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,

v.

THE UNITED STATES ELECTION ASSISTANCE COMMISSION;

ALICE MILLER, in her capacity as the Acting Executive Director & Chief Operating Officer of The United States Election Assistance Commission

Defendants,

and

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ARIZONA, and LEAGUE OF WOMEN VOTERS OF KANSAS

Proposed Defendant-Intervenors.

Case No. 13-cv-4095-EFM-DJW

AMENDED
PROPOSED DEFENDANT-INTERVENORS LEAGUE OF WOMEN VOTERS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. STATEMENT OF THE NATURE OF THE MATTER BEFORE THE COURT

By this lawsuit, Arizona and Kansas seek to seize victory from the jaws of defeat. Earlier this year, Arizona failed to persuade the U.S. Supreme Court that Arizona could require voter registration applicants to supply documentary proof of U.S. citizenship when they utilized the uniform national voter registration application form (the "Federal Form"). The Federal Form is the centerpiece of the National Voter Registration Act ("NVRA"), which requires all States to "accept and use" the Federal Form as developed and implemented by the U.S. Election Assistance Commission ("EAC") for mail-in voter registration.

The Supreme Court concluded that the Federal Form preempted Arizona's conflicting state law requiring documentary proof of citizenship at registration. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, – U.S. – , 133 S. Ct. 2247, 2260 (2013) (hereinafter "*ITCA*"). The Court did so because Congress enacted the NVRA pursuant to its plenary power under the Elections Clause of the Constitution and required States to "accept and use" the Federal Form, which therefore displaced contrary State laws. The Federal Form administered by the EAC reflected the view, consistent with the NVRA, that documentary proof of citizenship is not "necessary" to assess the eligibility of registration applicants.

The Supreme Court did suggest that one avenue might remain open for Arizona, namely, it could seek to demonstrate to the EAC that requiring an individual applicant to produce documentary proof of citizenship at registration was actually "necessary" under the NVRA to determine voter eligibility, and failing that, to challenge the EAC's determination in court under the Administrative Procedure Act ("APA"). *ITCA*, 133 S. Ct. at 2259-60.

Plaintiffs apparently construe the Supreme Court's suggestion as a roadmap for obtaining relief from the Supreme Court's *ITCA* ruling in the form of a preliminary injunction.[1] Yet nothing could be further from the truth. Instead, the "roadmap" portion of the *ITCA* opinion places this matter under the APA and thereby, under the normal rules of administrative law, establishes that Plaintiffs bear the heavy burden to persuade the EAC—notwithstanding the plain terms and intent of the NVRA—to reverse more than a decade of regulatory and interpretative guidance under, and consistent with, the NVRA. As the government demonstrates in its brief, Plaintiffs did not even attempt to carry their burden before the EAC and cannot seek to fix the record now on an appeal from an administrative ruling.

But even if this Court could review this case outside of the confines of the APA, we respectfully submit that Plaintiffs cannot show they are likely to succeed on the merits for at least five independent reasons: *First*, the EAC's regulations implementing the NVRA, and reflecting EAC's judgment that documentary proof of citizenship is neither consistent with the NVRA nor necessary for Plaintiffs to determine voter qualification, are entitled to deference. *Second*, the NVRA forbids requiring documentary proof of citizenship requirements. *Third*, Plaintiffs did not even attempt to show before the EAC, and have not shown here, that documentary proof of citizenship is necessary to assess an applicant's eligibility to vote. *Fourth*, Plaintiffs cannot show that federal law precludes them from obtaining the information that is necessary for them to assess voter qualifications. *Fifth*, while the Court need not reach the issue, nothing in the Constitution prevents federal law from clearly preempting Plaintiffs' state law documentary

[1] Although Plaintiffs have moved to convert their motion for a preliminary injunction (ECF No. 16), to a motion for summary judgment (ECF No. # 32), the Court has not ruled on that conversion motion, leaving Plaintiffs' preliminary injunction motion as their operative motion. Accordingly, the undersigned style this brief as an opposition to Plaintiffs' preliminary injunction motion. Should the Court allow conversion to a summary judgment, the undersigned submit that summary judgment should be denied for many of the same reasons detailed in this brief.

proof of citizenship requirements. Plaintiffs cannot demonstrate that they are likely to succeed on the merits. Nor can they satisfy the other requirements for a preliminary injunction. Accordingly, Plaintiffs' motion for a preliminary injunction must be denied.

II. STATEMENT OF THE FACTS AND RELEVANT BACKGROUND

A. Enactment of the National Voter Registration Act and the Federal Form

Congress enacted the NVRA pursuant to its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1. The NVRA's express goals are to "increase the number of eligible citizens who register to vote in elections for Federal office" and implement procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b)(1), (2). One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions. *See ITCA*, 133 S. Ct. at 2256 (citing 42 U.S.C. § 1973gg(b)) (noting that Federal Form was intended by Congress to increase registration in federal elections). The centerpiece of these new provisions was the creation of a standardized mail-in registration form that could be used by citizens of any state to register for federal elections. *See* 42 U.S.C. § 1973gg-4. By providing for the creation of a standardized registration form that "[e]ach State shall accept and use," *id.* § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements. *See ITCA*, 133 S. Ct. at 2255 ("[T]he Federal Form guarantees that a simple means of registering to vote in federal elections will be available").

