IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE

Plaintiffs,

v.

BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendants.

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION

Defendant-Intervenors.

Case No. 16-cv-236 (RJL)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

The Executive Director acted contrary to law by unilaterally granting the requests of three states to alter the National Mail Voter Registration Form (the "Federal Form") to require documentary proof of citizenship. Purporting to act on behalf of the entire U.S. Election Assistance Commission ("EAC" or "Commission"), the Executive Director made this decision of national importance (1) ***without*** the approval of three Commissioners as statutorily mandated by the Help America Vote Act ("HAVA"); (2) ***without*** any authority under the Commission's own management statement, (3) ***without*** explaining the grounds upon which he changed more than a decade of Commission policy and precedent; (4) ***without*** providing notice or opportunity to comment; and (5) ***without*** making the mandatory evidentiary findings required by the National Voter Registration Act ("NVRA") and the Supreme Court's holding in *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*") that the submission of documentary proof of citizenship with the Federal Form is "necessary" for states to enforce their voter eligibility requirements. As a result, the Executive Director's actions violated the Administrative Procedure Act ("APA"), HAVA, and the NVRA, and should be immediately rescinded. The EAC and Mr. Newby have even conceded that they violated the APA by failing to make any evidentiary finding of necessity as required under the NVRA, a binding admission that confirms Plaintiffs' substantial likelihood of success on the merits. *See* Defs.' Mem. at 8, 12 (Dkt. #28).

This case is about one thing alone: whether Mr. Newby's unauthorized actions altering the contents of the Federal Form violated the APA. The relative wisdom of Alabama, Georgia and Kansas's (collectively, the "States") documentary proof of citizenship laws is not at issue. The Kansas Secretary of State's arguments about the supposed merits of those laws, the administrative burdens on States in the absence of documentary proof, and his assertion that the

EAC had no discretion but to grant the States' requests, are either irrelevant or were rejected by the Supreme Court and the Tenth Circuit *in the last three years*. And this case certainly does not turn on the degree to which the EAC's former Executive Director consulted with the EAC's attorneys, the Department of Justice, in the drafting of a decision that followed years of consistent Commission policy and precedent during the pendency of prior litigation. The only issue in this case is whether Mr. Newby's actions on January 29, 2016 were authorized and lawful, and they were not.

The Secretary does not contest the fact that three Commissioners did not approve of changing the EAC's policy and precedent regarding documentary proof of citizenship. The Secretary made only passing reference at oral argument to APA standards, incorrectly asserting that: (1) the EAC's prior adjudications of States' requests did not establish any legally enforceable Commission policy with respect to documentary proof of citizenship, *see* TRO Hr'g Tr. 61:16, Feb. 22, 2016 ("Tr."); (2) Mr. Newby's private memorandum, penned after his actions and never disclosed except in this litigation, is a sufficient basis for upholding his actions,[1] *see* Tr. 79:18; and (3) the EAC's 2014 adjudication of Kansas, Georgia, and Arizona's requests,[2] sustained by the Tenth Circuit and denied review by the Supreme Court, is somehow invalid, because the EAC's former Acting Executive Director consulted with the Department of Justice in rendering her decision. *See* Tr. 59:10. As we demonstrate below, each of these arguments is wrong as a matter of law.

Nor has the Secretary rebutted Plaintiffs' showing that they will be irreparably harmed without an injunction. Plaintiffs' voter registration efforts have been significantly hampered by

[1] The Secretary's reliance on this private memorandum and other information created after the challenged actions by the Executive Director, is improper as such information lies outside the administrative record. Plaintiffs respond to the arguments made by the Secretary based on these extra-record materials simply to show that these arguments are meritless. Such responses do not indicate or concede that such materials may properly be considered by the Court.
[2] Georgia did not challenge EAC's 2014 decision.

documentary proof requirements. The League of Women Voters even temporarily stopped conducting voter registration drives in certain Kansas counties after nearly a century of helping U.S. citizens to register to vote. The Secretary has confirmed Plaintiffs' showing with evidence that many who applied to register in Kansas in February were not registered to vote. Courts routinely find that burdens on voter registration efforts constitute irreparable injury.

For these reasons, as set forth in Plaintiffs' opening brief and below, a preliminary injunction rescinding the Executive Director's actions should issue.

I. THE EXECUTIVE DIRECTOR LACKED AUTHORITY

A. The Executive Director Failed To Obtain The Approval of Three Commissioners

There is no dispute that Mr. Newby failed to obtain the approval of three Commissioners before reversing the EAC's longstanding policy and precedent that documentary proof of citizenship is not "necessary" under the NVRA to determine voter eligibility and thus may not be required on the Federal Form. Section 203(a) of HAVA provides that the Commission "shall have four members appointed by the President, by and with the advice and consent of the Senate." 52 U.S.C.A. § 20923. As the legislative history explains, "[o]f the four commissioners, no more than two can be from the same party, so bipartisanship is assured." 147 Cong. Rec. H9264-02, 147 Cong. Rec. H9264-02, 2001 WL 1587015. Consistent with the bipartisanship embedded into the agency's DNA, the EAC may only act upon a bipartisan consensus. Section 208 of HAVA expressly requires that "[a]ny action which the Commission is authorized to carry out under this Act may be carried out ***only with the approval of at least three of its members***." 52 U.S.C.A. § 20928 (emphasis added). Thus, at least one Commissioner from each party must approve any action before it can be taken. If the approval of three Commissioners is not obtained, the consequence is that the *Commission* takes *no* action. The

Supreme Court expressly recognized this in *ITCA*: "In 2006, the EAC divided 2-to-2 on the request by Arizona to include the evidence-of-citizenship requirement among the state-specific instructions on that Federal Form, *which meant that no action could be taken, see* 42 U.S.C. § 15328." 133 S. Ct. 2247, 2260 (2013) (emphasis added).

The Secretary and Mr. Newby's arguments that the Executive Director may act for the Commission subject to appeal to the Commissioners is wrong. *See* Tr. 57:8; Newby Decl. ¶ 28 (Dkt. #28-2). No provision of HAVA or the NVRA suggests that there is any such right of appeal from Executive Director decisions, because the Executive Director does not have the authority *in the first place* to decide questions of fundamental policy, such as with respect to the Federal Form. Under the Secretary's view, an Executive Director would have plenary reign to make partisan decisions on behalf of the Commission and immediately implement them, while the Commissioners must obtain a bipartisan consensus of three votes to overturn, veto or rescind his implemented decision. *See* Kansas Mem. at 15-16 (Dkt. #27). Nothing in the EAC's authorizing statute endows the Executive Director with greater freedom or power to act than the Commissioners on behalf of the EAC. Any other conclusion is untenable.

The sole Democratic commissioner, Tom Hicks, openly objected to the Executive Director's decision and demanded a full Commission vote on the States' requests to amend the Federal Form. *See* Keats Aff. Ex. 1. No such vote has been held. Even if the two Republican Commissioners support the Executive Director's actions, they cannot circumvent HAVA's three-vote requirement by permitting the Executive Director to act on his own.

B. Mr. Newby Incorrectly Concluded That Changing State Instructions to Require Documentary Proof of Citizenship Is Merely a "Ministerial" Matter

The NVRA requires that *the Commission* develop and adopt regulations governing the Federal Form. *See* 52 U.S.C. §§ 20508(a)(1), (a)(2). And Mr. Newby fully admits, as he must,

that changes to the Federal Form "require[] *Commissioner Review* through a rulemaking process." Newby Decl. ¶ 26 (Dkt. #28-2) (emphasis added). But he mistakenly believes that "changes to the state-specific instructions [a]re different than to the NVRA form itself" and therefore somehow exempt from the three-vote requirement. *Id.* To the contrary, both Supreme Court precedent and EAC regulations make clear that the state specific-instructions are an *integral part* of the Federal Form. *See* 11 Fed. Reg. 9428.2 ("Form means the national mail voter registration application form, *which includes the . . . state-specific instructions*.") (emphasis added); *ITCA*, 133 S. Ct. 2247, 2253 (2013) ("The Federal Form . . . contains a number of state-specific instructions . . . ."). That an oath signed under penalty of perjury is all that is "necessary" under the NVRA to confirm U.S. citizenship is a central element of the Federal Form. Mr. Newby cannot undermine that under the guise of amending state-specific instructions. Even the Secretary has described Mr. Newby's actions as changing the Federal Form itself (and not just the instructions), stating in a recent Kansas state court filing: "On February 1, 2016, the National Mail Voter Registration Form ('Federal Form') *was modified* by the United States Election Assistance Commission ('EAC') in response to a request from Kansas, to require proof of citizenship in accordance with Kansas law." Mem. in Support of Defendants['] K.S.A. 60-260 Motion at 1-2, *Belenky v. Kobach*, No. 2013cv1331 (Shawnee County, KS Dist. Ct. Feb. 2, 2016) (attached hereto as Keats Aff. Ex. 2) (emphasis added).[3]

Mr. Newby also incorrectly concluded that the question of documentary proof of citizenship is merely "ministerial, and, thus, routine." Newby Mem. at 2 (Dkt. #28-1). As an initial matter, as Johnson County's Election Commissioner, Mr. Newby submitted comments to the EAC supporting Kansas's 2014 request for a proof-of-citizenship instruction, in which he

[3] Mr. Kobach's memorandum incorrectly lists *Belenky* as filed in federal court with docket no. 12-CV-4150.

admitted that proof-of-citizenship is a "***policy change***," and that, "***[n]o doubt, proof of voter citizenship may have policy impacts***." Schmidt Decl. Ex. 8 (Dkt. #11-10) (emphasis added).

More fundamentally, after more than a decade of Commission-level decision-making and litigation on this issue, it strains credulity to maintain that documentary proof is a mere ministerial matter. The decision has affected and will affect tens of thousands of citizens, and the Supreme Court in *ITCA* held that Arizona could not require Federal Form users to submit documentary proof of citizenship unless the state demonstrated to the EAC that it could not enforce its citizenship qualification any other way. *See ITCA*, 133 S.Ct. at 2259. And the Tenth Circuit recognized under *ITCA* that the EAC "does have discretion to deny" state requests to amend the Federal Form to require documentary proof of citizenship. *See Kobach v. EAC*, 772 F.3d 1183, 1196 (10th Cir. 2014). In so doing, the court flatly rejected Kansas's argument that the EAC was under a "nondiscretionary duty" to grant the states' requests and made clear that this is a policy and not a ministerial question. *Id*.[4] The Commission's longstanding *policy* against documentary proof of citizenship can only be reversed by using the same administrative procedures that led to the establishment and enforcement of that policy in the first place, i.e., a three-Commissioner vote and notice and comment rulemaking. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1205 (2015) (holding that an agency may only change a rule or fixed policy using the "same procedures [as the agency] used to issue the rule in the first instance").[5]

The Secretary at argument also incorrectly asserted that the EAC's policy against documentary proof of citizenship was "not a policy" at all, but "simply an adjudication." Tr.

[4] Similarly, the Secretary's argument that "the state election official gets to decide what's necessary," is foreclosed by *ITCA* and *Kobach*. Tr. 68:25-69:1; *see generally* Tr. 69-72.

[5] While certain requested changes to the state-specific instructions may be ministerial, such as updates to election officials' addresses or telephone numbers, those matters cannot seriously be compared with the question of requiring documentary proof of citizenship, an issue Congress itself debated and rejected and that has been the subject of formal Commission votes, adjudications and protracted litigation.

61:16. However, as binding agency policy may be established through an adjudication *or* rulemaking, the Secretary's distinction makes no difference. *See N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (holding that agencies may "announc[e] new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion"); *Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication . . . ."). Here, the EAC established the requirements for the Federal Form both through two notice and comment rulemakings[6] and through adjudications that documentary proof of citizenship was not "necessary" under the NVRA. The EAC's policy that documentary proof of citizenship is not necessary is a longstanding and binding *substantive* rule of law.[7]

C. The Commissioners Did Not Delegate Authority to the Executive Director to Overrule Commission Policy and Precedent

Mr. Newby stated in his private memorandum that "courts have supported the ability of the acting Executive Director of the agency . . . to make binding administrative decisions on state requests." Newby Mem. at 1 (Dkt. #28-1). But the only court to have addressed the Executive Director's authority was the Tenth Circuit, which based its decision on an express delegation of authority in 2008 by the Commissioners that "instructed the Executive Director to continue maintaining the Federal Form *consistent* with the Commissioners' past directives unless and until those directions were countermanded by the Commissioners[.]" *Kobach*, 772 F.3d at 1194

[6]The Federal Form was initially developed by the FEC through a notice and comment rulemaking, *see* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 11,211 (Mar. 10, 1994), and after Congress enacted HAVA, the FEC and the EAC conducted a joint rulemaking which transferred responsibility for the NVRA regulations from the FEC to the EAC, but made "no substantive changes to those regulations." 74 Fed. Reg. 37519 (July 29, 2009).

[7] The Secretary mistakenly cited *Perez* as "reject[ing] the notion that an agency's longstanding practice suddenly constitutes a policy that requires rule making or even notice and comment to change." Tr. 61:22 – 62:1. But *Perez* simply overruled this Circuit's *Paralyzed Veterans* doctrine, which Plaintiffs do not rely upon here. *See Perez*, 135 S. Ct. at 1206.

(emphasis added). That delegation of authority was withdrawn before Mr. Newby's appointment. Even if it was still in effect, the Executive Director here indisputably did *not* maintain the Federal Form "consistent" with the Commissioner's past directives.[8]

But there is more. In February 2015, the Commissioners adopted a new management policy, *see* Pls.' Mem. at 11-13 (Dkt. #11-1), that eliminated the Executive Director's prior authority to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies" thereby reserving that authority exclusively for the Commissioners. The Commissioners narrowed the Executive Director's authority to (1) making policy *recommendations*, (2) implementing policies *established by the Commission*, and (3) other *administrative* duties. *See* Schmidt Decl. Ex. 6 (Dkt. #11-8). Mr. Newby remains free to make recommendations regarding the States' requests to the Commissioners, but has no authority to overrule and unilaterally change the Commission's longstanding policy regarding documentary proof of citizenship.

II. THE EXECUTIVE DIRECTOR FAILED TO PROVIDE A RATIONALE FOR HIS ACTIONS

A. The Executive Director Provided No Rationale For Changing EAC Policy and Precedent

The Executive Director's actions also violated fundamental principles of administrative law. In departing from the EAC's settled policy and precedent with respect to the Federal Form, the Executive Director was "obligated to supply a reasoned analysis for the change [even] beyond that which may be required when an agency does not act in the first instance." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42

[8] In attempting to justify his own authority within the EAC, Mr. Newby incorrectly conflated substantive "policy" set by the Commission, with procedural "policy" that merely governs the EAC's internal operations. *See* Newby Decl. ¶ 36-37 (Dkt. #28-2).

(1983). His failure to do so mandates overturning his actions "as arbitrary and capricious." *Comcast Corp. v. F.C.C.*, 526 F.3d 763, 769 (D.C. Cir. 2008).

This Court of course is fully familiar with these principles. In *Beaty v. Food & Drug Admin.*, this Court determined that the Food and Drug Administration ("FDA") had "departed from a longstanding policy of not allowing the importation of unapproved prescription drugs." 853 F. Supp. 2d 30, 41 (D.D.C. 2012) (Leon, J.) *aff'd in part, vacated in part sub nom. Cook v. Food & Drug Admin.*, 733 F.3d 1 (D.C. Cir. 2013). The FDA "failed to provide a reasoned explanation for departing from [its] own regulations, longstanding practices, and the purposes of the FDCA." *Id.* at 43. Therefore, invoking the administrative law hornbook principles that "agency action is arbitrary, capricious, or an abuse of discretion when it 'depart[s] from a prior policy sub silentio or simply disregard[s] rules that are still on the books,'" *id*. at 41 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), this Court held that the FDA acted arbitrarily and capriciously, and abused its discretion by departing from FDA's own regulations and longstanding policies. *Id.*

Here, as in *Beaty*, the Commission failed to provide a "reasoned explanation for departing from [its] own regulations, longstanding practices, and the purpose of [its governing statute]" when it abandoned its own policy by granting the States' requests. *Id*. at 43. Because the Executive Director has failed to provide a reasoned analysis explaining his departure from settled EAC policy, his decision must be set aside as arbitrary, capricious, and an abuse of discretion.[9]

[9] Mr. Newby's private memorandum and affidavit do not satisfy the APA's requirement of a reasoned decision. "'[T]he focal point for judicial review' under the [APA] 'should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Am. Coke & Coal Chems. Inst. v. E.P.A.*, 452 F.3d 930, 945 (D.C. Cir. 2006) (emphasis added) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Those documents are at best classic post-hoc rationalizations on which his actions cannot be sustained. *See Ass'n of Civilian Technicians v. Fed. Labor Relations Auth*., 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Agency decisions must

B. Mr. Newby's Memorandum Confirms That His Actions Were Arbitrary, Capricious And An Abuse of Discretion

Although Mr. Newby's memorandum is not part of the administrative record, his flawed reasoning confirms that his actions were arbitrary, capricious and an abuse of discretion. In contrast with prior detailed and well-reasoned decisions in 2006 and 2014 to reject the very same changes to the Federal Form consistent with agency policy and precedent,[10] Mr. Newby's private memorandum displays his apparent ignorance of the law governing the Federal Form. For example, his argument that the States' requests should be granted because they related solely to "voter qualifications," Newby Decl. ¶ 35 (Dkt. #28-2), was expressly rejected by the Supreme Court in *ITCA*. 133 S. Ct. at 2259-60. Mr. Newby also concedes that he did not rely on *any* of the evidence the Secretary submitted to demonstrate "necessity," thus confirming that even the Executive Director rejected the only possible (albeit inadequate) evidence offered in support of Kansas's assertion that documentary proof had suddenly become "necessary." *See* Newby Mem. at 4 (Dkt. #28-1). And as the EAC and Mr. Newby both admit, Mr. Newby does *not* even conclude that the States presented sufficient evidence demonstrating documentary proof of citizenship is "necessary to enable the [States] to assess the eligibility of the applicant," 52 U.S.C. § 20508(b)(1), a conclusion required by the statute and by the Supreme Court in *ITCA*. The failure to make that finding violated the NVRA and the APA as a matter of law, as the EAC and Mr. Newby admit. *See* Defs.' Mem. at 10-11 (Dkt. #28). And, crucially, Mr. Newby's post-

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generally be affirmed on the grounds stated in them. [. . .] Post-hoc rationalizations, developed for litigation are insufficient.").

[10] The Secretary attacks the former Executive Director's 2014 decision due to the Department of Justice's involvement. *See* Tr. 59:10. The Secretary previously challenged that decision in his prior litigation against the EAC, arguing that "the EAC memorandum looks astonishingly similar to the briefing of the opposite side[ ]," *i.e.*, the Department of Justice. Keats Aff. Ex. 3 at 42:5. That argument failed then, and he is barred from re-litigating it here. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[A] final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were *or could have been raised* in that action.") (emphasis added). But it is also irrelevant because the EAC's policy against documentary proof of citizenship long pre-dated the EAC's 2014 adjudication.

hoc memorandum does not make even a passing reference to prior EAC decisions rejecting identical requests, let alone provide a reasoned explanation as to why those decisions were "being deliberately changed," as opposed to "casually ignored." *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987). Simply put, even relying on Mr. Newby's post-hoc rationalization, there is no question that his actions were arbitrary, capricious and an abuse of discretion.

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM

The Secretary's assertions at oral argument that the Executive Director's actions are not causing irreparable harm are wrong as a matter of law and fact. Mr. Newby's adoption of a proof of citizenship requirement on the Federal Form has created unnecessary and sometimes insurmountable obstacles to registration for thousands of eligible voters, including some of Plaintiffs' members and those whom Plaintiffs seek to assist to register, and is preventing Plaintiffs from fulfilling their missions of helping voters register. Courts have consistently found that these injuries constitute irreparable harm.

The Secretary asserted that the proof of citizenship requirement does not result in irreparable harm, because (1) *most* citizens have proof of citizenship, and (2) those who apply to register without providing proof of citizenship might later be registered by the state *in the event that Plaintiffs succeed in this lawsuit*. Tr. 48:22 - 50:17. But the Secretary cannot deny that many citizens do *not* have ready access to proof of citizenship, and that many such citizens will *not* attempt to register using a form that requires documentation they do not possess. The Secretary also ignores that "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury," *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014), including when a law interferes with the ability of voter registration groups to

conduct voter registration drives. *See id.*; *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012).

Thousands of potential voters, including some of Plaintiffs' members and those whom Plaintiffs seek to help register to vote, are being prevented or discouraged from registering because of the Executive Director's actions. As the Secretary concedes, in the first three weeks of February 2016, an astounding *two thirds* of Kansas's 22,000 voter registration applicants were *blocked* from registering, presumably largely due to a lack of required proof of citizenship documents.[11] *See* Tr. 44:4; Caskey Decl. ¶ 27-1 (Dkt. #27-1). Between 2013 and September 2015, over 35,000 people (over 16% of total registrants) have been placed on Kansas's suspense list for failing to present their papers. *See Young voters, Wichitans top Kansas' suspended voter list*, Wichita Eagle, Sept. 26, 2015, http://www.kansas.com/news/politics-government/article36705666.html (newspaper report on its analysis of the suspense list). Nationwide, about 7% of voting-age Americans lack documentary proof of citizenship. *See Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice, 2-3 (November 2006), http://www.brennancenter.org/analysis/citizens-without-proof. According to Alabama's Secretary of State, 560,000 people in Alabama, or 20% of registered voters, lack a DMV-issued ID, the most common form of proof of citizenship in the state.[12]

Kansas's burgeoning list of "suspended" voters, and the Secretary's admission that Kansas is blocking two out of every three applicants from registering, confirms the difficulties

[11] In September 2015, the elections commissioner for Sedgwick County, Kansas — the second most populous in the state — reported that 92 percent of the people placed on the suspense list from that county were listed because they had not provided documentary proof of citizenship. *Young voters, Wichitans top Kansas' suspended voter list,* Wichita Eagle, Sept. 26, 2015, http://www.kansas.com/news/politics-government/article36705666.html.
[12] *Greater Birmingham Ministries v. Alabama*, no. 2:15-cv-02193-LSC (N.D. Ala. Dec. 2, 2015), http://www.naacpldf.org/files/case_issue/Greater%20Birmingham%20Ministries%20v.%20Alabama%20Complaint.pdf; *see also* Gaddy Decl. ¶ 10 (Dkt. #13-5).

and costs facing eligible voters who do not possess acceptable proof of citizenship. For example, a Kansas resident who recently moved from Texas was unable to register to vote, *even with* the help of the League, because he cannot afford to purchase a birth certificate from Texas. *See* Krehbiel Decl. ¶ 6.[13] Another resident, who is a Kansas League member, faced extreme difficulty and delay in registering after she was divorced and moved from Florida to Kansas, but did not have her marriage certificate. *See id.* ¶ 7. Voters in Alabama, Georgia and Kansas face similar burdens. A birth certificate costs fifteen dollars in Alabama and twenty-five dollars in Georgia, sums that will be too large for some citizens to expend. *See* Alabama Department of Public Health, *Birth Certificates*, http://adph.org/vitalrecords/index.asp?id=1559; Georgia Department of Public Health, *Birth Records*, https://dph.georgia.gov/birth-records.

The harm suffered by eligible voters and those who assist them is irreparable: Thousands will be prevented from registering and thus will not be able to vote in the upcoming elections (including the congressional primary in Georgia with a registration deadline of April 26), others will miss the opportunity to vote because of delays in registration, and still others are being discouraged from registering altogether. *See* Permaloff Declaration ¶¶ 16, 35 (Dkt. #13-8); Poythress Declaration ¶ 20-21 (Dkt. #13-6); Permaloff Supp. Declaration ¶¶ 11-12. No subsequent action by the states can remedy these wrongs. "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). And for those who are not permitted to register, "once the election occurs, there can

[13] The lowest cost of obtaining a birth certificate from Texas is twenty-two dollars. *See* Krehbiel Decl. ¶ 6. In Alabama, the combined cost of a birth certificate and driver's license can exceed fifty dollars. Gaddy Decl. ¶ 11 (Dkt. #13-5).

be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *League v. N. Carolina*, 769 F.3d at 247.[14]

Plaintiffs' voter registration activities are being seriously impaired by the proof of citizenship requirement, thwarting their mission and causing them to use their scarce "resources to counteract that harm," which constitutes injury and irreparable harm. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015); *see also Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (Leon, J.) (observing that *any* economic loss suffered as a result of administrative action "is irreparable *per se*").[15] The Secretary wrongly opined that the League will spend no additional money, because it will "hand[] out pieces of paper" regardless of what the rules are. Tr. 53: 1-2. The Kansas League, however, spent over $13,000 in recent years to produce new educational materials addressing the proof of citizenship requirement, and is continuing to spend money. Furtado Decl. ¶¶ 38-39 (Dkt. #13-7). And while the Secretary does not "think the [League] is flocking to people's homes" to help them find proof of citizenship, Tr. 53:14-15, the League actually has visited 115 homes in a *single county*. *See* Furtado Decl. ¶ 36 (Dkt. #13-7). The Georgia League has even purchased copying equipment for use in naturalization ceremonies, so that new citizens could register. Poythress Decl. ¶ 17 (Dkt. #13-6).[16]

Proof of citizenship requirements dramatically impair voter registration drives. The Kansas League registers fewer voters because many citizens lack proof of citizenship, and many

[14] *See also Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1271 (W.D. Wash. 2006) (finding irreparable harm due to obstruction of voting rights, and observing that "the Court does not consider a person's right to vote a mere 'detail' to be so easily dismissed").

[15] The Executive Director's actions also burden Plaintiffs' political speech and associational rights that they exercise when they help other citizens register to vote. *League v. Browning*, 863 F. Supp. 2d at 1158 ("The plaintiffs wish to speak, encouraging others to register to vote . . . . This is core First Amendment activity.").

[16] The Secretary mistakenly relies on *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). But plaintiffs there failed to provide adequate evidence showing diversion of resources. *Id.* at 460. Plaintiffs here, unlike in *Husted*, also include *membership* organizations that have standing to assert the rights of their members. *See Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

more who possess proof of citizenship do not carry that proof with them when attending events at which the League registers voters. Furtado Decl. ¶ 32 (Dkt. #13-7). The Kansas League has seen "a dramatic decrease" in voter registrations, and some of its local affiliates have temporarily suspended voter registration drives altogether for the first time in their nearly 100-year history. *Id.* ¶¶ 18-26. The Kansas League in Topeka registered over 900 voters in 2012, but only 275 in 2014, after Kansas's proof of citizenship requirement went into effect. *Id.* ¶ 26. The League's efforts in Alabama and Georgia similarly will be threatened mere weeks before voter registration deadlines. *See* Poythress Supp. Decl. ¶¶ 5-11. The Alabama League has at least three registration drives scheduled before the March 28 registration deadline for the April 12 runoff election. Permaloff Supp. Declaration ¶¶ 6-11. The Georgia League is also planning registration drives ahead of the April 26 deadline, including twelve to fifteen at naturalization ceremonies, where they typically also encounter residents from Alabama. Poythress Supp. Declaration ¶¶ 7, 14.

The Supreme Court recognized that "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." *ITCA*, 133 S. Ct. at 2255. "[W]hen a plaintiff loses an opportunity to register a voter, the opportunity is gone forever. If an injunction does not issue now, there will be no way to remedy the plaintiffs' continuing loss through relief granted later in this litigation." *League v. Browning*, 863 F. Supp. 2d at 1166.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

March 6, 2016

Respectfully submitted,

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**Pro hac vice motion pending*
***Admitted pro hac vice*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE

Plaintiffs,

v.

BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendants.

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION

Defendant-Intervenors.

Case No. 16-cv-236 (RJL)

AFFIRMATION OF MICHAEL KEATS IN SUPPORT OF THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

MICHAEL KEATS, an attorney admitted *pro hac vice* to practice before this Court, affirms the following to be true under the penalties of perjury:

1. I am a member of the firm of Stroock & Stroock & Lavan LLP, counsel for Plaintiffs the League of Women Voters of the United States, the League of Women Voters of

Alabama, the League of Women Voters of Georgia, and the League of Women Voters of Kansas in the above-captioned matter. I submit this affirmation in support of the plaintiffs' motion for a preliminary injunction in the above-captioned matter.

2. Annexed hereto as Exhibit 1 is a true and correct copy of the "Statement by Vice-Chair Thomas Hicks," dated February 2, 2016.

3. Annexed hereto as Exhibit 2 is a true and correct copy of the "Memorandum in Support of Defendants['] K.S.A. 60-260 Motion," dated February 2, 2016, originally filed in the matter Belensky, et al. v. Kobach, et al., No. 5:13-CV-1331 in Kansas state court.[1]

4. Annexed hereto as Exhibit 3 is a true and correct copy of the "Transcript of Proceedings," dated February 11, 2014, in the matter Kobach, et al., v. United States Election Assistance Commission, et al., No. 13-4095, in the U.S. District Court for the District of Kansas.

March 6, 2016

Respectfully submitted,

By: /s/ Michael Keats

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***Admitted pro hac vice*

[1] This memorandum incorrectly lists the *Belenky* case as having been filed in federal court with the docket number 12-CV-4150.

EXHIBIT 1

Statement by Vice-Chair Thomas Hicks

February 2, 2016

The Executive Director of the United States Election Assistance Commission (EAC) issued letters to the states of Kansas, Georgia, and Alabama granting the states' request to amend the state instructions to the federal voter registration form, a decision that contradicts policy and precedent previously established by this Commission.

The Executive Director unilaterally moved to alter the federal voter registration form to reflect those states' proof of citizenship requirements though a proposed change to the form beyond a simple change of election office address or phone number. Any material change to the form should be at the guidance of the agency's Commissioners following a notice and public comment period.

In fact, the Commission's vote in early spring affirmed that agency staff does not have the authority to make policy decisions and further clarifying the role of the Executive Director in its Organizational Management Policy Statement by stating that the Executive Director in consultation with the Commissioners, may only "(1) prepare policy recommendations for commissioners approval, (2) implement policies once made, and (3) take responsibility for administrative matters."

The Commission has addressed this matter several times over the last decade and voted to decline requests to add conflicting language to the federal voter registration form. As such, I believe that this decision constitutes a change of policy, which can only be made following official adoption by at least three Commissioners.

Therefore, I ask that the letters be withdrawn. I will also ask that the Commission review this matter in a public forum to consider the acceptance or reject of the instructions.

EXHIBIT
2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AARON BELENKY, SCOTT JONES, and EQUALITY KANSAS, Plaintiffs,	)	
vs.	)	Case No. 5:13-CV-04150
KRIS KOBACH, KANSAS SECRETARY OF STATE, and BRYAN CASKEY, DEPUTY ASSISTANT SECRETARY OF STATE, ELECTIONS AND LEGISLATIVE MATTERS, KANSAS, in their official capacities, Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS
K.S.A. 60-260 MOTION

Introduction and Facts

Defendants bring this K.S.A. 60-260 motion before the Court in order to ask this Court to vacate its January 28, 2016 Entry of Final Judgment, and also its January15, 2016 and August 21, 2015 orders, due to the emergence of new facts that make this case moot. After this court's entry of judgment, circumstances have changed dramatically. *See* K.S.A. 60-260(b)(2), (6). There is no longer any legal controversy regarding whether Kansas can require proof of citizenship for Federal Form voters. And, there will not be another election in Kansas in which some voters may voter for federal offices only. Specifically, on February 1, 2016, the National Mail Voter Registration Form ("Federal Form") was modified by the United States Election

Assistance Commission ("EAC") in response to a request from Kansas, to require proof of citizenship in accordance with Kansas law. Thus, the federal voter registration form and the state voter registration form are now the same. This development renders the case moot and renders the Court's previous order ineffectual.

This case involves a challenge to whether Defendant Kansas Secretary of State has the authority to hold a dual election, in which Federal Form registrants who fail to provide proof of citizenship are only permitted to vote for federal offices. By extension, the case also addresses whether the State is required to register individuals who have submitted a signed Federal Form without accompanying documentary proof of citizenship to vote in state and local elections. This Court in its January 15, 2016 Memorandum Opinion ("Jan. Slip Op.") ruled that the Secretary of State lacked this authority. Instead, this Court held that individuals who completed a Federal Form but did not provide K.S.A. 25-2309 compliant proof of citizenship were nevertheless required to be registered to vote in Kansas state and local elections, absent one of two conditions occurring. The condition relevant to this motion involves the EAC's modification of the Federal Form. *See* Jan. Slip Op. at 15 ("'Federal Form' registration is adopted in Kansas as one method of registration (K.S.A. 25-2309(a)), a registration method for which the United States Supreme Court has held that any additional state requirements for proof of citizenship do not apply *without advance approval and sanction by Election Assistance Commission for federal elections*. (*Arizona v. Inter Tribal Council of Arizona, Inc.*, ____ U.S. ____, 186 L.Ed.2d 239, 133 S. Ct. 2247 (2013))." (emphasis added)).[1] Thus, this Court has already specifically held that unless the Federal Form was modified to require proof of citizenship, the Secretary lacked the authority to require Federal Form applicants to provide

[1] The other possible condition was that the Kansas legislature expressly legislate for the process that the Secretary of State undertook. Slip Op. at 15.

proof of citizenship. That modification has now occurred. The EAC has approved and sanctioned the Kansas proof-of-citizenship requirement. This case is now moot because the circumstances underlying the Plaintiffs' claims have completely changed. The Federal Form now requires proof of citizenship; there will not be another dual election with federal-offices-only voters.

On November 18, 2015, following the implementation of K.A.R. 7-23-15, the Office of the Kansas Secretary of State renewed its request that the Election Assistance Commission ("EAC") amend the Federal Form to require proof of citizenship in accordance with K.S.A. 25-2309, along with including the requirements under K.A.R. 7-23-15. *See* Ex. 1 (Letter from Deputy Assistant Secretary of State Bryan Caskey). As part of the request, Kansas provided new evidence of numerous aliens who had registered to vote in Kansas prior to the proof-of-citizenship requirement; Kansas also provided new evidence regarding aliens who had attempted to register after the requirement went into effect, but were successfully prevented from registering. *Id.*

On January 29, 2015, the EAC granted Kansas's request to modify the Federal Form. *See* Ex. 2 (Letter from EAC Executive Director Brian Newby). As of February 1, 2015, the Federal Form has been modified to now include a specific requirement that a Federal Form applicant provide proof of citizenship to register to vote in Kansas. *See* Ex. 3 (Updated Federal Form). Specifically, the Kansas instructions on the Federal Form now include the following language:

> 9. Signature. To register in Kansas you must:
>
> • be a citizen of the United States
>
> • be a resident of Kansas
>
> • be 18 by the next election

• have provided a document, or copy thereof, demonstrating United States citizenship within 90 days of filing the application with 9 State Instructions the secretary of state or applicable county election officer

• have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote • not claim the right to vote in any other location or under any other name

• not be excluded from voting by a court of competent jurisdiction

• acceptable documents demonstrating United States citizenship as required by K.S.A. § 25-2309(l) include the following:

(1) a driver's license or nondriver state identification card indicating on its face that the holder has provided satisfactory proof of United States citizenship;

(2) a birth certificate indicating birth in the United States;

(3) pertinent pages of a valid of expired United States passport identifying the applicant and the applicant's passport number;

(4) a naturalization document indicating United States citizenship.

(5) A document issued by the federal government pursuant to the Immigration and Naturalization Act of 1952, and amendments thereto, indicating United States citizenship;

(6) a Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number;

(7) a consular report of birth abroad of a citizen of the United States;

(8) a certificate of citizenship issued by the U.S. Citizenship and Immigration Services;

(9) a certificate of report of birth issued by the U.S. Department of State;

(10) an American Indian card with KIC classification issued by the U.S. Department of Homeland Security;

> (11) a final adoption decree showing the applicant's name and United States birthplace;
>
> (12) an official U.S. military record of service showing the applicant's United States birthplace;
>
> (13) an extract from a U.S. hospital record of birth created at the time of the applicant's birth indicating the applicant's United States birthplace.
>
> If one does not possess any of the listed documents, the person may alternatively prove his or her citizenship through the process described in K.S.A. § 25-2309(m).

Due to this change to the Federal Form, the case is now moot and the Court's opinion is ineffectual. This Court should thus vacate its orders and dismiss this case as moot.

ARGUMENT

When a case becomes moot, a court has a duty to dismiss the case. *See In re M.R.*, 272 Kan. 1335, 1339 (2002) ("It is the duty of the courts to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions, or to declare principles which cannot affect the matters in issue before the court.") (citation and internal quotations omitted). "When it appears by reason of changed circumstances between the commencement of an action and the trial thereof, a judgment would be unavailing as the real issue presented, the case is moot and judicial action ceases [. . . .]" *State ex rel. Stephan v. Johnson*, 248 Kan. 286, 291 (citations omitted); *see also Sierra Club v. Moser*, 298 Kan. 22, 60 (2013) (quoting *Dickey Oil Co. v. Wakefield*, 153 Kan. 489, Syl. ¶ 1 (1994)). This rule applies to both actions seeking common-law remedies and "to actions under our declaratory judgment statute." *State ex rel. Stephan*, 248 Kan. at 291 (citation omitted). "This is manifest by the rule itself, by the express terms of the statute, and by our decisions which hold that in order to obtain an adjudication of any question law under the declaratory judgment act, an actual

controversy must exist and *when any legal question becomes moot, judicial action ceases.*" *Id.* (citations omitted) (emphasis added). Thus, "[a] case will be dismissed as moot when it clearly and convincingly appears that the actual controversy has ceased and any judgment rendered in the case will be an idle act insofar as the rights involved in the action are concerned." *In re Horst*, 270 Kan. 510, 519 (2000) (citations omitted).

After the February 1, 2016, modification to the Federal Form, the actual controversy on which this Court's opinions rest no longer exists. Thus, any judgment rendered would be "an idle act" with regard to these parties. *Id.* The legal question before the Court involving the statutory authority of the Secretary of State to require Federal Form applicants to vote only for federal office (through provisional ballots) is no longer a live controversy. After modification of the Federal Form by the EAC, individuals who register to vote by using either the Federal Form or the State Form will be required to provide proof of citizenship prior to be registered to vote in any election. Thus, no live legal dispute remains regarding the Secretary's authority to these plaintiffs.

Additionally, no exception to mootness exists that would permit this case to remain live. The most common mootness exception is that a court will retain a case "where the moot issue 'is capable of repetition and raises concerns of public importance.'" *State v. Hilton*, 295 Kan. 845, 850-51 (2012) (quoting *State v. DuMars*, 37 Kan. App. 2d 600, 605, *rev. denied* 284 Kan. 948 (2007)). "[P]ublic importance" in the "context" of mootness is defined as:

> [S]omething more than that the individual members of the public are interested in the decision of the appeal from motives of curiosity or because it may bear upon their individual rights or serve as a guide for their future conduct as individuals.

Hilton, 295 Kan. at 851 (citations omitted). The question is whether the issue is one "that is likely to arise frequently in the future unless it is settled by a court of last resort." *General Bldg.*

Contractors, L.L.C. v. Board of Shawnee County Com'rs, Shawnee County, 275 Kan. 525, 533 (2003) (quoting *Junction City Education Ass'n v. US.D. No. 475*, 265 Kan. 212, 215 (1998)).

After the modification to the Federal Form on February 1, 2016, the need for Kansas to hold dual elections to comply with Kansas and federal registration laws no longer exists. Additionally, the question of whether the State is required to register individuals who have submitted a signed Federal Form without accompanying documentary proof of citizenship to vote in state and local elections also no longer exists. The Federal Form now requires the inclusion of proof of citizenship to register to vote in Kansas. Thus, the issues addressed in this case will no longer occur in the future, let alone "arise frequently," and dismissal is appropriate. *General Bldg Contractors*, 275 Kan. at 533.

Because no actual controversy remains, this case must be dismissed as moot. Thus, pursuant to K.S.A. 60-260(b)(2) and (6), Defendants respectfully request that this Court amend its previous Order based on this new evidence that was not available prior to this Court's Order and dismiss this case as moot.

CONCLUSION

For the reasons set forth herein, this Court should vacate its judgment and previous orders, and dismiss this case as moot.

Respectfully submitted this 2nd day
of February, 2016.

Garrett Roe, Kansas Temporary License No. 26867
Kris W. Kobach, Kansas Bar No. 17280
Eric Rucker, Kansas Bar No. 11109
Bryan Brown, Kansas Bar No. 17634
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 2nd day of February 2, 2016, I caused a copy of the foregoing to be hand-delivered to the chambers of the Honorable Franklin R. Theis, and I further certify that I caused a copy to be served on the following by mailing the same with the United States Postal Service, first class postage pre-paid.:

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	Attorney for Plaintiffs

_____
Garrett Roe, Kansas Temporary License No. 26867
Defendants

EXHIBIT
3

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KRIS W. KOBACH, KANSAS SECRETARY OF STATE; KEN BENNETT, ARIZONA SECRETARY OF STATE; THE STATE OF KANSAS; and THE STATE OF ARIZONA,	)	
Plaintiffs,	)	
vs.	)	
THE UNITED STATES ELECTION COMMISSION; and ALICE MILLER, in her capacity as the ACTING EXECUTIVE DIRECTOR AND CHIEF OPERATING OFFICER OF THE UNITED STATES ELECTION ASSISTANCE COMMISSION,	)	District Court Case No. 13-4095
Defendants,	)	
and	)	
INTER TRIBAL COUNCIL OF ARIZONA; ARIZONA ADVOCACY NETWORK; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; STEVE GALLARDO; VALLE DEL SOL; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; COMMON CAUSE; CHICANOS POR LA CAUSA, INC.; DEBRA LOPEZ; PROJECT VOTE, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; LEAGUE OF WOMEN VOTERS OF ARIZONA; and LEAGUE OF WOMEN VOTERS OF KANSAS,	)	
Intervenor Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

On the 11th day of February, 2014, came on to be heard proceedings in the above-entitled and numbered cause before the HONORABLE ERIC F. MELGREN, Judge of the United States District Court for the District of Kansas, sitting in Wichita, commencing at 9:02 a.m. Proceedings

recorded by machine shorthand. Transcript produced by computer-aided transcription.

