IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs respectfully submit this Reply Brief in support of their Motion for Preliminary Injunctive Relief, ECF No. 16.

ARGUMENTS AND AUTHORITIES

I. The Plaintiffs Are Entitled to Relief Under and Apart From the Administrative Procedures Act.

A. This Court has Original Jurisdiction to Issue Declaratory Judgment and Mandamus Relief.

The Defendants argue that there have been no final agency actions by the EAC over which this Court can exercise judicial review. Def. Resp. at 12-17. This assertion ignores the fact that the Plaintiffs have advanced claims that are independent of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. (hereinafter "the APA"). The Plaintiffs' Complaint asserts that the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq*. (hereinafter "the NVRA"), as applied by the Defendants or applied to the Plaintiffs, violates the Plaintiffs' constitutional right to establish and enforce voter qualifications. Complt. at 25-29. Additionally, the Plaintiffs' Complaint requests the Court to declare the NVRA unconstitutional as applied by the Defendants or applied to the Plaintiffs. Complt. at 29-30. This Court has original jurisdiction over such requests for declaratory judgment. 28 U.S.C. § 2201. Because this Court has original jurisdiction over the Plaintiffs' requests for declaratory judgment and mandamus relief, this Court sits as the original trier of fact and law. It does not sit as a court of appellate jurisdiction regarding the Plaintiffs' request for declaratory judgment and mandamus relief. As a result, this Court can hear such claims regardless of whether the EAC has taken final action on claims that arise under the APA.

B. The EAC's Refusal to Modify the Federal Form Constitutes Agency Action Unlawfully Withheld or Unreasonably Delayed.

The Defendants argue that the EAC's refusal to modify the state-specific instructions to the Federal Form for Kansas and Arizona does not constitute agency action unlawfully withheld or unreasonably delayed. Furthermore, they assert that the Plaintiffs do not attempt to establish that 5 U.S.C. § 706(1) – the portion of the APA directing courts to compel agency action unlawfully withheld or unreasonably delayed – applies to the case at bar. Def. Resp. at 13. Nothing could be further from the truth. The Plaintiffs' Brief in Support of Plaintiffs' Motion for Preliminary Injunctive Relief (Plaintiffs' Brief) contains over two pages explaining that, pursuant to 5 U.S.C. § 706(1), this Court must compel the EAC to grant the Plaintiffs' request. Pl. Br. at 19-21.

The Defendants' assertion that the EAC's refusal to modify the state-specific instructions to the Federal Form for Kansas and Arizona does not constitute agency action unlawfully withheld or unreasonably delayed is premised on the following arguments: (1) the EAC is not under a nondiscretionary duty to make the requested modifications, (2) the Plaintiffs did not establish before the EAC that a mere oath is insufficient to enforce their citizenship requirements, and (3) the memorandum written by former Executive Director Thomas Wilkey on November 9, 2011, (hereinafter "the Wilkey Memorandum") established a policy of deferring "decision making on requests that raise issues of broad policy concern to more than one state until such time as a quorum" of EAC commissioners is established. Def. Resp. at 14-16. However, the Plaintiffs have established in the Plaintiffs' Brief and further demonstrate in this Reply that the EAC is under a nondiscretionary duty to make the requested modifications. *See* Pl. Br. at 11-15; *infra* at 7-11**.** In addition, the Plaintiffs explain below why the States are not

required to establish before the EAC that a mere oath is insufficient to enforce their citizenship requirements. See *infra* at 11-14.

At the outset, the Defendants' repeated reliance on the Wilkey Memorandum bears mentioning. Contrary to the Defendants' suggestion, the Wilkey Memorandum carries no weight as legal authority. It is simply an internal operating memorandum issue by a previous Executive Director of the EAWC. The Wilkey Memorandum is neither a formally-promulgated rule nor an adjudication carrying any precedential authority. Therefore, the Wilkey Memorandum should be treated accordingly by this Court as a mere state of opinion by an EAC official. It carries no more authority than an assertion that might be made now by Defendant Miller.

Moreover, the EAC itself has failed to follow the Wilkey Memodanum. The Wilkey Memorandum specifically stated that the EAC could approve changes to state-specific instructions that were required by a change in state law. The Plaintiffs' requests were specifically made pursuant to changes in their respective States' laws requiring proof of citizenship. The requested modifications clearly fall into a permissible category under the Wilkey Memorandum. The Wilkey Memorandum also provides that requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum. The Defendants rely on this provision of the Wilkey Memorandum to bolster their decision to take no action. However, the request made by Arizona was made to effectuate Arizona law, and therefore it will affect no State other than Arizona. Likewise, the request made by Kansas was made to effectuate Kansas law, and therefore it will affect no State other than Kansas. The Defendants have offered no coherent explanation of how Kansas's and Arizona's request could conceivably affect more than one state. The closest that the Defendants come to offering an explanation of how Kansas's and Arizona's requests might affect other states is the

following feeble assertion: "Such requests … might encourage every State to seek to increase the proof required from voters to register…." Def. Response at 30. This argument does not even pass the blush test. Every request might in theory encourage other states to follow suit; so every request is therefore one that affects other states. But that is not how the EAC has treated past requests. What this explanation reveals is a troubling motivation of the Defendants in this case: they do not like the policy of requiring proof-of-citizenship and they do not want additional states to adopt that policy. Consequently, the EAC misapplied its own internal operating procedures.

