January 3, 2014

ATTN: NVRA Federal Form Comments

U.S. Election Assistance Commission
1335 East West Highway
Suite 4300
Silver Spring, MD 20910
Electronic Submission via Federal eRulemaking Portal
http://www.regulations.gov

RE: EAC Review of State Requests to Include Documentary Proof of Citizenship on Federal Voter Registration Application Form, Docket No. EAC-2013-0004

Dear Ms. Miller:

On behalf of the League of Women Voters of the United States, the League of Women Voters of Arizona, and the League of Women Voters of Kansas (together, "the League"), intervenor-defendants in *Kobach v. United States Election Assistance Commission*, No. 5:13-CV-4095 (D. Kan.), we respectfully submit this Comment in response to the Notice and Request for Public Comment issued on December 20, 2013 concerning the requests by the Secretaries of State of Kansas and Arizona for the U.S. Election Assistance Commission (the "EAC" or the "Commission") to modify the national mail-in voter registration form (the "Federal Form") in order to require voter registration applicants to supply documentary proof of citizenship with that form. We write to urge you to inform the Secretaries of State of Kansas and Arizona that their requests cannot and will not be granted because they are inconsistent with the longstanding EAC policy, EAC regulations, and the National Voter Registration Act of 1993 (the "NVRA"). 42 U.S.C. § 1973gg. **The EAC has previously considered and made binding decisions on the precise regulatory, statutory, factual, and constitutional issues, and the EAC staff is bound by those precedents here.** And Kansas and Arizona have offered no compelling reasons for revisiting those decisions, even assuming EAC were permitted to do so (which it is not).

As the Notice and Request for Public Comment indicates, the Commission's "discretion [in this matter] is constrained by several statutory requirements" and its own

regulations. The Executive Director in particular is obligated to "maintain[] the Federal Form consistent with the [NVRA] and EAC Regulations and policies" and may not unilaterally alter those regulations and policies. This letter addresses the constraints that govern the Executive Director in this instance, namely: (1) the EAC's policies and past practices; (2) the NVRA and the EAC's regulations; and (3) statutory requirements and Commission policies expressly limiting the Executive Director's authority. In doing so, this letter also addresses (4) constitutional and factual considerations related to this request.

- First, the states' requests are inconsistent with binding EAC precedent. The Commission expressly rejected Arizona's initial request in 2006 based on its interpretations of the NVRA and its own regulations and subsequently rejected Arizona's request to reconsider that decision. Those interpretations, and their applications to these requests, are binding and therefore continue to control here. In short, the questions raised by these state requests have been asked and answered by the Commission.

- Second, the states' requests are inconsistent with the NVRA and EAC regulations. The NVRA's language, history, and purposes make clear that the statute prohibits states from requiring documentary proof of citizenship from applicants seeking to register to vote by mail using the Federal Form. The regulations developed by the EAC through notice-and-comment rulemaking also compel rejection of the states' requests.

- Third, the Executive Director lacks the unilateral authority to grant the states' requests. EAC staff has no authority to make material changes to the Federal Form, which was developed through rulemaking with the approval of three or more EAC commissioners pursuant to the NVRA and the Help America Vote Act of 2002, 42 U.S.C. § 15328 ("HAVA"). Simply put, even assuming EAC Staff was inclined to grant the states' requests, the EAC would be required to conduct a notice and comment rulemaking with the support of at least three Commissioners in accordance with the Administrative Procedure Act, the NVRA and HAVA.

- Fourth, constitutional and factual considerations require rejection of the states' requests. The Elections Clause of the U.S. Constitution authorizes the creation of the Federal Form as promulgated by the EAC. Arizona and Kansas cannot show, as they must, that documentary proof of citizenship at registration with the Federal Form is necessary to effectuate their voter eligibility requirements. Nor can the states show that the form precludes them from obtaining the information necessary to enforce their voting qualifications. Further, the states' untested assertions regarding registration and voting by ineligible persons do not stand up to scrutiny and do not support the changes they seek to the form. And finally, in practice, documentary proof of citizenship requirements for federal voter registration already have had harmful consequences on voters and voter service organizations in both Arizona and Kansas, undermining critical goals of the NVRA and the U.S. Constitution.