APPEARANCES:

The plaintiffs Secretary of State of the State of Kansas Kris W. Kobach and the State of Kansas appeared by and through:

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-and-
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Mr. Thomas E. Knutzen
Mr. Richard A. Dellheim
Mr. Caleb Crook
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The plaintiffs Secretary of State of the State of Arizona Ken Bennett and the State of Arizona appeared by and through:

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Arizona Attorney General Office
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The defendant EAC appeared by and through:

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Ms. Felicia L. Chambers
Mr. David G. Cooper
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Mr. Ryan "Kip" Elliot
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Ms. Linda Smith
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-and-
Mr. David G. Seely
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-and-
Mr. Jonathan Brater
Mr. Tomas Lopez
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I N D E X

09:02:30 THE CLERK: All rise. United States District
09:02:33 Court for the District of Kansas is now in session, the
09:02:35 Honorable Eric F. Melgren presiding.
09:02:37 THE COURT: Good morning. You may be seated.
09:02:39 Let court calls the case of Kris Kobach, et al.
09:02:45 versus the Election Assistance Commission, et al. Case
09:02:51 No. 13-4095.
09:02:52 We have a number of counsel, a large number of
09:02:56 counsel, who are appearing in this case. What I'd asked each
09:03:00 party to do -- and I believe they've done -- is designate who
09:03:04 will be speaking for that particular party. I'm going to ask
09:03:08 the lead attorney for each party or group of parties to enter
09:03:14 their appearance and then to enter the appearance of the others
09:03:17 that you wish the record to reflect that they are, rather than
09:03:20 have each attorney stand up individually.
09:03:22 So we'll start with the principal parties,
09:03:25 plaintiff and defendant. If you'd announce your appearance and
09:03:27 those that are appearing with you, and then for the
09:03:30 intervenors.
09:03:31 MR. KOBACH: Your Honor, I'm Kris Kobach
09:03:34 representing the plaintiffs. Appearing with me are Tom Knutzen
09:03:37 of the Secretary of State's office Caleb Crook of the Secretary
09:03:41 of State's office Gina Goff of the Secretary of State's office,
09:03:44 and Michelle Forney of the Arizona Attorney General's office.
09:03:47 THE COURT: And as I understand, Mr. Kobach, from

09:03:49 1 our prior conversation, you're going to be making argument both
09:03:52 2 for Kansas and for Arizona?
09:03:53 3 MR. KOBACH: Yes, Your Honor.
09:03:53 4 THE COURT: All right. Thank you.
09:03:54 5 MR. HEARD: Good morning, Your Honor. Bradley
09:03:57 6 Heard for the Election Assistance Commission. With me at
09:03:59 7 counsel table are David Cooper, Felicia Chambers, and Richard
09:04:04 8 Dellheim. Mr. Dellheim hasn't entered an appearance, but he
09:04:08 9 was here, as Your Honor is aware, at the last hearing.
09:04:10 10 THE COURT: All with the Department of Justice?
09:04:13 11 MR. HEARD: Yes, Your Honor.
09:04:13 12 THE COURT: Thank you, Mr. Heard.
09:04:15 13 MS. PERALES: Good morning, Your Honor. My name
09:04:17 14 is Nina Perales, and I represent the Valle del Sol intervenors.
09:04:21 15 I'm joined today by my cocounsel Ernest Herrera of my firm,
09:04:25 16 also Linda Smith and Gabriel Markoff of O'Melveny & Myers, and
09:04:30 17 cocounsel Jeff Simon and Judd Treeman of Husch Blackwell.
09:04:35 18 THE COURT: Thank you, Ms. Perales.
09:04:35 19 MS. PERALES: Thank you.
09:04:37 20 MR. FREEDMAN: Good morning, Your Honor. John
09:04:39 21 Freedman from Arnold & Porter from intervenor Project Vote.
09:04:43 22 With me as our cocounsel are Lee Thompson and Erin Thompson,
09:04:48 23 the Thompson Law Firm, and Michelle Kanter Cohen of Project
09:04:52 24 Vote.
09:04:52 25 THE COURT: Thank you, Mr. Freedman.

09:04:54 MR. KEATS: Good morning, Your Honor. Michael
09:04:56 Keats from Kirkland & Ellis for the League of Women Voters.
09:04:59 With me of the Brennan Center are cocounsel Jonathan Brater and
09:05:06 Tomas Lopez, and also from my office, Kirkland & Ellis, Adam
09:05:10 Teitcher, and also our local counsel David Seely.
09:05:12 THE COURT: Thank you, Mr. Keats.
09:05:15 MR. POSNER: Good morning. I'm Mark Posner for
09:05:17 the Inter Tribal Council group of intervenors, and with me are
09:05:24 Errol Patterson, Lane Williams, and Kip Elliot.
09:05:28 THE COURT: Thank you, Mr. Posner. And I
09:05:29 understand you wish to use some technology during your
09:05:32 presentation, I hope you're all set up to go.
09:05:34 MS. PERALES: We are, Your Honor. Thank you.
09:05:35 THE COURT: Oh, you are. I'm sorry. I
09:05:38 misapprehended who was going to do that. Very well.
09:05:40 Counsel, particular to our earlier scheduling
09:05:45 conference and preliminary phone conference that we had last
09:05:47 week, I indicated that I'm giving the principal parties, that
09:05:52 is to say Kansas and Arizona and then the Election Assistance
09:05:57 Commission, 45 minutes for opening arguments, and each of the
09:06:00 intervenors 30 minutes for opening argument.
09:06:03 I've read all your briefs. I've looked at the
09:06:06 administrative record. If I had it to do over again, I'd
09:06:10 probably give you a little less time, but I told you I'd give
09:06:14 you that and so I will. I think what we'll do -- and by the

09:06:16 1 way, you're not obligated to take all that time, just so you
09:06:20 2 know.
09:06:20 3 I think what we'll do is I'll hear the first
09:06:22 4 opening 45-minute arguments from both sides, we'll take a
09:06:25 5 morning recess. We'll then try to do -- plan to do all four of
09:06:29 6 the 30-minute arguments of the intervenors before we take a
09:06:32 7 lunch recess. That'll probably push us well past the 12:00
09:06:37 8 o'clock hour. Following the noon recess, I'm going to give
09:06:40 9 each side opportunities for rebuttals, but because I was
09:06:43 10 perhaps overly generous in your opening statement, I think I'm
09:06:46 11 going to ask again the principal parties to limit their
09:06:48 12 rebuttals to 15 minutes and the intervenors to ten.
09:06:51 13 I'm going to mostly follow that, although I don't
09:06:58 14 have a chess clock up here. So, Mr. Kobach, I believe you may
09:07:03 15 proceed.
09:07:12 16 MR. KOBACH: Thank you, Your Honor. May it please
09:07:16 17 the Court, I'm Kris Kobach representing the plaintiffs. We
09:07:20 18 submit that the Court is now at the point in this litigation
09:07:24 19 that was provided or described by Justice Scalia writing in
09:07:28 20 Inter Tribal Council where the Supreme Court stated, "Should
09:07:31 21 the EAC's inaction persist, Arizona would have the opportunity
09:07:35 22 to establish in a reviewing court that a mere oath will not
09:07:39 23 suffice to effectuate its citizenship requirement and that the
09:07:43 24 EAC is therefore under a nondiscretionary duty to include
09:07:47 25 Arizona's concrete evidence requirement on the Federal Form."

09:07:50 That's on page 2260 of the opinion.

09:07:53 I would note at the beginning, if you're troubled by the phrase "should the EAC's inaction persist," you'll note from the preceding photograph that the court switches between action in denying and inaction in not acting at all, so I think the court is simply saying should the situation persist where Arizona is getting no relief, then they can go to a reviewing court.

09:08:12 THE COURT: So you don't think Justice Scalia's comments require inaction on the part of the EAC?

09:08:16 MR. KOBACH: No, I don't, because I think it's in two sentences or three sentences preceding the court says "the EAC's action," and then he says, in parentheses, "or inaction," and he's essentially saying if the EAC does not accede to the Arizona request. But there are three points in that sentence that I'd like to draw your attention to, and all three points are ones that the defendants, I think, are disregarding.

09:08:37 Point number one in that sentence, the Supreme Court made clear that "a reviewing court" has the responsibility for determining whether the states have made the necessary showing, not the EAC. The opposing side wants to draw the inference that they can stand in the shoes of a reviewing court and then you must defer to their findings, but that is a very shaky inference to draw at best.

09:08:59 THE COURT: How do you get to that under the

09:09:01 Administrative Procedures Act, because, as you know, the briefs
09:09:06 talk from all sides a great deal about the scope or limitations
09:09:10 of this Court's authority under the APA?
09:09:13 MR. KOBACH: You know, I think, Your Honor, if you
09:09:14 look at -- there's some tension between the garden-variety APA
09:09:18 case and the cases that describe a reviewing court's authority
09:09:21 and then Justice Scalia's language on pages 2259 and 2260,
09:09:26 because clearly he's not saying in this sentence Arizona would
09:09:31 have to be able to establish in a reviewing court that the
09:09:34 record before the EAC sufficed to establish and that the EAC
09:09:38 did not abuse its discretion. I think the court itself, the
09:09:41 Supreme Court, is saying -- suggesting that these matters go
09:09:44 beyond the parameters of normal --
09:09:45 THE COURT: But doesn't that same paragraph -- and
09:09:48 I'm reading from the opinion -- say that the state may
09:09:51 challenge the EAC's rejection of that request and is sued under
09:09:56 the Administrative Procedures Act?
09:09:57 MR. KOBACH: Yes, absolutely. And I think the
09:10:00 court there is directing us to the fact that the APA is the
09:10:03 normal way that any plaintiff in the country, be it a
09:10:06 Government agency or an individual, can challenge an adverse
09:10:08 agency action.
09:10:09 I'm not sure we should -- you know, the Court did
09:10:12 not say and, therefore, should be -- and the reviewing court
09:10:15 shall be confined to a very narrow review of

09:10:18 abuse-of-discretion standard.

09:10:20 And later in my -- maybe I can just jump to it
09:10:22 right now. Later in my presentation I was going to address
09:10:25 that very argument about why the APA standards of review are
09:10:29 not exactly pertinent in this case. Let me just jump to it
09:10:32 right now.

09:10:32 Of course, under normal -- a normal APA case, the
09:10:37 action of the agency would be entitled to a Chevron deference,
09:10:41 but we would argue that they are entitled to no such deference
09:10:44 in this instance for three reasons: first, the Supreme Court
09:10:48 said in FDA v. Brown & Williamson, and that case came after
09:10:52 Chevron, of course, that in deciding whether or not to defer to
09:10:55 an agency's construction of a statute, the court "must be
09:10:59 guided to a degree by common sense as to the manner in which
09:11:02 Congress is likely to delegate a policy decision of such
09:11:06 economic and political magnitude to an administrative agency."
09:11:11 That's found at 529 U.S. at 133.

09:11:14 This is unquestionably one of those policy issues
09:11:18 of immense political magnitude, whether a state can safeguard
09:11:21 its voter rolls in this way. It's not a garden-variety agency
09:11:26 determination of whether a circumstance number of particulates
09:11:29 of a pollutant exceed a threshold or something like that; this
09:11:33 is a major policy question. I think the Supreme Court has
09:11:35 never said that Chevron deference always applies to any act
09:11:38 that an agency takes.

09:11:39 Second, the Supreme Court has also stated that
09:11:42 agencies are not entitled to any deference when they make
09:11:45 constitutional judgments. No deference whatsoever when they
09:11:49 make constitutional judgments.
09:11:50 I'm quoting from Califano v. Sanders, 430 U.S. 99,
09:11:57 "Constitutional questions obviously are unsuited to resolution
09:12:00 in administrative hearing procedures and, therefore, access to
09:12:03 the courts is essential to the decision of such questions."
09:12:07 The Ninth Circuit went further and put it this
09:12:11 way: Revolving an official -- sorry, "Resolving a claim
09:12:15 [based] solely upon a constitutional right is singularly suited
09:12:17 to a judicial forum and clearly inappropriate to an
09:12:22 administrative board." (As read.) That's Downen v. Warner,
09:12:25 481 F.2d 642.
09:12:26 And I apologize for having to give you these cites
09:12:28 in oral argument. Obviously, since we didn't have reply phase,
09:12:32 we couldn't put this in front of you on paper. Now, the EAC
09:12:35 memorandum of a decision is replete with constitutional
09:12:38 analysis, in particular at pages 24 through 28 of the EAC
09:12:42 memorandum.
09:12:43 Simply put, this is an agency decision that is
09:12:46 attempting to adjudicate the scope of a state's constitutional
09:12:49 authority under Article I, Section 2, of the Constitution. We
09:12:53 presented our petition and our request to the EAC as a
09:12:58 constitutionally based one that we have the authority to decide

09:13:00 what is necessary. They disagreed, and offered their own
09:13:03 constitutional analysis.
09:13:04 And, finally, my third response about Chevron
09:13:08 deference is, even if an EAC decision of this immense
09:13:14 constitutional nature and political magnitude were entitled to
09:13:18 Chevron deference, a decision issued by an acting executive
09:13:25 director, acting in the stead of what Congress described as a
09:13:28 commission which requires three votes to take action, would not
09:13:32 be entitled to any Chevron deference.
09:13:35 There -- clearly that deference cannot be
09:13:38 delegated in a situation like this. But, again, because it
09:13:41 is -- it involves constitutional nature and it is, as Brown &
09:13:45 Williamson described, a policy decision of immense political
09:13:47 magazine -- or such political magnitude that it is not entitled
09:13:51 to deference.
09:13:52 May I go ahead and continue where I was?
09:13:54 THE COURT: Please.
09:13:54 MR. KOBACH: So what we have here -- back to the
09:13:57 open -- that sentence from Inter Tribal Council on page 2260.
09:14:01 So first the court said a reviewing court has the
09:14:03 responsibility for making the determination. Second, that
09:14:07 sentence says the standard is "that a mere oath will not
09:14:10 suffice to effectuate its citizenship requirement."
09:14:15 The standard is not a cost-benefit analysis like
09:14:17 the EAC did. Nor is the standard whether documentary proof is

09:14:23 necessary or strictly necessary. Nor is the standard whether
09:14:27 documentary proof is the best means over all other means of
09:14:30 enforcement. The standard is will mere oath suffice.
09:14:33 Third, that sentence also shows that the EAC is
09:14:37 "under a nondiscretionary duty to include the Arizona
09:14:42 requirements -- sorry, under a nondiscretionary -- yeah, "to
09:14:47 include Arizona's concrete evidence requirement on the Federal
09:14:51 Form."
09:14:51 The EAC has no authority to second-guess a
09:14:54 sovereign state's policy judgment and I think the defendants
09:14:56 have bent over backward to ignore this nondiscretionary duty
09:14:59 phrasing.
09:15:00 THE COURT: How far does that nondiscretionary
09:15:02 duty go, Mr. Kobach? I mean, assume with me that the
09:15:07 legislature of the State of Kansas passes a law, and the
09:15:11 governor signs, saying that people of Swedish ancestry are not
09:15:15 smart enough to vote and so they will be disenfranchised. It's
09:15:20 now the law of the state of Kansas. Does the EAC have a
09:15:23 nondiscretionary duty to adopt that position?
09:15:25 MR. KOBACH: No, it doesn't.
09:15:26 THE COURT: And what's the difference between
09:15:28 that -- I mean, we all understand that that's wrong, but on a
09:15:31 legal framework, what's the difference between that decision
09:15:33 and the one that we're discussing here today?
09:15:35 MR. KOBACH: I am flipping through my pages

09:15:38 because I have a number of answers to that question. I want to
09:15:43 make sure to give you them all.
09:15:44 We would argue that the EAC -- the other side
09:15:49 mischaracterizes our position as saying, well, the EAC has
09:15:52 become a rubber stamp, in Kansas and Arizona's view, it has to
09:15:56 say yes all the time. No, they have a nondiscretionary duty
09:15:59 that is ministerial in nature. It is a ministerial
09:16:03 nondiscretionary duty. That means they can say no sometimes.
09:16:07 They can look at the request from a state, and then they must
09:16:10 look at the state's laws and see if that request comports with
09:16:13 the state's laws. Well, the State of Kansas didn't pass a law
09:16:16 saying that people of Swedish dissent cannot vote.
09:16:20 THE COURT: But my question is what if they did.
09:16:22 MR. KOBACH: If they did, I think they would be
09:16:24 under a duty -- there have been -- their authority's
09:16:27 ministerial. They're not a constitutional body sitting in
09:16:29 judgment. There would be litigation, of course, and suing, to
09:16:32 argue that that is a classification based on ethnic -- an
09:16:35 ethnic characteristic, and it would clearly be
09:16:38 unconstitutional, but they're not under --
09:16:39 THE COURT: And absent another court finding that
09:16:42 unconstitutional, the EAC, in your position or opinion, would
09:16:45 also have a duty to adopt that in the state-specific
09:16:51 instructions for Kansas?
09:16:52 MR. KOBACH: Yes. Yeah, they would.

09:16:54 Now, note this, though, there are other ways they
09:16:57 could exercise their discretion as well. So they can -- first
09:16:59 of all they have to in their ministerial act is look, does this
09:17:02 comport with the state's laws. Second, they can also look at
09:17:05 the proposed wording of the instruction and see if the wording
09:17:07 is a clear and understandable expression of what is in the
09:17:11 state's laws.
09:17:12 So, for example, they might look at Kansas'
09:17:14 request today and say, well, the phrase "an applicant must
09:17:19 provide evidence of U.S. citizenship," they might say, well,
09:17:22 that's not clear enough; it should be worded an applicant must
09:17:25 provide one of the following 13 documents proving U.S.
09:17:28 citizenship, and then list 13. They could suggest alternate
09:17:31 phrasing that is clear. Those are various examples of
09:17:34 nondiscretionary ministerial actions, discretion.
09:17:38 As Secretary of State, for example, I exercise
09:17:42 ministerial discretion all the time. And to give you an
09:17:45 example that's somewhat close to what you just gave me, I'm
09:17:47 under a nondiscretionary duty to file business filings when a
09:17:51 business forms in Kansas, establishing an LLC or an S Corp. or
09:17:56 any other form or many other forms. I have -- I have to file
09:17:59 them, and I have to register that business as a business in the
09:18:02 state of Kansas. However, I do have limited discretion to say
09:18:05 no. I can say no if the business offers a P.O. box rather than
09:18:09 a street address. I can say no if the business does not

09:18:12 require -- does not furnish all of their required information
09:18:15 on the form. However, if I know that the business is engaged
09:18:18 in fraudulent actions, that the business is a criminal
09:18:21 enterprise, I must register that business, even though I have
09:18:26 strong suspicions that the business is engaged in illegal
09:18:30 activity. The same goes with the nondiscretionary ministerial
09:18:35 duty of the EAC. They have to exercise discretion within their
09:18:39 ministerial scope, but not beyond.
09:18:41 The Inter Tribal Council court explained that the
09:18:47 "nondiscretionary duty to change the form" is the only position
09:18:52 that avoids the constitutional question of whether Congress can
09:18:55 empower an agency to deprive the states of their authority that
09:18:59 under Article I of the Constitution, under the well-established
09:19:05 Ashwander v. TVA doctrine, Article III courts are to avoid
09:19:08 statutory constructions that raise constitutional questions.
09:19:10 Giving them more discretion -- rather I would say
09:19:15 giving them more than ministerial discretion raises those
09:19:18 constitutional questions, and that's why we have to cabin their
09:19:22 discretion in this way.
09:19:24 If I may continue. So we have the three points in
09:19:30 that sentence that I think they have effectively tried to sweep
09:19:33 under the carpet.
09:19:34 What the EAC did do was not what Justice Scalia
09:19:38 anticipated, but the EAC held a bizarre combination of
09:19:42 quasi-judicial review in which the states were denied due

process in the sense that they were not granted an opportunity to respond to opposing comments, and combined that with a quasi-regulatory action, where the EAC for the first time in its history -- I believe, maybe not in its history -- but for the first time in responding to a request from a state to change the form, had a comment period, which would suggest it was engaging in some sort of policy making.

Now, I have basically five points to make in my presentation. Number one, mere oath will not suffice, and I'll spend a few minutes on each of these. Number two, the alternative suggested by the EAC are ineffective and expensive. Number three, denial of Kansas' request strips us of our -- and Arizona's -- strips us of our constitutional authority to control the qualifications of electors. Number four, the EAC denial cannot be squared with the language in Inter Tribal Council, and number five, I'd like to refute a few additional points that the defendants made in their reply briefs.

THE COURT: Briefly, before you start that, I want to go back to your comment that the EAC did not do what Justice Scalia anticipated they would do. What do you think the justice anticipated they would do by directing Arizona and ultimately Kansas to follow this course of action?

MR. KOBACH: I think the answer can be seen in Justice Scalia's choice of the word "happily." Justice Scalia said that, after the court laid out all of the constitutional

09:21:11 reasons why the states have the clear authority to control not
09:21:14 only the qualifications but the enforcement of the
09:21:16 qualifications for being an elector, and then the court laid
09:21:19 out that Arizona -- the wording of the NVRA requires Arizona to
09:21:24 accept the Federal Form. He then says, well, do we have to get
09:21:27 into a constitutional debate? And he says, no, happily Arizona
09:21:30 has a way out. And he clearly writes pages 2259 and 2260 with
09:21:35 the expectation that the EAC is under a duty to change the
09:21:39 Federal Form if Arizona requests.
09:21:41 And I don't think there's any other way to
09:21:43 understand --
09:21:44 THE COURT: So you think Justice Scalia's intent
09:21:47 was merely to direct the states to exhaust administrative
09:21:51 remedies, as it were --
09:21:52 MR. KOBACH: Yes.
09:21:52 THE COURT: -- to complete that, but the
09:21:54 exhaustion of the administrative remedies he contemplated would
09:21:58 be one done on a ministerial and not a discretionary basis?
09:22:01 MR. KOBACH: Yeah. And, Your Honor, if you look
09:22:03 at the opinion of Alito in the Inter Tribal Council case, he
09:22:06 even sees it the same way. He says -- he says it's ridiculous
09:22:09 for the majority opinion to force the state to jump through
09:22:12 some administrative hoops to get to where we need to go. So,
09:22:15 clearly, the majority are understanding that the EAC is just
09:22:19 going to have to do this, do their ministerial discretion,

09:22:22 change the form, and the -- some of the other opinions are
09:22:25 understanding it the same way. The court, evidently they, most
09:22:28 of the members of the Supreme Court, it appears, understood
09:22:30 that this was going through a few administrative hurdles, but
09:22:33 they all understood where the end of the race was going to be,
09:22:36 and that was going to be that the EAC would have to change the
09:22:38 form. There's no other way to get there, I think.
09:22:40 THE COURT: All right.
09:22:41 MR. KOBACH: Now, let me go through those five
09:22:43 points. Number one, mere oath will not suffice. That is, of
09:22:46 course, what we believe the standard is. First, I'd point out
09:22:48 that the court in Inter Tribal Council made clear that if a
09:22:52 state deems more than a mere oath to be necessary and that
09:22:56 deeming is expressed in state law, then that's all that's
09:22:58 necessary, a legislative act has occurred. So the fact that
09:23:02 the legislature of Kansas and the people -- the voters of
09:23:06 Arizona deemed it necessary in a duly enacted law or a duly
09:23:10 enacted initiative is enough. However, if a greater showing is
09:23:13 required that mere oath will not suffice, then the affidavits
09:23:17 we have presented to the EAC and that are now before the Court
09:23:20 clearly establish that mere oath was not sufficient to prevent
09:23:23 the 20 aliens found on the voter rolls in Kansas before our law
09:23:28 went into effect and the 196 aliens found on the voter rolls in
09:23:31 Arizona from signing the registration form anyway and
09:23:34 successfully registering to vote, even though they were not

09:23:36 U.S. citizens.

09:23:37 Furthermore, we have shown that since the
09:23:40 proof-of-citizenship law went into effect in Kansas on
09:23:43 January 1st, 2013, in the affidavits from the Sedgwick and
09:23:47 Finney County clerks, there were two individuals since then who
09:23:51 have been prevented from registering by the
09:23:53 proof-of-citizenship requirement. They were later demonstrated
09:23:57 to be aliens. They were, in fact, not entitled to vote.

09:24:00 One example, the individual told the Sedgwick
09:24:03 County clerk's office, I'm not a U.S. citizen, when the person
09:24:06 received a phone call saying, hey, your registration isn't
09:24:09 complete, please provide proof of citizenship. In another
09:24:12 example, a student at a community college was handed a
09:24:15 prefilled voter registration form, and the form already had the
09:24:19 box checked "I am a U.S. citizen," and already had the box
09:24:22 checked "I am 18 years of age or older." It even had the
09:24:25 student -- the student's dormitory address already preprinted
09:24:28 on the form. Evidently, they were trying to assist students
09:24:33 establishing residency so they could get in-state tuition at a
09:24:37 later date.

09:24:38 Now, the point are there are many ways this can
09:24:40 occur, and the affidavits them explain them, but the law is
09:24:44 working, it has already stopped --

09:24:46 THE COURT: Are you going to address the
09:24:47 Government, the Department of Justice, and the intervenors' de

09:24:53 minimis argument?

09:24:53 MR. KOBACH: Yes.

09:24:54 THE COURT: Go ahead.

09:24:54 MR. KOBACH: Had their argument merely been signing the oath in those two cases, both of those individuals would now be on the Kansas voter rolls, and the chances are minimal that we could ever discover them once they are on the voter rolls.

09:25:07 I would also argue that the 20 aliens in Kansas and the 196 aliens in Arizona are only the tip of the iceberg, because it is so difficult to discover aliens once they're on the voter rolls. It's very easy to stop someone from registering in the first place through a proof of citizenship requirement. It's almost impossible, not quite, but almost impossible to discover most of the aliens on the voter rolls. The only realistic chances we have is if the alien either applies for a driver's license in the state -- and both of our states have a requirement that you must prove -- if you are not a -- you have to swear to U.S. citizenship or, if you are an alien, prove that you're here lawfully, so that we do discover some things through the driver's license process. Or if you are summoned to jury duty, some people will, of course, check the box saying that I can't serve on the jury because I'm not a U.S. citizen. Those are the only two ways that we have a realistic chance of finding an alien who's on our voter rolls

09:26:01 once he or she is on the rolls.

09:26:03 But, of course, the vast majority of aliens do not
09:26:06 do one of those two things. The vast majority of aliens do not
09:26:09 attempt to get a driver's license in the state in which they
09:26:12 are residing, and they do not attempt to get out of jury duty
09:26:15 because it's highly unlikely that they'll be on the voter rolls
09:26:19 in the first place and therefore on the juror pool. Indeed,
09:26:23 illegal aliens can't get a driver's license in Kansas or
09:26:26 Arizona, and so we have no effective way to find aliens on the
09:26:30 voter rolls who are illegally in the country or who are
09:26:33 lawfully present but do not choose to get a state's driver's
09:26:36 license. Many try to operate with their home country's
09:26:39 driver's license.

09:26:39 It's also important to recognize that even though
09:26:43 we have a significant number -- or they would say insignificant
09:26:47 number -- of individuals we have found who have been aliens,
09:26:50 the tip of the iceberg, so to speak, I would argue that one is
09:26:54 enough. You know, we often hear in this country that a person
09:26:58 being disenfranchised, one person being disenfranchised is a
09:27:03 great injustice. Well, every time a person unlawfully votes
09:27:06 because he is not a U.S. citizenship, he's effectively
09:27:09 cancelling out the vote of some U.S. citizen who participates
09:27:12 in the same election. Certainly one is enough.

09:27:14 Now, let's go to the de minimis argument. The
09:27:20 defendants argue that we have not found enough cases of aliens

09:27:23 on the voter rolls who have registered under the mere oath
09:27:26 standard, and that when that number is compared to the total
09:27:30 number of people who are on the voter rolls in the two states,
09:27:33 it's a -- 20 or so aliens in Kansas to 1.76 million registered
09:27:39 voters at the time, boy, that's a really, really low ratio of
09:27:42 20 to 1.76 million. That ratio is an is of very little
09:27:49 relevance.

09:27:49 The crucial question is do we sometimes have close
09:27:52 elections in Kansas. The answer is yes, we do. In the last
09:27:56 ten years, from 2004 to the present, we have had 24 state
09:28:02 legislative races or Congressional races where the winner won
09:28:05 by 50 votes or less. Twenty-four, 50 votes or less. We had
09:28:11 eight races where the winner was won by 15 votes, the race was
09:28:16 won by 15 votes or less. We had three races where the winner
09:28:20 won by five votes or less, and we had one race that ended in a
09:28:26 dead tie.

09:28:28 I have -- this is information on the public
09:28:31 record. It's -- actually, you can find it on the Secretary of
09:28:34 State's web site, but for the ease of the Court it would
09:28:36 probably take you a good half a day, or maybe even a full day,
09:28:40 to scroll through all the pdf's. I have a spreadsheet. We'll
09:28:43 provide them to the others.

09:28:44 THE COURT: Was this information in the record
09:28:46 before the EAC?

09:28:47 MR. KOBACH: It's not, Your Honor, but we would

09:28:49 argue that, just as asserting that Barack Obama beat Mitt
09:28:55 Romney by X number of votes, this is information --
09:28:56 THE COURT: So you're asking the court to take
09:28:58 judicial notice?
09:29:00 MR. KOBACH: I am asking to you take judicial
09:29:01 notice of these facts.
09:29:02 MR. HEARD: Your Honor, we'd obviously object to
09:29:04 that as it's not in the administrative record.
09:29:07 MR. KEATS: We'd also join.
09:29:08 THE COURT: It's not an administrative hearing so
09:29:11 we don't need objections. You'll have a chance to argue and
09:29:12 address that then.
09:29:12 MR. KOBACH: Well, suffice it to say that even if
09:29:15 the Court did not take judicial notice of it, it's an obvious
09:29:18 fact. One wonders what we can or cannot say, since we didn't
09:29:22 have a hearing before the EAC, since I'm making all kinds of
09:29:25 factual statements, but perhaps an objection would be relevant
09:29:28 every 20 seconds or so as I speak. The point is it's obvious
09:29:32 there are many close elections.
09:29:33 And I would also like to point out that the
09:29:35 Supreme Court of the United States in the Marion County v.
09:29:39 Crawford case said -- they looked at the same de minimis
09:29:43 argument. The very same argument was made by the plaintiffs in
09:29:46 Marion County v. Crawford. That was the Indiana case governing
09:29:53 proof of citizen- -- photo ID, I'm sorry, photo ID requirement

09:29:53 in Indiana elections. It was decided in 2008, 6-3 decision
09:29:58 authored by Justice Stevens.
09:29:59 In that case the same kind of ratio analysis was
09:30:02 offered like the defendants are offering now. But saying that
09:30:05 voter fraud represents a small percentage of votes cast is
09:30:09 irrelevant. The court concluded that the facts of incidence of
09:30:12 voter fraud have occurred elsewhere in the county -- in the
09:30:14 country, and the Supreme Court noted that the state of Indiana
09:30:17 could not show a single case, could not show a single case, of
09:30:21 in-person voter impersonation, which photo ID is principally
09:30:26 targeted at, couldn't show a single case. And they said that
09:30:29 that didn't matter and the ratio analysis didn't matter. The
09:30:33 court said this, the fact that these incidents occurred
09:30:36 elsewhere "demonstrate that not only is the risk of voter fraud
09:30:40 real but that it could affect the outcome of a close election."
09:30:43 That's found at 553 U.S. at 195, 1996. So the Supreme Court
09:30:49 has already rejected the kind of ratio analysis by looking at
09:30:53 the fact that it could affect a close election. Do we have
09:30:56 close elections in Kansas? Yes, of course, and the public
09:30:59 record makes that clear.
09:31:03 I'd also like to offer as an illustration an
09:31:07 incident that occurred in Seward County in 1997, as described
09:31:10 by the Seward County Clerk before the Kansas legislature in
09:31:13 March of 2011. Now, we did not present the Seward County
09:31:17 clerk's testimony to the EAC, so the court may consider this as

09:31:20 an example of a scenario that may occur but not as factual
09:31:23 evidence. You need not accept my word or the word of the clerk
09:31:27 before the legislature that it did occur, but let me simply
09:31:30 describe the scenario for you.
09:31:30 In 1997 Charter Resolution 97-3 was placed before
09:31:37 the voters of Seward County. The resolution was one to
09:31:40 prohibit hog-farming operations in the county. It was an
09:31:43 intensely controversial question. It generated over a
09:31:48 51-percent turnout in Seward County. In a special election, 51
09:31:52 percent is pretty big. Before the vote occurred, over 50
09:31:57 employees from the hog-processing -- not hog-farming -- the
09:32:01 hog-processing plant in Guymon, Oklahoma, over the state
09:32:05 border, over 50 of them sent in in a large envelope voter
09:32:08 registration forms to the Seward County clerk's office. Now,
09:32:11 the registration forms included many made-up addresses that
09:32:15 gave addresses on streets that did not exist in Seward County,
09:32:20 Kansas.
09:32:20 Then on election day, workers from the Guymon
09:32:23 plant were bussed in a nine-passenger van, in several vanloads,
09:32:27 to the clerk's office to vote. The county clerk strongly
09:32:30 believed that the registrants were noncitizens, based on the
09:32:34 fact that most of the plant employees were not citizens, the
09:32:37 driver of the van was translating the ballot for them and was
09:32:40 actually overheard telling them how to vote because they could
09:32:43 not read the ballot question. And in some cases he clerk's

09:32:47 1 office personnel knew that specific voters were not U.S.
09:32:51 2 citizens because they had personal knowledge of the families
09:32:53 3 involved. And so I offer that as a scenario to say this can
09:32:56 4 happen, this does happen. And, again, as the Supreme Court
09:33:00 5 noted in Marion County, we don't have to show even one example,
09:33:03 6 but we've shown many, many examples.
09:33:05 7 Such risks of things like this happening, events
09:33:08 8 like Seward County, the cases we've discovered since our law's
09:33:12 9 been in effect and the 20 aliens beforehand and the 196 aliens
09:33:16 10 in Arizona, give obvious meaning to Justice Scalia's statement
09:33:21 11 in oral argument in the Inter Tribal Council case. "Simply the
09:33:24 12 statement that 'I am a citizen,' under oath, is not proof at
09:33:29 13 all." It's not part of the opinion, but Justice Scalia stated
09:33:32 14 the obvious.
09:33:35 15 So what do we have? We have a sovereign state
09:33:38 16 making a decision based on facts such as these. In Arizona's
09:33:41 17 case, 56 percent of the voters expressed this will on behalf of
09:33:45 18 the state. In Kansas' case, the legislature did so. The
09:33:48 19 proof-of-citizenship law was passed by a vote of 111 to 11 in
09:33:53 20 the house and 36 to 3 in the Senate.
09:33:55 21 The EAC cannot substitute its judgment that, no,
09:34:00 22 as a policy matter we don't think proof of citizenship is
09:34:03 23 necessary. It is attempting to substitute its judgment for the
09:34:06 24 judgment of the Kansas legislature and the judgment of the
09:34:08 25 people of Arizona. Mere oath will suffice because the

09:34:12 sovereign entities with the policy-making capacity to answer
09:34:15 that question say mere oath will not suffice.
09:34:18 Second part of my testimony is the alternative
09:34:23 method suggested by the EAC do not work and they are costly.
09:34:28 First, the EAC suggests, oh, Kansas and Arizona you don't need
09:34:31 to do this. Just compare your voter rolls with driver's
09:34:34 license databases and juror questionnaire responses. Well,
09:34:37 both states have already been doing both, and they are woefully
09:34:41 inadequate for the reasons I've already described, because they
09:34:44 go to such a small percentage of noncitizens on the voter
09:34:47 rolls.
09:34:48 Well, then the EAC suggests, here's something you
09:34:50 can do, you can rely on deterrence from criminal prosecutions
09:34:54 because there are crimes associated with registering to vote
09:34:58 when you're not a citizen. Well, that, too is something we've
09:35:01 been doing for years. Those crimes have been on the books for
09:35:04 years. Clearly, the aliens who register to vote and sign the
09:35:07 oath, either not knowing what they were signing or maybe even
09:35:11 knowing that they were signing and realizing they weren't going
09:35:14 to get caught, they weren't deterred by the very tiny threat of
09:35:17 prosecution.
09:35:18 Then the EAC offers a fourth suggestion. The EAC
09:35:22 says we should use the SAVE database, SAVE stands for
09:35:26 Systematic Alien Verification For Entitlements. It's created
09:35:30 by Congress in the 1990s. But the Department of Justice

09:35:34 evidently didn't consult closely with the Department of
09:35:36 Homeland Security when they offered this alternative. The SAVE
09:35:39 database only contains the records of aliens who are lawfully
09:35:42 present in certain visa categories or aliens who are
09:35:48 encountered by immigration enforcement officers or the border
09:35:52 patrol or USCIS.
09:35:54 It only includes lawfully present aliens who are
09:35:58 here on a visa of some sort or aliens who are encountered and
09:36:01 assigned an A number, usually used in deportation proceedings.
09:36:04 The SAVE database does not contain the names of
09:36:06 any U.S. citizens. Doesn't contain any. The SAVE database
09:36:10 also doesn't contain the names of aliens who are illegally
09:36:13 present in the United States but have not been encountered by
09:36:16 federal officials. As a result, one cannot draw any conclusion
09:36:20 from the fact that a person is not in the SAVE database.
09:36:24 As the Inter Tribal Council intervenors correctly
09:36:26 pointed out in their comments to the EAC at page 1563, the SAVE
09:36:31 database cannot verify citizenship. It is at best a starting
09:36:35 point from which phone calls can be made to the registered
09:36:38 voters based on maybe you can gain some suspicions by looking
09:36:41 at that person's name on SAVE. How in the world you got that
09:36:44 person's name to look at out of the 1.76 million voters, I
09:36:47 don't know. But it's a starting point and maybe you can lead
09:36:50 somewhere.
09:36:50 The DOJ also should have contacted Department of

09:36:54 Homeland Security before making this argument, because they
09:36:56 would have also learned that Kansas did contact the Department
09:37:00 of Homeland Security to, at least, use the SAVE database to
09:37:03 look for people who had naturalized, because there are
09:37:07 naturalized citizens in SAVE, people who were aliens, they were
09:37:12 naturalized, they go through the process to become a U.S.
09:37:14 citizen. But the DHS said we could not use the SAVE database
09:37:19 for that purpose unless we provide, I'm quoting from their
09:37:21 letter, "1, a specific type of unique identifier like an alien
09:37:25 number or certificate number that appears on
09:37:29 immigration-related documentation; and 2, a copy of the
09:37:31 immigration-related documentation in question to complete the
09:37:34 verification process."
09:37:38 Obviously, we don't have copies of immigration
09:37:41 documentation that a naturalized citizen might subsequently
09:37:45 provide when he's going to register to vote, and we certainly
09:37:48 don't have the unique number, the A number, assigned to an
09:37:51 alien or a visa number assigned to an alien. In other words,
09:37:55 the Department of Homeland Security told the State of Kansas,
09:37:58 tough luck. Unless you can provide us this information and a
09:38:01 copy of the person's document, we're not going to run names
09:38:04 through the SAVE database for you.
09:38:05 I have a copy of that letter. I'm not offering it
09:38:09 for the truth of the matter asserted. If you'd like to see it,
09:38:11 you can certainly look at it. It's not available on the web or

09:38:15 anything, but certainly can -- it can substantiate what we are
09:38:20 saying.
09:38:20 And this, again, goes to the nature of why this is
09:38:23 not a garden-variety APA hearing. They offered this argument
09:38:27 in their comments to the EAC. We couldn't respond to those
09:38:31 comments and tell the EAC, well, guess what, SAVE doesn't work
09:38:35 for the state of Kansas, and so the whole notion that this is
09:38:38 an APA-related hearing and we can't say anything other than
09:38:41 what was in those affidavits at the EAC is ludicrous. And
09:38:45 that's why I think Justice Scalia doesn't confine himself to
09:38:49 the normal APA procedures when he talks about what a reviewing
09:38:52 court should do and then, finally, the EAC suggests, I believe,
09:39:01 a fifth alternative, that we try a state-created system called
09:39:04 the Electronic Verification of Vital Events database. But that
09:39:08 doesn't work either, because you have to have the person's
09:39:11 place of birth to use the database, and we don't have the place
09:39:14 of birth on our voter rolls. It's not something that is
09:39:17 required when you provide the information necessary to vote.
09:39:20 Moreover, even if you did have a person's place of
09:39:22 birth, you still would not be able to confirm that he was not a
09:39:25 citizen by virtue of his absence from the EVVE database,
09:39:29 because he could have been from a nonparticipating state, he
09:39:34 could have been born in a nonparticipating state, and that
09:39:36 database only includes the birth certificates from
09:39:38 participating states, or he could be a naturalized U.S. citizen

09:39:42 who is not born anywhere in the United States.

09:39:44 In short, none of the five alternatives suggested
09:39:46 by the EAC are sufficient to ensure that aliens do not
09:39:51 register. And they are already doing three of the five, and
09:39:54 they are woefully inadequate. These options also require much
09:39:57 more expense and time on the part of the state personnel,
09:40:01 poring through databases, deciding which names to submit to
09:40:03 another agency to look at their databases, verifying that
09:40:07 matches of names are, in fact, the same person takes a lot of
09:40:11 time.

09:40:11 Those 20 names we gave you, that took weeks to get
09:40:14 though to those -- to narrow it down to those 20 people.
09:40:18 Because we don't just say, oh, here's a match, these two names
09:40:21 appear on both the driver's license rolls and the state voter
09:40:23 rolls; we go through excruciating processes to verify that it's
09:40:28 not just two people that happen to have the same name and date
09:40:31 of birth. We look at Social Security numbers, go through all
09:40:33 kinds of processes to make sure we are absolutely positive
09:40:37 those 20 names are indeed aliens names on the voter rolls. And
09:40:40 I'm sure that Arizona does the same thing. We also send a
09:40:44 personal letter asking for verification of their alien status.
09:40:45 All of this takes personnel, time, and money.