C. The EAC Has Taken Final Agency Action Over Which This Court Can Exercise Judicial Review.

The Defendants argue that there have been no final agency actions by the EAC over which this Court can exercise judicial review. Def. Resp. at 12-17. However, the EAC undeniably made a final determination that the "Plaintiffs requests' raised 'issues of broad policy concern to more than one state.'" Def. Resp. at 12. EAC00048, EAC000102, EAC000111, and EAC000117. Based on this determination, the EAC expressly declines to act on the Plaintiffs' request to modify the state-specific instructions to the Federal Form for Kansas and Arizona. As set forth in the Plaintiffs' Brief, the EAC's failure to act constitutes final agency action under the APA. Pl. Br. at 6-7. Therefore, both the EAC's determination that the Plaintiffs' requests raised issues of broad policy concern to more than one state and the EAC's failure to act on the Plaintiffs' request are final agency actions that are subject to judicial review.

Nevertheless, the Defendants insist that the EAC has not failed to act but has simply deferred acting on the Plaintiffs' requests until a quorum of commissioners is established. Def. Resp. at 12-13. The United States Court of Appeals for the Tenth Circuit has ruled that such delay constitutes a failure to act under the following circumstances: (1) if the agency

"affirmatively rejects a proposed course of action; (2) if the agency delays unreasonably in responding to a request for action; and (3) if the agency delays in responding until the requested action would be ineffective. *Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003); see also *Coalition for Sustainable Resources, Inc. v. U.S. Forest Service*, 259, F.3d 1244, 1251 (10th Cir. 2001). In both *Gordon* and *Coalition For Sustainable Resources, Inc.*, the Tenth Circuit considered whether a deferral of agency action amounted to final action and ruled that it did not in large part due to the fact that the agency was continuing to undertake the decision making process. *Gordon*, 322 F.3d at 1221; *Coalition for Sustainable Resources*, 259 F.3d at 1251-52.

By contrast, the EAC is not continuing to undertake the decision making process regarding the Plaintiffs' requests. Instead it has decided to indefinitely delay the decision making process until a quorum of commissioners is established. There is no end in sight to this lack of quorum. As was succinctly stated by Justice Alito, "The EAC currently has no members and there is no reason to believe that it will be restored to life in the near future." *Arizona v. Inter Tribal Council of Ariz., Inc.*, __ U.S. __, 133 S. Ct. 2247, 2273 (2013) (Alito, J., dissenting) (hereinafter "*Inter Tribal Council*"). The Defendants acknowledge that the lack of a quorum is for an indefinite time period. However, they attempt to minimize the situation by suggesting that "the EAC will eventually regain a quorum of its commissioners." Def. Resp. at 16. The Defendants then strain credulity by arguing that the EAC's three-year paralysis is just like the temporary vacancies that were recently filled on the Consumer Products Safety Commission and the Occupational Safety and Health Review Commission. *Id*. The Defendants fail to mention the pivotal distinction: unlike those commissions, the EAC is likely never to have a quorum

again because a large number of Members of Congress have supported legislation to abolish the EAC entirely.[1]

The possibility that the EAC will regain a quorum of its commissioners at some unknown time in the future does not save the EAC's alleged deferral of action from being characterized as a failure to act. The Plaintiffs must conduct elections on an ongoing basis and are currently preparing for quickly approaching primary and general elections that will be held in August 2014 and November 2014, respectively. Because the EAC's deferral of the Plaintiffs' requests keeps the requested modifications from being made to the state-specific instructions for Kansas and Arizona, the EAC's deferral of action has the exact effect of a denial of action for every election that is held prior to the establishment of a quorum.

D. This Court's Review is Not Limited to the Administrative Record.

The Defendants assert that this Court is limited in its review to information contained in the administrative record. However, as has been shown in the Plaintiffs' Reply Supporting Motion to Advance the Trial on the Merits and Convert Plaintiffs' Motion for Preliminary Injunctive Relief to a Motion for Summary Judgment, this Court is not limited to the administrative record. Instead, the Court is free to receive all relevant evidence regarding claims that are independent of the APA. Furthermore, the Plaintiffs were not allowed to create an administrative record. Accordingly, the Plaintiffs should be allowed to supplement the administrative record regarding claims that arise under the APA.

Additionally, for all claims that arise under the APA, the Court may only uphold an agency's action if it is supported by facts and rationale contained in the Administrative record.

