PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0404
Comment from Josie Lemus

Submitter Information

Name: Josie Lemus
Address:
3000 sw Gisbourne
Topeka, KS, 66614
Email: lemusjm51@hotmail.com

General Comment

As a American citizen, I feel we need to continue to check for ID on people that are voting. Especially now when there is so much theft on identity. I agree with Kris Kobach. I have worked voter registration and I feel we should keep ID's as important to show. Josie Lemus
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0405
Comment from Mark Ritchie

Submitter Information

Name: Mark Ritchie
Address:
    180 State Office Building, 100 Martin Luther King Blvd
    Saint Paul, MN, 55155
Organization: Office of the Minnesota Secretary of State
Government Agency Type: State
Government Agency: Office of the Minnesota Secretary of State

General Comment

The EAC should not approve state requests to alter the standardized National Mail Voter Registration Form to include proof-of-citizenship requirements. Registrants using the form must already legally certify their citizenship.

Minnesota has direct experience with requiring citizenship proof in the case of state-issued IDs. We have found that some senior citizens do not have and cannot ever obtain citizenship proof. Obtaining missing documentation can be expensive, which if it were required to vote, could be considered a poll tax. In the last 10 years in Minnesota, 45 percent of those who initially applied for a variance from the birth certificate requirement to obtain a state ID ultimately had their request denied because they were unable to provide sufficient alternate documentation to satisfy officials.

Some voters do not face the barrier of voter registration at all, as in North Dakota. Because this proposal will make it much harder to register in some states than in others, it could be considered a violation of the equal protection provisions of the Constitution. The courts have consistently ruled that making voting harder for senior citizens or other groups of eligible voters is not Constitutional. The EAC should not be promoting potentially unconstitutional activity.

The role of the EAC is to promote voting. Some states have quite high voter turnout, but others lag far behind. The EAC should study ways to encourage and increase voter turnout in states that are lagging behind—rather than making voting more difficult.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0406
Comment from Winnie Laughlin

Submitter Information

Name: Winnie Laughlin
Address:
P. O. Box 293
Mount Hope, KS, 67108
Email: winnieworld@hotmail.com

General Comment

I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don’t do this.

Please protect our nation from non-citizens voting in our elections. This is only common sense, that only citizens are allowed to vote. A nation that does not closely guard its identity, its elections and its borders is in danger of falling.

Thank you,
Winnie Laughlin
Mount Hope, Kansas
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0407
Comment from Raymond Lansdowne

Submitter Information

Name: Raymond Lansdowne
Address:
   250 N. Tyler Rd
   Wichita, KS, 67212

General Comment

I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don't do this!
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0408
Comment from Mary Pat Ward

Submitter Information

Name: Mary Pat Ward
Address:
    3641 NE Wenonah Rd.
    Topeka, KS, 66617
Email: Bobandmarypat@gmail.com
Phone: 785-286-1945

General Comment

Support Kansas law.
PUBLIC SUBMISSION

**Docket:** EAC-2013-0004
National Mail Voter Registration Form

**Comment On:** EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

**Document:** EAC-2013-0004-0409
Comment from Michelle Kanter Cohen

---

**Submitter Information**

**Name:** Michelle Kanter Cohen

**Address:**
Project Vote, 805 Fifteenth Street NW, Ste 250
Washington, DC, 20005

**Email:** mkantercohen@projectvote.org

**Phone:** 202-546-4173

**Submitter's Representative:** Michelle Kanter Cohen, Election Counsel

**Organization:** Project Vote

---

**General Comment**

Please see the attached comment from Project Vote.

---

**Attachments**

2014-01-03 Project Vote EAC comment
I. STATEMENT OF ORGANIZATIONAL INTEREST

Project Vote, Inc. is a national nonpartisan, nonprofit 501(c)(3) that works to empower, educate, and mobilize low-income, minority, youth, and other marginalized and under-represented voters. Since 1994 Project Vote has developed state-of-the-art voter registration and Get-Out-the-Vote programs, and has helped register more than 5.6 million Americans in low-income and minority communities. Project Vote has also achieved a nationwide presence through long-term relationships with service and advocacy partners, and takes a leadership role in nationwide election administration issues, working through research, legal services, and advocacy to ensure that its constituencies are not prevented from registering and voting.

The changes requested by Arizona, Georgia and Kansas to amend the state-specific instructions for the National Mail Registration Form ("Federal Form") to require documentary proof of citizenship will impede voter registration, particularly by minorities, young people, and the poor, and will make it harder to train voter registration organizers and conduct voter registration drives. Project Vote, in fact, sued Arizona concerning its efforts to require documentary proof of citizenship on the grounds that it was preempted under the National Voter Registration Act ("NVRA"), and ultimately prevailed in the Supreme Court. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013). Project Vote has also intervened as a defendant in the *Kobach v. United States Election Assistance Commission*, No. 5:13-cv-4095 (D. Kan.) litigation regarding Arizona’s and Kansas’ efforts to compel Election Assistance Commission ("EAC") to amend the Federal Form to require documentary proof of citizenship.

II. OVERVIEW OF COMMENTS

There is ample evidence in both the administrative record and the public domain that the changes requested by Arizona, Georgia and Kansas to the Federal Form are not “necessary to . . . assess the eligibility of the applicant” as that language is used in the NVRA. See infra III.B.2(c) & (d). This is evident in the fact that in the almost 20 years since the NVRA was enacted, states have used the information on the Federal Form, along with all manners of other information in their possession, to determine whether applicants are eligible to vote. Indeed, evidence submitted by Arizona and Kansas themselves in parallel litigation has confirmed that they have been able to utilize such information to detect potential applicants who do not meet the eligibility criteria. Accordingly, the EAC can and should make a reasoned administrative finding that the requested changes to the Federal Form are not permitted by the NVRA because they are not “necessary to . . . assess the eligibility of the applicant.”