I. The States' Requests are Inconsistent with Binding EAC Precedent

The EAC has previously considered and made binding decisions on the regulatory, statutory, factual and constitutional issues in this case and the EAC staff is bound to follow those precedents.[1]

A. Precedent Concerning Documentary Proof of Citizenship

Arizona and Kansas's requests cannot and should not be approved because they are contrary to binding EAC precedent. This precedent predates even Arizona's initial request. As Commissioner Ray Martinez III explained in 2006, the EAC has "established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from [the Federal Election Commission (FEC)]," the EAC's predecessor in administering the Federal Form. Position Statement, Commissioner Ray Martinez III, July 10, 2006, at 5 (Attachment A). The EAC 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, 3-3, 3-4 (1994) (specifying the FEC's assessment of data and attestations necessary for the federal form, including "signature with oath" but not documentary proof of citizenship);[2] 11 C.F.R. § 9428.4(b)(1), (2) (providing that the federal form specify citizenship as an eligibility requirement and mandating that the form include an attestation that the applicant meet this and other requirements). Applying this precedent, the Commission squarely addressed this very issue in 2006.

In 2005, Arizona first requested that the EAC amend the Federal Form to reflect its newly enacted Proposition 200, which required local election officials to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." E-Mail from Office of Arizona Secretary of State to U.S. Election Assistance Commission, December 12, 2005; Ariz. Rev. Stat. Ann. § 16-166(F). We understand that, during a meeting in February 2006, the four EAC Commissioners discussed Arizona's request, decided to reject it, and instructed then-Executive Director Thomas Wilkey to inform Arizona of the EAC's decision. In March 2006, Wilkey, with the required approval of three or more EAC Commissioners, informed Arizona of the EAC's reasoned conclusion that the state's documentary proof of citizenship requirement may not be applied to registrants using the Federal Form. *See* March 6, 2006 Letter from U.S. Election Assistance Commission Thomas R. Wilkey to Arizona Secretary of State Jan Brewer (the "EAC's March 6, 2006 Letter," attached as Attachment B). The EAC's

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1 The precise issues raised by the Kansas and Arizona requests have previously been asked and answered by the EAC. While there may be no limit on the number of times a particular Secretary of State can ask the EAC the same question, there is no reason to believe that the agency must follow elaborate procedures to reconsider each repeat request before informing the person making the repeat request that it cannot be granted.

2 Available at http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf.

March 6, 2006 Letter stated that the EAC had found that "[t]he Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof." *Id.* at 3. It further noted that "Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as 'not necessary or consistent with the purpose of [the NVRA].'" *Id.* Accordingly, the EAC found that Proposition 200 was "preempted by Federal law" and that the state "may not mandate additional registration procedures that condition the acceptance of the Federal Form." *Id.* The Commission's rejection of Arizona's 2005 request was based on its understanding of the information required using the Federal Form, consistent with its regulations, and the NVRA's text. *See id*.

Notably, the EAC's March 6, 2006 Letter makes clear that when the Commission rejected Arizona's identical request in 2006, it considered the same constitutional issues raised by Arizona and Kansas here. Specifically, the letter said:

> [W]hile Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election . . . , this does not limit the Federal authority to set voter registration procedures for such elections. . . . This is true even where States have declared voter registration to be a voting qualification . . . or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements. . . .

Id. at 2 (citations omitted). The EAC's March 6, 2006 Letter specifically rejected Arizona's assertion that its documentary proof of citizenship requirement is somehow necessary to enforce its citizenship voting qualification. It said that Arizona's requirement

> is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox."

Id. at 4. In other words, the EAC previously contemplated and rejected the constitutional arguments Arizona and Kansas raise here, and in doing so, expressly considered the relationship between the Elections and the Qualifications Clauses.

The EAC's March 6, 2006 Letter to Arizona is binding precedent that constrains EAC staff. On its face, the letter makes clear that it reflects the decision of the EAC, acting pursuant to its procedures ("the EAC concludes that [Arizona's] policies would effectively" violate the NVRA). *Id.* at 1. There is no basis to suggest otherwise. Pursuant to HAVA, the EAC may only take action "with the approval of at least three of

its members." 42 U.S.C. § 15328. The EAC's March 6, 2006 Letter, which constitutes formal agency action, thus was authorized by at least three Commissioners.

Subsequent EAC action and policy make clear that the denial of Arizona's request reflected in the EAC's March 6, 2006 Letter was made with the approval of a majority of Commissioners. After Arizona sought reconsideration of the EAC's March 2006 decision, the four EAC Commissioners denied the request by a 2-2 vote. 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. This vote reflected the EAC's belief and practice that any modifications to the Federal Form require assent of three Commissioners. It was also a second agency decision on Arizona's request to modify the Federal Form, and again the EAC rejected the request. In a statement issued in conjunction with this vote, then-Commissioner Ray Martinez wrote that the "EAC commissioners [had previously] chosen a consensus-driven" approach to its activities, and that a prior form modification request from the state of Florida was rejected through a letter from the EAC General Counsel "with the unanimous consent of the EAC commissioners." Martinez Position Statement 4, 7. At the time that the EAC rejected Arizona's initial request, the Commissioners acted through consensus, including on matters that reference no formal vote, like the above-mentioned Florida request.[3]

