Oral Argument Requested
Nos. 14-3062, 14-3072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

PROJECT VOTE, INC., *et al.*,

Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, No. 5:13-cv-04095-EFM-DJW
THE HONORABLE ERIC F. MELGREN

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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GLOSSARY

APA Administrative Procedures Act

ARS Arizona Revised Statutes

EAC Election Assistance Commission

HAVA Help America Vote Act, 42 U.S.C. §§ 15301 to 15545

ITCA *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

KSA Kansas Statutes Annotated

NVRA National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-10

VRA Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1

JURISDICTIONAL STATEMENT

The Appellees do not dispute the Appellants' and the Intervenors-Appellants' jurisdictional statements.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly conclude that the Election Assistance Commission ("EAC") has a nondiscretionary duty to modify the Federal Form's state-specific instructions to reflect Kansas's and Arizona's state laws requiring proof of citizenship from registering voters?

2. In the alternative, should the district court's order be affirmed because the EAC's denial of the States' requested modification to the instructions deprives the States of their exclusive authority to establish and enforce the qualifications of voters under Article I, Section 2 of the United States Constitution, or because the EAC acted in violation of the Administrative Procedures Act?

STATEMENT OF THE CASE

I. Introduction.

This case is a direct result of the United States Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"), 133 S. Ct. 2247 (2013). Plaintiffs-Appellees the State of Kansas, the State of Arizona, and their respective Secretaries of State Kris W. Kobach and Ken Bennett (collectively "the States"),

filed this case in response to the specific suggestion of the majority opinion in *ITCA*. *See id*. at 2260 n.10.

Both States require newly registering voters to provide proof of citizenship. In *ITCA*, the Supreme Court recognized that Article I, Section 2 of the United States Constitution (the "Voter Qualifications Clause") reserves to the States the exclusive power to establish the qualifications of voters and stated that "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id*. at 2258–59. The Court further stated that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id*. at 2258. On the other hand, the Court recognized that the National Voter Registration Act ("NVRA") requires States to "accept and use" the National Voter Registration Form ("Federal Form"), *id*. at 2257, which currently does not require registrants to provide documentary proof of citizenship. Therefore, the Court specifically suggested that Arizona renew its request to the EAC to modify the Federal Form to require proof of citizenship in the Arizona-specific instructions. If the EAC declined to honor that request, then the State should "seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed'" and/or

"assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form." *Id*. at 2260 n.10 (quoting 5 U.S.C. § 706(1)(2012)). That is precisely what Kansas and Arizona have done.

In this action, the States have challenged the EAC's refusal to incorporate their respective proof-of-citizenship requirements into the state-specific instructions for the Federal Form under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500–504 (2012). *Id*. at 2259–60. The district court held that "the EAC's refusal to perform its nondiscretionary duty to change the instructions as required constitutes agency action unlawfully withheld," App. 1448–49, and ordered the EAC to add the requested language, App. 1449. The EAC has appealed that ruling, and the States now respond.

II. The NVRA and the EAC.

Congress enacted the NVRA in 1993 with the following express purposes:

> (1) to establish procedures that will increase the number of *eligible* citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner than enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> (3) to protect the *integrity* of the electoral process; and
>
> (4) to ensure that accurate and current voter rolls are maintained.

42 U.S.C. § 1973gg(b)(1)–(4) (2006) (emphasis added). The NVRA requires each state to permit prospective voters to register to vote in elections for Federal office by any of three methods: simultaneously with a driver's license application, in person, or by mail. *Id.* § 1973gg-2(a) (2006). The Federal Form (which was intended principally to facilitate multi-state registration drives) includes a fillable form for the applicant's personal information as well as several pages of state-specific instructions. App. 79–103.

In 2002, Congress enacted the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301–15545, and in so doing, created the EAC, *id.* § 15321, an agency consisting of four appointed commissioners. The HAVA also transferred the responsibility of administering the NVRA from the Federal Election Commission to the EAC. *Id.* § 15532. The NVRA places upon the EAC the ongoing responsibility of updating the Federal Form, in consultation with the States' chief election officers, for the registration of voters for elections for federal office, 42 U.S.C. § 1973gg-7(a)(2) and in turn requires the States to accept and use the Federal Form to register voters for elections for federal office, *id.* § 1973gg-4(a)(1).

The NVRA provides that the Federal Form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* §

1973gg-7(b)(1). The NVRA also provides that the Federal Form "shall include statements that specify each eligibility requirement (including citizenship), contain an attestation of eligibility, and require the applicant's signature under penalty of perjury. *Id*. § 1973gg-7(b)(2). Lastly, the NVRA provides that the forms developed for voter registration "may not include any requirement for notarization or other formal authentication." *Id*. § 1973gg-7(b)(3). While the EAC is responsible for maintaining the Federal Form, Congress expressly denied the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. § 15329 (2006). There are three "components" to the Federal Form: the general application instructions, the form itself, and the state-specific instructions. App. 79–103.

The EAC's own regulations require "state-specific instructions" as a mandatory "component" of the Federal Form. *See* 11 C.F.R. § 9428.3(b) (2013). The regulation further mandates that "[t]he state-specific instructions *shall* contain ... information regarding the state's specific voter eligibility and *registration requirements*." *Id*. (emphasis added). The EAC requires that state election officials report and update it on the State's unique "voter registration eligibility

requirements" for the purpose of including and updating any requirements set forth in the "state specific" component of the Federal Form. *Id.* § 9428.6 (2013).

Pursuant to 42 U.S.C. § 15328, all actions that the EAC is authorized to take under Chapter 146 of Title 42 of the United States Code may be carried out only with the approval of at least three of its commissioners. The EAC has not had a quorum of commissioners since December 2010, and has not had any commissioners since December 2011. App. 53, ¶ 27; App. 284, ¶¶ 25–27.

In November 2011, the EAC's then-Executive Director, Thomas Wilkey, issued a memorandum ("the Wilkey Memorandum") that purported to implement a procedure for reviewing and processing States' requests for modification to the Federal Form. App. 104–05. The Wilkey Memorandum purported to confer authority to the EAC's Division of Research, Programs and Policy to make modifications to the Federal Form at the States' request when the proposed modifications are required by a change in state law, including proposed modifications that clarify existing state law. App. 104. It further stated, "Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum." App. 105. Under the Wilkey Memorandum, the EAC's Executive Director "will make the final determination with regard to each State request." *Id*. Appellant Alice Miller is the acting Executive Director ("Miller"). App. 50, ¶ 11; App. 254–55, ¶ 11; App. 1319.

III. Arizona Enacted Proposition 200 and Sought Inclusion of Its Proof-of-Citizenship Requirement in the State-Specific Instructions for the Federal Form.

In 2004, Arizona voters passed Proposition 200, which requires prospective voters to provide evidence of U.S. citizenship in order to register to vote (codified at Ariz. Rev. Stat. ("A.R.S.") § 16-166(F) (2010). App. 119–23. Proposition 200 also requires registered voters to present identification in order to cast their ballots at the polls. A.R.S. § 16-579 (2011). The initiative was designed in part "to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day." *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006).

Proposition 200 permits a variety of options to satisfy its proof-of-citizenship requirement. A.R.S. § 16-166(F). In most instances, providing proof of citizenship is accomplished by providing an identifying number that can be verified through government databases. Applicants who do not have any of these numbers can use copies of other documents such as birth certificates or passports. *Id.*

In 2005, Arizona requested the EAC to include Arizona's proof-of-citizenship requirement on the state-specific instructions for the Federal Form. App. 124–26. The then-EAC Executive Director declined to approve this state-specific requirement, apparently unilaterally. *Id.* The Director claimed that the

voter-approved measure was "preempted by Federal law." App. 125. Arizona's Secretary of State requested reconsideration of Mr. Wilkey's decision. App. 127–28.

In the interim, two groups of Arizona residents filed separate suits seeking to enjoin the voting provisions of Proposition 200 in the District of Arizona; the two suits were consolidated. App. 61, ¶ 70; App. 267, ¶ 70. In 2006, the district court issued an opinion and order denying the plaintiffs' request for a temporary restraining order that would have prevented Arizona officials from enforcing Proposition 200 stating: "Providing proof of citizenship undoubtedly assists Arizona is assessing the eligibility of applicants. Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA." App. 61–62, ¶ 71; App. 288, ¶ 71; Suppl. App. 000003.

