IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF[1]

Defendants United States Election Assistance Commission and Alice Miller (collectively, "EAC" or "Defendants") respectfully submit this opposition to Plaintiffs' Motion for Preliminary Injunctive Relief, ECF No. 16.

INTRODUCTION

This lawsuit is an attempt by Plaintiffs Arizona and Kansas to circumvent long-established principles of administrative law by taking a brief statement in a recent Supreme Court decision out of context. Their goal is to compel the EAC to include instructions on the National Mail Voter Registration Form ("Federal Form") that require certain voter registration applicants to include documentary proof of their United States citizenship in addition to the information already required.

Notwithstanding the Plaintiffs' repeated claims to the contrary, the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona* did not establish that the EAC has a "nondiscretionary duty" to accept the Plaintiffs' requested amendments to the voter registration form. Rather, the Court suggested that such a duty might arise only if the Plaintiffs were to prove that their proposed instructions are *necessary* to enable them to enforce their citizenship requirements, and that Plaintiffs are otherwise "precluded" from obtaining necessary information regarding citizenship. *See Inter Tribal Council*, __ U.S. __, 133 S. Ct. 2247, 2259-60 (2013).

[1] Although the currently pending motion to which this brief responds is a preliminary injunction motion, *see* ECF No. 16, the parties have agreed that the Court should convert the pending motion into a hearing on the merits, "because considerations of judicial economy support moving to final judgment in one round of briefing." ECF No. 32, Pls.' Mot. to Adv. Trial at 1; ECF No. 68, Defs.' Resp. to Pls.' Mot. to Adv. Trial at 5. Accordingly, this brief leads with a merits discussion. To the extent the Court is not inclined to treat the scheduled hearing on December 13, 2013, as an oral argument hearing on the merits, Defendants address the relevant preliminary injunction standards in Part III of the Argument section beginning *infra* at 32.

However, the States submitted ***no*** evidence to the EAC establishing the necessity of their requested instructions.

The Plaintiffs' claims thus fail because (1) the EAC has made no final decisions subject to judicial review under the Administrative Procedure Act ("APA"), and (2) even if the EAC had denied Plaintiffs' requests, that decision would not be arbitrary and capricious, an abuse of discretion, or otherwise contrary to law, because Plaintiffs submitted no evidence to the agency supporting their requests. Plaintiffs should not be permitted to upend the administrative process by introducing new, extra-record evidence before this reviewing Court.

Because Plaintiffs' claims fail on the merits, they are not entitled to their requested relief, preliminarily or otherwise, and in any event, they have not demonstrated imminent irreparable injury sufficient to justify a preliminary injunction.

STATUTORY AND REGULATORY BACKGROUND

I. NATIONAL VOTER REGISTRATION ACT AND HELP AMERICA VOTE ACT

The Elections Clause of the Constitution provides that "[t]he 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." U.S. Const. art. I, § 4, Cl. 1. "The Clause's substantive scope is broad. 'Times, Places, and Manner,' [the Supreme Court has] written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . regulations relating to 'registration.'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Exercising its authority under the Elections Clause, Congress enacted the National Voter Registration Act ("NVRA") in 1993 in response to its concern that "discriminatory and unfair

registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 42 U.S.C. § 1973gg(a)(3). The statute accordingly identifies as its objectives: "increas[ing] the number of eligible citizens who register to vote in elections for Federal office"; "enhanc[ing] the participation of eligible citizens as voters in elections for Federal office"; "protect[ing] the integrity of the electoral process"; and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. §§ 1973gg(b).

The NVRA mandates, among other things, that all States allow voters to register to vote in Federal elections "by mail application." 42 U.S.C. § 1973gg-2(a)(2). The statute directs that the EAC,[2] "in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office" and provides that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [EAC]." 42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2). States must also make the form developed by the EAC (the "Federal Form"), or an "equivalent" form, available for completion at certain State agencies designated as voter registration agencies. 42 U.S.C. §§ 1973gg-5(a)(4)(A), 1973gg-5(6)(A). States must also "ensure that any eligible applicant [who timely submits the form] is registered to vote." 42 U.S.C. § 1973gg-6(a)(1).

Congress explicitly limited the information the EAC may require applicants to furnish on the Federal Form. In particular, the form "may require *only* such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). The Federal Form

[2] Pursuant to the Help America Vote Act of 2002 ("HAVA"), the EAC assumed all of the functions originally assigned by the NVRA to the Federal Election Commission. 42 U.S.C. § 15532.

must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)"; "contains an attestation that the applicant meets each such requirement"; and "requires the signature of the applicant, under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2).

Additionally, pursuant to HAVA, the Federal Form must include two specific questions, along with check boxes, for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 42 U.S.C. § 15483(b)(4)(A). It was Congress' intent "that such questions should be clearly and conspicuously stated on the front of the registration form." H.R. Rep. No. 107-730, § 303, at 76 (2002) (Conf. Rep.).

When it was drafting the NVRA, Congress considered and specifically rejected language that would have allowed States to require "presentation of documentation relating to citizenship of an applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA bill that included this language, the conference committee determined that such a requirement was "*not necessary* or consistent with the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs…." *Id.*

II. EAC REGULATIONS AND POLICIES

A. The Federal Form

Pursuant to its rulemaking authority, the EAC has developed a Federal Form that meets NVRA and HAVA requirements. *See* 11 C.F.R. part 9428 (implementing regulations); 42 U.S.C. §§ 1973gg-7(a), 15329. The form consists of three basic components: the application,

general instructions, and State-specific instructions. *See* EAC 000073-97,[3] also available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_11-1-13_ENG.pdf (last visited Nov. 27, 2013). The application portion of the Federal Form "[s]pecif[ies] each eligibility requirement," including "U.S. Citizenship," which is "a universal eligibility requirement." 11 C.F.R. § 9428.4(b)(1). To complete the form, an applicant must sign, under penalty of perjury, an "attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements." 11 C.F.R. §§ 9428.4(b)(2), (3). The State-specific instructions for both Arizona and Kansas include the requirement that applicants be United States citizens. *See* EAC000081, 85.

B. EAC Roles and Responsibilities

In 2008, the EAC commissioners adopted a policy entitled, "The Roles and Responsibilities of the Commissioners and Executive Director of the [EAC]," *see* EAC 000064-72 ("R&R Policy"), which "supersede[d] and replace[d] any existing EAC policy that [was] inconsistent with its provisions." EAC000072.

Pursuant to the R&R Policy, the commissioners are responsible for developing policy, which is defined as "high-level determination, setting an overall agency goal/objective or otherwise setting rules, guidance or guidelines at the highest level." EAC000064. The Commission "only makes policy through the formal voting process" of the commissioners. *Id.*

Under the R&R Policy, the EAC commissioners delegated to the Executive Director the responsibilities to (among other things): "[m]anage the daily operations of EAC consistent with Federal statutes, regulations, and EAC policies"; "[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by

[3] Citations to "EAC xxxx" refer to the certified agency records filed with the Court. *See* ECF Nos. 79-82.

the commissioners"; "[a]nswer questions from stakeholders regarding the application of NVRA or HAVA consistent with EAC's published Guidance, regulations, advisories and policy"; and "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." EAC000071.

Finally, the R&R Policy provides: "In implementing this policy, the Executive Director shall issue internal procedures which provide for the further delegation of responsibilities among program staff and set procedures (from planning to approval) for all program responsibilities." *Id.*

C. The Wilkey Memorandum

On November 9, 2011, the EAC's then-Executive Director, Thomas Wilkey, issued a memorandum setting forth internal procedures for processing State requests to modify the State-specific instructions on the Federal Form. EAC000049-50 ("Wilkey Memorandum"). The procedure authorized the EAC's Division of Research, Policy and Programs ("RPP") to make recommendations and the EAC's Executive Director to make final determinations on State requests to modify the State-specific instructions on the Federal Form in order to reflect changes to the mailing addresses where the forms can be sent, and to reflect changes in State law. *Id.* However, the procedure further instructed that "[r]equests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum [of EAC commissioners]." EAC000050. Currently, all four seats on the Commission are vacant.[4] Thus, pursuant to the Wilkey Memorandum, any requests for modifications to State-specific instructions that the Executive Director believes "raise issues of broad policy concern to more

[4] A list of former commissioners and their dates of service can be found on the EAC's website at http://www.eac.gov/about_the_eac/former_commissioners.aspx (last visited Nov. 27, 2013).

than one State" have been deferred until such time as the President nominates and the Senate confirms at least three commissioners.[5] EAC000050.

