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, et al., Defendants,	Case No. 13-cv-4095-EFM-DJW

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

Earlier this year, the U.S. Supreme Court held that the uniform national voter registration application form (the "Federal Form"), mandated by the National Voter Registration Act ("NVRA") and administered by the Election Assistance Commission ("EAC"), preempted Arizona's conflicting state law requiring documentary proof of citizenship at registration. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013) (hereinafter "*ITCA*"). The Supreme Court suggested that Arizona could seek to demonstrate to the EAC that requiring an individual applicant to produce documentary proof of citizenship was "necessary" under the NVRA to determine voter eligibility, and challenge any adverse determination in court under the Administrative Procedure Act ("APA"). *Id.* at 2259-60.

Plaintiffs apparently construe the Supreme Court's suggestion as a roadmap for obtaining relief from the *ITCA* ruling in the form of a mandatory, status-quo altering, and thus disfavored preliminary injunction. However, the "roadmap" portion of the *ITCA* opinion places this matter under the APA. Under normal administrative law rules, Plaintiffs bear the burden to persuade the EAC to reverse two decades of regulatory and interpretative guidance, in the face of the plain language and intent of the NVRA, the agency's organic statute.

Plaintiffs have not shown they are likely to succeed on the merits, nor can they for at least five reasons. *First*, the EAC's regulations implementing the NVRA, and reflecting the 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. *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 information that is necessary to assess voter qualifications. *Fifth*, while the Court need not reach the issue, nothing in the Constitution prevents federal law from preempting Plaintiffs' state law documentary proof of citizenship requirements. Plaintiffs also cannot satisfy the other requirements for a preliminary injunction. Accordingly, Plaintiffs' motion for preliminary injunction (ECF No. 16) 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. A centerpiece of the statute was the creation of a standardized mail-in registration form that citizens of any state could use to register for federal elections. *See* 42 U.S.C. § 1973gg-4. By providing for a single 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. The NVRA prescribed the mail-in form's content, setting forth various limitations and requirements,[1] and vested the Federal Election Commission ("FEC"), and later the EAC, with the sole authority to develop the Federal Form in consultation with the states. *Id.* § 1973gg-7(a).

As reflected in the congressional records, the Senate Committee, like most Members of Congress, thought applicants should be required to attest under penalty of perjury that they were U.S. citizens. *See* S. Rep. No. 103-6, 1993 WL 54278, at *11, *36 (1993). The dissenters,

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[1] *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).

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), 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. 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.* at 23-24.

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. 9231-32 (1993). Thus, after votes in both the House and the Senate on this specific question, the final version of the NVRA expressly 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 EAC. 42 U.S.C. § 15532. HAVA also required the Federal 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. *Id.* § 15483(b)(4)(A)(i). The NVRA directives that the Federal Form include an attestation of eligibility (including citizenship) and that the applicant sign under penalty of perjury remained.

B. EAC Interpretation of the NVRA.

The NVRA requires a notice-and-comment rulemaking to develop the Federal Form. Following the NVRA's enactment, the FEC conducted such a rulemaking, received extensive comments, and then adopted the Federal Form, which requires registrants to, among other things, attest to their U.S. citizenship. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). The Federal Form developed through the rulemaking 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.

The EAC, in administering the Federal Form, has consistently interpreted the NVRA and its own regulations to preclude documentary proof of citizenship. *See, e.g.*, Nat'l Clearinghouse on Election Admin., Fed. Election Comm'n, Implementing the National Voter Registration Act of 1993 at 3-2, 3-4 (1994); 11 C.F.R. § 9428.4(b)(1), (2). Arizona first requested in 2005 that the EAC amend the Federal Form following the passage of Arizona's 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 lists the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. Ann. § 16-166(F). After discussion and decision by the Commission, 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.*

After Arizona sought reconsideration, the four EAC Commissioners denied the request by a 2-2 vote. *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%20

march%2020%202008.pdf; *see also* 42 U.S.C. § 15328 (requiring that any official action by the EAC must be approved by at least three Commissioners). 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 [the FEC]." Compl. Ex. 13, at 12. 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.*

Similarly and contemporaneously, the EAC advised Florida that it could not require applicants to answer 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 EAC'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 highlights the consistency of the EAC's position regarding preemption by the Federal Form.

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

Defendant-Intervenor League of Women Voters of Arizona and others challenged Arizona's Proposition 200 and its implementation because, *inter alia*, Arizona rejected completed Federal Form applications that were not accompanied by documentary proof of citizenship. *ITCA*, 133 S. Ct. at 2252. The Supreme Court ultimately ruled against Arizona, requiring the State to "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"). 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. The Court concluded 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 (citation omitted).