Any other outcome would be arbitrary and capricious and would violate the NVRA and the Administrative Procedure Act for the following reasons:
Comment of Project Vote, Inc.
Docket No. EAC-2013-0004

• In enacting the NVRA, Congress expressly determined that the type of documentation requirement requested by the States was “not necessary” to assess the eligibility of applicants. See infra III.B.2(b). Congress’ interpretation of this key statutory language precludes a contrary definition by the EAC.

• In promulgating the regulations to adopt the Federal Form, the Federal Election Commission concluded that similar documentary requirements to establish naturalization were not necessary to assess the eligibility of applicants. See infra III.B.2(a).

• The evidence in the administrative record and the public domain that the Federal Form is currently functioning as intended to allow states to assess the eligibility of applicants vastly outweighs the contrary evidence presented by Arizona and Kansas. See infra III.B.2(c), (d) & (e).

• Implementing the changes would violate other provisions of the NVRA. In particular, it would violate the provision in Section 9(b)(3) barring the imposition of any “formal authentication” requirement. See infra III.B.2(f).

• Implementing the changes would be contrary to the express legislative purpose of the NVRA “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” See infra III.C. In particular, the experience of Arizona and Kansas and the available data from Georgia all reflect that the changes sought by these states have been used to decrease the number of eligible citizens who can register to vote in their states. See infra III.C.1.

• Implementing the changes would also be contrary to the provisions of the NVRA intended to encourage “organized voter registration programs.” See infra III.C.2. The experience of Arizona demonstrates that the changes sought by these states have improperly and impermissibly burdened voter registration programs.

Because the current regulations are consistent with Congress’ interpretation of the NVRA and the current regulations prescribing the Federal Form were duly enacted and expressly rejected similar documentary requirements, the EAC’s professional staff has the authority under the NVRA to conclude that the changes requested by Arizona, Georgia, and Kansas are not “necessary . . . to assess the eligibility of the applicant.” Conversely, because amending the regulations to permit the requested changes to the Federal Form would require substantive changes to duly enacted regulations (in addition to being contrary to law and arbitrary and capricious), those changes can only be made through formal notice-and-comment rulemaking and approved by three EAC Commissioners. See infra III.A.

III. SUBSTANTIVE COMMENTS TO THE STATES’ REQUESTS

A. The EAC Can Only Grant the States’ Requests Through Formal Notice-and-Comment Rulemaking Approved By Three Commissioners

2
To effectuate the changes that the States request would require formal notice-and-comment rulemaking and consultation with the chief election officers of the other states. The EAC cannot grant the States’ requests to change the Federal Form without these procedures. Cutting any of these corners would violate the APA, to the detriment of other interested parties who are entitled to be heard regarding such regulatory changes. Proceeding in such a manner would also violate the NVRA, to the detriment of the 41 states other than Arizona, Georgia, and Kansas that are subject to the NVRA and are entitled to be consulted.

1. **Under the NVRA, Substantive Changes to the Federal Form Such As Those Sought By the States Can Only Be Made Through Formal Notice-and-Comment Rulemaking After Consultation with the Chief Election Officers of the States**

The contents of the Federal Form are governed by duly enacted regulations adopted by the EAC’s predecessor, the Federal Election Commission. Specifically, the contents of the Federal Form are governed by 11 C.F.R. § 9428.4(b)(1)-(3), which specifies the precise information that the Federal Form can request from an applicant. With regard to citizenship, the regulations instruct that the Federal Form shall “list U.S. Citizenship as a universal eligibility requirement,” “[c]ontain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state’s specific eligibility requirements,” and “[p]rovide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant’s signature.” 11 C.F.R. § 9428.4(b)(1)-(3).

Granting the modifications to the Federal Form requested by Arizona, Georgia, and Kansas would require making substantive changes to Section 9248.4. The States want the Federal Form to include different content than the Section 9248.4 specifies. They want to add to the state instructions a requirement that individuals submit documents or information constituting “satisfactory evidence of United States citizenship.” But this change would require that the EAC modify the controlling regulation, 11 C.F.R. § 9248.4. Under the APA, such a modification, particularly one that reconsider prior foundational decisions by the agency, requires notice to interested parties and an opportunity to comment.

Section 9428.4 was promulgated in 1994, following a formal notice-and-comment rulemaking proceeding conducted by the Federal Election Commission. 59 Fed. Reg. 32,311

---

1 The FEC and EAC entered into a joint rulemaking to transfer the NVRA regulations from the FEC to EAC on July 29, 2009. 74 Fed. Reg. 37,519 (July 29, 2009). The transfer became effective on August 28, 2009. Id. at 37,519.

2 As discussed below, these requirements precisely track the statutory language of the NVRA.

3 Specifically, the APA requires “[g]eneral notice of proposed rule making shall be published in the Federal Register,” including “the time, place, and nature of public rule making proceedings;” “reference to the legal authority under which the rule is proposed;” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b) (emphasis added). After the notice is published, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .” Id. § 553(c) (emphasis added).
Case 5:13-cv-04095-EFM-DJW   Document 132-17   Filed 01/25/14   Page 10 of 110

Comment of Project Vote, Inc.
Docket No. EAC-2013-0004

(June 23, 1994). The process for adopting these regulations involved extensive public notification and opportunity to comment. Specifically:

- the FEC began formal notice and comment rulemaking process by first publishing an advance notice of proposed rulemaking to “gain general guidance from the regulated community and other interested persons on how best to” implement the NVRA, see 58 Fed. Reg. 51,132 (Sept. 30, 1993);

- the FEC “received 65 comments from 63 commenters in response to the” advance notice, 59 Fed. Reg. 32,323 (June 23, 1994)

- at the same time the advance notice was pending, the FEC “conducted several surveys of state election officials to ascertain whether or not they plan to develop and use their own state mail and agency registration forms (or use the national form), and to clarify certain state voter registration requirements and procedures,” id.;

- after the initial advance notice and comment process, the FEC published a notice of proposed rulemaking to further “seek comments from the regulated community and other interested parties on the specific items of information that it proposed to include on the mail registration form, and on the specific items of information that it proposed be required from the states to carry out the Act’s reporting requirements,” 59 Fed. Reg. 11,211, 11,211 (March 10, 1994);

- 108 comments were received in response to that notice, 59 Fed. Reg. 32,311, 32,311 (June 23, 1994).

