IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' NOTICE OF ADVERSE AGENCY ACTION AND MOTION FOR RELIEF

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Defendants United States Election Assistance Commission and Alice Miller (collectively, "EAC" or "Defendants") respectfully submit this response brief in opposition to Kansas's and Arizona's (collectively "States'" or "Plaintiffs'") Notice of Adverse Agency Action and Motion for Relief, ECF Nos. 139, 140.

INTRODUCTION

Exercising its authority under the Elections Clause of the U.S. Constitution, Congress enacted the National Voter Registration Act ("NVRA") in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 42 U.S.C. § 1973gg(a)(3). In enacting the NVRA, Congress's goal was, *inter alia*, to increase voter registration and voter participation in federal elections. *Id.* § 1973gg(b). It did so in part by creating a unified and simplified application by which eligible citizens could register to vote by mail (the "Federal Form") and by giving one agency—originally the Federal Election Commission, and now the EAC—the discretionary authority to develop and maintain that Federal Form.

Plaintiffs seek to disrupt this carefully-crafted legislative framework by asking this Court to order the EAC to include on the Federal Form a requirement that applicants in those states provide additional proof of their United States citizenship as a precondition to registering to vote for federal elections. They request this relief notwithstanding that Congress and the EAC have already determined that such a requirement is unnecessary and inconsistent with the purposes of the statute because, among other reasons, the Federal Form already has the necessary safeguards to allow election officials to determine applicants' eligibility and citizenship status. Plaintiffs offer a number of arguments as to why the Court should vacate the EAC's comprehensive and

well-considered decision denying the States' requests, all of which are unpersuasive and thus should be rejected.[1]

First, the States now insist that, because the EAC currently lacks a quorum of commissioners, it had no authority to deny their requests. The Court should reject this argument because it has been waived. Plaintiffs did not present their lack of authority argument to the agency, and their failure to do so precludes them from pursuing it now. Furthermore, there is no support for Plaintiffs' contention that the EAC lacked the authority to deny their requests but somehow had the authority to grant them. The correct conclusion, as fully explained by the EAC in its decision, is that the agency's Executive Director had authority to act on the States' requests pursuant to a delegation of authority approved by a quorum of commissioners in 2008.

The Court also should reject Plaintiffs' argument that the EAC was under a nondiscretionary duty to grant their requests. As the Supreme Court has already recognized, the EAC's decisions regarding the contents of the Federal Form are discretionary in nature. Under the NVRA, it is the EAC, not the states, that has the discretion to determine what information is necessary to enable state election officials to assess applicants' eligibility. If there is any statutory ambiguity on this point, the Court must, under the well-settled *Chevron* doctrine, defer to the EAC's reasonable and permissible interpretation.

Finally, Plaintiffs fall well short in their attempt to overturn the agency's decision on procedural and substantive grounds. Their characterization of the EAC's decision making process as "quasi-judicial" is neither accurate nor relevant. The agency engaged in a thorough

[1] In addition to the arguments presented here, Defendants incorporate by reference their brief in opposition to Plaintiffs' Preliminary Injunction Motion, ECF No. 92, the consideration of which resulted in the Court's December 13, 2013 Order remanding this matter to the EAC, ECF No. 114.

consultative process, as contemplated by the NVRA, and reasonably exercised its discretion in reaching a well-supported, comprehensive, and rational decision.

STANDARD OF REVIEW

As the Supreme Court explained in *Arizona v. Inter Tribal Council of Arizona, Inc.*, ___ U.S. ___, 133 S. Ct. 2247, 2259-60 (2013), the agency's discretionary decisions with respect to Plaintiffs' requests to modify the contents of the Federal Form are subject to review under the Administrative Procedure Act ("APA"). Under the APA, the Court must affirm the agency's decisions unless Plaintiffs can demonstrate that they were "(A) arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).[2] This standard requires the Court to examine whether the agency's decisions were "based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *accord Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

Although judicial scrutiny is "to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park*, 401 U.S. at 416; *see also Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793-94 (10th Cir. 2010). The review is "substantially deferential," *Copar Pumice Co.*, 603 F.3d at 794, and the agency's action is entitled to a presumption of validity. *Schweiker v. McClure*, 456 U.S. 188, 200 (1982). A court may not substitute its judgment for that of the agency, but must only determine "whether the agency has 'articulated a rational connection between the facts found and the choice made.'" *Kisser v. Cisneros*, 14 F.3d

[2] Plaintiffs do not seek review under any of the remaining three review standards set out in 5 U.S.C. § 706(2), and those standards are in fact inapplicable.

