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-INTERVENOR LEAGUE OF WOMEN VOTERS' BRIEF IN RESPONSE TO PLAINTIFFS' NOTICE OF ADVERSE AGENCY DECISION AND MOTION FOR RELIEF

TABLE OF CONTENTS

Page

I. STATEMENT OF THE NATURE OF THE MATTER BEFORE THE COURT 1

II. STATEMENT OF THE RELEVANT BACKGROUND 3

III. ARGUMENT 5

A. The EAC's Uniform Interpretation of "Necessary" in the NVRA Is Consistent With The Statutory Text and is Entitled to Deference 6

1. Under the NVRA, Documentary Proof of Citizenship is Not Necessary In Connection With The Federal Form 7

2. The EAC's Reasonable and Consistent Interpretation of the NVRA Is Entitled To Deference 10

B. Plaintiffs Cannot Prove That Documentary Proof of Citizenship Is "Necessary" Under the NVRA 15

1. The EAC Determination Is Not Arbitrary or Capricious 15

2. The EAC's Decision Does Not Preclude Plaintiffs From Enforcing Their Citizenship Requirements. 16

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Anderson v. U.S. Dep't of Housing & Urban Dev.,
701 F.2d 112 (10th Cir. 1983) 15

Ariz. v. Inter Tribal Council of Ariz., Inc.,
133 S. Ct. 2247 (2013) ..... passim

Aviva Life & Annuity Co. v. F.D.I.C.,
654 F.3d 1129 (10th Cir. 2011) 16

Barrera-Quintero v. Holder,
699 F.3d 1239 (10th Cir. 2012) 7

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 6, 10, 11, 14

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,
419 U.S. 281 (1974) 15

Chevron, U.S.A. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) ..... passim

City of Colo. Springs v. Solis,
589 F.3d 1121 (10th Cir. 2009) 15

Decker v. Nw. Envtl. Def. Ctr.,
133 S. Ct. 1329 (2013) 10

Ecology Ctr., Inc. v. U.S. Forest Serv.,
451 F.3d 1183 (10th Cir. 2006) 16

Hoyl v. Babbitt,
129 F.3d 1377 (10th Cir. 1997) 7

I.N.S. v. Aguirre-Aguirre,
526 U.S. 415 (1999) 6

Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 7

Newton v. F.A.A.,
457 F.3d 1133 (10th Cir. 2006) 14

Oklahoma v. U.S. E.P.A.,
723 F.3d 1201 (10th Cir. 2013) 7

TABLE OF AUTHORITIES
(Continued)

Page

Smiley v. Citibank (S.D.), N.A.,
517 U.S. 735 (1996) 10

Smiley v. Holm,
285 U.S. 355 (1932) 20

Udall v. Tallman,
380 U.S. 1 (1965) 10

United States v. Mead Corp.,
533 U.S. 218 (2001) 12

W. Watersheds Project v. Bureau of Land Mgmt.,
721 F.3d 1264 (10th Cir. 2013) 16

Statutes

18 U.S.C. § 1015(f) 17

42 U.S.C. § 15483(b)(4)(A)(i) 4, 12

42 U.S.C. § 1973gg(b)(1) 3

42 U.S.C. § 1973gg-10 17

42 U.S.C. § 1973gg-4(a)(1) 3

42 U.S.C. § 1973gg-7(a) 3

42 U.S.C. § 1973gg-7(a)(1) 9

42 U.S.C. § 1973gg-7(a)(2) 9

42 U.S.C. § 1973gg-7(b) 3

42 U.S.C. § 1973gg-7(b)(1) .... passim

42 U.S.C. § 1973gg-7(b)(2) 7

42 U.S.C. § 1973gg-7(b)(2)(B) 9, 12

42 U.S.C. § 15483(a)(5) 18

42 U.S.C. §15483(b)(4)(A)(i) 8, 12

42 U.S.C. §15483(b)(5)(B)(i) 8

5 U.S.C. § 551(6) 5

TABLE OF AUTHORITIES
(Continued)

Page

5 U.S.C. § 551(7) 5

5 U.S.C. § 706(2)(A) 15

8 U.S.C. § 1227(a) 18

8 U.S.C. §1182(a) 18

Ariz. Rev. Stat. Ann. § 16-166(F) 4

Ariz. Rev. Stat. Ann. § 16-182 17

Help America Vote Act, Pub.L. 107–252 .... 4, 8

Kan. Stat. Ann. § 25-2309 19

Kan. Stat. Ann. § 25-2411 17

Regulations

11 C.F.R. § 9428.3(b) 9

11 C.F.R. § 9428.4(b) 11, 12

11 C.F.R. § 9428.4(b)(1) 3, 7

11 C.F.R. § 9428.4(b)(2) 3

11 C.F.R. § 9428.5 11

59 Fed. Reg. 32,316 (June 23, 1994) 12

74 Fed. Reg. 37,519 (July 29, 2009) 11

74 Fed. Reg. 37,520 (July 29, 2009) 4

Other Authorities

139 Cong. Rec. 5098 (1993) 3

139 Cong. Rec. 9231-32 (1993) 3

Election Assistance Comm'n, Public Meeting (Mar. 20, 2008) 4

H.R. Rep. No. 103-66 (1993) (Conf. Rep.) 3, 8

Nat'l Clearinghouse on Election Admin., Fed. Election Comm'n,
Implementing the National Voter Registration Act of 1993 at 3-2 (1994) 3

