. Indeed, the panel actually stated that, "The Court did not have to . . . employ canons of statutory construction to avoid" the constitutional doubts raised in *ITCA*. App. 23. It appears that the panel misunderstood this Court's statements on this subject in *ITCA*. Instead of following this Court's holding that the specific trumps the general when those two clauses are in tension, the panel held that the "states' Qualifications Clause powers [do not] trump Congress' Elections Clause powers." App. 30.

B. The Tenth Circuit Opinion Conflicts with *ITCA* by Giving the EAC the Authority to Determine What Information Is "Necessary" for a State to Enforce Its Voter Qualifications.

In *ITCA*, this Court stated that the NVRA should be construed to avoid the constitutional issue that would arise if States were precluded from obtaining information necessary to enforce their voter qualifications. 33 S. Ct. 2258-59. However, the Tenth Circuit misconstrued *ITCA* as holding that the States must prove necessity to the EAC. (App. 27.) The Tenth Circuit's construction rejects the constitutional avoidance doctrine and is at odds with the language of the NVRA, EAC's own regulations, and this Court's guidance in *ITCA*. This Court should grant review because the NVRA should be uniformly interpreted to preserve the States' right to enforce their voter eligibility requirements.

In *ITCA*, this Court strongly suggested that the Federal Form must include what the *State* deems necessary, not what the *EAC* deems necessary, to enforce voter qualifications. "Since, … 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." *Id*. at 2259 (emphasis added).

The NVRA withstood constitutional scrutiny only after the United States conceded before this Court in *ITCA* that the phrase "'may require only' in [52 U.S.C.

§ 20508(b)(1)] means that the EAC 'shall require information that's necessary, but may only require that information." *See ITCA*, 133 S. Ct. at 2260 (citations omitted). Thus, the Court avoided serious constitutional doubt in interpreting this specific provision of the NVRA by accepting the United States' argument that the "validly conferred discretionary executive authority" it had was "properly exercised (as the Government has proposed) to avoid serious constitutional doubt" only when 52 U.S.C. § 20508(b)(1) was read to mean that "necessary information which *may* be required *will* be required." *Id.* (emphasis in original).[5] In other words, the EAC would modify the state-specific instructions of the Federal Form to require information deemed necessary by the States.

This construction – that the States, not the EAC, determine what is necessary – is consistent with NVRA's language. The text of the NVRA provides that the Federal Form "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

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[5] On this point, the *ITCA* avoided answering the statutory question whether in light of other provisions of the NVRA, the EAC was statutorily required to modify the Federal Form, despite the statute's use of the term "may." *ITCA*, 133 S. Ct. at 2259. Instead, the Court accepted the assurance by the United States Government that it would include in the Federal Form necessary information. *Id.*

process." *ITCA,* 133 S. Ct. at 2059 (citing 52 U.S.C. § 20508(b)(1)) (emphasis added).

The rules of statutory construction support this construction as well. In addition to requiring States to use the Federal Form, the NVRA requires States to include a voter registration application form as part of the State's driver's license application. 52 U.S.C. § 20504(c)(1). Congress described the contents of the motor voter form with language that is nearly identical to that describing the contents of the Federal Form. *Id.* at 20504(c)(2)(B)(ii) ("requir[ing] 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"). Similarly, in permitting States to develop their own registration form for federal voter registrants, Congress describes the contents of the form in language that is identical to the language describing the contents of the Federal Form. *Id.* at §§ 20505(a)(2), 20508(b).[6] Because the EAC does not play any role in developing these state forms or impose any requirement on the States with regard to these forms, 52 U.S.C. § 20929, Congress did not use the "necessary to . . . enable State election officials to assess the eligibility" language to confer authority on the EAC to

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[6] In *ITCA,* the Court noted that "the state-developed forms may require information the Federal does not." 33 S. Ct. at 2255. But the Court was not discussing the content of the state-specific instructions that accompany the Federal Form. When the Court addressed the state-specific-instructions, it noted the relevant language of 52 U.S.C. § 20508(b)(1) that requires inclusion of information "as is necessary to enable the appropriate State official to assess the eligibility of the applicant." *ITCA*, 33 S. Ct. at 2259.

determine what is necessary for state election officials to assess voter eligibility when it authorized the EAC to develop the Federal Form. Thus, the NVRA language used to describe the contents of the Federal Form should be interpreted to require that EAC include what state officials deem necessary. *See Dep't of Revenue v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994) (applying the "normal rule of statutory instruction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

This construction is also consistent with the EAC's own regulations, which require the EAC to include state-specific instructions that reflect the States' respective voter qualification and registration requirements. The EAC regulations provide that "[t]he state-specific instructions *shall* contain the following information for each state, arranged by state: . . . *information regarding the state's specific voter eligibility and registration requirements."* 11 C.F.R. § 9428.3(b) (emphasis added). This regulation unambiguously requires the EAC to include state-specific instructions that reflect the respective voter qualification and registration laws *established by the States*. The EAC regulations require that the Federal Form specify each eligibility requirement (including citizenship) "and include by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompanying state instructions." *Id.* at § 9428.4(b)(1). The regulations also require the state election official to "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. *Id.*

§ 9428.6(c). If the Acting Executive Director had followed the EAC's own regulations, she would not have rejected Kansas's and Arizona's requests to include their evidence-of-citizenship requirements on the state-specific instructions.

The district court interpreted *ITCA*, the NVRA, and the EAC regulations to require the EAC to give state determinations of necessity deference. App. 61-69. The Tenth Circuit reached the opposite conclusion, giving the EAC the authority to override a State's decision and determine for itself what information is "necessary" for a State to enforce its own elector qualifications. App. 20-25. While the district court's decision interprets the NVRA to avoid the constitutional concerns that this Court highlighted in *ITCA*, the Tenth Circuit's decision "raise[s] serious constitutional doubts" because under it, "a federal statute "preclude[s]" the States "from obtaining the information necessary to enforce [their] voter qualifications." *ITCA*, 132 S. Ct. at 2259-60.

Prior to requesting that the EAC modify the Federal Form, Arizona and Kansas already determined that the requirement of documentary proof of citizenship at the time of registration is necessary to enforce the qualification that only United States citizens may vote. App. 50. The States made this determination based on their firsthand experience. *See* App. 109-112; *see also* 52 U.S.C. § 20501(b)(3)-(4). Notably, Arizona found that at least 159 specific noncitizens had successfully registered to vote (by falsely affirming their citizenship) and that at least 37 noncitizens voted; Kansas identified 20 noncitizens who had done so. App. 110-112. Because the States were acting within

the scope of their authority under the Qualifications Clause, the EAC was required to defer to the States and modify the Federal Form to reflect the States decisions. *ITCA*, 133 S. Ct. at 2258-59 ("a federal statute [may not] preclude[] a State from obtaining the information necessary" for enforcement).

However, the Tenth Circuit determined that the States must prove, to the satisfaction of the EAC and the federal courts, that they cannot fully "enforce their voter qualifications" by "provid[ing] substantial evidence of noncitizens registering to vote using the Federal Form." App. 31. Providing express evidence of currently registered aliens who had falsely declared themselves to be United States citizens on state voter registration forms was not enough "substantial evidence" for the States to exercise their constitutional authority to enforce voter qualifications. This decision of the Tenth Circuit defies explanation, since the declarations of citizenship on the Federal Form and the state forms are essentially identical. If noncitizens are able to falsely declare citizenship on the latter, they are able to do so on the former.