09:40:47 But the one thing that does work and doesn't take
09:40:50 time and money on behalf of the state is requiring proof of
09:40:53 citizenship at the front end. Look at the affidavit from Brad

09:40:56 Bryant, one of the affidavits from Brad Bryant. There's
09:40:59 several. He says there is no comparison in the efficacy of
09:41:02 preventing aliens from getting on the voter rolls in the first
09:41:05 place versus attempting to identify and removing them
09:41:08 afterward. It is much easier for the state to do the former.
09:41:11 Now, Brad Bryant is our elections director and has been so for
09:41:15 the state for over 20 years.
09:41:16 We have made the policy decision. Arizona has
09:41:18 made the policy decision. The EAC cannot second-guess our
09:41:22 policy decision by saying, well, you should have chosen these
09:41:25 other policies, and it certainly cannot do so based on such
09:41:28 poor research and flawed understanding of the very alternatives
09:41:31 that they suggest.
09:41:32 The third part of my argument, regardless, the
09:41:36 constitutional authority of the states to enforce voter
09:41:39 qualifications in Article I permits us to do so as we see fit.
09:41:45 As we've already mentioned, Article I, Section 2, of the
09:41:48 Constitution affirms our authority to determine the
09:41:50 qualification for electors. Article I, Section 4, contains the
09:41:54 Elections Clause, which says, "The times, place and manner[s]
09:41:56 of holding elections for senators and representatives shall be
09:42:00 prescribed in each state by the legislature thereof, but the
09:42:03 Congress may at any time by law make or alter such regulations,
09:42:06 except as to the places of choosing senators."
09:42:09 Although the Election Clause does give the

09:42:13 Congress power to alter or supplant state regulations regarding
09:42:15 time, place, and manner, the Inter Tribal Council court held,
09:42:18 "The Election Clause empowers Congress to regulate how federal
09:42:22 elections are held, but not who may vote in them." That's at
09:42:27 page 2257.

09:42:28 The authority of the states to establish voter
09:42:32 qualifications, the Inter Tribal court noted -- establish
09:42:35 qualifications for becoming an elector -- predated the
09:42:38 Constitution of 1787 and the Constitution recognized that those
09:42:42 qualifications remained an authority reserved to the states,
09:42:45 which the federal Constitution did not displace when it came
09:42:48 into existence. That's found at Inter Tribal Council at 2258.

09:42:51 Reflecting on these provisions in the
09:42:53 Constitution, the Inter Tribal court said, "Surely nothing in
09:42:56 these provisions lends itself to the view that voting
09:42:59 qualifications in federal elections are to be set by Congress."
09:43:03 "[N]othing . . . lends itself to the view that voting
09:43:06 qualifications [of] federal elections are to be set by
09:43:08 Congress." (As read.) The court, therefore, determined,
09:43:11 "Prescribing voter qualifications, therefore, 'forms no form of
09:43:14 the power' -- 'forms no part of the producer power to be
09:43:16 conferred upon the national government' by the Elections
09:43:20 Clause." And that's also from 2258. The court held that these
09:43:24 provisions reserve that power for establishing and enforcing
09:43:27 voter qualifications to the states. That's at 2258 and 2259 of

09:43:31 the opinion.

09:43:32 And the court further held very clearly that the
09:43:35 power to establish qualifications also includes the power to
09:43:38 enforce the qualifications, at 2258 and '59. Voter
09:43:43 registration rules are the rules in which we enforce our voter
09:43:47 qualifications. The states possess the sole authority to
09:43:49 determine the manner by which our voter qualifications are
09:43:51 enforced. Kansas and Arizona are acting well within this
09:43:54 constitutional authority when we require voters to provide
09:43:57 proof of citizenship. The EAC's refusal to allow us to require
09:44:03 proof of citizenship on all voter registration forms infringes
09:44:07 upon that power and, therefore, violates Article I, Section 2,
09:44:10 the Seventeenth Amendment, and arguably the Tenth Amendment as
09:44:14 well through commandeering principles.

09:44:16 So what can the federal government do with respect
09:44:19 to the registration process? Well, the federal government has
09:44:22 only a few limited procedural aspects of registration that they
09:44:26 can govern. Put it this way, they can regulate the time,
09:44:29 place, and manner of registering. In other words, they can
09:44:31 regulate the when, the where, and the how, but they cannot
09:44:35 regulate the what of registering. The what is the substance of
09:44:40 what is required to be an elector, and that substance of what
09:44:44 is required, what you must be, what you must show, what the
09:44:47 standard is for us to put you on the voter rolls, that is set
09:44:51 solely by the states.

09:44:52 Inter Tribal Council made this clear. "Since the
09:44:56 power to establish voting requirements is of little value
09:44:59 without the power to enforce those requirements, Arizona is
09:45:03 correct that it would raise serious constitutional doubts if a
09:45:05 federal statute precluded a state from obtaining the
09:45:09 information necessary to enforce its voter qualifications."
09:45:12 So who determines what is necessary? The Supreme
09:45:15 Court gave us that answer two paragraphs later. This is 2259.
09:45:19 "Since . . . a state may request that the EAC alter the Federal
09:45:23 Form to include information the state deems necessary to
09:45:28 determine eligibility and may [change the EAC's --] challenge
09:45:31 the EAC's rejection of that request in a suit under the [APA],
09:45:35 no constitutional doubt is raised by giving the accept and use
09:45:39 provision of the NVRA its fairest reading." (As read.)
09:45:42 The Supreme Court's saying very clearly that the
09:45:45 EAC does not have normal discretion here. It has ministerial
09:45:48 discretion to review the request, but it must, it must, accede,
09:45:52 it must submit to the state's exercise of its sovereign power.
09:45:57 If the EAC is permitted to say no, and to refuse
09:46:02 to put this on the form, then the EAC has limited the sovereign
09:46:08 constitutional authority recognized in Article I, Section 2, of
09:46:11 the United States Constitution. And the constitutional
09:46:14 authority that is being limited, therefore, raises the
09:46:16 constitutional questions that the Inter Tribal Council Supreme
09:46:19 Court was trying to avoid.

09:46:20 My fourth point. The defendant's --

09:46:24 THE COURT: I'll note you have about roughly five
09:46:26 minutes left to make your fourth and fifth points.

09:46:29 MR. KOBACH: Okay. The position can't -- cannot
09:46:31 possibly be squared with the last two pages of Inter Tribal
09:46:34 Council. I've already touched on this. The state -- the court
09:46:37 said that the Congress has no power to prescribe voter
09:46:40 qualifications or preclude a state from obtaining the
09:46:42 information necessary to enforce its qualifications; therefore,
09:46:45 as we had noted, the court said, Happily we are spared that
09:46:48 necessity" because Arizona may -- "The statute provides another
09:46:51 means by which Arizona may obtain information needed for
09:46:54 enforcement." And the court was referring to proof of
09:46:56 citizenship, and it called it information needed for
09:46:58 enforcement. The court was assuming, as we've noted, that
09:47:01 Arizona was going to get relief by going through the
09:47:04 administrative hurdles, as Justice Alito described, and that
09:47:06 would be enough.

09:47:07 Now, the Supreme Court also said this -- and this
09:47:09 is really important -- and it goes to your question about
09:47:12 what -- whether normal APA review applies. On page 2259, the
09:47:17 Supreme Court rejected the defendant's claim that they
09:47:19 possessed broad discretion to tell the states what information
09:47:22 is necessary. That's from footnote five of their brief, that
09:47:26 the Supreme Court rejected these defendants' claim that they

09:47:29 1 have broad discretion to tell the states what information is
09:47:31 2 necessary.
09:47:31 3 The court concluded its opinion in Inter Tribal
09:47:35 4 Council by saying that the EAC's discretion in this manner is
09:47:39 5 confined. Confined by what, you may ask? It's confined by the
09:47:42 6 Constitution itself. "[W]e think that -- by analogy to the
09:47:47 7 rule of statutory interpretation that avoids questionable
09:47:51 8 constitutionality -- validly conferred discretionary executive
09:47:55 9 authority is properly exercised . . . to avoid serious
09:47:59 10 constitutional doubt. That is to say, it is surely permissible
09:48:03 11 if not requisite for the Government to say that necessary
09:48:07 12 information which may be required will be required." And that
09:48:11 13 means necessary information which may be required by the states
09:48:13 14 will be required by the EAC.
09:48:15 15 So the Supreme Court says, their discretion is
09:48:18 16 cabined by the Constitution itself, just as Congress must avoid
09:48:22 17 constitutional -- interpreting a Congressional statute avoids
09:48:25 18 questionable constitutionality, the discretion, the ministerial
09:48:30 19 discretion that the EAC possesses, must be confined by avoiding
09:48:33 20 constitutional questions -- avoiding serious constitutional
09:48:37 21 doubt.
09:48:37 22 They have not attempted to explain in any of their
09:48:40 23 briefing how they can square the EAC's action with these
09:48:44 24 statements of the Supreme Court in 2258 through 2260. The EAC
09:48:47 25 does have ministerial discretion to decide if our requests

09:48:51 1 correctly expresses Kansas and Arizona law. And as I
09:48:54 2 mentioned, they can reject proposed phrasing because it's
09:48:56 3 unclear, but they do not have broad discretion to make policy
09:48:59 4 judgments because those policy judgments raise constitutional
09:49:01 5 questions.
09:49:02 6 Now, finally point five, I just want to answer a
09:49:05 7 couple of additional arguments in their response briefs. They
09:49:07 8 argue that the states waived their right to argue that the EAC
09:49:10 9 lacks the authority to act with only an executive -- an acting
09:49:14 10 director because the states did not make that argument to the
09:49:16 11 EAC itself. Two answers. One, the states maintained very
09:49:20 12 clearly in our information submitted to the EAC that the EAC
09:49:23 13 only possesses a nondiscretionary duty to change the Federal
09:49:26 14 Form once it has ascertained that the state law reflects the
09:49:29 15 request the state is making. Once it is determined that the
09:49:32 16 state law accurately is reflected in the request, the EAC lacks
09:49:35 17 the authority to say no, regardless of whether they're acting
09:49:38 18 with a quorum of commissioners or just an acting director. So
09:49:41 19 obviously, we are arguing implicitly, you could say, that they
09:49:45 20 cannot say no, given those considerations.
09:49:48 21 Furthermore, we did not believe that we could
09:49:50 22 assert the argument that the EAC has no authority to act in any
09:49:54 23 manner because the EAC was under an order -- under an order
09:49:58 24 from this court, the EAC was now acting in January of this year
09:50:01 25 under an order from an Article III court, so clearly they have

09:50:06 the ability to respond to an order from an Article III court.

09:50:09 Another argument I'd like to respond to is the

09:50:14 defendants' response to the sole authority of the states to

09:50:16 enforce voter qualifications. I'm going to quote the EAC

09:50:20 memorandum. I say defendants, but the EAC memorandum looks

09:50:23 astonishingly similar to the briefing of the opposite side.

09:50:26 The EAC memorandum says this, "The states claim that the

09:50:30 Constitution expressly grants to the states the power to

09:50:32 establish and enforce voter qualifications for federal

09:50:35 elections, and does so to the exclusion of Congress. To the

09:50:38 contrary, nothing in the Constitution prohibits the federal

09:50:41 government from also enforcing state-established voter

09:50:44 qualifications relating to federal elections so long as the

09:50:46 states are not precluded from doing so."

09:50:49 I can summarize my response in two words.

09:50:52 Enumerated powers. The EAC is evidently of the opinion that

09:50:56 the federal government can do anything it deems expedient as

09:51:01 long as the Constitution won't prohibit it. I won't dwell on

09:51:04 this point because it's so elementary, but the federal

09:51:07 government only has power to do what's enumerated in the

09:51:09 Constitution. To some it may seem a quaint, old-fashioned

09:51:12 notion, but the federal government is one of enumerated powers.

09:51:13 If it isn't listed in the Constitution, the power doesn't

09:51:16 exist.

09:51:16 Another argument I'd like to respond to. The

09:51:19 defendants respond to our argument that they are reading the
09:51:21 same language in two parts of the NVRA to mean different
09:51:25 things. We point out that the DMV registration part of the
09:51:28 NVRA in Subsection 3(c) says states may require "information
09:51:32 necessary to enable state election officials to assess the
09:51:35 eligibility of the applicant."
09:51:36 That's nearly identical to the language that is
09:51:41 found in Subsection 7(b), which is at the core of this case,
09:51:44 yet the EAC does not have the power to second-guess state DMVs
09:51:50 in how they word their state registration forms that are
09:51:53 provided to people getting a driver's license.
09:51:55 Amazingly, in response, the defendants answer they
09:51:59 do have the power to overrule what is on the state's DMV
09:52:03 registration form. That is their answer. It's a truly
09:52:06 breathtaking answer, perhaps explaining why it's buried in
09:52:09 footnote five of their brief, but it's amazing. They claim
09:52:12 they have the authority to do that. Well, that's very
09:52:15 interesting. Because if Congress really intended the EAC to
09:52:17 have the authority to tell a state that its state-created voter
09:52:21 registration form for DMV's is inadequate and strike down those
09:52:27 forms that do not meet with the EAC's approval, Congress
09:52:30 certainly would have said so. And it probably would have told
09:52:32 us how exactly they would do that. Does the EAC have the
09:52:35 injunctive power to order a state DMV to stop using a certain
09:52:40 form or change its form? Does it have the power to impose

09:52:43 fines on the DMV of a state when the DMV of a state ignores the
09:52:47 EAC's pleadings and doesn't comply with the EAC's edicts? If
09:52:50 so, the NVRA doesn't even mention it. It's truly astonishing
09:52:55 how much they're willing to read into Congressional silence in
09:52:59 order to find authority for this agency to act.
09:53:01 And, finally, the -- almost finally -- two last
09:53:04 points. The defendants respond to the fact that the EAC has
09:53:06 violated its own regulations. You may recall this from the
09:53:09 briefing. We point out that 11 C.F.R. 9428. (B) says, quote --
09:53:14 and this is the regulation that they are bound by -- "The
09:53:17 state-specific instructions shall contain the following
09:53:20 information for each state: . . . information regarding the
09:53:24 state's specific voter eligibility and registration
09:53:27 requirements." "Shall." The defendant's answer to this
09:53:29 argument is on page 13 of their response. And they say the EAC
09:53:32 is only obliged to include on the Federal Form state-specific
09:53:36 instructions for federal elections. Then they assert that the
09:53:40 EAC "is under no obligation to include instructions that relate
09:53:43 only to state and local elections."
09:53:45 If you're scratching your head, you're not alone.
09:53:49 The defendant's answer makes no sense at all. The Kansas and
09:53:52 Arizona instructions and requests purport to apply to all
09:53:56 elections, including federal ones. It appears that the
09:53:59 argument the defendants are making is this: they're saying
09:54:01 that because they have decided that proof of citizenship is not

09:54:04 1 necessary, then they can decree that the proof-of-citizenship
09:54:09 2 requirement no longer applies to federal elections, but that,
09:54:11 3 of course, is a circular argument. They're already assuming
09:54:14 4 that they can tell us that proof of citizenship is not
09:54:17 5 necessary. They decree that a state law does not apply to
09:54:21 6 federal elections and, therefore, they evade their own
09:54:23 7 regulation.
09:54:23 8 Finally, I would remind the Court that the Tenth
09:54:27 9 Circuit opinion in Via Christi says very clearly a federal
09:54:31 10 agency cannot take a position that is inconsistent with its own
09:54:33 11 regulations.
09:54:34 12 And now, the -- finally, the defendants claim that
09:54:37 13 the EAC was not engaged in a policy-making role when it issued
09:54:40 14 its memorandum of January 17th -- they make this claim on
09:54:43 15 page 7 of their brief -- in order to establish that Alice
09:54:46 16 Miller's memorandum is consistent with the EAC's delegation of
09:54:49 17 authority to the executive director in the R & R statement.
09:54:53 18 This is an extraordinary claim. The memorandum contains some
09:54:56 19 46 pages of policy-making weighing of costs and benefits. It
09:55:01 20 contains comparisons of different policies as to which policy
09:55:04 21 is the best. There's no other way to describe it other than a
09:55:06 22 policy-making memorandum, and that was the policy of the EAC
09:55:10 23 itself until December 12th, 2013. Let's not forget that all
09:55:14 24 the EAC letters to Arizona and Kansas said we're not going to
09:55:16 25 change the form for you. Why? Because that's a policy issue.

09:55:21 To quote from our letter we received on August 62013, the
09:55:25 request "raises issue of broad policy concern to more than one
09:55:28 state."
09:55:29 So I would ask will the real EAC stand up.
09:55:34 Obviously the earlier EAC was the one telling the -- describing
09:55:37 the situation accurately. It was a policy-making situation.
09:55:42 Whatever Alice Miller has the authority to do, she does not
09:55:44 have the authority to engage in policy-making. Agreeing to the
09:55:47 state's requests does not require policy making. All it
09:55:50 requires is exercising a ministerial duty. Denying the state's
09:55:54 request for any reason other than a ministerial one necessarily
09:55:59 entails policy-making. Thank you.
09:56:01 THE COURT: Thank you, Mr. Kobach. Mr. Heard,
09:56:03 I'll hear the argument from the United States.
09:56:13 MR. HEARD: Good morning, Your Honor.
09:56:15 THE COURT: Good morning.
09:56:16 MR. HEARD: May it please the Court. Your Honor,
09:56:20 first I'd like to say that we're here, obviously, on Kansas and
09:56:25 Arizona's appeal of the Election Assistance Commission's
09:56:30 determination of their requests to include the
09:56:32 proof-of-citizenship instructions. The Court is aware from not
09:56:36 only the plaintiff's notice of adverse agency action, but also
09:56:41 during the remarks on the conference call, all the parties,
09:56:44 including the plaintiffs, agreed that this was an APA case, and
09:56:47 that the case was confined to the administrative record. And

09:56:52 1 the Court asked several times for all parties, that if they did
09:56:57 2 not, you know, speak now or forever hold your peace to that
09:57:01 3 issue. So we would contend that this is an APA case, contrary
09:57:06 4 to what Mr. Kobach suggests, and that the normal standards of
09:57:09 5 APA review apply to the case.
09:57:15 6 Essentially plaintiffs assert three grounds of
09:57:19 7 error: two substantive, one procedure. And I can address --
09:57:24 8 they phrase it as five. I sort of have it in my argument as
09:57:28 9 three, and I didn't want to change the argument. I'll try to
09:57:34 10 work it in as we can.
09:57:35 11 But the first general argument is that the
09:57:38 12 Election Assistance Commission is under a nondiscretionary duty
09:57:40 13 to include their instructions because they have no ability to
09:57:44 14 contradict the state's legislative determination that the
09:57:48 15 additional proof-of-citizenship instruction is required.
09:57:52 16 In the alternative, they say if the EAC has
09:57:57 17 discretion to determine whether to grant or deny the request,
09:58:00 18 the states have shown that the existing oaths and affirmations
09:58:04 19 are insufficient to prevent that. And the procedural argument
09:58:09 20 which Mr. Kobach addressed at the end is that the agency is
09:58:13 21 somehow precluded -- the acting executive director doesn't have
09:58:17 22 the authority to deny the requests.
09:58:20 23 So as to the first argument regarding the
09:58:24 24 nondiscretionary duty, we would contend that that argument is
09:58:29 25 soundly foreclosed by Inter Tribal Council itself. The Supreme

09:58:34 Court held in the case that EAC decision-making regarding the
09:58:38 content of the federal forms is validly conferred,
09:58:42 discretionary, executive authority. They're seeking --
09:58:47 THE COURT: Well the Supreme Court said that the
09:58:49 EAC had validly conferred discretionary authority, but I don't
09:58:52 think they really spelled out the limits of it in the Inter
09:58:56 Tribal Council opinion. And they did seem to suggest that the
09:59:01 authority of the federal government under Article I to change
09:59:05 or impact what registration requirements were was a power
09:59:11 either given to Congress only if it chose to act or perhaps not
09:59:15 even given to Congress. So just because the EAC has valid
09:59:18 discretionary authority promulgated to or issued to it doesn't
09:59:22 necessarily mean that they have this discretionary authority.
09:59:26 MR. HEARD: But the ITCA case, Your Honor, spoke
09:59:29 exactly to this particular discretionary authority, the
09:59:31 authority to determine what is or what isn't necessary to
09:59:35 include on the federal voter registration form. Recall that
09:59:39 Section (b) of the NVRA requires the form to include
09:59:43 information that's necessary to enable state election officials
09:59:48 to determine voter eligibility and administer elections.
09:59:52 THE COURT: And isn't the single pivotal question
09:59:55 in this case who gets to decide what's necessary?
10:00:00 MR. HEARD: That is not an issue that I contend --
10:00:03 that we contend is an issue, because ITCA answers that issue:
10:00:06 it is the EAC. The plain text of the NVRA answers that issue

10:00:11 because it charges the EAC with creating the Federal Form, it
10:00:16 instructs the EAC to only include the information that's
10:00:18 necessary on the Federal Form.
10:00:20 THE COURT: And the question is who gets to decide
10:00:22 what's necessary. That's really what we're arguing about here,
10:00:25 because the states say they've shown that it's necessary to
10:00:29 demonstrate citizenship that proof of citizenship be provided.
10:00:34 The EAC has said, we've looked at it and we don't think that's
10:00:37 necessary. That's really where the dispute comes down, isn't
10:00:40 it, Mr. Heard, who gets to decide what's necessary?
10:00:43 MR. HEARD: And, Your Honor, the ITCA court
10:00:46 answered that question by saying it is the EAC that gets to
10:00:49 decide.
10:00:51 THE COURT: Show me the language where the ITCA --
10:00:53 'cause I've read this opinion several times, including this
10:00:56 morning -- show me where that opinion says the EAC gets to
10:00:59 decide what's necessary to establish citizenship.
10:01:04 MR. HEARD: It says that -- in the section of the
10:01:09 opinion where it discusses the United States construction of
10:01:16 Section 9(b) of the NVRA, that language we were just
10:01:20 discussing, to include information that's necessary, and that
10:01:24 it's a ceiling and a floor, and that the United States
10:01:27 construction, that the form shall include that information -- I
10:01:32 mean, information that is necessary will be included. And they
10:01:37 had said a few pages previously that, obviously, it would

10:01:40 create a constitutional issue if the state were precluded from
10:01:44 enforcing their voter qualifications, and happily, it said, we
10:01:48 don't have that constitutional issue because the state can
10:01:51 request the instruction that it deems necessary and they can
10:01:56 review the denial of that instruction under the Administrative
10:02:00 Procedure Act.
10:02:00 So the state -- I mean, so the ITCA court resolves
10:02:04 the constitutional issue by saying it is the EAC's discretion
10:02:09 to determine what's on the form. That's the plain text of the
10:02:11 statute.
10:02:11 THE COURT: Now, that's in the penumbras of this
10:02:16 opinion, because I'm not really sure -- in fact, I'm fairly
10:02:19 sure that I don't see a clear statement of the Inter Tribal
10:02:24 Council opinion by the high court -- that the EAC has the
10:02:29 authority or constitutionally can have the authority to be the
10:02:34 decision-maker vis-a-vis the states as to what's necessary for
10:02:38 the states to assess voter qualifications. If there's precise
10:02:41 language you can show me to, I'd like to look at it, but I
10:02:46 don't think that that's a clear statement in this opinion,
10:02:48 Mr. Heard.
10:02:48 MR. HEARD: Your Honor, I think we both read the
10:02:50 opinion several times. I mean, I -- I can't point you to the
10:02:54 exact quote where they say the EAC, you know, has the
10:02:57 discretion, but it does go through the analysis of the NVRA.
10:03:00 It does say that the EAC is charged by Congress in the NVRA

10:03:05 with creating the Federal Form itself, so it has -- by
10:03:08 definition it has to decide what goes on the Federal Form.
10:03:12 That's -- and then it -- and it also says that the EAC -- that
10:03:18 the states have to request the instruction, which also implies
10:03:23 that the EAC has to decide whether the request is granted or
10:03:28 not. And that --
10:03:29 THE COURT: I think, though, the tenor of both the
10:03:33 NVRA and of the Inter Tribal Council opinion indicates that
10:03:36 that discretion or that decision-making authority is cabineted
10:03:41 by the broader framework, and that's -- that's the part that I
10:03:47 think ultimately this case turns on.
10:03:49 MR. HEARD: Well, and, respectfully, we would
10:03:52 contend that the case -- I mean, that the broader framework is
10:03:55 also fairly established, not only -- I mean, most recently by
10:03:58 Inter Tribal Council, but also, you know, from 80 years of, you
10:04:02 know, case law going back to Smiley, is that the basic
10:04:07 framework is that the Elections Clause gives to Congress the
10:04:11 ultimate right to set regulations relating to voter
10:04:15 registration. That's the holding in ITCA in both of these
10:04:20 cases. And so this is an election --
10:04:24 THE COURT: Wait a minute, Mr. Heard. I'm reading
10:04:27 from the ITCA opinion on page 2258, and it says, "Prescribing
10:04:34 voter qualifications, therefore, 'forms no part of the power to
10:04:38 be conferred upon the national government' by the Election
10:04:41 Clause." That's directly in contradiction to the statement

10:04:43 you just made.

10:04:45 MR. HEARD: I don't think so, Your Honor, because
10:04:48 prescribing voter qualifications is the responsibility of
10:04:52 states under the Qualifications Clause and the Seventeenth
10:04:55 Amendment. The voter qualification at issue in this case is
10:04:58 United States citizenship, and there's no dispute that Kansas
10:05:01 and Arizona have that qualification, that the Election
10:05:06 Assistance Commission lists that voter qualification on the
10:05:08 state-specific instructions. All 50 United States have
10:05:12 United States citizenship as a universal voter qualification.

10:05:16 THE COURT: Well, your statement -- and I'm
10:05:17 reading from the transcript -- is that the basic framework is
10:05:21 that the Elections Clause gives to Congress the ultimate right
10:05:24 to set regulations relating to voter registration. And I think
10:05:29 that statement is directly contradicted by the sentence I just
10:05:32 read from the Inter Tribal Council opinion.

10:05:33 MR. HEARD: There's an interplay, Your Honor. The
10:05:35 Constitution says two things: The Constitution has the
10:05:39 Qualifications Clause, which allows states to set the voter
10:05:42 qualifications. The Constitution also has the Elections
10:05:46 Clause, which gives Congress the right to set voter
10:05:49 registration regulations, to alter the times -- to set times,
10:05:52 places, and manner of federal elections.

10:05:55 THE COURT: But Mr. Heard, Mr. Heard, the sentence
10:05:56 I read to you said that its registration is no part of the

10:06:00 power conferred by the Election Clause.

10:06:05 MR. HEARD: And we don't take issue with the

10:06:06 fact --

10:06:06 THE COURT: That's contradictory to what you just

10:06:08 said, you just said, and I'll quote you again, that the

10:06:11 Constitution gives Congress the right to set voter registration

10:06:14 regulations under the Election Clause.

10:06:18 MR. HEARD: That's correct.

10:06:19 THE COURT: But that's directly contradicted by

10:06:21 this sentence in Inter Tribal Council.

10:06:23 MR. HEARD: Well, if the Court looks a few pages

10:06:25 back in Inter Tribal Council, it talks about the Elections

10:06:28 Clause, and it discusses the Elections Clause and the duties

10:06:31 under the Elections Clause.

10:06:32 THE COURT: Right. And clearly the Congress has

10:06:34 rights to preempt the states' decisions under the Election

10:06:38 Clause if it so chooses.

10:06:39 MR. HEARD: And it defines specifically times,

10:06:40 place, and manner to --

10:06:42 THE COURT: And then it goes on to say that time,

10:06:44 place and manner does not include the power to prescribe voter

10:06:50 qualifications. So it talks about the right to preempt, and

10:06:52 then it limits that right to preempt. I cannot square that

10:06:57 with what I'm hearing from you.

10:06:58 MR. HEARD: What the Court's discussion -- what

10:07:00 1 the Court's discussion on page 2258 is referring to is it says
10:07:07 2 prescribing voter qualification is the state's responsibility.
10:07:10 3 It forms no power under the executive -- I mean, under
10:07:13 4 Congress' ability. Congress does not have the right to set
10:07:16 5 voter qualifications because they're set by the states.
10:07:18 6 THE COURT: Right.
10:07:18 7 MR. HEARD: So the power to set voter
10:07:20 8 qualifications includes also the power to enforce voter
10:07:23 9 qualifications.
10:07:24 10 THE COURT: Correct.
10:07:25 11 MR. HEARD: And it's discussing that -- it's
10:07:27 12 discussing the Qualifications Clause in that context, and it
10:07:30 13 moves on to say that the voter qualification includes the right
10:07:35 14 to enforce and, therefore, it would be -- it would create a
10:07:40 15 constitutional issue if something the EAC did precluded them
10:07:45 16 from enforcing their voter qualifications. That would create a
10:07:49 17 constitutional issue.
10:07:50 18 And then it says, but we don't have that
10:07:52 19 constitutional issue because we have -- because of two things:
10:07:57 20 A, the NVRA says that information that's necessary will be
10:08:02 21 included on the form. That's -- and the United States and the
10:08:07 22 EAC acknowledge that that was a ceiling and a floor. That's
10:08:10 23 one. Two, that the state has the right to request, as the
10:08:16 24 court said, any instruction that it sees fit to request to the
10:08:21 25 EAC and the EAC has to make a determination on that, and that

10:08:25 determination is subject to review under the Administrative
10:08:28 Procedure Act.
10:08:28 So the process of being able to request
10:08:33 instructions that the state deems necessary and the provision
10:08:36 of judicial review under the administrative act, under ITCA
10:08:42 that resolves the constitutional crisis that would otherwise
10:08:45 exist if a state were precluded. But it did not say that the
10:08:51 EAC -- and the Court acknowledged this in the December
10:08:54 hearing -- it did not say that the EAC had to accept the
10:08:58 request; it said that it was a request, and that the request is
10:09:02 reviewable under the APA.
10:09:05 THE COURT: It does say that the states -- and
10:09:08 this is, of course, the statement that Mr. Kobach has quoted
10:09:12 perhaps 500 times --
10:09:14 MR. HEARD: Passim.
10:09:16 THE COURT: Deeply. It does say that the states
10:09:17 have the opportunity to establish that a mere oath will not
10:09:20 suffice and, therefore, the EAC is under a nondiscretionary
10:09:25 duty. So although Justice Scalia, speaking for the court,
10:09:29 sends it back to the EAC, he seems to infer that if the states
10:09:33 establish that a mere oath will not suffice, then the EAC's
10:09:36 discretion is not discretionary. That's the rub of
10:09:39 Mr. Kobach's argument. My position is that I think it comes
10:09:43 down to constitutionally who gets to decide what's necessary.
10:09:48 MR. HEARD: Well, in sending it -- in stating that

10:09:51 1 the EAC -- I mean, excuse me, Your Honor, in stating that the
10:09:54 2 state had to make a request to the Election Assistance
10:09:57 3 Commission to include the instruction, that acknowledges that
10:10:00 4 it's the EAC's determination as to what goes on the Federal
10:10:03 5 Form.
10:10:03 6 THE COURT: I don't agree. I think it -- in
10:10:06 7 sending it to the EAC, under the Administrative Procedures Act,
10:10:10 8 and I disagree with some of Mr. Kobach's comments about the
10:10:13 9 review under the APA -- but under the Administrative Procedures
10:10:16 10 Act, that the states have the right to establish, through that
10:10:19 11 process, that a mere oath will not suffice; and, if so, then
10:10:24 12 the EAC's duty is nondiscretionary. So just because it goes to
10:10:29 13 the EAC doesn't mean -- and just because the EAC has
10:10:31 14 discretionary authority doesn't mean that it has discretionary
10:10:35 15 authority on this issue from the exact language of the Inter
10:10:38 16 Tribal Council opinion.
10:10:38 17 MR. HEARD: If -- Your Honor's correct that if the
10:10:42 18 states establish that they are precluded and that an oath is
10:10:46 19 not sufficient --
10:10:46 20 THE COURT: Right.
10:10:47 21 MR. HEARD: -- to enforce the voter qualification,
10:10:49 22 then the EAC would be required under that circumstance to
10:10:53 23 include the instruction. But the EAC has to make that
10:10:57 24 determination.
10:10:58 25 THE COURT: So you think the EAC's the one that

10:11:00 gets to decide whether it's been established?

10:11:03 MR. HEARD: In the first instance, yes. And then
10:11:06 that decision, as the Supreme Court said, is reviewable by a
10:11:09 reviewing court under the Administrative Procedure Act and all
10:11:13 that that entails. And so they have to -- they have to put the
10:11:16 request -- they have to establish before the EAC that the --
10:11:24 that the oath is insufficient and that they're precluded from
10:11:27 enforcing their voter qualifications. They have to establish
10:11:31 that. The EAC has to determine whether they've established
10:11:34 that, because otherwise the EAC has discretion whether to
10:11:38 accept or reject the request. And only if they establish that
10:11:43 they're precluded from enforcing their voter qualifications and
10:11:46 that an oath doesn't suffice does it become nondiscretionary at
10:11:51 that point.

10:11:51 And so the EAC, in its administrative
10:11:54 determination, has to conclude that the states have either made
10:11:58 that case or not, and if the states disagree with that, then
10:12:02 that is their right of judicial review under the Administrative
10:12:06 Procedure Act, so that there's no constitutional issue because
10:12:09 you have the agency making a determination, you have the court
10:12:12 reviewing under the Administrative Procedure Act, and,
10:12:16 therefore, both parts of the Constitution, the Qualifications
10:12:20 Clause and the Elections Clause, can be fully ferreted out in
10:12:25 court. But when they say "establish before a reviewing court,"
10:12:28 the language of a reviewing court is replete throughout the use

10:12:31 of Administrative Procedure Act law.

10:12:33 THE COURT: I agree that the reviewing court

10:12:35 language references the APA procedure.

10:12:36 MR. HEARD: Yes, sir. And so -- and so, again, we

10:12:41 say that, you know, in the first instance the duty -- so

10:12:44 there -- it is not a de facto rule that the EAC is under a

10:12:49 nondiscretionary duty to include the instruction. The state

10:12:52 has an obligation to establish that before the EAC, and then if

10:12:57 the state disagrees with the EAC's decision, they can seek

10:13:01 judicial review. And we contend that's what they have done,

10:13:04 they've sought judicial review of the EAC's decision. But it

10:13:08 is not a nondiscretionary duty.

10:13:10 The second point, that the required oaths and

10:13:20 affirmations don't permit noncitizens from registering and

10:13:24 voting, well, that's that somewhat misstates the inquiry.

10:13:28 Under Inter Tribal Council, the question that the EAC has to

10:13:32 determine is whether the states have established that they were

10:13:35 precluded from enforcing their voter qualifications, and

10:13:39 whether the existing oath and affirmations don't suffice to

10:13:43 effectuate the state's citizenship qualification.

10:13:46 Now, that's a nuanced thing. It does not require

10:13:51 absolute perfection in the voter rolls. It does not say that

10:13:56 in all circumstances every single person would be -- every

10:14:00 single noncitizen would be prevented from registering. The

10:14:04 states never even alleged, before the EAC or before this court,

10:14:09 that they're actually precluded from enforcing their voter
10:14:12 qualifications. They don't rebut the EAC's determination that
10:14:17 there are many alternative means available to them, to enforce
10:14:22 their voter qualifications. And all of the criticism of the
10:14:28 alternative means that Mr. Kobach was discussing this morning
10:14:31 before the Court the states did not put before the agency; and,
10:14:36 therefore, that is not a part of the administrative record upon
10:14:39 which the agency made its determination.
10:14:42 But even if it were, the states themselves have
10:14:45 established by the -- by their own seeking of these alternative
10:14:51 means, it has found noncitizens by comparing the driver's
10:14:55 license roll, it has found noncitizens by comparing jury
10:14:58 responses, it has found noncitizens most recently by inquiring
10:15:04 of its own state vital statistics agency. So even in the
10:15:11 states' submissions, they have established that there are other
10:15:13 ways to enforce their voter qualification without seeking proof
10:15:19 of citizenship.
10:15:19 THE COURT: The states' position is that those
10:15:22 other means are extraordinarily costly and laborious and
10:15:26 largely ineffective. You're saying that the use of the word
10:15:29 "precluded" means as long as it's not a legal impossibility,
10:15:36 cost, effort and success ratio notwithstanding, then they're
10:15:41 not precluded? Is that the Government's position?
10:15:44 MR. HEARD: I'm saying that there's no evidence in
10:15:48 the record to substantiate anything related to extraordinary

10:15:54 costs or practical or -- you know, impracticality. These are
10:15:59 arguments Mr. Kobach is making before the court this morning.
10:16:01 THE COURT: I've looked through the administrative
10:16:02 record, and I think the states also indicate the failure of the
10:16:06 past system to keep aliens from registering to vote.
10:16:10 MR. HEARD: Well, the states certainly -- the
10:16:12 states certainly present affidavits, you know, that show --
10:16:17 that allege that certain citizens had in the past successfully
10:16:21 registered despite the oaths. And the EAC makes the point in
10:16:27 its determination that it, you know, it accepted all of that
10:16:32 evidence for purposes of the argument it appeared -- I mean,
10:16:35 the intervenors have criticized the evidence that the states
10:16:41 put forward. But the EAC accepted, for purposes of argument,
10:16:45 that 20 or so folks in Kansas were able to register and that a
10:16:52 hundred or so in Arizona were able to register.
10:16:56 And it said that even if that's the case, that
10:16:59 does not establish that the system of oaths and affirmations is
10:17:04 not able to effectuate the citizenship requirement. Like
10:17:07 anything else, it says that any human endeavor has some degree
10:17:12 of error and has some degree of noncompliance. I mean, the
10:17:17 oath and affirmation that this court has, you know, does not
10:17:21 prevent occasional perjury, but it's pretty good at
10:17:25 preventing -- at seeking the truth.
10:17:28 The oath and affirmations that are associated with
10:17:31 tax filings, I mean, does not prevent the occasional tax cheat,

10:17:36 but it's generally deemed as an acceptable way of effectuating
10:17:40 a tax return. So it's the system of oath and affirmations.
10:17:44 THE COURT: Mr. Heard, I'm a former prosecutor,
10:17:47 before that I was a tax lawyer, and I'm acutely aware of the
10:17:51 failures of both, but I understand your argument.
10:17:53 MR. HEARD: Every human endeavor, and as a judge
10:17:56 I'm sure the court is aware people lie on the witness stand.
10:17:59 THE COURT: And on their tax returns,
10:18:00 astonishingly.
10:18:01 MR. HEARD: Astonishingly. But the important
10:18:03 thing is, Your Honor, that there are means of enforcing that,
10:18:07 if it is discovered. You can discover that people have cheated
10:18:09 on their tax returns, you can discover that people lie under
10:18:12 oath, and you can discover many things. And as long as you're
10:18:15 able -- so what the EAC's decision said is that, you know, as
10:18:19 long as there's a method of ferreting this out and as long as
10:18:23 the overall number of those things is small, then the
10:18:29 argument --
10:18:29 THE COURT: So you would define "preclude" as not
10:18:31 being absolute, but small?
10:18:34 MR. HEARD: Well --
10:18:35 THE COURT: 'Cause clearly the evidence presented
10:18:37 to the agency showed that this doesn't preclude, because people
10:18:41 slip through. So how do you define "preclude"?
10:18:44 MR. HEARD: Well, preclude -- precluding speaks to

10:18:47 the agency -- I mean, the state's ability to determine
10:18:53 citizenship. If they're not able to determine eligibility,
10:18:58 then, you know, they can establish preclusion. And it sort of
10:19:02 ties in with the mere oath or the existence of oaths and
10:19:07 affirmations as being a way to effectuate the voter
10:19:12 qualification. So that preclusion does not speak to an
10:19:17 occasional noncitizen registering. I mean, even I believe the
10:19:22 EAC made the point in its determination that even at a driver's
10:19:27 license bureau, where a proof of citizenship is required to get
10:19:30 a driver's license, there was a registrant who was a noncitizen
10:19:36 and registered to vote. I mean, so two things happened:
10:19:40 somebody did not see -- the person at the driver's license
10:19:43 bureau didn't see that the person was a noncitizen, and then
10:19:48 the registrar also did not see that they were a noncitizen.
10:19:53 So even where a proof of citizenship is required,
10:19:56 that does not guarantee that the person won't get on the voter
10:19:59 rolls. That's a point that the EAC made in its opinion, and
10:20:03 it's a valid point because it's a human endeavor, human
10:20:06 endeavors have some degree of error, and there are always going
10:20:10 to be people who lie about their age, who lie about their
10:20:13 citizenship, who lie about their residence. But as long as
10:20:16 there is a way to discover the invalid information and as long
10:20:22 as the occurrence of those things is rare --
10:20:25 THE COURT: I'm trying to understand your
10:20:26 argument, because the states say that the oath does not

10:20:30 preclude noncitizens from registering, and you're saying, well,
10:20:34 noncitizens will get through in any event, which is probably
10:20:37 true. And then you're saying that the EAC says as long as the
10:20:42 state has other means to discover this but you and I just
10:20:47 discussed five minutes ago that the states' position is that
10:20:51 those other means are largely ineffective and cost prohibitive,
10:20:54 so fold this up in one principle for me.
10:20:58 MR. HEARD: Well, the states did not make the
10:21:00 cost-prohibitive-and-ineffective argument before the agency.
10:21:02 THE COURT: I don't know that they made the cost
10:21:04 effective -- well, I think the cost effective is strongly
10:21:07 implied and they clearly made the ineffective argument. Their
10:21:10 evidence on the administrative record clearly shows that their
10:21:13 other methods are not comprehensive to detect voter
10:21:16 registration fraud.
10:21:18 MR. HEARD: Standing here, not looking over the
10:21:21 record, Your Honor, I recall that there was an affidavit from
10:21:27 Deputy Secretary Bryant that offered that this was the only
10:21:32 effective way of discovering noncitizens, is to do it at the
10:21:37 front end. But that was -- that was a statement that wasn't
10:21:42 necessarily supported by anything else in the record.
10:21:44 THE COURT: Well, it was in an affidavit. Isn't
10:21:46 that part of the record?
10:21:47 MR. HEARD: It's part of the record, and it's a
10:21:49 statement. And the EAC looked at that statement and also

10:21:53 looked at the other evidence in the record and came to a
10:21:57 conclusion that that --
10:21:59 THE COURT: What evidence in the record did the
10:22:00 EAC look at to conclude -- I mean, we've talked a lot about the
10:22:04 evidence in the record that the state submitted. What evidence
10:22:07 in the record did the EAC look at to conclude that a mere oath
10:22:11 was sufficient to suffice? What was the evidence in the record
10:22:15 that supported that decision?
10:22:16 MR. HEARD: That the oaths were sufficient to --
10:22:19 the evidence -- well, I'll say, as an initial matter, that the
10:22:24 decision speaks to what the EAC did. I mean, there's no --
10:22:29 there's no secret sauce that I would have to tell the Court as
10:22:33 to what the agency did.
10:22:34 THE COURT: No, of course not.
10:22:35 MR. HEARD: But the evidence that the agency
10:22:38 considered was, I mean, A, the oath, the oath itself, the fact
10:22:45 that it had been used for decades, centuries, to do this
10:22:52 process; the fact that the state -- the states themselves
10:22:57 believe this in some view because of the grandfathering
10:23:00 provisions. They looked at -- they looked at the states'
10:23:05 evidence of noncitizen registration, found it to be a very
10:23:08 small number when compared to the voter registration numbers in
10:23:12 general; they looked at the fact that the states were able to
10:23:17 discover noncitizen registrations through reviewing driver's
10:23:23 license records, through reviewing jury summons responses and a

10:23:28 variety of other means, checking birth registrations and such.
10:23:31 And so they reviewed all of that evidence to conclude that, on
10:23:37 balance, that they're not precluded and that the oath is
10:23:40 sufficient.
10:23:41 They acknowledge, for purposes of the -- of the
10:23:44 argument, that the states established that sometimes
10:23:47 occasionally noncitizens register. Sometimes occasionally
10:23:50 people under 18 register. Sometimes a person in Sedgwick
10:23:53 County registers in Kansas City, you know. I mean, these
10:23:58 things happen. The point is that they're discoverable, that
10:24:04 the state is able to discover them, and by being able to
10:24:07 discover them, they enforce their voter qualifications. They
10:24:11 also looked at the fact that the states have brought criminal
10:24:16 prosecutions, which is another way of enforcing voter
10:24:19 qualifications.
10:24:20 And so the states are able to establish and
10:24:26 enforce their voter qualifications as a result of all of these
10:24:29 means. And the state doesn't really contest that. And at the
10:24:32 end of the day what I'm -- what I'm saying that the -- on an
10:24:38 APA review -- the court has to -- has to establish whether that
10:24:45 is a reasonable conclusion to draw from the administrative
10:24:48 record, and whether that's an nonarbitrary and noncapricious
10:24:55 decision, based on the information in the record, whether that
10:24:57 was a rationale evaluation of the evidence, et cetera. The
10:25:02 Court's well aware of the APA standard.