The next day, Arizona again requested that the EAC reconsider Arizona's request to modify the state-specific instructions. App. 129–32. The EAC deadlocked, with two Commissioners voting in favor of amending the instructions and two voting against it. App. 133–37. Director Wilkey's original decision was permitted to stand, and the Federal Form has not been amended.

Gonzalez proceeded through the courts; and on June 17, 2013, the Supreme Court held that Arizona must accept and use the Federal Form to register voters for elections for federal office, but also held that Arizona could renew its request that

the EAC modify the state-specific instructions to include Arizona's proof-of-citizenship requirement and challenge the EAC's rejection of that request under the APA. *ITCA*, 133 S. Ct. at 2259–60. Following the *ITCA* roadmap, Arizona renewed its request to the EAC. App. 150–51. Acting Executive Director Miller responded, stating that the EAC "staff cannot process [Arizona's] request due to a lack of a quorum on the Commission." App. 157.

IV. Kansas's Legislature Enacted a Similar Proof-of-Citizenship Requirement.

In 2011, the Kansas Legislature passed, and the Governor signed into law, HB 2067, the "Secure and Fair Elections Act," which amended various Kansas statutes concerning elections. App. 55, ¶ 37; App. 285, ¶ 37. Section 8(*l*) of HB 2067, codified as Kan. Stat. Ann. ("K.S.A.") § 25-2309(*l*), provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." The statute enumerates thirteen different documents that constitute satisfactory evidence of citizenship, enabling Kansas election officials to assess the eligibility of voter registration applicants. *Id*.

On August 9, 2012, the Kansas Secretary of State's Office asked the EAC to modify the Kansas-specific instructions for the Federal Form to (1) change the voter registration deadline; (2) to delete the words "for mental incompetence" from

the portion of the instruction stating that to register to vote in Kansas an applicant must not be excluded from voting by a court of competent jurisdiction; and (3) to include an instruction that "[a]n applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote." App. 106. Miller responded, indicating that although the EAC would make the first two modifications, no action would be taken on the request concerning Kansas's proof-of-citizenship requirement, because this request "appears to have broad policy impact and would require consideration and approval of the EAC Commissioners." App. 107–08.

On June 18, 2013, Kansas Secretary of State Kris W. Kobach renewed Kansas's request for modification of the state-specific instructions in light of the *ITCA* decision. App. 109. Miller again responded, stating that "EAC must defer [Kansas's] request until the reestablishment of a quorum at EAC." App. 110.

V. Kansas and Arizona Filed Suit Against the EAC.

The States filed the instant action against Miller and the EAC under the APA. Specifically, they alleged that the EAC's refusal to modify the state-specific instructions in accordance with their duly enacted laws must be enjoined. App. 64–76. The States moved for a preliminary injunction to require the EAC to immediately modify the state-specific instructions. They later moved to expedite

the trial on the merits and to convert the preliminary-injunction motion into a summary-judgment motion.

The district court allowed four groups of voter advocacy organizations to intervene. App. 545–46. Thereafter, the district court found that there had been no final agency action by the EAC. App. 545. Accordingly, the district court remanded this matter to the EAC with instructions to render a final agency action; the district court also retained jurisdiction over the matter. App. 546.

The EAC issued a public notice and accepted public comment. App. 1274, at n.1. Miller determined that she had the authority to act on the requests on behalf of the EAC, issuing a 46-page decision denying Appellees' requests (the "EAC Decision"). App. 1274–1319.

The States then sought relief from Miller's decision in the district court. App. 33 at Dkt. 139–40; App. 1333–69. The district court held that the EAC had a nondiscretionary duty to update the state-specific instructions to reflect the States' proof-of-citizenship requirements, because any other interpretation of the NVRA would mean that the EAC could overrule a state's registration requirements, which would raise serious constitutional doubts. App. 1448. The district court ordered the EAC "to add the language requested by Arizona and Kansas to the state-specific instructions of the federal mail voter registration form immediately." App. 1449.

SUMMARY OF THE ARGUMENT

The NVRA cannot be read as permitting the EAC to second guess the States' proof-of-citizenship requirements. Doing so would permit a federal agency to displace the States' exclusive power to establish and enforce the qualifications for voting, found in the Voter Qualifications Clause. For that reason, the Supreme Court in *ITCA* recognized that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258–59. Accordingly, the Court described as "nondiscretionary" the EAC's duty to modify the Federal Form to include the States' proof-of-citizenship requirements. *Id*. at 2260. To interpret the NVRA otherwise would raise the constitutional doubts that the *ITCA* Court warned against. Moreover, if the NVRA were to be read as giving the EAC such power to overrule state registration requirements, then such a reading would effectively establish a federal preclearance requirement for State election laws, similar to that disapproved in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2623–24 (2013). That reading, too, would raise serious constitutional doubts and must accordingly be rejected.

As the district court in this case correctly determined, there is no language in the NVRA, express or implied, granting the EAC the authority to determine what information is necessary for state election officials to enforce voter qualifications.

App. 1447. Likewise, the NVRA does not address documentary proof of citizenship at all. Rather, the NVRA is silent on the subject. The district court was therefore correct to conclude that the NVRA does not prohibit the States' proof-of-citizenship requirements.

In the alternative, if the Court finds that it cannot read the NVRA in the same manner that the district court did and concludes that the NVRA does vest the EAC with the power to reject state registration requirements as "unnecessary," then the NVRA as applied in this matter would be unconstitutional. It would deprive the States of their exclusive constitutional authority to establish and enforce the qualifications of voters. Additionally, the decision of the district court may be sustained on the grounds that the EAC acted in violation of the APA. It did so by disregarding its own regulations, rendering factual findings and legal conclusions without reference to any specific legal standard, and by rendering a decision without the concurrence of three commissioners, as required by the NVRA.

ARGUMENT

I. The EAC Has a Nondiscretionary Duty to Modify the State-Specific Instructions of the Federal Form as the States Requested.

Because the text of the NVRA allows the States to determine what information is necessary to enable state election officials to assess the eligibility of voter registration applicants, the EAC has a nondiscretionary duty to include the

requested state-specific instructions. Moreover, as the district court correctly concluded, even if the text of the NVRA were unclear on the matter, the canon of construction requiring the avoidance of constitutional doubt demands that the NVRA be interpreted as giving the States, and not the EAC, the final authority to determine what is "necessary" to assess voter eligibility under 42 U.S.C. § 1973gg-7(b)(1).

A. The EAC's Expansive Interpretation of Its Own Authority Raises Serious Constitutional Doubts, and the District Court Therefore Correctly Applied the Canon of Constitutional Avoidance.

The *ITCA* Court held that under Article I, Section 2, of the U.S. Constitution, the States possess the exclusive power to establish and enforce voter qualifications for elections for federal office, and that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258–59. *ITCA* also clearly suggested what the correct decision by the EAC should have been. Pointing out that any law of Congress that attempted to restrict this exclusive power of the States would necessitate a constitutional ruling on the matter, the Court stated, "Happily, we are spared that necessity, since the statute provides another means by which *Arizona may obtain information needed for enforcement*." *Id*. at 2259 (emphasis added). The Court then suggested that the State renew its request to the EAC, with the expectation that the request would be

granted, and Arizona would thereby be able to obtain the proof-of-citizenship information needed for enforcement. *Id*.

In this case, the district court correctly determined that the EAC Decision raises the same serious constitutional doubts expressed in *ITCA* because it precluded the States from obtaining information they have deemed necessary to enforce their voter qualifications. App. 1435. The court therefore correctly applied the canon of constitutional avoidance in interpreting the NVRA as allowing the States—and not the EAC—to determine what information is necessary to assess the eligibility of Federal Form applicants. App. 1448.

The canon of constitutional avoidance is a cardinal principle of statutory interpretation requiring courts to construe federal statutes to avoid serious constitutional doubt. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011). Thus, "when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citation omitted). "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). The canon "requires merely a determination of serious

constitutional *doubt*, and not a determination of unconstitutionality." *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting); *see also United States v. La Franca*, 282 U.S. 568, 574 (1931) ("The decisions of this court are uniformly to the effect that 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'"). The canon of constitutional avoidance rests "on the reasonable presumption that Congress did not intend the alternative that raises serious constitutional doubts." *Clark*, 543 U.S. at 381. The courts must construe a statute so as to avoid constitutional doubts "so long as such a reading is not plainly contrary to the intent of Congress." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (citation omitted).