The EAC must follow its existing precedent. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 31-32 (D.D.C. 2012) ("It is established that an agency, like a court, '[n]ormally . . . must adhere to its precedents in adjudicating cases before it.'") (quoting *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010)); *Teva Pharms. USA, Inc. v. Sebelius*, 638 F. Supp. 2d 42, 50 (D.D.C. 2009) ("An agency may establish binding policy through rulemaking procedures or through adjudications which constitute binding precedent"), *rev'd on other grounds*, 595 F.3d 1303 (D.C. Cir. 2010).

B. Other Precedents

EAC precedent on another matter also constrains the staff today and properly guided the Commission in 2006. In 2005, Florida sought to modify the Federal Form to require applicants to answer questions about their mental capacity and felony status in order to assess eligibility. In response, the EAC advised Florida that it could not make the requested modifications because, the "NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls." Martinez Position Statement 5, *citing* Letter from Gavin Gilmour, EAC Associate General Counsel, to Dawn Roberts, Director of the Florida Division of Elections, July 26, 2005 ("EAC's July 26, 2005 Letter," (attached as Attachment C). The

[3] In 2010, for the first time, the EAC issued a policy concerning the role and responsibilities of the Executive Director. At no time previously did the EAC delegate any general authority to the Executive Director. *See* discussion *infra* Part III (explaining how EAC policy makes clear that the Executive Director could not have acted on his own).

EAC's July 26, 2005 Letter went on to clarify the Commission's position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.* at *7A. As Commissioner Martinez noted in 2006, "in refusing Florida's request . . . . the EAC not only established its own interpretive precedent regarding the use and acceptance of the Federal Form, but it also upheld established precedent from [its] predecessor agency." Martinez Position Statement 5.

Moreover, in their pleadings in the *Kobach v. EAC* litigation, Arizona and Kansas erroneously suggest that a 2012 decision by EAC staff to approve a modification to the Federal Form requested by Louisiana somehow renders the Commission's denial of their requests arbitrary and capricious. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (hereinafter "Pls.' Br.") at 17-18, Kobach v. EAC, No. 5:13-cv-04095 (D. Kan. Oct. 23, 2013). They are wrong because Louisiana's request is distinguishable from the requests by Arizona and Kansas and, in any event, the request should have been rejected as inconsistent with the EAC's precedent and beyond the agency staff's authority to grant.

First, Louisiana's request is plainly distinguishable because it 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 do not establish an applicant's 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* National Voter Registration Application at 9.

Second, to the extent that Kansas's and Arizona's requests are somehow deemed "similar" to Louisiana's, the League respectfully submits that the EAC should have rejected Louisiana's request as inconsistent with the EAC's precedent. As established in the Commission's response to Florida's 2005 request, made with the consensus of the Commissioners, states must "accept and use" the Federal Form "without supplementation." EAC's July 26, 2005 Letter at *6A. "Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." *Id.* Just as the EAC rejected Florida and Arizona's requests for requiring information beyond that of the Federal Form itself, so should it have rejected Louisiana's request on the very same ground. Additionally, as the EAC's staff made that decision at a time when the EAC was operating without a quorum of Commissioners in 2012, the Commission exceeded its authority in permitting Louisiana's changes. *See infra* Part III (discussion of EAC staff powers). In any event, the EAC's treatment of the Louisiana instructions does not render arbitrary or capricious the Commission's otherwise consistent decisions rejecting documentary proof of citizenship requirements.

II. The States' Requests Are Inconsistent with the National Voter Registration Act and EAC Regulations

Even setting aside the binding nature of EAC's own precedents, Arizona's and Kansas's requests are inconsistent with the governing statute and the EAC's implementing regulations. The plain terms of the NVRA prohibit states from requiring documentary proof of citizenship from applicants using the Federal Form. The legislative history surrounding the NVRA confirms that Congress expressly declined to allow documentary proof of citizenship. And the EAC, which was specifically authorized by Congress to implement the NVRA and maintain the Federal Form, has issued regulations prohibiting states from requiring documentary proof of citizenship, which are themselves entitled to deference.