Only after the notice and comment period ended did the FEC promulgate Section 9428. See id.

This process – formal notice-and-comment rulemaking and consultation with chief election officials of states – is required by the NVRA. In particular, the NVRA requires that the Commission “in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to . . . develop a mail voter registration application . . . .” 42 U.S.C. § 1973gg-7(a)(1&2). Moreover, by specifying that the contents of the Federal Form are to be “developed” through “regulations,” the statute invokes the language of the Administrative Procedure Act for notice-and-comment rulemaking. See, e.g., Joseph v. U.S. Civil Serv. Comm’n, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977) (exercise by executive agency of congressional delegation of authority to promulgate “regulations” must be done through notice-and-comment rulemaking). See also Arizona v. The Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2251 (2013) (hereinafter “ITCA”) (“The Election Assistance Commission is invested with rulemaking authority to prescribe the contents of [the] Federal Form”).

Moreover, the NVRA and APA require that comparable notice-and-comment process is to govern any substantive changes to the Federal Form. In particular, the NVRA’s language states that the of the Federal Form is to be “developed” through “regulations.” 42 U.S.C.
§ 1973gg-7(a)(1&2). The statute does not suggest that only the first version of the Federal Form need go through this process; rather, it suggests that anything that is done to “develop” the form must be done through “regulations,” which as discussed above, means a formal notice-and-comment process. Adopting the changes proposed by Arizona, Georgia, and Kansas would involve further “development” of the form under the NVRA; conversely, leaving the Federal Form as is (i.e., maintaining the status quo) is not a “development” that would require such process.

The APA similarly requires that substantive changes to properly promulgated rules may only be made through further notice-and-comment proceedings. *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999) (issuance of substantive rule required notice-and-comment rulemaking); *Natl Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) (“the law seems clear that when an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public... the agency must adhere to the notice and comment requirements of § 553 of the APA.”) Moreover, it is consistent with the EAC’s historic practice, which has considered substantive changes to the Federal Form in the past (that were not expressly called for in new legislation) through formal notice-and-comment rulemaking. For example, in 2010, the EAC issued a notice of proposed rulemaking to amend the NVRA regulations within the authority granted by the NVRA to reflect HAVA requirements and to make technical changes. 75 Fed. Reg. 47,729 (Aug. 10, 2010). Included in this notice was an invitation for “public comments” not only on the specific amendments outlined in the notice, but also on “additional changes to the NVRA regulations to improve voter registration through the content and format of the Federal form.” *Id.* at 47,729.

The EAC’s past approach of considering changes to the Federal Form through formal notice-and-comment rulemaking was well-advised under the law. Failure to comply with the required APA procedures invalidates an agency’s action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (“[R]egulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act.”) (internal quotation marks omitted). *See also Sorenson Communications, Inc. v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009) (“Under the APA, legislative rules can be issued only following notice and comment procedures.”).

2. **Under the Help America Vote Act, Any Substantive Change to the Federal Form Must Be Approved By Three Commissioners**

The Help America Vote Act of 2002 specified that “[a]ny action which the [EAC] is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members.” 42 U.S.C. § 15328. HAVA specifically authorizes the EAC to carry out the functions necessary to develop the Federal Form under Section 9 of the NVRA. *See 42 U.S.C. § 15532* (transferring to the EAC “all functions which the Federal Election Commission

---

4 On one occasion—the passage of HAVA—Congress mandated specific changes to the Federal Form, spelling out with precision in the statutory language the required changes to the Federal Form. 42 U.S.C. § 15483.
exercised under section 1973gg-7(a)). As discussed above, these functions include
“prescrib[ing] such regulations as are necessary to . . . develop a mail voter registration
application . . .” 42 U.S.C. § 1973gg-7(a)(1&2) (emphasis added). Accordingly, efforts to
“develop” the Federal Form (which would include substantive changes to the Federal Form) can
only be authorized through a vote of at least three EAC commissioners.

Conversely, leaving the current regulations in place (i.e., maintaining the current Federal
Form) would not constitute an effort to “develop” the Federal Form, and would not trigger the
three-commissioner approval provision.

B. The EAC Should Deny The States’ Requests Because The States Have Not
Established That The Requested Changes Are Necessary To Assess The
Eligibility Of Applicants

1. The Relevant Legal Standard For Requiring Information to be Provided on
or with the Federal Form

The current Federal Form is consistent with Section 9(b)(1) of the NVRA, which does
not permit the Federal Form to require the evidence of U.S. citizenship that the States demand.
Section 9(b)(1) instructs the EAC that the Form “may require only such identifying information
(including the signature of the applicant) and other information (including data relating to
previous registration by the applicant), as is necessary to enable the appropriate State election
official to assess the eligibility of the applicant and to administer voter registration and other

The plain language of the NVRA thus precludes the Federal Form from requiring any
information beyond what is “necessary . . . to assess the eligibility of the applicant . . .” to vote in
federal elections. As the Supreme Court noted, this language acts “as both a ceiling and a floor
with respect to the contents of the Federal Form,” meaning the EAC “shall require information
that’s necessary, but may only require that information.” ITCA, 133 S. Ct. at 2259 (emphasis
added).