FACTUAL BACKGROUND

I. ARIZONA

Original Request to Modify Instructions: In 2004, Arizona voters approved a ballot proposition that amended Arizona's election laws in certain respects. As relevant here, Ariz. Rev. Stat. Ann. § 16-166(F) requires applicants for registration to furnish proof of U.S. citizenship beyond the attestation requirement of the Federal Form. According to the State law, a county recorder must "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." *Id.* Acceptable proof of citizenship includes, *inter alia*, a driver's license or non-operating identification license number issued after October 1, 1996, by an agency of any U.S. State "if the agency indicates on the . . . license that the person has provided satisfactory proof of United States citizenship"; a photocopy of the applicant's birth certificate or passport; or the applicant's naturalization papers. Ariz. Rev. Stat. Ann. § 16-166(F).[6]

In December 2005, Arizona asked the EAC to add the citizenship documentation requirement to Arizona's State-specific instructions for the Federal Form. EAC000002. Then-Executive Director Thomas Wilkey responded by letter dated March 6, 2006, concluding that the

[5] As Plaintiffs note, there are currently two pending nominees for the EAC. ECF No. 1, Compl. ¶ 28; U.S. Senate, *Nominations in Committee*, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm (last visited Nov. 27, 2013.).

[6] After the ballot initiative's passage, Arizona officials submitted the new requirements to the U.S. Department of Justice for "preclearance" under Section 5 of the Voting Rights Act of 1965. *See generally Perry v. Perez*, 132 S. Ct. 934, 939-940 (2012) (describing preclearance procedure). The Department did not interpose an objection to the registration requirement under Section 5, but, consistent with the scope of its preclearance authority, did not review § 16-166(F)'s compliance with any other provision of Federal law. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476-485 (1997). *See also* 28 C.F.R. § 51.41(b), 51.49.

Arizona statute conflicted with the NVRA. EAC000002-4. He explained that the "NVRA requires States to both 'accept' and 'use' the Federal Form," and that "[a]ny Federal Registration Form that has been properly and completely filled out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." *Id.* at 3. Accordingly, a "state may not mandate additional registration procedures that condition the acceptance of the Federal Form." *Id.*

Arizona did not seek judicial review of Director Wilkey's 2006 final decision on behalf of the Commission.[7] However, after the decision was issued, Arizona's then-Secretary of State, Jan Brewer, wrote several letters of protest to the EAC's then-Chairman Paul DeGregorio. *See* EAC000005-8, 13-16. In response to those letters, Chairman DeGregorio, recommended to his fellow commissioners that they grant an "accommodation" that would allow Arizona's proof of citizenship instructions to be included in the State-specific instructions on the Federal Form. *See* EAC000011-13. The four sitting Commissioners at that time rejected Chairman DeGregorio's proposal by a 2-2 vote, with two commissioners issuing explanatory statements. EAC000010-32.

Litigation Over Citizenship Requirement: In 2006, several organizations filed lawsuits seeking, *inter alia*, to bar Arizona's enforcement of its registration requirement. After several years of litigation, the case reached the Supreme Court, which held that, for purposes of Federal elections, the NVRA preempts the Arizona statute as to the acceptance and use of the Federal Form. *Inter Tribal Council*, 133 S. Ct. 2247. The Court observed that the Elections Clause "imposes the duty . . . [on States] to prescribe the time, place, and manner of electing

[7] Any potential APA action arising from that 2006 final decision is foreclosed by the applicable statute of limitations. *See* 28 U.S.C. § 2401(a).

Representatives and Senators" but "confers [on Congress] the power to alter those regulations or supplant them altogether." *Id.* at 2253 (citing, *inter alia*, *Smiley*, 285 U.S. at 366).

The Court "conclude[d] that the fairest reading of the [NVRA] is that a State-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Inter Tribal Council*, 133 S. Ct. at 2257. The Court nevertheless noted that "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Id.* at 2257 (citing Brief of the United States as *Amicus Curiae* at 24).

After setting forth the Court's holding that Arizona must accept and use the Federal Form and cannot impose additional registration requirements, Justice Scalia, author of the majority opinion, noted how Arizona might take additional steps to seek to achieve the result it unsuccessfully argued for in the lawsuit. Specifically, he opined that Arizona could make another request to the EAC to revise the Federal Form to include Arizona's citizenship documentation language and could challenge any EAC denial of such a request under the APA. *Id*. at 2259-60.

Renewed Request to Modify Instructions: On June 19, 2013, two days after the Supreme Court's decision in *Inter Tribal Council*, Arizona's Secretary of State renewed the State's request that the EAC include in the State-specific portion of the Federal Form the requirement that voter registration applicants in Arizona provide evidence of citizenship beyond the existing attestation requirement. *See* EAC000034-35. Arizona's Attorney General submitted a follow-up letter in support of Secretary Bennett's renewed request. EAC000044-46. The State

did not, however, submit any evidence to the EAC showing that the State was "precluded . . . from obtaining the information necessary to enforce its voter qualifications." *Cf. Inter Tribal Council*, 133 S. Ct. 2258-59.

In a letter dated August 13, 2013, EAC Acting Executive Director Alice Miller indicated that a decision on Arizona's request would be deferred until the reestablishment of a quorum of EAC commissioners, in accordance with the Wilkey Memorandum. EAC000048.

II. KANSAS

On August 9, 2012, Brad Bryant, Kansas's Election Director, requested several changes to the Kansas-specific instructions in the Federal Form, including a requested instruction that "[a]n applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote." EAC000099. Acting Director Miller responded to Mr. Bryant by letter dated October 11, 2012, indicating that a decision on Kansas's request regarding proof of citizenship would be deferred until the reestablishment of a quorum of EAC commissioners, in accordance with the Wilkey Memorandum. EAC000101-02.

On June 18, 2013, after the Supreme Court decision in *Inter Tribal Council*, Kansas Secretary of State Kris Kobach wrote to Acting Director Miller, again urging her to take action on the portion of the State's August 9, 2012, request dealing with proof of citizenship. EAC000103. Like Arizona, Kansas submitted no evidence to the EAC showing that the State was "precluded . . . from obtaining the information necessary to enforce its voter qualifications." *Cf. Inter Tribal Council*, 133 S. Ct. 2258-59.

In her July 31, 2013 response to Secretary Kobach, Acting Director Miller again informed Kansas that the EAC would defer a decision on the State's request to include

documentary citizenship requirements on the Federal Form, in accordance with the Wilkey Memorandum. EAC000111.

Secretary Kobach clarified his State's position with respect to the Federal Form by letter dated August 2, 2013. EAC000112-13. He stated that he had instructed county election officials to accept the Federal Form without proof of citizenship, but that those voters would be eligible to vote only in Federal elections. If the requested change was made to the Federal Form, applicants would be able to vote in Federal and State elections. *Id*.

Acting Director Miller replied on August 6, 2013, concluding that Kansas's requested change "would . . . have applicability to voter registration for State elections but have no impact on procedures already in place for federal elections." EAC000116-17. This lawsuit followed on August 21, 2013.

ARGUMENT AND CITATION OF AUTHORITY

As a threshold matter, the States' claims fail because there have been no final agency decisions subject to judicial review. The EAC has simply (and reasonably) deferred reaching a decision on the States' most recent requests in 2012 (Kansas) and 2013 (Arizona) until there is quorum of Commissioners. Furthermore, even if the EAC had denied Plaintiffs' requests, that decision would not be arbitrary and capricious, an abuse of discretion, or otherwise contrary to law. Under the Supreme Court's decision in *Inter Tribal Council*, the EAC would only have a nondiscretionary duty to amend the State-specific instructions if the States had proven that those instructions are *necessary* to enable them to enforce their citizenship requirements. *See* 133 S. Ct. at 2260. However, the States submitted no evidence to the EAC establishing the necessity of their proposed instructions. Absent such a showing, the EAC's failure to act on their requests is neither final agency action reviewable under the APA nor an unreasonable exercise of its

discretion. Therefore, if the EAC's Acting Executive Director had decided to address the merits of Plaintiffs' requests, it would have been entirely proper, under the APA, the NVRA, and the Constitution, for her to deny the requests.