A. Language of the NVRA

Under the NVRA, states must "accept and use" the Federal Form developed by the EAC. As the Supreme Court explained in *Arizona v. Inter-Tribal Council of Arizona, Inc.* (hereinafter "*ITCA*"), states must accept and use the Federal Form, including whatever identifying information the EAC prescribes, and they may not require additional information. 133 S. Ct. 2247, 2257-59 (2013). The Court recognized 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)). States thus could only require documentary proof of citizenship if the Federal Form were modified to permit them to do so, but as described below, the plain terms of the NVRA prohibit such a change.

The NVRA prescribes the content of the Federal Form, setting forth several limitations and requirements that guide the EAC. First, the form "may require *only* such identifying information . . . and other information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). 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, the form "may not include any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3).

As explained in part C below, the EAC has interpreted these provisions to set both a floor and a ceiling for what states may require from applicants in order to establish citizenship. That interpretation is plainly the best reading of the statute. The statute allows for documentary proof of citizenship only if it is *necessary* to assess an applicant's citizenship. But the facts make clear that documentation is not necessary for that

purpose. *See infra* part IV.C. Moreover, by expressly providing for other means of verifying an applicant's citizenship in both the NVRA and HAVA, Congress made clear its conclusion that documentary proof of citizenship is not necessary. That conclusion is bolstered by the legislative history. *See infra* part III.B. In short, the Arizona and Kansas requests are precluded by the language of the statute.

The Arizona and Kansas requests also run counter to the NVRA's purpose. The NVRA's express goals are to "increase the number of eligible citizens who register to vote in elections for Federal office" and to implement procedures to "enhance[] the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b)(1), (2). The centerpiece of this effort was the creation of a standardized mail-in registration form that could be used by citizens of any state to register for federal elections—the Federal Form. *Id.* § 1973gg-4. By providing for the creation of a standard form that all states were required to "accept and use," 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, like the League, that register voters in multiple jurisdictions, so that they 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"); *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (noting that the NVRA "impliedly encourages" voter registration programs, and by "limit[ing] the states' ability to reject forms meeting its standards . . . it does protect [voter registration drives]").

The Arizona and Kansas requests undermine Congress's goals in enacting the NVRA and providing for the Federal Form—namely, the goals of providing for a simple voter registration form, promoting national uniformity in the voter registration process, increasing voter registration and participation, and facilitating large-scale voter registration drives.

The hypothetical constitutional question posed by Arizona and Kansas does not require the EAC to reinterpret the NVRA. The states assert that they need documentary

proof of citizenship to enforce their voter qualifications and the EAC is thereby constitutionally obligated to reinterpret the NVRA to allow them to do so. But as the Supreme Court made clear in *ITCA*, any such constitutional question would arise *only* "if a federal statute *precluded* a State from obtaining the information *necessary* to enforce its voter qualifications." 133 S. Ct. at 2258-59 (emphasis added). Here, however, the states have not and cannot demonstrate that rejecting inclusion of a documentary proof of citizenship requirement in the Federal Form actually would preclude them from obtaining information necessary to enforce their voter qualifications. *See infra* part IV.A. Thus, it would be inappropriate for the EAC to abandon the best interpretation of the NVRA.

B. Legislative History

The legislative history of the NVRA confirms that Congress considered whether the Federal Form should permit documentary proof of citizenship and 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." H.R. Rep. No. 103-66, at 224 (1993). 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. *See* 42 U.S.C. § 15483(b)(4)(A)(i). HAVA also provided states with tools to confirm 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 id.* at § 15483(a)(5)(B)(i). HAVA did not, however, allow states to require documentary proof of citizenship.[4]

In sum, 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.

C. EAC Regulations

[4] Notably, as explained in part IV.B, *infra*, these requirements long have allowed states, including Kansas and Arizona, to verify the eligibility status of applicants who sought to register to vote using the Federal Form.

The NVRA vests the EAC (and previously, the FEC) with the sole authority to develop the Federal Form in consultation with the various States. 42 U.S.C. § 1973gg-7(a)(2). The NVRA requires a notice-and-comment rulemaking in order to create the form. Following the statute's enactment, the FEC conducted a rulemaking, received extensive comments, and then adopted a Federal Form that required registrants, among other things, to 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 FEC used the rulemaking process to specify the bounds of "necessary" identifying information. In designing the Federal Form, it specifically determined that the information it required on the Federal Form were "all elements necessary for jurisdictions to determine voter qualifications and to administer voter registration and other parts of the election process." 59 Fed. Reg. 32,311. Thus, by not including documentary proof of citizenship in the Federal Form, the FEC made clear its conclusion that documentary proof of citizenship was not "necessary" to determine voter qualifications. To the contrary, it determined 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." *Id.* at 32,316. 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 is the "only [information] . . . necessary" for state officials to determine an applicant's citizenship. 42 U.S.C. § 1973gg-7(b)(1); *id.* § 15483(b)(4)(A)(i).