1. **The EAC's interpretation of its powers raises serious constitutional doubts because it trenches upon the States' exclusive constitutional authority to establish and enforce voter qualifications.**

Article I, Section 4, clause 1 of the U.S. Constitution, the Elections Clause, gives the States the initial authority to determine the time, places, and manner of holding federal elections, but gives Congress the power to alter those regulations or supplant them altogether. *ITCA*, 133 S. Ct. at 2253. The Supreme Court recognized that "[t]he Election Clause's substantive scope is broad" enough to authorize "regulations relating to 'registration.'" *Id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). But Congress's power under the Elections

Clause is limited: "[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id*. at 2257.

Instead, the Constitution gives the States the exclusive power to determine who may vote in federal elections. In particular, Article I, Section 2, clause 1, provides that the electors in each State for House of Representatives members "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise, the Seventeenth Amendment provides that the electors in each State for Senate members "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures," and Article II, Section 1, clause 2, states that "Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors.

Interpreting these provisions, the *ITCA* Court concluded, "Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *ITCA*, 133 S. Ct. at 2258 (internal quotation marks omitted). The Court therefore determined that "[p]rescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Id*. (quoting *The Federalist No. 60*, at 371 (A. Hamilton)). Rather, the Court held that these constitutional provisions expressly assign the power of establishing voter qualifications to the States. *ITCA*, 133 S. Ct. at 2258–59.

Importantly, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements," the Court held that the States' exclusive power to establish voter qualifications for federal elections includes the power to enforce those voter qualifications. *Id.* at 2258–59. Indeed, all nine justices in *ITCA* agreed that the States have the exclusive power to both establish and enforce voter qualifications for federal elections. *ITCA*, 133 S. Ct. at 2258–59; *id*. at 2261 (Kennedy, J., concurring); *id*. at 2262–64 (Thomas, J., dissenting); *id*. at 2270–73 (Alito, J., dissenting).

In light of the States' qualification power, the Supreme Court has elsewhere held, "States are thus entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (internal quotation marks and citation omitted). Similarly, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County*, 133 S. Ct. at 2623 (internal quotation marks and citation omitted). Therefore, the "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Id*. (internal quotation marks omitted). "The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made

between individuals, in violation of the Federal Constitution." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Since the States possess the constitutional power to establish and enforce voter qualifications for federal elections, the States' power can be limited only by the Constitution itself.[1]

Importantly, for the purposes of the instant case, *ITCA* specifically held that *it would raise serious constitutional doubts if the EAC were deemed to have the authority to reject Arizona's request*. The Court strongly suggested that the EAC must make the requested changes if Arizona (and Kansas) were to renew their requests:

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

ITCA, 133 S. Ct. at 2259. Accordingly, the district court below correctly determined that the EAC's interpretation of the NVRA that gave it the power to reject the States' requests raised serious constitutional doubts. It prevented Kansas and Arizona from obtaining the information that they deemed necessary to enforce their voter qualifications. And such power vested in a federal agency would be in

[1] Notably, the EAC Decision nowhere suggested that Kansas's or Arizona's proof-of-citizenship laws are unconstitutional, nor has any party made such a claim in this action.

conflict with Article I, Section 2 of the United States Constitution. App. 1435. The district court therefore correctly applied the canon of constitutional avoidance and held that the NVRA cannot be read as giving the EAC the power to reject the States' requested instructions.

Conversely, Appellants argue that the States' power to enforce voter qualifications is limited to requiring information that is "necessary" for enforcement and that the EAC has the authority to second-guess the States in determining what is "necessary." EAC Opening Br. 16; Intervenors' Opening Br. 46. However, the word "necessary" comes not from the constitutional provisions empowering the States to establish and enforce voter qualifications, but from the NVRA. *See* 42 U.S.C. §§ 1973gg-3(c)(2)(B)(ii), 1973gg-7(b)(1). Needless to say, the States' constitutional power to establish and enforce voter qualifications cannot be limited by a statute enacted by Congress. Thus, Congress can no more limit the States' power to enforce voter qualifications (e.g., proof of citizenship) by mere statutory enactment than it could limit the States' power to establish those voter qualifications in the first place (e.g., United States citizenship).

Because the EAC's interpretation of its own power would preclude the States from determining how to enforce voter qualifications, the district court concluded that it raises serious constitutional doubts by trenching upon the States' exclusive authority under Article I, Section 2. The court properly utilized the canon

of constitutional avoidance in support of its holdings that: (1) the NVRA did not prevent a state from adopting proof-of-citizenship requirements or prevent such requirements from being added to the Federal Form; (2) the States, not the EAC, have the discretion to determine what information is "necessary" for assessing voter eligibility under the NVRA; and (3) the EAC Decision was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* App. 1432–33 (utilizing canon of constitutional avoidance in determining the NVRA does not preempt the Plaintiff's proof-of-citizenship requirements); App. 1435–36 (canon of constitutional avoidance trumps *Chevron* deference); App. 1447–48 (the EAC's discretion is limited by constitutional concerns). In all of these respects, the holding of the district court should be affirmed.

2. The EAC's interpretation of its powers under the NVRA also raises serious constitutional doubts because allowing the EAC to determine what information is "necessary" would constitute an unconstitutional preclearance system.

Construing the NVRA to place upon the EAC the nondiscretionary duty to include the States' requested state-specific instructions on the Federal Form is also necessary to avoid raising serious constitutional doubts for a second reason. This is because the contrary interpretation would result in States effectively needing the EAC's preclearance before exercising their constitutional authority to establish and enforce voter qualifications.

In *Shelby County*, the Supreme Court struck down Section 4(b) of the Voting Rights Act of 1965 ("VRA"), which implemented a formula requiring certain States to obtain federal permission under Section 5 of the Act, before enacting any laws relating to voting. 133 S. Ct. at 2631. In doing so, the Court emphasized that when the VRA was originally upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), it was because "exceptional conditions can justify legislative measures not otherwise appropriate." *Shelby County*, 133 S. Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 334); *see also id.* at 2624 ("We recognized that it 'may have been an uncommon exercise of congressional power,' but concluded that 'legislative measures not otherwise appropriate' could be justified by 'exceptional conditions.'") (quoting *Katzenbach*, 383 U.S. at 334); *id*. at 2625 ("In short, we concluded that '[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.'") (quoting *Katzenbach*, 383 U.S. at 334–35).

The Supreme Court contrasted the extraordinary provisions of the VRA with the fundamental principles of state sovereignty, stressing that the federal government does not have a right to veto state enactments before they go into effect:

> State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect.

. . . .

> The Voting Rights Act sharply departs from these basic principles. It suspends all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . . .

Shelby County, 133 S. Ct. at 2623–24 (internal quotation marks and citations omitted).

The same analysis applies here. Requiring the States to beseech the EAC to include the States' requested instructions on the Federal Form amounts to preclearance of the kind criticized in *Shelby County* but without any of the reasons that justified the VRA when it was enacted. The Fifteenth Amendment authorized Congress to pass legislation protecting the right to vote without discrimination on the basis of race or color and therefore supported the original enactment of the VRA. *Shelby County*, 133 S. Ct. at 2629. No such constitutionally enumerated power supports granting the EAC discretion to preclude the States from enforcing their voter qualifications laws. Indeed, the Supreme Court unanimously agreed that the States have the exclusive power to establish and enforce voter qualifications for federal elections. *ITCA*, 133 S. Ct. at 2258–59; *id*. at 2261 (Kennedy, J., concurring); *id*. at 2262 (Thomas, J., dissenting); *id*. at 2270 (Alito, J., dissenting). And exceptional circumstances justified the enactment of the VRA.

Shelby County, 133 S. Ct. at 2624–25. No such exceptional circumstances support a requirement that States obtain preclearance from the EAC before being allowed to establish and enforce their voter qualifications laws.

Because requiring the States to register people to vote who have not fulfilled the States' proof-of-citizenship requirement would exceed Congress's powers, this Court should construe the NVRA to require the EAC to include States' requested instructions on the Federal Form.

3. Appellants misread ITCA as resolving all constitutional doubts.

Appellants disagree with the district court's conclusion that the EAC's interpretation of its own authority under the NVRA raises serious constitutional doubts. Instead, they argue that the *ITCA* decision *resolved* all constitutional doubt by recognizing that Arizona could potentially obtain a modification of its state-specific instructions by proving to the EAC's satisfaction that the proposed instruction was necessary. EAC Opening Br. 28–33; Intervenors' Opening Br. 28–31.