The NVRA prescribed the voter registration application form's content, setting forth several limitations and requirements. First, the application form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg-7(b)(1). Second,

the form must specify that U.S. citizenship is an eligibility requirement for voting. *Id.* § 1973gg-7(b)(2)(A); *see* 11 C.F.R. § 9428.4(b)(1). Third, the form must contain an attestation that the applicant meets all eligibility requirements, including U.S. citizenship. 42 U.S.C. § 1973gg-7(b)(2)(B). Fourth, it must require that the applicant sign under penalty of perjury. *Id.* § 1973gg-7(b)(2)(C). Fifth, the form must list the "penalties provided by law for submission of a false voter registration application." *Id.* §§ 1973gg-6(a)(5)(B), 1973gg-7(b)(4)(i). Sixth, it "may not include any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3). The NVRA vested the FEC (and now the EAC) with the sole authority to develop the application form in consultation with the various States. *Id.* § 1973gg-7(a)(2).

Congress thoroughly debated what information was needed for state election officials to assess whether an applicant was a U.S. citizen. Most Members of Congress thought applicants should be required to attest under penalty of perjury that they were U.S. citizens; others wanted to go further, demanding documentary proof of citizenship, such as a passport or birth certificate. The Senate Committee was in the former camp. S. Rep. No. 103-6, 1993 WL 54278, at *11, *37 (1993) [hereinafter "Senate Report"].

Worried that "mail registration under this bill would preclude" a State from requiring documentary "proof of citizenship at the time of registration," *id.* at *55 (minority views), the Committee dissenters sponsored an amendment stating that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5094, 5098 (1993). The amendment passed in the Senate, but the House opposed. *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.) [hereinafter "Conference Report"]. The Conference Committee ultimately rejected the Senate amendment, finding that it was "not necessary or consistent with the purposes

of this Act" and "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the [Act's] mail registration program." *Id.*

After the bill was reported out of conference, its House opponents moved to recommit the bill to the Committee on House Administration, specifically to direct reinsertion of the Senate amendment permitting States to require documentary proof of citizenship. That motion was defeated by a vote of 259 to 164. *See* 139 Cong. Rec. 9219, 9231-32 (1993). Thus, after votes in both the House and the Senate on this specific question, the final version of the NVRA did not include any provision permitting States to require documentary proof of citizenship.

The Federal Form remained largely unchanged until 2002, when Congress passed the Help America Vote Act ("HAVA"). HAVA transferred responsibility for the Federal Form from the FEC to the newly created Election Assistance Commission. 42 U.S.C. § 15532. HAVA also required the Form to include the question, "Are you a citizen of the United States of America?" and check-boxes for the applicant to answer that question.[2] *Id.* § 15483(b)(4)(A)(i). The EAC revised the Federal Form to meet these new statutory requirements. No change was made to the NVRA directives that the Form include an attestation of eligibility (including citizenship) and that the applicant sign under penalty of perjury.

B. EAC Interpretation of the NVRA

The NVRA required a notice-and-comment rulemaking in order to create the Federal Form. Following the NVRA's enactment, the FEC (EAC's predecessor) conducted a notice-and-comment rulemaking and then adopted a Federal Form that specified registrants, among other requirements, attest to their U.S. citizenship, in accordance with the statute's goals and mandates.

[2] HAVA also provided the states with new tools to assess the eligibility of voter registration applications, such as a valid driver's license, the applicant's driver's license number, or the last four digits of the applicant's Social Security number. *See* 42 U.S.C. §§ 15384(b); 15483(a)(5)(A)(i).

See Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). The final regulations adopting the Federal Form embody the EAC's view that under the NVRA, documentary proof is not "necessary . . . to assess the eligibility of the applicant," 42 U.S.C. § 1973gg-7(b)(1), as the Federal Form requires only an attestation of citizenship. *See* Nat'l Clearinghouse on Election Admin., Fed. Election Comm'n, Implementing the National Voter Registration Act of 1993 at 3-2, 3-4 (1994), http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf; 11 C.F.R. § 9428.4(b)(1), (2).

The Federal Form the FEC developed consists of a single sheet of cardstock that the applicant can simply fill out, sign under penalty of perjury, stamp, and mail as a postcard to the appropriate state election official. *See* 11 C.F.R. § 9428.5. It does not require applicants to submit any documentation. *See* 11 C.F.R. § 9428.4(b). Rather, the Federal Form contains the following attestation:

> I have reviewed my state's instructions and I swear/affirm that:
>
> □ I am a United States Citizen.
> □ I meet the eligibility requirements of my state and subscribe to any oath required.
> □ 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.

Compl. Ex. 1, at 4; *see also* 42 U.S.C. § 1973gg-7(b)(2).

After receiving public comment, the Federal Election Commission (FEC), which previously had responsibility for the NVRA, issued regulations implementing these requirements on June 23, 1994. See 59 Fed. Reg. 32,323 (June 23, 1994). The Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. § 15301 *et seq.*), transferred to EAC functions fulfilled by the FEC under Section 9(a) of the NVRA. The FEC and EAC entered

into a joint rulemaking to transfer the NVRA regulations from the FEC to EAC on July 29, 2009. *See* 74 Fed. Reg. 37,520. The transfer became effective on August 28, 2009.

The EAC has consistently interpreted the NVRA and its own regulations to preclude documentary proof of citizenship. Arizona first requested in 2005 that the EAC amend the Federal Form to include Arizona's newly-minted documentary proof of citizenship requirement following the passage of Proposition 200, which provides that an Arizona "county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship" and listed the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. Ann. § 16-166(F).