I. THERE HAVE BEEN NO FINAL AGENCY ACTIONS OVER WHICH THE COURT CAN EXERCISE JUDICIAL REVIEW.

Judicial review under the APA is limited to final agency action. 5 U.S.C. § 704. The "core question" for determining finality is "whether the agency has completed its decisionmaking process," and completed it in a way that "will directly affect the parties" in the "immediate" operation of their "day-to-day business." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *see also McKeen v. U.S. Forest Service*, 615 F.3d 1244, 1253 (10th Cir. 2010) ("An agency action is considered 'final' only if it marks 'the consummation of the agency decision-making process' and legal consequences flow from it.") (quoting *Tsegay v. Ashcroft*, 386 F.3d 1347, 1354 (10th Cir. 2004)).

A. The EAC has not completed its decision-making process.

The EAC has not issued final decisions with respect to Plaintiffs' renewed requests to modify the State-specific instructions on the Federal Form to include proof-of-citizenship requirements imposed by Arizona and Kansas law. Rather, pursuant to the EAC's current internal operating procedures as reflected in the Wilkey Memorandum, the agency determined that Plaintiffs' requests raised "issues of broad policy concern to more than one state" which were appropriate for consideration by a quorum of EAC commissioners, and that the requests would therefore be deferred until such time as a quorum of commissioners is seated. As outlined above, Acting Executive Director Miller advised Arizona and Kansas on multiple occasions that their requests were being *deferred*. These deferrals are not decisions within the meaning of the APA, let alone final determinations over which the Court can exercise judicial review. Neither

can Miller's deferrals be considered the "consummation of the agency decision-making process," *McKeen*, 615 F.3d at 1253, because they were not even the beginning of one. The very definition of "defer" is to "put off" or "delay" something. *See* Merriam-Webster Online at http://www.merriam-webster.com/dictionary/defer (last visited Nov. 27, 2013).

Plaintiffs are similarly unable to show that the EAC has failed to act within the meaning of 5 U.S.C. § 551(13), which defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." As in *Gordon v. Norton*, where the Tenth Circuit rejected a similar contention that an agency's alleged failure to act constituted final agency action, the agency has not affirmatively rejected Plaintiffs' proposed course of action and their deferrals do not constitute a "delay[] in responding until the requested action would be ineffective." *Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003).

Plaintiffs argue that Acting Executive Director Miller's deferrals are tantamount to denials, and hence final agency action, because the EAC currently has no commissioners, and, Plaintiffs speculate, will not have commissioners for the "foreseeable future." ECF No. 17, Pls.' Br. at 7. But the mere absence of commissioners cannot change a deferral of a decision —even an indefinite deferral—into a decision. Rather, the States requests' are still pending and will be considered once the Commission has a quorum.

B. EAC has not unlawfully withheld or unreasonably delayed a decision on Plaintiffs' requests by deferring a decision until a quorum of commissioners is seated.

Neither did the EAC's handling of Plaintiffs' requests constitute "action unlawfully withheld or unreasonably delayed," ECF No. 17, Pls.' Br. at 4, such that the Court may compel an agency to act under 5 U.S.C. § 706(1). Although this quoted phrase appears in the Complaint, Plaintiffs do not attempt to, and cannot, establish that Section 706(1) applies here.

The authority to compel action "unlawfully withheld" "'can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*,'" *Kane Cnty. Utah v. Salazar*, 562 F.3d 1077, 1086 (10th Cir. 2009) (quoting *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 64 (2004)), and only permits a court to "compel an agency 'to perform a ministerial or non-discretionary act.'" *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1148 (D. Kan. 2013) (quoting *SUWA*, 542 U.S. at 64). Such mandatory relief is "an extraordinary remedy, appropriate in only the clearest and most compelling cases," and the agency's duty to act "must be clear and undisputable." *Wyandotte Nation*, 939 F. Supp. 2d at 1148 (internal quotation marks and alterations omitted).

Here, the EAC has no "clear and undisputable" duty to render final decisions on Plaintiffs' requests in contravention of its internal operating procedures as specified in the Wilkey Memorandum, which direct that a quorum of commissioners should consider the "issues of broad policy concern to more than one State" in advance of a decision on particular requests for modifications to State-specific instructions that raise such issues. Indeed, the Supreme Court has described the EAC's authority and duty to determine the contents of the Federal Form, including any State-specific instructions included therein, as "validly conferred *discretionary* executive authority." *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis added). Thus, the EAC is free to grant, deny, or defer action on State requests, in whole or in part, so long as its action is consistent with the NVRA and other applicable Federal law.

Justice Scalia posited that 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. Yet, rather than attempting to establish before the EAC the insufficiency of an oath—something the States would need to do before a

reviewing court would be able to weigh their claims—the States repeatedly take the phrase "nondiscretionary duty" out of context and suggest that the Supreme Court has already decided that the EAC has a nondiscretionary duty to grant the States' requests. *See* Pls.' Br. at 1, 4, 7, 11, 12, 15, 18, 20, 21. Plaintiffs are incorrect. The States first bear the burden of establishing before the EAC that the oath is ineffective before any nondiscretionary duty arises. *See, e.g.*, *Inter Tribal Council*, 133 S. Ct. at 2260. But the States presented no such evidence to the EAC. The administrative record in this case—the only record appropriately before this reviewing Court, *see infra* at 18-19—contains no evidence regarding any alleged insufficiency of citizenship oaths. (ECF Nos. 79-82) Accordingly, Plaintiffs' assertions that the EAC has a "nondiscretionary duty" to approve their requested changes to the Federal Form are inapt.

Because the EAC's duty to determine what is necessary for inclusion on the Federal Form is ongoing and no particular statutory time frame attaches to it, *see* 42 U.S.C. § 1973gg-7(b), this Court's consideration is more properly limited to whether the EAC's election to defer decisionmaking on Plaintiffs' requests constitutes agency action "unreasonably delayed" within the meaning of 5 U.S.C. § 706(1). *Forest Guardians v. Bobbitt*, 174 F.3d 1178, 1189-90 (10th Cir. 1999). To demonstrate that an action has been "unreasonably delayed" under these circumstances, Plaintiffs must show that the EAC has failed to comply with the APA's general requirement that Federal agencies act "within a reasonable time." *Wyandotte Nation*, 939 F. Supp. 2d at 1150 (quoting 5 U.S.C. § 555(b)). "This inquiry is ultimately governed by a 'rule of reason,' which accounts for the difficulty and complexity of the issue, problems beyond the agency's control, an agency's need to prioritize its own resources, and administrative error." *Id.* at 1151 (citing *Cutler v. Hayes*, 818 F.2d 879, 898-99 (D.C. Cir. 1987)).

Here, former Executive Director Wilkey determined that it was appropriate and prudent to defer decisionmaking on requests that raise "issues of broad policy concern to more than one State" until such time as a quorum of EAC commissioners was available to consider those broader policy concerns and, if needed, provide additional policy guidance. EAC000049-50. Acting Director Miller has retained the Wilkey Memorandum procedure—thereby signaling her agreement with her predecessor's approach.

The Wilkey Memorandum sets forth an eminently reasonable rationale for deferring decisionmaking on Plaintiffs' requests. It distinguishes between more routine requests, such as address changes and changes that simply conform prior language to existing Federal law, and more complex and difficult requests, like Plaintiffs', which raise broader policy concerns. The Wilkey Memorandum allows the EAC commissioners, who are responsible for determining broader policy questions, the opportunity to consider and weigh in on those questions.

Likewise, the EAC's current lack of a quorum of commissioners is a temporary, though indefinite, state that constitutes a "problem[] beyond the agency's control," *cf. Wyandotte Nation*, 939 F. Supp. 2d at 1151. The uncertain timing of presidential appointments and Senate confirmations is a constant reality for government agencies and officials. History suggests that the EAC will eventually regain a quorum of its commissioners—just as the Consumer Product Safety Commission recently secured its quorum[8] and the Occupational Safety and Health Review Commission got its quorum.[9]

[8] *See* Christie Grymes Thompson, *Senate Confirms Two New CPSC Commissioners*, AD Law Access (June 28, 2013), http://www.adlawaccess.com/2013/06/articles/senate-confirms-two-new-cpsc-commissioners/ (last accessed Nov. 27, 2013).