This argument, however, misconstrues *ITCA*, which merely stated that Arizona's request, along with its attendant constitutional issues, should be resubmitted to the EAC and that any refusal by the EAC to grant the request should be reviewed under the APA. *ITCA*, 133 S. Ct. at 2260. *ITCA* does *not* state that the EAC has the discretion to determine whether a State's requested instruction is

"necessary" or that the EAC's determination is to be reviewed solely for abuse of discretion under the APA. Rather, the Court left unanswered (but labeled as "raising serious constitutional doubts") the question of whether the NVRA could be read to authorize the EAC to limit the States' power to enforce voter qualifications without trenching upon Article I, Section 2. That question might be answered in a subsequent challenge under the APA—the very challenge the States have raised in this case. *ITCA*, 133 S. Ct. at 2259, 2260 n.10.

The APA itself contemplates relief for constitutional violations. 5 U.S.C. § 706(2)(B). Any constitutional questions that arise during APA review fall expressly within the domain of the Article III courts, which review any constitutional determination rendered by an agency *de novo*. *Darden v. Peters*, 488 F.3d 277, 284–85 (4th Cir. 2007); *Westar Energy Co. v. U.S. Dep't of Interior*, 932 F.2d 807, 809 (9th Cir. 1991).[2] Thus, Appellants' contention that there is no

[2] Appellants erroneously contend that APA review is limited to whether an agency abused its discretion or acted arbitrarily or capriciously. EAC Opening Br. 30-31; Intervenors' Opening Br. 7, 31. They therefore mistakenly assume that *ITCA* must have intended the EAC to have the discretion to determine what information is "necessary" under the NVRA because otherwise the Court would not have directed Arizona to submit its request for modifications to the Federal Form to the EAC with subsequent APA review. EAC Opening Br. 26–27; Intervenors' Opening Br. 29. But that result does not follow. Since APA review includes *de novo* review for constitutional questions, there is no reason to read into *ITCA* a holding not evident from the language of the opinion itself. Indeed, a much-less-strained reading of *ITCA* is that the serious constitutional doubts arising from the EAC's refusal to grant Arizona's request would be resolved in future litigation under the APA.

constitutional doubt because the EAC's decision can be reviewed under the APA for abuse of discretion is simply wrong. Instead, and as the district court correctly concluded in this case, App. 1432, *ITCA* stopped short of resolving the constitutional questions attending the EAC's refusal to adopt Arizona's requested state-specific instruction, opting instead to allow such constitutional questions to be addressed in a subsequent APA challenge.

The *ITCA* decision therefore clearly anticipated that constitutional questions would remain to be resolved through judicial review under the APA.[3] And the Court specifically contemplated that the EAC's authority could be construed in a manner that raised constitutional doubts or avoided constitutional doubts, and advised the latter. *ITCA*, 133 S. Ct. at 2259. The Court characterized the EAC as having "a nondiscretionary duty" to include Arizona's proof-of-citizenship requirement upon establishing to an Article III court "that a mere oath will not suffice to effectuate its citizenship requirement." *Id.* at 2260. Reflecting on this language, the district court correctly concluded: "So, at the least, the [*ITCA*] opinion establishes that there is a point at which the EAC loses whatever discretion it possesses to determine the contents of the state-specific instructions." App.

[3] Indeed, there would otherwise be no reason for the Court to have noted that Arizona might be in a position to assert a constitutional right to enforce its proof-of-citizenship requirement apart from the Federal Form if the EAC was without authority to act on Arizona's renewed request, thereby potentially foreclosing effective APA review. *See ITCA*, 133 S. Ct. at 2260 n.10.

1447. Accordingly, the district court correctly concluded that the EAC's expansive view of its own authority raises serious constitutional doubts, many of which were highlighted by the *ITCA* decision itself, and correctly applied the canon of constitutional avoidance.

B. The NVRA Allows the States to Determine What Information Is Necessary to Enable State Election Officials to Assess the Eligibility of Federal Form Applicants.

The district court determined that the "NVRA does not address documentary proof of citizenship at all, neither allowing it or prohibiting it." App. 1442. The court also noted that the EAC's own regulations require the EAC to list a State's "statutory registration requirement on the federal form's state-specific instructions." App. 1443. The court found that the regulations are consistent with "a natural reading of the statute," which "suggests that a state election official maintains the authority to assess voter eligibility and that the federal form will require information necessary for the official to make that determination." App. 1444. Finally, the court concluded that "consistent with the determination of both states' legislatures, proof of citizenship is necessary to enable Arizona and Kansas election officials to assess the eligibility of applicants under their state laws." App. 1446.

Appellants argue that the district court's holding is inconsistent with the text of the NVRA, its purpose, its legislative history, the EAC regulations, and *ITCA*. But these arguments lack merit.

1. **The NVRA's text indicates that Congress intended the EAC to include information in the Federal Form that the States deemed necessary to assess the eligibility of the applicant.**

Appellants attempt to use legislative history to argue that Congress intended to preclude a proof-of-citizenship requirement in the Federal Form, even though the NVRA does not say so. Intervenors' Opening Br. 48–49. The district court rejected this argument because the text of the NVRA does not address the subject. App. 1442 at n.92 (relying on *Shannon v. United States*, 512 U.S. 573, 583 (1994) for the proposition that "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference"). Moreover, the legislative history supports the States here because Congress expressly prohibited the Federal Form from including a notarization requirement, but did not prohibit a proof-of-citizenship requirement. 42 U.S.C. § 1973gg-7(b)(3); *cf. Bruesewitz v. Wyeth, LLC*, 131 S. Ct. 1068, 1076 (2011) (a statute that explicitly prohibits one thing and does not prohibit another represents "deliberate choice, not inadvertence").

The EAC argues that the text of the NVRA gives it the authority to determine what state election officials need to assess the eligibility of registration

applicants. EAC Opening Br. 17–22. The EAC relies on the NVRA language that requires the EAC to create the Federal Form and prescribe regulations necessary to carry out its responsibility to develop the Federal Form. *Id*. at 19. But the congressional language concerning what must go into the Federal Form instructs the EAC to include 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). If the state election official, not the EAC, assesses the eligibility of the applicant and administers voter registration, it only makes sense that the state official, not the EAC, makes the determination of what is necessary to perform these duties.

This interpretation of NVRA's language is consistent with the NVRA provision that requires States to include a voter registration application form as part of the State's driver's license application, 42 U.S.C. § 1973gg-3(c)(1) ("Motor Voter Form"). Congress prescribed the contents of the Motor Voter Form with language that is nearly identical to the prescribed contents of the Federal Form: The Motor Vehicle Form "may require only the minimum amount of information necessary to . . .enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-3(c)(2)(B). Similarly, in permitting States to develop their own registration application form for federal voter registrants ("State

Form"), Congress prescribes the contents of the form in language that is identical to the language describing the contents of the Federal Form. 42 U.S.C. §§ 1973gg-4(a)(2), -7(b)(1). Because *the EAC has absolutely nothing to do with the development of the Motor Voter Form or the State Form*, it is clear that Congress did not use this language to confer upon the EAC the authority to determine what is necessary for state election officials to assess voter eligibility when it authorized the EAC to develop the Federal Form.[4]

"A core tenet of statutory construction is that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1131 (10th Cir. 2011) (quoting *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994) (internal quotation marks omitted). Given the States' constitutional authority over voter eligibility, and Congress's use of the phrase "necessary for state election officials to assess the eligibility of applicants" to prescribe the contents of the three registration forms, and given Congress's specific mandate that EAC develop the Federal Form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg-7(a)(2), Congress clearly intended to give the States the discretion to decide what

[4] The Supreme Court adopted this interpretation of § 1973gg-3(c)(2) in *Young v. Fordice*, 520 U.S. 273 (1997), where it noted that the driver's license application portion of the NVRA "still leaves room for policy choice," and explained that "[t]he NVRA does not list, for example, all the other information the State may—or may not—provide or request." *Id*. at 286.

they need to assess applicant eligibility. *See Wyodak* , 637 F.3d at 1131 ("[a]bsent some very good reason to conclude that Congress intended [the identical language] to have two different meanings within the very same act, such a tortured interpretation should be avoided").[5]

2. The NVRA's stated purpose is consistent with allowing States to determine what is necessary to assess applicants' eligibility.