Moreover, the NVRA narrowly cabins the EAC’s authority to deem information
“necessary” with regard to assessing citizenship. The NVRA and HAVA together specifically
catalog the information necessary to that end: the Federal Form must include “a statement
that . . . specifies each eligibility requirement (including citizenship),” a checkbox for individuals
to affirmatively indicate whether or not they are U.S. citizens, and a specific attestation signed by
the applicant under penalty of perjury that he or she is a U.S. citizen. 42 U.S.C. §§ 1973gg-
7(b)(2), 15483(b)(4)(A)(i).

The Federal Form also requires the applicant to provide other information that can be
used to assess eligibility to vote, including the applicant’s name, home address, date of birth, and
an identification number (such as a driver’s license number) if the applicant has one. And,
Federal law provides that first-time voters who register by mail and whose information cannot be
verified based on the ID number provided on the form must present identification, such as a
government document or utility bill, either when registering to vote or when voting for the first
time. See 42 U.S.C. § 15483(b).
2. The EAC Should Conclude that the Changes Sought By Arizona, Georgia, and Kansas are Not Necessary to Assess the Eligibility of an Applicant

   a. The Agency Has Previously Concluded that Documentation of Naturalization is Not Necessary to Establish Eligibility to Vote and to Reverse that Decision Would be Arbitrary and Capricious

At the time Section 9428 was promulgated, the FEC considered and rejected requests parallel to what the States seek here – to have the Federal Form include additional citizenship information. See 59 Fed. Reg. 32,323, 32,316 (June 23, 1994). In particular, during the notice and comment period on the Proposed Rule specifying the substance of the Federal Form, the FEC addressed public comments on whether to require proof of naturalization. 59 Fed. Reg. 32,311, 32,318 (June 23, 1994). Interpreting and implementing the NVRA, as Congress empowered it to do, the FEC concluded that such information was not necessary to establish eligibility to vote. In particular, the FEC concluded:

While U.S. citizenship is a prerequisite for voting in every state, the basis of citizenship, whether it be by birth or by naturalization, is irrelevant to voter eligibility. The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words “For U.S. Citizens [ ]” will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include this additional requirement.

The FEC thus considered and rejected requests similar to the States’ requests here, concluding additional information about naturalization status (beyond the information about citizenship status already sought by the form) was unnecessary to assess eligibility to vote. For the reasons discussed below, that conclusion was correct and has proven itself through the test of time.

In light of the prior consideration of this issue (and in light of the evidence discussed below), reversing course to have the Federal Form include a requirement to provide documentary proof of citizenship would be arbitrary and capricious. See, e.g., Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

   b. In Enacting the NVRA, Congress Concluded that Documentary Proof of Citizenship Was Not “Necessary” to Establish Eligibility

During the deliberations over the NVRA, Congress considered and expressly rejected permitting particular states to require the Federal Form to include documentary proof of citizenship, concluding such information was “not necessary” to establish eligibility to vote. In particular, during floor debate, Congress considered adding to the statute the statement: “Nothing 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 (Mar. 16, 1993) ("Simpson Amendment"). Although the Senate initially accepted the Simpson Amendment, the Congressional Conference Committee voted to remove it from the NVRA, finding it was “not necessary or consistent with the purposes of the Act.” H.R Rep. 103-66, at 23-24 (1993) (Conf. Rep.).

In other words, as Chief Judge Kozinski noted in the Ninth Circuit’s ITCA decision, “both chambers affirmatively rejected efforts to authorize precisely what Arizona is seeking to do.” Gonzalez v. Arizona, 677 F.3d 383, 442 (9th Cir. 2012) (en banc) (J. Kozinski concurring).

Congress’s conclusion that documentary evidence of citizenship was “not necessary” compels the conclusion that the changes requested by Arizona, Georgia, and Kansas seek (to modify the form to require documentary evidence of citizenship) are not necessary, as that term is used in the NVRA, to assess an applicant’s eligibility to vote. See, e.g., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”); Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006) (“Congress’ rejection of the very language that would have achieved the results the Government urges here weighs heavily against the Government’s interpretation.”).

In light of Congress’ conclusion that documentation of citizenship was “not necessary” for states to determine an applicant’s eligibility, any action by the EAC to permit states to require documentary evidence of citizenship would be arbitrary and capricious. See, e.g., Cardoza-Fonseca, 480 U.S. at 445 n.29 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

c. States are Utilizing the Information in the Current Federal Form to Assess Eligibility to Vote

The information currently required by Federal law and the Federal Form has been and continues to be sufficient to determine whether the applicant is a U.S. citizen. In particular, the information an applicant already provides on the Federal Form allows a state to corroborate an applicant’s citizenship status. For the nearly 20 years the Federal Form has been in use, states have used this information, along with other information in their possession, to determine whether applicants are eligible to vote.

5 During subsequent floor debate on the NVRA, the House of Representatives considered and rejected a motion to reinsert the Simpson Amendment into the NVRA, and both chambers adopted the Conference Committee version of the legislation without the Simpson Amendment. 139 Cong. Rec. 9231-32 (May 5, 1993) & id. at 9640-41 (May 16, 1993).

6 Congress knows how to revise the statutory requirements for the Federal Form, and supplemented the requirements at the time HAVA was adopted to add the checkbox requirement. See 42 U.S.C. § 15483. That Congress updated the statutory requirements concerning citizenship but did not add a requirement to submit documentary proof further confirms that Congress rejected the specific changes to the Federal Form that the States seek here.
With an individual’s name, home address, date of birth, and driver’s license (or other identifying) number, states can cross-check citizenship status against all manner of public and government records. States have, in fact, been using information from other records to assess whether applicants are citizens for nearly 20 years. As the Supreme Court noted in the ITCA decision, “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 denying registration based on information in their possession establishing the registrant’s ineligibility.” ITCA, 113 S. Ct. at 2250.