[1] The House of Representatives voted 235-190 to approve a bill abolishing the EAC. See http://www.washingtonpost.com/blogs/2chambers/post/house-votes-to-end-public-funding-for-presidential-campaigns/2011/12/01/gIQAc8SaHO_blog.html

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994). "After-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with these principles." *Id*. The Defendants' Response is replete with references to various rationale for the EAC's decision to not act on the Plaintiffs' requests that are not contained in the administrative record. The administrative record only contains one basis for the EAC's failure to act. That basis is that the Plaintiffs' requests raise issues of broad policy concern to more than one state, and that a decision on the Plaintiffs' requests should therefore be deferred until the EAC has a quorum of commissioners. EAC000048; EAC000111. However, the record contains no rationale to explain how the EAC arrived at such a conclusion. Furthermore, the administrative record contains no facts upon which such a conclusion could be based. An administrative action should be set aside "if it lacks factual support." *Olenhouse,* 42 F.3d at 1575-76.

Because the administrative record contains no rationale and no facts that support the EAC's conclusion that the Plaintiffs' requests raise issues of broad policy concern to more than one state, the EAC's decision to not act on the Plaintiffs' requests should not be upheld by this Court. To the extent this Court determines that its review is limited to the administrative record, this Court should disregard the Defendants' numerous references to matters outside of the administrative record. The Defendants cannot have it both ways.

II. The EAC's Failure to Include the Instruction Requested by the Plaintiffs Infringes Upon the the Plaintiffs' Constitutional Authority to Obtain Information That the Plaintiffs Deem Necessary to Enforce Their Voter Qualifications.

It is beyond dispute that this lawsuit is suggested by, controlled by, and disposed of by, the decision of the Supreme Court in *Inter Tribal Council*. Nevertheless, the Defendants absurdly argue that the Supreme Court made only a "brief statement" on the matter, which the

Plaintiffs take "out of context." Def. Resp. at 1. Evidently, the Defendants consider the two pages of Supreme Court analysis explaining why this lawsuit is necessary to be merely a "brief statement." *See Inter Tribal Council*, 133 S. Ct. at 2258-60. As the Supreme Court explained, its conclusion that this lawsuit is an avenue open to Arizona was required by two prior conclusions. First, the Court concluded that the NVRA required the State of Arizona to "accept and use" the Federal Form as written, without the proof of citizenship sought by the State. *Id*. at 2257. However, the Court also concluded that Congress has no power to "prescribe[e] voter qualifications" or "preclude[] a State from obtaining the information necessary to enforce its voter qualifications." *Id*. at 2258-59. These two conclusions were in obvious tension. Therefore, the Court suggested this very lawsuit as the way to reconcile these conclusions. "Happily, we are spared that necessity [of deciding whether or not the NVRA is constitutional], since the statute provides another means by which Arizona may obtain information needed for enforcement." *Id*. at 2259. The Court went on to expressly suggest this lawsuit. *Id*. at 2259-60. Not a word of the Court's opinion is taken "out of context." Nor do the Defendants offer an alternative reading of the Court's straightforward analysis. Their attempt to dodge the Supreme Court's holding in *Inter Tribal Council* is transparently weak.

A. The EAC Is Under a Nondiscretionary Duty to Include Instructions Which the States Deem Necessary to Enforce Their Voter Qualification Laws.

The EAC's failure to include the Plaintiffs' requested state-specific instructions on the Federal Form effectively precludes the Plaintiffs from obtaining the documentary evidence of citizenship that the Plaintiffs have deemed necessary to evaluate the eligibility of voter registration applicants. Despite this effect of the EAC's actions, the Defendants baldly assert that they have not interfered with the Plaintiffs' constitutional authority to establish and enforce

voter qualifications. Def. Resp. at 17-18. This assertion not only defies reason, but also runs contrary to the holding in *Inter Tribal Council*.

Subject to constitutional limitations such as those asserted by the Plaintiffs in this case, the *Inter Tribal Council* decision requires the States to accept and use completed Federal Forms to register applicants to vote in Federal elections. *Inter Tribal Council*, 133 S. Ct. at 2257, 2259. This requirement, however, cannot interfere with the constitutional authority of the States to establish and enforce voter qualifications. *Id.* at 2258-59. Thus, in holding that the States must accept and use the Federal Form, the *Inter Tribal Council* Court expressly limited the EAC's discretion regarding State requests that additional information be included in the state-specific instructions of the Federal Form. Noting that this limitation on the EAC's discretion was required to "avoid serous constitutional doubt," *id.* at 2259, the Court held that the EAC's is under a nondiscretionary duty to include instructions which enable the State to obtain information the States deem necessary to assess the eligibility of voter registration applications and to enforce the States' voter qualification laws. *Id*. at 2259-60. "That is to say, it is surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required." *Id.* at 2259 (emphasis provided). The Defendants have not disputed that documentary proof-of-citizenship *may* be required by the States to enforce their voter qualification laws. Thus, under *Inter Tribal Council*, the EAC must include such information on the Federal Form at the Plaintiffs' request.