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 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 result under the APA. *See id.* at 2258-60 & n.10. Shortly after *ITCA* was decided, Arizona and Kansas (which had enacted its own law substantially similar to Arizona's) renewed their separate requests to the EAC, without enclosing any evidence to support their assertion that documentary proof of citizenship is necessary for Plaintiffs to determine if an applicant is a U.S. citizen. Compl. Exs. 5, 14. Consistent with the NVRA and the agency's regulations and policies, the EAC staff deferred and did not approve the requests in the absence of a quorum of Commissioners. This litigation ensued.

III. ARGUMENT

To prevail on a motion for preliminary injunction, Plaintiffs must demonstrate: (1) substantial likelihood of success on the merits; (2) imminent irreparable harm; (3) 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). Because a preliminary injunction "is an extraordinary remedy, the right to relief must be clear and unequivocal." *Id.* at 1261 (internal quotation marks and citation omitted).

Here, Plaintiffs seek relief that is "specifically disfavored" in the Tenth Circuit. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005). "Specifically disfavored" preliminary injunctions are those that: (1) seek to alter the status quo; (2) are mandatory; or (3) afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *Id.* (citations omitted). 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.* at 1269. 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 1261. Plaintiffs' requested motion is disfavored for all three reasons: (1) it seeks to alter the status quo of the federal voter registration application requirements in place for over 20 years, (2) it seeks a writ of mandamus ordering the EAC to modify the Federal Form, (3) which is all the relief Plaintiffs could recover at the conclusion of a full trial on the merits. As explained below, Plaintiffs cannot satisfy the heightened standard for granting the requested disfavored preliminary injunction.

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. <u>The EAC's Regulations and Opinions Are Entitled to Deference.</u>

Regardless of whether the EAC affirmatively denies or refuses to reconsider Arizona's and Kansas's requests at this time, non-amendment of the Federal Form is the correct outcome for several reasons. *First*, the EAC's duly promulgated rules and regulations and prior interpretations thereof concluded that documentary proof is not required under the NVRA—agency precedent entitled to deference by this Court. *Second*, the NVRA's unambiguous text sets forth the specific application information necessary with respect to U.S. citizenship, and that

list expressly (*supra* II.A.) does not include documentary proof. *Third*, Arizona and Kansas both failed to present any evidence to the EAC demonstrating that documentary proof is necessary for them to assess voter qualifications.

a. EAC 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 because they reflect a reasonable reading of the NVRA. *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984). Indeed, the Supreme Court in *ITCA* determined that this was the best reading of the NVRA. *ITCA*, 133 S. Ct. at 2257; *see also 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).

As the agency charged with preparing the Federal Form, the EAC is uniquely positioned to interpret the NVRA and its registration-by-mail provisions. As explained above, *supra* II.A., a standardized mail-in registration form was a centerpiece of the NVRA. 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 requirements. *See* H.R. Rep. No. 103-66, at 23-24. Furthermore, in its

rulemaking, the EAC had the opportunity to gather information and ultimately made an informed decision as to 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, consistent with the NVRA, that an applicant's attestation of eligibility (including U.S. citizenship), *see* 42 U.S.C. § 1973gg-7(b)(2)(B), affirmative answer to the question "Are you a citizen of the United States of America?," *see id.* § 15483(b)(4)(A)(i), and signature under penalty of perjury are the "only [information] . . . necessary" for states to determine an applicant's citizenship, *see id.* 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 duly promulgated 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.") (quotation marks omitted); *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") (citation omitted).

The EAC's determination that documentary proof of citizenship is not necessary for state election officials to assess voter eligibility is certainly a reasonable construction of the statute, especially since the NVRA expressly commits the development of the Federal Form to that agency. The EAC's determination is therefore entitled to deference, as are the regulations

implementing the NVRA and adopting the Federal Form. Kansas's and Arizona's requests here are properly denied.

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."). 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)). Where the statute grants an agency discretion, courts "should not . . . disturb[] [the accommodation of conflicting policies] 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)); *Hillsborough Cnty. 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 is contrary to, and preempted by, the NVRA and the Federal Form created by the EAC's regulations. The agency's conclusions are entitled to deference here, and apply equally to

Kansas's proof of citizenship requirement.

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. (ECF No. 17) at 17-18. But Louisiana does *not* require applicants to produce documentary proof of citizenship. 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"—which do not establish citizenship and which 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 14. To the extent that Plaintiffs' 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 the requisite quorum 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 arbitrary and capricious the agency's consistent rejection of the documentary proof of citizenship requirement.