The EAC argues that allowing the States to determine what is necessary to assess the eligibility of applicants is inconsistent with the NVRA's purpose. EAC Opening Br. 24–25. But the EAC ignores NVRA's express purpose of protecting election integrity. In enacting the NVRA, Congress expressly stated its purposes. 42 U.S.C. § 1973gg(b). Although Congress indicated an intention to increase voter registration, it was also concerned with the integrity of the election process and ensuring that only eligible voters are registered. *Id*.

Allowing the States to determine what is necessary to assess the eligibility of registration applicants is consistent with Congress's purpose of protecting the integrity of elections. Under the NVRA, States are responsible for ensuring voter eligibility. For example, the NVRA requires each State, as administrators of

[5] Given the States' constitutional authority over voter eligibility requirements and the limiting of congressional authority to the "the times, places and manner of holding *elections*," U.S. Const. art. 1, § 4, cl. 1 (emphasis added), it makes sense that Congress recognized this language as necessary to preserve the States' authority to enforce voter eligibility requirements.

federal elections, to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). It also requires state election administrators to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. *Id.* § 1973gg-6(a)(4); *see also Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275–76 (D. Colo. 2010) ("States must strive to add eligible voters and to remove ineligible ones."). Because the NVRA makes the States responsible for ensuring voter eligibility, it is consistent with NVRA's election-integrity purpose to interpret the phrase "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" as giving the States the authority to determine what is necessary to assess the eligibility of the applicant. Indeed, a contrary interpretation is at odds with the NVRA's purpose and statutory scheme.

While the States acknowledge the NVRA's goal of streamlining the registration process, even the EAC recognizes that there is a limit to that streamlining. There are three "components" to the Federal Form: the general application instructions, the form itself, and the state specific instructions. App. 79–103. The state-specific instructions account for seventeen of the Federal Form's twenty-five pages. Nearly all of the state-specific instructions require that

the registrant provide additional identifying information on the Federal Form. App. 79–103. For example, to register in Colorado, the Federal Form "must contain your state issued driver's license number or identification." App. 88. In Louisiana, if an applicant does not have a driver's license, a state identification card, or a social security card, the applicant must attach either "a copy of a current valid photo identification" or other current official information that shows the applicant's name and address. App. 92. Thus the structure of the Federal Form is itself evidence that the NVRA's streamlining goal is subservient to the constitutional authority of each State to establish and enforce its own voter qualifications.

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

The EAC argues that the district court incorrectly interpreted its regulations because the regulations distinguish between eligibility requirements and procedural registration requirements. EAC Opening Br. 23. The EAC regulations do not make any such distinctions. The district court correctly concluded there is no conflict between the EAC regulations and the court's construction of NVRA as allowing the States to determine what information is necessary to assess voter eligibility: "[N]aturally reading [the EAC] regulations together suggests that 1) a state may have additional voter eligibility requirements, 2) a state must inform the

EAC of its voter eligibility requirements, and 3) the EAC must list those requirements in the state specific instructions." App. 1445.

The EAC regulations provide that "[t]he state-specific instructions *shall* contain the following information for each state, arranged by state: the address where the application should be mailed and *information regarding the state's specific voter eligibility and registration requirements*." 11 C.F.R. § 9428.3(b) (emphasis added). This regulation unambiguously uses mandatory language requiring the EAC to include state-specific instructions that reflect the respective *voter qualification and registration laws* of the States.[6] The EAC regulations require that the Federal Form specify each eligibility requirement (including citizenship) "and include by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompanying state instructions." 11 C.F.R. § 9428.4(b)(1). The regulations also require the state election official to "notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported

[6] The EAC's regulation is consistent with the guidelines of its predecessor, the Federal Election Commission. *See* The National Clearinghouse on Election Administration, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* (Jan. 1, 1994), *available at* http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%20199 3%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201 %201994.pdf (last visited on June 30, 2014). In the Guidelines, the FEC highlighted Congress's desire to avoid a construction of the NVRA that would displace the role of state officials regarding voter registration.

under this section." *Id.* § 9428.6(c). Thus, there is nothing in the regulations supporting the EAC's claim that it has the discretion to refuse state eligibility requirements.

4. **The district court's decision is consistent with ITCA.**

Appellants argue that the district court's interpretation is inconsistent with *ITCA*. EAC Opening Br. 26–28; Intervenors' Opening Br. 27–41. However, as explained below, the court's conclusion that the EAC had a nondiscretionary duty to include information that States deem necessary to determine eligibility was perfectly consistent with *ITCA*. *See* App. 1447.

In *ITCA*, the Supreme Court determined that Arizona could not require evidence of citizenship from Federal Form users if that requirement was not included on the Federal Form. 133 S. Ct. at 2257–60. The Court concluded "that the fairest reading of the [NVRA] is that a state-imposed requirement of evidence of citizenship is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Id*. at 2257. Contrary to Appellants' contention, the Court did not find that the EAC had the discretion to refuse to include a voter qualification requirement that a State deemed necessary to enforce its voter eligibility requirements. Rather, it strongly suggested that it would find that the EAC lacks such discretion. *Id*. at 2258–60.

The Court emphasized that the States have the exclusive constitutional authority to determine voter qualifications for federal elections, which includes the power to enforce those qualifications. *Id*. at 2258–59. In light of the States' exclusive constitutional authority to establish and enforce voter qualifications, the Court interpreted 42 U.S.C. § 1973gg-7(b)(1) as requiring the inclusion of necessary eligibility information. *Id*. at 2259. The Court then concluded that "a State may challenge the EAC's rejection of its request to alter the Federal Form to include information the *State deems necessary to determine eligibility*." *Id*. (emphasis added).

Importantly, the Court stated that if the EAC failed to act on Arizona's request to include its proof-of-citizenship requirement in the state-specific instructions, then Arizona "would have the opportunity to establish *in a reviewing court* that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a *nondiscretionary* duty to include" the requested instruction. *Id*. at 2260 (emphasis added). As the Supreme Court plainly stated, it is before the reviewing court that the State establishes that mere oath will not suffice, *not before the EAC*. The EAC's duty is "nondiscretionary."

The States made that showing in the district court. In addition to the fact that the people of Arizona and the Legislature of Kansas made a sovereign policy judgment that mere oath will not suffice, the States presented evidence that proves

a mere oath does not suffice to stop noncitizens from registering. Kansas provided evidence that twenty noncitizens had registered to vote, falsely affirming their citizenship; and Arizona provided evidence that 208 individuals had falsely affirmed U.S. citizenship and registered to vote, only to later testify under oath to a jury commissioner that they were not U.S. citizens. App. 673; Suppl. App. 000017. The court found that the policy judgment of the Arizona voters and the Kansas Legislature was enough. App. 1448.

Because Appellants would resolve any tension between Congress's power under the Elections Clause and the States' exclusive power to establish and enforce voter qualifications by subjugating the States' constitutional power to that of Congress, their approach raises the very same "serious constitutional doubts" that concerned the *ITCA* Court.[7] The Court resolved this tension by holding that the States must abide by the *procedural* provisions of the NVRA, specifically its "accept and use" provision, while the EAC is under a *nondiscretionary* duty to include state-specific instructions on the Federal Form which enable the States to enforce their voter qualifications: "information which *may* be required [by the

[7] Under Appellants' theory, the States' constitutional powers and rights are subject to the EAC's discretion. This proposition contradicts common sense—a constitutional power subject to an agency's discretion is no constitutional power at all. It also contradicts established precedent. *See Darden*, 488 F.3d at 284–85 (constitutional questions arising during APA review fall expressly within the domain of the courts which conduct review de novo); *Westar Energy Co.*, 932 F.2d at 809 (same).

States] *will* be required [by the EAC]." *ITCA*, 133 S. Ct. at 2259 (emphasis provided). The Appellants have not disputed that documentary proof of citizenship may be required by the States to enforce their voter qualification laws. Thus, under *ITCA*, the EAC must include such information on the Federal Form at the States' request.

Appellants also assert that the EAC's nondiscretionary duty arises only when *the EAC* determines that the requested instruction is necessary. EAC Opening Br. 9-10; Intervenors' Opening Br. 28–29. But this purported limitation on the EAC's discretion is illusory because Appellants further assert that the EAC's determination regarding an instruction's necessity is itself reviewed for abuse of discretion under the APA. EAC Opening Br. 33–34; Intervenors' Opening Br. 68. An agency's discretion limited by its own discretionary determination is not limited at all. Further, for the Appellants' circular reading of *ITCA* to be correct, the Court's reference to the cannon of constitutional avoidance would have to have meant that "information which [must] be required [must] be required"—a tautology that cannot be squared with the opinion. 133 S. Ct. at 2259.