TABLE OF AUTHORITIES
(Continued)

Page

S. Rep. No. 103-6 (1993) 3

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

The States of Arizona and Kansas appeal under the Administrative Procedure Act ("APA") from the Election Assistance Commission's ("EAC") denial of their requests to modify the National Mail Voter Registration Form ("Federal Form") by requiring voter registration applicants to present documentary proof of U.S. citizenship. The EAC based its well-reasoned, 46-page decision on the National Voter Registration Act ("NVRA"), its own rules and regulations implementing the Federal Form, and its own decisional precedent, including its earlier denial of Arizona's identical request nearly a decade ago. The sole issue on appeal is whether the EAC acted arbitrarily and capriciously in denying those requests. And the answer is plainly, No.

The touchstone for this appeal is *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984), *see* Pls.' Br. at 1-9, under which the EAC's construction of the NVRA is entitled to substantial deference. 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." 42 U.S.C. § 1973gg-7(b)(1) (emphases added). The Federal Elections Commission ("FEC") and the EAC, as the federal agencies charged by Congress under the NVRA with developing the Federal Form, reasonably concluded that documentary proof was *not* necessary under the statute, and their subsequent regulations and determinations likewise deserve deference. Furthermore, the States failed to show that documentary proof of citizenship is necessary; indeed, the EAC's voluminous administrative record—including materials submitted by Arizona and Kansas—demonstrates that the States have many other means to determine whether voter registration applicants are U.S. citizens.

This is precisely what the Supreme Court envisioned might occur when it noted that

Arizona could renew its request that the EAC amend the Federal Form to require documentary proof of citizenship as "necessary" under the NVRA to effectuate its citizenship requirement, and then seek review under the APA if the EAC denied that request. *See Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259-60 (2013) ("*ITCA*"). Plaintiffs now contend that simply enacting state legislation requiring such documentary proof sufficiently demonstrates necessity under the NVRA, arguing that the EAC is under a nondiscretionary duty to modify the Federal Form at the request of any state. But the language from *ITCA* upon which plaintiffs rely made clear that if EAC inaction persisted in the face of Arizona's request, the state would then have "the opportunity to *establish* in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement . . . ." *Id.* at 2260 (emphasis added). Plaintiffs offer no reason why a showing would need to be made before a reviewing court, but not before the EAC.

Simply put, the NVRA commits to the EAC's discretion the development of the Federal Form and the determination of what information is "necessary" to include therein. In exercising that discretion, the EAC has consistently interpreted the NVRA and its own regulations to preclude documentary proof of citizenship, even when States have requested alterations to accommodate state-specific documentary requirements. As the agency interpreting its governing statute, the EAC is entitled to great deference. Indeed, in *ITCA*, the Supreme Court expressly endorsed the EAC's ability to interpret the NVRA as "validly conferred discretionary executive authority" in the context of § 1973gg-7(b)(1)'s language that the phrase "may require only" means "shall require information that's necessary." *ITCA,* 133 S. Ct. at 2259. No less deference should be accorded to the EAC's interpretation of what is "necessary" under the NVRA. While the EAC's decision was issued by the Executive Director, the analysis remains the same, as the Executive Director simply applied the long history of precedent set by the Commissioners.

Thus, the EAC's decision should be affirmed.

II. STATEMENT OF THE RELEVANT BACKGROUND[1]

Congress enacted the NVRA to "increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). 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. Both houses of Congress debated and voted on the specific question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and ultimately rejected such a proposal. *See* S. Rep. No. 103-6 (1993); 139 Cong. Rec. 5098 (1993); H.R. Rep. No. 103-66, at 23 (1993) ("Conf. Rep."); 139 Cong. Rec. 9231-32 (1993).[2]

The NVRA set forth certain requirements for the Federal Form, *see* 42 U.S.C. § 1973gg-7(b), vesting the FEC, and later the EAC, with the sole authority to develop the Federal Form in consultation with the states. *Id.* § 1973gg-7(a). Pursuant to the NVRA's mandate, the FEC developed the Federal Form through the required rulemaking, 42 U.S.C. § 1973gg-7(a), interpreting the NVRA and its own regulations to preclude documentary proof of citizenship.[3]

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[1] The League hereby incorporates by reference the detailed background, contained in the League's Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction (the "League's PI Brief"), ECF No. 119.

[2] In particular, the final Conference Committee found 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." Conf. Rep. at 23-24 (1993). Plaintiffs claim that the legislative history cited by the EAC is "distorted," Pls.' Br. at 5, but Plaintiffs point only to the statement of a single member, while the Conference Committee includes membership from both Houses, appointed by leadership of both parties to craft a mutually acceptable bill.