615, 619 (D.C. Cir. 1994) (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)); *see also Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)).

ARGUMENT AND CITATION OF AUTHORITY

The EAC's Memorandum of Decision, ECF No. 129-1 [hereinafter "EAC Decision"], reflects the agency's careful and thorough consideration of the evidence in the record and the governing law, and fully and rationally explains the bases for its decision. The EAC Decision is easily sustainable under the applicable APA standards of review. Accordingly, the Court should affirm the EAC's decision and enter judgment in favor of Defendants.

I. THE EAC WAS FULLY AUTHORIZED TO ACT ON PLAINTIFFS' REQUESTS ABSENT A QUORUM OF COMMISSIONERS

In the brief accompanying their Notice of Adverse Agency Action, the States argue for the first time that the EAC lacked authority to deny their requests to modify the Federal Form's state-specific instructions due to the absence of a quorum of EAC commissioners. Specifically, they argue that the EAC Decision *denying* their requests is *ultra vires* and contrary to the quorum requirement set forth in Section 208 of HAVA, 42 U.S.C. § 15328, because it was rendered by the EAC's Acting Executive Director at a time when the agency had no sitting commissioners. Pls.' Br. (ECF No. 140) at 9-10. At the same time, the States assert that Section 208 of HAVA would have permitted the Acting Executive Director to *grant* their requests without the approval of a quorum of commissioners. *Id.*

As an initial matter, the States have waived their right to assert a challenge in this reviewing Court to the EAC's ability to act on their requests in the absence of a quorum of commissioners because they did not first present that argument to the agency. *See, e.g., Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1127 (10th Cir. 2009) (party cannot challenge in an APA

appeal something that it did not first present to the agency); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (same); *Excel Corp. v. USDA*, 397 F.3d 1285, 1296-1297 (10th Cir. 2005) (arguments not first presented to the agency are waived on judicial review); *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1167 (D.C. Cir. 2004) ("We do not consider this argument on its merits because it was not presented to the Commission below.").

Second, the States' argument that the EAC staff has the power to act when it acts in accordance with the States' wishes, but not otherwise, is internally inconsistent and illogical.[3] Either the agency staff has the authority to act in the absence of commissioners or it lacks that authority. Furthermore, even if the EAC were under a nondiscretionary duty to accede to the States' requests to modify the Federal Form's state-specific instructions to include additional proof of citizenship requirements, as the States argue, the agency would still have to take action to carry out that nondiscretionary duty. If Section 208 of HAVA precludes the EAC from taking "*[a]ny* action" without the approval of three commissioners, *cf.* Pls.' Br. at 9 (emphasis added), then even the carrying out of nondiscretionary duties would have to await the reestablishment of a quorum.[4] The States cannot have it both ways.

[3] The States' argument in this regard is the converse of the argument advanced by the League of Women Voters and Project Vote groups of Defendant-Intervenors before the agency. *See* EAC000764-66, EAC001810-13 (arguing that EAC staff has the ability, in the absence of commissioners, to deny the States' requests, but not to grant them). Those Intervenors' arguments are also unavailing.

[4] The Court could not compel an agency staff member to take a ministerial action that the agency itself is currently statutorily prohibited from taking. *See, e.g., Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995) (vacating district court's order compelling ministerial agency action when agency was statutorily prohibited from acting as a result of lack of appropriations); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1188-89 (10th Cir. 1999) (favorably citing *Envtl. Def. Ctr.*). Fortunately, the States and the Court do not find themselves in that predicament because, as discussed herein, the EAC Decision was issued under properly delegated authority. Indeed, despite its previously stated reservations about the agency's ability to act in the absence of commissioners, the Court ultimately remanded this issue to the EAC for final agency action based, in part, on the agency's representation to the Court that the agency had the legal ability to render a final determination and would do so if ordered by this Court. *See* Order of Dec. 13, 2013 (ECF No. 114) at 2; Hearing Tr. 12/13/2013 at 140:15-22. Neither Kansas nor Arizona disputed the agency's representation.