[9] *See Attwood confirmed as OSHRC commissioner*, Safety & Health Magazine (Aug. 13, 2013), http://www.safetyandhealthmagazine.com/articles/9087-attwood-confirmed-as-oshrc-commissioner (last accessed Nov. 27, 2013).

If, however, the Court concludes that the EAC has unreasonably delayed its decisionmaking, the sole remedy available under the APA would be an order remanding the matters to the EAC, with instructions to exercise its discretion and render decisions within a reasonable time.[10] "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (internal quotations and citations omitted), *overruled on other grounds, Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *see also FTC v. Anderson*, 631 F.2d 741, 750 (D.C. Cir. 1979) ("A citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised."); *Wyandotte*, 939 F. Supp. 2d at 1148; *Miccosukee Tribe of Indians of Fla. v. United States*, 574 F. Supp. 2d 1360, 1367 (S.D. Fla 2008) ("[M]andamus jurisdiction is coextensive with the remedies available under the APA where a plaintiff seeks to compel agency action, not to direct the exercise of judgment or discretion."); *Intermodal Technologies, Inc. v. Mineta*, 413 F. Supp. 2d 834, 839-40 (E.D. Mich. 2006) ("[E]ven if the outcome of [agency action] rests within the agency's discretion, the agency can be compelled to exercise its discretion.").

II. EVEN IF THE COURT FINDS THAT THE EAC'S DEFERRALS ARE REVIEWABLE AS FINAL DETERMINATIONS, SUCH DETERMINATIONS WERE WITHIN THE DISCRETION OF THE EAC AND SHOULD BE AFFIRMED.

Even if the Court finds that the EAC's deferrals are reviewable as final determinations under the APA, such determinations were within the agency's discretion and should be affirmed. Failure to approve Plaintiffs' requests does not interfere with their constitutional authority to

[10] Were this Court to enter such an order, the EAC would, of course, comply with it, subject to its right to appeal.

establish and enforce voter qualifications and is not arbitrary and capricious, an abuse of discretion, or inconsistent with the EAC's statutory authority.

A. The Court's review is limited to the records before the agency.

Because Plaintiffs' claims arise under the APA's judicial review provisions, 5 U.S.C. §§ 701-706; ECF No. 1, Compl. ¶¶ 80-128,[11] any review of the EAC's deferral of decisions on Plaintiffs' requests must be confined to the administrative records before the EAC.[12] *See, e.g.*, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review [under the APA] should be the administrative record already in existence, not some new record made initially in the reviewing court.")); *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (hereinafter "*CARD*"); *see also Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (stating that in APA action, "[t]he entire case on review is a question of law, and the complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action.") (internal quotations omitted).

"[O]nly in extremely limited circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record," should the Court consider materials outside of the record. *CARD*, 485 F.3d at 1096 (denying request to supplement administrative record) (internal quotation marks omitted); *see also American Min. Congress v. Thomas*, 772 F.2d 617, 626-27 (10th Cir. 1985) (same).

[11] Counts I-IV of the Complaint, ECF No. 1, Compl. ¶¶ 80-114, specifically incorporate the APA. Although Count V of the Complaint purports to raise a separate constitutional claim under the Tenth Amendment, *see id.* ¶¶ 115-28, that claim is already subsumed in Count II of the Complaint, which asks the Court to set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity," *see* 5 U.S.C. § 706(2)(B).

[12] The EAC has certified and filed the administrative records with the Court. *See* ECF Nos. 79-82.

Because no such circumstances exist here, any review on the merits that this Court undertakes should be limited to the administrative records at issue. No evidence supplied through declarations and affidavits, such as those attached to Plaintiffs' preliminary injunction motion, *see* ECF Nos. 19-26, is admissible in a merits proceeding, since such evidence forms no part of the administrative record that was before the agency.

B. The lack of State-specific instructions requiring additional proof of United States citizenship does not interfere with Plaintiffs' constitutional authority to establish and enforce voter qualifications.

Plaintiffs argue that the EAC has infringed upon Plaintiffs' constitutional right to establish and enforce voter qualifications by failing to accede to their requests to include State-specific instructions on the Federal Form that would require applicants in Arizona and Kansas to provide additional proof of their United States citizenship as a precondition to registration. This argument, to which Plaintiffs devote nearly a third of their brief, fundamentally misapprehends the crucial distinction between voter qualifications and voter registration procedures. Simply put, while States have exclusive authority to set substantive voter qualifications (subject, of course, to constitutional constraints, *see infra* at n.13), 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. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997) (upholding constitutionality of the NVRA); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert denied*, 516 U.S. 1093 (1996) (same); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (same).

It is undisputed that the Constitution expressly delegates authority to the States to determine the substantive qualifications for their respective voters in Federal elections. U.S.

Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII, ¶ 1.[13] Pursuant to this express delegation, Arizona and Kansas, like their sister States, require their voters to be United States citizens. Compl. ¶¶ 33, 58; Kan. Const. art. V, § 1; Ariz. Const. art VII, § 2; Ariz. Rev. Stat. § 16-101(A)(1). Defendants have taken no action to prevent Plaintiffs from establishing citizenship as a substantive eligibility criterion. In fact, EAC regulations explicitly recognize that United States citizenship is a "universal eligibility requirement" and, as such (and as required by the NVRA), it must be listed on the Federal Form. *See* 11 C.F.R. § 9428.4(b)(1).

Just as the States have ultimate Constitutional authority to determine the substantive voter qualifications for voters in Federal elections, Congress has the ultimate authority, under the Elections Clause, to determine the voter registration procedures relating to Federal elections nationwide and to override any State regulations regarding the "times, places, and manner of holding elections" for Federal office, including voter registration. U.S. Const. art. I, § 4, cl. 1; *Inter Tribal Council*, 133 S. Ct. at 2253-54; *Smiley*, 285 U.S. at 366.[14] "'Times, Places, and Manner'. . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . , regulations relating to 'registration.'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley*, 285 U.S. at 366).

[13] Such qualifications, however, may not violate other provisions of the Constitution, such as by discriminating against United States citizens on the basis of their race, color, previous condition of servitude, sex, or age over 18 years. U.S. Const. amends. XIV, XV, XIX, XXVI.

[14] Plaintiffs' statement that "the States possess the sole authority to determine the *manner* by which their voter qualification laws are enforced," Pls.' Br. at 9 (original emphasis altered), is contradicted by the plain text of the Elections Clause, which gives Congress the power to "make or alter" any State regulations regarding the "times, places, and *manner*" of holding Federal elections, including any regulations relating to voter registration. Plaintiffs erroneously rely on *U.S. Term Limits Inc. v. Thomas*, 514 U.S. 779, 834 (1995), to support their argument. That case did not present, nor did the Court address, the issue of Congress's authority to "make or alter" any State laws as they relate to Federal elections. Rather, that case overturned an Arkansas law that sought to impose additional term limit requirements on the eligibility qualifications for that State's congressional candidates, when the Constitution contained no such requirements. The Court correctly noted that States were "entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the [Federal] electoral process itself," *id.*, but did not suggest that Congress lacked the power to "make or alter" such laws.

1. The EAC's regulation of the content of the Federal Form derives from Congress's power to regulate the Federal voter registration process.

Congress enacted the NVRA pursuant to its authority under the Elections Clause. *See id.* at 2251-53. Under Section 9 of the NVRA, Congress charged the EAC with developing, in consultation with State chief election officials, a Federal Form that could be used nationwide to register voters in Federal elections. 42 U.S.C. § 1973gg-7(a)(2). States are required to "accept and use" the Federal Form, *id.* § 1973gg-4(a)(1), and may not require applicants "to submit information beyond that required by the form itself," *Inter Tribal Council*, 133 S. Ct. at 2260; *see also* 42 U.S.C. § 1973gg-7(b)(1).