[3] *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) (specifying the FEC's assessment of data and attestations necessary for the Federal Form, including "signature with oath" but not documentary proof of citizenship); 11 C.F.R. § 9428.4(b)(1), (2) (providing that the Federal Form shall specify citizenship as an eligibility requirement and include an attestation that the applicant meet this and other requirements).

The Federal Form remained largely unchanged until 2002, when Congress passed the Help America Vote Act ("HAVA"), which transferred responsibility for the Federal Form from the FEC to the newly-created EAC and amended the Federal Form to include the check-box question, "Are you a citizen of the United States of America?" 42 U.S.C. § 15483(b)(4)(A)(i). The EAC then adopted the FEC regulations. *See* 74 Fed. Reg. 37,520 (July 29, 2009).

In 2005, Arizona 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." The EAC denied this request on March 6, 2006, concluding that the state's documentary proof of citizenship requirement could not be applied to registrants using the Federal Form.[4] *See* March 6, 2006 Letter from EAC to Arizona Secretary of State Jan Brewer (the "EAC's March 6, 2006 Letter"), EAC001271-73; Ariz. Rev. Stat. Ann. § 16-166(F). Arizona subsequently sought reconsideration of the EAC's determination, but on July 11, 2006, the four EAC Commissioners denied the request by a 2-2 vote. EAC001275-79.[5]

Shortly after *ITCA* was decided in June 2013, Arizona and Kansas (which had enacted its own law substantially similar to Arizona's) renewed their separate requests to the EAC, without providing any evidence to support their assertions that a documentary proof of citizenship requirement in the Federal Form was "necessary" for enforcing their voting citizenship requirements. EAC000034-35; EAC000103. The EAC staff deferred the requests in the absence

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[4] Importantly, the EAC's March 6, 2006 Letter was sent with the Commissioners' consent and was unanimously recognized by the Commissioners as the official "prior determination" of the agency which demonstrated the "EAC's previously articulated legal rationale for declining Arizona's request." *See infra* III.A.2.b.

[5] Following the EAC's July 2006 vote, the EAC voted on Arizona's request again during subsequent meetings, and denied it by a 2-to-2 vote each time. *See, e.g.*, 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 (denying Arizona's renewed request by a 2-2 tally vote).

of a quorum of Commissioners, and Arizona and Kansas filed this suit. On December 13, 2013, following briefing and argument on Plaintiffs' motion for a preliminary injunction, this Court remanded the matter to the EAC with instructions to render a final agency action by January 17, 2014. The EAC did so, rejecting the States' requests to modify the Federal Form to include their documentary proof of citizenship requirements. Pursuant to order of this Court (ECF No. 130), Plaintiffs filed a notice and memorandum seeking review on January 31, 2014.

On February 4, 2014, the Court held a telephone conference with the parties, during which the parties agreed that this matter falls entirely within the bounds of the APA, rendering unnecessary the presentation of any additional evidence before the Court. The Court's review is thus limited to the administrative record before the agency.

III. ARGUMENT

The EAC's repeated and uniform interpretation of the NVRA through its rulemaking and policy determinations, as well as its consistent application through informal adjudications,[6] reflects the requisite—and wholly reasonable—interpretation of the statute's text by the agency designated by Congress to implement the Act. The Supreme Court has made clear that the EAC has the discretion to determine what information is "necessary" in the Federal Form—not the States. *ITCA*, 133 S. Ct. at 2259 (EAC's statutory interpretation was "validly conferred discretionary executive authority" and a State may merely "request that the EAC alter the Federal Form"). The EAC's consistent position on the question of documentary proof of citizenship in connection with the Federal Form is owed substantial deference because the EAC

[6] Unlike court adjudications, which are necessarily formal and subject to strict procedural rules, an "adjudication" under the APA may be informal and is defined generally as the "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order," in turn, is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . ." *Id.* § 551(6). Thus, under the APA, an adjudication is simply any decision-making process by an agency that is not a rule-making.

is interpreting a provision of its organic statute, as well as its own regulations developing and implementing the Federal Form, and is merely applying its precedent in the instant case. *See generally Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*,, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Indeed, even if the Court were to conclude that the EAC's current decision was made without proper authority, the Court should still defer to the agency's past interpretations made with a quorum concluding that documentary proof of citizenship in connection with the Federal Form is not "necessary to enable the appropriate State election official[s] to assess the eligibility of the applicant." *ITCA*, 133 S. Ct. at 2259 (quoting § 1973gg-7(b)(1)).

Plaintiffs also failed to meet their own affirmative burden to demonstrate that if the Federal Form were not altered, the "State would be precluded from obtaining information necessary for enforcement" of its citizenship requirement. *Id.* at 2259. Indeed, the Supreme Court has recognized that the NVRA "does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility,'" *id.* at 2257 (alteration in original), and the EAC's final agency action expressly details the "myriad of means available" to the States to do so. Thus, the record amply supports—in fact compels—the EAC's conclusion.