The EAC's Executive Director responded that Proposition 200 was "preempted by Federal law" and that Arizona "may not mandate additional registration procedures that condition the acceptance of the Federal Form." *See* Compl., Ex. 10 at 3. The EAC further explained that "[n]o state may condition acceptance of the Federal Form upon receipt of additional proof." *Id.* The EAC's rejection of Arizona's 2005 request was based on its own understanding of the information required using the Federal Form, consistent with its regulations, and the NVRA's text. *See id.*

After Arizona sought reconsideration, the EAC commissioners voted and divided 2-2 on Arizona's request to amend the Federal Form in light of Arizona's Proposition 200, which meant that no action could be taken. *See* 42 U.S.C. § 15328 ("Any action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of three of its members"). *See* Compl. Ex. 13; Election Assistance Comm'n, Public Meeting (Mar. 20, 2008), available at http://www.eac.gov/assets/1/Events/minutes%20public%20meeting%20march%2020%202008.pdf. As Commissioner Ray Martinez III explained, the EAC has

"established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from our predecessor agency, the Federal Election Commission." Compl. Ex. 13, at 5. Under this precedent—which remains intact—the "language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls." *Id.* (internal quotation marks and citation omitted).

Similarly and contemporaneously, the EAC advised Florida that it could not require applicants to answer additional questions about mental capacity and felony status on the Federal Form. Br. of the League of Women Voters as Amicus Curiae in Support of Respondents, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71), App. A, 2013 WL 267032, at *1A. The Florida advisory went on to clarify the agency's position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.* at *7A. This was the last time a majority of commissioners spoke on the issue of preemption. *Id.*; *see also* 42 U.S.C. § 15328 (requiring that any official action by the EAC must be approved by a majority of commissioners).

C. The U.S. Supreme Court's *Inter Tribal Council of Arizona v. Arizona* Decision

Proposed Defendant-Intervenor League of Women Voters of Arizona, along with various other groups, challenged Proposition 200 and Arizona's implementation of it because, *inter alia*, Arizona rejected completed Federal Form applications that were not accompanied by additional documentary evidence of citizenship. *ITCA*, 133 S. Ct. at 2252. The Supreme Court ultimately ruled against Arizona, requiring the State "accept and use" the Federal Form as promulgated by the EAC, regardless of what Proposition 200 provided. *Id.* at 2255-56 ("No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available" so as to "increas[e] the number of

eligible citizens who register to vote in elections for Federal office." (citing § 1973gg(b)). After careful analysis of the NVRA and EAC actions, the Supreme Court held that the NVRA "precludes [states] from requiring a Federal Form applicant to submit information beyond that required by the form itself." *Id.* at 2260. "We conclude that the fairest reading of the statute 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." *Id.* at 2257 (quoting *Ex parte Siebold*, 100 U.S. 371, 397 (1879)).

Noting that Arizona could have challenged EAC action under the APA at the time of the first application, the Court nonetheless suggested Arizona might again attempt to request the EAC to include the documentary proof requirement in the Federal Form, and if the EAC did not grant the request, Arizona could seek to challenge that agency determination under the Administrative Procedure Act. *See id.* at 2258-60 & n.10. Shortly after *ITCA* was decided, Arizona and Kansas (which had enacted its own law substantially identical to Arizona's) renewed their separate requests to the EAC, without enclosing any evidence to support their assertion that an applicant's submission of documentary proof of citizenship at registration was necessary for Plaintiffs to determine if an applicant was a U.S. citizen. Compl. Exs. 5, 14. Acting consistently with the NVRA and the agency's regulations and policies, the EAC staff deferred and did not approve the Arizona and Kansas requests in the absence of a quorum of Commissioners. This litigation ensued.

III. ARGUMENT

To prevail on a motion for preliminary injunctive relief, Plaintiffs must demonstrate: (1) substantial likelihood of success on the merits; (2) imminent irreparable harm; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the

opposing party; and (4) the preliminary injunction will not adversely affect the public interest. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). Because a preliminary injunction "is an extraordinary remedy, the right to relief must be clear and unequivocal." *Dominion*, 356 F.3d at 1261 (internal quotation marks and citation omitted). Merely showing that the potential injury would be "serious or substantial" or simple economic loss is insufficient to show irreparable harm. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (internal quotation and citations omitted); *Dominion*, 356 F.3d at 1262-63. Rather, the injury must be "certain, great, actual, and not theoretical," and the party seeking relief must show that the harm is "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Schrier*, 427 F.3d at 1267 (internal quotation marks omitted).

Here, Plaintiffs seek relief that is "specifically disfavored" in the Tenth Circuit. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (*en banc*) (per curiam). "Specifically disfavored" preliminary injunctions are: (1) those that seek to alter the status quo; (2) mandatory preliminary injunctions; and (3) those that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *Id.* Such preliminary injunctions "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.* Movants seeking such injunctions must satisfy a heightened standard and must make a "strong showing both with regard to the likelihood of success on the merits and with regard to the balance of the harms." *Id.* at 976. Plaintiffs' motion is at once all three types: it seeks to alter the status quo, namely the federal voter registration requirements in place for over 20 years, and

it seeks a writ of mandamus ordering the EAC to modify the Federal Form, which is all the relief Plaintiffs could recover at the conclusion of a full trial on the merits. Plaintiffs therefore must satisfy the heightened standard before any injunction can issue. As demonstrated below, Plaintiffs cannot, and their motion must be denied.

A. Plaintiffs Cannot Show that They Are Likely to Succeed on the Merits.

Plaintiffs cannot show, never mind make the requisite "strong showing," that they are likely to succeed on the merits.