Third, as discussed in detail in the EAC Decision, EAC staff was authorized to act on the States' requests because a quorum of three EAC commissioners unanimously took action in 2008 to delegate authority to EAC staff to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC regulations and policies." EAC Decision at 15-20; Roles & Responsibilities Policy, EAC000064-72 [hereinafter "R&R Policy"]. The States concede that such subdelegations of authority by federal agencies to their subordinate staff are "presumptively permissible absent affirmative evidence of a contrary congressional intent," *see U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); however, they claim that the existence of a quorum requirement in Section 208 of HAVA evinces the requisite affirmative evidence of contrary congressional intent. Pls.' Br. at 15. Yet, the States miss the mark.

In its decision, the EAC determined that "the existence of a quorum provision in Section 208 of HAVA does not prohibit the Commission from delegating administrative and implementing authority to its subordinate staff, so long as such delegation of authority is 'carried out . . . with the approval of at least three of its members,' as it was in this instance." EAC Decision at 19 & n.8. The agency based this conclusion on the statutory analysis that the commissioners themselves set out in the R&R Policy, including: that HAVA contained no specific statutory prohibition against delegation and no language that otherwise spoke to delegation; that "HAVA says little about the roles of the Executive Director and the Commissioners," but the statutory structure suggests that there should be a "general division of responsibility" between the two; and that such a division of labor would "improve the operations of the agency" and avoid creating situations where the agency was "unable to function in a timely and effective [manner]." *Id.* at 18-19 (quoting EAC000065). The commissioners further determined that the processing of requests from individual states for modifications to the Federal

Form's state-specific instructions was an administrative function that involved interpreting and implementing existing EAC policies (as set forth in existing regulations) and federal law requirements, but did not require the staff to assume a policy-making role—thereby reflecting the appropriate division of labor that they sought to establish. *Id.* at 19-20.

The statutory analysis and interpretation in the EAC Decision is reasonable and persuasive, and consistent with the commissioners' findings and analysis in the R&R Policy. The agency's conclusion on this point is therefore entitled to deference. *See, e.g., McGraw v. Barnhart*, 450 F.3d 493, 500-01 (10th Cir. 2006) (deferring to agency's informal statutory interpretation where it "appears thoroughly considered and expresses valid reasoning" and "is not just its litigating position . . . [but] reflects the agency's consistent practice over a number of years"); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1241 (10th Cir. 2000) ("We owe some degree of deference . . . to an agency's interpretation of its governing statutes and regulations."); *Me. Dep't of Health & Human Servs. v. HHS*, 766 F. Supp. 2d 288, 300 (D. Me. 2011) (deferring to agency's statutory interpretation where it was "reasonable, well-considered, and consistent with its own interpretations and with the legislative history").

Additionally, the States erroneously cite *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687 (2010), for the proposition that Congress's inclusion of a quorum provision in Section 208 of HAVA necessarily indicates a congressional desire to prohibit the EAC's subdelegation of certain duties to its subordinate staff. In *New Process Steel*, the Court held that a specific quorum statute requiring a minimum of three board members for the transaction of business by the National Labor Relations Board prohibited a purported delegation by a qualifying quorum allowing only two members to transact the Board's business. *Id.* However, the Court specifically stated that its decision "does not cast doubt" on a qualifying quorum's previous

delegations of authority to subordinate staff (in that instance, regional directors and the general counsel). *Id.* at 684 n.4. Accordingly, *New Process Steel* supports, rather than casts doubt on, the EAC commissioners' 2008 delegation (through the R&R policy) of Federal Form maintenance and administration authority to EAC staff.

Thus, even if the Court finds that the States have not waived their right to contest the EAC's authority to act on their requests in the absence of a quorum of commissioners, the Court should affirm the agency's determination that it was authorized to act on the States' requests.

II. THE EAC'S DECISIONS WITH RESPECT TO THE CONTENT OF THE FEDERAL FORM INVOLVE THE EXERCISE OF DISCRETION

A. *As* Inter Tribal Council *Confirms, Congress Intended for the EAC to Exercise its Discretion in Articulating the Necessary Procedures and Requirements for Registering to Vote in Federal Elections.*

Plaintiffs continue to argue that the EAC has a nondiscretionary duty to modify the Federal Form's state-specific instructions to include the additional proof-of-citizenship requirements Plaintiffs seek. *See* Pls.' Br. at 1-9. However, as discussed in the EAC Decision at 23-27, Plaintiffs' argument is foreclosed by *Inter Tribal Council*, which specifically describes the EAC's decisionmaking under Section 9(b)(1) of the NVRA as "validly conferred *discretionary* executive authority." 133 S. Ct. at 2259 (emphasis added).