10:25:04 So based on all of that, even if reasonable
10:25:07 persons disagree, as long as the conclusion that the EAC
10:25:12 arrived at in its decision-making is reasonable and supported
10:25:16 by the record, it's entitled to deference by the court, because
10:25:19 the decision itself is presumptively valid.
10:25:23 THE COURT: Which brings us back to the ultimate
10:25:24 question, which is it's your position that the EAC has the
10:25:28 right to make that decision superior to the states, with
10:25:32 respect to the Federal Form, which is, of course, all we're
10:25:34 talking about in this case.
10:25:35 MR. HEARD: Right. That the EAC is charged with
10:25:39 creating the Federal Form, that the EAC is, therefore, required
10:25:43 to make those determinations, that the EAC did, in fact --
10:25:48 well, that the predecessor to the EAC, when the FEC had
10:25:52 responsibility for this, they did, in fact, you know, state in
10:25:56 their rule-making that we have considered, you know, what is
10:26:00 necessary and what is not. And it goes through, you know, what
10:26:04 is necessary. And it also goes through, in their rule-making,
10:26:09 a variety of things that are not necessary, including, for
10:26:13 instance, putting naturalization information on the voter
10:26:17 registration form.
10:26:17 THE COURT: Although this precise issue was not
10:26:21 raised when the FEC made that comment rule-making earlier in
10:26:25 developing the Federal Form?
10:26:26 MR. HEARD: This precise issue was not raised.

10:26:28 THE COURT: And so ultimately the question comes
10:26:30 down to, at this point because now the issue is raised, if the
10:26:33 states decide X and the EAC decides Y, it's your position that
10:26:39 the EAC has the superior right to make that decision with
10:26:44 respect to the Federal Form?
10:26:45 MR. HEARD: It is, Your Honor. And it derives
10:26:49 that right from Congress itself, because the right is a
10:26:54 delegation by Congress, and it's Congress --
10:26:56 THE COURT: Under the NVRA.
10:26:58 MR. HEARD: Through the NVRA, right. And so
10:27:00 Congress, through the NVRA, delegates this right to the EAC.
10:27:04 So the EAC is just merely taking Congress' role under the
10:27:08 Elections Clause to set the boundaries for voter registration
10:27:12 in federal regulations.
10:27:14 THE COURT: And does the NVRA specifically address
10:27:17 this issue?
10:27:20 MR. HEARD: Citizenship?
10:27:21 THE COURT: Proof of citizenship.
10:27:21 MR. HEARD: Proof of citizenship. The Congress,
10:27:25 when it enacted the NVRA, considered --
10:27:29 THE COURT: I'm familiar with the legislative
10:27:32 history. I'm not very impressed by it, because, first of all,
10:27:35 I'm not sure, under the rules of statutory interpretation, we
10:27:38 get to legislative history. But if we do, the legislative
10:27:41 history shows that they thought about putting a provision in

10:27:44 regarding this. Ultimately they neither put a provision
10:27:48 requiring nor prohibiting it, so the statute is silent as to
10:27:53 that issue.
10:27:53 MR. HEARD: Well, if the Court considers the
10:27:55 legislative history, Your Honor, what the conference committee
10:27:59 determined, the Senate version had this --
10:28:01 THE COURT: I'm familiar with the legislative
10:28:03 history.
10:28:03 MR. HEARD: So what the legislative history says,
10:28:05 Your Honor, is that it is contrary to the purpose of the Act.
10:28:09 That is what the legislative history says, and that it would
10:28:12 interfere with other portions, with the mail registration
10:28:15 provisions as well as other provisions of the Act.
10:28:17 THE COURT: But they did not, as a result of that
10:28:19 decision, prohibit this in the statute.
10:28:22 MR. HEARD: By excluding it and saying that it's
10:28:26 not consistent with the Act, I would contend that they have
10:28:29 made a determination. You asked me whether Congress considered
10:28:33 this issue, and my answer is yes, they considered it.
10:28:35 THE COURT: No, actually I asked whether the NVRA
10:28:37 addresses this issue.
10:28:38 MR. HEARD: Right.
10:28:39 THE COURT: And the NVRA is silent on this issue.
10:28:41 I note what the legislative history says, and as a result of
10:28:45 that, they did not include the proposed language that would

10:28:48 permit this. But they also, as a result of that, did not then
10:28:52 include language that would prohibit this; correct?
10:28:56 MR. HEARD: That -- that is correct, Your Honor.
10:28:59 THE COURT: So the NVRA is silent on this issue?
10:29:02 MR. HEARD: The NVRA is not exactly silent on the
10:29:04 issue. The NVRA requires a number of things related to
10:29:07 citizenship. It requires it to be listed on the form. It
10:29:11 requires an oath and attestation to citizenship.
10:29:14 THE COURT: Is the NVRA silent on the issue of
10:29:17 whether or not states can require proof of citizenship?
10:29:20 MR. HEARD: The NVRA, as passed, does not include
10:29:24 language regarding proof of citizenship.
10:29:25 THE COURT: All right. So it is silent on that
10:29:27 precise issue, which is the precise issue the legislative
10:29:31 history was talking about. Ultimately no permission nor
10:29:35 prohibition was included in the NVRA.
10:29:37 I've not read the whole NVRA. I'm strongly hoping
10:29:40 not to read it, the whole NVRA. But it's my understanding that
10:29:44 it's silent on this issue.
10:29:45 MR. HEARD: There is no -- there is no information
10:29:47 regarding the ability of states to provide proof of
10:29:49 citizenship.
10:29:49 THE COURT: All right.
10:29:50 MR. HEARD: All that you have is the fact that it
10:29:53 says the Election Assistance Commission shall promulgate the

10:29:55 regulations for the Federal Form, and it sets out rules for
10:29:59 what the Federal Form should and should not include.
10:30:00 THE COURT: And I'm familiar with this.
10:30:01 MR. HEARD: Okay. And so -- lost my place in the
10:30:08 argument here. All right. So in finding that the states were
10:30:12 not precluded from enforcing their voter qualifications, I
10:30:15 mean, the states themselves do not rebut that sufficiently, and
10:30:19 they couldn't because they have, in fact, used many of those
10:30:23 alternative means in enforcing their voter qualifications.
10:30:29 Mr. Kobach stood here and said we've at least used three of the
10:30:32 five things that the EAC suggested, and they were successful in
10:30:36 identifying unlawful registrants and, thereby, enforcing their
10:30:42 voter qualifications.
10:30:43 So, you know -- and we've discussed, Your Honor,
10:30:46 how the EAC resolved the issue -- accepting for argument that
10:30:51 there were a few people who did register -- how it resolved the
10:30:55 issue and said that in the overall scheme, as long as you can
10:30:58 identify, as you have means to identify, and the overall
10:31:01 numbers are small, then there's not preclusion.
10:31:06 So then we come to the third primary argument of
10:31:11 the state, which is that the executive director lacked the
10:31:14 authority to deny the request. We contend in our briefs that
10:31:22 they've -- if they're questioning the ability of the executive
10:31:27 director to act on a request, that that ability is waived,
10:31:31 because they did not raise that request before the agency.

10:31:34 1 And, in fact, the whole reason that this case is before this
10:31:38 2 court --
10:31:38 3 THE COURT: Well, here's the trouble I have with
10:31:40 4 that argument, Mr. Heard. They raised that argument before me
10:31:42 5 when we were all here, upstairs, in December, and they said,
10:31:47 6 we're here and not there because we don't think that the EAC
10:31:53 7 has the authority to make this decision. And the very
10:31:56 8 persuasive attorney, I think it was you, persuaded me to send
10:31:59 9 it back to the EAC, over their position, and require them to
10:32:05 10 address it. So when they were before the EAC, they were there
10:32:08 11 on my order to exhaust that remedy, but they only got there
10:32:11 12 pursuant to my order, which came in a hearing in which the
10:32:15 13 states clearly said we don't think the EAC has the authority to
10:32:18 14 do this. So in that framework, I don't think they've waived
10:32:20 15 that argument.
10:32:21 16 MR. HEARD: Well, I would say, Your Honor, I mean,
10:32:25 17 that's -- certainly we were all here. I mean, that's not how I
10:32:28 18 recall the transcript going. They were here. We were all
10:32:31 19 here, because they initially brought an action. The EAC
10:32:34 20 initially deferred decision-making on this request, as the
10:32:38 21 Court is aware. And they brought an action and they argued in
10:32:42 22 their briefs that the agency was unreasonably delaying by not
10:32:48 23 acting. They said the agency should act.
10:32:50 24 THE COURT: But their argument was -- their
10:32:52 25 argument was the agency was unreasonably delayed because, in

10:32:56 the absence of commissioners, it could not make a decision.
10:32:59 And, of course, that argument cited to acting Executive
10:33:03 Director Miller's letter. But the unreasonable delay argument
10:33:07 was not just they need to decide, but that they can't decide
10:33:10 absent commissioners.
10:33:11 MR. HEARD: I think if the Court -- if the Court
10:33:13 reviews the pleadings from that portion, from the December
10:33:18 hearing, the states were of the opinion, as they are today,
10:33:23 that there's a nondiscretionary duty, so that it was
10:33:25 ministerial in any event --
10:33:27 THE COURT: Right.
10:33:27 MR. HEARD: -- and should have been done.
10:33:29 THE COURT: And of course their position remains
10:33:31 that the EAC has the ministerial duty, even under the executive
10:33:35 director or the acting executive director, to do this. They
10:33:40 contend that because the EAC said, no, this is a policy
10:33:42 decision and we can't make that policy decision without a
10:33:47 quorum of commissioners, that that was the cause of
10:33:50 unreasonable delay.
10:33:51 MR. HEARD: And we -- and we discussed that
10:33:53 argument, and we discussed how that was an internal operating
10:33:56 procedure of the agency, but that the delegation, you know,
10:34:00 from the roles and responsibilities policy, delegated the
10:34:05 responsibility to decide all requests.
10:34:06 THE COURT: Which they disagreed with and which I

10:34:09 expressed great skepticism about, although I acceded to your
10:34:12 request.
10:34:13 MR. HEARD: But the states did not -- there were
10:34:14 intervenors who took issue with that before the agency, but the
10:34:19 states never took issue with -- the states only wanted their
10:34:28 request granted.
10:34:29 THE COURT: You mean, administratively?
10:34:31 MR. HEARD: Administratively. And to the extent
10:34:33 that the commission was not acting because of what was in the
10:34:41 Wilkey memo, they said that that was an unreasonable delay.
10:34:43 They never contested the ability of the agency to act. They
10:34:49 said that the agency's refusal to act was unreasonable delay,
10:34:51 and they also -- they also claimed that it was an unlawful
10:34:55 withholding of it. But the unlawful withholding of it would
10:34:59 have been in relation to their nondiscretionary duty argument.
10:35:02 The unreasonable --
10:35:03 THE COURT: So what action or inaction on the part
10:35:05 of the states do you think constitutes waiver?
10:35:09 MR. HEARD: They did not -- they did not suggest
10:35:11 before the agency. They said -- they said, I believe, two
10:35:14 things before the agency: one, that this is a nondiscretionary
10:35:17 duty, all that's required is us showing you that the states
10:35:21 have passed this legislation and you are to include it on the
10:35:25 form. That was one. Two was, to the extent there is
10:35:31 discretion, we are giving you these affidavits to establish

10:35:34 that the oaths are not sufficient. Those are the only two
10:35:37 arguments that the states raised.
10:35:40 THE COURT: The states gave the oath to establish
10:35:42 the prerequisites for the administrative or the ministerial
10:35:46 duty. I don't -- I'm sorry, I think the states submitted the
10:35:49 affidavits in the evidence to meet the prerequisites to require
10:35:54 the EAC to act pursuant to its ministerial discretion. I don't
10:36:00 think they gave those affidavits in an attempt to address
10:36:05 discretionary authority by the acting commissioner to make a
10:36:09 policy decision.
10:36:13 MR. HEARD: Well, to my ear, Your Honor, the
10:36:15 phrase "ministerial discretion" seems to be an oxymoron. And I
10:36:18 heard Mr. Kobach use that phrase several times. But the duty
10:36:23 is either ministerial, meaning there's no discretion, or the
10:36:26 duty is discretionary.
10:36:28 THE COURT: Well, there's discretion in a
10:36:31 ministerial duty, discretion to determine whether or not the
10:36:33 prerequisite for the agency exercising its ministerial
10:36:39 function -- I mean, for instance, Mr. Kobach talked about his
10:36:41 ministerial obligation to file LLCs, whether he likes them or
10:36:45 not, but he doesn't have to file them unless they submit a
10:36:47 signed application.
10:36:48 MR. HEARD: Right.
10:36:49 THE COURT: So he has ministerial discretion to
10:36:52 say you've not complied with the facial requirements that you

10:36:55 have to do for me to file.

10:36:56 MR. HEARD: Right. If it meets the requirements
10:36:58 set forth, you know, as the corporation's commissioner, he has
10:37:03 to grant the LLC or whatever it is. And his argument is, if
10:37:08 the state establishes that it passed a law, then the EAC is
10:37:12 without discretion about including the instruction that the
10:37:14 state law reflects. So we may just be differing about the
10:37:19 definition of that, but that's ministerial.

10:37:21 THE COURT: I think since this issue was before
10:37:23 the EAC two months ago, pursuant to my direct order, I don't
10:37:29 think that the states' -- in light of that order -- failure to
10:37:33 object to it being before the EAC waives their argument.

10:37:37 MR. HEARD: But the state sought the Court's
10:37:40 order. The state sought the Court's order precisely because --

10:37:43 THE COURT: The state sought an order that I
10:37:46 remanded to the EAC with instructions that it fulfill their
10:37:49 requests. And you specifically said, if you remand it, don't
10:37:52 remand it with instructions, and I agreed. But that was the
10:37:55 order the state sought, not the order that they got. They
10:37:58 wanted a remand with instructions. I gave a remand to let it
10:38:03 run its course before the agency.

10:38:06 MR. HEARD: The court did give that order, and the
10:38:09 basis for me saying that in December, to ask the court to
10:38:13 remand without instructions, was that the duty was not
10:38:17 ministerial; it was discretionary, and, therefore, the court

10:38:22 cannot compel a discretionary --

10:38:25 THE COURT: I don't think I can, but they

10:38:26 disagreed with that position, you have to admit.

10:38:28 MR. HEARD: I understand, but the Court's order --

10:38:30 THE COURT: And since the court issued that order,

10:38:31 it's unreasonable for them to then be required to object to

10:38:34 being before the agency that I've sent it to, and to say that

10:38:38 their failure to object to a specific order that I just issued

10:38:41 means they've waived the argument.

10:38:43 MR. HEARD: Well -- well, Your Honor, we -- I

10:38:46 respect the Court's decision on that, but I think that there

10:38:52 are -- there are policy reasons for the waiver argument and the

10:38:56 right to request certain arguments before the agency, including

10:39:00 you can't sit back and wait and see what the decision is going

10:39:04 to be before you argue that the decision-maker didn't have

10:39:09 authority.

10:39:09 THE COURT: I understand. The states have argued

10:39:11 from the beginning that the EAC doesn't have discretion to do

10:39:14 this, and so to argue now that the exercise of a discretion

10:39:18 they don't have is ultra vires is not an argument they waived.

10:39:21 MR. HEARD: But that's -- well, their argument as

10:39:25 to a ministerial versus discretionary duty, Your Honor, I think

10:39:29 speaks to their arbitrary, capricious, and contrary-to-law

10:39:33 argument. It doesn't speak to the ability of the agency to

10:39:36 act. So certainly they have -- certainly they have alleged

10:39:39 that this is a ministerial duty and so to do anything other
10:39:43 than grant the request is arbitrary, capricious and contrary to
10:39:46 law.
10:39:46 THE COURT: Now, waiver has to be clear, and on
10:39:52 the record of this case I don't think that you have a clear
10:39:54 position of waiver prior to the states.
10:39:56 MR. HEARD: And even if the Court doesn't accept
10:39:58 the waiver argument, obviously we've addressed the issue of the
10:40:01 delegation authority in our brief. The agency has analyzed the
10:40:07 roles and responsibilities document, which was undisputedly
10:40:10 issued by a quorum of commissioners, the duty to administer the
10:40:15 form and main it consistent with the NVRA.
10:40:17 THE COURT: Do you think that the agency -- I'm
10:40:19 sorry, that the commissioners can lawfully delegate their
10:40:25 discretionary authority to the executive director, or can they
10:40:29 only delegate operational and ministerial authority to the
10:40:33 executive director?
10:40:33 MR. HEARD: I believe that the agency can delegate
10:40:37 administrative functions to subordinate staff, and that those
10:40:43 administrative functions can involve the exercise of
10:40:48 discretion. If you take another agency, for example, that the
10:40:50 Court, I'm sure, is familiar with, the EEOC, right, the Equal
10:40:56 Employment Opportunity Commission, delegates to the district
10:40:58 director the ability to make findings on discrimination
10:41:02 charges, and the district director further delegates it to

10:41:08 investigators.

10:41:08 THE COURT: But he makes the findings or she makes those findings within the parameters of the policy established by the EEOC commissioners?

10:41:16 MR. HEARD: Certainly. But their findings --

10:41:19 THE COURT: So my question is not whether the executive director has the authority to make findings -- I think she does -- but whether she has the authority from the delegation of authority to her to make discretionary policy decisions.

10:41:33 MR. HEARD: The executive director does not have the authority, under the rules and responsibility policy to make policy. That's reserved to the commission.

10:41:39 THE COURT: All right.

10:41:40 MR. HEARD: The commission has set out bounds for the -- it says "to maintain the federal voter registration form consistent with law, EEOC regulations and policy." So those are the boundaries just like, you know, investigators with the EEOC have boundaries that they have to follow as well, but they do it as the executive director does it, in the name of the commission and on behalf of the commission. So, again, we've set forth the argument about the delegation.

10:42:11 Let me see. That argument, by the way, is like most other things, construing statutes and construing regulations entitled to deference.

10:42:33 THE COURT: I think those were the three points
10:42:35 you wanted you wanted to cover.
10:42:36 MR. HEARD: I did have three points. I'm looking
10:42:38 back through my notes.
10:42:40 THE COURT: I'll give you a moment. Mr. Kobach
10:42:42 went five or six minutes over.
10:42:44 MR. HEARD: Okay. I made the point about the fact
10:42:52 that his alternative methods were inadequate. I made that
10:42:55 point. Unless the Court has other questions, or unless anybody
10:43:02 over there is running to hand me a note --
10:43:06 THE COURT: I've had lots of questions. It's my
10:43:09 questions, no doubt, that make it difficult for you to adhere
10:43:13 to my timeline.
10:43:14 Let's take our morning recess at this point.
10:43:16 Let's come back at 11:00 o'clock. I'll hear arguments at that
10:43:18 point from the intervenors. That should take us to about 1:00,
10:43:21 and we'll take a lunch recess at that point. Court's in
10:43:25 recess.
10:43:25 (A recess was taken from 10:43 to 11:00 a.m.)
11:00:51 THE COURT: You may be seated.
11:00:57 Well, I was going to ask if the intervenors have
11:01:00 agreed on who was going to go first, and it appears to me that
11:01:02 we have an agreement.
11:01:04 MS. PERALES: We did. Thank you, Your Honor.
11:01:05 THE COURT: Good morning.

11:01:06 MS. PERALES: Good morning. Again, Nina Perales
11:01:09 for the Valle del Sol intervenors.
11:01:12 I would like to start with the big question that
11:01:17 was raised by the Court earlier, and to say how happy I am to
11:01:23 address that question, because the Valle del Sol intervenors
11:01:29 and Mr. Gonzalez brought the original Arizona litigation in
11:01:33 2006 that culminated in the ITCA decision. And so the Court's
11:01:43 questions about who is the decider, who gets to say when the
11:01:51 states are precluded from enforcing their qualifications such
11:01:55 that the Federal Form should be changed we believe is answered
11:02:00 well. And I'd like to start with some of the language from the
11:02:03 ITCA decision, and particularly on page 2253. And here the
11:02:12 court is discussing the Elections Clause.
11:02:14 And just as a -- by way of context, this very
11:02:17 issue, Your Honor, was thoroughly litigated, Arizona did raise
11:02:21 the argument that, if forced to accept the Federal Form without
11:02:26 additional documentation to prove citizenship, it would be
11:02:29 unable to enforce its qualifications. That issue was
11:02:33 thoroughly briefed before the court, and we believe that the
11:02:35 language that I'm about to read was in the form of an answer to
11:02:39 that argument.
11:02:40 The Elections Clause. And, of course, the court
11:02:44 is discussing the Elections Clause here. "Substantive scope is
11:02:49 broad. Times, places, and manner, we have written, are
11:02:52 comprehensive words which embrace authority to provide a

11:02:55 complete code for Congressional elections, including, as
11:03:00 relevant here and as petitioners do not contest, regulations
11:03:04 relating to registration."
11:03:07 And we believe there the court answers the
11:03:13 question who gets to say, at least as an initial matter, what
11:03:19 you have to do to register to vote in federal elections.
11:03:24 The ITCA decision also --
11:03:27 THE COURT: Well --
11:03:28 MS. PERALES: Yes, Your Honor.
11:03:28 THE COURT: I'm sorry, perhaps -- perhaps I'm
11:03:31 slow, but if you believe it addresses that, what do you believe
11:03:33 it says?
11:03:35 MS. PERALES: What do we believe that it says?
11:03:40 That the Constitution gives Congress the authority within the
11:03:44 ability to set rules for time, place, and manner for federal
11:03:47 elections; to be able to say what is required in the process of
11:03:51 registering to vote for federal elections, not qualifications.
11:03:56 That is something that everyone agrees states get to set.
11:04:01 States have set citizenship as a qualification, as has the
11:04:04 federal government. So the qualification here is
11:04:07 uncontroversial: United States citizenship. However, the
11:04:11 court is making clear right here in ITCA that it is Congress
11:04:15 that decides the process --
11:04:17 THE COURT: I don't read it that way, Ms. Perales,
11:04:19 because I read, first of all, the constitutional provision

11:04:23 quoted, Article I, Section 4, "time, place, and manner shall be
11:04:27 prescribed in each state by the legislature," and the
11:04:31 Congressional analysis here is saying time, place, and manner
11:04:34 includes registration, but they're first talking about the
11:04:38 scope of the clause, and the clause begins by saying, shall be
11:04:41 established by the legislature. The clause goes on, of course,
11:04:44 to say, "[B]ut Congress may at any time make such regulations,"
11:04:48 et cetera, et cetera.
11:04:49 MS. PERALES: Yes.
11:04:49 THE COURT: And then later in the opinion it seems
11:04:51 to me that the ITCA opinion, while not as clear as we all now
11:04:58 hope or wish, casts some question on the ability of Congress to
11:05:03 impact time, place, and manner restrictions regarding
11:05:06 registration. So the provision you read to me on page whatever
11:05:12 it was --
11:05:13 MS. PERALES: 2253.
11:05:14 THE COURT: -- thank you, I think is talking about
11:05:17 initially the scope of the clause itself, and the clause itself
11:05:22 begins by talking about the authority granted to the state
11:05:26 legislatures, plural, and then later, in talking about what
11:05:30 Congress can preempt, says Congress can preempt much of that,
11:05:33 but it casts some doubt on how much Congress can preempt with
11:05:37 respect to registration.
11:05:38 MS. PERALES: Respectfully, no, Your Honor, this
11:05:40 provision is talking exactly about Congressional authority,

11:05:43 Smiley v. Holm was about Congressional authority. This case is
11:05:47 about Congressional authority, and we believe that this
11:05:50 sentence here is about Congressional authority and that there
11:05:55 is no doubt in the mind of the Supreme Court that the Congress
11:05:58 can enact laws that regulate the process of registration for
11:06:04 federal elections. And the --
11:06:06 THE COURT: The process I would probably not
11:06:08 disagree with.
11:06:09 MS. PERALES: And so -- and the outcome of the
11:06:11 case, of course, Your Honor, as the Court moves through the
11:06:15 analysis, that the NVRA requires the states to accept and use
11:06:19 the Federal Form, that it is only the EAC that designs the
11:06:23 Federal Form, is part of the structure that the Court is
11:06:26 talking about, where the Constitution endows Congress with this
11:06:30 authority, Congress establishes the NVRA to facilitate
11:06:34 registration, and gives the authority to the EAC to design the
11:06:38 Federal Form.
11:06:38 However, you're right that there is a piece of
11:06:41 this case which talks about the state's ability to enforce its
11:06:45 qualifications. And so what we have is sort of two big things
11:06:49 here: we have the Elections Clause and the power that Congress
11:06:52 has given to impose its own regulations on the process of
11:06:56 federal elections, and then we have over here the state's right
11:07:00 to enforce its qualifications. And the way that this case
11:07:03 resolves those two things is in the language that the state

11:07:08 will have the opportunity to show that it is precluded from
11:07:12 enforcing its qualifications.
11:07:15 So, in a sense, the Elections Clause, in the broad
11:07:20 authority given to Congress, is constrained by the state's
11:07:24 right to enforce its qualifications, but the state has to show
11:07:27 that.
11:07:27 THE COURT: It's actually the other way around,
11:07:29 isn't it? The state's power to establish time, place, and
11:07:32 manner restrictions are constrained by Congress' superior
11:07:35 right, if it chooses, to intervene and preempt?
11:07:38 MS. PERALES: As an initial matter, yes, Your
11:07:40 Honor, but with respect to the Qualifications Clause, I think
11:07:43 perhaps I could say it more accurately by saying when Congress
11:07:46 chooses to regulate in the area of federal elections, as it has
11:07:49 through the NVRA, its ability is quite broad to do that, but
11:07:54 the court recognizes that there's a point at which it might
11:07:57 impinge on a state's ability to enforce its qualifications.
11:08:00 THE COURT: All right. I understand your
11:08:01 argument.
11:08:01 MS. PERALES: And that's really the issue that
11:08:03 Justice Scalia -- I mean, the biggest part of this case is
11:08:06 about the Elections Clause and the authority of Congress and
11:08:08 the fact that states must yield. This is a classic preemption
11:08:11 case. But there is a case where Justice Scalia is talking
11:08:14 about the opportunity of the states to show that they are

11:08:18 precluded from enforcing their qualifications, and that this
11:08:21 could be a reason why the otherwise broad Congressional power
11:08:26 might have to yield.
11:08:28 And so I moved really fast down my notes. But the
11:08:34 other case that I think might not at first glance seem relevant
11:08:38 here but really is is Norton v. SUWA, Southwest -- Southern
11:08:45 Utah, Southwest Utah, and it's 542 U.S. and the quote is at 66.
11:08:50 And this is an APA case about an agency that was granted the
11:08:54 authority to regulate land use. It was the Bureau of the
11:09:02 Interior, and environmentalists sued and wanted the court,
11:09:05 under the APA, to force the agency to take certain actions.
11:09:08 And Justice Scalia authors this opinion, and it's
11:09:12 from 2004, and he talks about not just that the limit of the
11:09:16 APA is in requiring an agency to perform an act, but it does
11:09:21 not extend to dictating to the agency how it exercises our
11:09:24 discretion, which is a basic principle, but also really sets
11:09:28 out the framework in which Congress gives authority to
11:09:32 agencies -- and sometimes quite broad authority -- to exercise
11:09:35 its discretion. And that's really the context that we have
11:09:38 here for this case and for the claim by the plaintiffs that
11:09:43 they are precluded through the current structure from enforcing
11:09:47 their qualifications.
11:09:48 THE COURT: I'm not familiar with the Norton case,
11:09:50 but here's my question with respect to -- I agree that
11:09:56 administrative law is the overlay that we need to start our

11:10:00 1 analysis on, and the issue, of course, is the authority that
11:10:03 2 Congress has delegated to the commission known as the EAC with
11:10:07 3 respect to these issues. But we have the larger preemption
11:10:12 4 argument here that -- we may or may not have in the land use
11:10:16 5 case of Norton, and I have two questions -- since we're going
11:10:19 6 there, I have two questions of you about that. One, I would be
11:10:23 7 thrilled if you could explain to me what Justice Scalia meant
11:10:26 8 by the "presumption against preemption doesn't really apply
11:10:30 9 here," which Kennedy disagrees with in his concurrence; and,
11:10:34 10 two, my question is if -- if we accept that Congress'
11:10:40 11 preemption power even extends to these issues, has Congress
11:10:45 12 exercised that preemption power? Because merely by saying to
11:10:49 13 the EAC you've got authority to do this doesn't necessarily
11:10:52 14 mean that there's a clear exercise of preemption by Congress
11:10:55 15 over the state's authority.
11:10:56 16 MS. PERALES: And both questions are answered by
11:10:58 17 ITCA, Your Honor, both hotly debated in the litigation, whether
11:11:03 18 there was a presumption against preemption that would shift the
11:11:06 19 momentum towards Arizona and its arguments. And the Election
11:11:10 20 Clause is one of those cases where the court hasn't found a
11:11:14 21 presumption against preemption, and the court notes that
11:11:17 22 Elections Clause cases are different, doesn't quite completely
11:11:20 23 on the point resolve it. But for the purposes of this case,
11:11:23 24 the court does not apply a presumption against preemption in
11:11:26 25 the context of the NVRA and the Federal Form and whether states

11:11:30 are required to accept and use the Federal Form.

11:11:32 THE COURT: And what does it mean that the
11:11:34 presumption against preemption does not apply, because
11:11:36 preemption still only exists if Congress preempts? I assume
11:11:41 the presumption applies with respect to ambiguities, but we
11:11:44 have a larger question here, I think, a predicate question, as
11:11:48 to whether Congress has made any enactment of preemptive
11:11:52 legislation with respect to the precise issue before this
11:11:55 court.

11:11:56 MS. PERALES: Yes, and in this case the issue of
11:11:59 presumption against preemption had to do with whether the state
11:12:01 was regulating in a traditional area. And when we talk about
11:12:05 the Elections Clause and Congress stepping in to regulate
11:12:08 elections with -- to regulate federal elections, 'cause that's
11:12:12 its authority, the presumption against preemption doesn't apply
11:12:14 because the states do not have a historic police power in
11:12:18 regulating federal elections, because federal elections didn't
11:12:21 come along before the federal government did. So that question
11:12:24 is answered in that manner.

11:12:25 And the case itself answers the question about the
11:12:31 preemptive effect of the NVRA, and specifically the language,
11:12:35 states "must accept and use the Federal Form," that was, in
11:12:39 fact, the core question that came to the court in this case,
11:12:42 and the court answered in the affirmative, yes, Congress has
11:12:47 said that there should be a federal form, that the EAC should

11:12:51 1 design it, and that states must accept and use it.
11:12:54 2 THE COURT: Clearly the ITCA opinion finds
11:12:57 3 preemption with respect to the required use and acceptance of
11:13:00 4 the Federal Form, acceptance as being sufficient. Our issue,
11:13:06 5 of course, is a little different.
11:13:07 6 MS. PERALES: Yes.
11:13:09 7 THE COURT: And so my question is, with respect to
11:13:11 8 our issue, not the issue of the Federal Form, where I think
11:13:14 9 Congress has clearly preempted, but with respect to a state's
11:13:18 10 requirement for proof of citizenship, whether Congress has also
11:13:21 11 preempted the states on that issue.
11:13:22 12 MS. PERALES: And I think we're off -- we're off
11:13:24 13 to a good start with the ITCA decision, because not only must
11:13:28 14 states accept and use the Federal Form, but the ITCA decision
11:13:30 15 at page 2252, says that the EAC creates the Federal Form and
11:13:38 16 its instructions. And so there's no real doubt here that the
11:13:44 17 EAC creates the form and then states are required to accept and
11:13:48 18 use them.
11:13:49 19 THE COURT: But is the EAC creating the form, is
11:13:54 20 that equivalent to Congress -- I mean, would you agree with me
11:13:57 21 that the EAC can't preempt states' authority; Congress has to
11:14:03 22 preempt?
11:14:03 23 MS. PERALES: Yes.
11:14:04 24 THE COURT: So Congress tells the EAC to create
11:14:06 25 the form, but without more detailed instructions, can the EAC

11:14:13 then itself take preemptive action?

11:14:15 MS. PERALES: Well, and I don't have my beloved
11:14:17 copy of the NVRA here, Your Honor, but the instructions to the
11:14:21 EAC are both specific, there are some "shall" language and then
11:14:24 there is some "may" language. And this is where I think the
11:14:28 SUWA case, which is, let me get this right, Southern Utah
11:14:34 Wilderness Alliance, and so it's Norton v. Southern Utah
11:14:37 Wilderness Alliance, 124 Supreme Court 2373, encounters that
11:14:44 situation. It's not unusual for Congress to give an agency
11:14:46 authority and give it some very specific language in the
11:14:49 statute and then give it some discretionary language in the
11:14:52 statute.

11:14:53 THE COURT: Oh, I agree that's not unusual, but
11:14:55 that doesn't address the issue of whether an agency can
11:14:58 preempt.

11:14:58 MS. PERALES: And I think -- yes, we would -- I
11:15:01 would think of it in my mind as Congressional preemption,
11:15:04 federal preemption, and it's -- these tasks are delegated to
11:15:08 the agency to create the form, what it asks for, what it
11:15:12 doesn't, what the state-specific instructions say. And I think
11:15:15 Justice Scalia helps us here, because he does pose a limit,
11:15:19 which is if we get to the point where a state can show it is
11:15:22 precluded from enforcing its qualifications, that is where
11:15:26 perhaps federal power is going to have to yield.

11:15:30 I think Justice Scalia, when he uses that phrase

11:15:32 "happily," he says we don't have to confront the constitutional
11:15:35 question, because we have a way for the state to show that it's
11:15:39 precluded from enforcing its qualifications, and if that were
11:15:42 the case, then there may have to be a change in the way the
11:15:45 Federal Form is done.
11:15:46 THE COURT: You'll recall in December I said
11:15:48 happily for him, but unhappily for us.
11:15:49 MS. PERALES: Yes.
11:15:52 THE COURT: So it's your position that, by the
11:15:55 creation of the NVRA, Congress can generally be presumed to
11:16:02 have exercised preemptive action in this field, even in the
11:16:05 absence, as Mr. Heard confirmed for me, of any specific
11:16:08 language in the NVRA on this precise issue? Is that your
11:16:12 position?
11:16:12 MS. PERALES: Yes. And I would add, there is
11:16:14 other language in the NVRA that, I think, provides a helpful
11:16:16 context. The NVRA says, for example, that the form may only
11:16:21 require information that's necessary -- it doesn't talk about
11:16:24 citizenship.
11:16:25 THE COURT: Right.
11:16:25 MS. PERALES: The NVRA also says there shall not
11:16:27 be a formal requirement or a requirement of formal
11:16:31 authentication.
11:16:33 THE COURT: That's referring to notarized
11:16:36 signatures, isn't it?

11:16:38 MS. PERALES: It does, although some people
11:16:40 believe that it might also include having to bring paperwork
11:16:40 that proves something, official paperwork that proves
11:16:45 something.
11:16:45 THE COURT: It's a bit of a reach.
11:16:46 MS. PERALES: It's a little reach. So there is
11:16:49 some -- there's some language -- I concede, Your Honor, a
11:16:51 little reach. There's some language there that helps us, but
11:16:53 you're absolutely right, there is no specific -- after Congress
11:16:57 talked about this and went through the conference committee,
11:16:59 there is no specific language in the statute instructing the
11:17:01 EAC to either include it or not to include it.
11:17:03 THE COURT: So then that gets back to the question
11:17:05 that I dialoged with Mr. Heard about, which is who gets to
11:17:09 decide what's necessary, or when Scalia, Justice Scalia, talks
11:17:15 about proving that a mere oath will not suffice, to whose
11:17:21 satisfaction must that proof reach?
11:17:23 MS. PERALES: Well, Your Honor, that, we believe,
11:17:26 raises a foundational question regarding the authority of the
11:17:31 agency in this situation. If the agency has the ability to
11:17:36 act, then it would be up to the agency. If the agency doesn't
11:17:41 have the ability to act, we believe that the court cannot step
11:17:46 into the agency's shoes and make that decision under the APA.
11:17:50 THE COURT: And I found your brief on this point
11:17:52 to be very interesting.

11:17:52 MS. PERALES: Thank you very much, Your Honor.
11:17:54 You know, I prepared a small bit of technology, and I was
11:17:57 hoping that Mr. Markoff might have permission to approach the
11:18:01 bench and hand a copy of it, and I was going to show it on the
11:18:05 Elmo --
11:18:06 THE COURT: Certainly.
11:18:06 MS. PERALES: -- as a demonstrative exhibit, Your
11:18:11 Honor.
11:18:11 And in here, as we talk about who has the ability
11:18:14 to make this decision, the decider, in a sense Your Honor was
11:18:19 raising two questions about who gets to decide, first this
11:18:21 question of federal or state government. Congress has taken
11:18:24 the position that state government, merely by enacting the law,
11:18:27 puts -- in almost a reverse preemption -- puts everybody in the
11:18:31 position of having to comply with it. We obviously don't
11:18:33 agree.
11:18:33 But regardless of who gets to make this decision,
11:18:40 we would like to talk to the Court briefly about some of the
11:18:42 evidence that, regardless, the plaintiffs cannot show that they
11:18:48 lack the ability to enforce their qualifications.
11:18:53 Some of this we've already covered, including the
11:18:56 language in the ITCA decision, and I think this has also been
11:19:01 covered, that we don't believe that the states have an
11:19:05 automatic right to compel the agency. And here's the language
11:19:08 from ITCA, the opportunity to establish in a reviewing court

11:19:12 that a mere oath will not suffice, and that the EAC is under a
11:19:16 nondiscretionary duty.
11:19:19 And we believe that the central questions here
11:19:25 with respect to this are have there been any Federal Form
11:19:28 registrants who swore to U.S. citizenship and were noncitizens,
11:19:33 and are the states precluded from enforcing the citizenship
11:19:37 qualification by what is currently on the Federal Form.
11:19:44 THE COURT: Now, as to the first issue, there's no
11:19:46 evidence in the administrative record that I saw that's
11:19:49 specific to the Federal Form.
11:19:50 MS. PERALES: That's correct, Your Honor. There
11:19:52 is none whatsoever.
11:19:52 THE COURT: And you think that's determinative?
11:19:54 MS. PERALES: We do, Your Honor. We believe that,
11:19:57 at the very beginning, the states cannot show -- there's been
11:20:01 quite a bit of talk about this Kansas state form and what
11:20:05 Kansas has done to respond to what Kansas believes is a problem
11:20:10 with people using the state form to register to vote who are
11:20:13 not citizens. That is -- that's important, Your Honor, but it
11:20:18 is not really relevant to this case.
11:20:21 THE COURT: Why is that not form over substance?
11:20:24 If the states are concerned that registrants that don't show
11:20:27 proof of citizenship interfere with the state's rights to
11:20:32 enforce its rolls, why -- even though I understand that the
11:20:35 limitation of this Court's authority reaches only the Federal

11:20:40 Form -- why does it matter whether that registrant's
11:20:42 registering under the Federal Form or a state form?
11:20:44 MS. PERALES: Because this case is not about the
11:20:46 state form. Nobody is challenging here Kansas' authority to
11:20:49 put these requirements on the state form as it sees fit. The
11:20:54 only thing that we have here is the Federal Form, and to that
11:20:58 there is not a shred of evidence, not a single incident, that
11:21:02 anybody has used the Federal Form to register to vote as a
11:21:05 noncitizen. And these forms are different from each other,
11:21:07 Your Honor.
11:21:07 THE COURT: I understand.
11:21:08 MS. PERALES: They are not exactly the same. The
11:21:13 cover page of the Federal Form says, in bright red letters, For
11:21:16 U.S. Citizens; the check box at the top of the form, answering
11:21:19 the question, "Are you a citizen of the United States?",
11:21:23 directing applicants that they must not complete the form if
11:21:26 they check no; signing at the bottom, the attestation, "I am a
11:21:31 U.S. citizen."
11:21:34 The form is signed under penalty of perjury, and
11:21:38 it is explicit. It explicitly that talks about being fined,
11:21:43 imprisoned, and explicitly talks about the penalties for
11:21:45 noncitizens, "If I am not a U.S. citizen, I can be deported or
11:21:50 refused entry."
11:21:52 The Kansas and Arizona voter registration forms do
11:21:55 not mention perjury or the specific penalties for noncitizens.