1. The EAC's Regulations Implementing the NVRA, and EAC's Subsequent Opinions, Are Entitled To Deference.

This brief assumes for purposes of argument that the EAC's decision to defer consideration of and not approve Arizona's and Kansas's renewed requests until the appointment of the requisite number of EAC Commissioners, *see* 42 U.S.C. § 15328, constitutes a final agency action reviewable by this Court under the APA. While the EAC's decisions on Plaintiffs' requests were avowedly rendered in the absence of a Commission quorum, even assuming that the EAC had reached the merits of the renewed requests, the EAC could not have approved the Arizona and Kansas requests. The outcome there would be the same and this Court should leave that result undisturbed. That is so for several reasons. *First*, the EAC previously has concluded that documentary proof may not be required under the NVRA, and the EAC's rules and regulations, and EAC prior interpretations reflecting that conclusion serve as precedent for subsequent cases that raise the same issues, and are entitled to deference by this reviewing Court. *Second*, the EAC could have reached no other decision in view of the NVRA's unambiguous text which sets forth the specific application information necessary with respect to U.S. citizenship and that list does not include documentary proof. *Third*, Arizona and Kansas both failed to present any evidence to the EAC demonstrating that documentary proof of citizenship is

necessary for them to assess voter qualifications, a fatal defect they cannot cure by seeking to expand the administrative record on appeal.

a. The EAC's Regulations Governing the Federal Form Adopted After a Notice-and-Comment Rulemaking are Entitled to Deference

The EAC's rules and regulations adopting the specifications for the Federal Form after a formal notice-and comment-rulemaking, are entitled to deference as they reflect a reasonable—if not the only (see infra, III.A.2)—reading of the NVRA. *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Indeed, the Circuit Court of Appeals and the Supreme Court in *ITCA* determined that this was the best reading of the NVRA. *ITCA*, 133 S. Ct. at 2257; *Gonzalez v. Arizona*, 677 F. 3d 383, 398 (9th Cir. 2012) (*en banc*). Federal courts accord *Chevron* deference "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Moreover, since Congress during the legislative process voted on and rejected multiple times a requirement of documentary proof of citizenship at registration, the NVRA left little ambiguity, if any.

Here, the NVRA designated the EAC as the agency charged with preparing the Federal Form, and the EAC therefore is uniquely positioned to interpret the NVRA, including its mail voter registration provisions. As explained above, a standardized mail voter registration form was one of the centerpieces of the NVRA. *Supra* II.A., at 3-4.

The FEC, in adopting the original regulations implementing the Federal Form, interpreted the NVRA as requiring only "necessary" identifying information in connection with the Federal Form. 42 U.S.C. § 1973gg-7(b)(1). The FEC further determined that documentary proof of

citizenship was not "necessary" by not making it a requirement of the Federal Form. This interpretation is eminently reasonable. Congress deliberately refused to allow states to condition their acceptance of the Federal Form on proof of citizenship. *See* H.R. Rep. No. 103-66, at 23-24. Furthermore, through its rulemaking, EAC had the opportunity to gather information and ultimately make an educated decision regarding what information was "necessary" for the Federal Form. 59 Fed. Reg. 32,311.

Through its regulations at 11 C.F.R. § 9428.4(b), the EAC determined that an applicant's attestation of eligibility (including U.S. citizenship), affirmative answer to the question "Are you a citizen of the United States of America?," and signature under penalty of perjury are the "only [information] . . . necessary" on the Federal Form to allow state officials to determine an applicant's citizenship. 42 U.S.C. § 1973gg-7(b)(1); *id.* § 15483(b)(4)(A)(i). Indeed, during the rulemaking proceeding to develop the Federal Form, the EAC specifically found that "[t]he issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury." 59 Fed. Reg. 32,316; *see also id.* at 32,311 (describing extensive notice and comment during the EAC's rulemaking proceedings). The EAC's formal regulations carry the force of law and are therefore entitled to deference. *See, e.g., United States v. Ransom*, 642 F.3d 1285, 1292 n.5 (10th Cir. 2011) ("Statutorily authorized, substantive regulations generally do 'have the force of law unless they are irreconcilable with the clear meaning of a statute, as revealed by its language, purpose, and history.'") (quoting *Allen v. Sybase, Inc.*, 468 F.3d 642, 646 n.3 (10th Cir. 2006); *Joudeh v. U.S.*, 783 F.2d 176, 180-81 (10th Cir. 1986) ("[A] regulation promulgated by an administrative agency charged with the administration of an Act has the force and effect of law if it is reasonably related to administrative enforcement and does

not contravene statutory provisions") (citing *United States v. Barnard*, 255 F.2d 583 (10th Cir. 1958)).

The Commission's determination that documentary proof of citizenship neither is necessary to enable state election officials to assess voter eligibility nor ought to be requested as part of the Federal Form is certainly a permissible construction of the statute, especially since the NVRA expressly committed to the federal agency's discretion the decision as to what information is or is not necessary and ought to be included on the Federal Form, and is therefore entitled to deference. The agency's regulations implementing the NVRA and adopting the Federal Form reflect reasonable interpretations of the NVRA and are also entitled to deference, precluding Kansas and Arizona's requests here.

b. The EAC Has Reasonably Interpreted Its Own Regulations and the NVRA To Preclude State Law Proof of Citizenship Requirements.

The EAC's interpretations of its own regulations governing the Federal Form are entitled to even greater deference. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (when a case "involves an interpretation of an administrative regulation . . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations"); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is *even more clearly* in order.") (emphasis added). And it is well established that agency views on the preemptive effects of its governing statute and regulations are entitled to *Chevron* deference. "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 496 (1996)). "[I]f the agency's choice to pre-empt 'represents a reasonable

accommodation of conflicting policies that were committed to the agency's care by the statute, [courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of N.Y. v. F.C.C.*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (considering agency understanding of preemptive effect of regulations "dispositive").

Here, the EAC has consistently concluded that Arizona's proof of citizenship requirement was contrary to the NVRA and the Federal Form embodied in the EAC's regulations, and therefore is preempted by the NVRA. The EAC's conclusions with respect to the preemptive effect of the Federal Form are entitled to deference here. And those conclusions apply equally to Kansas's documentary proof requirement, which is substantially similar and patterned on Arizona's law.