The Tenth Circuit also reasoned that the EAC had this extraordinary authority over a State's constitutionally-recognized power because *ITCA* stated that "'a State may request 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 [APA].'" App. 23 (quoting *ITCA*, 132 S. Ct. at 2259). According to the Tenth Circuit, the *ITCA*'s opinion "would make no sense" if the EAC was not the entity that decided the question of what is "necessary." App. 24.

The Tenth Circuit conclusion is inconsistent with this Court's central determinations in *ITCA* and with the NVRA's language. The Tenth Circuit's reasoning is contrary to *ITCA*'s discussion of the Framers' intent that electors' qualifications be set exclusively by the States. 133 S. Ct. at 2258. By permitting the EAC to determine what information is "necessary," the Tenth Circuit incorrectly supposed that the federal government can supersede a State's exercise of its Qualifications Clause power, something the Framers' expressly rejected. *Id.* ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government[. . . .]'") (quoting *The Federalist No.* 52, at 326 (J. Madison)). Doing so would create the same constitutional problem that *ITCA* avoided. It would take the power to determine and enforce the qualifications for congressional electors out of the States' hands and place it in the hands of a federal agency. *See id*. at 2258-59. The Constitution vests with the States the authority to set and enforce voter qualifications, and the NVRA can only be read constitutionally if the States are the arbiter of what information is necessary. This Court in *ITCA* was quite clear on this point: "Since, . . . 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." *Id*. at 2259.

In addition, *ITCA* rejected any argument that the EAC possessed broad discretion to tell the States what information is necessary when the Court concluded:

> [W]e think that – by analogy to the rule of statutory interpretation that avoids questionable constitutionality – validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt. That is to say, it is surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required."

Id. at 2259. The Tenth Circuit opinion completely ignores these sentences from *ITCA*. Had the Tenth Circuit heeded the sentence, it could not have held that the EAC was free to overrule a State's determination of what is "necessary to enable the appropriate State election official to assess the eligibility of the applicant." 52 U.S.C. § 20508(b)(1).

Additionally, the Tenth Circuit ignored the NVRA language that requires that the Federal Form include information that is "necessary *to enable the appropriate State election official to assess the eligibility of the applicant* . . ." 52 U.S.C. § 20508(b(1) (emphasis added). The States, not the EAC, are the ones tasked with assessing applicant eligibility and are in the best position to determine what information is necessary. The Tenth Circuit's reliance on the EAC's "alternative" options for enforcing voter qualifications illustrates this point. App. 27. Every "alternative" theory that the EAC identified was available to the States when they enacted their proof-of-citizenship provisions. Indeed, one of these identified alternatives, prosecutions related to improper registration or voting, was already in place when the States sought amendment to the Federal Form by the EAC and is still available. *See*

A.R.S. §§ 16-182, 16-1016; K.S.A. § 25-2411(d), 25-2416; *see also* App. 118-119 n. 19. Yet Kansas and Arizona enacted their proof of citizenship requirements anyway, precisely because these alternatives were inadequate in preventing noncitizens from registering to vote.

Finally, even if the "alternatives" were adequate, as the EAC believed, nowhere did *ITCA* imply that states must contemplate and exhaust all hypothetical alternatives before the EAC allows a state to require documentary proof-of-citizenship for registration. Doing so would create the same constitutional problem that *ITCA* avoided. It would take the power to determine and enforce the qualifications for congressional electors out of the states' hands and place it in the hands of a federal agency. *See id*. at 2258-59. The Constitution vests with the States the authority to set and enforce voter qualifications, and the NVRA can only be read constitutionally if the States are the arbiter of what information is necessary. *See ITCA*, 133 S. Ct. at 2259 (Federal Form must "include information the State deems necessary").

In summary, the writ must be granted to ensure proper application of *ITCA*. If the Tenth Circuit's decision is permitted to stand, then the path laid out by this Court in *ITCA* will be blocked. Moreover, the EAC will continue to interpret its power under the NVRA in a manner that raises all of the constitutional doubts that this Court said must be avoided.

II. This Case Presents an Issue of Great National Importance Because the Voter Qualifications for Congressional Elections Now Differ from the Voter Qualifications for State Legislative Elections, in Violation of Article I, Section 2.

Additionally, certiorari must be granted because the Tenth Circuit's decision has created an outcome that is contrary to the constitutional design of the Qualifications Clause. In holding that the EAC has the authority to reject including in the Federal Form a State's proof-of-citizenship requirement, the Tenth Circuit has caused the creation of two separate lists of qualified voters: one set that is qualified to vote for the "most numerous Branch of a State's Legislature," and a second set that is not. This result is a direct conflict with Article I, Section 2, Clause 1, and of the Seventeenth Amendment.

The EAC's refusal to add Kansas's and Arizona's proof-of-citizenship requirement to the Federal Form has created a different set of requirements for registering for federal congressional elections than those for registering for state legislative elections. This is because the NVRA only controls registration for "federal elections." *See* 52 U.S.C. § 20503. This Court has accordingly held that the NVRA's reach extends only to federal elections, and a State's acceptance of the Federal Form must be understood as mandatory only for "federal elections." *ITCA*, 133 S. C.t at 2251. That is why it is essential that the EAC Federal Form requirements mirror the relevant state requirements. The Constitution only permits one set of electors to exist, those with "the qualifications requisite for electors of the most numerous branch of the state

legislature." Art. I, § 2, Cl. 1. However, the Tenth Circuit's opinion has caused elector qualifications (and the enforcement of those qualifications) in Kansas and Arizona state elections to be different than elector qualifications in Kansas and Arizona congressional elections. That violates the Qualifications Clause and conflicts with *ITCA*.

The Constitution is "straightforward" regarding the powers reserved to the States and the powers granted to the federal government with respect to defining the federal electorate. *Id.* The Qualifications Clause is unambiguous: "the Electors in each State [for congressional elections] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Article I, § 2, cl. 1. The Legislature of Kansas has exercised its sovereign authority to make registration, and documentary proof of citizenship during the registration process, qualifications for being an elector in state legislative elections. K.S.A. 25-2309; *Dunn v. Bd. of Comm'rs of Morton Cnty.*, 194 P.2d 924, 934 (Kan. 1948). The people of Arizona have done the same. A.R.S. §§ 16-121(A); 16-166(F). The standard of requiring documentary proof of citizenship is unquestionably a "standard ... which may be established … by the State itself." *Federalist 52*. After the State has established its standard, the federal government must adopt the *identical* standard in defining the qualifications of electors for congressional elections. *See ITCA*, 133 S. Ct. at 2258 ("voting qualifications in federal elections are [not] set by Congress") (citations omitted). There is no other plausible way to interpret the Qualifications Clause.

The EAC has ignored this constitutional command and assumed for itself the power to determine who is qualified to vote. Consequently, both Kansas and Arizona have been compelled to register voters for state elections using their own standard established in state law, while simultaneously registering federal-only voters using the EAC's standard. Specifically, Kansas and Arizona have allowed Federal Form users who fail to provide documentary proof of citizenship (meeting the EAC's standard, but not the States' standard) to register for federal elections only. At the time of this filing there are 363 federal-elections-only voters registered in Kansas and 1,982 federal-elections-only voters in Arizona.

Pursuant to the Tenth Circuit's erroneous holding, the federal government is now setting the qualifications for electors in federal elections, while Arizona and Kansas have had their authority restricted to setting qualifications for electors in state elections. Congress has the authority to alter the "Times, Places, and Manner" of elections, but only to the extent it does not go beyond that authority and alter elector qualifications, which are set solely by the States. *ITCA*, 131 S. Ct. at 2258 ("[N]othing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.") (citations and quotation marks omitted). If a State requires proof of citizenship prior to registration to be a qualified elector, Article I, § 2, Cl. 1, and the Seventeenth Amendment command that the federal government must respect the State's decision and acknowledge that the same qualification applies to federal elections—despite what the Congress or the EAC may prefer.