Appellants also argue that the States' exclusive constitutional power to enforce voter qualifications is breached only when the States are *completely* precluded from an ability to enforce their voter qualifications. Intervenors'

Opening Br. 39. Similarly, the EAC Decision asserted that the States' constitutional power was not violated because the EAC determined in its discretion that the States had alternative means of enforcing their voter qualifications (even if the States themselves believed those alternative means to be unviable). App. 1300. This limitation, again, is illusory. Because there will always be some alternative way to enforce voter qualifications (e.g., the States could expend millions of dollar employing special investigators), the States' constitutional power to enforce voter qualification could never be infringed upon. Moreover, Appellants' argument is not in keeping with the language of the NVRA itself, which clearly envisions that the information used to assess eligibility *accompany* the Federal Form, *see* 42 U.S.C. § 1973gg-7(b)(1) (the Federal Form "may require only such identifying information . . .and other information"), and be assessed *prior to* registering the application to vote, *see id.* ("as is necessary to enable the appropriate election office to assess the eligibility of the applicant"); *see also id.* § 1973gg-6(a)(1)(B) (States shall ensure that applicant who submits valid Federal Form prior to voter registration deadline is registered to vote). Nothing in the NVRA suggests Congress intended to force the States to adopt complicated, time-consuming, and expensive "alternative means of enforcing voter qualifications." Instead, the NVRA envisions that voter qualifications will be enforced based on information provided with the Federal Form itself.

Appellants further argue that *ITCA* must have held that the EAC has discretion to determine what information is necessary because it would have otherwise been futile to direct Arizona to renew its request with the EAC. They similarly suggest the district court's Order effectively converts the agency into a rubber stamp with authority only to approve state requests but not to deny them. That does not necessarily follow. Indeed, at the district court oral argument, the Appellants and the States agreed that the EAC retains discretion over "voter registration procedures," while the States have exclusive authority over enforcement of substantive registration requirements. Suppl. App. 000137–38, 167. The EAC has significant discretion in several respects: (1) the structure and wording of the Federal Form insofar as it does not impede the States' enforcement of voter qualifications; (2) determining whether the requested instruction in fact reflects the State's laws; and (3) determining whether the requested instruction is confusing to the voter. Thus, the district court's decision does not convert the EAC into a rubber stamp.

Appellants also contend that placing a nondiscretionary duty on the EAC would circumvent the concern in *ITCA* that the Federal Form provide a backstop to any procedural hurdles the State's own form imposes. *See ITCA*, 133 S. Ct. at 2255. However, this portion of *ITCA* was clearly concerned with States requiring information beyond that listed in state-specific instructions—a concern not present

in this case. As the Court noted, the purpose of the Federal Form is that "every eligible voter can be assured that if he does what the Federal Form says, he will be registered." *Id*. at 2255 n.4. Thus, by encompassing all of the States' various voter registration requirements on one form, voter registration activities are not hampered by having "to give every prospective voter not only a Federal Form, but also a separate set of either Arizona- or California-specific instructions detailing the additional information the applicant must submit to the State." *Id*. at 2255. No such concerns exist as long as the States' requested instructions are part of the Federal Form.

5. The NVRA Did Not Vest the EAC with Quasi-Judicial Power.

The NVRA must be interpreted as allowing the States, and not the EAC, to determine the information that is necessary to assess eligibility under 42 U.S.C. § 1973gg-7(b)(1) because the NVRA contains no statutory provisions delegating to the EAC the authority to undertake the quasi-judicial and high-level policymaking functions it undertook in rendering the EAC Decision. "[A]n agency's power is not greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The APA provides that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). When analyzing a challenge to agency action under § 706(2)(C) of the

APA, the court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

Likewise, the Court recognized: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* at 159 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).

The NVRA did not confer upon the EAC the authority to adjudicate the States' requests in quasi-judicial fashion or to engage in the high-level policy-making functions. Nothing in the NVRA suggests that the EAC is to receive "evidence," determine the scope of the States' constitutional rights, make broad policy determinations, or make findings of fact.[8] Rather, the NVRA's delegation is extremely narrow, contained in one subsection of one statute of the NVRA, § 1973gg-7(a)(1), and referring to only two responsibilities (to develop the Federal

[8] The EAC asserts, without citation, that "Congress called for the creation of the Federal Form after concluding that a federal agency was best suited to determine the information necessary to register for federal elections." EAC Opening Br. 18. However, this statement is found nowhere in the NVRA's findings, nor is this assertion reflected in the legislative history.

Form and to submit certain reports to Congress) enumerated in two other subsections, § 1973gg-7(a)(2) and (3). Comparing the magnitude of the questions presented to the narrow delegation of rulemaking authority in § 1973gg-7(a)(1), and placing that subsection in the context of the entire NVRA, it is clear that Congress did not delegate to the EAC the authority to engage in the quasi-judicial and broad policy-making functions to determine what information is "necessary" to assess a voter's qualifications. Consequently, the NVRA cannot be read as conferring upon the EAC the authority to determine what information is necessary to assess eligibility under § 1973gg-7(b)(1).

Indeed, the NVRA's language does not grant the EAC full discretion even over the Federal Form. Specifically, the NVRA enumerates eight subjects for the Federal Form, most of which contain mandatory language withholding discretion from the EAC. 42 U.S.C. § 1973gg-7(b). This mandatory list includes a requirement that the Federal Form "shall include a statement . . . that specifies each eligibility requirement." *Id.* § 1973gg-7(b)(2)(A). It is beyond dispute that the States possess the exclusive constitutional authority to establish voter qualifications, i.e. eligibility requirements. *See ITCA*, 133 S. Ct. at 2258–59. Thus, the NVRA itself places a nondiscretionary duty upon the EAC to include each State's registration requirements, including subsequent amendments to those requirements, on the Federal Form. Appellants' protestations that the States are

attempting to convert the EAC from an agency with full discretion into an agency with limited discretion is therefore fallacious; the EAC is already an agency with limited discretion under the NVRA itself.

C. The EAC's Determination That the Proof-of-Citizenship Requirements Are Unnecessary Is Not Entitled to Deference.

Lastly, Appellants argue that the district court did not give proper deference to the EAC's determination that the States' proof-of-citizenship requirements were unnecessary. However, as previously noted, the APA itself contemplates relief for constitutional violations. 5 U.S.C. § 706(2)(B). Any constitutional questions that arise during APA review fall expressly within the domain of the courts, which conduct review *de novo*. *Darden*, 488 F.3d at 284–85; *Westar Energy Co.*, 932 F.2d at 809.

Deference to the EAC's determination is particularly inappropriate where constitutional claims are made because, by the EAC's own admission, EAC proceedings are informal, non-adjudicatory in nature and lack any means of discovery. Supp1. App. 000109. Giving deference to the EAC's informal adjudication of the States' constitutional powers and rights made in the absence of discovery or other formal procedures would raise serious due process concerns. Further, as explained *supra*, there is absolutely nothing in the NVRA that suggests that Congress intended the EAC to undertake this type of quasi-judicial inquiry.

In sum, the district court correctly determined that its construction of the NVRA was necessary to avoid a constitutional question, and that the "canon of constitutional avoidance trumps *Chevron* deference owed to an agency's interpretation of a statute." App. 1436 & n.57 (citing supporting authority from the Tenth, Eighth, Ninth, and D.C. Circuits). Appellants do not even attempt to address the district court's extensive authority. Nor do Appellants explain why the canon of constitutional avoidance would not override any deference owed to the EAC.

II. This Court Should Affirm the Judgment of the District Court on Alternative Grounds.

It is well-established that appellate courts are free to "affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1231 (10th Cir. 2013). In the instant case, there are multiple alternative bases for affirmance on appeal.

A. The NVRA Is Unconstitutional as Applied by the EAC Because it Infringes on the States' Exclusive Power to Establish and Enforce Voter Qualifications.

The district court held that the EAC Decision and its interpretations of the NVRA raised serious constitutional doubts and that the canon of constitutional avoidance therefore required the court to adopt a construction of the NVRA that avoids such constitutional questions, if possible. App. 1433–35. The court then

determined that such a construction of the NVRA was possible, and held, *inter alia*, that the NVRA did not prohibit the Kansas and Arizona proof-of-citizenship requirements and did not authorize the EAC to deny the States' requests to modify their state-specific instructions on the Federal Form. App. 1448. Assuming, *arguendo*, that the construction of the NVRA adopted by the district court was not possible, this Court should hold that the NVRA is unconstitutional as applied by the EAC.