2. The NVRA Prohibits Documentary Proof of Citizenship at Registration.

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." As interpreted by the Supreme Court in *ITCA*, the EAC must include in the Federal Form necessary identifying information prescribed by the NVRA, but may not require

additional information. 133 S. Ct. at 2259. Accordingly, section 1973gg-7(b)(1) acts as both a ceiling and a floor with respect to the content of the Federal Form. *See id.*

The purpose and text of the statute confirm this. 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). The Federal Form fosters these goals by simplifying the registration process, promoting national uniformity, allowing registration by mail, facilitating voter registration drives, and ensuring that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements. *See ITCA*, 133 S. Ct. at 2255-56; *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997). Thus, underlying Congress's intent 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 solely to a federal agency—the EAC.

As discussed above, *supra* II.A., 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 declaring 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 on this score 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). HAVA also provided states tools to assess applicants' eligibility by requiring 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). HAVA did not, however, allow states to require documentary proof of citizenship. Both 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.

Plaintiffs' bare assertion that documentary proof of citizenship is necessary to effectuate their state law voter qualification requirements is insufficient to meet their burden. A state whose request to modify the Federal Form is denied 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. In other words, Plaintiffs must "establish" that their documentary proof of 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 numerous methods that states—including Arizona and Kansas—utilize and have at their disposal to enforce their voter qualification requirements, Plaintiffs cannot show that documentary proof of citizenship is "necessary."

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. Const., art. 7 § 2.A; Kan. Const. art. 5 § 1, and have successfully registered voters and assessed their eligibility without requiring documentary proof of citizenship at registration. Further, for over 20 years, since the enactment of the NVRA and the creation of the Federal Form, Kansas, Arizona, and the 42 other states that are subject to the NVRA have registered voters using the Federal Form and assessed voter eligibility without the additional proof Plaintiffs now demand. 42 U.S.C. § 1973gg-2. It would be extraordinary to find that documentary proof of citizenship suddenly is necessary in two states to enforce a longstanding nationwide citizenship requirement.

Indeed, attestations remain sufficient in Arizona and Kansas to satisfy other voting-related requirements. *See, e.g.*, Kan. Stat. Ann. § 25-1802 (accepting affidavits for past and current residences from voters who recently moved, for voter eligibility, and for attestations that voters will not cast duplicate ballots); *id.* § 25-1122d(c) (accepting registration for permanent advance voting status due to disability via written statement); *id.* § 25-2908(i)(5) (exempting photo identification requirement due to religious beliefs via written declaration). Moreover, Plaintiffs employ a myriad of other ways to verify voter qualifications, further undermining their claim that documentary proof of citizenship is necessary for Plaintiffs to assess voter eligibility. *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); 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). Similar examples abound in both states.

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

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 constitutional questions Plaintiffs raise. 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 use, a number of other means of verifying citizenship status. For instance, election officials in both states 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 have already entered into agreements with the Department of Homeland Security to access SAVE, and have used it to verify the eligibility of individuals registering to vote.[2] Similarly, Kansas' Secretary of State has expressed interest in using SAVE to verify voter registration, and also has requested access.[3] Plaintiffs' own affidavits—the veracity of which the undersigned strenuously contest[4]—

[2] *See Arizona Dep't of State Election Procedures Manual*, at 12 (2012), *available at* http://www.azsos.gov/election/ Electronic_Voting_System/manual.pdf.

[3] *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.

[4] Plaintiffs are not entitled to a preliminary injunction on this record. To the extent the Court will consider Plaintiffs' affidavits or any other evidence on Plaintiffs' motion for preliminary injunction, the League requests the

show that Plaintiffs have been able to identify potential non-citizens who have sought to register to vote without requiring documentary proof of citizenship. *See, e.g.,* Pls.' Br. Ex. D (ECF No. 25, Osborne Decl.) ¶¶ 3, 10 (noting Maricopa County's use of County Recorded and Jury Commissioner records to identify non-citizens); *id.* Ex. A (ECF No. 19, Bryant Decl.) ¶ 3 (noting Kansas Secretary of State's use of driver's license records to identify non-citizens). In short, non-amendment of the Federal Form unabashedly 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, Plaintiffs cannot make a "strong showing," or *any* showing, that they can prevail on the merits because the NVRA's bar on the Federal Form requiring documentary proof of citizenship, 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 to set voter qualifications, they may not usurp Congress' power to prescribe the manner in which those qualifications are enforced through the registration process.

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" regarding "***registration***." *ITCA*, 133 S. Ct. at 2254 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added)); *accord. 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's plenary power extends to voter registration because the Elections Clause "invests the States with responsibility for the

right to respond accordingly and not be limited to this brief.

mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *ITCA*, 133 S. Ct at 2253 (quotation marks omitted).