The information provided on the Federal Form has proved sufficient for nearly two decades, as demonstrated by (i) the absence of any significant incidents of non-citizen voting and (ii) the experience of every other state that uses the Federal Form (each of which, like Arizona, Georgia, and Kansas, prohibits non-citizens from voting).

In light of this experience, the additional documentation sought by Arizona, Georgia, and Kansas is not necessary to assess the eligibility of an applicant.

d. The Experience of Arizona, Georgia and Kansas Confirms that Requiring Additional Documentation is Not Necessary to Assess Eligibility to Vote

The experience of the petitioner states using the Federal Form confirms that the information contained in the current Federal Form is certainly sufficient for them to assess the eligibility of applicants to vote, and accordingly, requiring additional information is not necessary within the meaning of the NVRA. This is evident from the following:

- Prior to the enactment of Arizona Proposition 200, Georgia SB 86, and Kansas HB 2067, Arizona, Georgia, and Kansas all had used the Federal Form without significant incidents of non-citizen voting. Indeed, each of these states, as part of their legislation, conceded that all individuals who previously had registered to vote were “deemed to have provided satisfactory evidence of citizenship.” Ariz. Rev. Stat. § 16-166(G); Kan. Stat. Ann. § 25-2309(n); Ga. Code Ann. § 21-2-216(g)(3).


- Affidavits submitted in the Kobach litigation also reflect that the Kansas Secretary of State has received communications from the U.S. Department of Homeland Security that one potential applicant may be a non-citizen. Bryant Decl. ¶ 4, Kobach, No. 5:13-cv-4095 (D. Oct. 23, Kan. 2013).
Comment of Project Vote, Inc.
Docket No. EAC-2013-0004

- An affidavit submitted in the Kobach litigation reflects that the Director of Elections for Maricopa County, Arizona, by cross-referencing applicants against jury commissioner and County Recorder records, has been able to determine that potential applicants may not be citizens. Osborne Decl. ¶ 10, Kobach, No. 5:13-cv-4095 (D. Kan. Oct. 23, 2013).

- In addition to their state resources, several Arizona counties (including Maricopa, La Paz, Pima, Yavapai, and Yuma Counties) have entered into agreements with the U.S. Department of Homeland Security for access rights to the Systematic Alien Verification for Entitlements (SAVE) program.7

All of this is consistent with the Supreme Court’s observation that the NVRA “does not preclude States from denying registration based on information in their possession establishing the registrant’s ineligibility.” ITCA, 113 S. Ct. at 2257. In neither the ITCA nor the Kobach cases have Arizona, Georgia, nor Kansas contended that confirming the eligibility of applicants using the information provided on the Federal Form would be difficult for them to do. To the contrary, evidence that the States have presented in the Kobach litigation confirms that they have been (and would continue to be) able to assess eligibility without requiring additional documentation from applicants.

e. While the Evidence Proffered By Arizona and Kansas in the Kobach Litigation Reflects That a De Minimis Number of Non-Citizens Have Submitted Voter Applications, This Evidence Does Not Demonstrate That Changes to the Federal Form are Necessary

Because a primary purpose of the NVRA is to increase the number of eligible citizens who can register to vote in federal elections, the requirement of the NVRA that changes to the Federal Form be “necessary” to assess voter eligibility should be read to require that Arizona, Georgia, and Kansas present evidence that significant numbers of non-citizens have registered to vote using the Federal Form. This evidence simply does not exist.8

Rather than presenting evidence of significant, widespread voter registration by non-citizens (which they cannot do), all that these States have presented (over the course of years of litigation attempting to defend their laws) is anecdotal evidence that a few non-citizens may have registered to vote – and no evidence that any such individuals registered to vote using the Federal Form.

7 Thus the States have access to both their own databases and those of the federal government to assess the eligibility of voters. It should be noted, however, that data inaccuracy and poor data matching have resulted in states erroneously and overinclusively flagging individuals as ineligible to vote who, in fact, are eligible to vote.

8 Indeed, as discussed below, evidence indicates that making the changes to the Federal Form that have been requested by Arizona, Georgia, and Kansas would dramatically decrease the number of eligible citizens who could register to vote, which is directly contrary to the purpose of the NVRA.
Comment of Project Vote, Inc.
Docket No. EAC-2013-0004

In conjunction with the Kobach litigation, Arizona and Kansas submitted evidence that a handful of non-citizens have attempted to register to vote. Notably, none of this evidence indicates that it concerns individuals who attempted to register using the Federal Form; rather it appears to concern individuals who attempted to register through a state specific form or in person through a public agency.

Moreover, as discussed above, the evidence submitted by Arizona and Kansas demonstrates that they have been able to detect when non-citizens have attempted to register to vote. Specifically:

- Kansas submitted a declaration from the County Clerk of Finney County, concerning a single non-citizen who submitted a voter registration application. The individual in question submitted a Kansas state Voter Registration Application, rather than the Federal Form. And based on the information submitted, the County Clerk was able to detect that the person may not have been eligible to vote.

- Kansas also submitted a declaration from the Election Commissioner of Sedgwick County (which includes Wichita) concerning a separate incident of a single non-citizen who submitted a voter registration application. The individual in question appears to have submitted a Kansas state Voter Registration application through a public agency (i.e., it was submitted electronically through the Kansas Division of Motor Vehicles online registration), rather than the Federal Form. Lehman Decl. ¶¶ 2-3, Kobach, No. 5:13-cv-4095 (D. Kan. Oct. 23, 2013). And based on the information submitted, the Election Commissioner was able to detect that the person may not have been eligible to vote.