1. **Congress Cannot Displace the Voter Qualifications Clause.**

The principal basis for such a holding is that the EAC has assumed a power to trump the States' constitutional authority to establish and enforce voter qualifications. As the *ITCA* Court stated, "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258–59. The Court's implication was crystal clear. Any federal statute or agency that attempted to do so would be in conflict with the Voter Qualifications Clause. The precedents recognizing the States' authority in this area are discussed *supra* in Section I.A.1.

In addition, vesting the EAC with authority to nullify State laws that exercise the States' exclusive authority to enforce voter qualifications would

constitute a system of preclearance of the kind specifically disapproved in *Shelby County*. *See supra* Section I.A.2. Thus, the NVRA cannot prevent the States from obtaining information directly related to the enforcement of their substantive voter qualifications.

Finally, it should be noted that being registered is itself a qualification for being an elector. Both States' laws reflect this fact. A.R.S. § 16-121(A); *Dunn v. Bd. of Comm'rs of Morton Cnty.*, 194 P.2d 924, 934 (Kan. 1948) (qualified electors means persons who have the constitutional qualifications of an elector and who are duly and properly registered). Although it is not necessary for the Court to reach this question to resolve this case, it must be noted that if registration is itself a qualification for being an elector within the meaning of the Voter Qualifications Clause, then the States' constitutional argument possesses considerable additional force.

2. Any Tension Between the Voter Qualifications Clause and the Elections Clause Must Be Resolved in Favor of the Voter Qualifications Clause.

Appellants argue that because the Elections Clause gives Congress authority over the manner of conducting elections for federal office, Congress (and by extension the EAC) could override a sovereign State in deciding what information is necessary to assess the applicant's eligibility. EAC Opening Br. 29–33; Intervenors Br. 37–43. But Appellants fail to recognize that the States' exclusive

power to establish and enforce voter qualifications is protected by the more specific and explicit constitutional provision in the Voter Qualifications Clause of Article I, Section 2, clause 1 (as well as the equivalent clauses in Article II, Section 1, and the Seventeenth Amendment). Importantly, these specific constitutional powers retained by the States override Congress's general power under the Elections Clause.

The Supreme Court in *ITCA* specifically addressed this potential tension between the Voter Qualifications Clause and the Elections Clause. The Court resolved this tension by utilizing the rule of construction that any explicit clause trumps a clause that suggests an implicit power (alternatively described as the principle that the specific trumps the general). Applying this principle, the Court held the following:

> One cannot read the 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.

ITCA, 133 S. Ct. at 2258 (internal quotation marks and citations omitted).

Justice Thomas in his dissenting opinion agreed with the majority on this point and elaborated further:

> Article I, §4, also cannot be read to limit a State's authority to set voter qualifications because the more

> specific language of Article I, §2, expressly gives that authority to the States. As the Court observed just last Term, "[a] well established canon of statutory interpretation succinctly captures the problem: '[I]t is a commonplace of statutory construction that the specific governs the general.'" The Court explained that this canon is particularly relevant where two provisions "'are interrelated and closely positioned, both in fact being parts of [the same scheme.]'". Here, the general Times, Places and Manner Clause is textually limited by the directly applicable text of the Voter Qualification Clause.

ITCA, 133 S. Ct. at 2266 (Thomas, J., dissenting) (internal citations omitted). For this reason, the Elections Clause cannot be read as implicitly giving Congress the power to regulate what is expressly reserved to the States in the Voter Qualifications Clause. This issue was unquestionably settled in *ITCA*.

B. The EAC Disregarded Its Own Regulations in Violation of the APA.

The EAC's plain failure to comply with its own regulation provides an additional ground for affirming the district court's decision because under the APA the EAC's failure to follow its own regulations was unlawful, arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. §§ 706(1), (2)(A). Specifically, EAC regulations require that "[t]he state-specific instructions *shall contain* the following information for each state, arranged by state: the address where the application should be mailed and *information regarding the state's specific voter eligibility and registration requirements*." 11 C.F.R. § 9428.3(b)

(emphasis added). There is no dispute that the States were requesting changes reflecting their specific voter eligibility and registration requirements.

Generally speaking, an agency's interpretation of its own regulation is to be given deference. *Utah Envtl. Congress v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007). However, an agency's interpretation of its own regulation must be rejected when it is "unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning." *Id*. It is arbitrary, capricious, an abuse of discretion, and not in accordance with law for an agency to fail to comply with its own regulations. *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007). Indeed, courts "must… be careful not to disrupt the plain language of the regulation itself," and if an agency "wants to take a position that is inconsistent with existing regulations, then [the agency] must promulgate new regulations under the notice-and-comment provisions of the APA." *Id*. at 1272–73 (internal citations omitted). Indeed, deferring to an agency's re-interpretation of an unambiguous regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

Section 9428.3(b) unambiguously uses mandatory language requiring the EAC to include state-specific instructions that reflect the respective voter registration laws of the States. Kansas's and Arizona's laws require voter

registration applicants utilizing the Federal Form to provide satisfactory proof of citizenship before being registered to vote in any election, including elections for Federal office. K.S.A. § 25-2309(a), (*l*); A.R.S. § 16-166(F). Therefore, according to its own regulations, the EAC *must* modify the Kansas and Arizona state-specific instructions to include each State's proof-of-citizenship requirements.

However, the EAC determined that 11 C.F.R. § 9428.3(b) did not obligate it to include the States' requested instructions on the Federal Form. App. 1318. The EAC essentially declared the regulation to be inapplicable because the EAC deemed the States' proof-of-citizenship requirements unnecessary. But 11 C.F.R. § 9428.3(b) requires the EAC to include instructions describing "the state's specific voter eligibility and registration requirements" *regardless* of the EAC's opinion on the matter. The States' statutory proof-of-citizenship requirement is not any less of a requirement simply because the EAC thinks the requirement is unnecessary. The EAC's determination was contrary to its own regulations and therefore not in accordance with law.

C. The EAC Decision Was Arbitrary, Capricious, and an Abuse of Discretion in Violation of the APA.

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

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

W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1273 (10th Cir. 2013). The EAC Decision qualifies as arbitrary and capricious for multiple reason.

1. **The EAC Decision was not in accordance with law because it rendered findings of fact and conclusions of law without articulating a standard of proof.**

An agency's failure to properly articulate or apply the correct legal standard underlying its final agency action requires reversal. *See Mountain Side Mobile Estate P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995) (holding that, when reviewing an agency's decision, "[t]he failure to apply the correct legal standard or to provide this court with a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal") (internal quotation marks omitted). Federal courts have set aside agency action if the law or regulation underlying the agency's action does not explicitly set forth the requisite standard of proof and the agency failed to sufficiently articulate the standard of proof that it applied to evaluate the evidence. *See Mori v. Dep't of Navy*, 731 F. Supp. 2d 43, 49 (D.D.C. 2010) (finding that, because the agency failed to identify the standard of proof it used, "the court is unable to evaluate what

standard of proof the [agency] applied; as a consequence, it is also unable to determine whether the [agency's] chosen standard was appropriate or whether the [agency] properly applied that standard."). Because Congress did not intend for the EAC to be empowered to conduct fact-findings regarding the necessity of state-specific instructions, the NVRA does not articulate a standard of proof. Nevertheless, the EAC Decision purports to weigh evidence, make factual findings, and draw conclusions therefrom. App. 1302–04, 1306, 1309–10, 1313, 1315–16. However, the EAC Decision did not articulate the standard of proof that Miller applied when she was rendering such findings and conclusions. Instead, the EAC Decision contains statements such as:

- "Rather, the EAC finds that the possibility of potential fines, imprisonment, or deportation (as set out explicitly on the Federal Form) appears to remain a powerful and effective deterrent against voter registration fraud." App. 1302–03 (emphasis added).

- "The above methods *appear* to provide effective means for identifying individuals whose citizenship status may warrant further investigation." App. 1313 (emphasis added).

- "Such burdens do not enhance voter participation, and they *could* result in a decrease in overall registration of eligible citizens." App. 1315 (emphasis added).

- "Based on the evidence submitted, the EAC finds that granting the States' requests *could* discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form." App. 1316 (emphasis added).