Congress mandated that the Federal Form include certain specific information, including: "a statement that—(A) specifies each eligibility requirement *(including citizenship)*; (B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2) (emphasis added). Congress also required that the Federal Form state the "penalties provided by law for submission of a false voter registration application." *Id.* §§ 1973gg-6(a)(5)(B); 1973gg-7(b)(4)(i). Congress further stated that the Federal Form "may require *only* such…information…as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 1973gg-7(b)(1) (emphasis added).

Although Congress provided that the EAC must consult with the country's chief State election officials in the development of the Federal Form, it is the EAC that ultimately has the responsibility and discretionary authority to determine the Federal Form's contents, to prescribe necessary regulations relating to the Federal Form, and to "provide information to the States with respect to the responsibilities of the States under [the NVRA]." *Id.* § 1973gg-7(a). In particular,

the EAC determines the quantum of "information…necessary to enable the appropriate State election official to assess the eligibility of the applicant" and ensures that the Federal Form's contents are limited to such information. *Id.* § 1973gg-7(b)(1); *see also Inter Tribal Council*, 133 S. Ct. at 2259 (concluding that the United States' interpretation of § 9(b)(1) 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") (emphasis in original).

Importantly, "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Inter Tribal Council*, 133 S. Ct. at 2257. The Act "clearly contemplates that not every submitted Federal Form will result in registration," and it leaves the task of determining an applicant's eligibility to State and local election officials, in accordance with Federal law and any State law that is not otherwise preempted. *Id.* Indeed, as discussed *infra* at p. 38, States have a variety of alternate means to enforce their voter qualifications, including the qualification of United States citizenship. Therefore, the EAC's failure to require additional documentary proof of citizenship beyond that required by the Federal Form does not "preclude[] a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 2258-59. Additionally, as previously explained, Plaintiffs provided no evidence to the EAC that would establish that they were precluded from obtaining such information. *Cf.* EAC000034-35, 44-46, 99, 103, 112-13.

2. Plaintiffs have no authority under the Tenth Amendment to regulate any aspect of the Federal elections process.

Plaintiffs' reliance on the Tenth Amendment and the concept of residual sovereignty, *see* Pls.' Br. at 10-11, is misplaced insofar as it concerns the Federal elections process. The Tenth Amendment 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. However, the Tenth Amendment concerns only those sovereign powers that States possessed prior to entering into the Union. Of course, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." *U.S. Term Limits*, 514 U.S. at 802 (internal quotation marks omitted). States had no authority prior to entering the Union to regulate Federal elections, since Federal elections arose from the Constitution itself. *Cook v. Gralike*, 531 U.S. 510, 522 (2001).[15]

3. The EAC, not the States, has the discretion to determine the contents of the Federal Form and the quantum of information necessary to enable election officials to administer the Federal voter registration and elections process.

Plaintiffs misconstrue *Inter Tribal Council* to argue that the NVRA imposes upon the EAC a "nondiscretionary duty" to include on the Federal Form any State-specific instructions that the States deem necessary to determine voter eligibility. *See* Pls.' Br. at 11-15. In fact, just the opposite is true. After consulting with the country's chief elections officials, the EAC retains full discretion to determine the contents of the Federal Form, to promulgate regulations relating

[15] The provisions that Plaintiffs quote from *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013), *see* Pls.' Br. at 11, do not conflict with the Court's prior statements in *U.S. Term Limits* and *Cook*. Indeed, the Court in *Shelby County* cited its recent *Inter Tribal Council* decision for the principle that "the Federal Government retains significant control over federal elections." *Shelby Cnty.*, 133 S. Ct. at 2623. The Tenth Amendment rights to which the Court refers in *Shelby County* relate to States' ability to regulate their own elections, and States' general ability to enact laws without prior approval from the Federal government (absent circumstances such as those that necessitated the enactment of Section 5 of the Voting Rights Act).

thereto, and decide whether proposed State instructions are consistent with NVRA requirements. 42 U.S.C. § 1973gg-7(a). Indeed, the *Inter Tribal Council* opinion itself refers to the EAC's authority to determine the contents of the Federal Form as "validly conferred *discretionary* executive authority." 133 S. Ct. at 2259 (emphasis added).

Plaintiffs also mix apples and oranges by contending that the EAC's exercise of discretion to determine the "information…necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and the other parts of the [Federal] election process," 42 U.S.C. § 1973gg-7(b)(1), is akin to the preclearance procedure under Section 5 of the Voting Rights Act, *id.* § 1973c, whereby certain jurisdictions were required to obtain approval from the Attorney General or a three-judge district court in the District of Columbia before they could implement changes to their voting laws. *See* Pls.' Br. at 12-15. Here again, Plaintiffs get it backwards. Unlike a State law that was subject to the Section 5 preclearance requirements, the Federal Form is a creation of Congress, not the States. It was created to assist with the registration of voters in Federal elections, which arise out of the United States Constitution and which the Constitution gives Congress the ultimate authority to regulate. Through the NVRA, Congress delegated to the EAC the discretionary authority to regulate the content of the Federal Form, and instructed the EAC to consult with State chief election officials in developing the form. "Consultation" with State election officials does not impose a mandatory duty to incorporate every suggestion made by any election official. Rather, consultation with the nation's election officials is designed to facilitate the EAC's responsible exercise of its discretion to develop the contents of the Federal Form.[16]

[16] Indeed, the final rules resulting in the original promulgation of the Federal Form rules by the Federal Election Commission show many examples where States request inclusion of certain information on the Federal Form, but the FEC declined to include such information. *See* NVRA Final Rule Notice, 59 Fed. Reg. 32,311 (June (Cont'd…)

Because Congress mandated that the Federal Form contain *only* the "information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer" the Federal voter registration and election process, the EAC must make a determination as to exactly what information that is. To make that determination, the EAC must exercise discretion—particularly where, as here, different States advance different standards of proof regarding the same eligibility criterion, United States citizenship.

In recent years, Kansas and Arizona have modified their State voter registration procedures to require a heightened standard of proof of an applicant's United States citizenship as a precondition to registration. This heightened proof standard differs from the vast majority of States (and from Arizona's and Kansas's previous practices), which require an attestation under oath and under penalty of perjury that the applicant meets that State's citizenship qualification and every other eligibility criterion. To decide what ultimately is included on the Federal Form, the EAC must determine what information is necessary for *Federal* election and registration purposes, to enable election officials to assess an applicant's eligibility as it relates to citizenship.

In making such determinations, the EAC has been guided in part by the NVRA's legislative history. When considering the NVRA, Congress deliberated about—but ultimately rejected—language allowing States to require "presentation of documentary evidence of the citizenship of an applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA bill that included this language, the conference committee determined that such a requirement was "*not necessary* or consistent with

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23, 1994) ("The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words "For U.S. Citizens Only" will appear in prominent type on the front cover of the national mail voter registration form.") .

the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs…." *Id.* (emphasis added). Given Congress's emphatic rejection of the very requirement that Arizona and Kansas sought to add to the Federal Form's State-specific instructions, the EAC's failure to grant Plaintiffs' requests is entirely reasonable. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the [Plaintiffs] urge[] here weighs heavily against the [Plaintiffs'] interpretation.").

4. Plaintiffs have presented no evidence to the EAC that changes to the State-specific instructions are necessary to enforce their voter qualifications.

As discussed above, the Supreme Court's decision in *Inter Tribal Council* indicates that in order to compel the EAC to grant their requested changes, Arizona and Kansas would need to establish that those changes are necessary to enable them to enforce their citizenship requirements. 133 S. Ct. at 2260. However, when Plaintiffs submitted their requests to the EAC for changes to the State-specific instructions, they presented no such evidence. Rather, they advanced the theory that a sworn statement such as that required by the Federal Form attesting to an applicant's citizenship is "virtually meaningless" and "not proof at all." EAC000045; Pls.' Br. at 23. This theory is quite novel, given the long history in Federal law of using sworn statements as evidence, *see, e.g.*, U.S. Const. art. III, § 3 (requiring the testimony of two witnesses to convict for treason); 3 Wigmore on Evidence § 1831 (1904) (perjury penalty "is a real and powerful security for truth-telling"). Plaintiffs' theory is based only on a fragmentary remark made by a single Supreme Court justice during a lively exchange at oral argument in *Inter Tribal Council*. However, a brief remark by a justice at an oral argument is not law, and often is not even a reliable indicator of a justice's views on a legal matter. *See, e.g., Q&A with*

Justice Antonin Scalia, at 20:05 (C-SPAN Jul. 19, 2012), *available at* http://www.c-spanvideo.org/program/Antonin ("Judges ought to express their views on the law in their opinions."). Indeed, when Justice Scalia, who made the remark on which Plaintiffs rest their argument, later wrote the Court's opinion in *Inter Tribal Council*, he chose not to include any reference whatsoever to the notion that sworn statements are "not proof at all." This is no surprise, and neither is it surprising that Plaintiffs are unable to cite any other authority for their theory.