Ignoring the extent to which this portion of the *Inter Tribal Council* decision limits the EAC's discretion, the Defendants apparently believe that, despite the unequivocal holding in *Inter Tribal Council*, the EAC retains "full discretion" to determine, unconstrained by constitutional principles, the necessity of state-specific instructions. Def. Resp. at 23-24.

Throughout their Response Brief, the Defendants maintain that the Plaintiffs needed to establish *to the EAC's satisfaction* that the state-specific instructions requested by the Plaintiffs are *necessary* to enforce the Plaintiffs' voter qualification laws. See Def. Resp. at 1, 10, 11, 15, 19, 21-22, 23-24, 25, 26, 30. Indeed, the Defendants go further and assert that the EAC's determination regarding the necessity of such instructions should be reviewed only for abuse of discretion. Def. Resp. at 17-18, 29. Maintaining that the Plaintiffs must establish the necessity of their requested instructions to the EAC's satisfaction, the Defendants state that under *Inter Tribal Council* "the EAC might have 'a nondiscretionary duty' if, but only if, a State could 'establish… that a mere oath will not suffice to effectuate its citizenship requirement.' *Inter Tribal Council*, 133 S. Ct. at 2260." Def. Resp. at 14. However, nothing in the *Inter Tribal Council* opinion (nor in the NVRA, for that matter) suggests that States need to convince the EAC that their requested instructions are necessary before being allowed to enforce their validly enacted voter registration laws.

The Defendants characterize the EAC as a policy making body empowered to second-guess the judgment of a sovereign State. They contend that the States of Arizona and Kansas should have submitted "evidence to the EAC showing that the State was 'precluded … from obtaining the information necessary to enforce its voter qualifications.'" Def. Resp. at 11 (*quoting Inter Tribal Council*, 133 S. Ct. at 2258-59). There are two fatal flaws with this contention. First, they take the *Inter Tribal Council* words out of context. The Defendants declare that such a showing must be made to the EAC, which they imagine sits in judgment of state voter registration laws. However the Supreme Court explained two paragraphs later exactly to whom such a showing must be made: the showing should be made *to this Court*. "Should the EAC's inaction persist, Arizona would have the opportunity to establish *in a reviewing court* that

a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form." *Inter Tribal Council*, 133 S. Ct. at 2260 (emphasis added). The Defendants' attempt to substitute the EAC for "a reviewing court" is a brazen mischaracterization of *Inter Tribal Council*, to say the least.

Second, the EAC is nowhere empowered by statute to judge which State registration laws are "necessary" and which State registration laws are not. Nor could Congress have vested the EAC with such power. An executive agency created by Congress cannot exercise powers that Congress itself lacks. Article II, Section 2, of the Constitution makes clear, and the Supreme Court has confirmed, that "prescribing voter qualifications … 'forms no part of the power to be conferred upon the national government'" *Inter Tribal Council*, 133 S. Ct. at 2258. And "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary" to ascertain that a person claiming to be a qualified elector was in fact so qualified. *Id*. at 2258-59. The Defendants' attempt to transform the EAC into a policy making body empowered to nullify state registration laws is contrary to the NVRA, contrary to the Constitution, and contrary to *Inter Tribal Council*. What is more, vesting the EAC with broad authority to nullify validly enacted state laws would constitute a system of preclearance of the kind specifically disapproved of in *Shelby County, Ala. v. Holder,* __ U.S. __, 133 S. Ct. 2612 (2013) (hereinafter "*Shelby County*").

The word *necessary* is derived from the NVRA itself, which provides that the Federal Form "may require only such identifying information… and other information… as is necessary to enable the appropriate State election official to assess the eligibility of the applicant…" 42 U.S.C. § 1973gg-7(b)(1). The NVRA, however, is silent regarding who is responsible for

determining what information is necessary. While the Defendants assume that the EAC is charged with making that determination in its discretion, the *Inter Tribal Council* Court assumed otherwise, noting that a State may request that its state-specific instructions "include information *the State* deems necessary to determine eligibility…" *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis added). This reading, again, was required so that "no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading." *Id*. Thus, the *Inter Tribal Council* Court recognized that, pursuant to their power to establish and enforce voter qualifications, it is for the States, not the EAC, to determine what information is necessary to enforce the States' voter qualification laws.

B. The EAC Lacks the Authority to Determine the "Quantum of Information" Necessary for State Election Officials to Assess the Eligibility of Voter Registration Applicants.