These same provisions relating to the "necessary" information were retained in subsequent rulemakings for which, like the original rulemaking, the states were asked their views. The EAC's rules and regulations adopting the specifications for the Federal Form after a formal notice-and-comment rulemaking, are entitled to judicial deference as they reflect a reasonable—if not the only—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. Ariz.*, 677 F.3d 383, 398 (9th Cir. 2012) (en banc). Deference is afforded "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).

III. The EAC Executive Director Is Expressly Prohibited from Unilaterally Altering the *Status Quo* Under Both Law and EAC Policy

Even if EAC staff wished to approve the states' requests (and the states have failed to present any reason to do so), the Executive Director and EAC staff lack the requisite authority to do so. As the EAC acknowledged in the Notice and Request for

Public Comment, statutes and regulations constrain the Executive Director on matters involving the Federal Form. *See* Notice and Request for Public Comment at 3.

A. The EAC Staff Have No Authority to Overturn a Standing Agency Decision

As described above, the EAC acted multiple times on Arizona's initial request. First, it denied the request through the EAC's March 6, 2006 Letter. Then, the Commission reconsidered the request and publicly voted 2-2 against granting Arizona the Federal Form modification it sought. Adopting the identical requests from Arizona and Kansas now would defy a Commission decision that only the Commissioners themselves can address through appropriate procedures. As noted above, HAVA, the statute that created the EAC, expressly requires that any official EAC action must be approved by at least three Commissioners. *See* 42 U.S.C. § 15328. HAVA has no language delegating the power to take action to modify the Federal Form to Commission staff, let alone in the absence of a Commission quorum, nor have the Commissioners purported to delegate such authority to staff. The Commission's staff therefore may not act on its own to modify the Federal Form. What is more, even with the approval of three Commissioners, the EAC may still only implement new modifications to the Federal Form through a notice-and-comment rulemaking, as provided by the NVRA. 42 U.S.C. §1973gg-7(a)(1) (EAC must prescribe regulations to develop the Federal Form). As the Commission has previously acknowledged, the Administrative Procedure Act governs proposed changes to EAC regulations and the Federal Form. *See* 59 Fed. Reg. 32,323, and 74 Fed. Reg. 37,520.[5]

B. EAC Policy Expressly Prohibits Staff Granting the States' Requests Here

The Commission recognizes that the staff must "maintain[] the Federal Form consistent with … EAC Regulations and policies." Notice and Request for Public Comment at 3. Such policy as to agency procedures reinforces the EAC staff's inability to act to change the status quo. The Commission's September 15, 2008 policy on "The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission" clearly states that the Executive Director has responsibility to "maintain the Federal Voter Registration Form consistent with the NVRA and EAC regulations and policies." Roles Policy 7. As discussed in the preceding sections, the states' requests are wholly inconsistent with NVRA's provisions, its purpose as reflected in its legislative history, and the determinations of its application as made through notice and comment rulemaking by the EAC and FEC.

The "Roles and Responsibilities" policy further states that "adoption of NVRA regulations" and "policies of general applicability that impact parties outside of the EAC"

[5] Not all changes to the state-specific instructions on the Federal Form require a new notice-and-comment rulemaking. The EAC's regulations concerning the Federal Form specifically provide for a list of pieces of information that will be included in those instructions pursuant to information provided by chief state election officials. *See* 11 C.F.R. 9428.6 (listing information state officials must provide the EAC for the Federal Form instructions and requiring officials to notify the agency of any changes to that information).

are the responsibility of the Commissioners and "must be accomplished by an affirmative vote of three or more commissioners." Roles Policy 2. These matters require the Executive Director to follow specified procedures. *See id.* at 3. The three-commissioner requirement is mandated by HAVA, 42 U.S.C. § 15328.

Although the policy includes a statement that the Executive Director may "implement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners," this is within the context of "provid[ing] for the overall direction and administration of EAC's operating units and programs, consistent with the agency's strategic plan *and any applicable commissioner adopted policies*." Roles Policy 6 (emphasis added.) It is not a blanket grant of authority, and it should go without saying that the Executive Director cannot have authority that the Commission itself currently lacks in the absence of a Commission quorum. And it certainly is not a grant of authority to change any policies previously issued by Commissioners.

This lack of authority is further confirmed by the EAC's current operating procedure. As mentioned above, Executive Director Wilkey established in 2011 that, without a quorum of commissioners, EAC staff will defer and thus not approve "[r]equests that raise issues of broad policy concern to more than one State." Wilkey Memo at 2. The instant issue (a request by more than one state) before the Commission is precisely that.