- Kansas also submitted a declaration from the Deputy Assistant Secretary of State for the Kansas Secretary of State’s Office concerning 13 non-citizens who had registered to vote. A supplemental declaration stated that one of these individuals may not have been a non-citizen when he or she registered to vote. Neither declaration stated whether any of these individuals registered to vote using the Federal Form. Bryant Decl. ¶ 3, Kobach, No. 5:13-cv-4095 (D. Kan. Oct. 23, 2013); Bryant Supp. Decl ¶¶ 3-4, Kobach, No. 5:13-cv-4095 (D. Kan. Dec. 24, 2013). And based on the information submitted and cross-referencing that information against state databases, the Secretary of State was able to detect that these individuals may not have been eligible to vote.

- Arizona submitted a declaration from the Director of Elections of Maricopa County, who has served in that position for nearly 20 years, concerning (i) 36 individuals who were identified as of 2006 as having applied for U.S. citizenship and who had either voted or registered and (ii) 10 individuals who were charged by the Maricopa County Attorney as a result of referrals in which there purportedly was evidence that non-citizens had registered to vote. The declaration did not state whether any of these individuals registered to vote using the Federal Form. Osborne Decl. ¶¶ 8, 10, Kobach, No. 5:13-cv-4095 (D. Kan.)
Oct. 23, 2013). And based on the information submitted and cross-referencing that information against county databases, the Director of Elections was able to detect that these individuals may not have been eligible to vote.⁹

Thus, the States have not presented evidence that the information provided by applicants using the Federal Form is not sufficient – and, accordingly, they have not presented evidence that additional documentation is necessary to enable the States to assess the eligibility of such applicants. Nothing the States have presented makes it necessary to put an initial burden on applicants who use the federal form to present documentary proof of citizenship in order for the states to assess eligibility.

Moreover, in neither the Kobach nor the ITCA litigation did the states provide information that the extensive safeguards in the NVRA to prevent non-citizens from registering to vote were insufficient. In particular, the Federal Form itself warns that individuals who provide false information and are not U.S. Citizens may be “fined, imprisoned . . . or deported from or refused entry to the United States.” And there are numerous criminal penalties for non-citizens to register to vote; each of which serves as a strong deterrent against fraud. See 18 U.S.C. § 1015(f) (fine and/or imprisonment for up to 5 years); 42 U.S.C. § 15544(b) (fine and/or imprisonment); see also 42 U.S.C. § 1973gg-10(2)(A) (similar penalties for knowingly procuring or submitting voter registration applications that are materially false, fictitious, or fraudulent); 8 U.S.C. § 1227(a)(6) (deportation for alien who votes); 8 U.S.C. § 1182(a)(10)(D) (inadmissibility for alien who votes); 18 U.S.C. § 611 (fine and/or imprisonment for up to 1 year).

These are powerful disincentives, and there is every indication that they work. As Arizona acknowledged in the ITCA litigation, “those who are in the country illegally are especially fearful of registering their names and addresses with a governmental agency for fear of detection and deportation.” Joint Appendix at 166, ITCA, 2012 WL 6198263 (Dec. 7, 2012) (quoting Letter from Jessica Funkhouser, State Election Director, Arizona, to Rick Cunnington (July 18, 2001)).

f. The Changes Requested By Arizona, Georgia, and Kansas Constitute an Impermissible Request for Formal Authentication

Section 9(b)(3) of the NVRA prohibits the EAC from including on the Federal Form “any requirement for notarization or other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). Consistent with the legislative purpose of the NVRA (discussed in more detail below) to “provide simplified systems for registering to vote,” Section 9(b)(3) specifically prevents the

---

⁹ Further, although Arizona and Kansas have demonstrated they are able to identify a small number of potential non-citizens for follow-up on an individual case-by-case basis, and prosecution as appropriate, almost all of the examples given to support Arizona and Kansas’ position do not even offer information that the individuals in question were in fact non-citizens at the time of registration or voting. This omission further demonstrates that Arizona and Kansas have not shown there is a problem with non-citizen voting which would make documentary proof of citizenship necessary for all voter registration applicants using the Federal Form.
EAC or particular states from requiring applicants to complete additional steps to “authenticate” their eligibility because of the risk that such requirements would burden, inconvenience, or make completion of the Form more difficult.

The changes to the Federal Form sought by Arizona, Georgia, and Kansas would contravene this statutory bar. All three states would have the Federal Form modified to require submission of documentation so that the local election official can determine whether the “applicant has provided satisfactory evidence of United States citizenship.” In other words, Plaintiffs would have the EAC impose a requirement tantamount to “formal authentication” of eligibility to vote, in which the applicant must go through an additional step after completely filling out the Federal Form. This is contrary to the express prohibition in the NVRA, such that permitting such a requirement would be arbitrary and capricious.

C. The EAC Should Deny The States’ Requests Because Implementing The States’ Requests Would Result In Negative Consequences That Are Contrary To The Purpose Of The NVRA

Granting the changes to the Federal Form requested by Arizona, Georgia, and Kansas would produce significant, negative collateral effects that are contrary to the NVRA’s purpose. Congress enacted the NVRA in part in order “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” 10 Congress did so because it concluded that “discriminatory and unfair registration laws and procedures” have: (1) “a direct and damaging effect on voter participation in elections for Federal office” and (2) “disproportionately harm voter participation by various groups, including racial minorities.” 11 The effects of Proposition 200, HB 2067, and SB 86 demonstrate that the Requests undermine the NVRA’s purpose and amount to the very sort of “discriminatory and unfair registration laws and procedures” that decrease voter registration and that Congress sought to eliminate through enactment of the NVRA. This is evident both in the burdens these requirements would impose on citizens who register to vote, and the increased burden on organizations that conduct voter registration drives, such as Project Vote.