Additionally, having two sets of voter qualifications is plainly inconsistent with the Framers' intentions in drafting the Qualifications Clause. This element of the proposed constitution was an essential one. Alexander Hamilton assured the country that, "prescribing qualifications . . . for those who may elect . . . forms no part of the power to be conferred on the national government." *The Federalist No. 59* (A. Hamilton). Accordingly, the qualifications of electors, "must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself." *The Federalist No. 52* (J. Madison). "To have left it open for the occasional regulation of the Congress, would have been improper[.]" *Id.* Some of the States would not have accepted a constitutional arrangement whereby the federal government could establish a uniform rule governing voter qualifications in all of the states. "To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option." *Id.* If the Tenth Circuit's erroneous decision is permitted to stand, the Framers' careful plan will be abandoned.

Finally, the Court is urged to take notice that time is of the essence in addressing this matter. There is no other case making its way through the inferior courts concerning this issue.[7] A circuit split is not likely to

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[7] Two other states require documentary proof of citizenship as a qualification for voting: Georgia and Alabama. Ga. Ann. Code § 21-2-216(g)(1); Ala. Code § 31-13-28. Georgia was denied a

materialize anytime soon. But, the presidential election of 2016 is on the horizon. A presidential election is not an "ordinary election" because "[t]he importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Bush v. Gore*, 121 S. Ct. 525, 533 (2000) (Rehnquist, J. concurring) (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (internal quotations omitted). This Court should not allow another federal election, and in particular a Presidential election, to occur that is plainly inconsistent with the Constitution's design. Granting the writ now, and rendering an opinion prior to the start of the 2016 election cycle, would allow this Court to ensure that the Qualifications Clause is being correctly applied and provide needed guidance to Petitioners, as well as to Alabama and Georgia.

The writ must be granted to ensure that the 2016 federal elections are conducted in a manner that is consistent with Article I, Section 2, Clause 1, of the Constitution. The Framers of the Constitution took great care to ensure that the electors for federal office would be the same as the electors for state office. If the writ is not granted, and any federal elections in Kansas or Arizona are close, the results of the election may ultimately be called into question.

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modification to the relevant Federal Form instructions at the same time that Petitioners' requested modifications were. Alabama's requirement was temporarily on hold pending preclearance under Section 5 of the Voting Rights Act; that preclearance hurdle has since been removed. *See Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2623-24 (2013). These States also have an interest in implementing their proof-of-citizenship law.

CONCLUSION

For the reasons stated above, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 14-3062 and 14-3072

[Filed November 7, 2014]

KRIS W. KOBACH, Kansas Secretary of State; KEN BENNETT, Arizona Secretary of State; STATE OF KANSAS; STATE OF ARIZONA,	)
Plaintiffs - Appellees,	)
v.	)
UNITED STATES ELECTION ASSISTANCE COMMISSION; ALICE MILLER, in her capacity as acting Executive Director and Chief Operating Officer of the United States Election Assistance Commission,	)
Defendants - Appellants,	)
and	)

INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; STEVE GALLARDO; PROJECT VOTE, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; LEAGUE OF WOMEN VOTERS OF ARIZONA; LEAGUE OF WOMEN VOTERS OF KANSAS; VALLE DEL SOL; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; COMMON CAUSE; CHICANOS POR LA CAUSA, INC.; DEBRA LOPEZ,

Defendant Intervenors - Appellants.

REPRESENTATIVES NANCY PELOSI, STENY H. HOYER, JAMES E. CLYBURN, XAVIER BECERRA, MARCIA L. FUDGE, RUBEN HINOJOSA, JUDY CHU, ROBERT A. BRADY; ROCK THE VOTE; VOTO LATINO; PROTECTING ARIZONA'S FAMILY COALITION; NONPROFIT VOTE; FAIR SHARE EDUCATION FUND; FAIR SHARE; AMERICAN UNITY LEGAL DEFENSE FUND;

ALLIED EDUCATIONAL FOUNDATION; JUDICIAL WATCH, INC.; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND; THE STATES OF GEORGIA AND ALABAMA,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 5:13-cv-04095-EFM-TJJ)

Bonnie I. Robin-Vergeer (Jocelyn Samuels, Acting Assistant Attorney General, and Diana K. Flynn and Sasha Samberg-Champion, attorneys, with her on the briefs), United States Department of Justice Civil Rights Division - Appellate Section, Washington, D.C., for the Defendants-Appellants.

Kris W. Kobach, Secretary of State of Kansas (Thomas E. Knutzen and Caleb D. Crook, Kansas Secretary of State's Office, Topeka Kansas; Thomas C. Horne, Attorney General of Arizona and Michele L. Forney, Arizona Attorney General's Office, Phoenix, Arizona; and Derek Schmidt, Attorney General of Kansas and Stephen R. McAllister and Jeffrey A. Chanay, Kansas Attorney General's Office, Topeka, Kansas, with him on the brief), Kansas Secretary of State's Office, Topeka, Kansas for the Plaintiffs-Appellees.

Susan Davies, Jonathan Janow, and Rachel B. Funk, Kirkland & Ellis LLP, Washington, D.C.; Michael C.

Keats, Bonnie L. Jarrett, and Adam Teitcher, Kirkland & Ellis LLP, New York, New York; David G. Seely, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, Kansas; and Wendy R. Weiser, Tomas Lopez, and Jonathan Brater, Brennan Center for Justice at NYU School of Law, New York, New York, Michelle Kanter Cohen, Project Vote, Inc., Washington, D.C.; Lee Thompson, Erin C. Thompson, Thompson Law Firm, LLC, Wichita, Kansas; and Robert N. Weiner, John A. Freedman, Andrew W. Beyer, and Andrew Treaster, Arnold & Porter, LLP, Washington, D.C.; Nina Perales, Ernest Herrera, Mexican American Legal Defense and Education Fund, San Antonio, Texas; Jeffrey J. Simon and Judd M. Treeman, Husch Blackwell LLP, Kansas City, Missouri; Linda Smith, Adam P. KohSweeney, and J. Jorge deNeve, O'Melveny & Myers LLP, Los Angeles, California; Lane Williams and Kip Elliot, Disability Rights Center of Kansas, Topeka, Kansas; Mark A. Posner and Erandi Zamora, Lawyers' Committee for Civil Rights Under Law, Washington, D.C.; Linda Stein, Errol R. Patterson, and Jason A. Abel, Steptoe & Johnson, LLP, Washington, D.C.; Joe P. Sparks, Laurel A. Herrmann, and Julia M. Kolsrud, The Sparks Law Firm, P.C., Scottsdale, Arizona; David B. Rosenbaum, Thomas L. Hudson, and Anna H. Finn, Osborn Maledon, P.A., Phoenix, Arizona; and Daniel B. Kohrman, AARP Foundation Litigation, Washington, D.C., submitted a brief on behalf of Intervenors-Appellants League of Women Voters of the United States, League of Women Voters of Arizona, League of Women Voters of Kansas, Project Vote, Inc., Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., Debra Lopez, and Inter Tribal Council of Arizona, Inc., Arizona Advocacy

Network, League of United Latin American Citizens Arizona, and Steve Gallardo.

Nina Perales, Ernest Herrera, Mexican American Legal Defense and Education Fund, San Antonio, Texas; Jeffrey J. Simon and Judd M. Treeman, Husch Blackwell LLP, Kansas City, Missouri; Linda Smith, Adam P. KohSweeney, and J. Jorge deNeve, O'Melveny & Myers LLP, Los Angeles, California, submitted a brief on behalf of Intervenor-Appellant Valle Del Sol.