Pursuant to its plenary authority under the Elections Clause to regulate all aspects of voter registration in federal elections, *see id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("'Times, Places, and Manner,' are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including . . . regulations relating to '*registration*'") (emphasis added), Congress enacted the NVRA and charged the EAC with developing a Federal Form that could be used nationwide in states covered by the NVRA to register voters in federal elections. 42 U.S.C. § 1973gg-7(a)(2). Although Congress provided

that the EAC must develop the Federal Form "in consultation with the chief election officers of the States," it left the agency with the ultimate responsibility and discretionary authority to determine the Federal Form's contents and prescribe necessary regulations relating to the Federal Form. *Id.* § 1973gg-7(a)(1), (2). By requiring "consultation" with state election officials, Congress did not impose a mandatory duty upon the EAC to incorporate every suggestion made by those officials. Rather, consultation with the nation's election officials is designed to facilitate the EAC's responsible exercise of its discretion to develop the contents of the Federal Form.

In particular, the EAC is responsible for determining the "information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant" and ensuring that the Federal Form requires only such information. *Id.* § 1973gg-7(b)(1). When the Federal Election Commission originally promulgated the Federal Form in 1994, it "considered what items are deemed necessary to determine eligibility to register to vote and what items are deemed necessary to administer voter registration and other parts of the election process in each state." 59 Fed. Reg. 32311, 32312 (June 23, 1994). Likewise, the FEC determined that several pieces of information that some had suggested for inclusion on the Federal Form should be excluded "because they do not meet the 'necessary threshold' of the NVRA to assess the eligibility of the applicant or to administer voter registration or other parts of the election process." *Id.* at 32316. Specifically, the FEC determined that no additional information regarding citizenship, such as information relating to whether an applicant was a natural-born or naturalized citizen, was necessary to include on the form. *Id.* ("The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens

Only' will appear in prominent type on the front cover of the national mail voter registration form.").

Thus, the plain language of the NVRA, the previous actions of the FEC in promulgating the Federal Form, and the Supreme Court's recent *Inter Tribal Council* opinion all confirm that the EAC's decisions with respect to the content of the Federal Form are discretionary matters, not nondiscretionary matters, as the States argue. Additionally, Congress charged the EAC with the responsibility to "provide information to the States with respect to the responsibilities of the States under [the NVRA]." 42 U.S.C. § 1973gg-7(a)(4). This language likewise reveals Congress's intent that the EAC is responsible for defining for the States what the procedures and requirements are for the registration of voters in federal elections.[5]

B. The Court Must Defer to the EAC's Interpretation of the NVRA and Its Implementing Regulations.

As demonstrated above, the NVRA clearly grants discretion to the EAC to determine the contents of the Federal Form and, specifically, to determine the "information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C.

[5] In light of Section 9(a)(4) of the NVRA, Plaintiffs' references to Sections 5(c)(2)(B) and 6(a)(2) are of no moment. *See* Pls.' Br. at 2-4. Pursuant to Section 9(a)(4), the EAC is empowered to tell states what information is "necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process" within the meaning of Section 5(c)(2)(B), for purposes of the voter registration application used in connection with driver's license transactions. 42 U.S.C. §§ 1973gg-3(c)(2)(B), 1973gg-7(a)(4). Although the EAC has not issued formal interpretive regulations regarding Section 5(c)(2)(B), it has properly made that determination with respect to the Federal Form. Likewise, Section 6(a)(2) requires that any state-developed mail voter registration application must "meet all of the criteria" of the Federal Form "for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(2). Thus, while state-developed mail voter registration forms "may require information the Federal Form does not," *Inter Tribal Council*, 133 S. Ct. at 2255, this Court need not speculate as to what such additional information a state-developed form may include. It should suffice for present purposes that Congress charged the EAC with the power to determine the information necessary on the Federal Form to enable state election officials to assess an applicant's eligibility to vote. Finally, Section 8(a)(1) of the NVRA also generally requires that states timely register eligible applicants who submit valid applications in advance of the registration deadline. 42 U.S.C. § 1973gg-6(a)(1). This provision reinforces Congress's intent that an eligible citizen should be able to register to vote in federal elections by completing a simple application and should not be required to supply additional information not required by the application itself. This principle applies regardless of whether a person applies to register to vote through a driver's license bureau, a designated public assistance or disability agency, or through submission of a Federal Form or a state-developed mail-in registration form.