A. The EAC's Uniform Interpretation of "Necessary" in the NVRA Is Consistent With The Statutory Text and is Entitled to Deference

Courts engage in a two-step inquiry to determine whether to apply *Chevron* deference to an agency's interpretation of a statute it is responsible for implementing: (1) the statute must be ambiguous or silent regarding the relevant issue, and (2) the agency's interpretation must be based on a permissible construction of the statute. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). So long as an agency's interpretation of an ambiguous statute is reasonable, "*Chevron*

requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).[7]

Plaintiffs fail at both steps of this analysis. Not only are the text and legislative history of the NVRA and HAVA clear as to what information is (and is not) "necessary" in connection with the Federal Form, but the EAC has consistently interpreted the relevant provision in a reasonable manner which must be accorded deference in any event.

1. **Under the NVRA, Documentary Proof of Citizenship is Not Necessary In Connection With The Federal Form**

As detailed above and in the League's PI Brief, the NVRA, as amended by HAVA, prescribes what must be included in the Federal Form, including an attestation of citizenship.[8] But this floor is also a ceiling, because the NVRA makes clear that the Federal 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) (emphases added); *ITCA*, 133 S. Ct. at 2259. Under the plain language of the NVRA, therefore, the Federal Form may not include documentary proof of citizenship unless

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[7] *See also, e.g.*, *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201, 1207 (10th Cir. 2013) (finding *Chevron* deference applies when the agency's construction is reasonable); *Barrera-Quintero v. Holder*, 699 F.3d 1239, 1244 (10th Cir. 2012) ("'[A] court gives deference to an agency's interpretation of a statute Congress charged it with administering if the statute is silent or ambiguous on the question at hand and the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute.'") (citation omitted); *Hoyl v. Babbitt*, 129 F.3d 1377, 1385 (10th Cir. 1997) ("[W]here Congress is silent regarding the issue before us, and has delegated authority over the subject matter to the agency construing the statute, we will defer to the agency's construction.").

[8] *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." *Second*, the form must specify that U.S. citizenship is an eligibility requirement for voting. *Third*, the form must contain an attestation that the applicant meets all eligibility requirements, including U.S. citizenship. *Fourth*, it must require that the applicant sign under penalty of perjury. *Fifth*, the form must list the "penalties provided by law for submission of a false voter registration application." *Sixth*, it "may not include any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(1)-(b)(2), (b)(3); *id.* §§ 1973gg-6(a)(5)(B); 11 C.F.R. § 9428.4(b)(1).

that documentation is necessary to enable an election official to assess an applicant's citizenship. And Congress clearly decided it was *not* necessary, as shown both by the legislative history and the fact that it provided states with other means by which to verify an applicant's citizenship.

Congress specifically considered a provision allowing states to require documentary proof of citizenship in conjunction with use of the Federal Form, but rejected it as contrary to the purposes of the statute. Conf. Rep. at 23-24. Congress's intent was further amplified when it passed HAVA in 2002, adding a requirement that applicants must check a box confirming that they are citizens, 42 U.S.C. §15483(b)(4)(A)(i), but not requiring (or allowing states to require) documentary proof of citizenship in connection with the Federal Form. HAVA further provided states with additional tools to confirm applicants' eligibility to vote by requiring an identification number (a driver's license number, a non-operating identification license, or the last four digits of their Social Security number), and requiring states to check the accuracy of the applicant's voter registration information against the driver's license and/or Social Security databases. 42 U.S.C. §15483(b)(5)(B)(i). Thus, by specifically prescribing the information that the EAC could require to establish citizenship, and by specifically rejecting efforts to affirmatively require documentary proof of citizenship, Congress has made clear that documentary proof of citizenship was never intended to be part of the Federal Form.

Plaintiffs ignore this clear statutory mandate and offer two flawed arguments that state election officials are alone entitled to determine what information is necessary in connection with the Federal Form. But each of these arguments has already been rejected by the Supreme Court. *First*, Plaintiffs contend that Section 1973gg-7(b)(1)'s language—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"—dictates that state election

officials alone may determine what must be required in the Federal Form. *Second*, Plaintiffs point to the statutory language in Section 1973gg-3(c)(2)(B) (requiring States to provide for voter registration via State drivers' license application forms) and Section 1973gg-7(b)(1) (permitting States to create their own voter registration forms, subject to statutory limitations) to argue that Congress must have intended for States to control the Federal Form, since they have authority over the form of these other voter registration vehicles. But as the Supreme Court recognized, the NVRA created a multi-faceted system that differentiated the Federal Form—which is expressly committed to the authority of the EAC only "in *consultation* with" state officials, § 1973gg-7(a)(1), (2) (emphasis added)—from the permission granted to states to craft their *own* registration forms via these alternate statutory mechanisms:

> These state-developed forms may require information the Federal Form does not. . . . This permission works in tandem with the requirement that States "accept and use" the Federal Form. States retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: 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.