Bradley J. Schlozman, Hinkle Law Firm, LLC, Wichita, Kansas, and Robert D. Popper and Chris Fedeli, Judicial Watch, Inc., Washington, D.C., filed an amicus curiae brief for Judicial Watch, Inc. and Allied Educational Foundation.

Lawrence J. Joseph, Washington, D.C., filed an amicus curiae brief for Eagle Forum Education & Legal Defense Fund.

Edith Hakola, American Unity Legal Defense Fund, Warrenton, Virginia, and Barnaby Zall, Weinberg, Jacobs Tolani, Bethesda, Maryland, filed an amicus curiae brief for American Unity Legal Defense Fund.

Luther Strange, Alabama Attorney General, Samuel S. Olens, Georgia Attorney General, and Dennis Dunn, Deputy Attorney General, Georgia Department of Law, Atlanta, Georgia, Montgomery, Alabama, filed an amicus curiae brief for the States of Georgia and Alabama.

Karl J. Sandstrom, Perkins Coie, LLP, Washington, D.C., and Joshua L. Kaul, Perkins Coie, LLP, Madison, Wisconsin, filed an amicus curiae brief for Representatives Nancy Pelosi, Steny H. Hoyer, James

E. Clyburn, Xavier Becerra, Marcia L. Fudge, Ruben Hinojosa, Judy Chu, and Robert A. Brady.

Stuart C. Naifeh, Demos, New York, New York, and Brenda Wright and Lisa J. Danetz, Demos, Brighton, Massachusetts, filed an amicus curiae brief for Community Voter Registration Organizations.

Before **LUCERO**, **HOLMES**, and **PHILLIPS**, Circuit Judges.

LUCERO, Circuit Judge.

Arizona Secretary of State Ken Bennett and Kansas Secretary of State Kris Kobach sought, on behalf of their respective states, that the Election Assistance Commission ("EAC") add language requiring documentary proof of citizenship to each state's instructions on the federal voter registration form ("Federal Form"). The EAC concluded that the additional language was unnecessary and denied their requests. After Kobach and Bennett filed suit challenging the EAC's decision, the district court concluded that the agency had a nondiscretionary duty to grant their requests. We hold that the district court's conclusion is in error in that it is plainly in conflict with the Supreme Court's decision in Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) (ITCA). Were the agency's duty "nondiscretionary," the ITCA majority would have so concluded and arrived at an opposite result. This would, of course, have rendered the Court's suggested option of Administrative Procedure Act ("APA") appellate review both

unnecessary and inapplicable. It would also have made the Justice Thomas dissenting opinion endorsing the theory Arizona and Kansas bring to us in this appeal the majority not the dissent. This is one of those instances in which the dissent clearly tells us what the law is not. It is not as if the proposition had not occurred to the majority of the Court. Applying traditional APA review standards, our thorough reading of the record establishes that Kobach and Bennett have failed to advance proof that registration fraud in the use of the Federal Form prevented Arizona and Kansas from enforcing their voter qualifications. Exercising jurisdiction under 28 U.S.C. § 1291, we therefore reverse the grant of judgment favoring Kobach and Bennett, and remand with instructions to vacate.

I

The present appeal is the latest installment in a long-running dispute over the Federal Form. In 2004, Arizona passed Proposition 200, which requires documentary proof of citizenship for voter registration. On December 12, 2005, Arizona asked the EAC to add language to the Federal Form's state-specific instructions indicating a documentary proof of citizenship requirement. The EAC's Executive Director denied the request, leading Arizona to ask the EAC commissioners to reconsider the denial. By a 2-2 vote, the commissioners effectively confirmed the Executive Director's denial.

Meanwhile, various organizations and individuals, many of them Intervenor-Appellants in this case, challenged Proposition 200 in federal court. Their suit culminated in the Supreme Court holding that the

National Voter Registration Act ("NVRA") "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." ITCA, 133 S. Ct. at 2260. Anticipating this case, the Court stated: "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 [APA]." Id.

Just two days after the ITCA decision, Arizona again asked the EAC to include documentary proof of citizenship language as a state-specific instruction on the Federal Form. Kansas, which had enacted legislation similar to Proposition 200, made a similar contemporaneous request. Both petitions were deferred on the basis that the EAC lacked a quorum of commissioners. Kobach and Bennett then sued the EAC in the U.S. District Court for the District of Kansas, alleging that the EAC's failure to act violated the APA and that the NVRA is unconstitutional as applied. The district court ordered the EAC to issue a final agency action by January 17, 2014.

After receiving and reviewing 423 public comments, including comments from Arizona, Kansas, and each of the Intervenor-Appellants, the EAC's Executive Director issued a memorandum on January 17, 2014, denominated as final agency action, denying the states' requests. Kobach and Bennett then renewed their previous demand for relief. This request was granted by the district court and the EAC was ordered to add the subject language to the Federal Form on the district court's conclusion that the NVRA did not preempt state laws requiring proof of citizenship, and

that the EAC had a nondiscretionary duty to grant Kobach's and Bennett's petitions. We stayed the order. The merits appeal is now before us.

II

We review questions of statutory interpretation de novo. United States v. Porter, 745 F.3d 1035, 1040 (10th Cir. 2014). Likewise, we review district court decisions under the APA de novo. Forest Guardians v. U.S. Forest Serv., 641 F.3d 423, 428 (10th Cir. 2011). Our de novo review includes the question of whether an agency acted within the scope of its authority. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1227 (10th Cir. 2011).

The arguments of the parties and intervenors require us to address four issues: (1) as preliminary matters, (a) is the Executive Director's decision a final agency action over which we may exercise jurisdiction, and (b) if so, is it procedurally valid, such that we may reach the merits; (2) does the EAC have a nondiscretionary duty to approve the states' requests under the NVRA; (3) is the Executive Director's decision arbitrary and capricious; and (4) is the Executive Director's decision unconstitutional?

A

At the outset, we must consider two broad issues: (1) whether the Executive Director's decision constituted final agency action; and (2) if so, whether the Executive Director's decision was procedurally valid.

1

We must first determine whether the Executive Director's decision constituted final agency action, a question that necessarily implicates our own jurisdiction. The APA authorizes judicial review only of final agency actions. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61-62 (2004). "[T]o be final, agency action must mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences." Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004) (quotations omitted).

There is a "presumption in favor of judicial review of administrative action." Block v. Cmty. Nutrition Inst., 467 U.S. 340, 348 (1984); accord Painter v. Shalala, 97 F.3d 1351, 1356 (10th Cir. 1996). Additionally, we construe the concept of final agency action pragmatically, rather than inflexibly. Abbott Labs. v. Gardner, 387 U.S. 136, 149-50 (1967); Coal. for Sustainable Res., Inc. v. U.S. Forest Serv., 259 F.3d 1244, 1251 (10th Cir. 2001); Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1990). Even if "the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior [could] belie[] the claim that its interpretation is not final." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001).

An agency cannot render its action final merely by styling it as such. See, e.g., Cody Labs., Inc. v. Sebelius, 446 F. App'x 964, 968 (10th Cir. 2011) (unpublished) (noting that the "label an agency attaches to its action is not determinative") (quoting Cont'l Air Lines, Inc. v. Civil Aeronautics Bd., 522 F.2d 107, 124 (D.C. Cir.