§ 1973gg-7(b)(1). But if the Court finds that the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The Court "need not conclude that the agency construction is the only one possible, or even that [the Court] would have so construed the statute had the issue arisen in a judicial proceeding." *Pharmanex v. Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000). The Court must instead "give effect to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.*

The key language here, of course, is the NVRA provision stating that the Federal Form "may require only such identifying information . . . *as is necessary to enable the appropriate State election official to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process." 42 U.S. C. § 1973gg-7(b)(1) (emphasis added). Plaintiffs argue that, under this provision, it is their prerogative to determine what is "necessary" to assess an applicant's eligibility. In other words, Plaintiffs contend that the NVRA requires the EAC to include anything on the Federal Form that a state deems necessary. As noted, however, the plain language of the NVRA directs the opposite conclusion: Congress vests the EAC with discretionary authority to formulate and maintain the Federal Form. Under *Chevron*, the Court's statutory analysis should end there.[6]

[6] In rejecting the States' requests, the EAC also considered that Congress had expressly rejected the idea of including a citizenship documentation requirement in the NVRA, finding that such a requirement was "not necessary or consistent with the purposes of this Act," and could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act[.]" H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep). *See* EAC Decision at 20-21 (*citing Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the [Plaintiffs] urge[] here weighs heavily against the [Plaintiffs'] interpretation.")). Plaintiffs contend that the EAC omitted pertinent contrary legislative history in making this finding. Pls.' Br. at 4-5. However, the passages Plaintiffs cite are not "helpful

(Cont'd…)

Should the Court disagree with the EAC's plain language analysis, Plaintiffs' arguments would still fail because the EAC's interpretation is permissible. If Congress wanted the *states* to determine what information is "necessary," it easily could have said that the Federal Form may only require such information "*as a state deems necessary*" to assess voter eligibility. But Congress did not do that. Under *Chevron*, the agency need not demonstrate that its interpretation is the only reasonable one, or even the best one. It just has to be permissible. 467 U.S. at 843, 866. For the reasons discussed above, the EAC easily clears that threshold. Indeed, as *Inter Tribal Council* makes plain, it is Plaintiffs' interpretation that is unreasonable. If the States could "demand of Federal Form applicants every additional piece of information the State requires on its state-specific form," the Federal Form would "cease[] to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *Inter Tribal Council*, 133 S. Ct. at 2256 (quoting 42 U.S.C. § 1973gg(b)).

The States fare no better in arguing that the EAC's determination is inconsistent with the agency's own regulations. The parties agree that the Court must defer to an agency's reasonable interpretation of its own regulations, *see* Pls.' Br. at 11-12, but disagree whether the EAC's interpretation warrants such deference. Specifically, the States argue that the EAC's decision denying their requests conflicts with 11 C.F.R. § 9428.3(b), which provides that "[t]he state-specific instructions shall contain . . . information regarding the state's specific voter eligibility and registration requirements." In their view, "[t]his regulation unambiguously uses mandatory

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because . . . [they] . . . [were] superceded (sic) and, in effect, contradicted by the language of the statute and the Conference report[.]" *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 n.4 (3d Cir. 1989); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 606 (1952) ("That language was superseded in the Conference Report by the language that was finally enacted).

language requiring the EAC" to defer to state law in maintaining the Federal Form. Pls.' Br. at 8.

The EAC properly and reasonably rejected this interpretation. As the agency concluded, consistent with the Federal Form's purpose under the NVRA (i.e., to facilitate the registration of voters for federal elections), the regulation "can only require the [Federal] Form's state-specific instructions to include voter eligibility and registration requirements relating to registration *for Federal elections*." EAC Decision at 45 (emphasis in original). Accordingly, the EAC properly found that it was "under no obligation" under 11 C.F.R. § 9428.3(b) to include instructions that relate only to state and local elections on the Federal Form. *Id*.