The Defendants assert that Congress has the ultimate authority to determine voter registration procedures relating to Federal elections, including "making decisions regarding the quantum of information necessary for election officials to determine a voter's eligibility for those elections." Def. Resp. at 19. Thus, by extension, the Defendants assert that under the NVRA it is for the EAC to determine "the quantum of 'information… necessary to enable the appropriate State election official to assess the eligibility of the applicant,' and [to ensure] that the Federal Form's contents are limited to such information." Def. Resp. at 21-22 (quoting a portion of 42 U.S.C. § 1973-7(b)(1)).[2] However, the NVRA nowhere states that the EAC shall determine the

[2] Supporting this assertion, the Defendants also point to *Inter Tribal Council*, 133 S. Ct. at 2259, for purportedly concluding "that the United States' interpretation of § 9(b)(1) (*sic*) of the NVRA to mean that 'the EAC 'shall require information that's necessary, but may only require that information' is a proper exercise of 'validly conferred discretionary executive authority.' " The Plaintiffs submit that the Defendants mischaracterize this portion of the *Inter Tribal Council* opinion, which in fact *rejected* the Government's contention, as a fuller review of this section of the opinion makes plain. Indeed, the Defendants' reading is undermined by the final sentence in this section of the opinion, where the Court stated, "it is surely permissible if not requisite for the Government to say that

"quantum of information" necessary for State election officials to assess the eligibility of Federal Form applicants, and the Defendants have cited to no other legal authority conferring such authority upon the EAC.[3] The "quantum of information" theory is nothing more than an unsupported assertion that runs contrary to the holding of *Inter Tribal Council*.

That is because the power to determine the quantum of information necessary to assess the eligibility of voter registration applicants is part of (if not synonymous with) the power to enforce voter qualifications, a power exclusively held by the States. *Inter Tribal Council*, 133 S. Ct. at 2258-59. Simply put, the Defendants are attempting to establish a new federal power to establish and enforce voter qualifications by calling this power by a different name, *i.e.*, "the power to establish the quantum of information necessary to assess the eligibility of voter registration applicants." Thus, while the Defendants pay lip service to the States' exclusive authority to establish and enforce voter qualifications, the Defendants' arguments in fact vitiate that power and subject it to a nebulous federal authority to "establish the quantum of information" necessary to enforce voter qualifications. Whatever one calls this power, the fact remains that the Defendants are precluding the Plaintiffs from enforcing their voter qualification laws in violation of the constitutional principles described in *Inter Tribal Council*.

The Defendants claim this new power to establish the quantum of information necessary to assess the eligibility of voter registration applications under the auspices of the Elections Clause, which states, "The Times, Places and Manner of holding Elections for Senators and

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necessary information which *may* be required *will* be required." *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis provided).

[3] After asserting that Congress has the power to determine the quantum of information necessary for election officials to determine an applicant's eligibility, the Defendants point to three cases: *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995); and *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995). All three cases merely hold that the NVRA's "motor-voter" requirement that each State's motor vehicle driver's license application process shall serve as an application for voter registration with respect to elections for Federal office is constitutional. None of those cases concern the "quantum of information" to be required in voter registration applications.

Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const. Art. I, § 4, cl. 1. Concerning the Elections Clause, the *Inter Tribal Council* Court stated, "The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.' " *Inter Tribal Council*, 133 S. Ct. at 2253 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).[4]

Nevertheless, to the extent the Elections Clause gives Congress the authority to regulate voter registration relating to Federal elections, this power must be interpreted in light of the States' equally weighty constitutional power to establish and enforce voter qualifications under Article I, § 2, cl. 1, Article II, § 1, cl. 2, and the Tenth and Seventeenth Amendments. To that end, the *Inter Tribal Council* Court expressly held that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257 (emphasis provided). The *Inter Tribal Council* Court thus acknowledged a tension between the competing power of Congress to regulate voter registration under the Elections Clause on the one hand and the power of the States to establish and enforce voter qualifications under the Qualifications Clauses on the other hand. This tension exists because voter registration is how voter qualifications are enforced.

[4] While *Inter Tribal Council* and *Smiley* assume that Congress's authority under the Elections Clause includes the power to regulate "registration," Justice Thomas's dissenting opinion in *Inter Tribal Council* correctly classifies these statements as dicta. "But that statement was dicta because *Smiley* involved congressional redistricting, not voter registration. 285 U.S., at 361-62. Cases since *Smiley* have similarly not addressed the issue of voter qualifications but merely repeat the word "registration" without further analysis." *Inter Tribal Council*, 133 S. Ct. at 2268 (Thomas, J., dissenting). Like the Petitioners in *Inter Tribal Council*, the Plaintiffs here do not contend, at least for the purposes of this action, that Congress has no authority to regulate voter registration relating to Federal elections.

While the Defendants would resolve this tension by completely subjugating the States' constitutional power to that of Congress, their approach raises the same "serious constitutional doubts" that concerned the *Inter Tribal Council* Court because it would preclude the Plaintiffs from obtaining the information they deem necessary to enforce their voter qualifications. Conversely, the *Inter Tribal Council* Court resolved this tension by holding that the States must abide by the *procedural* provisions of the NVRA such as 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. To that end, "information which *may* be required [by the States] *will* be required [by the EAC]." *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis provided).

Finally, and most importantly, the Defendants' argument cannot be squared with the wording of *Inter Tribal Council*. The Supreme Court made clear that the EAC retains absolutely no discretion on this particular matter: "Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is *therefore under a nondiscretionary duty* to include Arizona's concrete evidence requirement on the Federal Form." *Inter Tribal Council*, 133 S. Ct. at 2260 (emphasis added). A state need only show (to the satisfaction of the reviewing Court) that mere oath will not suffice. The EAC's duty is "nondiscretionary." The EAC does not sit in judgment of which state policies are necessary and which are not necessary.

