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.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

The National Voter Registration Act, 42 U.S.C. § 1973gg *et seq*. (hereinafter "the NVRA") requires the United States Election Assistance Commission (hereinafter "the EAC") to develop a mail voter registration application form (hereinafter "the Federal Form") in consultation with the chief election officers of the States. 42 U.S.C. § 1973gg-7(a)(2); *Arizona v. Inter Tribal Council of Ariz., Inc.*, __ U.S. __, 133 S. Ct. 2247, 2252 (2013) (hereinafter "*Inter Tribal Council*"). Plaintiffs initiated this action because the EAC and the EAC's Acting Executive Director, Alice Miller (hereinafter "Miller"), refused to honor Plaintiffs' requests to modify the Federal Form to include State-specific instructions. Consistent with the holding in *Inter Tribal Council*, the EAC is under a nondiscretionary duty to include instructions that reflect the respective voter qualification and registration laws of Plaintiffs, and which enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applications and to enforce Plaintiffs' voter qualification laws. This Brief is filed in support of Plaintiffs' Motion for Preliminary Injunctive Relief, which seeks a preliminary injunction requiring the Defendants to include on the Federal Form the instructions requested by Plaintiffs.

STATEMENT OF FACTS

Facts supporting Plaintiffs' Motion for Preliminary Injunction are set forth in detail in the Complaint. To avoid repetition, Plaintiffs incorporate by reference the facts contained therein, including all exhibits attached thereto. In addition, Plaintiffs offer the following facts supported by affidavits of Kansas Deputy Assistant Secretary of State Brad Bryant, Sedgwick County (KS) Election Commissioner Tabitha Lehman, Arizona Secretary of State Ken Bennett, Maricopa County (AZ) Elections Director Karen Osborne, and Maricopa County Federal Compliance

Officer Tammy Patrick, attached hereto respectively as Exhibits "A" through "E," which are incorporated herein by reference:

In accordance with their authority under the United States Constitution to establish qualifications for their respective voters, Plaintiffs Kansas and Arizona (collectively "Plaintiff States") both enacted statutes requiring applicants seeking to register to vote to provide proof of citizenship. (Exhibit A at ¶ 6; Exhibit C at 7.) Both States have experienced situations in which non-citizens have been permitted to register and have in fact voted. (Exhibit A at ¶¶ 3-4; Exhibit B; Exhibit D at ¶¶ 8-10.)

Both Plaintiffs requested the EAC to modify the State-specific instructions to include their respective proof-of-citizenship requirements, which unlike the sworn attestation included on the Federal Form, will enable the States to verify that applicants are United States citizens and are therefore eligible to vote. (Exhibit A at ¶¶ 8-13; Exhibit C at ¶¶ 6-10, 14, 18-19.) The EAC has refused to approve Plaintiffs' requests. (Exhibit A at ¶¶ 10, 12, 14; Exhibit C at ¶¶ 9, 14, 19.) However, the Department of Defense promptly approved the same request for Arizona's proof-of-citizenship requirement to be included in the instructions for the Federal Post Card Application used by military and overseas absentee voters. (Exhibit C at ¶ 11.)

As a direct result of the EAC's refusal to modify the State-specific instructions as requested by Plaintiffs, the Plaintiff States are being forced to establish dual voter registration systems in which applicants submitting the Federal Form without evidence of citizenship are eligible to vote in elections for federal office only while other applicants who have provided evidence of citizenship are eligible to vote in all elections. (Exhibit A at ¶ 16; Exhibit C at ¶¶ 4, 17, 20-23.) Implementing dual voter registration systems is already costing Plaintiffs a tremendous and incalculable amount in lost voter confidence and in increased voter confusion.

(Exhibit A at ¶¶ 16-18; Exhibit C at ¶¶ 4, 23, 36-38.) In addition to these incalculable and irreparable costs, Plaintiffs will be forced to expend thousands of dollars and man-hours to implement these dual registration systems. (Exhibit A at ¶¶ 16-18; Exhibit C at ¶¶ 21-35; Exhibit E at ¶¶ 8-22.)

ARGUMENTS AND AUTHORITIES

The granting or denial of a preliminary injunction rests within the discretion of the district court. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940); *see also*, *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). A movant is entitled to a preliminary injunction upon establishing the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party resulting from the preliminary injunction; and (4) the injunction is not adverse to the public interest. *Westar Energy*, 552 F.3d at 1224; *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001) (hereinafter "*Prairie Band*"). As demonstrated below, these four factors weigh heavily in Plaintiffs' favor and the Court should therefore enter the requested preliminary injunction.

I. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs seek a writ of mandamus pursuant to 28 U.S.C. § 1361 and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. (hereinafter "the APA"), ordering the EAC and Miller to make modifications to the State-specific instructions of the Federal Form as requested by Plaintiffs. Plaintiffs are likely to succeed on the merits because under Article I, § 2, cl. 1, Article II, § 1, cl. 2, and the Tenth and Seventeenth Amendments of the United States Constitution, the States have the sole authority to establish and enforce the qualifications of its voters. Moreover,

as the U.S. Supreme Court recently determined, the EAC is under a nondiscretionary duty to include instructions that reflect the respective voter qualification and registration laws of the Plaintiff States. *Inter Tribal Council*, 133 S. Ct. at 2259-60. Likewise, the EAC is under a nondiscretionary duty to include instructions which enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualification laws. *Id*. As a result, the EAC is absolutely required to include the instructions requested by Plaintiffs.

A. Plaintiffs are entitled to judicial review of the EAC's agency action.

Plaintiffs have stated four causes of action arising from the APA: (1) that the EAC unlawfully withheld or unreasonably delayed approval of Plaintiffs' requested State-specific instructions; (2) that the EAC's refusal of Plaintiffs' State-specific instructions violated Plaintiffs' constitutional rights; (3) that the EAC's refusal of Plaintiffs' State-specific instructions was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and (4) that the EAC's refusal of Plaintiffs' State-specific instructions exceeded the EAC's statutory jurisdiction. (Doc.[1] 1 at ¶¶ 80-114.) In each of these claims, the Court must first determine that the EAC's action was final, such that judicial review is appropriate.

The EAC is a federal agency of the United States whose actions are subject to judicial review under the APA. 5 U.S.C. § 551(1); 42 U.S.C. § 15321 *et seq.*; *see also Inter Tribal Council*, 133 S. Ct. at 2250. The APA allows for judicial review of agency decisions and authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). In reviewing the

[1] "Doc." refers to the Document filed on the Court's ECF system. Here, Doc. 1 is the Complaint.

decision of a federal agency, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The reviewing court reviews questions of law de novo and does not defer to an agency's construction of a statute if "the agency's construction is unreasonable or impermissible." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010) (internal citation and quotation marks omitted).

Under the APA, "agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Where no other statute provides a private right of action, judicial review of an agency action is appropriate if it constitutes a "final agency action." 5 U.S.C. § 704; *Norton*, 542 U.S. at 62. In explaining whether an agency action is final, the U.S. Supreme Court has stated:

> To determine when an agency action if final, we have looked to, among other things, whether its impact "is sufficiently direct and immediate" and has a "direct effect on . . . day-to-day business." An agency action is not final if it is only "the ruling of a subordinate official," or "tentative." The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.

Franklin v. Massachusetts, 505 U.S. 788, 796-97 (1992) (citations omitted). Similarly, the Tenth Circuit Court of Appeals has held that, a final agency action occurs when two conditions have been met: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1236 (10th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (internal quotation marks omitted). Second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.*

Importantly, an agency's failure to act can be a final agency action. For purposes of assessing agency action, a "failure to act, is . . . a failure to take an *agency action* – that is, a failure to take one of the agency actions (including their equivalents) earlier described in § 551(13)." *Norton*, 542 U.S. at 62 (emphasis provided) (internal quotation marks omitted). The U.S. Supreme Court has stated:

> A "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline. The important point is that a "failure to act" is properly understood to be limited, as are the other items in § 551(13), to a discrete action."

Id. at 63.

Here, the letters from the EAC to Kansas Secretary of State Kris W. Kobach (Doc. 1-9[2]), and to Arizona Secretary of State Ken Bennett (Doc. 1-18), denying Plaintiffs' requests to modify the State-specific instructions of the Federal Form to reflect Plaintiffs' voter qualification laws, constitute "final agency actions." In sending these letters to Plaintiffs, the EAC completed its decisionmaking process. The actions were not merely tentative, and the results directly affect Plaintiffs because of the subsequent legal consequences to Plaintiffs' constitutional rights to establish and enforce voting qualifications. While the EAC's letters to Plaintiffs indicate the agency's decision to "defer" Plaintiffs' request until "the reestablishment of a quorum at EAC," (Doc. 1-9) the EAC has not had a quorum for almost three years, has not had a single commissioner for almost two years, and "there is no reason to believe that [the Commission] will be restored to life in the near future." *Inter Tribal Council*, 133 S. Ct. at 2273 (Alito, J., dissenting). There being no prospect for reconsideration of the EAC's decision for the

[2] These references are to the Exhibits to the Complaint. For example, this refers to Document 1, Exhibit 9 as set forth on the Court's ECF Docket.

foreseeable future, Plaintiffs submit that the EAC's letters to Plaintiffs constitute denials of Plaintiffs' requests, and that such denials constitute "final agency actions."