A written statement made under penalty of perjury is considered reliable evidence for many purposes. *See, e.g.*, Fed. R. Civ. P. 56(c)(1)(A) (permitting parties in civil cases to cite written affidavits or declarations in support of an assertion that a fact is not in genuine dispute); *United States v. Reed*, 719 F.3d 369, 374 (5th Cir. 2013) (criminal defendant's affidavit "constitutes competent evidence sufficient, if believed, to establish" facts in support of his ineffective assistance of counsel claim); *United States v. Haymond*, 672 F.3d 948, 959 (10th Cir. 2012) (FBI agent's affidavit provided sufficient evidence of probable cause to search criminal defendant's home); *Siddiqui v. Holder*, 670 F.3d 736, 742 -743 (7th Cir. 2012) (amnesty applicant may satisfy his burden of proof by submitting credible affidavits sufficient to establish the facts at issue); 26 U.S.C. § 6065 (requiring any tax return, declaration, statement, or other document required under Federal internal revenue laws or regulations to be made under penalty of perjury). Even the evidence advanced by the Plaintiffs here to support their case for a merits determination, as well as a preliminary injunction, is in the form of sworn declarations. Thus, Plaintiffs are in the odd posture of asking this Court to enter judgment based upon the presumptive truthfulness of their sworn oaths while simultaneously arguing that such oaths are in fact "virtually meaningless." Plaintiffs cannot have it both ways.

No evidence suggests that the threat of potential fines, imprisonment, or deportation that is explicitly set out on the Federal Form, *see* Compl. Ex. 1, Federal Form, at 4, is not a powerful or effective deterrent against voter registration fraud.[17] As Arizona has previously recognized, the benefit to a non-citizen of fraudulently registering to vote is distinctly less tangible than the loss of access to his or her home, job, and family that would come with deportation. *See* Letter from Office of the Secretary of State of Arizona, July 18, 2001, Joint Appendix at 165-66, *Inter Tribal Council*, 133 S. Ct. 2247 (No. 12-71), 2012 U.S. S. Ct. Briefs LEXIS 5184 ("It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.").

Instead of holding that an attestation under penalty of perjury is virtually meaningless, the Supreme Court made clear in *Inter Tribal Council* that to compel the EAC to add the State's requested instruction to the Federal From, Arizona would need to establish that a sworn statement alone "will not suffice to effectuate its citizenship requirement," 133 S. Ct. at 2260, and that the lack of the requested instruction would "preclude . . . [the] State from obtaining the information *necessary* to enforce its voter qualifications," *id.* at 2259 (emphasis added).[18] Plaintiffs have not come close to bearing this heavy burden.

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[17] The Federal Form prominently warns: "The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." As the Federal Form suggests, a number of Federal criminal statutes potentially apply to false claims of citizenship in registering and voting. *See, e.g.*, 18 U.S.C. §§ 611, 911, 1015(f); 42 U.S.C. § 1973gg-10(2). Evidence that non-citizens are registering and voting can be investigated by the FBI and where violations are found, they can be prosecuted by the Department of Justice.

[18] Furthermore, Federal law already requires that election agencies and driver licensing agencies share database information relevant to voter registration, which provides Plaintiffs with a potential means of seeking to check the citizenship status of applicants who submit the Federal Form. *See* 42 U.S.C. § 15483(a)(5)(B). In addition, several counties in Arizona have contracted with the Department of Homeland Security as one potential

(Cont'd…)

C. The EAC's response to Plaintiffs' requests to modify the Federal Form was not arbitrary, capricious, or an abuse of discretion.

If the Court were to find that the EAC has rendered final agency decisions with respect to Plaintiffs' two requests, it could set aside those agency actions only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard requires the Court to examine "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although judicial scrutiny is "to be searching and careful, the ultimate standard of review is a narrow one." *Id.; see also Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793-94 (10th Cir. 2010). The review is "substantially deferential," *Copar Pumice Co.*, 603 F.3d at 794, and the agency's action is entitled to a presumption of validity. *Schweiker v. McClure*, 456 U.S. 188, 200 (1982). A court may not substitute its judgment for that of the agency, but must only determine "whether the agency has 'articulated a rational connection between the facts found and the choice made.'" *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994) (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)). Finally, as noted above, a court must give substantial deference to the agency's interpretation of its own regulations, deferring so long as the interpretation is reasonable. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

The EAC's failure to grant Plaintiffs' requests to include documentary proof of citizenship instructions on the Federal Form was neither arbitrary, capricious, nor an abuse of

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avenue to check citizenship status in specifically defined circumstances. See, e.g., U.S. Citizen and Immigration Services, *The Systematic Alien Verification for Entitlements Program*, http://www.uscis.gov/save (last visited Nov. 27, 2013). Thus, "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Inter Tribal Council*, 133 S. Ct. at 2257.

discretion. As discussed above, such instructions may be contrary to the EAC's discretionary determination of the quantum of information necessary to enable election officials to assess citizenship, and to NVRA's legislative history, which specifically considered and rejected language that would have allowed States to impose a documentary proof-of-citizenship requirement on Federal registrations.

Plaintiffs' contention that their requested changes to the State-specific instructions are of no concern to other States misapprehends the EAC's position. The EAC is responsible for developing a Federal Form for use in States across the country to register voters in *Federal* elections, and (as relevant here) for determining the quantum of information necessary to allow registration officials to determine an applicant's citizenship for purposes of registering in *Federal* elections in each State. Kansas and Arizona, through their requests for modifications to the Federal Form, sought to impose on *Federal* registrants the heightened proof standards relating to citizenship that resulted from recent changes to *State* law. Such requests affect nationwide policy because if granted, that precedent would change how the Federal Form has previously worked and thus might encourage every State to seek to increase the proof required from voters to register for Federal elections through the Federal Form.

Neither is the EAC's response arbitrary when compared to its decision to approve Louisiana's 2012 request to modify the State-specific instructions to include HAVA-compliant language. In August 2012, the EAC approved Louisiana's July 16, 2012, request to amend the State-specific instructions for Louisiana to provide that if the applicant lacked a Louisiana driver's license and a special identification card, or a Social Security number, he or she should attach to the registration application a copy of a current, valid photo identification, or a utility

bill, bank statement, government check, paycheck, or other government document that shows the name and address of the applicant. EAC000167-71.

HAVA provides that Federal voter registration applicants must provide their driver's license number, if they have one, or the last four digits of their Social Security number. 42 U.S.C. § 15483(a)(5)(A)(i). If they do not provide such information at the time of registration and they are registering by mail for the first time in a State, they will generally be required to show one of the following forms of identification the first time they vote in a Federal election, irrespective of State law: a "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *Id.* § 15483(b)(2)(A). One of the ways voters who register by mail can avoid the HAVA ID requirement is to submit a copy of one of the HAVA-compliant forms of identification with their registration application. *Id.* § 15483(b)(3)(A).

Louisiana's request to modify State-specific instructions thus followed HAVA's requirements. By contrast, Plaintiffs' requests sought to require Federal voter registration applicants to supply additional proof of their United States citizenship beyond the oaths and affirmations already included on the Federal Form, even though such a requirement had already specifically been rejected by Congress when it enacted the NVRA. These are fundamentally different types of requests, and the EAC reasonably treated them differently. There was nothing arbitrary about the EAC's decision to grant Louisiana's request and to defer the requests made by Arizona and Kansas.

D. Failure to approve Plaintiffs' requests to modify the Federal Form is fully consistent with and not in excess of the EAC's statutory authority and jurisdiction.