11:21:59 And I wanted to raise this information to the Court, but not as
11:22:03 dispositive. The important thing here is that Kansas and
11:22:07 Arizona -- and under the ITCA decision -- can make changes to
11:22:11 their state forms and can change their state requirements of
11:22:14 voter registration. However, with respect to the Federal Form,
11:22:18 if they're going to make a compelling case, or any case at all,
11:22:21 that it needs to be changed, they have to come forward with an
11:22:24 example of somebody who either misunderstood or used the form
11:22:28 fraudulently, and they have not.
11:22:29 THE COURT: And so it's your position that because
11:22:32 the Federal Form is scarier than the state form, that's
11:22:37 sufficient to further dissuade noncitizens from registering who
11:22:41 may not be dissuaded by the less-intimidating state form?
11:22:44 MS. PERALES: My position would be very similar to
11:22:46 that, but slightly different, that the Federal Form, perhaps
11:22:50 because of the way it's designed or perhaps because of the way
11:22:53 it's distributed and used, I can't really tell you at which
11:22:56 point it's been effective, but that it has been effective, and
11:23:00 that there are no examples of noncitizens registering to vote
11:23:04 using the Federal Form. That seems to just end the matter
11:23:08 entirely, Your Honor, in our opinion.
11:23:10 But if we move forward to the idea -- I mean, this
11:23:17 case has always been frustrating to me, and I see this as a
11:23:19 continuation of a case that we've been working on for so long,
11:23:22 because nobody comes to court asking for an injunction to stop

11:23:25 1 the stampeding pink elephants every day at 6:00 p.m., but
11:23:30 2 that's kind of what we have here. We have an allegation that
11:23:32 3 the Federal Form has to be changed, so we have to do all this
11:23:34 4 enormous changing of a federal form and interfere with the
11:23:37 5 activities of Congress and federal agencies, but without an
11:23:44 6 example that it was ever used to register a noncitizen to vote.
11:23:47 7 Moving on, because I think I've made my point. I
11:23:50 8 wanted to point the Court to statements by the state of Kansas
11:23:55 9 in the December hearing. "[W]e have the ability to obtain
11:24:00 10 information unilaterally establishing citizenship." And this
11:24:04 11 was a discussion specifically about the Federal Form.
11:24:08 12 Obtaining birth certificates, doing face-to-face interviews
11:24:12 13 with people who might not have gotten all their paperwork in,
11:24:16 14 using 8 U.S.C. 1373, and then the final statement, "we have the
11:24:21 15 ability to clear that 100."
11:24:23 16 And the facts of the case is that it's a
11:24:25 17 relatively small number of people, Kansas says it has the
11:24:29 18 ability to clear those individuals, and nobody has used the
11:24:37 19 Federal Form to vote as a noncitizen.
11:24:41 20 There are additional means. And Your Honor raised
11:24:45 21 the question earlier whether if it was difficult for the state
11:24:50 22 or time-consuming, that perhaps that might weigh against
11:24:54 23 considering these options. And we would say that an
11:24:59 24 administrative burden in enforcing these qualifications does
11:25:01 25 not overcome or does not satisfy the central question whether

11:25:06 the states are precluded from enforcing their qualifications.

11:25:11 We believe, Your Honor, that the states' claims of
11:25:21 noncitizen registration, using the state form, is, first,
11:25:26 irrelevant, for the reasons that I've explained; second,
11:25:30 lacking support. The information that Kansas has put forward
11:25:35 is that there were individuals who were not citizens when they
11:25:39 took out their driver's licenses and that they subsequently
11:25:44 registered to vote. You can't just stop there. In order to
11:25:49 prove that a noncitizen registered to vote, you have to also
11:25:53 show that the person didn't naturalize in the interim.

11:25:57 Mr. Gonzalez, the lead plaintiff in the Arizona
11:25:59 litigation, was in exactly that situation. He took out his
11:26:03 driver's license when he was a legal permanent resident, years
11:26:06 later he naturalized, he was subsequently flagged and denied
11:26:10 voter registration on the assumption that he was a noncitizen.
11:26:13 And Arizona has worked to try to overcome that problem. Kansas
11:26:20 cannot now, knowing all of that, come in and say that because
11:26:24 there are former noncitizens found on the voter roll, that that
11:26:27 is somehow proof. It is not proof. It may be enough to call
11:26:31 somebody, but it is not proof.

11:26:32 THE COURT: But doesn't that contradict your
11:26:34 earlier argument that the states have means, cost effectiveness
11:26:38 aside, to determine whether registered voters are citizens or
11:26:43 noncitizens, because now you're indicating, as have others,
11:26:46 that those means have questionable accuracy or current

11:26:50 information?

11:26:50 MS. PERALES: Well, no, Your Honor, because I
11:26:54 believe this was fairly recent, and these examples of these
11:26:56 purported noncitizens on the voter rolls are from 2009 and, I
11:27:00 believe, 2007, so before the state began deploying the means
11:27:04 that it has to enforce its qualifications.

11:27:08 If Your Honor looks at the affidavits or the
11:27:10 declaration from Mr. Bryant, they are from previous years when
11:27:13 I don't believe this kind of checking was done. We would
11:27:16 assert today it's certainly possible, if you have 12 people in
11:27:19 a year who show up as potentially noncitizens -- I think even
11:27:25 Kansas would agree -- it would be possible to contact them and
11:27:27 say, we think we might have a discrepancy here, can you help us
11:27:30 resolve it. The bottom line is that it is not proof. Not only
11:27:34 is it not the Federal Form, but it is not even proof as to the
11:27:37 state form.

11:27:38 And then, of course, Your Honor mentioned earlier
11:27:41 the de minimis. And, of course, with respect to Arizona, the
11:27:46 Ninth Circuit noted Arizona has not provided persuasive
11:27:49 evidence that voter fraud and registration procedures is a
11:27:53 significant problem in Arizona. Moreover, the NVRA includes
11:27:56 safeguards addressing voter fraud. That's the Ninth Circuit en
11:28:01 banc. Also Arizona never came forward with an example of a
11:28:04 noncitizen using the Federal Form to register to vote.

11:28:12 The only thing I would conclude with, Your Honor,

11:28:15 because I don't want to take more time if I don't need it, is
11:28:18 that Kansas has mentioned several times that there is an
11:28:20 impending constitutional crisis. We don't agree with Kansas'
11:28:25 position. But we do think that Kansas is inviting the Court to
11:28:30 create a constitutional crisis of its own making, or asking for
11:28:35 the Court's assistance in doing so, and that is to upset the
11:28:38 balance of federalism or to violate the balance of power
11:28:46 between the branches to the extent that they are asking the
11:28:49 court to step into the agency's shoes. If the Court finds that
11:28:53 the agency has authority to make its determination, or even
11:28:56 doesn't have authority, the Court cannot step into the agency's
11:28:59 shoes, as set out in our brief. And also the position of
11:29:03 Kansas that somehow their enactment of a law related to
11:29:07 documentation and proof of citizenship then sort of overcomes
11:29:11 everything in the federal structure is not correct and would
11:29:15 be, as I mentioned earlier, a reverse preemption.
11:29:19 Kansas has an interest in enforcing its
11:29:21 qualifications, and it has many tools to do so. What Kansas
11:29:25 doesn't have a constitutional right to do is latch on to this
11:29:29 one tool, this new law that they have, and say, if we can't use
11:29:33 this one tool, then we are precluded altogether, because that's
11:29:36 ignoring all of the other means that Kansas has.
11:29:44 If the Court has no further questions --
11:29:46 THE COURT: Thank you, Ms. Perales.
11:29:47 MS. PERALES: Thank you.

11:30:05 MR. KEATS: Good morning, Your Honor.

11:30:06 THE COURT: That podium didn't used to be there, did it? Oh, I guess Ms. Perales was speaking there.

11:30:11 MR. KEATS: I could speak there, if it's easier for you.

11:30:13 THE COURT: No, no, I'm perfectly happy wherever you are. I just looked and I heard a voice and they weren't where I thought they would be.

11:30:20 MR. KEATS: Glad to keep you on your feet.

11:30:22 THE COURT: Absolutely, absolutely. Late in the day, that's good -- or late in the morning, that's good.

11:30:26 MR. KEATS: So thank you, Your Honor, for holding this hearing and taking all the time to hear from all of us. Before I begin, I did just want to welcome several of our clients here from the League of Women Voters, Dolores --

11:30:40 THE COURT: Can you -- excuse me.

11:30:40 MR. KEATS: Slow down?

11:30:41 THE COURT: For the -- no, no, for the sake of the court reporter, can you identify yourself again.

11:30:44 MR. KEATS: Michael Keats of Kirkland & Ellis for the League of Women Voters.

11:30:48 THE COURT: Thank you, Mr. Keats.

11:30:52 MR. KEATS: So with us today is Dolores Furtado, who is the President of the Kansas League; Janis McMillen, who's a member of the National League's board of directors;

11:31:01 Ernestine Krehbiel, who is the Vice President of the Kansas
11:31:04 League; and Betty Ladwig, who is the Voter Services chair.
11:31:09 They're with us today.
11:31:17 So following the point of answering the big
11:31:19 question, we also, obviously, believe that it was the EAC's
11:31:22 decision to determine in the first instance whether or not it
11:31:29 was necessary to include documentary proof of citizenship on
11:31:32 the Federal Form. And the reason -- there's two parts of that,
11:31:38 really. One is who decides it, and the second is whose burden
11:31:41 is it to show. We've talked about burdens, administrative
11:31:43 burdens and the like. We haven't really talked about whose
11:31:46 burden it is to actually make that proof, to make that case.
11:31:51 We think very -- it's very clear from the opinion that they
11:31:56 were supposed to make that showing in the first instance to the
11:31:59 EAC. I agree there was not -- though those words do not appear
11:32:04 in the opinion. But if you read, there are parts of the
11:32:07 opinion, particularly the part that says if the EAC continues
11:32:10 to be unable to act, then they would have the opportunity in
11:32:15 the reviewing court to establish that a mere oath is not
11:32:18 sufficient.
11:32:19 I never -- I don't think it makes any sense that
11:32:22 they'd have to establish in a court for the first time that
11:32:24 that was insufficient, but they wouldn't have to do it for the
11:32:27 first time in the context of an administrative review by an
11:32:30 agency. And we think that's the logic of the opinion, and what

11:32:35 Scalia was trying to explain.

11:32:39 So let me take -- so, first, we very much think it
11:32:43 was the EAC's decision in the first thing, we think they had
11:32:47 the ability to make that decision. They had -- they were
11:32:50 relying, frankly, on long-standing rule-makings, where
11:32:55 documentary proof had been considered as a possible addition to
11:33:00 the Federal Form. They had actually -- were relying on a
11:33:03 decision by the EAC itself.

11:33:04 THE COURT: What was that decision?

11:33:05 MR. KEATS: Excuse me?

11:33:06 THE COURT: What was that decision?

11:33:08 MR. KEATS: The 2006 decision. So backing up, if
11:33:11 you mean about the rules that were adopted --

11:33:13 THE COURT: 'Cause I don't -- you say they're
11:33:15 relying on the EAC's decision itself, but I don't think that we
11:33:18 can consider the 2006 two/two vote an EAC decision because the
11:33:24 EAC's governing legislation clearly indicates that it takes
11:33:27 three votes to make a decision. So I think that vote was a
11:33:31 nondecision, was it not?

11:33:33 MR. KEATS: I disagree, actually. One, they
11:33:35 actually -- the executive director had issue -- had issued a
11:33:39 ruling. We believe it's pretty clear from the record that
11:33:43 ruling was with the consent of the commissioners, that they
11:33:45 have a public vote.

11:33:47 THE COURT: How do you determine that? What's the

11:33:49 record that it was with the consent of the commissioners,
11:33:52 because when the commissioners voted they voted two to two?
11:33:55 MR. KEATS: Understood. Well, let's just say
11:33:57 we're outside the administrative record, I think, at this
11:33:59 point. I can offer up a possibility on that. Nothing more.
11:34:02 You're right, on the record there's nothing that says what
11:34:05 happened before, but if you read the letters themselves, they
11:34:07 refer -- both of those -- both of the opinions that were issued
11:34:10 by the commissioners afterwards, after that vote, they both
11:34:13 refer to "our prior decision" or "our prior," with respect to
11:34:18 the executive director's letter.
11:34:19 THE COURT: Well, here's my issue on that. If --
11:34:24 and this is a big "if" -- if the executive director had the
11:34:26 authority to make decision, she could only make that decision
11:34:30 if it were ministerial and not a policy decision; correct?
11:34:33 MR. KEATS: I don't know I'd -- it has to be a
11:34:36 ministerial, nonpolicy decision.
11:34:38 THE COURT: You think the executive director has
11:34:39 authority to make policy decisions?
11:34:41 MR. KEATS: No, I actually think that the 2008
11:34:43 delegation memo actually uses the right words. What she --
11:34:47 what they delegate to her, among other things -- it actually
11:34:51 might have been a him at that point -- but the delegation of
11:34:54 the executive director then was to maintain the Federal Form.
11:34:57 The statutory language is to effectively -- I think it's

11:35:02 create -- it's not create. It's something like create.

11:35:04 I don't think -- and this is where I think we
11:35:06 differ a little bit from some of the other intervenors and from
11:35:10 the Government, frankly -- we don't think on -- given the prior
11:35:13 rule-makings, given the prior decision in '06, we don't think
11:35:16 that the EAC director could have frankly come out the other
11:35:20 way, given the fact they proceeded by rule-making.

11:35:23 THE COURT: And I expressed that concern in the
11:35:25 December hearing.

11:35:27 MR. KEATS: Yes.

11:35:27 THE COURT: But my question is, the EAC executive
11:35:34 director does not have the authority to make policy decisions.
11:35:35 Would you agree with that?

11:35:36 MR. KEATS: I agree with that.

11:35:37 THE COURT: All right. So in 2006 the executive
11:35:40 director made a decision, and if that was a policy decision,
11:35:44 then his decision in 2006 was ultra vires, would you agree with
11:35:49 that, if it was a policy decision?

11:35:51 MR. KEATS: I think it was a straightforward
11:35:53 application of the NVRA and the regulations, whether that's a
11:35:56 policy --

11:35:57 THE COURT: Well, you're not accepting my
11:35:57 hypothetical. My hypothetical --

11:35:59 MR. KEATS: Correct, I'm not.

11:35:59 THE COURT: If it's a policy decision --

11:36:01 MR. KEATS: If it's a policy, correct.
11:36:01 THE COURT: -- he didn't have authority to make it?
11:36:04 MR. KEATS: Unless, unless the commissioners, which we believe -- we believe the record would show what the commissioners effectively approved, what the executive director did, which we believe is what happened.
11:36:11 THE COURT: And what the commissioners did was vote two to two.
11:36:14 MR. KEATS: Yes, afterwards, but yes.
11:36:16 THE COURT: Which is not a vote to establish a policy.
11:36:20 MR. KEATS: The EAC can take an action without --
11:36:23 THE COURT: Right. So if it was a policy decision, there was no decision on behalf of the EAC in 2006; do you agree with that, if it was a policy decision?
11:36:33 MR. KEATS: Again, I think I'd differ on whether or not -- even -- even if you assume it was a policy decision, we still think that the commission approved it. We don't think that the executive director could have or would have issued that letter without the commissioners --
11:36:45 THE COURT: How did the commission approve it?
11:36:47 MR. KEATS: As Justice Scalia pointed out, it's a very informal agency, and we believe that internally there were discussions.

11:36:52 THE COURT: But the records --
11:36:54 MR. KEATS: It's beyond the administrative record.
11:36:55 THE COURT: But the records of the EAC only
11:36:58 reflect a two-to-two commission vote?
11:37:01 MR. KEATS: Yes, but those -- but with letter
11:37:03 rulings after -- with letters of explanation afterwards,
11:37:06 frankly, explaining that they had hitherto previously all votes
11:37:10 had been unanimous, and we believe that that encompassed that
11:37:14 prior issue.
11:37:15 THE COURT: And so what your saying is the
11:37:16 executive director in 2006 thought he had the commission's
11:37:20 approval.
11:37:20 MR. KEATS: Yes.
11:37:20 THE COURT: He may have had belief, reasonable
11:37:25 belief, that he had the commission's approval, but when the
11:37:28 commission voted, they didn't approve?
11:37:30 MR. KEATS: That's right.
11:37:31 THE COURT: So if it's a policy decision, there
11:37:34 was no formal approval of it in 2006?
11:37:35 MR. KEATS: I'm not so sure that their decision
11:37:38 not to take an action isn't of precedential value.
11:37:41 THE COURT: So, in other words, you're saying that
11:37:43 the executive director can act with commission unless the
11:37:45 commissioners overrule him? Doesn't that put the cart before
11:37:48 the horse?

11:37:49 MR. KEATS: Well, except, sir, I think we thought
11:37:51 the commissioner -- we -- again, we think at the time of the
11:37:53 letter, I'm not saying --
11:37:54 THE COURT: Yeah, I'm not casting any aspersions
11:37:56 on the executive director, but I'm just saying, as it turns out
11:37:59 legally, she can only establish -- or operate on a policy
11:38:04 that's established by the commission.
11:38:05 MR. KEATS: I think I agree with you on that.
11:38:06 THE COURT: And there's no policy decision
11:38:09 established by the -- and you may think it doesn't even require
11:38:12 a policy decision, but there was no policy decision in 2006 on
11:38:16 this issue. Several of the briefs have talked about the 2006
11:38:19 vote, but I think a two-two vote is inconclusive as to what the
11:38:23 formal policy of the EAC is on that issue. Perhaps it doesn't
11:38:27 need to be a policy decision, but if it does, then the
11:38:32 two-to-two vote did not establish a policy decision.
11:38:34 MR. KEATS: You know, but let's say you'd be right
11:38:37 about that for a moment. We would still say they would have --
11:38:41 they've had the rule making before right back in 1993.
11:38:44 THE COURT: Right.
11:38:45 MR. KEATS: And people did submit comments. There
11:38:47 were 60 or 70 comment letters submitted. Some people did
11:38:50 submit comments about documentary proof. It weren't any
11:38:54 states, although some of the states, I think, may have actually
11:38:57 submitted comments in that proceeding. That -- the results of

11:38:58 that, the regs which specify what's supposed to be in the
11:39:02 Federal Form and, you know, indicate, and later on with HAVA,
11:39:05 when HAVA came along and you added the check box, that does --
11:39:08 it's the policy of the agency 'cause that's what the statute
11:39:11 has required and it's what the rule-makings have implemented
11:39:15 based on the statute. So is it a policy, we've always --
11:39:17 THE COURT: So it's your position that the policy,
11:39:19 it at least implicitly for the agency preexisted '06 --
11:39:25 MR. KEATS: Yes.
11:39:25 THE COURT: -- and nothing in '06 changed that?
11:39:28 MR. KEATS: Yes.
11:39:28 THE COURT: All right. You can go on.
11:39:29 MR. KEATS: Okay. Well, again, we think -- so,
11:39:34 again, we think the question really was now that -- it was for
11:39:37 the EAC in the first instance to make -- to make the decision,
11:39:41 and the decision was largely a factual one based on -- with all
11:39:44 the backdrop of the rule-makings and the 2006 decision, which
11:39:48 the executive director did sign, obviously, the prior denial of
11:39:53 Arizona's requests, we do think that they had -- the executive
11:39:57 director had the ability to ask for a notice, put out a notice
11:40:02 to receive comment, to review what was submitted.
11:40:05 And as an aside, I know that Mr. Kobach has -- one
11:40:10 of the points he made in his presentation was he thought he was
11:40:12 denied due process because he didn't get to respond to all the
11:40:16 submissions. I have to say, speaking of waiver, I don't think

11:40:18 he ever asked for an opportunity to respond, and if I'm wrong,
11:40:21 someone can correct me on the record. But I don't remember
11:40:23 that request being made. I don't remember a letter going in.
11:40:26 So I would say that's waived.
11:40:30 THE COURT: I did not see anything in the record
11:40:32 whereby the states asked for an evidentiary hearing before the
11:40:35 EAC. And so if it's not in there, and there's a lot in the
11:40:40 record, but I would agree that there would be a colorable
11:40:45 waiver argument in that case.
11:40:47 MR. KEATS: So the EAC received its comments, it
11:40:51 wrote a very thorough, reasoned decision. You could disagree
11:40:55 with it. You may think that Kansas' policy is more effective,
11:41:01 maybe it's a safer policy, but at the end of the day Congress
11:41:05 has legislated the NVRA, it gave the authority to the EAC to
11:41:10 develop the Federal Form. They did. They have historically,
11:41:15 routinely for 20 years not allowed documentary proof of
11:41:19 citizenship. It's entirely --
11:41:21 THE COURT: It's not that they've not allowed it;
11:41:23 it's that they've not required it. Actually, the issue's not
11:41:26 come up.
11:41:26 MR. KEATS: Oh, I think it has -- look, in the
11:41:29 notice-and-comment period, people -- there was a comment letter
11:41:31 submitted, and I could probably get a cite for it, someone did
11:41:35 actually talk about it, but again the states hadn't enacted
11:41:38 their laws at that point.

11:41:41 THE COURT: Talk to me about -- with respect to
11:41:43 the agency's decision, I dialoged a lot with Ms. Perales about
11:41:45 the preemption argument, which is to say whether the EAC has
11:41:50 the constitutional authority to supersede the states' decision
11:41:58 under Article I. Give me your view on that.
11:42:00 MR. KEATS: Okay. Let's take it -- can I take it
11:42:03 from a little bit of a different tack? They're not superseding
11:42:06 the states' decision on the state form; right? This is not --
11:42:09 this is not like preclearance under Section 5 of the Voting
11:42:14 Rights Act. This is that -- the law in Kansas is the law.
11:42:18 That is what they follow. And as we all know, that's not the
11:42:22 subject of this litigation. So, one, this is not like the EAC
11:42:25 has passed on the validity of the statute and said it can't
11:42:28 come to force or effect. So that's number one.
11:42:31 Two, it's very clear from ITCA itself, which is
11:42:37 just citing cases that have been around for, you know, almost
11:42:40 90 years, that the -- that the Elections Clause gives --
11:42:49 invests Congress with very broad authority, which by definition
11:42:53 Scalia says is preemptive. They exercise that authority in
11:42:56 enacting the NVRA, they delegated that authority, they
11:42:59 developed the Federal Form.
11:43:00 THE COURT: Do you think preemptive authority can
11:43:02 be exercised broadly, or does it have to be exercised
11:43:04 specifically?
11:43:05 MR. KEATS: Well, I think it's exercised

11:43:07 specifically in the context of the Federal Form.

11:43:09 THE COURT: Well, Congress didn't enact the

11:43:11 Federal Form; Congress enacted the NVRA.

11:43:13 MR. KEATS: Congress enacted -- Congress directed

11:43:16 the NVRA to develop the Federal Form. That Federal Form has

11:43:19 preemptive force by virtue of being --

11:43:21 THE COURT: And so has Congress told the NVRA --

11:43:23 well, Congress told the agency through the NVRA to enact a

11:43:26 federal form, anything the agency did in enacting that form had

11:43:31 preemptive authority under Article I; is that your position?

11:43:34 MR. KEATS: Yes, I think so.

11:43:34 THE COURT: So the agency can exercise

11:43:36 preemptive --

11:43:37 MR. KEATS: But the -- to the extent that the

11:43:39 states have to accept and use it, yes.

11:43:42 THE COURT: Oh, no, that's not my question. My

11:43:44 question is does anything the agency does in enacting that form

11:43:48 have preemptive power under Article I, even though Congress'

11:43:53 legislation in the NVRA may not address this specific issue?

11:43:56 MR. KEATS: I don't know that it has to.

11:44:01 THE COURT: Doesn't it under Article I, Section 4?

11:44:05 MR. KEATS: I think they gave --

11:44:05 THE REPORTER: I'm sorry, I can't --

11:44:06 THE COURT: The court reporter's unhappy with both

11:44:08 of us because we're both talking at the same time. And you get

11:44:11 to go home; I have to live with her, so we should both try to
11:44:15 do better.
11:44:16 Doesn't Article I, Section 4, say that Congress
11:44:24 can preempt the states' decisions, but it's the state's
11:44:28 decision unless Congress preempts it?
11:44:33 MR. KEATS: That's fine. I'll accept that.
11:44:35 That's fine.
11:44:35 THE COURT: It's very inartful, I'll admit. So
11:44:38 the question is, by enacting the NVRA, did Congress preempt the
11:44:44 states as to the specific issue?
11:44:47 MR. KEATS: They didn't have to. Well, actually,
11:44:49 let me take a step back. I would say there is an argument that
11:44:52 they did, because we would take the position that the statute
11:44:56 on its face says that what -- they can only include what is
11:45:03 necessary; right? And if you look at the legislative history,
11:45:06 if you look at the intent of the statute, it was pretty clear
11:45:08 that they believed that documentary proof of citizenship was
11:45:12 not necessary.
11:45:14 THE COURT: That's -- you see that in the statute?
11:45:15 MR. KEATS: So you can make -- I think it's a fair
11:45:19 interpretation of the statute itself and the legislative
11:45:21 history, yes.
11:45:22 THE COURT: All right.
11:45:27 MR. KEATS: Let me turn to somewhat of a different
11:45:29 issue, and that's the question of proof. And I have to -- I

11:45:37 1 was going to restrain myself, but I have to say this. This
11:45:40 2 notion of aliens in the voter rolls, that may make great
11:45:45 3 political theater, but it is not evidence. It is not
11:45:50 4 sufficient for an administrative agency or, obviously, a court,
11:45:55 5 and it masks the evidentiary deficiencies of the presentation I
11:46:01 6 believe -- we believe -- that the states presented to the EAC.
11:46:05 7 If you look at the documents to my cocounsel's
11:46:10 8 point, no one was using the Federal Form and registering, and
11:46:16 9 there's no proof that anybody -- that any of those people was
11:46:19 10 not a U.S. citizen. There's a complete failure of proof in
11:46:23 11 that regard. And this is a case about the Federal Form, it's
11:46:29 12 about whether or not it's -- whether or not an oath is
11:46:31 13 necessary, and if they can't present evidence that someone took
11:46:35 14 an oath on the Federal Form and lied and actually were not a
11:46:41 15 U.S. citizen, then they haven't even come close to making the
11:46:45 16 showing that Justice Scalia said they needed to make.
11:46:51 17 As to the evidence they did submit, everybody,
11:46:56 18 frankly, has very well briefed the issue as to whether -- as to
11:46:59 19 what that evidence shows. You were a former prosecutor, and
11:47:02 20 I'm not going to pretend to be an expert in this area, but I
11:47:06 21 don't believe on the documents that were presented, the
11:47:08 22 affidavits that were presented, you could make out a criminal
11:47:12 23 case of voter fraud in any of those instances.
11:47:12 24 THE COURT: Well, there's no question --
11:47:14 25 MR. KEATS: There are still questions to be asked.

11:47:16 THE COURT: Well, they didn't have a reasonable -- beyond a reasonable proof criminal burden of proof before the agency.

11:47:21 MR. KEATS: That's right.

11:47:21 THE COURT: So whether or not I could make out a criminal case on that or not is irrelevant.

11:47:24 MR. KEATS: But if you're going to argue that there's voter fraud, which is what they're arguing, you would need to present -- I would expect -- if this was a big burning issue that there were aliens on the voter rolls, and that people are coming from outside the country to register in Kansas elections to tilt close local elections, I would expect to see pretty clear evidence of that before I started making those claims. There's no such evidence in the record.

11:47:51 THE COURT: They presented evidence of people on the voter rolls who are not citizens.

11:47:55 MR. KEATS: They didn't present that they were noncitizens at that time that they registered in some cases to vote. What they show was that they looked at a driver's license database, right, that was for driver's licenses that were given to non-U.S. citizens, temporary licenses, and, in fact, I think Mr. Bryant had to retract one of the statements that he made, that it turned out that one of those people became naturalized afterwards.

11:48:20 People who think about -- you know, I kind of

11:48:22 1 think about the people who are willing to come forward and get
11:48:24 2 a temporary driver's license. Those are highly unlikely to be
11:48:29 3 people who are here illegally. They are probably trying to put
11:48:33 4 themselves in a legal -- they're either here living lawfully
11:48:35 5 here or they're trying to become U.S. citizens.
11:48:38 6 The idea -- certainly, there's no evidence that
11:48:40 7 any of those people actually registered to vote when they were
11:48:44 8 not a U.S. citizen or hadn't been naturalized.
11:48:47 9 THE COURT: I'm not sure how you get to that
11:48:49 10 conclusion. I mean, it may be just a handful of cases, and it
11:48:54 11 may be that Mr. -- I've forgotten his name, who submitted
11:48:57 12 several affidavits.
11:48:58 13 MR. KEATS: Yes. Bryant?
11:48:59 14 THE COURT: I think -- yeah, I think Mr. Bryant
11:49:04 15 found on further review that one of them had, in fact, obtained
11:49:07 16 citizenship. The inference from that is that the review showed
11:49:10 17 that the others have not.
11:49:12 18 MR. KEATS: Well, it's an inference, but they
11:49:14 19 don't say they actually did that work.
11:49:14 20 THE COURT: Well, it's less an inference than your
11:49:16 21 inference that none of them were still aliens at the time they
11:49:19 22 registered.
11:49:19 23 MR. KEATS: I don't -- it's not my burden.
11:49:20 24 THE COURT: I understand it's not your burden --
11:49:22 25 MR. KEATS: It's his burden.

11:49:23 THE COURT: -- but they produced evidence that
11:49:25 these people were not citizens, and there's nothing to rebut
11:49:28 that evidence except the subsequent evidence that Mr. Bryant
11:49:32 himself presented that further review showed that one of them
11:49:35 was, in fact, a citizen. What rebuts that evidence?
11:49:38 MR. KEATS: Look, if the agency -- I think that
11:49:40 the agency had the discretion to decide that based on -- they
11:49:42 haven't even made a prima facie case effectively.
11:49:47 THE COURT: Believe me, that's a prima facie case.
11:49:49 There may be evidence to rebut it, I don't know what that is,
11:49:52 there may be arguments that the evidence is de minimis, those
11:49:55 arguments have been made, but they produced evidence that there
11:49:58 were noncitizens on the voter rolls, clearly on a prima facie
11:50:03 case.
11:50:03 MR. KEATS: I don't know if I, respectfully, agree
11:50:05 with that, but --
11:50:08 THE COURT: All right. You may proceed.
11:50:10 MR. KEATS: Yep. So just a couple of little odds
11:50:19 and ends, then I will balance my time.
11:50:22 So Mr. Kobach said that Kansas couldn't use the
11:50:27 SAVE system databases because DHS had sent them a letter saying
11:50:31 that in order to use SAVE, Kansas would have to provide
11:50:35 immigration information, such as an A number. But if you look
11:50:39 in the record, we had submitted a declaration of one of our
11:50:44 members, a Lloyd Leonard, who actually works for the National

11:50:51 League of Women Voters, which several states, Kansas, Colorado,
11:50:54 actually even some jurisdictions in Arizona, do provide that
11:50:58 information and do use SAVE. I don't think there's anything
11:51:00 actually stopping can from doing that.
11:51:04 He also said that they took extensive steps to
11:51:07 verify that individuals they'd initially identified as
11:51:12 potential noncitizens based on DMV lists were, in fact,
11:51:16 noncitizens, but the record doesn't show any verification
11:51:19 beyond that initial match in a letter to a county official.
11:51:24 There's no evidence of any follow-up that was done with respect
11:51:26 to that, with voters to see if they were actually noncitizens.
11:51:30 We don't know how any of that turned out.
11:51:55 This notion about the administrative burden on the
11:51:57 states to actually verify people's citizenship, one, I thought
11:52:03 that was interesting because that he went there because I
11:52:05 thought he said this wasn't about a cost-benefit analysis in
11:52:08 the beginning, but now it sort of sounds like maybe it is.
11:52:12 Look, it's funny to hear that because it sounded like --
11:52:16 somewhere in the record I think it'll show, that using the
11:52:21 Federal Form, the state doesn't actually -- almost everybody in
11:52:23 the state uses the state forms, right. Very few -- we're
11:52:27 talking maybe a hundred or so, maybe more than that, people a
11:52:32 year, what I think the periodicity of that is. But the notion
11:52:38 this is a massive burden on -- for people using the Federal
11:52:41 Form, I just don't think -- that doesn't really -- it rings a

11:52:43 1 little bit hollow, frankly, given all the resources that
11:52:46 2 they've been able to dedicate to, frankly, going outside the
11:52:49 3 scope of the statute for people using the state form to clear
11:52:51 4 the people who, you know, were put in suspense for a long time.
11:52:57 5 They clearly are able to do that, and it's
11:52:59 6 interesting that the Secretary has to do things to ameliorate
11:53:04 7 the very kind of harsh impact of this law, that so many people
11:53:08 8 aren't being able to vote coming up, there's an election kind
11:53:12 9 of right around the corner. But I just don't think that that
11:53:15 10 shows preclusion.
11:53:16 11 THE COURT: The cost-benefit analysis I'd like to
11:53:19 12 see is the combined billing rate of the 30 attorneys in this
11:53:22 13 case divided into the small number of federal forms used in
11:53:26 14 these states.
11:53:26 15 MR. KEATS: I can make that number for us. I can
11:53:28 16 make that number for us because it's zero 'cause it's pro bono.
11:53:32 17 Thank you, Your Honor.
11:53:33 18 THE COURT: All right. Thank you very much,
11:53:35 19 Mr. Keats.
11:53:35 20 Who do we have next? All right.
11:53:41 21 MR. FREEDMAN: Good morning, Your Honor, Tom
11:53:43 22 Freedman, Project Vote.
11:53:45 23 THE COURT: Thank you, Mr. Freedman.
11:53:47 24 MR. FREEDMAN: If I guess I should have looked at
11:53:49 25 my watch to see if it's still morning before I wished you a

11:53:51 good morning.

11:53:51 THE COURT: It is. It's still morning.

11:53:53 MR. FREEDMAN: A couple more minutes, so we're a
11:53:55 little ahead of schedule.

11:53:56 Your Honor, I suspect Your Honor's familiar with
11:54:00 the League of Women Voters and some of the other intervenors.
11:54:02 I just wanted to spend a minute explaining what my client
11:54:05 Project Vote is. It's a national nonpartisan organization that
11:54:09 works to register low-income minority youth and other
11:54:12 marginalized voters. It does so by developing state-of-the-art
11:54:16 voter registration, get-out-the-vote programs, including
11:54:19 running trainings for voter registration. My client was one of
11:54:23 the original litigants challenging the Arizona Proposition 200.
11:54:26 My client also, incidentally, was founded in 1994, right at the
11:54:30 birth of the NVRA. It's very much a child of the NVRA, the
11:54:35 year after the NVRA passed. It relies heavily on the NVRA,
11:54:39 particularly the provisions that facilitate easing uniform
11:54:43 voter registration, are critical to its mission.

11:54:46 I'm going to address a different part of the
11:54:49 administrative record, starting in a different place than my
11:54:54 co-intervenors did, just to make sure the Court's had an
11:54:57 opportunity to hear this, which is the impact that Proposition
11:55:01 200 and HB 2067 have had in their states on U.S. citizens
11:55:08 seeking to register to vote and on organized voter registration
11:55:12 drives.

11:55:14 Facilitating voter registration generally and
11:55:20 organizing voter registration drives are two of the primary
11:55:24 purposes of the Federal Form. In enacting the NVRA, Congress
11:55:28 explicitly stated that its first purpose was to, "To establish
11:55:32 procedures that will increase the number of eligible [voters]
11:55:35 who register to vote in elections for Federal office." And in
11:55:40 describing the Federal Form, Congress mandated that the states
11:55:44 "shall make the forms available," with particular emphasis on
11:55:46 making them available for organized voter registration
11:55:49 programs.
11:55:50 The collateral consequences of amending the form
11:56:00 to require the documentary proof that the states are seeking
11:56:04 here demonstrate that such proof violates the NVRA. It's
11:56:10 directly contrary to the purpose of the NVRA and the language
11:56:12 of the NVRA.
11:56:15 The administrative record shows that, following
11:56:17 the passage of Proposition 200, tens of thousands of
11:56:21 individuals in Arizona who attempted to register to vote were
11:56:24 not allowed to register.
11:56:25 THE COURT: Were they attempting under the Federal
11:56:27 Form or under the state form?
11:56:29 MR. FREEDMAN: Both, both, Your Honor.
11:56:31 THE COURT: All right.
11:56:32 MR. FREEDMAN: We don't have the precise
11:56:34 statistics because Arizona, when it reports this information to

11:56:37 the EAC, doesn't provide any breakdown. There is an affidavit
11:56:43 from, I believe, the Deputy Secretary of State of Arizona, or
11:56:48 maybe it was the Deputy Maricopa County Registrar, providing a
11:56:52 breakdown, estimating, I believe, sort of 3 to 5 percent of the
11:56:55 forms were federal forms, but in the balance, state forms.
11:57:01 The data Arizona submits to the EAC shows that the
11:57:08 number of applicants who were rejected essentially doubled
11:57:14 after the passage of Proposition 200, from about 20,000
11:57:19 rejected applicants in 2004 to 38,000 in 2008 and 32,000 in
11:57:26 2012, all presidential years, looking at apples-to-apples
11:57:30 comparisons of the number of folks rejected. Again, we don't
11:57:34 have the breakdown how many of those are Federal Form, how many
11:57:36 of those are state form.
11:57:38 Arizona didn't submit any evidence that the EAC,
11:57:43 either in conjunction with the latest request or in conjunction
11:57:47 with its original request to modify the Federal Form, that any
11:57:50 of the individuals who were blocked from registering to vote
11:57:53 were noncitizens, as opposed to individuals who simply didn't
11:57:58 have a passport or one of the other forms of documentation
11:58:00 required by the statute.
11:58:03 Now, I'll note that these numbers that I gave, the
11:58:07 38,000 in 2008 and the 32,000 in 2012, dwarf the number of
11:58:12 non-Citizens Arizona claims to have found who have registered
11:58:16 to vote through one form or another.
11:58:19 Kansas -- although HB 2067 is significantly

11:58:27 newer -- is showing similar trends. The plaintiff's brief,
11:58:30 they didn't submit this in the administrative record, but
11:58:32 Deputy Secretary of State Bryant's latest declaration, which
11:58:36 accompany the brief, indicates that 29 percent of the people in
11:58:40 the state of Kansas who have attempted to register in 2013,
11:58:43 since the effective date of the statute, almost 21,000 people
11:58:48 are still not registered to vote. They're on a suspense list.
11:58:53 Now, in his statement Mr. Kobach handed up a very
11:58:57 nice chart showing close elections in Kansas, 24 close
11:59:01 elections; only one of those elections was actually a federal
11:59:05 election, the rest were state elections. The federal election
11:59:08 was a Democratic primary, which I've been told is not terribly
11:59:13 consequential in the state of Kansas for any purpose. But the
11:59:17 point is that most of those close elections wouldn't be
11:59:21 impacted by making modifications in the Federal Form one way or
11:59:24 the other.
11:59:25 The point is, though, if we're talking about close
11:59:28 elections and 38,000 people not being allowed to register to
11:59:33 vote in Arizona in 2008 and 32,000 people -- the 32,000 people
11:59:39 not being allowed to register to vote in 2012 and 21,000 people
11:59:45 whose status is unclear for the 2014 election, those numbers
11:59:50 dwarf the numbers of noncitizens we've been talking about.
11:59:53 THE COURT: Mr. Freedman, if you're still making
11:59:55 your introductory contextual statement, I would let you do
11:59:59 that, but you understand that the issue before this court is

12:00:01 not the validity of either Kansas or Arizona's law itself?

12:00:05 MR. FREEDMAN: I do. And I appreciate that. What
12:00:09 I'm trying to give to the Court is just a sense of -- I
12:00:12 recognize there are critical legal issues that I'm prepared to
12:00:15 address, but I think that this is an important part of the
12:00:17 administrative record. The EAC, which credited Kansas and
12:00:23 Arizona at their word on the number of noncitizen voters,
12:00:28 balanced that against looking at the consequences from the
12:00:31 implementation in evaluating whether it was a factor that they
12:00:35 considered, determining whether these -- this documentation was
12:00:39 necessary to assess the eligibility of voters.