Alternatively, at the very least, the EAC has "failed to act" as that phrase is used in 5 U.S.C. § 551(13) and *Norton*. As argued *infra*, the EAC is under a nondiscretionary duty, at the request of Plaintiffs, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registrations laws of the Plaintiff States, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. The discrete agency action that the EAC should have taken was to grant Plaintiffs' requests to modify their State-specific instructions on the Federal Form. The EAC's failure to not only grant the requests but to take any action whatsoever other than deferring any decision into the indefinite future constitutes "agency action" under 5 U.S.C. § 551(13), and is therefore subject to review under the APA.

B. The EAC's failure to modify the State-specific instructions of the Federal Form as requested by Plaintiffs violates Plaintiffs' constitutional rights to establish and enforce voter qualifications.

An agency action should be reversed if it violates constitutional rights. Here, as discussed more fully below, the EAC's refusal to approve Plaintiffs' requested State-specific instructions violates the Plaintiff States' constitutional rights and must be overturned.

1. The United States Constitution affirmatively vests the States with the authority to establish and enforce voter qualifications.

The federal government's powers are specifically enumerated in the U.S. Constitution, which means that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Since

Congress has no power to act unless the Constitution authorizes it to do so, Congress's enumerated powers have "judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566 (1995). As recently recognized by the U.S. Supreme Court in *Inter Tribal Council*, the Constitution expressly reserves to the States, to the exclusion of Congress, the power to establish and enforce voter qualifications for the federal elections.

Article I, § 4, clause 1 of the U.S. Constitution, often referred to as the Elections Clause, states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Although the Elections Clause gives Congress the power to alter or supplant state regulations related to the "Times, Places, and Manner" of elections, the *Inter Tribal Council* Court 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.

In fact, the Court determined that three different sections of the Constitution expressly reserve to the States, to the exclusion of Congress, the power to establish and enforce voter qualifications for federal elections: Article I, § 2, clause 1 (providing that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); Article II, § 1, clause 2 (providing that "Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors); and the Seventeenth Amendment (providing that electors in each State for the Senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"). *Inter Tribal Council*, 133 S. Ct. at 2258.

Reflecting on these provisions of the Constitution, the *Inter Tribal Council* Court concluded that "[o]ne cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly . . . 'Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'" *Inter Tribal Council*, 133 S. Ct. at 2258 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J. concurring in part and dissenting in part)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 833-34 (1995). The Court therefore determined that "Prescribing voting qualifications, therefore, '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 provisions of the Constitution expressly assign the power of establishing voter qualifications to the States. *Inter Tribal Council*, 133 S. Ct. at 2258-59. Further, the Court held that this power includes the power to enforce voter qualifications. *Id.*

In light of this power, the United States 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) (quotation marks omitted). Thus, *the States possess the sole authority to determine the manner by which their voter qualification laws are enforced.* Kansas and Arizona are acting well within this authority when they require voter registration applicants to prove their United States citizenship. The EAC's refusal to modify the Federal Form as requested by Plaintiffs infringes on that power, and therefore violates Article I, § 2, Article II, § 1, and the Seventeenth Amendment of the Constitution.

2. The Tenth Amendment reinforces the States' authority to establish and enforce voter qualifications.

Not only do the States have explicit authority under the U.S. Constitution to establish and enforce voter qualifications for federal elections, but the States also have implicit authority to do so pursuant to the Tenth Amendment. The Tenth Amendment to the United States Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment thus makes explicit what is implied by the enumeration, and therefore limitation, of powers granted to the Federal Government. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992) (citations omitted).

Further, the Tenth Amendment and the structure of the Constitution highlight the importance of state sovereignty. "It is incontestable that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and *inviolable* sovereignty,' . . . [which] is reflected throughout the Constitution's text." *Id*. at 919 (quoting The Federalist No. 39 (J. Madison)) (emphasis added). Indeed, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. The Constitution's concern for state sovereignty is therefore central to the limited nature of federal power. "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only

discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz*, 521 U.S. at 919.

To that end, the Constitution's establishment of this system of "dual sovereignty" "is one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921. Likewise, the "'allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.' *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). But the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' *Ibid*. (internal quotation marks omitted)." *Shelby County, Ala. v. Holder*, __ U.S. __, 133 S. Ct. 2612, 2623 (2013) (hereinafter "*Shelby County*").