1. Changing the Federal Form Would Reduce the Number of Eligible Voters Who Register to Vote, Contravening the NVRA’s Purpose

The experience of Arizona since it adopted Proposition 200 demonstrates that modifying the Federal Form to require documentary proof of citizenship would reduce the number of eligible voters who register to vote. In the eight years since Proposition 200 was enacted, numerous examples have surfaced of how Proposition 200 has reduced the number of eligible voters able to register to vote in federal elections. For example:

Comment of Project Vote, Inc.
Docket No. EAC-2013-0004

- Over 31,000 individuals were initially rejected for voter registration in Arizona between January 2005 and September 2007 because of a failure to comply with Proposition 200’s onerous requirements.12

- Only about 11,000 of these individuals were subsequently able to register to vote.13

- As of August 2006, Maricopa County rejected 16% (4,903 of 28,467) of voter registration applications it received that year, acknowledging that most of the rejected applicants likely were citizens who did not provide the documentation required by Proposition 200.14

- In the ITCA litigation, Arizona produced no evidence that the remaining 20,000 individuals who were barred by Proposition 200 from registering to vote were non-citizens, as opposed to individuals who, for example, were unable to furnish the requisite documents or were otherwise unreasonably burdened by Proposition 200’s documentation requirements.

- According to evidence presented in the ITCA litigation, as of 2007, eight out of the ten prosecutions brought in Maricopa County against non-citizens who allegedly registered to vote were dismissed, and neither of the two charged individuals who pled guilty to misdemeanor “presentment of a false instrument” charges was alleged to have ever voted in Arizona.15

- According to data reported by the EAC, in the 2004 election cycle, Arizona reported 692,148 new registration applicants added to the rolls, and 20,309 applications rejected as invalid. From 2006 to 2008, 633,363 new applicants were added to the voter rolls and 38,000 were rejected. From 2010 to 2012, 576,085 new registrations were added, and 32,028 rejected as invalid. That represents more than a 50% increase in rejected applications from 2004 to 2012, both presidential election cycles, and a nearly 17% drop in new voter registration applications added to the rolls between those two cycles.16 Notably,


13 Id.


approximately 331,000 individuals who were eligible to register to vote in August 2006 could not use an Arizona driver’s license or non-operating identification license as evidence of citizenship.17

Kansas’ experience has also been similar. Although, HB 2067 has been in effect for less than one year, the available information indicates that HB 2067 has reduced the number of citizens eligible to vote. For instance, in September 2013, the Kansas Secretary of State announced that it had placed over 17,000 voter registrations on hold due to failure to provide HB 2067’s listed documents.18 The number of registrants placed on hold has fluctuated since then, including figures as high as 18,500 registrants.19

With regard to Georgia, drivers’ licenses are likely to be the most commonly possessed form of proof of citizenship, where they suffice. But evidence before a federal district court in a challenge to Georgia’s 2005 voter identification law in 2006 showed nearly a quarter of the state’s registered voters aged sixty-five or over did not have a license or other state identification card; nearly a third of African-American voters over sixty-five lacked such identification.20

Nationwide survey data corroborate the collateral effects of Proposition 200’s, SB 86’s, and HB 2067’s documentation requirements and suggest that such effect disproportionately burdens certain voting groups and perpetuates the type of voter registration practices that “disproportionately harm voter participation by various groups, including racial minorities,” and motivated Congress to enact the NVRA.21 For example, a recent survey found that as many as 5.7% of U.S. citizens – i.e., 11 million citizens – do not have a passport or birth certificate available.22 Such citizens were disproportionately found in certain segments of society.23

Footnote continued from previous page


22 Greenstein et al., Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens 1 (2006) (“Greenstein”) (finding that 5.7% of citizens do not have a passport or birth
Another survey found that “[a]s many as 11 percent of United States citizens – more than 21 million individuals – do not have government-issued photo identification,” “such as a driver’s license or military ID” that include the citizen’s current address and legal name.” Once again, such citizens were disproportionately found in certain segments of society:

Collectively, these nationwide data suggest that minorities, the poor, the elderly, and the young likely bear a disproportionate share of observed collateral effects of Proposition 200, SB 86, and HB 2067.

The available data thus indicate that Proposition 200, SB 86 and HB 2067 all have had or will have “a direct and damaging effect on voter participation in elections for Federal office” – namely, they contradict the purpose of the NVRA by imposing voter registration practices that

Footnote continued from previous page


23 Greenstein at 1-2. The survey also found that 9.2% of citizens who did not earn a high school diploma also lacked a passport or birth certificate. Id. at 1.


25 Id.
place obstacles between eligible voters and the voting booth that serve to decrease the number of eligible voters able to register.

2. Changing The Federal Form Would Significantly Burden Voter Registration Efforts, Undermining the NVRA’s Purpose

The requested changes in the Federal Form would burden not only the individual citizens in registering to vote, but also organizations, such as Project Vote, that organize voter registration drives.26 By creating the Federal Form and in turn requiring that it be widely distributed to “organized voter registration programs,” the NVRA set out to encourage voter registration through community voter registration drives. 42 U.S.C. § 1973gg-4(b). Documentary proof of citizenship requirements contravene this important purpose of the NVRA by impeding voter registration through drives.

Many citizens who are otherwise perfectly qualified potential registrants do not possess the specified documentation set forth in Proposition 200, SB 86, or HB 2067 and even if they do, they do not typically carry many of the approved types of documents to places where Project Vote conducts voter registration drives, such as bus stops, shopping malls, markets, college campuses, and community centers.27 Notably, most Americans do not have a passport,28 and even if they do, they do not carry it with them while running errands within the United States. Similarly, most U.S. citizens also do not carry around their birth certificate or naturalization papers with them.