1975) (en banc)). Generally, the decision of a subordinate is not final action. See Abbott Labs., 387 U.S. at 151. However, we conclude that, under the unique circumstances of this case, the Executive Director's decision—which was issued pursuant to a subdelegation of authority in a 2008 policy—was final.

2

On September 12, 2008, the EAC commissioners subdelegated several responsibilities to the Executive Director, including the responsibility to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies," in its Roles and Responsibilities Policy. The subdelegated responsibilities also included, inter alia, the responsibilities to "[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;" and "[a]nswer questions from stakeholders regarding the application of NVRA or HAVA [the Help America Vote Act] consistent with EAC's published Guidance, regulations, advisories and policy[.]"

We owe deference to the EAC's interpretation of the statute it was charged with administering when it issued this policy, and to its conclusion that HAVA, the EAC's enabling statute,[1] permitted the Executive

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[1] See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 ("HAVA") (transferring voter-registration functions to the EAC).

Director to issue decisions on behalf of the agency in maintaining the Federal Form. See City of Arlington v. FCC, 133 S. Ct. 1863, 1870-71 (2013) (deference extends to an agency's interpretation of the scope of its own authority under a statute). "[W]e apply Chevron deference to the [agency]'s interpretation of the statute and its own authority." In re FCC 11-161, 753 F.3d 1015, 1114 (10th Cir. 2014). This level of deference requires us to "decide 'whether the agency's answer is based on a permissible construction of the statute.'" Id. (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

Absent some indication in an agency's enabling statute that subdelegation is forbidden, subdelegation to subordinate personnel within the agency is generally permitted. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121 (1947).[2] Our sibling circuits that have spoken on this issue are unanimous in permitting subdelegations to subordinates, even where the enabling statute is silent, so long as the enabling statute and its legislative history do not indicate a prohibition on subdelegation. See La. Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 671 (3d Cir. 2014); Frankl v. HTH Corp., 650 F.3d 1334, 1350 (9th Cir. 2011) (noting the "general presumption that delegations to subordinates are permissible in cases of statutory silence"); U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 345 (2004) ("When a statute delegates authority to a federal officer or agency, subdelegation to a

[2] Fleming was not the first case in which the Supreme Court reached this well-established conclusion. See, e.g., Parish v. United States, 100 U.S. 500, 504 (1879).

subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."); United States v. Mango, 199 F.3d 85, 91-92 (2d Cir. 1999); House v. S. Stevedoring Co., 703 F.2d 87, 88 (4th Cir. 1983); United States v. Gordon, 580 F.2d 827, 840 n.6 (5th Cir. 1978); United States v. Vivian, 224 F.2d 53, 55-56 (7th Cir. 1955) (in dicta).[3]

Because the text of HAVA, the EAC's enabling statute, neither explicitly permits nor forbids subdelegation, subdelegation is presumed permissible. HAVA provides for an Executive Director, a General Counsel, and other staff, 52 U.S.C. § 20924, indicating that Congress contemplated some degree of subdelegation to those staff members. Cf. Norman v. United States, 392 F.2d 255, 263 (Ct. Cl. 1968) (noting that Congress' authorization of a staff to assist the Secretary of the Air Force supports the conclusion that the Secretary could subdelegate his duties).

Further, in NLRB v. Duval Jewelry Co. of Miami, 357 U.S. 1, 7 (1958), the Court held that the "limited

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[3] See also Jason Marisam, Duplicative Delegations, 63 Admin. L. Rev. 181, 241 (2011) (noting that the Supreme Court has held that "the power to subdelegate was presumed when Congress was silent on whether subdelegation was allowed," and that subdelegation to subordinates has become uncontroversial in the modern day); cf. United States v. Widdowson, 916 F.2d 587, 592 (10th Cir. 1990), vacated on other grounds, 502 U.S. 801, 801 (1991) (explaining that the "relevant inquiry in any subdelegation challenge is whether Congress intended to permit the delegate to subdelegate the authority conferred by Congress[,]" and that language in the statute at issue allowing the Attorney General to authorize staff to carry out his duties implied such an intent).

nature of the delegated authority" exercised by a subordinate official justifies upholding a delegation to such an official.[4] The 2008 subdelegation before us specifies the authority granted to the Executive Director and the manner in which it is to be exercised. It is not a subdelegation of the entirety of the superior's power. Accordingly, we do not discern any problem with the EAC's determination in 2008 that HAVA permitted a limited subdelegation of decisionmaking authority regarding the maintenance of the Federal Form to the Executive Director. In other words, we conclude that the EAC's decision amounted to a reasonable interpretation of the scope of its authority under HAVA, and we accord that interpretation Chevron deference.

The key inquiry then involves what kind of questions the Executive Director is authorized to decide in maintaining the Federal Form. As relevant here, the EAC argues that the 2008 subdelegation permits the Executive Director to give effect to existing EAC precedent in maintaining the Federal Form by making decisions concerning the contents of the Federal Form. Specifically, the EAC contends that the Executive Director was subdelegated the authority to make decisions regarding state requests to modify the contents of the Federal Form. We agree. The authority to make decisions concerning the maintenance of the Federal Form naturally includes the authority to make

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[4] See also Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 816 (1960) ("[A] court should inquire into the extent of the particular subdelegation since the narrower the area of judgment left to the subordinate, the less objectionable the subdelegation should be.")

decisions concerning the contents of the Federal Form. Indeed, although the states vigorously contend that the Executive Director does not have discretion to deny their requests to modify the contents of the Federal Form and that her denial of their requests is not procedurally valid due to the EAC's lack of a quorum—matters we address infra—they do not seem to dispute the notion that the Executive Director is properly vested through a subdelegation from the EAC with responsibility to make decisions (even if only of a provisional and ministerial sort) regarding the contents of the Federal Form. However, important procedural issues remain regarding whether the Executive Director's decision here—with respect to the states' requests to modify the contents of the Federal Form—constitutes final agency action; and, if so, whether that decision is procedurally valid.

3

By the time the Executive Director issued her decision purporting to act on the agency's behalf, the EAC lacked a quorum of Commissioners. This lack of a quorum rendered further review of the Executive Director's decision by the EAC Commissioners impracticable.[5] Thus, under the unique circumstances of this case, the Executive Director's decision concerning the states' requests to modify the contents of the Federal Form consummated the agency's

[5] We recognize that some might find the practical unavailability of further agency review because of the absence of a quorum troubling on due-process or related grounds. However, the states have waived any such arguments by failing to advance them in their appellate briefing.

decisionmaking process and constituted final agency action. And, because the Executive Director's decision was effectively the last word of the agency, it imposed legal consequences that were not provisional: namely, the decision resulted in the exclusion of the states' requested language from the Federal Form.

In Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1200-01 (10th Cir. 2014), we concluded that the finality of an agency action turns in part on "whether the action's impact is direct and immediate." Id. at 1201 (quotations omitted). We reasoned that, despite questions about the agency action's procedural validity that stemmed from the agency board's composition, the action was final and reviewable because it "denied the union's requested relief, marked the end of the road for the agency's consideration of the issue, and purported to decide the union's rights under the [statute]. The order could be invalid and issued without authority, but none of that would destroy our jurisdiction to hear the case." Id.; see also George Hyman Constr. Co. v. Occupational Safety & Health Review Comm'n, 582 F.2d 834, 837 (4th Cir. 1978) (holding that a commission's lack of a quorum does not render their delegee's order unappealable, because "[u]nless the order is appealable the employer is placed in a jurisdictional limbo that would prevent him from seeking judicial relief from a possibly erroneous decision"); Marshall v. Sun Petroleum Prods. Co., 622 F.2d 1176, 1179-80 (3d Cir. 1980) (reaching the same conclusion).