12:00:42 Now, these laws are indisputably impacting U.S.
12:00:51 citizens, and they are impacting them because citizens, many
12:00:54 citizens, lack a passport or the other forms of documentation.
12:00:57 These burdens fall disproportionately on racial minorities, the
12:01:01 elderly, the poor, and young voters, exactly the communities my
12:01:06 client seeks to serve. These requirements also make it
12:01:10 logistically and financially impractical to register voters
12:01:14 through community-based registration drives.

12:01:17 There's ample evidence in the administrative
12:01:20 record that certain voter registration organizations, including
12:01:24 League of Women Voter affiliates in Kansas and Arizona, have
12:01:27 stopped conducting registration drives because of this
12:01:31 registration. Miss Furtado, who's in the audience, submitted
12:01:35 an affidavits identifying two affiliates in Kansas that have

12:01:39 effectively stopped the registration drives. There's also
12:01:43 ample evidence in the administrative record that the number of
12:01:45 voter registrations achieved through voter registration drives
12:01:50 is down in both states since the implementation of the -- since
12:01:53 the passage of these laws.
12:02:00 This is all consistent with how we would expect
12:02:03 Proposition 200 and HB 2067 to function. A great number of
12:02:08 U.S. citizens don't have the documents called for or at least
12:02:13 easy access to the documents. Most people, if they have the
12:02:16 documents, don't carry them around to places where voter drives
12:02:20 are conducted, such as malls or shopping centers or public
12:02:24 transportation sites. It can be difficult or impractical for
12:02:28 voter registration organizations to make copies of the
12:02:32 documents.
12:02:33 We know that anything that makes it more difficult
12:02:36 to register to vote reduces the number of eligible citizens who
12:02:43 register in federal elections, which is the opposite of what
12:02:48 the NVRA is supposed to do. If you look at the first
12:02:50 Congressional purpose, citing the statute, the purpose of the
12:02:54 NVRA, the first purpose, is to "increase the number of eligible
12:02:59 citizens who register to vote."
12:03:04 I want to turn now to some of the legal issues
12:03:07 that have been discussed before -- both during the Government's
12:03:13 presentation and with my co-intervenors. With regard to the
12:03:19 issue of the states, whether the states have established that

12:03:24 they are precluded from assessing the eligibility of applicants
12:03:35 by the Federal Form or by the NVRA, which is what, if you read
12:03:40 Justice Scalia's decision he says a lot of things, but it's one
12:03:43 of the things that he suggests the states might need to do, and
12:03:46 it's what he suggests would create a constitutional issue, if
12:03:48 the federal law or the Federal Form is precluding the states
12:03:54 have assessing the eligibility, whether particular voters meet
12:03:59 their qualifications, Justice Scalia suggests that might create
12:04:04 a constitutional issue.

12:04:05 I largely endorse what Ms. Perales said during her
12:04:09 presentation on this issue. If you look at the states'
12:04:16 submissions to the EAC, what their -- the record that they
12:04:19 tried to build, it doesn't come close to establishing that they
12:04:23 are precluded from assessing the eligibility of voters and
12:04:29 whether voters meet their qualifications. You can see aspects
12:04:35 of the -- what they put in, which established that the
12:04:38 mechanisms that they use, checking their databases, the motor
12:04:43 vehicle databases, the jury commissioner records, their vital
12:04:47 statistics, have all been used to ferret out noncitizens who
12:04:53 are attempting to vote.

12:04:54 We've heard some discussion, and the EAC relied on
12:04:58 two federal databases, which the states can rely on to
12:05:07 determine whether people are noncitizens. These are all tools.
12:05:10 They're not one-stop shopping. It's just -- they don't
12:05:12 necessarily provide clear things, but they're at least

12:05:15 ways this -- resources the states can access to flag potential
12:05:19 applicants for follow-up. If somebody shows up on the SAVE
12:05:25 database, there's at least a question, is this person really a
12:05:28 noncitizen, and let's go figure that out. If somebody's birth
12:05:34 record is not in the EV -- I'm going to get the acronym
12:05:39 wrong -- but the EVVS (sic) database, that flags something, are
12:05:42 you from one of the states that doesn't participate, are you
12:05:46 from outside the country, and it allows the secretary of state
12:05:51 and county registers to focus their resources on determining
12:05:55 whether these people are noncitizens.
12:05:57 That's the way the NVRA works, and that's the way
12:06:01 most states continue to do that. It's the way the NVRA worked
12:06:04 in Arizona and Kansas prior to this time, prior to the passage
12:06:07 of these statutes. Secretaries of state all over the country,
12:06:11 county registrars all over the country, take their applications
12:06:14 and they check them against their databases and their
12:06:17 resources. There's ample evidence of that in the record.
12:06:22 THE COURT: You're saying that there's evidence in
12:06:24 the record that the states check all their voter registrations
12:06:28 against --
12:06:28 MR. FREEDMAN: There's --
12:06:29 THE COURT: -- other databases?
12:06:33 MR. FREEDMAN: If there's a question on the
12:06:34 application, if something doesn't match, states then use these
12:06:37 databases to go and do the second round of searches.

12:06:42 THE COURT: Okay.

12:06:42 MR. FREEDMAN: And then secretaries of state all over the county, country registers all over the country, you know, it's, obviously, a resource pool, but if it's flagged through that process, then send out resources to figure it out.

12:06:54 All against the backdrop that there are criminal sanctions here if a noncitizen attempts to register, you do get referrals, not in a lot of referrals but you get referrals around the country because of these issues, all of which demonstrates that the Federal Form and the information provided in the Federal Form allow the states, in conjunction with all these other resources, the myriad of resources that the EAC refers to, to assess the eligibility of potential applicants.

12:07:28 Now, in building that administrative record, the Secretaries of States of Kansas and Arizona and Georgia had the opportunity to submit evidence why the statute, the information in the Federal Form, wasn't working for them. Georgia didn't submit anything.

12:07:49 THE COURT: Georgia's not before this court.

12:07:51 MR. FREEDMAN: I'm aware of that. Arizona and Kansas largely submitted what they submitted to this court before the preliminary injunction, and we've talked about sort of the different ways you can interpret the affidavits and the significance. They didn't go beyond that, to talk about costs associated with this or anything that comes close to the kind

12:08:12 of showing that Justice Scalia called upon them to make if they
12:08:15 thought there was a constitutional issue.
12:08:16 They had their opportunity. I suppose one thing
12:08:21 the Court could do is send this back and give them another
12:08:24 opportunity to present this information to the EAC. But on
12:08:26 this administrative record, there's nothing there that shows --
12:08:30 there's no evidence that shows that the information in the
12:08:34 Federal Form is insufficient to allow them to assess the
12:08:36 eligibility of applicants.
12:08:45 Other -- I think one of the other principal legal
12:08:54 issues that have come up that has been sort of addressed
12:08:57 squarely is the question of authority and whether the EAC had
12:09:05 authority to deny the states' requests. And I know you've had
12:09:12 discussion with Mr. Heard and my two co-intervenors about that,
12:09:16 and I know that it was a very sensitive question at the last
12:09:20 hearing. I thought I might briefly explain our thinking on
12:09:23 that issue, in the hope that it might be of some benefit to the
12:09:26 Court.
12:09:27 We have a similar position to the League of Women
12:09:35 Voters. We have a slightly different approach on how we get
12:09:39 there, which is that -- let me start by saying the EAC, you
12:09:44 know, unambiguously had the authority to render the decision it
12:09:48 rendered here. And I think that's the proper question before
12:09:51 the court: did the agency have the authority to render this
12:09:54 decision, as opposed to did the EAC, in theory, have the power

12:10:01 to render a different decision.

12:10:06 We base our analysis really on two points. The
12:10:11 first is a statutory construction provision. If you look at
12:10:16 the HAVA statute, the statute that authorizes the EAC and the
12:10:20 quorum provision, it's limited -- the quorum provision is
12:10:23 limited to any action which the commission is authorized to
12:10:26 carry out under this act -- action.

12:10:30 What is the action at issue here? If you go to
12:10:33 the NVRA, the action here is that the EAC -- this is Section
12:10:38 9(a), the EAC "shall develop a mail voter registration
12:10:43 application form for federal elections," the key word being
12:10:47 "develop."

12:10:49 The statute doesn't say that the action is
12:10:53 "develop and maintain." It says "develop." Developing means
12:10:59 creating in the first instance. It might entail an overhaul.
12:11:04 It might entail a significant new change to the form.

12:11:11 A quorum, conversely, is not required to maintain
12:11:16 the form. And a quorum is not necessary to maintain the status
12:11:25 quo, which is effectively the upshot of this decision.
12:11:33 Maintenance is consistent with the -- with the staff making
12:11:36 ministerial changes to the form, but it's not consistent with
12:11:40 an overhaul, and I think that may be one place where we differ
12:11:43 from the Government and at least one of our co-intervenors, is
12:11:48 whether the EAC staff could have done a complete overhaul of
12:11:52 the form, could have made a substantive change. We have no

12:11:55 dispute that they have the authority to maintain the status
12:11:58 quo, to maintain the form as it's been in existence for 20
12:12:03 years. All the EAC did here, in our view, is maintain the
12:12:09 status quo.
12:12:09 Now, the second -- the second part of our thinking
12:12:13 on this issue is that the decision to maintain the status quo
12:12:18 wasn't made on a blank slate. And you had some dialogue with
12:12:22 Mr. Keats about what the EAC's prior rule-making on this issue
12:12:26 was. In our argument the agency considered the -- the prior
12:12:33 agency considered a virtually identical request in 1994 when it
12:12:39 enacted the regulations in the first place. The specific
12:12:41 request was should the form require a naturalization number.
12:12:48 Didn't have the long list of documentation required here, but
12:12:51 it's a similar request, that the concern was with noncitizen
12:12:54 voting and should people be required to provide their
12:12:56 naturalization number, and the agency considered that and
12:12:59 rejected it at that time.
12:13:01 The agency considered and rejected the proposal to
12:13:08 change the form in 2006 when Arizona proposed it, two different
12:13:13 times, once by the executive director, once by the split vote
12:13:17 of the commission. The agency again, upon Arizona's renewed
12:13:23 request in 2008, considered and rejected the request to change
12:13:28 then. All these decisions were valid. Arizona didn't appeal
12:13:31 any of them. There's no question that the agency had the
12:13:38 authority to maintain the status quo in each of those

12:13:41 instances.

12:13:44 I would argue that the court should consider the
12:13:50 implications, if we hold that the agency doesn't have the power
12:13:57 to maintain the status quo now because of the lack of a quorum,
12:14:01 think about some of the implications of that. It's a question
12:14:04 of timing. If a litigant, having been denied three or four
12:14:08 times by an agency in a request to change the form, waits until
12:14:15 there's a lack of a quorum in the commission and picks that
12:14:20 moment, is it really the answer that we have some
12:14:26 constitutional crisis that staff can't say we've considered
12:14:30 this, we considered this before, we said no before, we're
12:14:34 saying no now?

12:14:36 It just seems like it would be absurd that any
12:14:40 time that you have a federal agency out there issuing a rule
12:14:47 and there's a proposal to change that rule and that proposal's
12:14:50 rejected and rejected and rejected, that you can advantageously
12:14:56 wait -- and I'm not suggesting the states did this, in terms of
12:14:59 being strategic in their timing -- but that you could wait to a
12:15:03 point where there was a lack of authority, lack of quorum at
12:15:06 the head of that agency, and say, aha, you have to suspend what
12:15:10 you've been doing for 20 years.

12:15:14 If Your Honor has no further questions, I will
12:15:19 yield back my time.

12:15:21 THE COURT: All right. Thank you.

12:15:28 Mr. Posner, you represent the named party in the

12:15:32 Supreme Court case we've all grown to know and love, so I guess
12:15:35 that's why they elected you to be the closing pitcher.
12:15:38 MR. POSNER: Well, I'm not sure about that. My
12:15:42 name is --
12:15:42 THE COURT: You don't want to get the expectation
12:15:47 set too high, is that --
12:15:48 MR. POSNER: Well, I was going to start by saying
12:15:49 I have the honor, or perhaps the burden, of going both last
12:15:54 after everyone else and the last person before lunch, so --
12:15:58 THE COURT: Better than the first person after
12:16:00 lunch.
12:16:02 MR. POSNER: That is true. I had civil procedure
12:16:04 in law school right after lunch and that was a difficult one.
12:16:07 But in any event, so I'm Mark Posner for the ITCA
12:16:14 intervenors. I would like to begin by wading back into the
12:16:26 "who decides" question, that, of course, there's been a lot of
12:16:29 discussion about that. Perhaps I can put a slightly different
12:16:32 spin on it, but I can at least put our view on it.
12:16:37 And let me begin by making sure that I understand
12:16:41 what the question is. And I believe that the question that
12:16:44 Your Honor has posed, in terms of who decides, is whether it's
12:16:49 the EAC or the states that should decide. Okay. So I think it
12:16:58 is true, as far as it goes, that perhaps there's no place --
12:17:01 there's no sentence that one could find in the ITCA opinion
12:17:07 where the Supreme Court says, you know, in a simple declarative

12:17:11 sentence, that the EAC decides whether or not there's proof of
12:17:19 citizenship when one requests it, et cetera. But even though
12:17:26 that sentence is not there, I think there are a variety of
12:17:28 reasons why it's clear from the opinion, or perhaps put more
12:17:34 picturesquely, I think that statement is stitched into the
12:17:39 fabric of the Supreme Court's decision, and I think there are
12:17:42 several reasons for that.
12:17:43 So the first reason is that -- well, is getting to
12:17:53 a sentence that, actually, I focused on at the last hearing and
12:17:56 that Mr. Kobach focused on, and that's the sentence that the
12:18:00 NVRA provides the "means by which Arizona may obtain
12:18:06 information needed for enforcement." And that sentence comes
12:18:10 at the end of the discussion about the Elections Clause, about
12:18:13 the Constitution's provisions, about eligibility, the sentence
12:18:21 that Your Honor has focused on about that the states decide the
12:18:27 who question, not the federal government. But -- and I think
12:18:32 there is some disagreement about exactly what all those things
12:18:36 mean, but it is clear what the bottom line is of the Supreme
12:18:42 Court's decision. And I think -- I mean, I think it's very
12:18:45 clear in that sentence. I think Mr. Kobach seems to agree.
12:18:48 I mean, the bottom line is that whatever the
12:18:51 problem may be and whatever the constitutional authority may be
12:18:54 and however you somehow balance the Elections Clause with the
12:18:58 constitutional provisions of eligibility, the bottom line is
12:19:04 that, at least with regard to proof of citizenship, and

12:19:05 certainly as to Arizona's requests and Kansas' request mimics
12:19:10 that, the bottom line is that the NVRA provides the means by
12:19:15 which the states can obtain the necessary information.
12:19:20 So if the statute provides the means, then it
12:19:27 necessarily must be that one has to then explore what the
12:19:31 statute says about how that is to be implemented, how is that
12:19:36 to occur that they can obtain through the statute the necessary
12:19:42 information. And in that regard the statute, you know, clearly
12:19:48 says that the form shall be developed by the EAC with the
12:19:52 consultation of the states.
12:19:55 THE COURT: Can I interrupt you just a second?
12:19:57 Where in the opinion is the statement that the NVRA supplies
12:20:01 the means by which the states can obtain the necessary
12:20:06 information?
12:20:07 MR. POSNER: Well, at -- it's the beginning of
12:20:11 2259, but it's the paragraph that begins, "Since the power to
12:20:15 establish voting requirements is of little value without the
12:20:19 power to enforce those requirements, Arizona is correct that it
12:20:22 would raise serious constitutional doubts if a federal
12:20:27 statute" -- and I added the emphasis -- "if a federal statute
12:20:29 precluded [the] state from obtaining the information
12:20:33 necessary."
12:20:33 And then the conclusion to that is that while
12:20:41 these constitutional -- that "if" is not one -- is not
12:20:44 something that has come to, you know, come to fruition in this

12:20:49 case because, in fact, the federal statute, the NVRA, provides
12:20:54 another means -- you know, "another" as is referring to not
12:20:57 through the constitutional argument that Arizona was making --
12:21:01 but that the statute provides another means by which Arizona
12:21:06 may obtain information necess- -- needed for enforcement.
12:21:10 And then the court goes through the rest of the
12:21:13 opinion talking about, well, what does that mean? And they
12:21:16 say, well, you know, the information necessary, what does the
12:21:19 NVRA mean by that, it's both a ceiling and a floor, and then it
12:21:24 talks about how Arizona can make a request to the EAC.
12:21:28 But if the statute provides the means, then it
12:21:32 necessarily follows that one needs to look at what means the
12:21:36 statute provides. And the means that the statute provides is,
12:21:42 of course, the Federal Form, as developed by the EAC, in
12:21:45 consultation with the states.
12:21:48 You know, there is certainly nothing in the NVRA
12:21:54 which contradicts or raises questions about that. I mean,
12:21:58 consultation is pretty clear; the states need to be involved,
12:22:03 but in the end it's the EAC that makes the decision.
12:22:06 So I think, you know, referencing one of the
12:22:10 questions that Your Honor raised, you know, you asked, you
12:22:15 know, can the EAC exercise preemptive authority, even though
12:22:19 Congress did not expressly address the issue. And I think that
12:22:24 there's some confusion as to what Congress -- you know, what
12:22:28 the issue is. The issue is to who is -- was directly addressed

12:22:36 by Congress. Congress said that, of course, it's the EAC. So,
12:22:46 you know, turning back to what the Supreme Court said in the
12:22:48 ITCA opinion, I think there's important to note what the
12:22:54 Supreme Court said and what the Supreme Court didn't say.
12:22:58 First, in terms of what they said, I think it's,
12:23:01 you know, there are statements throughout the opinion about the
12:23:04 EAC's authority over the Federal Form. For example, the states
12:23:08 here are making the requests about the state-specific
12:23:13 instructions, and the Supreme Court says that this -- that the
12:23:19 EAC has to approve those requests.
12:23:21 But it's also important what the Supreme Court
12:23:24 doesn't say, because if one is to look at that statute and say,
12:23:27 well, that provision about consultation and about the EAC
12:23:32 deciding, it doesn't really apply when you're talking about
12:23:36 proof of citizenship. You know, that would be a major
12:23:41 construction of the statute. Either you'd have to construe the
12:23:44 statute to somehow limit the inclusive language that it uses,
12:23:50 or you would have to say there's something unconstitutional
12:23:52 about that language. And there's nothing in the Supreme Court
12:23:56 decision which in any way, shape, or form throws any doubt upon
12:24:02 that. And the reason is is because throughout the opinion
12:24:07 they've -- it's all been based upon the EAC's authority.
12:24:10 Now, I think there are a couple of other reasons,
12:24:14 in terms of sort of pulling back from what was going on in that
12:24:18 case and looking at what's going on here, why I think that

12:24:23 underscores my point. The basic issue in the ITCA case was
12:24:30 whether Arizona could bypass the EAC. Arizona argued that they
12:24:38 could supplement the Federal Form by adding this
12:24:40 proof-of-citizenship procedure; even though the EAC hadn't
12:24:44 adopted it, they could add it. And they claimed they had both
12:24:48 a statutory argument and they had their constitutional argument
12:24:51 as to why they could bypass the EAC.
12:24:55 The Supreme Court said no, you may not bypass the
12:24:59 EAC. You must accept and use the Federal Form as developed by
12:25:04 the EAC. So your solution, Arizona, if you want one, is to go
12:25:12 back to the EAC and try to get it in the Federal Form, 'cause
12:25:15 you can't bypass the EAC.
12:25:17 Well, really what's going on in this case, in
12:25:20 terms of this nondiscretionary duty, is really just the same
12:25:25 argument, kind of restated or reformed, but it's the same
12:25:32 bottom line that the states are arguing for. They want to be
12:25:36 able to bypass the EAC by saying, well, sure, we have to go to
12:25:41 the EAC, but the EAC doesn't have to do anything, all the EAC
12:25:44 has to do is say, oh, did you pass the statute? Yeah, they
12:25:48 passed the statute, and then they stamp it approved. That
12:25:51 really is bypassing the EAC, and that's inconsistent with the
12:25:55 thrust and, you know, the very issue that was --
12:25:59 THE COURT: Why is that bypassing the EAC?
12:26:02 MR. POSNER: Well, it's bypassing the EAC because
12:26:05 the EAC is not exercising any independent judgment about

12:26:10 whether or not these instructions or this proof-of-citizenship
12:26:14 provision is -- is necessary.
12:26:16 THE COURT: But Justice Scalia envisioned at least
12:26:18 one scenario whereby the EAC would have a nondiscretionary
12:26:26 duty. Perhaps that doesn't apply to all scenarios with respect
12:26:30 to this request, but Justice Scalia did envision one scenario
12:26:37 where the EAC's duty to do as the states requested would be
12:26:39 nondiscretionary, and arguably he ordered these matters sent
12:26:45 back to the EAC. So if, in fact, that arose, the EAC could
12:26:50 perform its nondiscretionary duty. I don't see how under the
12:26:53 ITCA opinion that bypasses the EAC.
12:26:56 MR. POSNER: Well, I think -- and, certainly, you
12:27:00 can correct me if I'm thinking of the wrong reference in the
12:27:03 Supreme Court's decision, but I believe that the only place
12:27:06 where he said that the EAC has a nondiscretionary duty is if
12:27:12 the EAC finds that the information is necessary.
12:27:15 THE COURT: I understand.
12:27:17 MR. POSNER: So that becomes --
12:27:18 THE COURT: I'm saying it's not the only scenario
12:27:20 in this case. But, nevertheless, because he has a scenario
12:27:23 where the EAC's duty would be nondiscretionary, your argument
12:27:27 was that the EAC simply stamping Approved bypasses the EAC, but
12:27:31 there's at least one scenario where that would be their
12:27:34 nondiscretionary duty, and that's not contemplated as bypassing
12:27:39 them. So I think --

12:27:39 MR. POSNER: Well, I guess I don't really --
12:27:42 THE COURT: -- you're overstating your argument.
12:27:43 MR. POSNER: I'm sorry. I guess what I'm trying
12:27:45 to say is I don't really think that his use of the word
12:27:49 "nondiscretionary" is in the same sense that perhaps the state
12:27:55 is using it, because, I mean, I think what the -- what Scalia
12:28:05 is saying is almost a tautology. It would be like -- it would
12:28:10 be like Your Honor saying that if I conclude that the states
12:28:17 are correct in this case, I have a nondiscretionary duty to
12:28:20 rule for them. So it was, yeah, the states would have a
12:28:25 nondiscretionary -- the EAC would have a "nondiscretionary"
12:28:30 duty, but only if they first independently made the decision
12:28:35 that it was necessary.
12:28:36 THE COURT: I'm skeptical that Anton Scalia is
12:28:39 that careless as to the language he uses. I mean,
12:28:45 nondiscretionary duty is -- we can argue whether his choice of
12:28:50 the word "preclude," what that means, but nondiscretionary in
12:28:55 the context of an administrative agency action has a pretty
12:28:58 clearly understood implication, and he uses that phrase in the
12:29:02 same paragraph he talks about the APA, and so to think that he
12:29:06 used that term as carelessly as you just suggested is really
12:29:11 contrary to APA law and to -- really to the way Justice Scalia
12:29:18 writes. I'm highly skeptical that I can be that cavalier about
12:29:21 his choice of that word.
12:29:23 MR. POSNER: Well, I don't want to, you know,

12:29:25 unduly focus on that one sentence, because that's not -- you
12:29:29 know, the point of my argument has to do with principally with
12:29:36 the fact that the court said that the solution to Arizona
12:29:39 and -- Arizona's concern is to be found in the statute, and the
12:29:43 statute clearly says that the states have a consultive role
12:29:48 only, and there's nowhere in the opinion that suggests that
12:29:53 somehow the statute can be ignored or that it's
12:29:56 unconstitutional or that it has to be construed in a different
12:29:59 fashion. Indeed, you know, throughout the opinion, there are
12:30:02 statements about the authority of the EAC.
12:30:05 I guess I would just say I'm not saying that, you
12:30:09 know, Justice Scalia's use of that word was careless. Perhaps
12:30:13 there was some flare to the use of that word, and I think he
12:30:17 does --
12:30:18 THE COURT: That would be certainly be consistent
12:30:21 with his writing style.
12:30:23 MR. POSNER: Yes. So also to -- briefly, because
12:30:28 I would like to go on to a few other points and that are
12:30:31 related. Another interesting contrast in the case, in terms of
12:30:36 understanding what the Supreme Court meant in terms of the
12:30:40 EAC's authority on this particular issue, is that the court was
12:30:45 careful to contrast the situation with the Federal Form to the
12:30:48 state form, and we've had some discussions about that. But,
12:30:53 you know, the bottom line was the court said the state is --
12:30:57 the states are free to add their policy desires, their choices,

12:31:02 their preferences to the state form, and there's no limitation
12:31:07 on that, but that the Federal Form is something different.
12:31:10 The Federal Form was specifically adopted by
12:31:14 Congress to provide a simplified system to promote voter
12:31:18 registration, and so one needs to be very careful about what
12:31:23 you add to it. And that's why the necessity provision is not
12:31:29 only the floor that Mr. Kobach has emphasized, but it's also a
12:31:34 ceiling, that there's a cost to adding things to the Federal
12:31:37 Form, and the cost could be that some people aren't able to
12:31:41 register, which, in turn, could affect the close elections that
12:31:45 he's -- that everyone is concerned about. So I do think that
12:31:57 the Supreme Court has in many ways answered the question about
12:32:00 who decides.
12:32:01 I think related to that, you know, perhaps isn't
12:32:07 concern of the courts about, you know, is it really proper for
12:32:12 the EAC to override a policy decision made by the states. I
12:32:21 think that was a lot of what Mr. Kobach was arguing. And in
12:32:26 this regard I think it's important that that necessity, that
12:32:32 that requirement in the NVRA, does not involve a policy
12:32:37 decision, and the EAC explicitly said that it did not make a
12:32:41 policy decision.
12:32:43 Now, the EAC did, in several pages, talk about a
12:32:49 number of policy concerns, they talked about the Constitution,
12:32:53 they talked about the legislative history, they talked about
12:32:58 the regulatory history, but none of those things determined its

12:33:03 decision. It was -- the EAC was very clear that it ultimately
12:33:08 decided the question as a factual matter. And in contrast to
12:33:15 several of the other intervenors, the ITCA intervenors agree
12:33:23 with that decision by the EAC. We do not believe that the
12:33:25 legislative history or the 2006 decision or the statute itself,
12:33:34 any of those things, prevented the EAC from ruling on behalf of
12:33:40 the states, and the EAC in its decision reached the same
12:33:44 conclusion.
12:33:45 So then the question might be, well, what was all
12:33:47 this discussion by the EAC about all these different policy
12:33:52 concerns? And I think those were completely appropriate
12:33:55 because the Supreme Court has directed in the ITCA opinion that
12:34:05 the necessity requirement establishes both a ceiling and a
12:34:08 floor. So that phrase is a little hard to understand. It's
12:34:15 kind of not very concrete, unless one tries to understand what
12:34:19 the source of those terms are. So the EAC looked at, well,
12:34:23 it's a floor because of these constitutional concerns; it's a
12:34:26 ceiling because of these policy concerns, you know,
12:34:31 particularly Congress' concern about adding requirements to the
12:34:37 Federal Form.
12:34:37 The Supreme Court itself, in talking about the
12:34:40 state form, talked about how if all these provisions were
12:34:44 allowed to be added to the Federal Form, then the Federal Form
12:34:47 would -- I think Justice Scalia used the word "feeble." I
12:34:52 guess in that case I think he was speaking very precisely and

12:34:57 very intentionally and very carefully, and so these policy
12:35:03 concerns establish the framework in which the decision should
12:35:06 be made, but they did not determine the decision by the EAC.
12:35:10 In fact, now Mr. Kobach, Secretary Kobach, says,
12:35:18 well, it was obvious that it was a policy decision, but that
12:35:22 was mostly a conclusion by him. He didn't really explain how
12:35:26 you get there. I believe that, for a number of reasons, the
12:35:31 contrary conclusion that it wasn't a policy decision by the EAC
12:35:36 is the better one. You know, first of all, the word
12:35:39 "necessity" itself, I think, connotes a factual decision as to
12:35:44 what's not based upon what your personal preferences or policy
12:35:50 preference, but based upon an examination of the facts.
12:35:53 It's also relevant that what the states are asking
12:35:58 for is an exception to the general rule. The general rule is
12:36:01 that the Federal Form doesn't require proof of citizenship. So
12:36:04 there has to be some factual reason for the EAC to do something
12:36:09 different in Arizona and Kansas.
12:36:13 And, lastly, there's that ceiling and floor
12:36:15 language again. I don't think it makes much sense to try to
12:36:19 ask -- if it's simply a policy question, it doesn't really make
12:36:24 any sense to say is a policy above the ceiling and below the
12:36:29 floor? I mean, it's a policy. It doesn't matter whether it's
12:36:33 a ceiling and floor; it's an independent judgment. I think
12:36:35 looking at it as a factual question makes a lot of sense, that,
12:36:40 say, well, is it something that you really need, is it more

12:36:43 than you need, and that kind of factual decision in terms of
12:36:48 findings by the EAC executive director, I think, were perfectly
12:36:52 appropriate.
12:36:53 So then you get to the question of the evidence.
12:37:02 I think there's a variety of evidence that the EAC relied upon.
12:37:08 There's been a lot of focus on the alternatives and, you know,
12:37:14 were those alternatives better, why should they have to rely on
12:37:17 those alternatives. I think it's important to emphasize that
12:37:22 the question of the alternatives was just one of the pieces of
12:37:26 evidence that the EAC relied on. And, in fact, I think, as
12:37:30 Mr. Heard emphasized here today and I think what the EAC said
12:37:34 in its decision, is that this is a situation where the
12:37:39 front-end safeguards are doing a very good job, the front-end
12:37:43 safeguards of the provisions that are in the Federal Form. So
12:37:49 what you have is a situation where there's a handful of people
12:37:54 who seem to be getting through, for one reason or another, who
12:37:59 may be noncitizens. So if it was -- if it was a different
12:38:02 situation, you know, perhaps there would be a different kind of
12:38:04 analysis. If the front end wasn't doing a very good job, then
12:38:09 you might ask about, well, is it really okay just to deal with
12:38:14 this sort of, you know, after the whatever has escaped from the
12:38:17 barn. That's not the situation presented here. But
12:38:25 necessity -- but then in terms of the alternatives, there were
12:38:29 lots of other things that the EAC considered, and there are
12:38:32 things that the state has never responded to.

12:38:36 For example, the EAC emphasized that almost all
12:38:42 the states rely on basically the same kind of system that the
12:38:46 Federal Form uses. That's not something that the states have
12:38:49 responded to, but the point being that it's almost universally
12:38:56 concluded that the system used by the Federal Form is
12:39:01 sufficient, it does provide sufficient safeguards.
12:39:04 So then I think it's fair to ask, well, perhaps
12:39:07 the situation in Kansas and Arizona is simply, you know,
12:39:10 different from California or Texas or North Carolina or any
12:39:14 other state where perhaps there are some number -- you know,
12:39:19 throughout the United States -- where there are people who are
12:39:21 not citizens. And here I think that the evidence showed that
12:39:27 they really failed to make much of a showing. They showed
12:39:30 there's a handful. They showed that there's a de minimis
12:39:35 number. They wished to conclude that that's just the tip of
12:39:38 the iceberg, but that's really -- they don't offer any basis
12:39:41 for that other than that, you know, perhaps their gut feeling,
12:39:44 which doesn't really, you know, establish on evidentiary basis
12:39:49 that it's just the tip of the iceberg. So -- and there's also
12:39:57 the situation from the state's own concessions, in terms of
12:40:01 what they do things -- of how they do things. They use the
12:40:05 sworn statement, for age, for example. Apparently, there's not
12:40:09 a concern that people will lie about their age, in terms of
12:40:14 registering to vote. They use sworn statements for other
12:40:16 purposes.

12:40:18 The statutes themselves use the word "say" that
12:40:23 all the people who were registered at the time the laws went
12:40:27 into effect are deemed to have provided adequate proof of
12:40:30 citizenship. If that wasn't sufficient, what the states seem
12:40:36 to be admitting is that the rolls are currently, perhaps,
12:40:39 riddled with noncitizens, which they're unable to deal with,
12:40:43 but that, apparently, is not a concern.
12:40:46 I think, you know -- I think the opposite really
12:40:48 is true, that what we have here, basically, is a policy
12:40:53 decision, a policy decision by the states, for example
12:40:57 Proposition 200, which was adopted through the initiative
12:41:03 process. It wasn't adopted through any legislative findings of
12:41:08 necessity by the State of Arizona. The states have made a
12:41:10 policy decision. I think they're -- you know, they're
12:41:14 understandably frustrated that they're not able to -- they
12:41:17 haven't been able to implement that on the Federal Form.
12:41:23 The basic difficulty is that the EAC, as specified
12:41:28 by the NVRA and as explained in the Supreme Court's decision,
12:41:33 is not to make a policy decision. That would be an
12:41:37 interference with the sovereign rights of the states. Rather,
12:41:46 the -- or at least that possibly could be. I don't want to
12:41:49 overstate myself in terms of supposition in some other matter,
12:41:52 but that would raise, perhaps, some concern. The point being
12:41:56 is that the EAC had to make a factual evaluation of whether
12:42:02 that policy that was chosen is, in fact, necessary, and that's

12:42:06 the limited ruling that the EAC executive director has made.

12:42:13 So with that, I think that concludes my

12:42:17 presentation.

12:42:19 THE COURT: All right. Very well. Thank you,

12:42:21 Mr. Posner.

12:42:22 We will take a lunch recess at this point. Let's

12:42:28 come back at 2:00 o'clock. At that point I will give the

12:42:34 principal parties 15 minutes a side rebuttal and the

12:42:37 intervenors ten, and we'll call it a day.

12:42:42 MR. KOBACH: Your Honor?

12:42:43 THE COURT: Yes, Mr. Kobach.

12:42:44 MR. KOBACH: Just in light of the fact that we're

12:42:45 responding to two hours and 45 minutes of things to rebut,

12:42:49 might we have a little bit of extra time?

12:42:51 THE COURT: How much would you like?

12:42:52 MR. KOBACH: Would 25 minutes be okay?

12:42:54 THE COURT: I understand that as I divide things

12:42:56 up among six parties, you see it as a one versus five, so I'll

12:42:59 give you 25 minutes to respond.

12:43:01 MR. KOBACH: Thank you.

12:43:01 THE COURT: All right. We'll be in recess until

12:43:04 2:00 o'clock.

12:43:05 THE CLERK: All rise.

12:43:06 (A recess was taken from 12:43 to 2:01 p.m.)

14:01:51 THE CLERK: All rise.

14:01:55 THE COURT: Good afternoon. You may be seated.

14:01:58 Mr. Kobach, during your rebuttal, one thing in particular I'm interested in hearing on from you, or hearing about from you, is an argument raised this morning which I had not heard before, which is the lack of evidence before the administrative agency of any unqualified voters on the Kansas rolls who got there through the Federal Form. But you can address that, you know, in the confines of the administrative agency, and whether you think that matters.

14:02:35 MR. KOBACH: Okay.

14:02:35 THE COURT: Other than that, I wouldn't say I'll try to leave you alone to make your argument, but I don't like to make promises I can't keep.

14:02:56 MR. KOBACH: Thank you, Your Honor. I'd like to begin with -- I will address that point. I've got it in my notes about halfway through.

14:03:13 THE COURT: All right.

14:03:14 MR. KOBACH: I'd like to begin by making one additional point on the whole notion that we have an administrative record from which we are forbidden to depart. The administrative record in this case is an artificial creation. Every request to modify the Federal Form, ever since the NVRA was passed in 1993, has come in the form of a letter stating that, our law says X, we would request that you change and add the following words to the Federal Form. There has

14:03:40 never been, ever, the creation of an administrative record with
14:03:44 respect to these decisions.
14:03:46 Then on December 13th, 2013, this court ordered
14:03:50 the EAC to act. We were rather surprised when the EAC
14:03:55 announced it was opening up a comment period, something never
14:03:59 done with respect to a Federal Form change, never done before,
14:04:04 and that they had a brief period where they wanted things put
14:04:07 on the record. And I was puzzling over why they did this, and
14:04:09 then it finally dawned on me today why they are doing this.
14:04:13 They are creating an artificial administrative record, so that
14:04:16 they can try to cabin this Court's ability to exercise judicial
14:04:19 review.
14:04:20 There is no such administrative record in the past
14:04:23 practices. Now, you might say, well, so what, it's a gross
14:04:26 departure from 20 years of practice, the agency's just changed
14:04:30 its mind and, gosh, they were responding to a federal court
14:04:32 order and they got all flustered and decided to go ahead and
14:04:35 have comment period. Well, it's not quite that easy.
14:04:37 There's extensive case law on this point, mostly
14:04:40 from the D.C. Circuit, not surprisingly. Greater Boston
14:04:43 Television Corporation v. FCC, it's found at 444 F.2d at page
14:04:52 852, D.C. Circuit, "an agency changing its course must supply a
14:04:55 reasoned analysis indicating that prior practices and standards
14:04:58 are being deliberately changed, not casually ignored."
14:05:01 From the Sixth Circuit, Ohio Fast Freight v.

United States, 574 F.2d 316 at page 319, Sixth Circuit. "[A]n administrative agency must either conform [its actions to] its [own] previous general policies [and precedents] or explain its departure." (As read.)

They are not entitled to deference to a record that completely departs from past practice. This is done to gain litigation advantage. I'm not sure if they have successfully gained it, but there is extensive case law on departures from past practices.

THE COURT: If, in fact, I limited this Court's consideration to the record established before the EAC, in what way would the states be prejudiced?

MR. KOBACH: Our belief is that because of this departure from past practices, the -- there are a number of things. One is the state has presented all kinds of, you know, for example, the evidence of very close elections, the -- evidence that we could have brought in but we all chose, because of the urgency of the situation and the election coming up, not to have an evidentiary hearing, you know, testimony of additional county clerks and things like that. We chose to rely on the affidavits. And that's fine.

THE COURT: I would point out that the urgency of the scheduling was done in response to your concerns.

MR. KOBACH: Yes, yes, absolutely. And we created that urgency by asking for it. I absolutely agree.

14:06:20 As far as the prejudice goes, I'm not so much
14:06:23 arguing that the limitation to the record creates prejudice,
14:06:27 but the rigid, iron-clad adherence that they are saying, they
14:06:32 were just making their points that if there isn't something in
14:06:35 the record saying that the SAVE system is inadequate, then you,
14:06:40 Your Honor, you can't consider my statement and my explanations
14:06:43 of the many reasons why the SAVE system is inadequate. They're
14:06:46 making the argument that if the magic words aren't found
14:06:49 somewhere in this record, then you can't even consider it.
14:06:51 THE COURT: Well, Mr. Kobach, what I don't see in
14:06:53 the record is evidence that your system is not adequate. The
14:06:58 state submitted evidence. I don't see countervailing evidence,
14:07:02 so perhaps it's to your advantage to have a closed evidentiary
14:07:04 record.
14:07:04 MR. KOBACH: Well, I would argue that whether it's
14:07:07 to our advantage or not, there's something amiss here where we
14:07:10 have an agency departing from its past practices and then
14:07:13 trying to cabin a federal court and say you can't touch
14:07:16 anything that's not stated in that record, when they've never
14:07:19 created a record before. And I'm not quite sure how the Court
14:07:23 should deal with it, but I don't think the Court should feel
14:07:26 bound by APA considerations governing administrative records.
14:07:29 Now, I'd like to jump to the central point of the
14:07:35 case, which you have asked many people in this proceeding, who
14:07:37 gets to decide what is necessary. Mr. Heard said it is the EAC

14:07:40 1 that gets to decide what is necessary because the EAC is
14:07:45 2 charged with creating the Federal Form. Mr. Heard also said,
14:07:47 3 however, I cannot pointed to the exact quote in the Inter
14:07:51 4 Tribal Council opinion, because, of course, I will add, the
14:07:54 5 court did not say that. And Mr. Posner conceded as much.
14:07:58 6 But what the Inter Tribal court did say was in
14:08:01 7 four different places to the contrary. The court did say that
14:08:05 8 this must be established not before the EAC but "in a reviewing
14:08:08 9 court," on page 2260.
14:08:11 10 The second place is on page 2259. "Discretion is
14:08:15 11 to be cabined by an agency avoiding constitutional doubt." (As
14:08:19 12 read.)
14:08:19 13 The third place is on page 2259. The court said,
14:08:25 14 necessary what may be -- it is necessary that what "may be
14:08:28 15 required will be required." Take out the word "necessary."
14:08:31 16 What "may be required will be required," and that's at
14:08:34 17 page 2259, and it means what may be required by the State will
14:08:38 18 be required by the EAC.
14:08:38 19 Number four --
14:08:40 20 THE COURT: Does that quote say what may be
14:08:42 21 required by the states will be required --
14:08:45 22 MR. KOBACH: I have it in brackets.
14:08:46 23 THE COURT: So your interpretation of that court
14:08:48 24 is what may be required by the states will be required by the
14:08:50 25 EAC?