Plaintiffs' argument that the EAC has exceeded its statutory authority is premised on its erroneous assumption that "the EAC is under a nondiscretionary duty to include Plaintiffs'

requested instructions on the Federal Form." Pls.' Br. at 18. As discussed more fully *supra* at 23, the EAC has full discretion to determine the contents of the Federal Form, and its actions in this case are fully consistent with Congress's delegation of that responsibility to the agency.

III. PLAINTIFFS DO NOT MEET THE STANDARDS FOR A PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20 (citations omitted); *see also Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

Plaintiffs face an additional hurdle because they seek a preliminary injunction that would be mandatory, would alter the status quo, and would provide affirmative relief that, as a practical matter, would constitute the same relief that Plaintiffs have requested in the Complaint. *See O Centro Espirita Beneficiente Unioa Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (per curiam), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006) (noting heightened standard where preliminary injunctive relief would "alter the status quo," be "mandatory," or "afford the movant all the relief that it could recover at the conclusion of a full trial on the merits"). A request for relief that meets any one of these three criteria, much less all of them, must be "more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id*. at 975. "[A] party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id*. at 976. This is because "the primary goal of a preliminary injunction is to preserve the pre-

trial *status quo*." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (emphasis added); *see also id.* at 1208-09 (noting that "mandatory preliminary injunctions are traditionally disfavored," and "courts should be especially cautious when granting an injunction that requires the nonmoving party to take affirmative action . . . before a trial on the merits occurs") (citations omitted).

A. Plaintiffs are unlikely to succeed on the merits.

As described in Parts I and II above, Plaintiffs are unlikely to succeed on the merits of their claims because the EAC has not rendered final, reviewable decisions, and to the extent the Court finds that the EAC has issued final decisions, those decisions were fully consistent with Congress's authority under the Constitution to regulate the Federal voter registration process, are not arbitrary and capricious, and in no way interfere with the ability of Plaintiffs to determine the qualifications of voters generally, or with the States' procedures for enforcing such qualifications as they relate to State and local elections.

B. Plaintiffs have not shown irreparable injury.

Plaintiffs have failed to show that they "will suffer irreparable harm unless the injunction issues," a necessary precursor to issuance of an injunction. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1254 (10th Cir. 2006) (quoting *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998)). To constitute irreparable harm, an injury must be certain, great, actual, "and not theoretical." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). "A speculative injury or the mere possibility of harm will not suffice." *Hill's Pet Nutrition, Inc. v. Nutro Products, Inc.*, 258 F. Supp. 2d 1197, 1205 (D. Kan. 2003) (citing *Public Serv. Co. of N.H. v. Town of West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987)). "[T]he preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done

so." *O Centro Espirita*, 389 F.3d at 978 n.1 (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2947 (2d ed.)). In this case, the harm alleged by the Plaintiffs will not "have an irreparable effect in the sense of making it difficult or impossible to . . . restore the status quo ante in the event they prevail." *Heideman*, 348 F.3d at 1189.

1. Nothing Plaintiffs have alleged amounts to imminent, irreparable harm justifying a need for a preliminary injunction because no Federal elections are scheduled to occur in Kansas or Arizona until August 2014.

Any harm that Plaintiffs may suffer as a result of the EAC's alleged acts or failure to act can be remedied prior to the next Federal elections in Kansas and Arizona, which do not take place until August 2014; thus, there is no need for a preliminary injunction. Plaintiffs claim that the principal harm comes from their alleged need to implement dual registration systems. However, the EAC's alleged action or inaction is not causing Plaintiffs to expend funds at this time on any measures that they may deem required for the next Federal election, whether implementation of a dual registration system or otherwise. Rather, it is the changes in Arizona and Kansas law that mandate those potential changes to Plaintiffs' state and local voter registration systems.

Plaintiffs presently appear to be able to identify and flag any voter registration applications that have not presented evidence of citizenship that the States deem sufficient under State law at the time those applications are processed by local registrars. *See, e.g.*, EAC000014 (describing the procedure Kansas has had in place since July 30, 2013, for tracking Federal Form registrants); ECF No. 26, Decl. of Tammy Patrick ¶¶ 11-12 (listing detailed information regarding Federal Form applicants in Arizona's most populous county, Maricopa County).[19]

[19] Kansas's existing procedures allow it to track and isolate the few registrations that are currently being submitted in Kansas using the Federal Form. On July 30, 2013—prior to filing the Complaint in this action—
(Cont'd…)

Hence, irrespective of whether Plaintiffs ultimately succeed in obtaining the relief they request in this case, and absent any other requirement of Federal law that prevents it, these States can already prevent persons from registering and voting in State elections if they have not provided citizenship documentation that the States deem sufficient.

If Plaintiffs succeed on the merits in this case, they would likewise be able to prevent people from registering and voting in Federal elections, unless and until they complied with the States' documentary proof of citizenship laws. But since there is no Federal election imminent, Plaintiffs would have ample opportunity to implement their proof of citizenship requirements in Federal elections, should they prevail. Thus, there is nothing occurring now that is irreparable—*i.e.*, nothing that cannot be remedied later in the event that the States ultimately prevail in this case.

2. Even if the EAC has infringed on Plaintiffs' sovereignty, as Plaintiffs allege, it does not automatically follow that Plaintiffs are suffering irreparable harm sufficient to justify a preliminary injunction.

Even if the Court finds that the EAC has "infringed on the sovereignty of the Plaintiffs," Pls.' Br. at 22, it does not automatically follow that Plaintiffs are suffering an irreparable injury sufficient to justify the extraordinary remedy of an injunction, and the cases cited by Plaintiffs do not establish such a rule.

Kansas's State election director, Brad Bryant, advised all local election officials "to track which voter registration applicants in your county have applied using the federal form since January 1, 2013. This means you should take note when a federal form comes to your office and keep a list of the names of individuals who submit them." EAC000014. He further advised the local officials that the State would be modifying the status codes in the statewide voter registration database, ELVIS, to assist with tracking Federal Form registrants. *Id.* Importantly, Bryant acknowledges, "Many counties probably have had *very few federal forms submitted over the years.*" *Id.* (emphasis added). Bryant left these important facts out of the declaration he submitted to this Court in support of Kansas's motion for a preliminary injunction. *Cf.* ECF No. 19, Bryant Decl.

It is unclear whether Arizona has taken similar steps to identify Federal Form applicants, but Arizona's Secretary of State, Ken Bennett, confirms that the process would be similar to what Kansas has done. *See* ECF No. 21, Bennett Decl. ¶¶ 24, 29. Further, an Elections Department employee in Maricopa County, Arizona's most populous county, indicates that her office is already tracking and isolating Federal Form registrations that do not comply with the State's proof-of-citizenship requirement. *See* ECF No. 26, Decl. of Tammy Patrick ¶¶ 11-12.

"Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 112-13 (1983)). Thus, the allegation of the deprivation of a constitutional right "does not automatically require a finding of irreparable injury." *Hohe*, 868 F.2d at 72-73. In fact, cases holding that the deprivation of a constitutional right is sufficient to show irreparable harm "are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief." *Public Serv. Co. of N.H.*, 835 F.2d at 382.

The Tenth Circuit did not, as Plaintiffs claim, determine in *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221 (10th Cir. 2005), that "a deprivation of constitutional rights constitutes irreparable injury as a matter of law." Pls.' Br. at 22. Rather, the court in *Pacific Frontier* concluded that the plaintiffs in that case would suffer irreparable harm because the loss of their commercial speech rights under the First Amendment could not be fully remedied by compensation for lost profits. *See* 414 F.3d at 1235-36. Similarly, in *Kikumura v. Hurley*, the Tenth Circuit found irreparable harm where violations of the plaintiff's statutory and First Amendment religious rights could not be adequately remedied by the relief that would be available to him after trial. 242 F.3d 950, 963 (10th Cir. 2001). Further, the Supreme Court did not make any broad statement on this subject in *Elrod v. Burns*, which was limited to First Amendment freedoms. 427 U.S. 347, 373 (1976).