Plaintiffs suggest that the EAC's denial of their request is somehow arbitrary and capricious because "[i]n 2012, the EAC approved a modification to the Louisiana-specific instructions of the Federal Form similar to the instructions requested by Plaintiffs." Pls.' Br. at 17-18. But Louisiana does *not* require applicants to produce documentary proof of citizenship at registration. Instead, the Louisiana-specific instructions require that applicants without a valid driver's license or social security number "attach one of the following items to his application: (a) a copy of a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of applicant"—documents that typically do not establish an applicant's citizenship and that federal law already requires first-time voters who register by mail to provide either with their applications or when they appear to vote. *See* Compl. Ex. 1, at 9. To the extent that

Arizona's and Kansas's proposed documentary proof requirements are deemed to be "similar" to Louisiana's, the League respectfully submits that the NVRA precludes all such changes to the Federal Form, and the EAC's staff, operating without a quorum of Commissioners in 2012, should be deemed to have exceeded its authority in permitting Louisiana's changes. In any event, the EAC's treatment of the Louisiana instructions does not render the agency's consistent decisions with respect with documentary proof of citizenship arbitrary or capricious.

2. The NVRA Unambiguously Precludes Documentary Proof of Citizenship at Registration.

The EAC's interpretation of the NVRA is not only a reasonable interpretation of the statute, it is the *only* reasonable reading. Section 1973gg-7(b)(1) of the NVRA provides that the Federal Form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." The words "may require," *ITCA* concluded, 133 S. Ct. at 2259, are mandatory and mean that the EAC will include in the Federal Form information that is necessary. The NVRA, as amended by HAVA, prescribe precisely what the Federal Form *must* contain regarding U.S. citizenship. The EAC is not at liberty to add or subtract from that list. Accordingly, section 1973gg-7(b)(1) acts as both a ceiling and a floor with respect to the content of the Federal Form. The legislative background of the statute also confirms this reading of the NVRA. Congress enacted the NVRA pursuant to its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1. The NVRA's express goals are to "increase the number of eligible citizens who register to vote in elections for Federal office" and implement procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(1), (2). One of the primary ways in which the NVRA was intended to combat state laws imposing barriers to voting and

facilitate voter registration was through its mail registration provisions. *See ITCA*, 133 S. Ct. at 2256 (citing 42 U.S.C. § 1973gg(b)) (noting that Federal Form was intended by Congress to increase registration in federal elections).

The centerpiece of these new provisions was the creation of a standardized mail-in registration form that could be used by citizens of any state to register for federal elections. *Id.* § 1973gg-4. By providing for the creation of a standardized registration form that "[e]ach State shall accept and use," *id.* § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements. *See ITCA*, 133 S. Ct. at 2255 ("[T]he Federal Form guarantees that a simple means of registering to vote in federal elections will be available"); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) (hereinafter "ACORN") ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA]."); *see also* Craig C. Donsanto & Nancy L. Simmons, U.S. Dep't of Justice, Federal Prosecution of Election Offenses 63 (7th ed. 2007), *available at* http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf ("The major purpose of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail.").

The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. *See* 42 U.S.C. § 1973gg-4(b) (mandating that state officials make the Federal Form available to "governmental and private entities, with particular

emphasis on making them available for organized voter registration programs"); *cf. ITCA*, 133 S. Ct. at 2255 n.4.

Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. *Gonzalez*, 677 F.3d at 401; *see also ITCA*, 133 S. Ct. at 2260. Rather, the development and implementation of the Federal Form was a task delegated exclusively to a federal agency—the EAC.

As discussed above, *supra* II.A., at 4-5, Congress considered whether the Federal Form should require documentary proof of citizenship, and ultimately rejected such a requirement. During congressional deliberations on the NVRA, the Senate passed an amendment to the bill providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993). The House version of the bill, however, did not include this amendment, and in reconciling the two versions, the Conference Committee explained why: "[The amendment] is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by states to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act." Conference Report at 23-24. The final version of the NVRA did not include any provision permitting states to require documentary proof of citizenship.

Congress's intent was further amplified when HAVA was passed in 2002. HAVA presented Congress with an opportunity to modify the Federal Form to require more information from applicants. Instead, Congress added one mandatory question asking the applicant to check a box affirming that she is a United States citizen. 42 U.S.C. § 15483(b)(4)(A)(i). In addition, HAVA established new procedures to allow those states that require such information to confirm

applicants' eligibility to vote by providing an identification number (such as a driver's license number, a non-operating identification license, or the last four digits of their social security number), and requiring states to verify those numbers against other government databases. *See* 42 U.S.C. § 15483(a)(5)(B)(i). Congress did not, however, use HAVA to require (or allow states to require) documentary proof of citizenship. By specifically prescribing the information that the EAC could require to establish citizenship, the NVRA acts as both a ceiling and a floor with respect to the contents of the Federal Form. The EAC has no authority to amend the Federal Form to include documentary proof requirements. Accordingly, the NVRA and HAVA's "text, context, purpose, and . . . drafting history all point in the same direction." *United States v. Hayes*, 555 U.S. 415, 429 (2009). Congress plainly did not allow states to require documentary proof of citizenship in connection with the Federal Form.

3. Plaintiffs Cannot Show that Documentary Proof of Citizenship Is "Necessary" To Assess an Applicant's Eligibility To Vote

As an initial matter, Plaintiffs submitted no evidence of necessity to the EAC, as they are required to do. They cannot now attempt to supplement the administrative record on an appeal from an administrative action. That failure alone warrants denying Plaintiffs' preliminary injunction.