Guided by Teamsters, we conclude that the lack of a quorum in January 2014—though presenting a colorable question regarding the procedural validity of

the Executive Director's decision, which we address infra—does not affect the finality of that decision. As in Teamsters, the decision had "direct and immediate" impact, because as soon as it was issued, it denied Kobach's and Bennett's requests to modify the Federal Form. It also marked the end of the agency's consideration of the issue and purported to decide the parties' rights under the NVRA. The Executive Director's decision therefore constitutes a final order, notwithstanding a subsequent lack of quorum, and we thus have jurisdiction under the APA to review it.

4

Finally, we assess the procedural validity of the Executive Director's decision. Kobach and Bennett argue that 52 U.S.C. § 20928's requirement that "[a]ny action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members" renders the Executive Director's decision ultra vires because it was not approved by three commissioners. But because the decision is consistent with and relies in substantial part upon the EAC's established policies, it falls within the scope of the 2008 subdelegation, which was approved by three commissioners. Moreover, § 20928 explicitly applies only to actions authorized in the same chapter. The decision at issue in this case was authorized by 52 U.S.C. § 20508, which was contained in a different chapter of the Code when § 20928 was passed.

Moreover, because the 2008 delegation only passes limited authority to a subordinate outside the delegating group, it grants the Executive Director powers that survive the later loss of a quorum of

commissioners. In New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676 (2010), the Supreme Court invalidated actions taken by two members of the National Labor Relations Board ("NLRB") when the statute required a quorum of at least three members to be present. However, the Court stated that its decision "does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." Id. at 684 n.4. The Court explicitly noted that "we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." Id. (citing Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 475 (D.C. Cir. 2009)). All other circuits to consider the issue have rejected Laurel Baye and allowed delegations to nongroup members to survive loss of a quorum. Kreisberg v. HealthBridge Mgmt., LLC, 732 F.3d 131, 140 (2d Cir. 2013); Frankl, 650 F.3d at 1354; Osthus v. Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011); Overstreet v. El Paso Disposal, L.P., 625 F.3d 844, 852-854 (5th Cir. 2010).

The 2008 subdelegation parallels the "prior delegations of authority to nongroup members" that New Process Steel distinguished from the broad intra-group delegation struck down in that case. 560 U.S. at 684 n.4. In New Process Steel, the Court invalidated a redelegation of "all of the Board's power" by a quorum of commissioners to a subgroup of two commissioners in anticipation of impending loss of a quorum. Id. at 677. The Court repeatedly emphasized that the power the subgroup had attempted to exercise was the full power of the agency. See 560 U.S. at 681 (noting the

"command implicit in both the delegation clause and in the Board quorum requirement that the Board's full power be vested in no fewer than three members") (emphasis added); id. at 688 ("Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.") (emphasis added).

In contrast, the 2008 subdelegation did not transfer the Commissioners' full power.[6] Rather, it instructed the Executive Director to continue maintaining the Federal Form consistent with the Commissioners' past directives unless and until those directions were countermanded. The 2008 subdelegation therefore did not raise the specter of New Process Steel's "tail that would not only wag the dog, but would continue to wag

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[6] The limited, rather than plenary, nature of the 2008 subdelegation might appear to undermine its ability to support the issuance of a final decision even while it supports that decision's validity. However, had the subdelegation not authorized a final agency action, no amount of remonstration from the district court could have compelled the EAC to issue what would have necessarily been an ultra vires action. Nor would the EAC's choice to wait for a quorum to be reestablished necessarily have constituted unreasonable delay. See Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (five year delay not unreasonable for an understaffed agency); see also Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999) (absent a statutory deadline for agency action, courts retain "the discretion to decide whether agency delay is unreasonable"). Certainly, the EAC's lack of quorum would not subject it to a ministerial duty to grant whatever requests states make, just as a court lacking a quorum would not acquire a ministerial duty to grant all motions advanced by litigants.

after the dog died." Id. A more apposite analogy for this case would be the faithful servant who continues to follow his master's orders even while his master is absent.

Our decision in Perlmutter v. Commissioner, 373 F.2d 45 (10th Cir. 1967), further supports our conclusion. In Perlmutter, we upheld an agency regulation authorizing the Commissioner of Internal Revenue to "redelegate authority to perform functions, including issuance of deficiency notices, to other officers or employees under his supervision and control." Id. at 46 (quotations omitted). Perlmutter noted that "[f]rom a practical standpoint, the office of District Director cannot cease operating because of the Director's illness." Id. Similarly, it would be impractical to simply shutter the EAC while it lacks a quorum. Kobach and Bennett essentially concede as much by asking the EAC to modify the Federal Form to include their requested text despite its lack of a quorum.

In sum, we conclude that the Executive Director's decision is not only a final agency action, but also a procedurally valid action. Having determined that the Executive Director's decision is reviewable and procedurally sound, we proceed to its merits.

B

According to the district court's interpretation of the NVRA, the EAC lacks discretion to determine what information is "necessary" for state officials to assess an applicant's eligibility to vote. Under this reasoning, the EAC has a nondiscretionary duty to approve state requests to include state voter qualifications on the Federal Form. Exhaustive examination of the NVRA by

the ITCA Court, however, is dispositive of that issue. We are compelled by ITCA to conclude that the NVRA preempts Arizona's and Kansas' state laws insofar as they require Federal Form applicants to provide documentary evidence of citizenship to vote in federal elections. Accordingly, we hold that the EAC is not compulsorily mandated to approve state-requested changes to the Federal Form.

In ITCA, the Supreme Court considered "whether the [NVRA's] requirement that States 'accept and use' the Federal Form pre-empts Arizona's state-law requirement that officials 'reject' the application of a prospective voter who submits a completed Federal Form unaccompanied by documentary evidence of citizenship." 133 S. Ct. at 2253. It answered that question in the affirmative. Id. at 2260.

The Court expressly rejected the argument that states have exclusive authority to regulate elections under the Elections Clause, U.S. Const. Art. I. § 4, cl. 1. ITCA, 133 S. Ct. at 2257. Instead, the Court reaffirmed its precedent interpreting the Elections Clause to permit federal regulation of federal elections. Id. at 2253. "The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.'" Id. (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

Turning to the text of the NVRA, the Court "conclude[d] that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is

'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." Id. at 2257.[7] In particular, the Court noted that permitting such state alterations threatened to eviscerate the Form's purpose of "increas[ing] the number of eligible citizens who register to vote." Id. at 2256 (quoting 42 U.S.C. § 1973gg(b)). "Arizona's reading would 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. . . ." Id. Additionally, the Court observed that when Congress acts pursuant to the Elections Clause, courts should not assume reluctance to preempt state law. Id. at 2257. The Court therefore held that "42 U.S.C. § 1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." Id. at 2260.

Even as the ITCA Court reaffirmed that the United States has authority under the Elections Clause to set

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[7] The NVRA's legislative history, although the Court did not examine it, provides additional support to the Court's interpretation. Both houses of Congress debated and voted on the specific question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and ultimately rejected such a proposal. See S. Rep. No. 103-6, at 11 (1993) (concluding that attestation under penalty of perjury and criminal penalties are "sufficient safeguards to prevent noncitizens from registering to vote"); 139 Cong. Rec. S2091 (1993) (proposing amendment that would allow states to require documentary proof of citizenship for registration); H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (rejecting amendment); 139 Cong. Rec. H2269, 2274-76 (1993) (deciding not to overturn Conference Committee's rejection of the amendment).

procedural requirements for registering to vote in federal elections (i.e., that documentary evidence of citizenship may not be required), it noted that individual states retain the power to set substantive voter qualifications (i.e., that voters be citizens).[8] See id. at 2257-58. "The Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them." Id. at 2257. In ITCA, the Court explains that if federal enactments "precluded a State from obtaining information necessary for enforcement," this "would raise serious constitutional doubts." Id. at 2258-59. The Court did not have to resolve this potential constitutional question in ITCA, nor did it employ canons of statutory construction to avoid it, because such steps would only be necessary if Arizona could prove that federal requirements precluded it from obtaining information necessary to enforce its qualifications.