C. The States' Power to Establish and Enforce Voting Qualifications Existed Prior to the Constitution and is therefore Protected by the Tenth Amendment.

Despite the Defendants' previous concession that the Plaintiffs have the exclusive authority to establish and enforce voter qualifications for Federal elections, see Def. Resp. at 17-

20, the Defendants now assert, citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (hereinafter "*U.S. Term Limits*"), that the Tenth Amendment does not protect the Plaintiffs' authority to establish and enforce voter qualifications for Federal elections because, according to the Defendants, the States did not possess that authority prior to entering into the Union. Def. Resp. at 23. However, the decision in *U.S. Term Limits* is clearly distinguishable from this case, and the Defendants' assertion is contrary to the language of the Constitution itself.

U.S. Term Limits presented a constitutional challenge to an amendment of the Arkansas State Constitution that prohibited the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate had already served three terms in the House of Representatives or two terms in the Senate. *U.S. Term Limits*, 514 U.S. at 783. In holding that the States lacked the power to set qualifications for congressional candidates additional to those found in the Qualifications Clauses, U.S. Const. Art. I, § 2, cl. 2 and Art. I, § 3, cl. 3, the Court noted that the Tenth Amendment could not reserve this power to the States because the power to set qualifications for service in Congress did not exist before the Constitution was ratified. *U.S. Term Limits*, 514 U.S. at 802-03.

In contrast to the power to establish the qualifications for congressional candidates (which offices did not exists prior to the Constitution), the power of the States (and, before them, the colonies) to establish and enforce voter qualifications *did* exist before the Constitution was ratified, a fact made plain by the Constitution itself. Concerning the electors for Representatives, Article I, § 2, cl. 1 of the Constitution provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Similarly, the Seventeenth Amendment provides concerning electors for Senators that "[t]he

electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." These constitutional provisions limit the States' ability to establish voter qualifications for congressional elections which differ from voter qualifications for the most numerous branch of the State legislatures, a limitation that would not be in any way sensible if the States did not have the power to establish voter qualifications in the first place.

The Defendants' assertions to the contrary notwithstanding, the States had the power to establish and enforce voter qualifications for all elections (including, presumably, elections for delegates to the Constitutional Convention) prior to the ratification of the federal Constitution, and the Tenth Amendment continues to reserve that power to the States. "In other words, 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) (quotation omitted). The Supreme Court in *Shelby County* therefore emphasized, relying in part on the Tenth Amendment, that the "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby County*, 133 S. Ct. at 2623 (quotation omitted). In the instant case, the EAC's failure to modify the state-specific instructions of the Federal Form as requested by the Plaintiffs infringed upon this right, and the Plaintiffs are therefore entitled to relief under the Tenth Amendment.

D. The States Have Established That "a Mere Oath Will Not Suffice to Effectuate [Their] Citizenship Requirement[s]"

The Supreme Court in *Inter Tribal Council* identified the showing that must be made to this Court: "Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship…" *Inter Tribal Council*, 133 S. Ct. at 2260 (emphasis added). This both Arizona and Kansas have already done.

The showing consists of two parts. First, both States have submitted evidence indicating that in the past when proof of citizenship was not required, significant numbers of aliens have succeeded in registering to vote by falsely signing voter registration forms. Kansas has provided affidavits in this case identifying twenty such aliens on the voter rolls. And that number is only the tip of the iceberg, because it principally includes aliens who applied for driver's licenses and confirmed their alien status in the process. Aliens who did not apply for driver's licenses cannot be so easily identified on the voter rolls. Arizona has provided affidavits identifying an even larger number of aliens who successfully registered to vote when the only means of enforcing the State's citizenship requirement was a mere oath.

Second, the State of Kansas has also shown that, after January 1, 2013, the new proof-of-citizenship requirement (on the state form) successfully prevented aliens who attempted to register from doing so. In Sedgwick County, an alien who submitted a registration form confirmed in a telephone conversation with the county election commissioner's office that he was not a United States citizen. The alien signed the oath on the registration form attesting to United States citizenship. Had the proof-of-citizenship requirement not been in effect, the alien would have succeeded in registering to vote. See Lehman Affidavit, ECF No. 20. In addition, in Finney County, an alien attending Garden City Community College submitted a voter registration form on which the box attesting to United States citizenship was already checked before the alien filled out and signed the form. The alien presumably did so in order to qualify for in-state tuition rates in the future. *See* Ulrich Declaration, attached hereto. As the documentary evidence submitted under seal demonstrates, the alien was in possession of a current lawful permanent resident alien card (a "green card") which, by definition, can only be issued to an alien. And in the space on the registration form asking for a naturalization number

(if applicable), the alien wrote the "A number" on his green card, not a naturalization number. Here too, if the proof-of-citizenship requirement had not been in place, the alien would have succeeded in registering to vote. Mere oath was insufficient. As Justice Scalia correctly observed during oral argument in the *Inter Tribal Council* case: "The proof [the EAC] requires is simply the statement, 'I'm a citizen.' That is proof?… That is not proof at all… Under oath is not proof at all. It's just a statement." *Inter Tribal Council*, transcript of oral argument, at 44. Kansas and Arizona have demonstrated the truth of Justice Scalia's observation. "[T]he EAC is therefore under a nondiscretionary duty to include Arizona's [and Kansas's] concrete evidence requirement on the Federal Form." *Inter Tribal Council*, 133 S. Ct. at 2260.