Plaintiffs' bare assertion that documentary proof of citizenship is necessary to effectuate their state law voter qualification requirements is insufficient to meet their burden. That is because the U.S. Supreme Court made clear in *ITCA* that a state whose request to alter the Federal Form is not honored by EAC has the opportunity, through a challenge under the APA, "to *establish* in a reviewing court" that the Federal Form, with its attestation requirements, "will not suffice to effectuate [the state's] citizenship requirement." 133 S. Ct. at 2260 (emphasis added). In other words, Plaintiffs must "establish" that their state documentary proof of U.S.

citizenship requirements are, in the language of the NVRA, "necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* at 2259 (citing 42 U.S.C. § 1973gg-7(b)(1)). Given the existence of numerous methods that states—including Arizona and Kansas—can and do employ to effectuate their voter qualification requirements, Plaintiffs cannot show necessity and therefore cannot show, never mind make a "strong showing," that they are likely to succeed on the merits.

a. For Decades, Plaintiffs Have Been Registering Applicants To Vote Without Requiring Documentary Proof of Voter Eligibility.

Arizona's and Kansas's own voting histories undermine any claim of necessity under the NVRA. For over a hundred years, Kansas and Arizona have held U.S. citizenship as a requirement for voting, *see* Ariz. Rev. Stat. Ann. Const., Art. 7 § 2.A; Kan. Stat. Ann. Const. Art. 5 § 1, and have successfully registered voters and assessed their eligibility without requiring documentary proof of citizenship at the point of registration. For example, Kansas held its first legislative election in 1855 and has required U.S. citizenship as a qualification since 1859. *Ngiraingas v. Sanchez*, 495 U.S. 182, 196 (1990); Wyandot Constitution of July 29, 1859, Nat. Archives of the United States, http://research.archives.gov/description/6721634. The state has assessed voter eligibility and conducted both federal and state elections without requiring documentary proof of citizenship for over 150 years and evidently without any significant issue of noncitizen voting. Further, for over 20 years, since the enactment of the NVRA and the creation of the Federal Form with its citizenship attestation requirements, Kansas and Arizona as well as the 42 other states that are subject to the NVRA, have been registering voters using the Federal Form and assessing voter eligibility without the additional proof Plaintiffs now demand. 42 U.S.C. § 1973gg-2. In light of those facts, it would be extraordinary to find that documentary

proof of citizenship is now necessary in two states to enforcement a citizenship requirement that has long existed nationwide.

b. That Plaintiffs Do Not Require Applicants To Produce Documentary Proof of Voter Eligibility for Other Voter Eligibility Requirements Further Undermines Any Claim of Necessity.

Any claim of necessity is further undermined by the fact that for decades, both Arizona and Kansas have enforced their other voter qualifications without requiring registrants to present documentary proof of meeting those qualifications. Both states require that voters be (1) U.S. citizens; (2) aged eighteen or older; and (3) residents of state and locality where they plan to vote. *See* Ariz. Rev. Stat. Ann. Const., Art. 7 § 2.A; Kan. Stat. Ann. Const. Art. 5 § 1. In Arizona, "[a] person is presumed to be properly registered to vote on completion of a registration form" that contains the registrant's name, address, signature, citizenship attestation, and identifying number.[3] Ariz. Rev. Stat. Ann. § 16-121.01(A). The presumption established by a completed registration form "may be rebutted only by clear and convincing evidence" that the registrant is not qualified. *Id.* § 16-121.01(B). Prior to enactment of the Secure and Fair Elections Act ("S.A.F.E. Act"), H.B. 2067, 2011 Session (Kan. 2011), voter registration applicants in Kansas only needed to fill out a form with basic background information, including signing an attestation that the applicant met each eligibility requirement and checking boxes indicating whether he or she was a U.S. citizen and would be 18 years of age or older on election day. Now, under the state's new law at issue in this litigation, the county election officer or chief state official must also check a box on the form indicating whether the applicant has met the documentary proof-of-citizenship requirement. *See* Kan. Stat. Ann. § 25-2309.

[3] Acceptable identifying numbers include a driver license number, a non-operating identification license number, the last four digits of a Social Security number, or a unique identifying number issued by the secretary of state if the registrant has not been issued any of the prior three descriptors. Ariz. Rev. Stat. Ann. § 16-121.01.

Moreover, attestations alone remain sufficient in Arizona and Kansas to satisfy other voting-related requirements. *See, e.g.*, *id.* § 25-1802 (permitting Kansans who have recently moved to vote in their new election district upon submitting an affidavit stating their past and current place of residence, along with an attestation that they are entitled to vote and will not case duplicate ballots); *id.* § 25-1122d(c) (allowing voters to register for permanent advance voting status due to disability upon submitting "a statement regarding the permanent character of such illness or disability); *id.* § 25-2908(i)(5) (granting an exemption to photographic identification based upon religious beliefs upon completion of "a declaration concerning such religious beliefs to the county election officer and to the Kansas secretary of state").

Finally, that Plaintiffs currently have available to them, and indeed employ, a myriad of other ways to verify voter qualifications further undermines the claim that submission of documentary proof of citizenship at the point of registration is necessary for Plaintiffs to verify voter eligibility. Arizona and Kansas have each established mechanisms for disqualifying ineligible registrants and preventing them from voting. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-165(C) (directing state courts to notify the Secretary of State of all felony convictions and incompetency adjudications); *id.* § 16-165(D) (directing the Department of Health Services to transmit a list of deceased Arizonans to the Secretary of State of a monthly basis); Kan. Stat. Ann. § 25-2316c(b) (directing county election officers to remove voters from their county's registration records after notice that such voters have registered in a different place).