14:08:51 MR. KOBACH: Yes, the final sentence, the final
14:08:53 phrase --
14:08:53 THE COURT: I remember the sentence.
14:08:54 MR. KOBACH: Yeah, but I don't think there's any
14:08:56 other way to make sense of it, because he's saying what may be
14:08:59 required when a state chooses to, among the things it may do,
14:09:02 will be required by the EAC. Otherwise, it's right after the
14:09:05 sentence about constitutional doubt.
14:09:06 And then, fourth, on page 2260, the court says the
14:09:10 EAC is under a nondiscretionary duty. And that, of course,
14:09:14 comes from my favorite sentence in the opinion. So, now,
14:09:21 the -- you said who acts to decide what is necessary. And
14:09:26 you're looking at the phrase of the opinion that uses the word
14:09:30 what is "necessary." I would argue -- and indeed looking at
14:09:34 the sentence that I have so often quoted -- the only coherent
14:09:37 way to read that sentence is to read it that a reviewing court
14:09:40 decides what is sufficient, and then the EAC's duty becomes
14:09:44 nondiscretionary at that point. Otherwise, if the EAC gets to
14:09:48 decide what is sufficient, it could expand its own discretion.
14:09:51 That makes no sense whatsoever.
14:09:53 In other words, let's change the sentence on
14:09:55 page 2260 and make it read the way the defendants want it to
14:09:59 read. It would go this way: Arizona would have the
14:10:03 opportunity to establish in the EAC that a mere oath will not
14:10:07 suffice to effectuate its citizenship requirement and that the

14:10:10 EAC is, therefore, under a nondiscretionary duty to include
14:10:14 Arizona's concrete evidence requirement on the Federal Form.
14:10:17 Well, of course the EAC would say, well, you
14:10:20 haven't established that; therefore, our duty is -- we are not
14:10:24 confined to a nondiscretionary duty, we have full discretion.
14:10:28 Obviously, you wouldn't give that agency the ability to decide
14:10:31 how much discretion it gets. I think it's an implausible
14:10:35 reading of Justice Scalia's wording in the case.
14:10:37 Mr. Heard said that the states have other means to
14:10:44 discover this information about whether someone is an alien or
14:10:47 not on the voter rolls; therefore, a proof of citizenship is
14:10:51 not necessary. There is no indication from the court that
14:10:58 "strictly necessary" is the standard that must be applied. If
14:11:00 strictly necessary were the standard, then no means of
14:11:05 enforcing our proof of citizenship would ever qualify for that,
14:11:08 because you could always argue that there's something else you
14:11:11 could do, there's some other way you could possibly do this.
14:11:14 So no method is strictly necessary. And that's why I think
14:11:18 Justice Scalia avoided the use of the word "necessary" when he
14:11:22 established the standard. The standard was whether mere oath
14:11:24 will suffice, not whether it is necessary to have something
14:11:27 more.
14:11:29 Mr. Heard also said that even at a DMV, where
14:11:33 proof of citizenship is required, and this was in the context
14:11:36 of a larger point he was making. I just simply want to clarify

14:11:41 1 factually that is incorrect. Proof of citizenship is not
14:11:43 2 required to get a driver's license in Kansas, only lawful
14:11:46 3 status is required. Now, that was prior to 2012. In 2012 the
14:11:52 4 Kansas Department of Revenue instructed DMV to require proof of
14:11:56 5 citizenship for new driver's license applicants only, so only
14:12:00 6 mostly younger kids getting their first driver's license would
14:12:03 7 be required to provide proof of citizenship. Those of us
14:12:05 8 renewing our driver's license still do not have to provide
14:12:08 9 proof of citizenship, so there is no proof-of-citizenship
14:12:11 10 requirement at the Kansas DMV.
14:12:14 11 Going back to the question of the administrative
14:12:19 12 record, Mr. Heard emphasized that the inadequacy of alternative
14:12:24 13 means of determining whether a voter is a citizenship (sic) or
14:12:29 14 not is not on the record before the EAC, the inadequacy of
14:12:32 15 alternative means. And, of course, I had mentioned earlier
14:12:35 16 that, well, these alternative means were first brought up as a
14:12:38 17 reason by the EAC itself after the creation of this artificial
14:12:43 18 record. But I would point out that we actually did -- we do
14:12:47 19 have several points in the record where we refer to the
14:12:50 20 inadequacy of alternative means.
14:12:51 21 Mr. Bryant has two statements on that point. His
14:12:55 22 first affidavit from the 22nd of October, 2013, it's found in
14:13:00 23 the EAC record at page 616, "A mere oath's failure to prevent
14:13:04 24 noncitizens from registering to vote is exacerbated by the fact
14:13:09 25 that once unqualified individuals are registered to vote, it is

14:13:09 extremely difficult to detect them and remove them from the
14:13:11 voting rolls. My years of experience as an election official
14:13:14 in Kansas lead me to the conclusion that it is much easier to
14:13:18 prevent registration by unqualified persons than to detect and
14:13:21 remove them after they are on the rolls."
14:13:24 THE COURT: Mr. Kobach, the smoke coming from the
14:13:26 court reporter's machine will soon set off the fire alarm,
14:13:29 so --
14:13:29 MR. KOBACH: I apologize.
14:13:30 THE COURT: -- if you could slow that down that
14:13:31 just a bit for her, that would be appreciated.
14:13:33 MR. KOBACH: I will slow it down on the next one.
14:13:36 Mr. Bryant also on his second affidavit, which is found at
14:13:38 page 620 of the EAC record, says the following: "The methods
14:13:42 referred to in this affidavit that have been used by our office
14:13:44 to identify noncitizens registered to vote are limited in
14:13:50 scope. Our office possesses very few tools that can be
14:13:53 utilized to discover noncitizens who registered to vote prior
14:13:57 to Kansas's proof-of-citizenship requirement on January 1,
14:14:01 2013. Consequently, the total number of noncitizens who have
14:14:05 registered to vote is likely to be higher than the number of
14:14:08 cases that we have been able to discover."
14:14:10 I would also note that in the EAC record there is
14:14:16 some analysis provided by Mr. Hans von Spakovsky of the
14:14:21 Heritage Foundation, and that's on page EAC 684. He says,

14:14:26 "Catching a violation after the fact is extremely difficult.
14:14:29 It rarely happens, because local officials lack the means to
14:14:32 verify the citizenship of registrants once they have become
14:14:35 registered." As a federal court in Florida said, "For
14:14:40 noncitizens, the state's duty is to maintain an accurate voting
14:14:44 list. A state can and should do that on the front end,
14:14:47 blocking a noncitizen from registering in the first place."
14:14:51 And Mr. von Spakovsky was citing United States v. Florida, 870
14:14:57 F.Supp. 2d, at page 1351. It was in Northern District of
14:15:01 Florida.

14:15:01 The Inter Tribal intervenors themselves mention
14:15:05 the SAVE system and say it is at best a starting point in their
14:15:09 submissions to the EAC. Furthermore, nothing in EAC records
14:15:14 say these alternative means are sufficient or effective.
14:15:18 Indeed, the EE -- the EVVE database of birth certificates was
14:15:23 never even mentioned, to my knowledge, in the entire EAC
14:15:26 record, yet the EAC in their memorandum, in their decision,
14:15:29 magically found that to be an answer as a factual question, in
14:15:34 answering the factual question are there other methods that
14:15:37 will suffice to prevent noncitizens from getting on the voter
14:15:40 rolls or to remove them once they are there. Again, the EAC
14:15:43 draws from things that were not in the record in rendering its
14:15:46 decision.

14:15:46 It is a curious record at best. But my point is
14:15:50 there are multiple references to the inadequacy of alternative

14:15:53 1 means. I believe they are trying to take the position that
14:15:56 2 unless you say the word SAVE or unless you say the acronym EVVE
14:16:01 3 in one of your submissions to the EAC, then you, Your Honor,
14:16:05 4 may not consider my arguments as to how inadequate those
14:16:07 5 alternative systems are, and I don't think that can stand.
14:16:11 6 Mr. Heard also said, when you pointedly asked him
14:16:16 7 the question, he said the EAC has a superior right over the
14:16:20 8 states to decide what is necessary because Congress gave it to
14:16:24 9 them. I would answer that Congress does not have the power,
14:16:27 10 even if Congress said specifically in the NVRA, no state may
14:16:31 11 require documentary proof of citizenship, that Act would be
14:16:34 12 unconstitutional, period. That is the constitutional ruling
14:16:38 13 that the court was attempting to avoid in Arizona v. Inter
14:16:43 14 Tribal Council.
14:16:43 15 THE COURT: -- you don't think the Congress has
14:16:44 16 that power under Article I, Section 4?
14:16:46 17 MR. KOBACH: Absolutely not.
14:16:47 18 THE COURT: Because?
14:16:48 19 MR. KOBACH: That is not a valid time, place, or
14:16:51 20 manner restriction. And, furthermore, it is -- I don't think
14:16:52 21 it can qualify as a -- it's a restriction on the "what" of
14:16:57 22 registering, not on the time, place, or manner of registering.
14:16:58 23 THE COURT: Doesn't the law establish the time,
14:17:00 24 place, and manner includes particulars of registration?
14:17:02 25 MR. KOBACH: I don't think the law establishes

that.

THE COURT: I think Justice Scalia says the law establishes that.

MR. KOBACH: No, I'm going to get to that point. He quotes -- there's reference to the Smiley case, and I was about to --

THE COURT: Right, right.

MR. KOBACH: Here, let me jump down to it. The other side, in this case Ms. Perales, asked you to read the time, place, and manner clause very broadly to include whatever Congress wants to do regarding registration, and then they cite Smiley. And it is true that Justice Scalia, in passing, mentioned Smiley as well, just for the proposition that the time, place, and manner clause can do various things. But Justice Thomas, in his dissent, explained why Smiley doesn't apply. And this comes from page 2268 of Inter Tribal Council. "Moreover, this Court's decisions do not support the respondents' and the Government's position. Respondents and the United States point out that Smiley v. Holm mentioned 'registration' in a list of voting-related subjects it believed Congress could regulate under Article I, Section 4 (listing '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.') But that statement was

14:18:13 dicta because Smiley involved Congressional redistricting, not
14:18:16 voter registration. Cases since Smiley have similarly not
14:18:20 addressed the issue of voter qualifications but merely repeated
14:18:23 the word 'registration' without further analysis."
14:18:26 And then the court goes on to quote --
14:18:28 THE COURT: Well, if the earlier opinions were
14:18:32 dicta, then does Justice Scalia establish that point in the
14:18:35 ITCA?
14:18:35 MR. KOBACH: I don't think so, because in the
14:18:36 context of when he's mentioning it, he's not coming to the
14:18:39 conclusion that the Article I, Section 4, power is broad enough
14:18:42 to cover this particular type of regulation.
14:18:48 THE COURT: All right.
14:18:49 MR. KOBACH: Okay.
14:18:56 THE COURT: So it's your position -- and I note
14:18:58 that Justice Thomas' dissent goes on to cite the Oregon v.
14:19:03 Mitchell case -- that Congress does not have the power to
14:19:06 regulate voter qualifications in federal election, so it's your
14:19:09 position that whatever preemption power Congress may have in
14:19:12 Article I, Section 4, it does not extend to voter registration
14:19:16 and qualification issues?
14:19:17 MR. KOBACH: It does not extend to the method of
14:19:19 enforcing voter qualifications.
14:19:21 THE COURT: All right.
14:19:21 MR. KOBACH: And I want to get -- I wanted to

develop that point a little further. Mr. Heard said the EAC preempts the states from requiring proof of citizenship, in so many words, and the Court has used the term "preemption." I want to be very clear here. There's really two different constitutional analyses going on here. At the first stage, this is not a preemption case. These are coordinate Article I powers. This is a not a preemption case; it's a case of Article I powers.

You have the Article I, Section 2, power of the states, which predates the Constitution and is recognized by the Constitution to set the qualifications and to enforce those qualifications. Then you have an Article I, Section 4, power of Congress, and, of course, the EAC -- or, rather, the acting director of the EAC -- is attempting to stand in the shoes of Congress and exercise the time, place, and manner power.

When those two coordinate powers collide, as they are here, the specific overrides the general, and Inter Tribal Council said that. And I quote from page 2258. "One cannot read the [election --] Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. '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.'" And finally, the court was quoting Oregon v.

14:20:51 Mitchell in that instance.

14:20:51 So this is a case of coordinate powers. But if
14:20:57 the Court finds that in that clash of Article I, Section 2,
14:21:00 powers exercised by the state versus Article I, Section 4,
14:21:03 powers purportedly exercised by the federal government, if the
14:21:08 Court finds that the Article I, Section 4, is as broad as they
14:21:11 claim then it becomes a preemption analysis. Only then do you
14:21:15 get to election preemption analysis. And let me jump to that
14:21:20 point.

14:21:26 You, Your Honor, immediately went to the crucial
14:21:30 question if this is a preemption case. You asked, can the EAC
14:21:35 itself preempt, or does Congress -- is Congress itself required
14:21:40 to speak. I believe they sort of danced around answering your
14:21:43 question directly. The answer is absolutely clear, the
14:21:47 executive branch does not have the power to preempt under the
14:21:50 Supremacy Clause. The executive branch, especially an agency
14:21:53 in this case, does not have -- an agency acting without an
14:21:58 actual quorum of people that constitute the agency cannot do
14:22:01 it. The Supreme Court said this in North Dakota v.
14:22:04 United States. It's found at 495 U.S. 423 at page 442. This
14:22:11 was 1990. "It is Congress -- not the [Department of
14:22:14 Defense] -- that has the power to preempt." (As read.)

14:22:17 I inserted "the Department of Defense." I believe
14:22:19 the original phrasing was It is Congress not the agency that
14:22:22 has the power to preempt.

14:22:23 So the EAC cannot, by its actions, preempt a state
14:22:28 from exercising its sovereign powers. And, certainly, Alice
14:22:32 Miller cannot preempt when she does not even have the authority
14:22:36 Congress vested, which required three votes, in the EAC.
14:22:40 THE COURT: If preemption becomes a critical issue
14:22:42 on my decision in this case, what do I do with Justice Scalia's
14:22:46 statement about the presumption against preemption not applying
14:22:50 here, the statement to which Justice Kennedy objected or
14:22:53 concurred or whatever?
14:22:54 MR. KOBACH: I think Justice Kennedy is correct
14:22:56 here.
14:22:57 THE COURT: But he doesn't write for the majority,
14:22:59 so Justice Scalia has to be correct.
14:23:01 MR. KOBACH: I think it probably matters little,
14:23:02 because the presumption against preemption just says where's
14:23:05 our starting point, does the state have -- does the state begin
14:23:08 with the presumption that it is acting win its sovereign power
14:23:12 and the federal government has to disprove that in court, or
14:23:15 does the federal government have an edge or an initial
14:23:17 presumptive favor. And, basically, when there's no
14:23:20 presumption, then both states simply -- both entities come to
14:23:23 the court and say, no, preemption applies or it doesn't apply.
14:23:27 I think it's a starting point, so it probably doesn't guide
14:23:30 your decision in either way.
14:23:31 THE COURT: All right.

14:23:32 MR. KOBACH: But then there's one more point. Not
14:23:34 only MUST Congress have to preempt, not the executive branch,
14:23:36 Congress must speak unmistakably, and I'll take this from De
14:23:40 Canas v. Bica, 424 U.S. 351 at page 356. "Federal
14:23:46 regulation . . . should not be deemed preemptive of state
14:23:49 regulatory power in the absence of persuasive reasons -- either
14:23:53 that the nature of the regulated subject matter permits no
14:23:56 other conclusion, or that Congress has unmistakably so
14:24:03 ordained." "That Congress has unmistakably so ordained."
14:24:06 And as the court has noted multiple times,
14:24:09 Congress was silent in the NVRA on the issue of proof of
14:24:12 citizenship, probably reflecting the fact that members of
14:24:15 Congress in the very -- in each party had different views about
14:24:18 that, and Congress chose to stay out of that fight. Certainly,
14:24:22 Congress did not empower an executive agency to decide the
14:24:25 outcome of the fight on behalf of Congress, and deciding that
14:24:28 outcome would have preemptive effect. Absolutely the
14:24:32 Constitution does not contemplate in the Supremacy Clause that
14:24:35 an unelected -- indeed not even formally-positioned agency
14:24:39 official -- has the power to displace the sovereign authority
14:24:42 of the states.
14:24:45 Then -- this gets to your question at the
14:24:48 beginning. Then Ms. Perales said the Federal Form uses the
14:24:50 word "perjury" and mentions -- it mentions imprisonment. The
14:24:55 Federal Form is really mean and nasty the way it's used, the

14:24:59 way it's written.

14:24:59 THE COURT: I think that was my comment.

14:24:59 MR. KOBACH: Yeah, that was your language.

14:25:01 THE COURT: I don't want to attribute such harsh
14:25:04 language to her.

14:25:04 MR. KOBACH: Those words weren't from her mouth,
14:25:07 that's right. But I have a couple of answers. As we have
14:25:11 pointed out, in the Seward County incident, in that case the
14:25:14 aliens who were being urged to register by their employer
14:25:18 couldn't even read English anyway. The notion that a warning
14:25:22 in small print at the bottom is sufficient is clearly not
14:25:25 correct, and as Justice Scalia pointed out, swearing something
14:25:29 under oath is nothing more than a statement and it is not
14:25:32 enough.

14:25:32 Second, I'd give you the Finney County example.
14:25:35 There college students were being handed a prefilled form with
14:25:38 it already checked by the computer, and just asked to write
14:25:42 their name -- their name, their date of birth, and a couple
14:25:45 other things and sign the form. The idea that those scary
14:25:48 word -- the scary word "perjury" is on the form is, I think,
14:25:52 ludicrous.

14:25:52 Now, Ms. Perales went to this point which you are
14:25:55 hitting at. There are no examples, she says, of aliens using
14:25:58 federal forms who have successfully registered. Well, we can't
14:26:01 say that. We have not attempted to distinguish among the 20

14:26:06 aliens -- and neither has Arizona attempted to distinguish
14:26:08 among the 196 aliens -- whether they used the Federal Form or
14:26:13 the state form. Until this hearing no one asked us whether the
14:26:17 Federal Form was used or the state form, because, frankly,
14:26:19 there's not that much difference. They ask for the same
14:26:22 things, although the state form, of course, in Kansas and
14:26:25 Arizona also asks for proof of citizenship. So we have not
14:26:28 distinguished. It is entirely possible that some of the 20 and
14:26:30 some of the 196 may have used the Federal Form.
14:26:33 THE COURT: Compare the scariness, if I can use my
14:26:36 word, of the state form to the Federal Form, with respect to
14:26:41 cautionary language, et cetera.
14:26:42 MR. KOBACH: I think they're -- those are
14:26:45 immaterial distinctions. The state form -- the state form asks
14:26:51 the same questions, and merely says at the end, "You must
14:26:54 provide proof of citizenship to complete your registration."
14:26:57 And the reference to perjury on the Federal Form, you know
14:27:03 what, I'd have to double-check, because I think some iterations
14:27:06 of our state form may refer to the penalties for -- or it is a
14:27:11 violation of law to falsely swear, but I'm not certain of that.
14:27:14 I probably should have done that over lunch, to check. We have
14:27:17 various iterations of it, for example, because when you go to
14:27:20 the DMV you're looking at an on-screen version of the form and
14:27:23 that on-screen version has successive screens you have to
14:27:26 answer, and I'm not sure if the on-screen version, when it says

14:27:30 are you a U.S. citizen, has printed at the bottom of the screen
14:27:32 saying "falsely answering these questions." So honestly, Your
14:27:35 Honor, I don't have the answer to that, but I believe the
14:27:39 distinctions are immaterial in any event.
14:27:43 Ms. Perales also said, well, if Kansas has, say,
14:27:46 12 people a year who register whose registrations are
14:27:49 questionable and they might be aliens, Kansas could just call
14:27:52 them, call them up, contact them, perform interviews, and do
14:27:56 further research. Well, if we had some way of finding which of
14:28:02 the 12 out of the hundred thousand or so people who register
14:28:05 every year, and could figure out which 12 there were, and then
14:28:08 call them up, maybe that would work. But we have no way to
14:28:12 scan the hundred thousand people who register in a given year
14:28:14 or scan the 1.8 million people on our voter rolls and look for
14:28:18 ones who, you know, might be deserving of a question or an
14:28:21 interview or a letter. There's simply no way to look at our
14:28:24 voter database and say, okay, that person looks to me like he
14:28:28 might not be a citizen.
14:28:28 She also said that Kansas verified the citizenship
14:28:31 of approximately 7,700 registrants -- we put this in our
14:28:36 brief -- as U.S. citizens by using the birth certificate
14:28:39 records. We did this in January 2014. That's absolutely
14:28:42 right, but the problem is we can't identify noncitizens that
14:28:45 way. We can run all 1.8 million voters against the Kansas
14:28:50 birth certificate records. And if we did, we'd find that

14:28:52 roughly 35 percent of them were born in Kansas, and we have a
14:28:55 record for them. But you can't conclude that the other 65
14:28:59 percent are noncitizens, because chances are they were born in
14:29:02 another state or they naturalized and were born out of the
14:29:05 country. You can't draw any conclusions by just running the
14:29:08 entire batch against your birth certificate records. You can
14:29:10 only do it at the front end, which is why we do all this at the
14:29:14 front end. To help people who have not yet completed their
14:29:16 registration, we went ahead and said it's good government for
14:29:20 the state agency to talk to another agency and say, you know
14:29:23 what, we can get this for you, you don't have to bother. So
14:29:25 you can't use it at the back end, as Ms. Perales erroneously
14:29:28 suggested.
14:29:28 Then I'm going now to an argument by, I believe,
14:29:42 Mr. Freedman. The statement was made the 20 -- oh, yeah, the
14:29:46 20 aliens that we mentioned are not proven to be noncitizens
14:29:49 because we didn't do enough double-checking that they didn't
14:29:52 naturalize subsequently to our initial discovery of them.
14:29:55 The registration in all of the cases is still
14:29:59 illegal when it happens, so if a person registers when he gets
14:30:02 his driver's license, he's an alien on that day, and then 365
14:30:06 days later he becomes -- he naturalizes and becomes a U.S.
14:30:09 citizen, the registration was still illegal.
14:30:11 THE COURT: I think Mr. Freedman's argument was
14:30:12 that he may have been an alien when he got his driver's

14:30:14 1 license, may have subsequently become a citizen and registered
14:30:17 2 to vote at that point.
14:30:18 3 MR. KOBACH: Right.
14:30:18 4 THE COURT: That was how I understood
14:30:20 5 Mr. Freedman's argument.
14:30:20 6 MR. KOBACH: I wasn't quite clear on what he was
14:30:22 7 arguing, but either way, the way we discovered these records
14:30:24 8 was that we got them when the person registered --
14:30:28 9 THE COURT: I think that's much farther in the
14:30:31 10 weeds than this case will turn on anyway.
14:30:33 11 MR. KOBACH: Okay. Well, the point is we -- my
14:30:35 12 main answer is we did the double-checking, and that's why we
14:30:38 13 removed the one alien because we weren't sure when the person
14:30:41 14 got naturalized. We said, well, because we only want to
14:30:43 15 present truthful information to the court, we're going to take
14:30:46 16 this guy off the list because at some point he naturalized. He
14:30:49 17 may have very well be a non-citizen on the rolls for some
14:30:51 18 period.
14:30:52 19 Mr. Freedman then went to a long exposition on his
14:31:00 20 policy opinions that proof of citizenship is bad policy. I'm
14:31:03 21 not going to --
14:31:03 22 THE COURT: Those aren't before this court.
14:31:06 23 MR. KOBACH: Okay. Then I'll just leave it.
14:31:09 24 There are plenty of inaccuracies in that statement, but I'll
14:31:11 25 leave that for another discussion.

14:31:13 Mr. Freedman then also said the purpose of the
14:31:16 NVRA is violated by Kansas and Arizona's proof-of-citizenship
14:31:20 law. Well, Mr. Freedman did not quote all of the purposes of
14:31:26 the NVRA. There were four of them listed by Congress. Numbers
14:31:28 three and four he might find interesting. No. 3, "to protect
14:31:32 the integrity of the electoral process"; and No. 4, "to ensure
14:31:35 that accurate and current voter registration rolls are
14:31:39 maintained." These laws are perfectly consistent with purposes
14:31:44 three and four.
14:31:45 And indeed the NVRA was a constitutional -- was a
14:31:47 Congressional bargain of sorts. The way it was passed is there
14:31:53 were members of Congress pushing for easier, quicker
14:31:57 registration, and there were others who were saying, no, but
14:32:00 look our voter rolls are already swollen with inaccurate
14:32:03 records of people that are not qualified, and so the NVRA was
14:32:06 an attempt to balance both, but they, of course, were silent on
14:32:10 the question of proof of citizenship.
14:32:11 Mr. Freedman also stated that the Kansas Secretary
14:32:14 of State's -- no, sorry, that secretary of states office all
14:32:17 over the country do investigations when registrations are
14:32:20 flagged for possible doubt. Simple answer, no, we don't. It's
14:32:24 impossible to flag these registration. If you got a hundred
14:32:27 thousand coming in every year, or three times that number in
14:32:30 Arizona, there's no way to look at them and flag them, and you
14:32:33 have no basis for flagging them. You can't look at a person's

14:32:36 surname or a person's residence and say, oh, I think that
14:32:39 person's an alien. Absolutely not. Indeed registrations come
14:32:43 in over the internet, they're coming in through the DMV,
14:32:47 they're coming in from government offices all over the state.
14:32:48 There is no process for scanning them and flagging them. We
14:32:51 certainly don't have the resources for doing that, even if we
14:32:53 had a method for scanning them. Again, his statements do not
14:32:56 reflect the reality of the voter registration process.
14:32:58 Mr. Posner suggested that the Supreme Court
14:33:00 accepted the assertion that the NVRA may require what is
14:33:05 necessary language serves as both a ceiling and a floor. No,
14:33:11 the Supreme Court did not accept that. The Supreme Court
14:33:14 expressly declined to accept that characterization saying on
14:33:17 page 2259 immediately thereafter, "We need not consider the
14:33:21 Government's contention," referring to their contention that
14:33:25 it's a ceiling and a floor. Why did the majority opinion say
14:33:28 that? Because in the next sentence, "What may be required must
14:33:33 be required," what may be required by a state looking for other
14:33:36 ways to prove up its voter rolls must be required by the EAC.
14:33:44 Almost done, Your Honor.
14:33:51 Finally, I would add this, and I think this is a
14:33:56 question we just have to -- I certainly have -- I constantly go
14:34:01 to as I think about this case. Why would the Supreme Court
14:34:06 have suggested that Arizona file another request and that, if
14:34:10 that request is denied, sue other than the Supreme Court

14:34:15 expected a nondiscretionary duty to be exercised, as Justice
14:34:19 Scalia defined it? It makes no sense for the Supreme Court to
14:34:23 spend two pages describing the safety valve if the safety valve
14:34:27 won't let the water out, if the safety valve won't work. And
14:34:30 so there's really no other way to make sense of that long
14:34:34 description of what is necessary in the wake of Inter Tribal
14:34:39 Council.

14:34:39 And I'd like to close by asking the Court for
14:34:42 specific remedies. We've already mentioned these in our
14:34:45 complaint, but I just want to be very specific. We are asking
14:34:48 the Court for three things: one, a declaration that the EAC's
14:34:53 refusal violates the states' constitutional rights, for the
14:34:56 multiple reasons we have already described; second, we are
14:35:00 asking for an injunction enjoining the EAC to add the requested
14:35:05 language immediately. It can be done immediately. Indeed, it
14:35:09 can be done in a matter of hours because nowadays the Federal
14:35:12 Form exists principally on the Internet and people download it,
14:35:15 so it's not a matter of running all over the country, as it was
14:35:19 in 1993, and taking hard copies and replacing them with other
14:35:23 hard copies, although certainly there certainly still are some
14:35:26 printed hard copies that still exist out there. And the third
14:35:29 remedy we ask for is a further declaration that the EAC has
14:35:33 acted in violation of the Constitution since its August 9th,
14:35:37 2012, denial of Kansas' request. And, therefore, the
14:35:41 registrants who used the Federal Form since January 1st, 2013,

14:35:45 1 were improperly permitted to register, using a form that did
14:35:49 2 not inform them of their proof of citizenship. We will mail
14:35:52 3 each of them an additional notice that they must provide proof
14:35:55 4 of citizenship, but essentially to treat those who have acted
14:35:59 5 in the wake of the EAC's unconstitutional denial as not having
14:36:04 6 a special avenue. The number as of yesterday is 65. That is
14:36:10 7 the number of people who have registered using the Federal Form
14:36:12 8 since January 1st, 2013, in the state of Kansas.
14:36:16 9 I realize that this third remedy is -- well, it's
14:36:20 10 an interesting one to puzzle over, but it would be most helpful
14:36:24 11 for the administration of the upcoming election if the Court
14:36:26 12 would consider issuing that declaration as well.
14:36:29 13 THE COURT: I'm puzzling over the second one,
14:36:31 14 because since we're here in an APA, at least generally in an
14:36:36 15 APA action, although you're asking for an injunction against
14:36:39 16 the EAC, when you were before me in December you asked that it
14:36:44 17 be remanded to the EAC with instructions that it amend the
14:36:47 18 form. Is that not still what you mean by an injunction at this
14:36:51 19 point?
14:36:52 20 MR. KOBACH: I guess if -- I suppose a remand with
14:36:56 21 instructions from the court to amend the form, yeah.
14:36:58 22 THE COURT: How else do you get the form amended?
14:37:03 23 Because ultimately you want -- you have to use the Federal
14:37:06 24 Form. That, at least, is sure --
14:37:08 25 MR. KOBACH: That is absolutely clear.

14:37:10 THE COURT: -- in the case, and ultimately you
14:37:12 want the Federal Form to require proof of citizenship.
14:37:14 MR. KOBACH: Absolutely.
14:37:15 THE COURT: I don't see how any of these three
14:37:16 requests get you there.
14:37:18 MR. KOBACH: Well, I guess you could remand it to
14:37:21 the EAC with instructions that it add the state-specific
14:37:27 instructions requested by Kansas and Arizona, consistent with
14:37:30 this opinion.
14:37:30 THE COURT: I'm saying, isn't that -- you're still
14:37:33 using injunction language, but because we're in an APA review,
14:37:37 isn't that really what you're seeking?
14:37:38 MR. KOBACH: To be honest, Your Honor, I'm not
14:37:41 sure. I'm not sure that in this context an injunction would
14:37:45 not be appropriate, because the EAC's already refused in every
14:37:49 which way it can think of to do this. They've said we can't
14:37:52 act.
14:37:53 THE COURT: But what's it mean that I enjoin them
14:37:55 against denying your request?
14:37:58 MR. KOBACH: Well, with remanding with specific
14:38:01 instructions, I think, is certainly permissible as well. And,
14:38:04 again, the other reason why an injunctive -- injunctive relief
14:38:08 is necessary is there's no assurance that the EAC will do
14:38:11 anything. If it's remanded back to the EAC and the EAC
14:38:14 decides, well, we're going to sit on it for six months, which

14:38:18 they could -- in the past they didn't do that, but they
14:38:20 could -- then we are in a position where we -- oh, my cocounsel
14:38:26 has informed me that mandamus is concurrent with the APA, and
14:38:31 that a writ of mandamus would suffice.
14:38:34 THE COURT: That's what I thought. All right,
14:38:36 thank you, Mr. Kobach.
14:38:36 MR. KOBACH: Thank you.
14:38:39 THE COURT: Mr. Heard.
14:38:52 MR. HEARD: Afternoon, Your Honor.
14:38:56 All right, I'll try to address as quickly as I can
14:39:02 the points that Mr. Kobach raised. But let me start with
14:39:09 just -- just a general principle that I think we all agreed on
14:39:13 last week, and that Mr. Kobach is trying to run away from in
14:39:20 some instance today. This is an APA case. Everybody on the
14:39:27 conference call with the Court agreed that this is an APA case,
14:39:31 that there was an administrative record, that the Court was
14:39:36 confined to the administrative record, and that the
14:39:37 administrative record presented all of the information upon
14:39:42 which the Court -- it presented all the information that the
14:39:47 Court needed to make rulings in this case.
14:39:50 Those were the agreements that all parties --
14:39:53 THE COURT: And I'm not sure how the operation of
14:39:57 this court limited to the APA record prejudices the states. I
14:40:01 asked Mr. Kobach that. There is really very little information
14:40:03 that he wanted to supplement that record with, and that

14:40:06 information was mostly illustrations of hypothetical arguments
14:40:09 he made, so I'm not sure that that ultimately becomes a
14:40:14 significant -- the limitation in the record becomes a
14:40:17 significant impediment to the process of this case.
14:40:22 MR. HEARD: All right. Well, I just wanted to
14:40:24 make that point clear. And the other point that flows from
14:40:27 that, of course, is that the APA has standards of review, and
14:40:31 it has -- it has -- APA decisions are reviewed with a
14:40:39 presumption that the decision is valid. APA decisions, the
14:40:43 court is to owe deference to the agency in its decision-making.
14:40:48 The agency is entitled to find facts, and those facts are
14:40:53 entitled to deference if they're supported in the record. The
14:40:57 agency's decision has to be a rational decision. It does not
14:41:01 have to be the only possible decision. The court does not have
14:41:04 to agree with the decision. The states do not have to agree
14:41:07 with the decision. The decision just has to be a possible
14:41:10 decision that results from the administrative record, and the
14:41:13 agency has to adequately explain its decision.
14:41:16 THE COURT: But you would agree with me that if
14:41:21 this case ultimately turns on the doctrine of constitutional
14:41:24 enumeration of powers and preemption, then deference to an
14:41:27 agency decision pretty much gets overshadowed by that much
14:41:33 larger issue?
14:41:34 MR. HEARD: The court is certainly entitled to
14:41:37 take an independent review of the constitutionality of the

14:41:42 1 issue surrounding the agency decision, but that doesn't change
14:41:47 2 the fact that it still is in the context of an APA case, and
14:41:53 3 that the underlying decisions upon which it was based are
14:41:58 4 deference -- deferential decisions. Essentially, the facts
14:42:02 5 that were decided by the EAC and the rationale that the EAC
14:42:07 6 used, assuming that it was constitutional, is owed deference by
14:42:12 7 the court.
14:42:13 8 Yes, I mean -- and that, I guess, takes me to my
14:42:18 9 second point, which is that there are no constitutional
14:42:22 10 dimensions to the case, even though Mr. Kobach is inviting the
14:42:26 11 court to relitigate a bunch of things. He's inviting the Court
14:42:31 12 to relitigate the Inter Tribal Council case. He's inviting the
14:42:36 13 Court to set aside the Court's prior precedence about the scope
14:42:43 14 of the Elections Clause. Those issues are not before the
14:42:47 15 court. They were decided by the Supreme Court. This court is
14:42:50 16 bound by those decisions. It's not a forum to revisit the
14:42:56 17 constitutionality of the Elections Clause. It's not a forum to
14:43:00 18 revisit the prior precedents of the Supreme Court.
14:43:03 19 THE COURT: So talk to me about the Smiley case
14:43:06 20 and the Oregon case and what you think those decisions held
14:43:12 21 with respect to Congress' ability to legislate in the field of
14:43:16 22 voter registration, which was an issue not decided by the ITCA
14:43:20 23 case.
14:43:21 24 MR. HEARD: I believe -- and forgive me if I'm not
14:43:23 25 recalling all of the facts of the Smiley case. The Smiley case

14:43:27 1 did not deal specifically with registration; it construed the
14:43:31 2 Elections Clause and indicated that time, place, and manner
14:43:35 3 is -- includes regulations, the scope of Elections Clause and
14:43:40 4 the times, place, and manner clause includes regulations
14:43:44 5 relating to registrations. That is -- that is a holding that
14:43:50 6 the Inter Tribal Council court specifically found again in June
14:43:56 7 of 2013. And it does relate specifically to the issues at hand
14:44:02 8 in Inter Tribal Council.
14:44:04 9 So even if you bought Mr. Kobach's argument or the
14:44:07 10 dissents' argument that Smiley -- that Smiley's statements on
14:44:12 11 that were dicta, ITCA's statements on that certainly were not
14:44:16 12 dicta; they were crucial to the holding and they have, once
14:44:22 13 again, reaffirmed 80 years plus of precedent that says that
14:44:26 14 time, place, and manner includes the ability to regulate voter
14:44:31 15 registration, including establishing regulations that preempt
14:44:36 16 Congress.
14:44:37 17 THE COURT: Well, what about the ITCA's opinion --
14:44:39 18 MR. HEARD: Sorry that preempt the states, Your
14:44:41 19 Honor.
14:44:41 20 THE COURT: I understand. What about the ITCA's
14:44:43 21 statement cited to the Oregon v. Mitchell case that says "it's
14:44:48 22 difficult to see how words can be clearer," in stating what
14:44:52 23 Congress can control and what it cannot control, and nothing in
14:44:56 24 these provisions lends itself to the view that voting
14:44:58 25 qualifications are to be set by Congress? What about that

14:45:02 language from Oregon v. Mitchell?

14:45:04 MR. HEARD: Well, the EAC is not contesting the
14:45:06 fact that the states get to set voter qualifications. Again,
14:45:10 that's not an issue that's in dispute in this case. The voter
14:45:13 qualification is citizenship, and the state has -- both states
14:45:16 have set that voter qualification. And the EAC -- the Federal
14:45:21 Form addresses that. Congress and the NVRA require that
14:45:25 citizenship is a -- because it's a universal voter
14:45:28 qualification -- be included on the Federal Form. So that's
14:45:31 not in dispute.

14:45:32 Again, the -- what the ITCA opinion does is it
14:45:37 avoids the constitutional -- the troubling constitutional
14:45:43 things that would occur if an agency were precluded from
14:45:47 enforcing its voter qualifications, but it does not --

14:45:50 THE COURT: You mean if a state were precluded
14:45:52 from enforcing?

14:45:53 MR. HEARD: I've been mixing that up, trust me.

14:45:55 THE COURT: It's been a long day for all of us.

14:45:57 MR. HEARD: And it has been a long day. I
14:45:59 apologize, Your Honor. But, yes, it prevents a constitutional
14:46:05 problem by recognizing what has always been the case, which is
14:46:10 that any state that makes a request of the EAC, if it's
14:46:15 dissatisfied with the request, can challenge that request under
14:46:18 the Administrative Procedure Act. But it does not set up --
14:46:23 the basic balance and the interplay between the Qualifications

14:46:27 Clause and the Elections Clause is something that the Supreme
14:46:31 Court case talks about, and it says your avenue of challenging
14:46:35 that is to make the request and challenge the request under the
14:46:39 Administrative Procedure Act.
14:46:46 So when the Court -- when the Court asked the
14:46:50 question, I believe of counsel for League of Women Voters, when
14:46:54 it asked the question do the agency's actions, do the EAC's
14:47:00 actions have the power to preempt, and can the EAC preempt or
14:47:05 does that require Congress' preemption. Again, the National
14:47:12 Voter Registration Act was an act of Congress that delegated
14:47:16 Congress' power to regulate in the area of federal elections,
14:47:21 and it delegated that to the EAC. So when the EAC speaks on
14:47:26 matters relating to federal elections, and particularly when it
14:47:29 promulgates a federal form, it is speaking preemptively, to the
14:47:35 extent that conflicts with states, with contrary state laws.
14:47:40 THE COURT: But you're saying, even in the absence
14:47:42 of specific Congressional preemption language, the EAC, under
14:47:49 its broader grant of authority, can affect preemption?
14:47:53 MR. HEARD: The national -- the NVRA is Congress'
14:47:57 preemptive act.
14:47:58 THE COURT: So you're saying the NVRA is a blanket
14:48:02 preemption of everything relating to elections?
14:48:05 MR. HEARD: I'm saying that it preempts in the
14:48:07 subject matter that it speaks to.
14:48:09 THE COURT: And that subject matter was elections.

14:48:11 MR. HEARD: Well, the subject matter is voter
14:48:13 registration in federal elections.
14:48:15 THE COURT: So the NVRA, on all matters relating
14:48:18 to registration, preempts state law; that's your position?
14:48:22 MR. HEARD: I don't think that's what I said, Your
14:48:23 Honor. I think -- I think the NVRA preempts to the extent that
14:48:28 the scope of -- with respect to the scope of the things it
14:48:32 covers. So the NVRA mandates three modes of registration:
14:48:37 registration by mail, which is what this case is about; motor
14:48:40 voter, driver's license registration; and agency registration.
14:48:43 THE COURT: You admitted to me earlier that the
14:48:45 NVRA is silent on this issue of proof of citizenship, so if is
14:48:49 the NVRA is silent on that precise issue, then how does
14:48:52 Congress preempt the states on that issue?
14:48:55 MR. HEARD: The NVRA, Your Honor, regulates
14:48:58 registration by mail. It mandates registration by mail. It
14:49:02 mandates that states accept and use a federal form. It
14:49:08 authorizes the Election Assistance Commission. It directs the
14:49:11 Election Assistance Commission to develop that form in
14:49:13 consultation with the states. And it prohibits the form from
14:49:17 including anything but what is necessary to enable election
14:49:22 officials to assess the eligibility of the applicant and
14:49:26 administer the voter registration process.
14:49:29 So with respect to the subject of mail
14:49:31 registration, with respect to the Federal Form, and with

14:49:35 respect to Congress' delegation of authority to the EAC
14:49:40 regarding those things, the EAC does speak preemptively to the
14:49:47 states in that scope, and it's because it is speaking pursuant
14:49:51 to a delegation of Congress, which has the power to preempt in
14:49:56 the first place.
14:49:56 THE COURT: So Congress, in creating NVRA, said
14:49:58 that we're preempting state regulations regarding registration
14:50:03 to the extent they are not necessary to -- and I don't remember
14:50:08 the exact end of that sentence, but to the extent they're not
14:50:12 necessary to meet the state's requirements for their
14:50:17 registration issues, and that's the preemption statement under
14:50:20 which the EAC's authorized -- the EAC is acting?
14:50:24 MR. HEARD: Congress preempted -- Congress -- I
14:50:26 think -- I would describe it differently, Your Honor.
14:50:29 Congress' preemption is that it's requiring registration by
14:50:33 mail and it's requiring the acceptance and use of a federal
14:50:39 form in that process, and it's directing the EAC to develop
14:50:44 that federal form. And so the accept and use, the ITCA
14:50:48 decision, as the Court mentioned, stands for the proposition
14:50:50 you have to accept the form.
14:50:52 THE COURT: Clearly, clearly the NVRA required the
14:50:56 states to accept and use the form, and that was precise
14:50:58 preemption language. The question here is whether we have
14:51:01 preemption with respect to proof of citizenship.
14:51:05 MR. HEARD: Well, I would contend, Your Honor, you

14:51:09 don't have to drill it down that specifically, because the
14:51:11 basic -- the basic point and the point that ITCA says is
14:51:15 whatever is on the Federal Form you have to accept and use the
14:51:19 Federal Form as is. Your remedy, if you believe you're
14:51:22 precluded from enforcing your voter qualifications, is to ask
14:51:26 for additional instructions to be included on the Federal Form.
14:51:29 That's your remedy. Because outside of that, you have to
14:51:34 accept and use the --
14:51:35 THE COURT: I understand, Mr. Heard, but I don't
14:51:36 think I'm communicating my question to you, because clearly, in
14:51:40 Article I, states have the initial authority to make these
14:51:45 decisions. Clearly Article I, Section 4, provides certain
14:51:50 areas of Congressional preemption for those. But you would
14:51:54 agree with me that for Congress to preempt a state's power,
14:51:57 they have to do so specifically. So Congress -- I mean, so the
14:52:02 Supreme Court decided in the ITCA opinion that Congress had
14:52:04 specifically preempted the state's power with respect to the
14:52:07 use of the form, and the states had to use the form, accept and
14:52:10 use the form. The question now is has Congress specifically
14:52:14 preempted the states' requirements of proof of citizenship,
14:52:18 because if they haven't, then Article I, Section 4, vests that
14:52:24 initial determination in the states.
14:52:26 MR. HEARD: What the Court is speaking to is what
14:52:29 is also addressed by the ITCA opinion, which is this difference
14:52:35 between traditional presumption against preemption and issues

14:52:39 of preemption under the Elections Clause. Those are two
14:52:43 different things, and the court spells them out. So what the
14:52:48 Court's question related to is the presumption against
14:52:52 preemption, like it has to be a specific, you know, preemption
14:52:55 of a particular thing. And what Congress and what the Supreme
14:53:01 Court -- I'm sorry, what the Supreme Court said in ITCA is
14:53:04 under the Elections Clause the preemption is viewed more
14:53:07 broadly. And if you look at --
14:53:09 THE COURT: Right, I remember the language from
14:53:11 Justice Scalia. And you're saying what that means is that the
14:53:14 presumption against preemption does not apply under the
14:53:17 Elections Clause.
14:53:17 MR. HEARD: Right.
14:53:18 THE COURT: You're saying that the effect of that
14:53:21 is that it does not require the same specific Congressional
14:53:24 language to preempt that might otherwise exist?
14:53:27 MR. HEARD: And in traditional preemption
14:53:29 language, like it would sort of kind of relate to field of
14:53:34 preemption; in other words, Congress has taken the field with
14:53:36 respect to this subject, and so you can't -- I mean, it
14:53:41 would -- I'm not saying it's equivalent, because Congress --
14:53:46 because the Supreme Court points out that Elections Clause
14:53:48 preemption works differently than traditional preemption.
14:53:50 THE COURT: Although they don't help us out by
14:53:52 explaining how that is exactly.