To prove preclusion, said the Court, "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 [APA]." Id. at 2259.[9]

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[8] That federal authority to establish procedural rules can coexist with state authority to define substantive rights is familiar from other contexts, such as the federal rules of civil procedure. See, e.g., Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010); Lujan v. Regents of Univ. of Cal., 69 F.3d 1511, 1516 (10th Cir. 1995).

[9] In context, the ITCA opinion's reference to "the EAC's inaction" as the trigger for APA review uses the term "inaction" to encompass the EAC's denial of a state's request as well as the EAC's refusal to issue a final agency action at all. The opinion

The Court's ruling would make no sense if the EAC's duty was nondiscretionary. "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." Id. at 2260. This framework makes neither the states nor the EAC exclusive arbiters of whether a procedural requirement precludes the enforcement of a voter qualification. Rather, each must support its position with evidence that will survive the evaluation of a reviewing court. Under the Court's approach, the EAC has a duty to include a state's requested text on the Federal Form only if a reviewing court holds, after conducting APA review, that excluding the requested text would preclude the state from enforcing its voter qualifications.

By contrast, the district court held that the states' averment that their requested text is necessary for enforcement was, on its own, sufficient to impose a nondiscretionary duty on the EAC. Kobach v. U.S. Election Assistance Comm'n, No. 13-CV-4095-EFM-TJJ, 2014 WL 1094957, at *12 (D. Kan. Mar. 19, 2014) ("[T]he states' determination that a mere oath is not sufficient is all the states are required to establish."). This holding is inconsistent with the Supreme Court's statements that states must "request" (rather than direct) the EAC to include the requested text, and must "establish" (rather than merely aver) their need for it. See ITCA, 133 S. Ct. at 2259-60. Moreover, the Court

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characterizes the EAC's 2006 denial of Arizona's request as an "agency action (or rather inaction)." ITCA, at 2260.

explained that states may "assert . . . that it would be arbitrary for the EAC to refuse to include" a requested instruction, and support that assertion by comparison with other EAC decisions. Id. at 2260. Were a state's mere averments truly sufficient to obligate the EAC to grant its requests, there would be no need for states to advance and substantiate an argument that their requests had been arbitrarily refused.

We accordingly conclude that the district court incorrectly interpreted the NVRA as subjecting the EAC to a nondiscretionary duty to approve state requests. The EAC does have discretion to reject such requests, subject to judicial review of its decisions under the APA.

C

Next, we hold that the Executive Director's decision to reject the states' request was a consistent and valid exercise of limited subdelegated authority. Kobach and Bennett have thus failed to carry the burden ITCA establishes for them: to convince a court conducting APA review that the denial of their request precluded them from obtaining information that is "necessary" to enforce their respective states' voter qualifications. See 133 S. Ct. at 2260.

The Executive Director's decision was an informal adjudication carried out pursuant to 5 U.S.C. § 555.[10] An informal adjudication must be reversed if it is

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[10] Unless a statute requires otherwise, agencies have "flexibility" to decide that a full evidentiary hearing is unnecessary in an informal adjudication. Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412, 1425-26 (10th Cir. 1992).

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); City of Colo. Springs v. Solis, 589 F.3d 1121, 1131, 1134 (10th Cir. 2009). This standard of review is "very deferential" to the agency's determination, and a presumption of validity attaches to the agency action such that the burden of proof rests with the party challenging it. W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1273 (10th Cir. 2013); accord Aviva Life & Annuity Co. v. FDIC, 654 F.3d 1129, 1131 (10th Cir. 2011); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1188 (10th Cir. 2006). A court applying the arbitrary-and-capricious standard of review must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Aviva Life, 654 F.3d at 1131.[11]

Although Kobach and Bennett complain that the Executive Director did not apply a particular standard of proof, they misunderstand the nature of informal adjudications. When an agency undertakes an informal adjudication, we require only that "the grounds upon

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[11] Some amici contend that the Executive Director's decision should be subject to de novo review in its entirety, but Kobach and Bennett propose de novo review only for constitutional disputes. Their briefs argue that the decision should be reversed as arbitrary and capricious, not that this court should engage in de novo review of the factual basis for that decision. Accordingly, we review the decision under the arbitrary-and-capricious standard. Arbitrary-and-capricious review would be appropriate even had the EAC's lack of a quorum rendered the Executive Director's decision procedurally suspect. See Teamsters, 765 F.3d at 1204-05 (applying arbitrary-and-capricious review to NLRB decision made without a quorum).

which the agency acted . . . be clearly disclosed in, and sustained by, the record." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994). The Executive Director's detailed memorandum clearly discloses the grounds for its decision.

Kobach and Bennett also charge that the Executive Director did not accurately evaluate the evidence before her. We disagree. The Executive Director supported her conclusion in detail with evidence in the record, rationally connected that evidence to the conclusions that she drew, and was fully consistent with the EAC's own regulations and prior reasonable interpretation of the NVRA in its 2006 response to Arizona. Specifically, the Executive Director's decision discussed in significant detail no fewer than five alternatives to requiring documentary evidence of citizenship that states can use to ensure that noncitizens do not register using the Federal Form. Kobach and Bennett do not dispute that these means exist, and merely contend that they are overly onerous. But, in ITCA, the Court stated that the states must carry their burden "to establish in a reviewing court that a mere oath will not suffice." ITCA, 133 S. Ct. at 2260. Generalized complaints that the memorandum's suggested approaches present logistical difficulties do not meet ITCA's standard.

The states have failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form. Nor do they raise the argument that the Court suggested states might offer as part of an APA challenge: that the denial of their request was

inconsistent with the EAC's granting other states' requests. Id. Even if we credited all of Kobach's and Bennett's criticisms of the Executive Director's decision, the states simply did not provide the EAC enough factual evidence to support their preferred outcome.

Moreover, had the EAC accepted the states' requests, it would have risked arbitrariness, because Kobach and Bennett offered little evidence that was not already offered in Arizona's 2005 request, which the EAC rejected. Changing course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision. See In re FCC 11-161, 753 F.3d at 1142 (noting that "[t]he arbitrary-and-capricious standard requires an agency to provide an adequate explanation to justify treating similarly situated parties differently" (quotation omitted)); see also Eagle Broad. Grp., Ltd. v. FCC, 563 F.3d 543, 551 (D.C. Cir. 2009) (observing that "an agency may not treat like cases differently" and that "an agency's unexplained departure from precedent must be overturned as arbitrary and capricious" (citations omitted)).

D

Finally, we consider the states' constitutional claims. Kobach and Bennett argue that the EAC's denial creates an unconstitutional preclearance regime. See Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013). They also argue that states' constitutional powers to enforce voter qualifications trump Congress' Elections Clause power to enact regulations governing the procedures for federal elections.