Relying in part on the Tenth Amendment, the *Shelby County* Court recently emphasized the power of the States to establish and enforce voter qualifications laws. In doing so, the Court explained, "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 (quotation omitted). Therefore, the "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Id*. (quotation omitted). As such, the Tenth Amendment reinforces the power of the States to establish and enforce voter qualifications laws.

3. <u>The NVRA must be interpreted to place upon the EAC a nondiscretionary duty to modify the Federal Form at the Plaintiffs' request to avoid raising serious constitutional doubts.</u>

Since, as shown *supra*, the States have the exclusive power to both establish and enforce voter qualifications, the *Inter Tribal Council* Court interpreted the NVRA to place upon the EAC

the nondiscretionary duty of including on the Federal Form State-specific instructions that the States deem necessary to determine voter eligibility. *Inter Tribal Council*, 133 S. Ct. at 2258-59. This interpretation was necessary to avoid "rais[ing] serious constitutional doubts" regarding the NVRA's requirement that the States "accept and use" the Federal Form. *Id*. The Court noted that "[a]t oral argument, the United States expressed the view that the phrase 'may require only' in § 1973gg-7(b)(1) means that the EAC '*shall require* information that's necessary, but may only require that information.'" *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis provided). This interpretation of 42 U.S.C. § 1973gg-7(b)(1) would have vested discretion with the EAC to decide whether or not to include State-specific instructions on the Federal Form. Rejecting this reading, the Court instead interpreted that provision in the only manner that could pass constitutional muster; namely, that the EAC had no such discretion.

> "We need not consider the Government's contention that despite the statute's statement that the EAC 'may' require on the Federal Form information 'necessary to enable the appropriate State election official to assess the eligibility of the applicant,' other provisions of the [NVRA] indicate that such action is statutorily required. That is because we 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 surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required."

Inter Tribal Council, 133 S. Ct. 2259 (emphasis provided).

Construing the NVRA to place upon the EAC the nondiscretionary duty of including Plaintiffs' requested State-specific instructions on the Federal Form is also necessary to avoid raising serious constitutional doubts because the contrary interpretation—that the EAC has discretion regarding these requests—would result in Plaintiff States effectively needing preclearance from the EAC before exercising their authority to establish and enforce voter qualifications.

Recently in *Shelby County*, the U.S. Supreme Court struck down Section 4(b) of the Voting Rights Act of 1965, which implemented a coverage formula requiring certain states to obtain federal permission, pursuant to 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 Voting Rights Act 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). Indeed, the extraordinary nature of the Voting Rights Act was emphasized throughout the *Shelby County* opinion. *See, e.g.*, *Shelby County*, 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 334) ("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.'"); *id.* at 2625 (quoting *Katzenbach*, 383 U.S. at 334-35) ("In short, we concluded that '[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.'").

The *Shelby County* Court contrasted the extraordinary provisions of the Voting Rights Act with the fundamental and well-established principles of federalism and state sovereignty, stressing that the federal government does not have a right to veto state enactments before they go into effect:

> The Constitution and laws of the United States are "the supreme Law of the Land." 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. A proposal to grant such authority to 'negative' state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.
>
> …

> More specifically, the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. But States have broad powers to determine the conditions under which the right of suffrage may be exercised.
>
> …
>
> 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." (citation omitted). 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 citations omitted).

The same analysis applies here. All nine justices in *Inter Tribal Council* agreed that the States have the exclusive power to both establish and enforce voter qualifications for federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59 (majority opinion), *id.* at 2261 (Kennedy, J., concurring), *id.* at 2262 (Thomas, J., dissenting), *id.* at 2270 (Alito, J., dissenting). Requiring the Plaintiff States to beseech the EAC to include Plaintiffs' requested instructions on the Federal Form amounts to preclearance of the kind criticized in *Shelby County*. What is more, the preclearance dictated by the Voting Rights Act was constitutional only in light of the exceptional circumstances when it was enacted. *Shelby County*, 133 S. Ct. at 2624-25. No such exceptional circumstances support a requirement that Plaintiffs obtain preclearance from the EAC before being allowed to establish and enforce their voter qualifications laws.

Further, the Voting Rights Act was supported by the Constitution itself; the Fifteenth Amendment enables Congress to pass legislation protecting the right to vote without discrimination on the basis of race or color. *Shelby County*, 133 S. Ct. at 2629. No such constitutionally enumerated power supports granting the EAC discretion to preclude Plaintiffs

from enforcing their voter qualifications laws. Since requiring Plaintiffs to register people to vote who have not fulfilled Plaintiffs' proof-of-citizenship requirement "would exceed Congress' powers under Article I, § 4, and violate Article I, § 2," *Inter Tribal Council*, 133 S. Ct. at 2269 (Thomas, J., dissenting), the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs' requested instructions on the Federal Form. *Id.* at 2259.