Because the EAC's interpretation of § 9428.3(b) is "neither plainly erroneous nor inconsistent with the [applicable] regulation[s]," *St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs.*, 309 F.3d 680, 711 (10th Cir. 2002), this Court should give the EAC "the benefit of the doubt as to the meaning of its regulation." *Id.* at 709 (citation omitted).

C. The Process by Which the EAC Decided the States' Requests Was Entirely Proper.

Having asked the EAC on multiple occasions to act on their requests—even going so far as to initiate litigation in this Court to compel such action—the States now challenge the manner in which the agency acted. Specifically, the States appear to object that the EAC sought input from all interested parties, considered and analyzed all of the numerous and varied comments, and then reached a conclusion as to whether the States had demonstrated a need to revise the Federal Form. Plaintiffs disparage this process as "quasi-judicial," Pls.' Br. at 7, but beyond that, offer nothing to demonstrate that the EAC proceeded improperly. There is, in fact, nothing unique (much less untoward) about the manner in which the EAC acted on the requests.

As an initial matter, the EAC's decisionmaking process was not "quasi-judicial," but rather discretionary. *Inter Tribal Council*, 133 S. Ct. at 2259. The agency's actions in receiving and evaluating information from the States was simply a form of the consultation that the NVRA explicitly contemplates. *Cf.* 42 U.S.C. § 1973gg-7(a)(2). The NVRA does not provide any guidance or limitations as to the parameters of that consultation process. *See Inter Tribal Council*, 133 S. Ct. at 2260 n.10 (noting that "the whole request process appears to be entirely informal"). Here, the EAC consulted with Arizona and Kansas by carefully considering their requests. It also solicited the views of other interested parties (including other states) and evaluated all of the information it received. Further, the agency reviewed and evaluated the controlling law (e.g., NVRA and HAVA) and EAC regulations, policies and procedures. All of these actions are consistent with the EAC's reasonable exercise of discretion in determining the contents of the Federal Form. The agency's decision does not establish any legal rights or obligations, other than determining the contents of the Federal Form, which the States are obliged to accept and use in the registration of voters for federal elections. Plaintiffs remain free to enforce their voter qualification requirements through all of the many other means available to them. *See, e.g.*, EAC Decision at 36-41.

Finally, Plaintiffs incorrectly contend that the EAC was required to articulate a "standard of proof," Pls.' Br. at 12-13 (citing *Mountain Side Mobile Estate Partnership v. HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995)). But *Mountain Side Mobile* merely stands for the unremarkable proposition that an agency must apply legal standards set forth in governing statutes or regulations. 56 F.3d at 1250-51 (discussing whether allegations of discrimination by mobile home park require a disparate impact or disparate treatment analysis under the Fair Housing Act). Because neither the NVRA, HAVA, nor EAC rules and regulations establish a standard of

proof governing the EAC's decision, the Court's review here is limited to whether the EAC has "provide[] this court with a sufficient basis to determine that appropriate legal principles have been followed[.]" *Id. (quoting Nielson v. Sullivan,* 992 F.2d 1118, 1119–20 (10th Cir. 1993) (additional quotation marks omitted). Here, the legal principles are those that apply to all APA challenges—whether the EAC, in rejecting the States' request, acted in a way that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. §§ 706(2)(A), (2)(C). As demonstrated below, the EAC easily meets that deferential standard.

III. THE EAC'S DECISION WAS NEITHER ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, NOR OTHERWISE CONTRARY TO LAW

The EAC thoroughly reviewed all submissions responding to its Notice and Request for Public Comment. *See* EAC Decision at 5-10. In particular, it carefully examined those portions of the submissions of Arizona and Kansas purporting to demonstrate that a small number of noncitizens have in past years registered to vote and/or voted in those states. In its decision, the agency provided a detailed recitation and analysis of that evidence, and explained its conclusion that the evidence failed to demonstrate that the States are precluded from enforcing their voter qualifications. *Id.* at 31-36. Throughout its decision, the EAC set out the evidence and rationale supporting each of its inferences and conclusions, and in all cases, the agency's analysis was supported by the evidence in the record.