4. Plaintiffs Cannot Show that the Current Federal Form Precludes Them from Obtaining Information Necessary To Enforce Their Voter Qualifications

Rejecting inclusion of a documentary proof of citizenship requirement in the Federal Form does not preclude Plaintiffs from obtaining information necessary to enforce their voter qualifications and as such, does not require this Court, notwithstanding the doctrine of

constitutional avoidance, to address the difficult constitutional questions Plaintiffs raise. As the Supreme Court made clear in *ITCA*, any such constitutional questions only arise "*if* a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2258-59 (emphasis added). Here, both Kansas and Arizona have available to them, and indeed employ, a number of other means of verifying citizenship status. For instance, election officials in both Arizona and Kansas have sought access to the Systematic Alien Verification for Entitlements program ("SAVE") to determine whether any non-citizens were registered on their voter rolls. In Arizona, Maricopa, La Paz, Pima, Yavapai, and Yuma counties had already entered into agreements with Department of Homeland Security to access SAVE and have used the database in various ways to verify the eligibility of individuals registering to vote. *See Arizona Dep't of State Election Procedures Manual*, at 12 (2012) ("[E]ach County Recorder shall establish an account with the United States Citizenship and Immigration Services to utilize the Systematic Alien Verification for Entitlements (SAVE) program."), *available at* http://www.azsos.gov/election/Electronic_Voting_System/manual.pdf. Similarly, Kansas' Secretary of State has expressed interest in using SAVE for the purposes of verifying voter registration, and has requested access as well. *See* Corey Dade, *States to Use U.S. Immigration List for Voter Purges*, NPR (July 17, 2012, 3:51 p.m.), http://www.npr.org/2012/07/17/156880856/states-to-use-u-s-immigration-list-for-voter-purges.

Moreover, the affidavits Plaintiffs submit here only confirm that Plaintiffs have been able to identify when non-citizens have sought to register to vote without using the Federal Form requiring documentary proof of citizenship. *See, e.g.,* Pls. Br. in Supp. of Mot. for Prelim. Inj. Relief, Ex. D (Osborne Decl.) ¶¶ 3, 10 (noting Maricopa County's use of County Recorded and Jury Commissioner records to identify non-citizens); *id.* at Ex. A (Bryant Decl.)¶ 3 (noting

Kansas Secretary of State's use of driver's license records to identify non-citizens). Finally, the discussion of other means for Plaintiffs to assess voter eligibility and ways in which Plaintiffs assess ineligibility, *supra* III.A.3.a.,b, further demonstrate that nonamendment of the Federal Form does not preclude Plaintiffs from obtaining information necessary to enforce their voter qualifications.

5. In Any Event, Federal Law Preempts Plaintiffs' State Law Documentary Proof of Citizenship Requirements

Finally, the NVRA's prohibition against requiring documentary proof of citizenship from applicants using the Federal Form, and the EAC's corresponding actions, are consistent with Congress' broad power under the Elections Clause to regulate the manner of conducting federal elections. Although states retain the power the set voter qualifications, they may not usurp the power of Congress to prescribe the manner in which those qualifications are to be enforced in federal elections through the voter registration process.

At best, the Plaintiffs can demonstrate that they deem documentation useful in determining whether an applicant for registration in federal elections, who has signed an affirmation, under penalty of perjury attesting to citizenship and who has checked a box reaffirming citizenship, is in fact a citizen. This is insufficient to allow the state to supplant Congress' power to regulate registration in federal elections. The League respectfully submits that over a hundred years of precedent, including the U.S. Supreme Court's recent decision in *ITCA*, compels this Court to find that federal power to displace the state laws governing the Manner of federal elections, including voter registration, prevents a finding that Plaintiffs are likely to prevail on the merits.

For over a century, the Supreme Court has recognized that the Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections. *Ex parte*

Siebold, 100 U.S. 371, 387 (1879). Under the Clause, Congress wields "broad" authority to craft "'a complete code for congressional elections,' including" details regarding "registration." *ITCA*, 133 S. Ct. at 2254 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (emphasis added); *see ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) ("[T]he 'Manner' of holding elections has been held to embrace the system for registering voters."). Congress has such plenary power, including over voting registration, because the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *ITCA*, 133 S. Ct at 2253, quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)) (citation omitted).

Thus, while Article I, Section 4 of the Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," it also states "but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." In other words, as *ITCA* explained, because this provision empowers Congress to "make or alter" state election regulations, "[w]hen Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States." 133 S. Ct at 2256-57 (quoting U.S. Const. Art. I, § 4, cl. 1). Thus, "[u]nlike the States' 'historic police powers, ... [t]he States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it "terminates according to federal law." *Id.* at 2257 (citation omitted). The Supreme Court has consistently recognized that federal power over the "Manner" of federal elections is "paramount" and trumps state authority on the subject. *See id.* at 2254 (citation omitted). In the event of a conflict between federal and state voting regulations—including voter

registration requirements—"the [federal] regulations effected supersede those of the State which are inconsistent therewith." *Id.* (quoting *Siebold*, 100 U.S. at 392).

Even though states retain the power to establish their own voter qualifications, states may not enforce that power in a way that circumvents or usurps the paramount federal authority to regulate the manner of federal elections when Congress has already spoken clearly on the matter, as it has here. A state's election authority cannot infringe upon Congress's power to establish registration procedures for federal elections. *See ITCA*, 133 S. Ct. at 2254; *Smiley*, 285 U.S. at 366; *Siebold*, 100 U.S. at 392. As the Supreme Court explained in *ITCA*, "the Elections Clause empowers Congress to regulate *how* federal elections are held," but the states determine "*who* may vote in them." 133 S. Ct. at 2257-58. Plaintiffs' documentary proof of citizenship requirement at registration addresses a "how" issue, not into a "who" issue. They may not undermine Congress' clear authority to regulate voter registration by seeking to redefine voter registration requirements as a "who" issue.