IV. Constitutional and Factual Considerations Also Require EAC Staff to Deny Kansas's and Arizona's Requests

To the extent that the Executive Director and EAC staff wish to recommend that the Commission grant this request when the EAC has its necessary quorum of Commissioners (and there is no basis for doing so), constitutional and factual considerations require the EAC staff to recommend that the EAC deny Arizona's and Kansas's requests. As a constitutional matter, the states do not have the power to require those applying to vote in federal elections to provide documentary proof of their citizenship with the Federal Form. The Federal Form and its current contents are creatures of federal power under the Elections Clause, and under the Clause, any inconsistent state law must give way. The relevant factual considerations are twofold: first, the states cannot show, as they must, that documentary proof of citizenship is *necessary* for the states to effectuate their voter qualifications; and second, the implementation of documentary proof of citizenship requirements has had harmful consequences to voters and voter registration efforts, such as those by the League, in both Arizona and Kansas.

A. The States' Requests Must Be Denied Because They Conflict with Federal Authority Under the Elections Clause to Regulate Federal Elections

The EAC's previous denial of Arizona's request to require documentary proof of citizenship was correct under the U.S. Constitution. Under the Elections Clause, Congress possesses broad power to regulate the manner of conducting federal elections.

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. at 387. 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).

Article I, Section 4 of the Constitution provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." While states shall "prescribe[]" the "Times, Places and Manner of holding Elections for Senators and Representatives." *Id.* In other words, as the U.S. Supreme Court 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 2253-54 (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).

While states may have the power to establish voter qualifications,[6] states may not enforce that power in a way that 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. Arizona and Kansas's

[6] Whether states have the power under the Constitution to determine *federal* voter qualifications is an open issue that is not presented squarely here, as this case concerns federal elections *regulations*.

documentary proof of citizenship requirement at registration addresses a "how" issue, not a "who" issue. The states may not undermine Congress's clear authority to regulate voter registration by seeking to redefine voter registration requirements as a "who" issue.

Kansas and Arizona 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). The statutes at issue here, however, do not preclude a state from obtaining such information, and the Federal Form does not interfere with states' longstanding procedures to enforce their citizenship qualifications. Indeed, the Federal Form 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 impose any registration requirements they desire onto the Federal Form in the name of enforcing their voter 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 and 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 any event, in suggesting that they need only assert that documentary proof of citizenship is necessary, Kansas and Arizona fail to recognize the federal government's authority to enforce eligibility requirements. Enforcement is not solely a state prerogative and any consideration of constitutional power must include consideration of the dual nature of the responsibility and the preemptive authority of the federal government in this sphere. *See, e.g.,* HAVA, 42 U.S.C. § 15483(a)(5)(B)(i) (establishing procedures to allow those states that require such information to confirm applicants' eligibility to vote by providing an identification number and requiring states to verify those numbers against other government databases); NVRA, 42 U.S.C. § 1973gg-7(a), (b) (vesting the FEC (and now the EAC) with the sole authority to develop the

application form in consultation with the various States and prescribing requirements and limitations for the Federal Form's content). Because Congress has clearly determined that the Federal Form may not include documentary proof of citizenship requirements, "the [federal] regulations effected supersede those of the State which are inconsistent therewith." *ITCA*, 133 S. Ct. at 2254 (quoting *Siebold*, 100 U.S. at 392).

B. The States Cannot Show that Documentary Proof of Citizenship Is Necessary To Effectuate their Voter Qualifications

The NVRA, as interpreted by the U.S. Supreme Court, requires that Kansas and Arizona "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." *ITCA*, 133 S. Ct. at 2259 (citing 42 U.S.C. §1973gg-7(b)(1)). Given the numerous methods that states—including Kansas and Arizona—utilize and have at their disposal to enforce their voter qualification requirements, the states 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. Rev. Stat. Ann. Const., Art. 7 § 2.A; Kan. Stat. Ann. Const. Art. 5 § 1, and have assessed applicants' eligibility without requiring documentary proof of citizenship at the point of registration, registering those are qualified and denying registration for those who are not (for whatever reason). 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 non-citizen 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, Arizona, and 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 Kansas and Arizona 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.

Moreover, the declarations that Kansas and Arizona have submitted to the federal district court in *Kobach v. EAC* as evidence purporting to show non-citizen registration and voting, suffer from several major infirmities and thus should be accorded scant weight. *First*, the declarations are untested as the court in *Kobach* has not yet provided the defendants in the case, including the League, the opportunity or the forum to subject them to the rigors of cross-examination or other challenge. As noted to the court, the League strenuously objects to the factual and legal assertions made in the states' declarations.