A. The EAC did not ignore, discount, or misconstrue the States' submissions.

The EAC did not ignore, discount, or misconstrue the Plaintiffs' submissions. In fact, the EAC fully considered the comments submitted by Arizona and Kansas, including the letters submitted to the agency in 2006 by then-Arizona Secretary of State Jan Brewer, EAC000007-08, EAC000013, the 2008 district court decision issued in *Gonzalez v. Arizona*, No. 06-cv-1268 (D. Ariz. Aug. 20, 2008) (hereinafter "*Gonzalez 2008*"), EAC001651-99, and the declarations of

Kansas Deputy Secretary of State Brad Bryant, EAC000611-24. That the agency did not cite the specific portions of those documents identified by Plaintiffs in their brief, *see* Pls.' Br. at 14-18, does not mean that the agency failed to consider that evidence. It would be impractical and unnecessary for the agency to cite to the entire contents of its 1,912-page record.

For example, with respect to then-Secretary Brewer's letters of protest following the EAC's March 6, 2006, denial of Arizona's original request to include proof-of-citizenship instructions, *see* Pls.' Br. at 14-15, it is irrelevant that the Department of Justice interposed no objection under Section 5 of the Voting Rights Act to the implementation of Proposition 200. *See* EAC000009. Similarly, it is irrelevant that the district court in *Gonzalez v. Arizona* found at the TRO stage that the proof-of-citizenship requirements of Proposition 200 did not conflict with the NVRA, *see* Pls.' Br. at 15, since that holding was specifically overturned on appeal by the Supreme Court. *See Inter Tribal Council*, 133 S. Ct. at 2257; EAC Decision at 24-25.

The EAC did consider the findings of fact and conclusions of law issued by the district court in *Gonzalez 2008*, EAC Decision at 5-6, including that court's findings that preventing voter fraud and protecting voter confidence were important governmental interests in Arizona and its conclusion under the Equal Protection Clause that those interests outweighed the burden imposed by the proof-of-citizenship requirement. EAC001701-02 (citing *Gonzalez 2008*, slip op. at 34-35, EAC001684-85). However, as the EAC explained, the agency is bound not only by the Constitution, but also by the provisions of statute, regulation, and policy governing the Federal Form. EAC Decision at 20-27. Under applicable law, the agency's duty was to determine whether, in the absence of the requested instructions, the States were precluded from enforcing their voter qualifications, *id.*—not whether the States' proof-of-citizenship requirements are themselves an unconstitutional burden on the right to vote, the question that

was addressed by the *Gonzalez* court, *see Gonzalez 2008*, slip op. at 28-29, EAC001678-79 (describing constitutional standard).

In reaching the decision under review here, the agency had no need to—and did not purport to—assess the relative importance of the States' interests in preventing voter fraud, protecting voter confidence, and minimizing the burdens placed on eligible citizens seeking to register to vote. To the extent those reflect inconsistent or competing interests that relate to administration of the Federal Form, the proper balance between them was determined by Congress when it enacted the NVRA and HAVA, and by the EAC (and the FEC prior to the EAC's creation) in its governing regulations and policies. *See* EAC Decision at 20-27; Defs.' Br. (ECF No. 92, Nov. 27, 2013) at 2-4, 19-28. In any event, the court in *Gonzalez* did not conclude, as Plaintiffs now imply, that a "sworn statement is insufficient" to enforce the States' voter qualifications. *See* Pls.' Br. at 15-16.

With respect to Kansas, the EAC noted in its decision that the state had submitted several declarations, EAC Decision at 6, and the agency fully considered all of those declarations, including the three by Deputy Secretary Brad Bryant, EAC000611-24. The EAC explicitly acknowledged that the States had submitted evidence they contended "demonstrates that requiring additional proof of citizenship is necessary to enable them to enforce their citizenship requirements," EAC Decision at 33, and the agency proceeded to explain in detail why it came to a contrary conclusion based on all the evidence in the record, *id.* at 33-36. In particular, the agency detailed how and why it found that Deputy Secretary Bryant's statements that Kansas has "very few tools to identify noncitizens after they are registered to vote" and that "the only means of effectively ensuring that voter registration applicants are citizens is to obtain proof-of-citizenship at the time of registration," Pls.' Br. at 17-18, were conclusory and, in any event,

belied by evidence in the record that the States had a number of alternative means to identify potential noncitizens, and that the States had in fact used a number of those means already. EAC Decision at 36-41. Likewise, the EAC was entitled to conclude that Deputy Secretary Bryant's statement that "the total number of non-citizens who have registered to vote, is likely to be higher than the number of cases that we have been able to discover," EAC000620 ¶ 8, was simply speculative and not supported by record evidence.