ITCA, 133 S. Ct. at 2255. The Supreme Court accordingly rejected the view that the NVRA itself obligates the EAC simply to adopt the determination of the States in connection with the singular task to which the EAC is entrusted—the creation and maintenance of the Federal Form.[9] Indeed, the Supreme Court observed that Arizona's reading was "plainly not the best reading [of the statute]," *id.* at 2259, and noted that if it adopted Arizona's reading of the NVRA to allow states to "demand of Federal Form applicants every additional piece of information the State requires on its state-specific form[,] . . . *the Federal Form ceases to perform any meaningful*

[9] Plaintiffs' argument based on the text of 11 C.F.R. § 9428.3(b), which addresses the state-specific instructions for the Federal Form, is similarly foreclosed by the statutory text. Although the regulations state that the state-specific instructions shall include "information regarding the state's specific voter eligibility and registration requirements," this regulation cannot implicitly alter what the NVRA expressly commands: that the EAC determine what information is "necessary" to be submitted in conjunction with the Federal Form. 42 U.S.C. § 1973gg-7(b)(1).

function. . . ." *Id.* at 2256 (emphasis added). Thus, in order to provide a meaningful backstop against "procedural hurdles" imposed by the state, the Federal Form cannot be subject to modification based on a State's unilateral determination of what is "necessary."

2. The EAC's Reasonable and Consistent Interpretation of the NVRA Is Entitled To Deference

Even were the NVRA not clear, the EAC has uniformly interpreted "necessary" in the NVRA to preclude documentary proof of citizenship in connection with the Federal Form, and that interpretation merits substantial deference. Federal courts accord such 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).

When interpreting its organic statute, an agency is entitled to *Chevron* deference. If the agency is interpreting its own regulations, it is entitled to even greater deference under *Seminole Rock*, which requires a reviewing court to defer to the agency unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock,* 325 U.S. at 413-14. The Supreme Court recently reaffirmed this high level of deference, stating, "It is well established that an agency's interpretation [of its own regulation] need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1329, 1337 (2013); *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.").

The EAC's reasonable and consistent interpretation of the NVRA and its own regulations as precluding documentary proof of citizenship has occurred in three ways, each of which is

accorded significant deference under *Chevron* or *Seminole Rock*. *First*, in issuing the original regulations implementing the Federal Form under the NVRA, the FEC—the EAC's predecessor agency—determined that documentary proof of citizenship was not "necessary" and therefore did not include it in the Federal Form.[10] *Second*, in denying Arizona's initial request that the EAC modify the Federal Form to include Arizona's proof of citizenship requirement and its subsequent request for reconsideration, the EAC stated clear policy that under the NVRA, states could not "condition [their] acceptance of the Federal Form upon receipt of additional proof." EAC's March 6, 2006 Letter at 3, EAC001273. *Third*, in its recent final agency action, the EAC acted pursuant to its interpretive precedent once again. Each of these interpretive acts should be accorded deference in its own right.

a. The Federal Form Was Developed Through Notice-And-Comment Rulemaking

As discussed above and in the League's PI brief, following the NVRA's enactment, the FEC conducted a notice-and-comment rulemaking, and then adopted a Federal Form that required registrants, among other things, to attest to their U.S. citizenship under penalty of perjury, in accordance with the statute's goals and mandates. The Federal Form that the FEC developed consists of a single sheet of cardstock that the applicant can simply fill out, sign, stamp, and mail as a postcard[11] to the appropriate state election official. *See* 11 C.F.R. § 9428.5. Applicants are required to attest to their citizenship but are not required to submit any additional documentation. *See* 11 C.F.R. § 9428.4(b).

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[10] The FEC and EAC reaffirmed the decision that documentary proof of citizenship was not "necessary" for the Federal Form when, as a result of HAVA, both agencies engaged in joint rulemaking to transfer the NVRA regulations from the FEC to the EAC, and "no substantive changes to those regulations" were made. 74 Fed. Reg. 37,519 (July 29, 2009); EAC Decision at 22.

[11] The use of a postcard itself further confirms that no supporting documentation was necessary in connection with the Federal Form.

Ultimately, through its regulations at 11 C.F.R. § 9428.4(b), the FEC determined 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.* (emphasis added). Indeed, during the rulemaking proceedings to develop the Federal Form, the FEC 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 (June 23, 1994). The agency thus settled on the issue of any "necessity" of documentary proof of citizenship.

These reasonable determinations made through notice-and-comment rulemaking are entitled to the high level of deference set forth in *Chevron*. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (citing notice-and-comment rulemaking as a manner of valid delegation of Congressional authority entitled to *Chevron* deference). The EAC's regulations, as adopted from the FEC, thus reflect reasonable and wholly permissible interpretations of the NVRA, and are entitled to deference here.

b. The EAC Determinations of Arizona's Prior Requests

The EAC further interpreted the NVRA and its own implementing regulations through the informal adjudications resulting in the EAC's 2006 and 2008 rejections of Arizona's request to amend the Federal Form. In March 2006, the EAC expressly found that documentary proof was not necessary. Consistent with the EAC's traditional practice of the Executive Director acting pursuant to the unanimous consent of the Commissioners, then-Executive Director Thomas Wilkey informed Arizona of the EAC's reasoned conclusion, that the state's documentary proof of citizenship requirement could not be applied to registrants using the