It is important to note that the constitutional provisions and principles articulated above provide Plaintiffs with an independent basis for relief apart from the APA. (Doc. 1 at ¶¶ 115-128.) These constitutional provisions and principles, however, are also important for the relief requested by Plaintiffs under the APA as described below.

C. The EAC's refusal to modify the Federal Form constitutes agency action contrary to Plaintiffs' constitutional right and power to establish and enforce voter qualifications for federal elections.

The APA directs that this Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). "Because constitutional questions arising in a challenge to agency action under the APA 'fall expressly within the domain of the courts,' [a court reviews] de novo whether agency action violated a claimant's constitutional rights." *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010) (citing *Darden v. Peters*, 488 F.3d 277, 283-84 (4th Cir. 2007)).

As shown *supra*, the Plaintiff States have the right and power, exclusive of the federal government, of establishing and enforcing voter qualifications for federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59. This exclusive right and power is derived from Article I, § 2, Article II, § 1, and the Seventeenth Amendment of the Constitution, *Inter Tribal Council*, 133 S.

Ct. at 2258, as well as the Tenth Amendment. By refusing to include Plaintiffs' requested instructions on the Federal Form, the EAC violated Plaintiffs' rights and powers under these constitutional provisions. Therefore, this Court should hold the EAC's action unlawful, set it aside, and enter an injunction directing the EAC to include Plaintiffs' requested instructions on the Federal Form.

D. The EAC's refusal to modify the Federal Form was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The APA directs that this Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In performing arbitrary and capricious review, we accord agency action a presumption of validity; the burden is on the petitioner to demonstrate that the action is arbitrary and capricious." *Copar Pumice*, 603 F.3d at 793 (citing *Sorenson Commc'ns, Inc. v. Fed. Commc'ns Comm'n.*, 567 F.3d 1215, 1221 (10th Cir. 2009)). A court considers several factors in determining whether an agency action is arbitrary and capricious:

> Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Copar Pumice, 603 F.3d at 793 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Because the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs' requested instructions on the Federal Form, the Wilkey Memorandum's (Doc No. 1-3) conferral of authority to the EAC's Division of

Research, Programs and Policy (hereinafter "the RPP") to process State requests for modifications to the Federal Form can only have conferred nondiscretionary authority. The Wilkey Memorandum could not have constitutionally conferred discretionary authority to the RPP for the simple reason that the EAC itself lacks discretionary authority to refuse to include State-specific instructions that reflect state voter qualification laws. Thus, to the extent the Wilkey Memorandum vested discretionary authority in the RPP to refuse to make modifications to the Federal Form at the Plaintiffs' request, the Wilkey Memorandum constitutes final agency action that was arbitrary, capricious, an abuse of discretion, and was otherwise made not in accordance with law. This Court should hold unlawful and set aside the Wilkey Memorandum, and enter an injunction directing the EAC to include Plaintiffs' requested instructions on the Federal Form.

Even if the Wilkey Memorandum validly conferred discretionary authority to the RPP, such discretion was still abused. The Wilkey Memorandum provided that "Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum." This portion of the Wilkey Memorandum was cited a basis for the decision in the EAC's letters to Plaintiffs denying their requests for modifications to the Federal Form instructions. However, this explanation runs counter to the evidence before the EAC because there is no evidence that Plaintiffs' proposed State-specific instructions is of *any* concern to other States. Just as the Plaintiff States have the power to establish and enforce voter qualifications, other States have the power to maintain their voter qualification laws without any regard to the laws of Plaintiffs.

The EAC's actions, or non-actions, are also arbitrary. In 2012, the EAC approved a modification to the Louisiana-specific instructions of the Federal Form similar to the instructions

requested by Plaintiffs. Decisions of an agency that are internally inconsistent are arbitrary. See *Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011); *Ace Motor Freight, Inc. v. I.C.C.*, 557 F.2d 859, 861-62 (D.C. Cir. 1977). Disparate treatment of sovereign states heightens the concern for inconsistent treatment because "there is also a fundamental principle of equal sovereignty among the States." *Shelby County*, 133 S. Ct. at 2623. Then, in *Inter Tribal Council*, the United States Supreme Court specifically noted that Arizona could argue that it would be arbitrary for the EAC to refuse to include Arizona's proposed instruction when it had accepted a similar instruction requested by Louisiana. *Inter Tribal Council*, 133 S. Ct. at 2260.