14:53:54 MR. HEARD: Well, I mean, it -- one of the
14:53:55 passages here on 2257 of the opinion is, "When Congress
14:54:00 legislates with respect to 'Times, Place and Manner' of holding
14:54:03 Congressional elections, it necessarily displaces some element
14:54:07 of preexisting legal regime erected by the states. Because the
14:54:12 power the Elections Clause confers is none other than the power
14:54:16 to preempt, the reasonable assumption is that the statutory
14:54:18 text accurately communicates the scope" of the presumptive
14:54:22 right. (As read.)
14:54:22 And the scope here is the scope of mail
14:54:25 registration in connection with federal elections. The scope
14:54:30 is the requirement to accept and use the Federal Form, and so
14:54:33 Congress has preempted Kansas' and Arizona's contrary
14:54:39 requirements with respect to those issues, and directs that the
14:54:44 states accept and use the Federal Form as promulgated by the
14:54:49 EAC.
14:54:49 THE COURT: So it is like field preemption.
14:54:52 MR. HEARD: It's akin to field preemption. I'm
14:54:54 not going to say it's the exact same thing, but it's akin to a
14:54:57 field preemption argument.
14:54:58 THE COURT: I think I understand your position.
14:55:07 MR. HEARD: To the third point, as to who decides
14:55:10 the issue of necessity, I said before -- so I won't dwell on it
14:55:16 too long -- but it is the EAC that decides it, in the specific
14:55:21 language of Section 9 of the NVRA, decides it in consultation

14:55:24 with the states. But that does not mean, as we've addressed in
14:55:29 our briefs, consultation with the states does not mean that
14:55:32 they have to take every suggestion of every state.
14:55:35 THE COURT: I read your brief on that, and I was
14:55:39 unable to find the reference you were referring to in Section 9
14:55:42 of the NVRA.
14:55:44 MR. HEARD: Of the "in consultation with the
14:55:46 states"? Okay, so you're aware of the tricky thing with the
14:55:50 NVRA?
14:55:50 THE COURT: I'm probably not.
14:55:51 MR. HEARD: Okay. So that when you say Section 9,
14:55:55 you have to subtract two, and so it's under gg-7.
14:55:59 THE COURT: So Section 9 is really Section 7?
14:56:01 MR. HEARD: I think -- yeah, I think that's right.
14:56:04 THE COURT: Working with the federal government,
14:56:05 that only makes sense.
14:56:06 MR. HEARD: Right.
14:56:07 THE COURT: I assumed that was probably the case.
14:56:08 MR. HEARD: Right.
14:56:09 THE COURT: And your reference -- and you'll have
14:56:11 to help me out here now again, because I looked at that but
14:56:17 what was your sub-reference, 7(b) --
14:56:20 MR. HEARD: So the -- well, let me just flip to it
14:56:22 myself.
14:56:23 THE COURT: I dug through this in the --

14:56:25 MR. HEARD: In gg-7, which is Section 9(a), the
14:56:30 Election Assistance Commission, so Section 9(a)(2), "In
14:56:34 consultation with the chief election officers of the States
14:56:39 shall develop a mail voter registration application form for
14:56:43 elections for Federal office." That's Congress' assignment to
14:56:46 the EAC. In Subparagraph (a)(1), they give the regulatory
14:56:53 authority to actually promulgate the regulations for the form.
14:56:56 And so it's the EAC's duty under gg-7 or Section 9
14:57:03 of the NVRA to create this Federal Form. Yes, it has to
14:57:08 consult with the states, but it does not have to agree with
14:57:13 them, because it doesn't have to agree with everything the
14:57:15 states may or may not request, because, as you might imagine
14:57:19 with 50 states, not all the states are going to agree. Not all
14:57:26 the states really agree even about proof of citizenship. So
14:57:28 the EAC has to decide in the first instance what is necessary
14:57:31 to go on the form.
14:57:33 You'll also see in Section 9 -- I should have kept
14:57:36 my place here in the statute, but you'll also see in Section
14:57:41 9(b) of the NVRA that's the language where it says that the
14:57:46 form, 9(b)(1), says the form may require only such identifying
14:57:49 information . . . as is necessary to enable the
14:57:52 appropriate . . . election officials." (As read.)
14:57:53 THE COURT: Right.
14:57:54 MR. HEARD: So it's, again -- it's telling the EAC
14:57:56 what the form can and cannot do. When the FEC, the predecessor

14:58:01 to the Federal Election Commission, when it did its rule-making
14:58:05 in 1994, it specifically says in the rule-making document that
14:58:11 it has considered what is necessary to go on the form, what is
14:58:14 necessary to enable election officials to determine
14:58:19 eligibility, and this form that we hereby promulgate is the
14:58:22 result.
14:58:23 So if there's a policy decision of the EAC, it is
14:58:28 embodied in the regulation itself, where it says that we have
14:58:32 considered this. And if you read, it's a long rule-making, as
14:58:35 those federal registered things normally are, but it also
14:58:39 addresses several things that they do not believe meet the
14:58:43 standard of being necessary to include on the voter
14:58:47 registration form, and it goes through why it believes certain
14:58:50 things are and are not necessary. I mentioned earlier one of
14:58:54 those things was the information related to naturalization.
14:58:59 And in connection with the information relating to
14:59:01 naturalization, they do have a paragraph that I think speaks a
14:59:05 little more generally, which says that the issue of citizenship
14:59:08 is addressed on the form through the oath and attestations.
14:59:12 Since that time, since the '94 promulgation -- sorry, let me
14:59:18 step back. They also said that we're also going to add, in big
14:59:21 letters on the front of the form, For United States Citizens.
14:59:25 So those two things are how the FEC addressed it.
14:59:30 Since that time, since 2002, Congress has
14:59:34 revisited this issue through the Help America Vote Act, and it

14:59:37 1 required another thing relating to citizenship to be included
14:59:39 2 on the Federal Form, which is the check box at the top of the
14:59:42 3 form which asks "Are you a citizen of the United States?" And
14:59:46 4 it says right under that, "If you answered no, do not complete
14:59:50 5 this form." So Congress again revisited the issue in 2002, put
14:59:56 6 another citizenship requirement on the form, so that speaks to
15:00:02 7 that. But in the absence of those things, Congress has left it
15:00:06 8 to the discretion of the EAC within the guidelines that
15:00:09 9 Congress pointed out, which is only include things that are
15:00:12 10 necessary.
15:00:13 11 So that's how you get to the EAC deciding the
15:00:17 12 necessity question. And the EAC's decision is basically an
15:00:21 13 embodiment of how it determined that Kansas and Arizona have
15:00:27 14 not met that burden of establishing necessity for the
15:00:32 15 regulation. To the extent Mr. Kobach mentioned briefly that
15:00:49 16 the NVRA has several purposes, including the voter integrity
15:00:52 17 purposes of making sure that, you know, that -- I could flip to
15:00:58 18 the -- I could flip to the statute, but there are voter
15:01:01 19 integrity provisions, and the provisions of increasing
15:01:05 20 registration and making it a less burdensome process.
15:01:08 21 To the extent that those purposes of the statute
15:01:12 22 are in conflict, it's Congress that had the ability to balance
15:01:17 23 those out. What Mr. Kobach is trying to do, what the states of
15:01:21 24 Kansas and Arizona are trying to do, is upset the balance that
15:01:25 25 Congress did when it enacted the NVRA and had to make various

15:01:29 calls. You want to make the registration process easy. Yes,
15:01:32 you want to ensure that accurate and current voter registration
15:01:36 rolls are maintained. But if those things conflict, Congress
15:01:40 has to balance it out.
15:01:45 THE COURT: You're already a good five minutes
15:01:47 over. If you've got a critical point left, then you can make
15:01:50 it. Otherwise --
15:01:51 MR. HEARD: I'm being told that I have one very
15:01:53 important point to make, maybe two.
15:01:57 THE COURT: And the academy goes to?
15:02:03 MR. HEARD: We do not think -- right, I think I
15:02:06 mentioned this in my earlier argument, but we do not believe
15:02:09 that the court has the power, under the Administrative
15:02:13 Procedure Act, to stand in the shoes of the agency.
15:02:15 THE COURT: No, but I do have the power -- I mean,
15:02:17 this is a hypothetical. But if I decide, as Mr. Kobach is fond
15:02:22 of saying, that the agency had a nondiscretionary duty and it
15:02:26 failed to perform that, I do have the power to order the agency
15:02:29 to perform a nondiscretionary duty. I do not have the power to
15:02:32 order the agency to decide a discretionary call one way or the
15:02:36 other.
15:02:36 MR. HEARD: That's correct. And, obviously, you
15:02:40 know, as the Court -- as the Court is aware, I mean, to the
15:02:43 extent that the Court orders something and to the extent that
15:02:46 the EAC chooses not to appeal it, it'll obviously comply with

15:02:50 1 the Court's -- with the Court's order in that regard. But if
15:02:53 2 you found that there was a nondiscretionary duty, and that
15:02:58 3 would simply be a finding reviewing the decision of the agency
15:03:03 4 and finding that it was contrary to law because it was a
15:03:06 5 nondiscretionary duty.
15:03:07 6 THE COURT: Exactly.
15:03:08 7 MR. HEARD: Thank you, Your Honor.
15:03:08 8 THE COURT: Thank you.
15:03:12 9 Ms. Perales, are you going to lead off for our
15:03:15 10 intervenors?
15:03:19 11 MS. PERALES: Yes, Your Honor.
15:03:20 12 THE COURT: Very well.
15:03:20 13 MS. PERALES: And very quickly. Just picking up
15:03:22 14 on where the Court was a moment ago, there was some talk today
15:03:27 15 about whether or not the EAC has a nondiscretionary duty to
15:03:32 16 incorporate the changes from Kansas and Arizona. And I wanted
15:03:37 17 to point the court to some language in the ITCA decision at
15:03:43 18 2255, 56, in talking about the EAC and the federal forms in the
15:03:51 19 states.
15:03:52 20 THE COURT: Okay.
15:03:52 21 MS. PERALES: "States retain the flexibility to
15:03:54 22 design and use their own registration forms, but the Federal
15:03:59 23 Form provides a backstop. No matter what procedural hurdles a
15:04:04 24 State's own form imposes, the Federal Form guarantees that a
15:04:08 25 simple means of registering to vote in federal elections will

15:04:13 1 be available."
15:04:13 2 And this, of course, is because the language in
15:04:16 3 the NVRA about accept and use the Federal Form comes after the
15:04:20 4 words "in addition to" whatever the state is doing. So the
15:04:24 5 NVRA does not step in and tell states what to do with their own
15:04:28 6 state registration forms, but merely, in addition to whatever
15:04:31 7 the state is doing, it must accept and use the Federal Form.
15:04:34 8 And the language continues, "Arizona's reading
15:04:38 9 would permit a state to demand a federal of Federal Form
15:04:42 10 applicants every additional piece of information the State
15:04:46 11 requires on its state-specific form. If that is so, the
15:04:51 12 Federal Form ceases to perform any meaningful function, and
15:04:55 13 would be a feeble means of 'increas[ing] the number of eligible
15:04:58 14 citizens who register to vote in elections for federal
15:05:01 15 office.'" And that quote is from the NVRA.
15:05:03 16 The reason that I wanted to point the Court to
15:05:07 17 this language, within the context of the discussion, is that
15:05:10 18 here the court is recognizing that the Federal Form can be
15:05:14 19 different from state forms when it talks about the Federal Form
15:05:18 20 as a backstop. Clearly, the court recognizes that the Federal
15:05:23 21 Form will not always mirror the state form. And even more than
15:05:27 22 that, the court contemplates, rightly, that the agency will
15:05:32 23 sometimes say no to state requests to change the Federal Form.
15:05:38 24 So there's really, in the structure of this decision, an
15:05:43 25 understanding that the EAC is not going to incorporate every

15:05:47 1 state requirement into the Federal Form.
15:05:51 2 And the language, also just a fragment from
15:05:53 3 page 2259, which talks about validly conferred discretionary
15:06:00 4 executive authority, I think that's not consistent at all with
15:06:05 5 an interpretation in which the EAC has a nondiscretionary duty;
15:06:12 6 right? And, of course, my colleague, Mr. Heard, just reviewed
15:06:15 7 the language from gg-7, where the NVRA directs the EAC to
15:06:20 8 develop the Federal Form in consultation with the states.
15:06:24 9 In the ITCA decision, the only time the
15:06:28 10 nondiscretionary duty comes up is in conjunction with agency
15:06:33 11 inaction and the state proving that a mere oath will not
15:06:38 12 suffice. And that's connected to the language on the
15:06:42 13 constitutional issue, whether a federal statute precludes the
15:06:46 14 state from obtaining the information necessary to enforce its
15:06:50 15 voter qualifications. So we do see this nondiscretionary duty
15:06:54 16 language come in, but it's -- it is embedded in a couple of
15:06:59 17 other events, agency inaction and proving that the state is
15:07:03 18 precluded. So that was the first point that I wanted to make.
15:07:06 19 The second is that as much of a pleasure as it has
15:07:10 20 been today to re-argue chunks of the ITCA case, that case is
15:07:14 21 over, and I don't think that this is the appropriate forum for
15:07:18 22 the states to relitigate those issues, and specifically I mean
15:07:22 23 the states' attempt here today to argue that Congress lacks
15:07:26 24 authority to give discretion to the EAC under the Elections
15:07:31 25 Clause or similar arguments that somehow the Elections Clause

15:07:36 is inadequate to accomplish what the ITCA -- what the Supreme
15:07:40 Court recognized in ITCA can be done.
15:07:42 I understand that people can be frustrated with
15:07:45 the outcome of the case. In some ways I'm frustrated with the
15:07:49 outcome of the case, 'cause here we are kind of in a take two,
15:07:52 but I don't think that this is the appropriate forum for the
15:07:54 states to try to relitigate those issues.
15:07:56 THE COURT: Well, I think that case and this one
15:07:58 present related but different issues.
15:08:00 MS. PERALES: I agree, Your Honor. But to the
15:08:02 extent that we're being pulled back into some of the older
15:08:07 discussions that were so thoroughly litigated before, I wanted
15:08:10 to register my protest.
15:08:12 And then, finally, I think we're fairly clear now
15:08:17 that Kansas and Arizona have no examples of any federal forms
15:08:20 ever being used by noncitizens to register. There really
15:08:23 wasn't much of an argument offered there. This is not a
15:08:27 litigation about the Kansas form. There's nothing in the NVRA
15:08:31 that stops Kansas from using the Kansas form. Nothing here in
15:08:36 this case is challenging the use of the Kansas form.
15:08:39 But if the states want to come and ask for a
15:08:42 change to the Federal Form for its instructions, they must show
15:08:47 that noncitizens have registered to vote with the Federal Form.
15:08:51 I do not really understand how to respond to the argument
15:08:56 "nobody asked us to" because, first of all, that's not true.

15:08:58 As you can imagine, the ITCA case involved a great deal of
15:09:02 discussion about the fact that there was no evidence of
15:09:04 noncitizens registering to vote using the Federal Form. And
15:09:08 the record and all the depositions are replete with that issue.
15:09:13 So in the end we think that the states have not met this very
15:09:18 simple, very initial burden to bring us all here and to invoke
15:09:22 the Court's authority.
15:09:24 And then, finally, my last point, Secretary Kobach
15:09:30 said we have no way to look at voters and figure out who might
15:09:34 be a noncitizen. And I will direct the Court to, in the EAC
15:09:40 record, pages 611 to 624, which involve a declaration by
15:09:48 Mr. Bryant from the Secretary of State's office, where he talks
15:09:53 about looking at the motor vehicles' records here in Kansas,
15:09:58 and specifically looking to see whether there are any
15:10:02 registered voters who show up as also holding temporary
15:10:07 driver's licenses. And Mr. Bryant explains that temporary
15:10:12 driver's licenses are given to certain classes of noncitizens,
15:10:16 and so this is an initial way to look and see, not picking
15:10:21 people out by their last names.
15:10:22 THE COURT: Mr. Kobach's argument was you can't
15:10:24 look at the voter registration forms and decide who to
15:10:28 highlight.
15:10:28 MS. PERALES: Ahh, but that gets me to what can be
15:10:31 done, which is the exact kind of database checks that Kansas is
15:10:35 doing in Mr. Bryant, and what Arizona has done.

15:10:39 THE COURT: They do that on every voter
15:10:41 registration?
15:10:41 MS. PERALES: Yes, Arizona does it for every voter
15:10:43 registration application. And I wanted to give the court a
15:10:46 cite to the EAC record, which is 1023 to 1104. Those are
15:10:53 excerpts from a man who works for the Arizona Secretary of
15:10:56 State's office, where he talks about the software that takes
15:11:00 every voter registrant in Arizona and runs that person's
15:11:04 information through a whole series of databases, including
15:11:08 motor vehicles. And if there's no driver's license number,
15:11:12 they run the last four of the Social through the Social
15:11:15 Security database. The information is also run through vital
15:11:18 records for births and deaths, as well as court convictions.
15:11:22 And this is routinely done. It's done as part of
15:11:25 Help America Vote Act. It's done both to identify people and
15:11:28 make sure they are real people getting on the voter rolls and
15:11:31 not somebody's dog, but also meant to see if maybe there is an
15:11:34 instance in which somebody merits further review. It's exactly
15:11:38 what Kansas is doing in this declaration by Mr. Bryant. Let's
15:11:41 run our voter rolls against our driver's license rolls for
15:11:46 temporary driver's licenses, and let's see if -- and we get
15:11:48 some hits. And that's exactly what Mr. Bryant's talking about,
15:11:51 the 13 people. Mr. Kobach says, well, how could we identify
15:11:54 these 13 people in the first place, but that's exactly what
15:11:57 Mr. Bryant did; he identified them by doing this kind of

15:12:00 database match.

15:12:01 That doesn't -- and it isn't a prima facie case,
15:12:04 Your Honor, of noncitizen registration. It only means that
15:12:08 somebody in the past was not a citizen when he got his driver's
15:12:12 license and at some point in the future he registered to vote.
15:12:14 And, of course, something can happen in between those two
15:12:17 things, which is naturalization. It's as if to say that if
15:12:20 somebody files their taxes and declares no dependents and then
15:12:23 the following year declares a dependent, I don't think that's
15:12:26 prima facie evidence of lying on your taxes, but maybe that you
15:12:29 had a baby.

15:12:30 And so I do believe that the 13 or 12 people
15:12:34 identified by Mr. Bryant are not proven to be noncitizens, but
15:12:38 it does show that there's an alternative means, and that was
15:12:41 the point that I wanted to make to Your Honor. And those were
15:12:43 the record cites that I wanted to point out to you.

15:12:47 THE COURT: All right. Thank you very much,
15:12:48 Ms. Perales.

15:12:48 MS. PERALES: Thank you.

15:12:49 THE COURT: Mr. Keats.

15:12:54 MR. KEATS: Be very brief. This time I'll stand
15:12:58 here.

15:13:00 Just a couple of quick things. Mr. Kobach is
15:13:04 trying to present the Smiley case as dicta on the point of
15:13:08 registration being part of the time, place, and manner of how

15:13:11 elections are conducted, but I think Judge Posner in the ACORN v. Edgar case actually cites Smiley for the proposition, "Consistent with this point, the 'Manner' of holding elections has been held to embrace the system for registering voters." So it's not like --

THE COURT: Is that talking about states or the federal government there?

MR. KEATS: Say again?

THE COURT: Is he talking about states or the federal government in that citation you just gave?

MR. KEATS: The federal government.

THE COURT: All right.

MR. KEATS: So I think that just -- I can give the cite. It's 56 F.3d at 793.

And I'm just going at some point reemphasize what Ms. Perales said, the notion, you know, so much -- we can differ over what some of the record shows regarding noncitizens being registered to vote, but the notion that Mr. Kobach can now say, well, maybe there's some federal forms in this record that people have used to register to vote, you know, they've had these documents for a very long time, especially the Arizona case. They know the record. If they had them -- they know this case has been about the Federal Form -- for a very long time, I think they would have presented them, and they didn't. But the idea that you can speculate your way into

15:14:26 thinking that there are federal voter forms which people used
15:14:30 to lie to the election commissioners to get registered to vote,
15:14:34 illegal aliens, I don't think we get -- I don't think the EAC
15:14:37 had to do that as the finder of fact at the administrative
15:14:41 state, and I don't think that you have to do that. And that's
15:14:45 all I have. Thank you.
15:14:46 THE COURT: Thank you very much, Mr. Keats.
15:14:48 Mr. Freedman.
15:14:50 MR. FREEDMAN: Your Honor, Ms. Perales made the
15:14:52 two points I was going to make, so unless you have any
15:14:55 questions for me I'll yield my time.
15:14:56 THE COURT: The Court notes that he likes
15:15:00 Mr. Freedman. All right, I guess that leaves us with
15:15:05 Mr. Posner.
15:15:06 MR. POSNER: Well, I hope that doesn't imply the
15:15:08 negative.
15:15:09 THE COURT: Certainly not.
15:15:14 MR. POSNER: So I would like to make a few points
15:15:16 and answer some of the things that Secretary Kobach said, and
15:15:19 also just sort of underscore some of the things I said before.
15:15:24 So, again, to try to do that briefly.
15:15:26 So first I -- you know, one of the major points
15:15:29 that I made when I was standing up here before was that
15:15:31 ultimately, you know, when you consider all of the Supreme
15:15:35 Court's discussion of the Elections Clause, the qualifications

15:15:40 provision, Oregon v. Mitchell, et cetera, the court ultimately
15:15:44 resolves the whole issue by saying that the constitutional
15:15:48 controversy gets transmuted into a statutory issue because the
15:15:53 NVRA provides the means by which Arizona may obtain the
15:15:57 information needed for enforcement.
15:16:01 And so -- and by the way, so Justice Scalia
15:16:05 certainly does refer to "necessary" or "needed." I think those
15:16:08 two words are synonymous. And for that reason and for the
15:16:13 reasons that Mr. Heard, I think, explained very well, when you
15:16:17 then look to the statute, there are two key provisions: one is
15:16:21 that the EAC is to make the decision only in consultation with
15:16:26 the states, but certainly the states don't control the outcome;
15:16:30 and, secondly, the NVRA does speak to preemption and to proof
15:16:37 of citizenship by saying that only necessary information may be
15:16:40 included. And that's, you know, of course, what ITCA was
15:16:45 about, was about proof of citizenship. And the Supreme Court
15:16:48 said, well, that gets resolved by the EAC looking and deciding
15:16:53 whether that's necessary.
15:16:55 For that matter, you know, the whole question of
15:16:57 reviewing court that Mr. Kobach has referred to a couple of
15:17:01 times, in terms of what the Supreme Court's said near the end
15:17:07 of its opinion, that reference to a reviewing court then is
15:17:10 followed by a citation to the APA, so that's the kind of
15:17:13 reviewing court that Justice Scalia is concerned with.
15:17:17 So in terms of then -- so the standard in -- or

15:17:24 the question in part that the EAC had to determine was what
15:17:28 does "necessary" mean. And Secretary Kobach tried to minimize
15:17:34 that standard by saying, well, the standard is not strictly
15:17:37 necessary. And, of course, that adjective doesn't appear in
15:17:40 the statute, but I think the absence of that adjective doesn't
15:17:45 mean that the standard of necessity is a light one. I think
15:17:50 we, for example, in our brief, have pointed to the definition
15:17:54 of the word "unnecessary," and it does set a high standard. So
15:17:59 it's not something that is simply may be helpful or it may be
15:18:03 convenient or it may be useful, and, you know, we're not
15:18:08 conceding that any of those apply here. But even if -- even if
15:18:13 Kansas and Arizona were able to establish any of those things,
15:18:17 that still would not meet the standard of whether it's
15:18:20 necessary. And "necessary" does require looking at a whole
15:18:24 variety of factors, which the EAC did and which we summarize
15:18:28 with bullet points in our brief, so I won't repeat those here.
15:18:32 There are a couple of questions that are raised
15:18:36 sort of getting into maybe a little bit into the weeds of
15:18:42 Supreme Court decisions, past Supreme Court decisions, that the
15:18:47 Supreme Court, Justice Scalia, mentions in ITCA. So since they
15:18:51 came up again in the rebuttal, I thought I would mention them,
15:18:54 hopefully briefly.
15:18:55 One is the Oregon v. Mitchell case. And Oregon v.
15:19:00 Mitchell, it was a very unusual decision, because the ultimate
15:19:04 result of that decision was that Congress' -- Congress'

15:19:10 1 legislation providing that 18-year-olds could vote, that was
15:19:15 2 held to be constitutional for federal elections. And the odd
15:19:19 3 way in which the court reached that ruling was that four
15:19:22 4 justices concluded that Congress wasn't able or had the power
15:19:26 5 to make that decision about 18-year-olds to vote, and Congress
15:19:30 6 had the power under the Fourteenth Amendment to decide that for
15:19:32 7 both state and federal elections. Justice Black provided the
15:19:37 8 fifth vote, and he said under the Elections Clause Congress
15:19:40 9 could decide qualifications to vote and they could decide that
15:19:45 10 18-year-olds may vote in federal elections. So his vote tipped
15:19:50 11 the scales and, therefore, as a result of that legislation
15:19:53 12 being upheld, 18-year-olds could vote in federal elections,
15:19:58 13 subsequently there was a constitutional amendment which
15:19:59 14 provided for all elections.
15:20:01 15 So that, I think, is the specific thing that
15:20:03 16 Justice Scalia was concerned about, sort of rebutting any
15:20:06 17 notion that Justice Black's one vote somehow carried forth in
15:20:14 18 the future that the election -- that the Elections Clause kind
15:20:19 19 of decide qualifications. But he didn't then say that then the
15:20:23 20 Elections Clause is excluded from addressing how you enforce
15:20:28 21 that voter registration, and ultimately he came to that
15:20:31 22 sentence that I'm circling back to, the sentence that I've
15:20:34 23 emphasized about the statute providing the answer.
15:20:39 24 Also, the question came up about, you know, there
15:20:42 25 was some discussion about, you know, whether the decision of

15:20:48 the Supreme Court in the Smiley case was dicta. You know, I
15:20:55 generally agree that -- or I do agree that that is sort of
15:20:58 beside the point at this point, because of Justice Scalia
15:21:02 citing to it and relying upon it. But just to add one small
15:21:06 point, you know, from the danger of going into the weeds of
15:21:09 past Supreme Court precedent, but at the end of the paragraph
15:21:14 Justice Scalia also refers to this other older case, the ex
15:21:20 parte Siebold case that dates back to 1880, which also dealt
15:21:25 with Congress' authority under the Elections Clause. And that
15:21:29 decision was a case in which the Supreme Court -- what was at
15:21:34 issue was a federal statute that, among other things, allowed
15:21:38 federal officials to oversee, in person, the voter registration
15:21:42 process for federal elections, authorizing such officials to
15:21:46 review the registration rolls prepared by local officials, and
15:21:52 to directly undertake voter registration for such elections.
15:21:56 And that was the case that dealt directly with voter
15:22:00 registration and which Justice Scalia cited to with approval.
15:22:07 So I just mention that other case as well.
15:22:11 I also would join in what Ms. Perales was talking
15:22:15 about, in terms of the alternatives and how the states do use
15:22:22 DMV records. And one small point that may have been missed a
15:22:26 little bit in what she was saying is that the Help America Vote
15:22:30 Act actually requires states to use the motor vehicle rolls and
15:22:36 to compare the DMV database with the voter registration
15:22:41 database. So that's not only something -- that's not something

only that Kansas and Arizona may voluntarily be doing, but it's something that they are compelled by federal law to do. So regardless of the decision in this case, that's something that they will continue to do, to assess whether their rolls are accurate.

I think that pretty much concludes my presentation.

THE COURT: All right.

MR. POSNER: Thank you.

THE COURT: Thank you, Mr. Posner. Thank you, counsel. The case will be laboriously submitted, will be considered laboriously submitted. I appreciate all of your attendance and arguments. I hope nobody was expecting me to rule from the bench. We'll issue a written opinion, of course, as quickly as possible. The Court's in recess.

THE CLERK: All rise.

(Whereupon, the proceedings were concluded at 3:23 p.m.)

C E R T I F I C A T E

I, Johanna L. Wilkinson, United States Court Reporter in and for the District of Kansas, do hereby certify:

That the above and foregoing proceedings were taken by me at said time and place in stenotype;

That thereafter said proceedings were transcribed under my direction and supervision by means of computer-aided transcription, and that the above and foregoing constitutes a full, true and correct transcript of said proceedings;

That I am a disinterested person to the said action.

IN WITNESS WHEREOF, I hereto set my hand on this the 25th day of February, 2014.

s/Johanna L. Wilkinson
Johanna L. Wilkinson, CSR, CRR, RMR
United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN and PROJECT VOTE Plaintiffs, vs. BRIAN D. NEWBY, in his capacity as Executive Director of The United States Election Assistance Commission; and THE UNITED STATES ELECTION ASSISTANCE COMMISSION Defendants.	Case No. 16-cv-236 (RJL)

DECLARATION OF ERNESTINE KREHBIEL

I, Ernestine Krehbiel, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am a member of the League of Women Voters of Kansas. I was President of the Kansas League from May 2009 to May 2013, and am now an active member of the Wichita Metro League affiliate.

2. As President of the League of Women Voters of Kansas, I coordinated the activities of our local affiliates on a range of statewide issues. As part of that, I communicated

with our local affiliates and am still kept apprised of their activities. We often respond to policy matters pending before the Legislature.

3. The League of Women Voters of Kansas is a separately incorporated entity affiliated with the League of Women Voters of the United States. The Kansas League is a nonpartisan political organization that encourages informed and active participation in government. For nearly ninety-five years, we have promoted this mission through voter service and civic education by registering voters, educating the public on voting rights and other public policy issues, and hosting events. We have also promoted our mission through action to advocate for public policies that comport with our mission and the public interest.

4. One of the Kansas League's principal activities is running voter registration drives, often focusing on communities with a history of lower participation in elections and people who are less likely to have proof of citizenship, such as minorities, women, students, younger voters, the poor, and the elderly.

5. During my years as a League member and President, I have developed a deep understanding of problems with voter registration in Kansas, especially relating to the proof of citizenship requirement. I have encountered many eligible voters who have (1) been unable to register to vote because of the cost and/or difficulty of obtaining proof of citizenship documents; or (2) have registered only after spending a significant amount of time and/or money obtaining proof of citizenship.

6. One man I have helped try to register is named Robert Gann. Robert is over eighteen years old and was born in Texas. He meets the legal requirements to vote in Kansas elections, but does not have proof of citizenship. He lives in Kansas with his wife and young child. He hopes to vote in the upcoming election, but has not been able to afford the cost of

obtaining his birth certificate or another form of proof of citizenship. When I began to help Robert try to register, the minimum cost of obtaining a birth certificate from Texas was eighteen dollars; it is now twenty-two dollars. Because of his financial obligations to his family, Robert cannot afford the money it would cost to obtain a birth certificate, and therefore will likely be unable to register in the upcoming election unless he is able to use the federal voter registration form without providing proof of citizenship.

7. Kansas League member Mary Curtiss McCrea also faced significant difficulties registering to vote in Kansas. Mary moved to Wichita from Florida in 2013. She visited a local driver's license station in an attempt to register to vote and obtain a Kansas driver's license. After waiting for two hours, she showed her Florida driver's license, social security card, Medicare cards, and birth certificate. Because her birth certificate only showed her maiden name, Mary Bunnell Curtiss, the clerk refused to allow Mary to register. Mary drove back to her home, twenty minutes away, and retrieved a marriage booklet with photographs issued by the church in which she was married. The clerk refused to accept the document as proof of marriage. Mary returned home once again to retrieve her passport and brought it to the driver's license station. However, her passport listed her name as Mary Bunnell McCrea rather than Mary Curtiss McCrea, and the clerk registered her to vote under the name Mary Bunnell McCrea.

8. Because she was registered to vote under the wrong name, Mary feared she would not be able to vote. Eventually, Mary mailed a request to Cuyahoga County, Ohio, and received her marriage certificate. After gathering all her documents and writing an explanation of her problem and the experience she had attempting to register to vote, Mary returned to a different driver's license station. At that station, the clerk re-entered her information as Mary C. McCrea and issued her a proper driver's license.

9. The obstacles faced by Robert Gann and Mary McCrea are faced by thousands of Kansans. I have met many other Kansans with similar stories, some of whom simply stop trying to register because the burdens are too great. The proof of citizenship requirement prevents Kansans from registering and creates unnecessary expense and hurdles for many citizens. That burden falls more heavily on low income citizens and women.

10. In voter registration drives, the Wichita League typically offers applicants both the federal voter registration form and the state form. Before the Executive Director's January 29 decision, people without documentary proof of citizenship could use the federal form to register immediately. If the Executive Director's decision is enjoined, the Wichita League will likely use the federal form much more often.

11. If the proof of citizenship requirement is not removed from the federal voter registration form, many Kansans will be prevented from registering to vote in this year's primary and general elections.

12. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 4th day of March, 2016.

Ernestine Krehbiel
League of Women Voters of Kansas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN and PROJECT VOTE

Plaintiffs,

vs.

BRIAN D. NEWBY, in his capacity as the Acting Executive Director & Chief Operating Officer of The United States Election Assistance Commission; and

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendants.

Case No. 16-cv-236 (RJL)

SUPPLEMENTAL DECLARATION OF ANNE PERMALOFF

SUPPLEMENTAL DECLARATION OF ANNE PERMALOFF

I, Anne Permaloff, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. On February 15, I offered a declaration in connection with the League of Women Voters' motion for a preliminary injunction in the above-captioned matter.

2. I offer this supplemental declaration to describe the League of Women Voters of Alabama's planned voter registration activities in the coming weeks, and the effect of documentary proof of citizenship requirements on these activities.

3. I understand that Alabama of Secretary of State John Merrill has stated that his office would not enforce the documentary proof of citizenship requirement until March 1. To my knowledge, he has not stated that the State would delay any further in implementing this requirement. To my knowledge, the Secretary has never stated that the federal voter registration form would not be accepted for state and local elections, in addition to federal elections.

4. The state-specific instructions for Alabama on the federal form currently state that proof of citizenship is required.

5. Because of the results of the March 1, 2016 primary election, the state will hold a runoff election on April 12 for a number of offices. The registration deadline for this election is March 28.

6. Multiple local chapters of the League of Women Voters of Alabama have registration drives planned prior to March 28.

7. The Greater Birmingham League will be conducting voter registration drives in Bibb County on March 16, March 18, March 21, and March 23.

8. The Baldwin County League intends to conduct a voter registration drive at Faulkner State Community College in Bay Minette on March 23, in connection with Women's History Month.

9. The East Alabama League is planning to show the movie *Selma* on March 6 and will be registering voters at that time. In the following weeks, that league plans to visit Smiths Station High School and Lee County Youth Development Center to conduct voter registration.

10. If the proof of citizenship requirement is in effect during this period, as we have reason to believe it will be based on the Secretary of State's prior statement, it will significantly disrupt our efforts to register voters for the reasons I stated in my previous declaration.

11. Even if the Secretary of State does not plan to enforce the proof of citizenship requirement until a later date, the federal voter registration form currently lists a proof of citizenship requirement. The League uses both state and federal voter registration forms. We typically use the federal form in addition to the state form when we do registration drives on college campuses. Absent a documentary proof of citizenship requirement, we would use the federal form as a backup for potential registrants who do not have documentary proof of citizenship.

12. If the League is unable to register voters during the period between now and March 28, the opportunity to register voters for the runoff election will be lost forever. Moreover, it is our experience that we often do not get multiple opportunities to register an individual, so the opportunity to register that individual at any point in the future may be lost forever.

13. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 4th day of March, 2016.

Anne Permaloff
President
League of Women Voters of Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN and PROJECT VOTE

Plaintiffs,

vs.

BRIAN D. NEWBY, in his capacity as the Acting Executive Director & Chief Operating Officer of The United States Election Assistance Commission; and

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendants.

Civil Action No. 1:16-236 (RJL)

SUPPLEMENTAL DECLARATION OF ELIZABETH POYTHRESS

SUPPLEMENTAL DECLARATION OF ELIZABETH POYTHRESS

I, Elizabeth Poythress, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

Personal Background and Position

1. On February 15, I offered a declaration in connection with the League of Women Voters' complaint in the above-captioned matter.

2. I offer this supplemental declaration to describe the League of Women Voters of Georgia's planned voter registration activities in the coming weeks, and the effect of documentary proof of citizenship requirements on these activities.

3. I understand that Georgia Deputy Secretary of State Timothy K. Fleming has stated that his office would not enforce the documentary proof of citizenship requirement until after March 1. To my knowledge, he has not stated that the State would delay any further in implementing this requirement.

4. The state-specific instructions for Georgia on the Federal voter registration form currently state that proof of citizenship is required.

5. The state will hold a primary election for federal and state offices on May 24. The registration deadline for this election is April 26.

6. Multiple local chapters of the League of Women Voters of Georgia are currently planning their efforts to register voters ahead of the April 26 deadline, and a number of events are already in place.

7. Our local Leagues will again be helping people register to vote at naturalization ceremonies. We estimate that we will be present at 12 to 15 such events between March 1 and April 26—the precise number is subject to communicating with immigration officials. These

ceremonies typically include newly naturalized citizens from outside of Georgia, including neighboring Alabama. We have the federal form available at these events for those individuals.

8. Our Cobb County League is currently planning a registration event to take place in the coming weeks at Kennesaw State University in Kennesaw, Georgia, where our members will be especially focused on helping college students register to vote.

9. Our Atlanta-Fulton County League is currently planning to hold a registration drive in the Atlanta area in the coming weeks before the April 26 primary registration deadline.

10. As I mentioned in my previous declaration, the Georgia League obtained funding that allows us to make photocopies of citizenship documents at naturalization ceremonies. However, we and our local Leagues do not have the means to replicate this for our other registration activities, such as those on college campuses.

11. If the documentary proof of citizenship requirement is in effect during this period, as we have reason to believe it will be based on the Deputy Secretary of State's prior statement, it will significantly disrupt our efforts to register voters for the reasons state in my previous declaration.

12. Even if the Secretary of State does not plan to enforce the documentary proof of citizenship requirement until a later date, the federal voter registration form currently lists a proof of citizenship requirement.

13. If the federal form did not include a documentary proof of citizenship requirement, we would use it as a backup for potential registrants in Georgia who do not have documentary proof of citizenship.

14. The League already uses the federal form at naturalization ceremonies for newly naturalized citizens who live outside of the Georgia. At each of these, we typically encounter ten

to fifteen such individuals, including a normally sizeable portion from neighboring Alabama. To the extent that we would not have photocopying equipment available at a given ceremony, we will not be able to assist these voters.

15. If the League is unable to register voters during the period between now and April 26, the opportunity to register voters for the primary election will be lost permanently. Moreover, it is our experience that we often do not get multiple opportunities to register an individual, so the opportunity to register that individual at any point in the future may also be lost forever.

16. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this ___ day of March, 2016.

Elizabeth Poythress
President
League of Women Voters of Georgia

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on the 6th day of March, 2016, they caused one copy each of the foregoing SUPPEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION and attachments, to be served by electronic mail and/or the Court's ECF system on the following:

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March 6, 2016

Respectfully submitted,

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***Admitted pro hac vice*