These statements demonstrate that not only did the EAC Decision fail to articulate a standard of proof, but in many instances it failed to apply any standard at all. The EAC attempted to displace the States' constitutional authority to establish and enforce voter qualifications by second-guessing whether a State's chosen enforcement mechanism is necessary. Such an invasion into a State's exclusive constitutional sphere cannot be based on standardless speculation about mere possibilities.

2. The EAC arbitrarily and capriciously adopted the Intervenors' unsupported factual assertions while discounting the States' evidence.

The EAC failed to evenhandedly evaluate all of the evidence submitted by the parties. Instead, Miller ignored, discounted, and misconstrued the State's relevant evidence, while readily adopting the Intervenors' unsupported factual assertions.

a. The EAC Decision ignored, discounted, and misconstrued Arizona's evidence.

The EAC Decision improperly discounted, or simply ignored, evidence when discussing Arizona's position that the Federal Form's sworn statement is insufficient. The EAC suggested that Arizona's sole source of support for this argument was Justice Scalia's statement during oral argument in *ITCA*. App. 1302. While Justice Scalia's statement is correct, Arizona also provided to the EAC the factual findings and legal conclusions underlying Judge Silver's denial of the

Gonzalez plaintiffs' motion for permanent injunction (hereinafter "the 8/20/08 Order"). Suppl. App. 000440–000488. Other parties also submitted those same findings and conclusions to the EAC during the public comment period. Suppl. App. 000288–000336.

In *Gonzalez*, the district court ultimately held that Proposition 200 was constitutional because it served the important governmental interests of preventing voter fraud and maintaining voter confidence. Suppl. App. 000473–000474. The court reached this conclusion after holding a six-day bench trial and hearing all of the parties' evidence. In the 8/20/08 Order the district court summarized all of the evidence submitted. Suppl. App. 000441–000466. The court noted that 208 individuals in Pima and Maricopa Counties had their voter registrations cancelled after they swore under oath to the respective jury commissioners that they were not citizens.[9] Suppl. App. 000455. The district court's findings demonstrate that for at least 208 individuals in two of Arizona's fifteen counties, the threat of a conviction for perjury was not enough to prevent them from falsely declaring their non-citizenship in order to get out of participating in jury service. For this, and other reasons, Arizona citizens initiated and voted in favor of Proposition 200 to require affirmative proof of citizenship, not just a sworn statement, in order to register to

[9] The EAC Decision noted the existence of this evidence as a suggestion for enforcement opportunities, but disregarded the same evidence when talking about Arizona's determination that an oath is insufficient. App. 1312.

vote. The EAC Decision arbitrarily and capriciously ignored these factual findings from a federal judge that the States submitted as evidence.

Despite ignoring the *Gonzalez* district court's factual findings supporting the States' position that the Federal Form's sworn statement is insufficient, the EAC Decision cited the 8/20/08 Order for its statements that over 30,000 people were initially unable to register because of Proposition 200's requirement; and subsequently approximately 11,000 of those applicants were able to register successfully. App. 1314. Because it did not support the rejection of the States' request, the EAC Decision did not bother to include the court's conclusion after receiving all of the evidence: The *Gonzalez* plaintiffs failed to demonstrate "that the persons rejected [those same 20,000 individuals] are in fact eligible to vote." Suppl. App. 000471. The EAC Decision's failure to acknowledge certain factual findings from Judge Silver's order that supported the States' position while relying on other parts of the order was an arbitrary and capricious agency action.

b. The EAC Decision ignored and discounted Kansas's evidence.

The EAC concluded that Kansas failed "to establish that the registration of noncitizens is a significant problem … sufficient to show that [Kansas], by virtue of the Federal Form, currently [is] precluded from assessing the eligibility of Federal Form applicants. App. 1306. In drawing this conclusion, Miller compared the total number of registered voters in Kansas as of January 2013 (1,762,330) to

the twenty noncitizens that Kansas identified as having registered to vote or attempted to register to vote. App. 1307. Miller then summarily determined that the number of noncitizens who registered to vote or attempted to register to vote was insignificant. *Id.*

However, Kansas had submitted an affidavit by Brad Bryant, Kansas Elections Director, that included a statement explaining that Kansas has very few tools to identify noncitizens after they are registered to vote. App. 673. Mr. Bryant further stated that the number of noncitizens who have registered to vote is likely to be much higher than the twenty reported in the affidavit. *Id.* In another affidavit, Mr. Bryant provided a statement explaining that the only means of effectively ensuring that voter registration applicants are citizens is to obtain proof-of-citizenship at the time of registration. App. 669. Kansas had also submitted affidavits from two county election officials stating that the proof-of-citizenship requirement had successfully stopped individuals from registering who were later identified as noncitizens. Those individuals had falsely signed under the statements on their registration cards indicating that they were United States Citizens. The EAC Decision contains no indication that Miller took these multiple affidavits into consideration when she concluded that noncitizens registering to vote in Kansas is not a significant problem.

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

The EAC found that "granting the State's requests would likely hinder eligible citizens from registering to vote in federal elections." App. 1315. This finding was based entirely on conclusory statements submitted by the Intervenors and other commenters, asserting that some citizens may lack the required proof-of-citizenship documents and would therefore be prevented from registering to vote in federal elections. App. 1315; *see also* App. 749–51, 1074–80, 1157, 1260–62; Suppl. App. 000202, 000344, 000347–000353, 000406, 000408, 000411, 000489, 000491. However, the vast majority of those comments were unsupported assertions that eligible citizens will be unable to register to vote without identifying any eligible applicants who have actually been denied the right to vote.

Furthermore, the EAC Decision refers to the number of voter registration applicants in Arizona and Kansas who have submitted applications without proof of citizenship as evidence that proof-of-citizenship requirements unduly hinder the voter registration process. App. 1314–15. However, there is no actual evidence that any of these applicants are eligible voters. Indeed Kansas submitted evidence indicating that approximately 83% of all individuals who had submitted an application since January 1, 2013 would be registered to vote. App. 1367–69. The remaining 17% had the right to take as long as they want before faxing, emailing,

or sending in their documents. But the mere fact that they had delayed did not demonstrate any hindrance.

D. The EAC Decision Is *Ultra Vires* Because the EAC Lacked the Requisite Quorum of Commissioners.

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

At the time of the EAC Decision, the EAC had no commissioners. Nevertheless, Miller determined that "EAC staff" (i.e., Miller herself) had the authority to act on all state requests for modifications to the state-specific instructions of the Federal Form. App. 1288. As shown *supra*, the EAC is under a nondiscretionary duty to include state-specific instructions reflecting the voter qualification and registration laws of the States. Thus, while the States agree that Miller could have performed the nondiscretionary and ministerial duty of including the state-specific instructions requested by the States, she was not authorized to engage in the quasi-judicial analysis and policy making that she purportedly undertook.

Because the EAC Decision is *ultra vires* for lack of a quorum of EAC commissioners, the means of obtaining the information the States deem necessary for enforcement described in *ITCA* was unavailable. The *ITCA* Court specifically contemplated this possibility: "The EAC currently lacks a quorum—indeed, the Commission has not a single active Commissioner. If the EAC proves unable to act on a renewed request, Arizona would be free to seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed.'" *ITCA*, 133 S. Ct. at 2260 n.10 (quoting 5 U.S.C. § 706(1)). That is what the States have done in this matter. The district court followed *ITCA* with precision and correctly reversed the agency's decision to unlawfully withhold action.

CONCLUSION

For all of the reasons described above, this Court should affirm the district court's decision.

Respectfully submitted this 30th day of June, 2014.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Plaintiffs-Appellees Kris W. Kobach, Ken Bennett, and the States of Kansas and Arizona, respectfully request oral argument. This case involves the interplay between state and federal governments and the interpretation of constitutional rights and obligations, and Appellees believe oral argument will assist the Court in ruling upon these issues.

Respectfully submitted this 30th day of June, 2014.

s/ Michele L. Forney
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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), Plaintiffs-Appellees state that they are not aware of any related cases pending in the Tenth Circuit.

Respectfully submitted this 30th day of June, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,847 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Respectfully submitted this 30th day of June, 2014.

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CERTIFICATE OF DIGITAL SUBMISSION

Per Tenth Circuit Rule 25.5, no privacy redactions were necessary in this document. The document is a native PDF document. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program Windows Defender, which was most recently updated June 30, 2014. According to the program, the document is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2014, I electronically filed the above and foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Service on all other parties to this action has occurred via electronic means

Respectfully submitted this 30th day of June, 2014.

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