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Unlike the statute at issue in Shelby County, the NVRA does not require preclearance of state election laws. Cf. id. at 2624. Instead, the NVRA establishes that the Federal Form for voter registration can only be modified by the federal government, not directly by states, and that states must "accept and use" the Federal Form to register voters for federal elections. See ITCA, 133 S. Ct. at 2259. The NVRA therefore leaves Arizona and Kansas free to choose whether to impose a documentary evidence of citizenship requirement on voters in state elections.[12]

Accordingly, Shelby County does not cast doubt on the NVRA's constitutionality as interpreted in ITCA. Rather, Shelby County cites ITCA for the proposition that the federal government retains "significant control over federal elections." Shelby County, 133 S. Ct. at 2623.[13] Far from undermining ITCA, Shelby County reaffirms its core holding.

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[12] Whether Kansas' or Arizona's own constitutions permit this requirement is not before us in this case. See Belenky v. Kobach, 13-4150-EFM-KMH, 2014 WL 1374048, at *4 (D. Kan. Apr. 8, 2014) (unpublished) (remanding to state court a lawsuit alleging that Kansas's imposition of proof-of-citizenship requirements on registrants using the state form violates the Kansas constitution and Kansas statutes).

[13] Shelby County signals unanimous support for this proposition. The four dissenters regarded ITCA as consistent with their claim that "Congress holds the lead rein in making the right to vote equally real for all U.S. citizens." Shelby County, 133 S. Ct. at 2637 n.2 (Ginsburg, J., dissenting).

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Kobach's and Bennett's argument that the states' Qualifications Clause powers trump Congress' Elections Clause powers is foreclosed by precedent. In ITCA, the Court clearly held that Congress' Elections Clause powers preempt state laws governing the "Times, Places and Manner" of federal elections, including voter registration laws. 133 S. Ct. at 2253. Citing the Federalist Papers, the Court noted that the Framers expressly rejected giving the states exclusive authority to regulate federal elections because "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." Id.[14] Only the dissenting opinion by Justice Thomas endorses the theory that Arizona and Kansas press before this court. Id. at 2266-69 (Thomas, J., dissenting). The dissent proves the point.

With the Supreme Court's recent precedent squarely against their position, we cannot accept Kobach's and Bennett's contention that states' Qualifications Clause powers trump Congress' Elections Clause powers. Nor can we credit their contention that the EAC's refusal to modify the Federal Form unconstitutionally precludes them from enforcing their laws intended to prevent noncitizen voting. As discussed in Section II.C, supra, there are at least five

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[14] In ITCA, the Court noted that this "prospect seems fanciful today." 133 S. Ct. at 2253. But during oral argument in the district court, the states took the position that there were no limits on their ability to include requirements on the Federal Form so long as those requirements reflected valid state law enactments.

alternate means available to the states to enforce their laws, and they have not provided substantial evidence of noncitizens registering to vote using the Federal Form.

III

In sum, the EAC had valid authority under HAVA to subdelegate decisionmaking authority to its Executive Director relating to the contents of the Federal Form. Under the unique circumstances of this case (involving a quorum-less EAC), an appeal from the Executive Director's decision to deny the states' requests to modify the contents of the Federal Form was impracticable. Consequently, the Executive Director's decision constitutes final agency action. And that action—which fell within the bounds of the subdelegation that the EAC issued when it had a quorum—was procedurally valid. Contrary to Kobach's and Bennett's claims, the NVRA does not impose a ministerial duty on the EAC to approve state requests to change the Federal Form. The Executive Director's denial of the states' requests survives our APA review, and the states' constitutional claims are unavailing. We therefore **REVERSE** the ruling of the district court and **REMAND** the case to the district court with instructions to vacate its order instructing the EAC to modify the Federal Form.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

[Filed March 19, 2014]

KRIS W. KOBACH, *et al.*,

Plaintiffs,

vs.

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

Defendants.

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 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

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[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).

[3] *Id. at* 2260.

[4] *Id*.

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

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[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.

letters indicated that her decision was based on a 2011 memorandum, 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

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

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 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

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

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.

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

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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).

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;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (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
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[15]

The Court must review the entire administrative record or those parts of it cited by a party, and due

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

[14] *Id.* at 64.

[15] 5 U.S.C. § 706(2).

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.

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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.

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?

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

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[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.").

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 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,'

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

[24] *Id.* at 2257.

[25] U.S. Const. art. I, § 4, cl. 1.

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

[27] *Id.*

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

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[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.

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

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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").

necessarily includes the power to enforce those qualifications.[37]

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

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[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 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).

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 of citizenship apart

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[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.

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

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[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.").

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 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.

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

[45] *Id.*

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

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 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

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[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).

[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).

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 "permissible construction of the statute."[54] But when an

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[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.

[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)).

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

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[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

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 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.

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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.

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

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

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]

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

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[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).

> 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.

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[65] 42 U.S.C. § 1973gg-7(b).

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

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 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

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

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

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

[70] *Id.* at 393.

[71] *Id.*

[72] *Id.*

> 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 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

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

[74] *Id.* at 398.

[75] *Id.* at 403.

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

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

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[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.

law as it pertains to adding information to the federal form's state-specific 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

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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.*

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 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.

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

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

[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.

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,

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[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).

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 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

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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.").

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 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

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[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).

[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.

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:
>
> (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 instructions, and the regulations are silent

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

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

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[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).

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 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

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[103] 42 U.S.C. § 1973gg-7(b)(1).

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

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

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

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

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[107] *Id.* at 13.

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

[109] *Id.* at 27.

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

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[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.").

establishes that there is a point at which the EAC loses whatever discretion it possesses to determine the contents of the state-specific instructions.

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

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

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

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 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.

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

[115] *See* 5 U.S.C. § 706(1).

IT IS SO ORDERED.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

APPENDIX C

[SEAL]

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

DOCKET NO. EAC-2013-0004

[Filed January 17, 2014]

MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM

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. § 16-166(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

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[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.

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, 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.

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[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).

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 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

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[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.

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 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

[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.

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 registration procedures for federal elections. *Id.*;

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[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.

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 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.

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[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.

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.*

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[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.

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. 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

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[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).

as is necessary to ensure that they accurately reflect the requirements for registering to vote in federal elections.

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

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[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.

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 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

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[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.

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.

- 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.

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

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. This data

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[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.

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

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[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.

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 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]

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[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

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]

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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

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).

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

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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).

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

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 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

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[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).

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

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[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.

offices are already using this database to attempt to verify citizenship of voter registration applicants. EAC000771.

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.).

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[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).

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 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.).

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[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.

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

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

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 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'

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[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

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

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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.

"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). 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 COMMISION

BY: /s/ Alice P. Miller
Alice P. Miller
Chief Operating Officer and
Acting Executive Director

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 14-3062 and 14-3072

[Filed December 29, 2014]

KRIS W. KOBACH, Kansas Secretary of State, et al.,
Plaintiffs - Appellees,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, et al.,
Defendants - Appellants,

and

INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,
Defendant Intervenors - Appellants.

REPRESENTATIVES NANCY PELOSI, et al.,
Amici Curiae.

ORDER

Before **LUCERO**, **HOLMES**, and **PHILLIPS**, Circuit Judges.

Plaintiffs-Appellees' petition for panel rehearing is denied.

Entered for the Court
/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

52 U.S.C. § 20501. Findings and purposes

(a) Findings

The Congress finds that--

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this chapter are--

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20504. Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information

No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures

(1) Each 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.

(2) The voter registration application portion of an application for a State motor vehicle driver's license--

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to--

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that--

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) Change of address

Any change of address form submitted in accordance with State law for purposes of a State motor vehicle

driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) Transmittal deadline

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

52 U.S.C. § 20505. Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form

that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(B) who is provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 20507(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 20507(d) of this title.

52 U.S.C. § 20508. Federal coordination and regulations

(a) In general

The Election Assistance Commission--

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this chapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this chapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this chapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2)--

(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 formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.