For these reasons, the decision of the RPP and the EAC denying Plaintiffs' requests to their State-specific instructions on the Federal Form was arbitrary and capricious. This Court should hold that action unlawful, set it aside, and enter an injunction directing the EAC to include Plaintiffs' requested instructions on the Federal Form.

E. The EAC's refusal to modify the Federal Form was in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

The APA directs that this 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). As explained *supra*, the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs' requested instructions on the Federal Form. *Inter Tribal Council*, 133 S. Ct. at 2260. Congress may not delegate power to an administrative agency that Congress itself does not have. Thus, any discretion exercised by the EAC in denying Plaintiffs' requests was in excess of statutory authority and limitation, or short of statutory right.

F. The EAC's refusal to modify the Federal Form constitutes agency action unlawfully withheld or unreasonably delayed.

The EAC's refusal to approve Plaintiffs' State-specific instructions constitutes a final "agency action" that is subject to this Court's review pursuant to the APA. If, however, the Court finds that the EAC has not made a final determination, then as discussed below, that failure to act is itself subject to this Court's review.

The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Further, the APA directs that this Court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[T]he only agency action that can be compelled under the APA is action legally required." *Norton*, 542 U.S. at 63. Thus, "§ 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" *Id.* (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). In sum, then, "a claim under [5 U.S.C. § 706(1)] can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64.

Because the EAC unlawfully withheld or unreasonably delayed agency action pursuant to 5 U.S.C. § 706(1), this Court must compel the agency action so withheld or delayed; neither this Court nor the EAC has discretion to allow the EAC to avoid discharging the duties that Congress intended the EAC to perform. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-89 (10th Cir. 1999); *see also*, *Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("As a reviewing court, we must 'compel agency action unlawfully withheld or unreasonably delayed.' 5 U.S.C. § 706(1)."); *Health Sys. Agency of Okla. v. Norman*, 589 F.2d 486, 492 (10th Cir. 1978) ("trial court must 'compel'" agency action unlawfully withheld).

As the court in *Forest Guardians* explained, a trial court must compel agency action upon a finding that such action was unreasonably delayed:

> [I]f an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions—such as the APA's general admonition that agencies conclude matters presented to them "within a reasonable time," *see* 5 U.S.C. § 555(b)—a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and court, upon proper application, must compel the agency to act.

Forest Guardians, 174 F.3d at 1190. Similarly, "once a court deems agency delay unreasonable, it must compel agency action." *Id.* at 1191.

In the instant case, the EAC is under a nondiscretionary duty to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registrations laws of the Plaintiff States. Specifically, the EAC is under a nondiscretionary duty to include requested State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. Withholding Plaintiffs' requested instructions from the Federal Form was unlawful because the EAC does not have the discretion, under the NVRA and *Inter Tribal Council*, to refuse Plaintiffs' requests. This Court should therefore issue a preliminary injunction directing the EAC to include Plaintiffs' requested instructions on the Federal Form.

Further, the EAC's failure to modify the State-specific instructions of the Federal Form as requested by Plaintiffs constitutes agency action unreasonably delayed. Kansas made its initial request to have its State-specific instructions modified on August 9, 2012, more than one year prior to the initiation of the instant action. (Exhibit A at ¶ 8.) Worse yet, Arizona made its initial request to have its State-specific instructions modified on December 12, 2005, roughly eight years prior to the initiation of this case. (Exhibit C at ¶ 9.) As if these delays are not bad

enough, the EAC currently lacks any Commissioners and is not expected to have a quorum in the foreseeable future.

Since the EAC is under a nondiscretionary duty to modify the State-specific instructions as requested by Plaintiffs, these requests should have been fulfilled as a matter of course. The EAC's lengthy delays in granting these requests are also unreasonable, and this Court should issue a preliminary injunction requiring the EAC to fulfill its nondiscretionary duties.

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

In order to obtain a preliminary injunction, a plaintiff must show that they will suffer an irreparable injury. *Westar Energy*, 552 F.3d at 1224. "A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citations omitted). In the present case, the failure of the EAC to modify the Federal Form to include Plaintiffs' State-specific instructions that would allow the Plaintiff States to obtain information they deem necessary to assess the eligibility of voter registration applicants has inflicted and is continuing to inflict three distinct irreparable injuries. First, Plaintiffs have been and are being deprived of their sovereign and constitutional right to establish and enforce voting qualifications with respect to those applicants who use the Federal Form to register to vote. Second, unqualified individuals, namely aliens, have been and continue to be registered as voters for federal elections in Kansas and Arizona. Third, Plaintiffs are being forced to implement a bifurcated voter registration system that is unduly burdensome.