Thus, while the Elections Clause provides that "The Times, Places and Manner" of elections "shall be prescribed in each State by the Legislature thereof," it also states that "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. In other words, "[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." *ITCA*, 133 S. Ct at 2257 (emphasis added). 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.* (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 2253-54 (citation omitted). Thus, 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.* at 2254 (quoting *Siebold*, 100 U.S. at 392).

While states retain the power to establish their own voter qualifications, a state's election authority cannot usurp Congress's power to establish registration procedures for federal elections where, as here, Congress has spoken clearly on the matter. *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. Plaintiffs' documentary proof of citizenship requirement addresses a "how" issue, not a "who" issue. They may not undermine

Congress's clear authority to regulate voter registration by seeking to redefine it as a "who" issue.

Plaintiffs misconstrue their power to decide *who* may vote in federal elections as authority to determine *how* federal elections are run, based on a tenuous connection between election procedures 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 here; as discussed above, the Federal Form does not interfere with states' ability 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 and Necessary & Proper Clauses]. . . ." *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 Clause, U.S. Const. art. I, § 2, cl. 1, or the Seventeenth Amendment 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. In sum, Plaintiffs cannot make the "strong showing" that they are likely to success on the merits and thus, their requested, disfavored preliminary injunction must be denied.

B. Plaintiffs Will Not Be Irreparably Harmed if the Motion Is Denied.

Plaintiffs claim that they are suffering irreparable injury because: (1) they are being deprived of their constitutional right to establish and enforce voter qualifications, (2) non-citizens are registering to vote and voting, and (3) they are being "forced" to implement a bifurcated voter registration system. Pls.' Br. (ECF No. 17) at 21. These alleged harms are either nonexistent or self-imposed. First, as explained above, Plaintiffs cannot show that the EAC's refusal to modify the Federal Form violates the Constitution. Second, Plaintiffs' scant and untested evidence does not support their allegations that non-citizens have registered to vote or voted. *See* Pls.' Br. Ex. D (ECF No. 25, Osborne Decl.) (claiming 159 non-citizens registered to vote in Arizona in 2005 out of 2,706,223 registered voters); *id.* Ex. A (ECF No. 19, Bryant Decl.) (asserting that 13 non-citizens registered to vote in Kansas in 2009, out of 1,723,820 registered voters). Third, Plaintiffs *chose* to create a bifurcated voter registration system. Nothing in the NVRA or the EAC's regulations or decisions requires states to do so.

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 requests to modify the Federal Form, that injury does not outweigh the harm to the League and its constituents, or to the other Defendants or 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 citizens register to vote. Its mission, and the progress it has fought for, would not only be impeded, but substantially set back if Plaintiffs' motion were granted. Moreover, like several 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. *See id.* at 15. 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 a denial of their request to modify the Federal Form, the League and the communities it serves would suffer far greater harm 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. (ECF No. 17) at 26. As shown above, however, Plaintiffs cannot show any 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, as Congress recognized in enacting the NVRA. *See* 42 U.S.C. § 1973gg(b)(1), (2). Granting a preliminary injunction would undermine the NVRA, making it harder for people to vote, especially those in traditionally disenfranchised communities. *See* League's Motion to Intervene (ECF No. 53), at 7.

IV. CONCLUSION

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

/s/David G. Seely__
David G. Seely, No. 11397
Fleeson, Gooing, Coulson & Kitch L.L.C.
1900 Epic Center, 301 N. Main
Wichita, KS 67202
Phone: 316-267-7361
Fax: 316-267-1754
Email: dseely@fleeson.com

Wendy R. Weiser (*pro hac vice*)
Director, Democracy Program
Tomas Lopez (*pro hac vice*)
Jonathan Brater (*pro hac vice*)
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: 646-292-8318
Fax: 212-463-7308
Email: wendy.weiser@nyu.edu,
lopezt@exchange.law.nyu.edu,
braterj@exchange.law.nyu.edu

Michael C. Keats (*pro hac vice*)
Bonnie L. Jarrett (*pro hac vice*)
Adam Teitcher (*pro hac vice*)
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
Phone: 212-446-4800
Fax: 212-446-4900
Email: michael.keats@kirkland.com,
bonnie.jarrett@kirkland.com,
adam.teitcher@kirkland.com

Susan Davies (*pro hac vice*)
Philippa Scarlett (*pro hac vice*)
Rachel B. Funk (*pro hac vice*)
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Phone: 202-879-5000
Fax: 202-879-5200
Email: susan.davies@kirkland.com,
philippa.scarlett@kirkland.com,

rachel.funk@kirkland.com

Attorneys for Defendant-Intervenors League of Women Voters of the United States, League of Women Voters of Arizona, and League of Women Voters of Kansas

CERTIFICATE OF SERVICE

I certify that on December 17, 2013, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/ David G. Seely
David G. Seely