Unlike the expressive freedoms guaranteed by the First Amendment, the sovereign interests potentially implicated in this case are tied to discrete events—Federal elections—that will not take place until August 2014. In the event Plaintiffs succeed on the merits, an adequate

remedy would be available to them well in advance of that date, so a preliminary injunction is not necessary to prevent irreparable harm to Plaintiffs' alleged sovereign interests.

3. Plaintiffs have failed to establish that in the absence of a preliminary injunction they will be forced to register ineligible voters.

Plaintiffs next argue that because in recent years they have identified a handful of non-citizens on their voter lists, absent a preliminary injunction, they will suffer irreparable injury from being forced to register more ineligible voters. The only evidence Plaintiffs offer of ineligible individuals registering to vote is their identification of 15 non-citizens registered to vote in Kansas and 47 non-citizens registered to vote in Arizona. Pls.' Br. Ex. A (ECF No. 19) ¶¶ 3-4; Pls.' Br. Ex. D (ECF No. 25) ¶¶ 8, 10. This small handful of individuals came from the nearly 1.8 million registered voters in Kansas and the more than 3.2 million registered voters in Arizona.[20]

Plaintiffs do not provide much detail regarding the circumstances by which these alleged non-citizens registered to vote. Significantly, Plaintiffs fail to identify any connection between these non-citizen registrants and use of the Federal Form. Nor do Plaintiffs allege that these individuals would have been prevented from registering had they been required to comply with Plaintiffs' current proof-of-citizenship statutes. And they do not explain whether or how they made any attempt to verify these individuals' eligibility before registering them and if they did make such attempts, why these failed to reveal that they were ineligible.

Rather than explain how this evidence demonstrates that they are unable to prevent the registration of ineligible voters, Plaintiffs rely on a single, fragmentary remark by a Supreme

[20] State of Kansas Office of the Secretary of State, *2012 October Voter Registration Numbers by county*, http://www.kssos.org/elections/12elec/2012_October_Voter_Registration_Numbers_by_county_OFFICIAL.xlsx (last visited Oct. 27, 2013); Arizona Department of State Office of the Secretary of State, *State of Arizona Registration Report: 2013 July Voter Registration*, http://www.azsos.gov/election/voterreg/2013-07-01.pdf (last visited Oct. 27, 2013).

Court justice at oral argument, a statement which has no force of law, as discussed *supra* at 26-29.

Furthermore, as discussed *supra* at n.18, there are additional measures at Plaintiffs' disposal to verify the citizenship status of individuals who submit the Federal Form. Another such measure is suggested by Brad Bryant, Kansas's Deputy Assistant Secretary of State. *See* ECF No.19, Decl. of Brad Bryant. Mr. Bryant describes a database that contains identifying information for non-citizen residents of Kansas who obtain driver's licenses, including the identification numbers requested by the Federal Form. *Id.* ¶¶ 2-3; EAC000144, 153. He further describes how Kansas has used this database in the past to identify non-citizens on its voter rolls, ECF No.19, Decl. of Brad Bryant ¶¶ 2-3, a procedure that could just as easily be applied to prospective registrants. In addition, Mr. Bryant's declaration contradicts the conclusory statement in Plaintiffs' brief that "there is no meaningful procedure by which such unlawfully registered non-citizens can be detected and removed from the voter registration rolls." Pls.' Br. at 24. As discussed earlier, nothing precludes a State from "deny[ing] registration based on information in their possession establishing the applicant's ineligibility." *Inter Tribal Council*, 133 S. Ct. at 2257.[21]

Plaintiffs have therefore failed to demonstrate that a preliminary injunction is necessary to enable them to prevent non-citizens from registering to vote.

[21] The converse is also true: absent any evidence in the State's possession that contradicts the specific information on the voter registration application, to which the applicant has attested under penalty of perjury, the registration official should accept the sworn application as sufficient proof of the applicant's eligibility and register that applicant to vote in Federal elections in accordance with Section 8(a)(1) of the NVRA. *See* 42 U.S.C. § 1973gg-6(a)(1) (requiring States to "ensure that any eligible applicant is registered to vote" in Federal elections "if the valid voter registration form of the applicant" is submitted or received by the close of registration).

4. Adoption by Plaintiffs of bifurcated registration systems is not compelled by any action or failure to act by Defendants.

Any burdens resulting from Plaintiffs' creation of bifurcated voter registration systems are attributable to their own choices and/or the requirements of State law, and not to any action or inaction by the EAC.

As discussed above, Congress enacted the NVRA under its "broad" powers set out in the Elections Clause to "provide a complete code for congressional elections, including . . . regulations relating to registration." *Inter Tribal Council*, 133 S. Ct. at 2253 (internal quotation marks omitted). The NVRA requires Kansas and Arizona to "accept and use" the Federal Form created by the EAC when submitted by individuals seeking to register to vote in Federal elections, "[n]o matter what procedural hurdles [their] own form[s] impose[]." *Id.* at 2255. Nothing in Federal law requires the States to create dual registration systems, and no change in EAC practices has resulted in their necessity. Any need for dual registration systems arises solely from State law or State preferences governing State and local registration procedures and is, therefore, of the States' own making.

A preliminary injunction is therefore wholly unnecessary to prevent any injury Plaintiffs may sustain from their decisions to adopt bifurcated registration systems.

C. A preliminary injunction would cause harm to Defendants that would outweigh the alleged injury to the Plaintiffs.

Plaintiffs have also failed to show that the irreparable harm they will allegedly suffer in the absence of a preliminary injunction "outweighs any harm the proposed injunction may cause" to the Defendants. *Wyandotte Nation*, 443 F.3d at 1255 (quoting *Kiowa Indian Tribe*, 150 F.3d at 1171); *see also Winter*, 555 U.S. at 376 ("[C]ourts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542

(1987))); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). Further, to the extent the Plaintiffs argue that the NVRA is unconstitutional as applied by the EAC, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [Defendants] in balancing hardships." *Heideman*, 348 F. 3d at 1190-91 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) (granting application for stay of injunction)).

As between Congress and the several States, the Constitution gives Congress the express power "to pre-empt state regulations governing the 'Times, Places and Manner' of holding [Federal] elections." *Inter Tribal Council*, 133 S. Ct. at 2253. The scope of this power is "broad" and includes the authority to "provide a complete code for congressional elections, including . . . regulations relating to registration." *Id.* at 2253 (internal quotation marks omitted).

When Congress, in exercising this authority, enacted the NVRA, two of the express purposes it identified were "(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," and "(2) to make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b). Congress was likewise concerned with protecting electoral integrity and ensuring the accuracy and currency of the voter registration rolls. *Id.* The statute thus reflects Congress's fair and deliberate balancing of these factors.

As the agency charged by Congress with developing and maintaining the Federal Form, the EAC has a particularly strong interest in ensuring that Congress's voter registration procedures are followed by all States and that eligible citizens are able to register to vote in Federal elections. The Plaintiffs' requested preliminary injunction would interfere with the EAC's performance of this duty and place an additional obstacle in the way of eligible citizens seeking to register to vote in Federal elections, thereby frustrating Congress's purpose in enacting the NVRA. The considerable harm to the Federal election system caused by such interference outweighs the alleged harm that would be suffered by Plaintiffs in the absence of an injunction.

D. An injunction would not serve the public interest.

Similarly, the Plaintiffs have failed to establish that the preliminary injunction they propose would be in the public interest, a showing they must make to prevail on their motion. *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *Winter*, 555 U.S. at 20. Their motion falls far short of the mark when it is "even more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is certainly extraordinary." *O Centro Espirita*, 389 F.3d at 979. Moreover, the harm to the public and to the government "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009) (applying standards for a stay); *see also Minard Rum Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) ("[W]e consider together the[se] two elements of the preliminary injunction framework.")

In fact, issuance of a preliminary injunction would be contrary to the public interest because it would place an additional obstacle in the way of eligible citizens seeking to register to vote in Federal elections and would interfere with the Federal election system, the balance of

interests established by Congress in the NVRA, and the balance of power between Congress and the States established by the Elections Clause.

IV. CONCLUSION

For the foregoing reasons, judgment should be entered on behalf of Defendants. Alternatively, Plaintiffs' motion for preliminary injunctive relief should be DENIED.

Respectfully submitted this 27th day of November, 2013.

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CERTIFICATE OF SERVICE

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

This 27th day of November, 2013.

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