A. Plaintiffs are being deprived of their sovereign and constitutional right to establish and enforce voting qualifications.

The Tenth Circuit Court of Appeals has determined that a deprivation of constitutional rights constitutes an irreparable injury as a matter of law. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005). The court has additionally declared that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura*, 242 F.3d at 963. Additionally, the U.S. Supreme Court has ruled that the deprivation of a constitutional right, such as a First Amendment right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). An agency's decision that places a State's sovereign interests and public policies at stake are deemed to cause irreparable injury to that state. *Kansas v. U.S.*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). Likewise, the Tenth Circuit Court of Appeals has ruled that an intrusion of an Indian Nation's sovereignty constitutes irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

The U.S. Constitution confers to the Plaintiff States the constitutional right and power, exclusive of the federal government, to establish and enforce the qualifications for voting in both state and federal elections. *See, supra* Section I.B. Nevertheless, the EAC has refused to modify the State-specific instructions on the Federal Form to reflect the voter qualification and registration laws of Plaintiffs, and which would enable Plaintiffs to obtain information Plaintiffs deem necessary to determine whether applicants are qualified to vote. By such refusal, the Defendants have invaded the constitutional rights of and infringed on the sovereignty of the Plaintiffs. Consequently, the Plaintiffs have suffered and continue to suffer an irreparable injury.

B. Unqualified individuals have been and continue to be registered as voters in Kansas and Arizona, and non-citizens have and will continue to vote in Kansas and Arizona elections.

Plaintiff States have constitutional provisions establishing citizenship as a qualification for being able to vote in state and federal elections. Kan. Const. art. V, § 1; Ariz. Const. art. VII, § 2. Their respective constitutions also mandate that the state legislatures shall enact laws to ensure that voting qualifications are enforced. Kan. Const. art. V, § 4, Ariz. Const. art. VII, § 12. Pursuant to these constitutional provisions, the Kansas Legislature and the Arizona voters through the initiative power have enacted statutes requiring voter registration applicants to provide documentary evidence of their citizenship. K.S.A. 25-2309(l); A.R.S. § 16-166. Nevertheless, Defendants have refused to modify the Plaintiffs' State-specific instructions to require applicants utilizing the Federal Form to provide documentary evidence of citizenship. As held in *Inter Tribal Council*, the NVRA requires Plaintiffs to "accept and use" the Federal Form to register voters for federal election even though the Federal Form does not currently effectuate Plaintiffs' proof-of-citizenship requirements. *Inter Tribal Council*, 133 S. Ct. at 2259-60; 42 U.S.C. § 1973gg-4(a)(1). As Justice Scalia noted during oral argument in *Inter Tribal Council*, a mere oath is virtually meaningless and does not enable the States to ensure that a voter registration application is actually qualified to vote: "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." Transcript of Oral Argument at 44, *Inter Tribal Council*, 133 S. Ct. 2247 (2013) (No. 12-71).

There is concrete evidence that non-citizens register to vote in Kansas and Arizona when Plaintiffs' proof-of-citizenship requirements are not enforced, and that some such non-citizens unlawfully vote in Kansas and Arizona elections. (Exhibit A, at ¶¶ 3-4; Exhibit B; Exhibit D, at ¶¶ 8-10.) Accordingly, Plaintiffs are being forced to register unqualified non-citizens as voters

due to the EAC's failure to include their requested instructions on the Federal Form. Once such persons are registered to vote, there is no meaningful procedure by which such unlawfully registered non-citizens can be detected and removed from the voter registration rolls. What is more, non-citizens have unlawfully voted in Kansas and Arizona elections after being unlawfully registered, effectively "cancelling out" the votes of citizens. Therefore, Plaintiffs are suffering irreparable harm as long as their proof-of-citizenship requirements go unenforced.

C. Plaintiffs are being forced to implement a bifurcated voter registration system that is unduly burdensome.

As a result of the *Inter Tribal Council* decision, Plaintiffs are currently required to accept the Federal Form to register individuals to vote in federal elections without documentary evidence of citizenship as required by the state laws of Plaintiffs. However, such registrants are not properly registered to vote in state and local elections. Therefore, the Plaintiffs must administer one system for voters registered only for federal elections and one system for voters registered for both state and federal elections.

As shown by Exhibits A, C and E, incalculable amounts of time, money, and other resources will need to be expended to reprogram statewide voter registration systems and to train county and state election officials to administer the bifurcated system in the primary elections scheduled for August 2014 and the general election in November 2014. For example, in Maricopa County, Arizona, election officials have estimated that the cost of designing, printing, and mailing additional ballots wills cost over $230,000 and the other tasks, including reprograming computer systems, educating voters, training staff and poll workers, and increased costs related to provisional ballots may exceed $100,000. (Exhibit E at ¶¶ 13-24.) These costs may be extrapolated to Arizona's fourteen other counties.