Regardless of the number of aliens unlawfully present on the Plaintiffs' voter rolls or successfully kept off the voter rolls through the proper implementation of the Plaintiffs' proof-of-citizenship requirements, the Plaintiffs submit that under *Inter Tribal Council* they need not provide such specific evidence. Because the EAC is under a nondiscretionary duty to include the Plaintiffs' requested instructions simply because those requested instructions reflect the Plaintiffs' validly enacted laws for the enforcement of voter qualifications, no additional showing is necessary. Stated differently, the Plaintiffs have "establish[ed] in a reviewing court that a mere oath will not suffice to effectuate [their] citizenship requirement[s]" simply by showing that a mere oath does not effectuate the Plaintiffs' validly enacted proof-of-citizenship laws. As stated *supra*, to require more would result in an unconstitutional preclearance system contrary to *Shelby County*, and in any event is contrary to the holding in *Inter Tribal Council* placing a nondiscretionary duty upon the EAC to include state-specific instructions enabling the Plaintiffs to enforce their voter qualification laws.

E. The Defendants Attempt to Advance Their Policy Preference Opposing Proof of Citizenship Requirements.

Finally, counsel for the Defendants go beyond arguing that the EAC *cannot* act to accommodate the Plaintiffs' requests and instead argue that the EAC *should not* act to accommodate the Plaintiffs' requests. They drop all pretense of defending the inaction of the EAC as a mere procedural delay and resort to making policy arguments reflecting their partisan view that States should not require proof of citizenship. In their own words: "A written statement made under penalty of perjury is considered reliable evidence for many purposes." Def. Resp. at 27.[5] "No evidence suggests that the threat of potential fines, imprisonment, or deportation as explicitly set out on the Federal Form … is not a powerful or effective deterrent against voter registration fraud." *Id*. at 28.[6] While defense counsel are certainly entitled to hold those policy views, such policy considerations are of no relevance to the question of whether the EAC has acted in violation of the APA, has acted contrary to the NVRA, or has blocked the authority of the States in contravention of Article I, section 2 and the Tenth Amendment of the Constitution. This case is not about whether the States are correct in their view that the integrity of voter rolls is best protected by a proof-of-citizenship requirement. It is about whether the States have the constitutional authority to make that judgment for themselves.

III. The Plaintiffs Meet the Standards for Preliminary Injunctive Relief.

The Plaintiffs submit that the Defendants' contentions that the Plaintiffs do not meet the standards for preliminary injunctive relief are largely disputed by the Plaintiffs' Brief, Pl. Br. at

[5] The Defendants then argue that a sworn statement on a voter registration card is of equal reliability to a sworn affidavit submitted to an Article III Court. Def. Resp. 27. The Defendants apparently forget that an attorney reviews, submits, and relies upon an affidavit submitted to a Court; whereas no one else reviews, or stands behind the veracity of, the assertions made on a voter registration form.

[6] No evidence other than the Plaintiffs' affidavits which the Defendants wish to prevent this Court from considering, that is.

17. The present Reply therefore focuses on particular assertions made by the Defendants that warrant a response.

A. The Plaintiffs Have Already Suffered and Will Continue to Suffer Irreparable Injury Unless the Court Issues a Preliminary Injunction.

The Defendants assert that the EAC's inaction is not causing the Plaintiffs any harm, but rather the changes in Kansas and Arizona law are causing the Plaintiffs harm. Def. Resp. at 34. Notably, the Defendants do not dispute that the Kansas and Arizona laws in question are validly enacted state laws pursuant to the Plaintiffs' constitutional authority to establish and enforce voter qualifications. Conversely, the EAC's inaction is blocking the Plaintiffs' constitutional authority to enforce their voter qualifications. The Defendants' focus is misplaced. It is to no avail to assert that the Plaintiffs could simply forgo exercising their constitutional authority because that assertion fails to address the Defendants' unlawful failure to include the Plaintiffs' requested state-specific instructions on the Federal Form. The Defendants cannot force the Plaintiffs into the position of choosing between exercising established constitutional authority or suffering irreparable harm.