Plaintiffs misconstrue their retention of power to decide *who* may vote in federal elections as blanket authority to determine *how* federal elections are run, as long as they can articulate some connection between an election procedure and voter qualifications. In *ITCA*, the Supreme Court made the straightforward observation that Congressional regulation could not leave states entirely "without the power to enforce those requirements." 133 S. Ct. at 2258. The Court said that "it would raise serious constitutional doubts if a federal statute *precluded* a State from obtaining the information *necessary* to enforce its voter qualifications." *Id.* (emphasis added). But that is not the case; as discussed above, the Federal Form does not interfere with states' longstanding procedures to enforce their citizenship qualifications and even requires applicants to attest to their citizenship under penalty of perjury and to reaffirm this attestation by

separately checking an additional box on the form. If states are permitted to bootstrap any registration requirements they desire onto the Federal Form in the name of enforcing qualifications, Congress' power to regulate the manner of voter registration in federal elections would be rendered a near nullity.

The spheres of federal and state authority over federal elections are closely linked to constitutional first principles. As the Supreme Court has stated: "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject . . . *to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections* under [the Elections Clause and Necessary & Proper Clause]. . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941) (citations omitted) (emphasis added). Without such restriction, states would necessarily engage in "the mechanics of congressional elections," *ITCA*, 133 S. Ct at 2253, including registration. The states have this power only to the extent that Congress has not claimed it—as Congress did when it passed the NVRA and HAVA. Reading the Qualifications Clauses more broadly would allow the exception – the states' power to set voter qualifications – to swallow the rule – Congress's power over every other aspect of federal elections.

As demonstrated above, Plaintiffs are wholly unable to demonstrate a likelihood of success on the merits. As such, this Court must deny their motion for preliminary injunctive relief.

B. Plaintiffs Will Not Be Irreparably Harmed if the Motion for Preliminary Injunction is Denied.

Plaintiffs claim that they are suffering irreparable injury because: (1) they are being deprived of their right to establish and enforce voter qualifications, (2) non-U.S. citizens are

registering to vote and voting in their elections, and (3) they are being "forced" to implement a bifurcated voter registration system. Pls. Br. in Supp. of Mot. for Prelim. Inj. Relief at 21. These alleged harms are either nonexistent or self-imposed.

First, for the reason articulated above, Plaintiffs cannot show that they are entitled to have the Federal Form amended as they request and that the non-amendment of the Federal Form is a constitutional violation. Thus, the notion that they are suffering irreparable injury because of a constitutional violation must be rejected.

Second, Plaintiffs have offered scant evidence in support of their claims that non-citizens have successfully registered to vote and/or voted in their elections. Even assuming non-citizens have done so, Plaintiffs have not offered any evidence to show that the number of non-citizens who register to vote or actually vote have done so in numbers great enough to cast the validity of Plaintiffs' elections into doubt.

Finally, no one is forcing Plaintiffs to implement a bifurcated voter registration system. Nothing in the NVRA requires states to do this, and indeed, the other 42 states subject to the NVRA do not. Plaintiffs' decision to create a bifurcated voter registration system was a choice, not a requirement, and certainly not one dictated by the NVRA or the EAC. Moreover, pursuant to the NVRA, the EAC does not and cannot merely rubberstamp states' requests to modify the Federal Form. As such, Plaintiffs should have recognized that there was always the possibility that their requests would be denied and planned accordingly.

C. The Balance of Interests Weighs in Favor of Defendants

Even if Plaintiffs' alleged harms could somehow be construed to be the result of the EAC's denial of their requests to modify the Federal Form, that injury does not outweigh the harm to the League and its constituents, or to the other Defendants/Intervenors. As explained in greater detail in the League's motion to intervene, ECF No. 53 at 7, the League has extremely

limited resources, which it uses to advocate for unobstructed access to the polls, educate the public about voting requirements, and help people register to vote. Its mission, and the progress it has fought for, would not only be impeded, but substantially set back if Plaintiffs' motion for a preliminary injunction were granted. Moreover, like many of the other intervenors, the League focuses its efforts on members of traditionally disenfranchised communities, who would consequently also suffer if Plaintiffs' request were granted. In contrast, Plaintiffs have offered no evidence to show that they cannot simply operate as they did before enacting their documentary proof-of-citizenship requirements. Thus, while Plaintiffs claim great costs as a result of the EAC's denial of their request to modify the Federal Form, the truth is that the League and the communities it serves would suffer far greater cost if Plaintiffs' motion for a preliminary injunction is granted.

D. The Requested Injunction Is Adverse to the Public Interest.

Plaintiffs claim that a preliminary injunction here would be in the public interest because remedying a constitutional violation is always in the public interest. Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 26. However, as shown above, Plaintiffs cannot show that the status quo amounts to a constitutional violation. In fact, should a preliminary injunction issue, it would itself create a violation of the constitutional rights afforded to Congress under the Elections Clause. *See supra* III.A.5.

Furthermore, the public interest favors access to the polls, which Congress recognized in enacting the NVRA. Granting Plaintiffs' request for a preliminary injunction would cripple the NVRA, making it harder for people to vote, especially those in traditionally disenfranchised communities. *See* ECF No. 53, at 7 (League's motion to intervene).

IV. CONCLUSION

For the reasons above, the League respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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CERTIFICATE OF SERVICE

This certifies that I have this day filed the foregoing 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 system.

Dated: December 2, 2013

/s/ David G. Seely
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