Federal Form. *See* EAC's March 6, 2006 Letter; July 10, 2006 Position Statement of Commissioner Ray Martinez III (the "Martinez Statement") at 5, EAC001282-89 at EAC001286 (noting that the later July 2006 vote was "the first time that a decision by the EAC commissioners will be decided by less than a unanimous basis"). 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." EAC's March 6, 2006 Letter at 3, EAC001273. 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" with respect to the Federal Form and that the state "may not mandate additional registration procedures that condition the acceptance of the Federal Form." *Id.*

On June 20, 2006, Arizona asked the EAC to reconsider its denial of the state's request. On July 11, 2006, and again on March 20, 2008, the EAC Commissioners denied the request by a 2-to-2 vote. As indicated by Commissioners on both sides of that decision, the March 2006 determination was unanimously viewed by the Commissioners as the official "prior determination" of the agency which demonstrated the "EAC's previously articulated legal rationale" for declining Arizona's request. *See* July 6, 2006 Mem. to EAC Commissioners from EAC Chairman Paul DeGregorio (the "DeGregorio Memo") at 1, EAC001280-81 at EAC001280 ("[T]he EAC has previously refused Arizona's request to amend the Federal Form's state specific instructions"); Martinez Statement at 1-2, EAC001282-83 (same); *id.* at 2 (describing the "EAC's previously articulated legal rationale"); Statement of EAC Chairman DeGregorio regarding the EAC's Tally Vote of July 6, 2006 (the "DeGregorio Statement") at 1, EAC001290-

91 at EAC001290 (describing the March 2006 letter as the "EAC's determination regarding the National Voter Form."). Indeed, as Commissioner Martinez explained in his position statement, approving Arizona's request to reconsider its prior determination would have "drastically alter[ed] our agency's interpretation of NVRA . . . ." EAC001283; *cf.* DeGregorio Statement at 2, EAC001291 ("While the state may determine the evidentiary requirements of its voter registration form (consistent with the minimum requirements of the NVRA), *the EAC determines the procedural and evidentiary requirements of the federal form*.") (emphasis added).[12]

The EAC's decision to deny Arizona's request to modify the Federal Form is also entitled to *Chevron* deference. Indeed, not only was the EAC interpreting the NVRA, but it was interpreting its own regulations governing the Federal Form, which, as explained above, is entitled to even greater deference under *Seminole Rock*.

c. The EAC's 2014 Final Agency Action

Finally, the EAC's decision issued on January 14, 2014 ("EAC's 2014 Final Agency Action"), applying its prior determinations regarding documentary proof of citizenship, must also be accorded deference. An agency's informal interpretation of a statute is "entitled to deference to the extent it is persuasive, and it is entitled to great deference insofar as it is interpreting the agency's own regulations." *Newton v. F.A.A.*, 457 F.3d 1133, 1136-37 (10th Cir. 2006). Here, the EAC continued to apply its consistent interpretation of its own regulations in a decision fully supported by the administrative record and the agency's precedent. Thus, the

[12] Commissioner Martinez's statement also noted that the EAC had refused a similar request by Florida the year before to modify the Federal Form to reflect Florida's law requiring registrants to check a box attesting to their mental capacity. In refusing Florida's request, the EAC made clear that the "language of the NVRA mandated that the Federal Form, without supplementation, be accepted and used by states to add an individual to its voter rolls." Martinez Statement at 5 (quotations omitted). In so doing, the EAC further "established its own interpretive precedent regarding the use and acceptance of the Federal Form, [and] upheld established precedent from [its] predecessor agency, the [FEC]." *Id*. As with the EAC's initial letter to Arizona, although the Florida letter was written by the EAC's general counsel, it was done "with the unanimous consent of the EAC commissioners." *Id*. at 4.

agency, acting through its Executive Director with properly delegated administrative authority,[13] did not blindly reject Plaintiffs' requests because there were no Commissioners, but appropriately rejected the request in accordance with the agency's established precedent.

B. Plaintiffs Cannot Prove That Documentary Proof of Citizenship Is "Necessary" Under the NVRA

Decisions based on informal agency action are reviewed under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1134 (10th Cir. 2009). Judicial review of informal agency action is limited to "whether the record facts supporting agency action are adequately adduced and rationally applied." *Anderson v. U.S. Dep't of Housing & Urban Dev.*, 701 F.2d 112, 115 (10th Cir. 1983). Thus, when reviewing a final agency action based on an informal adjudication, the reviewing court must uphold the decision so long as "the agency's path may reasonably be discerned," even if the decision is one of "less than ideal clarity." *Solis*, 589 F.3d at 1134 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

1. <u>The EAC Determination Is Not Arbitrary or Capricious</u>

Under the APA, the court's inquiry "must be thorough," but the standard of review is "highly deferential" to the agency's determination, and a presumption of validity attaches to the agency action such that burden of proof rests with the party challenging it. *W. Watersheds*

[13] This was not a broad delegation to make new policy. Instead, it was recognition that applying existing policy previously determined by the Commission was a proper staff role. *See* The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission, September 12, 2008, EAC000065 ("Commissioners shall take action in areas of policy … The Executive Director is expected to: … implement policies once made …."). This delegation of narrow and limited authority was adopted by the Commission by "consensus vote" on September 12, 2008. EAC000064. Other Executive Director administrative duties delegated by the Commission at that time included: "Establish, maintain and amend EAC's organizational structure and staffing as necessary to implement EAC's mission, goals, objectives, and policies …; Develop and execute the internal operational policies and procedures of EAC…; and Maintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies …." *Id.*, at EAC000070-71. Thus the final agency action was properly within the continuing authority of the Executive Director to "maintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies."

Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1273 (10th Cir. 2013) (citations omitted); *Aviva Life & Annuity Co. v. F.D.I.C.*, 654 F.3d 1129, 1131 (10th Cir. 2011) (citing *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006)). The duty of a court applying the arbitrary and capricious standard is to "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Aviva Life*, 654 F.3d at 1131. Under this standard, the EAC's 2014 Final Agency Action is clearly not arbitrary or capricious. As discussed above, the EAC's ultimate conclusion is fully consistent with, and in fact mandated by, the EAC's prior reasonable interpretation of the NVRA and its own implementing regulations. Plaintiffs have failed to meet their burden to show that the EAC's determination that documentary proof of citizenship is not necessary is arbitrary and capricious. To the contrary, they provided no reliable evidence of a problem of non-citizen voting, let alone evidence that the problem cannot be addressed without documentary proof.

For example, Kansas claims to have identified eighteen or nineteen non-citizens who registered to vote in 2009 and 2010. Decl. of Brad Bryant (10/22/13) ¶ 3, EAC000611-12; Supp. Decl. Brad Bryant ¶ 5, EAC000620. The underlying evidence, however, fails to support this claim. The methods used to identify these individuals include database matching of the last four digits of an individual's Social Security number, *see* EAC000637, which often yields false positives, since more than one person can have the same name and four digits. Moreover, the search was premised upon a type of license, issued to only non-citizens, Decl. of Brad Bryant (10/22/13) ¶2-3, EAC000611-12, but Plaintiffs do not even consider that these individuals may have naturalized since issued that license.

2. <u>The EAC's Decision Does Not Preclude Plaintiffs From Enforcing Their Citizenship Requirements.</u>

Plaintiffs have also failed to meet their burden to demonstrate that the EAC's

longstanding interpretation of the statute precludes the States from enforcing their citizenship qualifications. As the EAC decision noted, there are many avenues available to Plaintiffs to confirm citizenship outside of the Federal Form. And as the Supreme Court noted in *ITCA*, "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" 133 S. Ct. at 2257 (internal quotations, alteration, and footnote omitted).

First, the Federal Form contains a number of self-regulating mechanisms, including the attestation requirement and citizenship check box. EAC Memorandum of Decision ("EAC Decision") at 28; *see also* Decl. of Lloyd Leonard, ¶ 24, EAC000729. Far from being a "mere attestation," the requirement, which includes a penalty of perjury, is like that administered by courts to ensure truthfulness. Moreover, the states may (and do) rely on criminal prosecutions and the deterrence generated thereby to enforce their citizenship requirements. EAC Decision at 37-38; *see also* Kansas Public Comment to EAC, Jan. 2, 2014, Exs. M-O, EAC000632-68; Decl. of Karen Osborne, ¶ 10, EAC001740; Inter Tribal Council of Arizona, Inc., et al. Comment, Jan. 3, 2014, at 10-11 & n.12, EAC001558-59 (citing Arizona's admissions that criminal penalties deter non-citizen voter registration). Federal law, as well as the laws of Arizona and Kansas, impose serious criminal penalties for voter fraud, and are enforced. *See, e.g.*, 18 U.S.C. § 1015(f); 42 U.S.C. § 1973gg-10; Ariz. Rev. Stat. Ann. § 16-182; Kan. Stat. Ann. § 25-2411. And as the record before the EAC shows, and as Plaintiffs have previously acknowledged, these prosecutions have a particularly strong deterrent effect with respect to non-citizens because unlawful registration by a non-citizen can lead to deportation and/or subsequent inadmissibility

to the United States. EAC Decision, at 37-38; Dep. of Karen Osborne, Jan. 14, 2008, 29:12-30:1, EAC001571-72; *see also* 8 U.S.C. §§ 1227(a), 1182(a).

Second, Plaintiffs are required under HAVA to coordinate with the States' driver licensing agencies and the Social Security Administration to check the citizenship status of voter registrants. 42 U.S.C. § 15483(a)(5). Kansas itself has demonstrated that it is able to identify potential non-citizens who are registered to vote by reviewing records of those who hold driver's licenses issued only to noncitizens. *See* Decl. of Brad Bryant, ¶¶ 2-3, EAC000611-12; Supp. Decl. of Brad Bryant, ¶ 5, EAC000620.