Second, the declarations claiming to show a handful of examples of non-citizen voting do not all allege any connection with the Federal Form. The declarants all do not even claim, never mind prove, that the handful of alleged non-citizen registrants or non-citizen voters had indeed registered to vote using the Federal Form at issue here. Thus, most of the declarations thus appear to be inapposite.

Third, the declarations do nothing to undermine Congress's and the EAC's determination that an attestation under oath, along with the other tools available to election officials, suffices to deter non-citizen registration and voting. Specifically, one declaration purports to show that, in 2009, only 13 non-citizens registered to vote in Kansas—without any mention of whether they used the Federal Form. *See* Bryant Decl., Pls. Br., Ex. A (ECF No. 19), ¶ 3. In August 2009, there were 1,700,330 individuals registered to vote in Kansas.[7] Thus, only 0.00076 percent—less than one-thousandth of one percent—of all registrants were allegedly non-citizens, even assuming they registered using the Federal Form. Furthermore, Kansas points to no more than four non-citizens who may have actually voted prior to 2009—an infinitesimal number. *See id.*, ¶¶ 3-4. A second declaration asserts that a permanent resident of the United States attempted to register to vote in Kansas using the Federal Form. *See* Ulrich Decl., ¶ 7. There is no indication that Kansas would have been unable to determine that the individual was ineligible to vote without its documentation requirement. Finally, a third declaration alleges that 37 people applying for U.S. citizenship in 2006 had either voted or registered to vote in Maricopa County. *See* Osborne Decl., Pls.' Br. Ex. D (ECF No. 25), ¶ 8. In 2006, there were 1,484,434 registered voters in Maricopa County.[8] Thus, only 0.00249 percent—about two-thousandths of one percent—of total registrants in 2006 are alleged to have been non-citizens. The tiny fraction of a percent of non-citizens who have purportedly registered in Kansas and Arizona indicates that, consistent with Congress's findings, an attestation under oath suffices to establish eligibility for federal elections. *See Gonzalez v. Arizona*, No. 08-17094, Docket Entry No. 232 at 8 (9th Cir. June 7, 2012) (en banc) (denying Arizona's application for a stay of the appeals court ruling, and holding that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud").

Fourth, putting aside whether they actually show (albeit infinitesimal) instances of voter fraud perpetrated by registration using the Federal Form, the states' declarations do demonstrate that the states are decidedly *not* precluded from enforcing their voter eligibility requirements. The Supreme Court explained that 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. *See generally* Declaration of Lloyd Leonard, Jan.

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[7] *See* Voter Registration Statistics, State of Kansas Office of the Secretary of State, *available at* http://www.kssos.org/elections/elections_registration_voterreg.asp.

[8] *See* State of Arizona Registration Report: 2006 General Election, *available at* http://www.asos.gov/election/voterreg/2006-10-31.pdf.

3, 2014, ¶¶ 21-32 (attached hereto as Attachment E). For instance, elections 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.[9] Similarly, Kansas's Secretary of State has expressed interest in using SAVE to verify voter registration, and also has requested access.[10] Further, the states' own declarations in the *Kobach* case show that Kansas and Arizona have been able to identify potential non-citizens who have sought to register to vote without requiring documentary proof of citizenship. *See, e.g.*, Osborne Decl., Pls.' Br. Ex. D (ECF No. 25), ¶¶ 3, 10 (noting Maricopa County's use of County Recorder and Jury Commissioner records to identify non-citizens); Bryant Decl., Pls. Br., Ex. A (ECF No. 19), ¶ 3 (noting Kansas Secretary of State's use of driver's license records to identify non-citizens). In short, Kansas and Arizona cannot carry their burden to show that that the current Federal Form precludes them from obtaining information necessary to enforce their voter qualifications.

Finally, those declarations contain no new relevant facts beyond those previously considered by the EAC to justify reconsideration of the agency's prior, correct decisions. While the states may have offered additional examples of the types of facts the EAC already considered in rejecting the previous requests, developing its regulations and policies, and implementing the NVRA, there is nothing materially new here. The states' factual allegations boil down to this: there have been a small number of non-citizens who may have somehow registered to vote in recent years, and several of those individuals might have voted illegally. But it has long been well known in the elections community that some small number of ineligible people may register to vote. The EAC determined both in the Arizona case and in developing the regulations governing the Federal Form that this fact does not justify a proof of citizenship requirement. . Congress was similarly was well aware of this fact when the NVRA and HAVA were debated and adopted, and provided alternative mechanisms to address eligibility determinations.