In addition to these quantifiable costs, Plaintiff States' voters will suffer confusion in their own individual voter registrations and eligibility to vote in certain elections. (Exhibit B at ¶ 37.) Those voters may also lose confidence in the electoral process. (*Id*. at ¶ 38.)

As shown above, Plaintiffs are being deprived of the their constitutional rights, are being deprived of attributes of their sovereignty, are being forced to register unqualified voters, and are being required to maintain a bifurcated voter registration system. Consequently, Plaintiffs are suffering irreparable harms. All of these harms would be discontinued if this Court grants the requested preliminary injunctive relief.

III. The Injury to Plaintiffs Greatly Outweighs Any Purported Injury to Defendants.

As has been shown above, Plaintiffs are being deprived of their constitutional and sovereign right to establish and enforce qualifications for voter registration, are being forced to register unqualified voters, and are being required to maintain a bifurcated voter registration system that is unduly burdensome. If a preliminary injunction is not granted, the harm caused by such injuries will continue to mount. Defendants on the other hand will incur minimal economic costs if a preliminary injunction is granted.

Such economic costs would be limited to the negligible costs of adding the required wording to the Kansas-specific and Arizona-specific instructions for the Federal Form. This is a routine task that is part of the Defendant's statutory duty under the NVRA. As a matter of fact, the EAC recently modified two Kansas-specific instructions unrelated to Kansas's proof-of-citizenship requirement, but arbitrarily refused to add the instruction reflecting Kansas's proof of citizenship requirement. Furthermore, the EAC recently modified the Louisiana-specific instructions to require additional documentation of identity that is similar to the information that Plaintiffs are requesting. Consequently, the slight economic harm that the EAC might incur if

the preliminary injunction is granted is far outweighed by the depravation of constitutional rights, the infringement on state sovereignty, the registration of unqualified voters, and the harms of maintaining a bifurcated voter registration system that Plaintiffs will suffer if the preliminary injunction is not granted.

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

A movant is entitled to a preliminary injunction upon establishing that the injunction is not adverse to the public interest. *Westar Energy*, 552 F.3d at 1224. In the present case, injunctive relief will prevent an infringement of the sovereign and constitutional rights of Plaintiffs. Therefore, the requested injunction is not only not against the public interest, but it strongly favors the public interest.

The Tenth Circuit Court of Appeals has unequivocally declared that, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013). The Ninth Circuit Court of Appeals has succinctly summarized the same point by stating, "[g]enerally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Thus, a preliminary injunction that prevents a violation of a constitutional right is in the public interest as a matter of law.

The same reasoning can be applied to an infringement on a state's sovereignty. The sovereign authority of the states is ensured by the Tenth Amendment. U.S. Const. amend. X. Moreover, all citizens have a stake in maintaining the sovereignty of the states. Accordingly, a preliminary injunction that prevents an infringement on a state's sovereignty is in the public interest. What is more, neither the EAC nor the Federal Government have any power to establish

voter qualifications. Thus, granting the requested preliminary injunction cannot be adverse to the public interest from the Federal Government's perspective.

There is also an immense public interest in ensuring that aliens do not cast illegal votes in elections. Of the fifteen aliens who registered to vote in Kansas as described in Exhibit A, five proceeded to vote illegally. One alien voted in five successive elections. Whenever an alien votes, it effectively cancels out the vote of a United States citizen. The public has a significant interest in protecting the franchise of United States citizens and thereby preserving the integrity of elections. Indeed, the States are entrusted with the responsibility of protecting this important public interest. "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) (quoting *Anderson v. Celebrezze*, 103 S. Ct. 1564, 1570, n. 9 (1983)).

Plaintiffs have clearly shown that the failure to grant the requested preliminary injunction will violate Kansas's and Arizona's constitutional and sovereign right to establish and enforce voter qualifications. Furthermore, the citizens of Kansas and Arizona have a strong interest in ensuring the integrity and efficiency of their elections. Yet, if the Court does not grant the requested injunction, Kansas and Arizona will be forced to register unqualified voters and implement a bifurcated registration system that is unduly burdensome. Therefore, the requested preliminary injunction is in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to enter a preliminary injunction in their favor requiring Defendants to modify their State-specific instructions to the Federal Form as Plaintiffs have requested.

Respectfully submitted this 23rd day of October, 2013.

s/ Thomas E. Knutzen
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 23rd day of October, 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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