Third, as Arizona has indicated is feasible, Plaintiffs may use information provided by potential jurors seeking excusal from jury duty to determine citizenship. EAC Decision at 39; *see also, e.g.,* Decl. of Karen Osborne, ¶ 10, EAC001740; Dep. of Karen Osborne, Jan. 14, 2008, 91:14-19, EAC001145; Dep. of Karen Osborne, July 31, 2006, 15:23-16:23, EAC001588-89; Decl. of Lloyd Leonard, ¶ 29, EAC000730. Although jurors' excuses may not always be truthful and thus may not be a perfect form of citizenship verification, the records of state jury commissioners are a useful tool for Plaintiffs to enforce their voter registration laws without burdening legitimate registrants.

Fourth, the federal government maintains a database of lawful noncitizens and naturalized citizens (the "SAVE" database). EAC Decision, at 39. State and municipal agencies may receive access to this database to verify citizenship status, and several Arizona counties have already implemented the SAVE database as part of their voter registration process. *See id*; *see also* Decl. of Lloyd Leonard, ¶¶ 30-31, EAC000730.

Fifth, states may use a national database of birth records to verify citizenship for those born in 50 of the 55 U.S. states and territories. *See* EAC Decision at 40 (describing the

Electronic Verification of Vital Events System developed by the National Association for Public Health Statistics and Information Systems).

Finally, it is undisputed that only a small fraction of voters have actually used the Federal Form. In Maricopa County, Arizona, for instance, "[a]pproximately 3% of voter registration forms received" each year are Federal Forms. Decl. of Tammy Patrick ¶ 12, EAC001742-48 at EAC001744. From August 2012 through October 2013, Maricopa County received a total of approximately 427,000 voter registration forms, and of those, only about 12,600 were Federal Forms. *Id.* ¶¶ 11, 12. And, as the EAC noted, to the extent that Plaintiffs seek to verify the citizenship status of this sliver of the electorate, there are "a myriad of means available" for Plaintiffs to do so "without requiring additional information from Federal Form applicants." EAC Decision at 37. Indeed, the States have admitted this outright: "[U]nder Kansas law we have the ability to obtain information unilaterally establishing citizenship." December 13, 2013 Hearing Transcript at 109:11-13. Mr. Kobach represented to the Court at the hearing that Kansas' resources to do so were limited, but given the small number of applicants who actually use the Federal Form, it seems reasonable to expect the State to follow up with these few applicants.

In fact, not only do the States have the means, but they have already put it into practice, as shown by the most recent declaration by Kansas election official Brad Bryant. *See* Pls.' Br., Decl. of Brad Bryant (ECF No. 140-2). Mr. Bryant acknowledges that a simple birth certificate search successfully verified the citizenship of 7,700 registrants who had not submitted documentary proof of citizenship.[14] *Id.* ¶ 4. While it is not explicitly stated in the declaration,

[14] It should be noted that the Kansas law in question in this case requires the ***applicant*** to provide documentary proof of citizenship. Kan. Stat. Ann. § 25-2309(l) . In a clear acknowledgement of the unreasonable burden placed on voters by this requirement, Kansas election officials—by conducting birth certificate searches—are apparently providing proof of citizenship for applicants who failed to provide it themselves.

most if not all of those applicants presumably used the state voter registration form rather than the Federal Form, as most people do. But had those applicants used the Federal Form rather than Kansas' form, and had Kansas not done the birth certificate check, then 7,700 people who are undeniably U.S. citizens would not have been able to vote.

Given this plethora of mechanisms by which states may verify the citizenship of those who register to vote, it is no surprise that only three states (Georgia, Kansas, and Arizona) have even attempted to condition their acceptance of the Federal Form upon the presentation of documentary proof of citizenship. And the fact that even these three states accepted the Federal Form for decades before seeking to add the documentary proof requirement belies any claim that such proof is "necessary."

In short, not only is the EAC entitled to substantial deference regarding its interpretation of "necessary" in the NVRA and its interpretation in subsequent regulations, but Plaintiffs are wholly unable to demonstrate that they would be precluded from enforcing their citizenship requirement without a documentary proof of citizenship requirement in the Federal Form.[15]

IV. CONCLUSION

For the reasons above, the League respectfully requests that the Court deny Plaintiffs' request to review the EAC's January 17, 2014 decision.

/s/David G. Seely

Michael C. Keats (*pro hac vice*)
Bonnie L. Jarrett (*pro hac vice*)
Adam Teitcher (*pro hac vice*)

David G. Seely, No. 11397
Fleeson, Gooing, Coulson & Kitch L.L.C.
1900 Epic Center, 301 N. Main

[15] Plaintiffs contend that the EAC, in declining to modify the Federal Form, has somehow intruded on the states' sovereign right to set voter qualifications. Pls.' Br. at 11. But this argument mischaracterizes both the nature of the EAC's review and the constitutional underpinning of the statute it administers. Congress charged the EAC with maintaining a uniform national registration form for federal elections—something squarely within Congress's power under the Elections Clause. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). The agency's rejection of the States' requested change reflects only enforcement of a federal law governing a federal form, not a judgment on state law.

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

Neil Eggleston (*pro hac vice*)
Susan Davies (*pro hac vice*)
Jonathan Janow (*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: neil.eggleston@kirkland.com,
susan.davies@kirkland.com,
jonathan.janow@kirkland.com,
rachel.funk@kirkland.com

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

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 February 7, 2014, 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