B. The EAC did not "readily adopt[]" any conclusory statements from the submissions of Defendant-Intervenors.

In concluding that "granting the States' requests would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA," EAC Decision at 42, the EAC did not "readily adopt[] conclusory statements submitted by the Intervenors," as Plaintiffs argue in their brief, Pls.' Br. at 18. Rather, the agency based its conclusions on evidence submitted by a number of commenters, including, among others, detailed information submitted by the League of Women Voters Intervenor group describing the difficulties posed by the proof-of-citizenship requirements for the organization of voter registration drives. *See* EAC000771-73. The district court's findings in *Gonzalez v. Arizona* and news reports from Kansas indicating that each state's proof-of-citizenship requirements had resulted in a large number of voter registration applicants being kept off the voter rolls further informed the EAC's conclusion. *See* EAC Decision at 41-42 (citing *Gonzalez 2008*, slip op. at 13-14, EAC001663-64; EAC001823). The States provided no contrary evidence as to these points.[7]

[7] Plaintiffs criticize the agency for not pointing out that the *Gonzalez* plaintiffs were not able to establish that the 20,000 people who remained unregistered as a result of Proposition 200 were "in fact eligible to vote." *See* Pls.' Br. at 17 (quoting *Gonzalez 2008*, slip op. at 32, EAC001682). However, neither was Arizona able to establish that the 20,000 applicants were ineligible. Given the exceedingly small percentages of noncitizen registrants that the States were able to point to, *see* EAC Decision at 31-35, it would be reasonable to infer that most of those 20,000 (Cont'd…)

C. The States do not dispute the availability or efficacy of alternative means of enforcing their qualifications.

As noted above, other than referencing several vague and conclusory assertions by Deputy Secretary Bryant, the States do not dispute the availability or efficacy of many of the alternative means of enforcing their voter qualifications discussed by the agency in its decision. EAC Decision at 36-41. This in itself supports the conclusion that the EAC's decision was appropriate.

IV. CONCLUSION

For the foregoing reasons, the EAC Decision, ECF No. 129-1, should be AFFIRMED, and judgment should be entered on behalf of Defendants in regard to Plaintiffs' Notice of Adverse Agency Action and Motion for Relief.

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applicants were eligible to vote, but simply unable, for whatever reason, to supply additional proof of citizenship as required by Proposition 200.

Additionally, while the fourth declaration of Kansas Deputy Secretary of State Brad Bryant, submitted with Plaintiffs' Brief, *see* ECF No. 140-2, is outside of the record and thus not properly before the Court, it nevertheless would support the inference that many of Kansas's "suspense" applicants are, in fact, citizens who are eligible to vote. Bryant acknowledges that the state has recently been able to verify the citizenship of 7,700 (roughly 37%) of the approximately 21,000 citizens who remain unregistered as a result of Kansas's proof-of-citizenship law. Secretary Kobach has testified to the Kansas legislature that the state was able to confirm those citizens' status through checking birth records available through the Kansas Department of Health and Environment. *See* Dion Lefler, "Kobach: Birth-records scan helps 7,700 Kansas voters meet citizenship requirement," *Kansas City Star*, Jan. 23, 2014, http://www.kansascity.com/2014/01/22/4769084/kobach-birth-records-scan-helps.html (last accessed Feb. 5, 2014). As the EAC noted in its decision, requesting and verifying birth record data is one of many ways that states can enforce their voter qualifications without having to require additional proof of United States citizenship from applicants. *See* EAC Decision at 40-41. It is unclear how many "suspense" applicants were born outside of Kansas and thus could not be assisted by the process Secretary Kobach described to the legislature.

Respectfully submitted this 7th day of February, 2014.

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CERTIFICATE OF SERVICE

This certifies that I have this day filed the within and foregoing **Defendants' Response Brief in Opposition to Plaintiffs' Notice of Adverse Agency Action and Motion for Relief** electronically using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record through the Court's electronic filing system.

This 7th day of February, 2014.

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