The Defendants also minimize the value of the Plaintiffs' sovereignty interest by attempting to tie that sovereignty to discrete events such as Federal elections. Def. Resp. at 36. But the Plaintiffs are suffering harm right now because their validly enacted laws for the enforcement of voter qualifications are going unenforced due to the EAC's failure to fulfill their nondiscretionary duty to include the Plaintiffs' requested instructions on the Federal Form. According to the Plaintiffs' validly enacted laws, Federal Forms submitted without fulfilling the Plaintiffs' proof-of-citizenship requirements should be rejected upon receipt. K.S.A. 25-2309(l); A.R.S. § 16-166. Rather, and only due to the exceptional circumstances created by the Defendants' inaction, the Plaintiffs have undertaken extraordinary measures which they should

not be required to undertake. Such extraordinary measures include, as described in affidavits submitted by the Plaintiffs, extensive training and preparation for a bifurcated election system.

Similarly, the Defendants attempt to limit the existence of irreparable harm to the infringement of only certain constitutional rights. Def. Resp. at 36. In so doing, the Defendants completely ignore the two Tenth Circuit cases cited by the Plaintiffs in their opening brief. In those cases, the Tenth Circuit held that an agency's decision that places a State's sovereign interests and public polices at stake is deemed to cause irreparable injury to that state, *Kansas v. U.S.*, 249 F.3d 1213, 1227-28 (10th Cir. 2001), and that an intrusion of an Indian Nation's sovereignty constitutes irreparable injury, *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

Lastly, the Defendants assert that the Plaintiffs are not suffering irreparable harm because there are additional measures at the Plaintiffs' disposal to verify the citizenship of voter registration applicants. Def. Resp. at 38. Defendants point in particular to after-the-fact investigation tools which the Plaintiffs have already shown to be relatively ineffective compared to requiring proof of citizenship at the time of application. See e.g., ECF No. 19 at ¶ 15. It is beyond cavil that the Plaintiffs cannot be expected to detect every noncitizen who successfully yet unlawfully registers to vote. Regardless, even if such investigation tools were as effective as the Plaintiffs' validly enacted voter qualification laws, the Defendants do not have the power to force sovereign States to choose enforcement measures that those States have found to be insufficient.

B. The Injury to the Plaintiffs Greatly Outweighs Any Purported Injury to the Defendants.

The Defendants' assert two interests that would purportedly be injured if preliminary injunctive relief is granted to the Plaintiffs: (1) an interest in ensuring that Congress's voter

registration procedures are followed by all States; and (2) an interest in ensuring that eligible citizens are able to register to vote without "additional obstacles." Def. Resp. at 41. As to the first asserted interest, granting the Plaintiffs preliminary injunctive relief would not injure that interest because adding the Plaintiffs' requested instruction to the Federal Form would be in conformity, not in violation of, the NVRA. Once the Plaintiffs requested instructions are added to the Federal Form, the Plaintiffs would process Federal Form registration in compliance with the NVRA just as they are now. The Defendants, therefore, have not shown how granting preliminary injunctive relief would result in the NVRA being violated by the Plaintiffs.

As to the second asserted interest, it is no injury to the Defendants that there are obstacles to registering to vote. Indeed, the current version of the Federal Form contains 24 pages of unique state-specific instructions, each of which present obstacles to registering to vote. *See* EAC00073-EAC000097. Thus, the Defendants are essentially arguing that they are injured when, and only when, state-specific instructions are included on the Federal Form contrary to the Defendants' policy decisions regarding what should and should not be required to register to vote. However, as argued *supra*, the State have the constitutional authority to establish and enforce voter qualifications to the exclusion of the Defendants. Thus, the Defendants do not possess the interest that they assert would be injured.

C. Injunctive Relief Is Not Adverse to the Public Interest.

Finally, the Defendants assert that the Plaintiffs' requested preliminary injunctive relief would be adverse to the public interest because it would place an obstacle in the way of registering to vote and would interfere with "the Federal election system." However, placing obstacles in the way of registering to vote is not by definition adverse to the public information. Indeed, many obstacles to registering to vote, such as the Plaintiffs' proof-of-citizenship

requirements, are positively in the public interest because they "protect the integrity and reliability of the electoral process itself." *U.S. Term Limits*, 514 U.S. at 834 (1995) (quotation omitted). The Defendants have not shown how the benefits of the Plaintiffs' requested state-specific instructions would be adverse to the public interest.

Further, the Defendants assert without explanation that the Plaintiffs' requested state-specific instructions would interfere with Federal elections. To the contrary, the Plaintiffs submit that their requested instructions would in no way interfere with Federal elections or the Federal election system. Preventing noncitizens from voting in elections does not interfere with but rather protects and enhances the integrity of elections. The Plaintiffs' requested instructions are therefore not adverse to the public interest.

CONCLUSION

For the foregoing reasons, the Plaintiffs ask this Court to enter a preliminary injunction in their favor, or in the event that this Court advances this matter to summary judgment, a permanent injunction, requiring the Defendants to modify their state-specific instructions to the Federal Form as the Plaintiffs have requested.

Respectfully submitted this 11th day of December, 2013.

s/ Thomas E. Knutzen
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 11th day of December, 2013, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

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