In any event, the League reserves the right to respond to and object to any of the factual and legal assertions made by Kansas and Arizona.

C. The States' Documentary Proof of Citizenship Requirements Have Had Harmful Consequences in their Implementation

A further reason the EAC should deny the states' requests to amend the Federal Form is that documentary proof of citizenship requirements have had harmful consequences in both Arizona and Kansas. The League can speak directly to these consequences through its local organizations in both states. In both Arizona and Kansas, the requirements have complicated voter registration and alarmed the electorate. The

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

[10] *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.

requirements thus run directly counter to the NVRA's purpose of making the ballot more accessible to all Americans.

The Arizona League was a plaintiff in the *Inter Tribal Council* litigation, the result of which the states are seeking to reverse through the *Kobach* litigation. The organization participated in the previous case because it was harmed during the period when Arizona implemented its documentary proof-of-citizenship requirement. It is participating in the *Kobach* litigation because it would be harmed again if the states prevailed. When Proposition 200 was previously implemented, the Arizona League was forced to drastically reduce its voter registration activities because of the administrative burden imposed by the law. Also, while the Arizona League continued to distribute voter registration forms, it was no longer able to confirm voter registrations, as it had done previously. The communities that the Arizona League serves were also adversely impacted. In *Gonzalez v. Arizona*, Case No. 2:06-cv-01268-PHX-ROS, slip op. (D. Ariz. Aug. 20, 2008),[11] the case that eventually led to the Supreme Court's decision in *Inter Tribal Council*, the district court found that after Arizona enacted the documentation requirement in 2004, over 30,000 people were initially unable to register to vote because of the requirement. *Id.* at 13. The court also found that a disproportionate number of those applicants were Latino. *Id*. Moreover, while approximately 11,000 of those applicants subsequently were able to register to vote, about 20% of the remaining 20,000 unsuccessful applicants were Latino. *Id.* at 14.

The Kansas League has also observed troubling issues in Kansas during the implementation of its proof of citizenship requirement. The registration activities of the organization's nine local affiliates have been limited, hindered, or stopped entirely because the citizens that the League seeks to register and educate cannot produce documentary proof of citizenship or would have great difficulty doing so. Moreover, prospective League members who do not currently possess qualifying proof-of-citizenship documents could face difficulty registering to vote. In addition, partly in response to the new documentary proof-of-citizenship requirement, the Kansas League is initiating a campaign, "Protect the Vote," to educate voters about Kansas voting requirements. League members have thus far contributed more than $6,000 toward this effort.

The state Leagues run voter registration drives that focus on communities with a history of lower participation in elections and people who are less likely to have proof of citizenship, such as minorities, women, students, younger voters, the poor, and the elderly. *See Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice (November 2006), at 2-3. The documentary proof-of-citizenship requirements make it significantly harder for the League and others to continue to register eligible voters because of the costs associated with buying, maintaining, and moving the equipment necessary to register voters who must show documentary proof of citizenship.

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[11] Since this decision is not readily available electronically, it is included as Attachment D.

In addition to voter registration drives, the state Leagues and the national League engage in a number of nonpartisan activities geared to facilitate voting and other forms of civic participation, including in their efforts low-income neighborhoods, young people, rural areas, and minorities. Since the documentary proof-of-citizenship requirements were enacted by Arizona and Kansas, the Arizona and Kansas Leagues have encountered and received numerous inquiries from concerned citizens who lack the newly mandated proof-of-citizenship documents, do not have documentation with their current name, do not understand how they can acquire these documents, or are frustrated by the expensive and complicated procedures involved in obtaining such documents required under Arizona and Kansas law. In practice, the proof of citizenship requirement chills and in some cases prevents voting—precisely contrary to the NVRA's mission of making voting more accessible to the general public.

V. Conclusion

The Supreme Court held in *ITCA v. Arizona* that:

> 42 U. S. C. §1973gg–4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act.

133 S. Ct. at 2260.

The Executive Director and the EAC staff should inform the Secretaries of State of Kansas and Arizona that their requests cannot and will not be granted. As the EAC staff has acknowledged, it does not have discretion to alter with the Federal Form's content in the manner the states request. Moreover, any action granting the requests would violate the NVRA substantively, HAVA procedurally, EAC regulations, and the commissions' own policies. In addition, constitutional and the states' proven ability to identify ineligible voters without requiring documentary proof further require denial of these requests.

The League asks that this letter and its attachments are included in any record related to the requests from the Secretaries of State of Kansas and Arizona and any EAC action or proceeding in relation to *Kobach v. EAC*.

Thank you for your attention to these important matters.

Respectfully submitted,

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