26 E.g., Project Vote v. Blackwell, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006) (“After reviewing all of the briefs submitted by the various parties, and following careful consideration of the relevant case law, the Court is satisfied that participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment. These rights belong to – and may be invoked by – not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls.”) (citation omitted); Am. Ass’n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) (“The Court concludes that the act of voter registration is expressive conduct worthy of First-Amendment protection.”), reconsidered in part and on other ground in CIV 08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010); accord Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997); League of Women Voters of Florida v. Cobb, 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006); Charles H. Wesley Found. v. Cox, 408 F.3d 1349, 1353-56 (11th Cir. 2005).


28 For instance, in the United States in 2010, 101,797,872 passports were in circulation and the number of eligible voters was 210,800,000. U.S. Department of State, Passport Statistics, http://travel.state.gov/passport/ssi/stats/stats_890.html; U.S. Census, Table 1 Reported Voting and Registration, by Sex and Single Years of Age: November 2010 (Oct. 2011), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html. Therefore, assuming every passport in circulation in 2010 was provided to a citizen of voting age, the number of passports in circulation would only account for 48% of the voting eligible population. In reality, however, the percentage of the voting eligible population with a passport is likely well below 48% because passports are also issued to minors who cannot vote.
Moreover, even if a potential registrant possessed the listed documentation at the registration drive location, it would be logistically and financially impractical for Project Vote and other third-party voter registration organizations to photocopy the documents at the drive site. At some registration locations (e.g., public transit facilities, such as bus stops), it is not even feasible to have a dependable source of electricity, much less operate a photocopier. In sum, the realities of voter registration drives make conducting a community registration drive consistent with the documentation requirements of Proposition 200, SB 86, and HB 2067 financially and logistically impractical.

Reduced voter registration through drives is a known consequence of such impracticalities. For instance, in Maricopa County (Arizona’s largest county), registration through voter registration drives plummeted 44% between the years prior to and immediately following Proposition 200.\(^\text{29}\) Throughout Arizona, new voter registrations attributable to community drives have remained low – 11% in 2007-2008, 5% in 2009-2010, and 6% in 2011-2012.\(^\text{30}\) Reduced voter registration drives can result in reduced voter registrations, especially in areas with a high proportion of citizens who are already underrepresented among the voting population, because voter registration drives often seek to reach these communities in particular.\(^\text{31}\)

IV. CONCLUSION

For the foregoing reasons, the EAC should conclude that the changes to the Federal Form requested by Arizona, Georgia, and Kansas are not “necessary . . . to establish the eligibility of the applicant” and should be rejected.

\(^{29}\) Maricopa County Recorder’s Information Center, All Voter Registrations By Source Month (1999-2007).


PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0410
Comment from Chuck Akins

Submitter Information

Name: Chuck Akins
Address:
   2020 N 10th
   Independence, KS, 67301

General Comment

“I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don’t do this!”
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0411
Comment from Viola Heskett

Submitter Information

Name: Viola Heskett
Address:
   2211 Birch Road
   Emporia, KS, 66801

General Comment

I am a US citizen and a resident of Kansas. I want the Kansas voter ID state law requirement written onto the federal form. It is imperative that the EAC update the National Mail Voter Registration Form such that it will include instructions regarding Kansas requirements for one of thirteen documents that would verify that the person applying by using the federal form is a citizen. Significant disruption if not chaos will be the consequence if these instructions are not included on the federal form.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0412
Comment from Mike and Judy Collette

Submitter Information

Name: Mike and Judy Collette
Address:
  cody dr
  Louisburg, KS, 66053

General Comment

As Kansas residents we know that it is the commissions duty to Update the Kansas Voter ID Registration Form. We expect all updates to be included in the Kansas-specific instructions on the national mail voter registration form as required.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0413
Comment from Chet Hiatt

Submitter Information

Name: Chet Hiatt
Address:
   1908 S Locust
   Pittsburg, KS, 66762

General Comment

"I'm a southeast Kansas resident. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires (per Kansas law) a copy of at least one of a list of thirteen documents to verify that the applicant using the federal form is a citizen of the United States. The federal government has no right to complicate the voting requirements of the State of Kansas."
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0414
Comment from Brian Newby

Submitter Information

Name: Brian Newby
Address:
   2101 East Kansas City Road
   Olathe, KS, 66061
Email: brian.newby@jocogov.org
Phone: 913-715-6850

General Comment

Please see formal comment in the attached PDF file, on behalf of the Johnson County (Kansas) Election Commissioner.

Attachments

EAC Comments to Proof of Citizenship Requirements
Friday, January 3, 2014

As an election administrator serving more than 370,000 voters in Kansas, I have a strong interest in the outcome of the above-referenced document number pertaining to the Election Assistance Commission’s Notice and Request for Public Comment on State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form.

I respectfully request that the voter registration form maintained for Kansans by the Election Assistance Commission (EAC) be modified to the full extent previously requested by the Kansas Secretary of State. The Secretary of State first requested this change to the National Voter Registration Mail Application Form in a letter to the EAC on August 9, 2012. This change request was among three changes requested based upon Kansas law.

In reviewing the correspondence between the Secretary’s office and the EAC, I believe two of the changes were made and this item, related to citizenship, was not made because it “appears to have broad policy impact and would require consideration and approval by the EAC Commissioners,” according to an October 11, 2012, response to the Secretary of State’s office by Alice Miller, EAC Chief Operating Officer and Acting Executive Director.

No doubt, proof of voter citizenship may have policy impacts, and the change in Kansas law to require proof of citizenship for new registrants has resulted in new procedures adopted by our office. My comments here are not intended to weigh the benefits and drawbacks of this policy, or support or criticize the law in any way, but I do feel compelled to stress that this policy change is now law in Kansas, passed by the legislature and signed into law by Governor Sam Brownback.

A policy review of Kansas law does not seem to be an appropriate reason to avoid making this change to the form. If a legal review of the law is necessary, to consider if the Kansas law is consistent with federal
election law, I would think that would be done, and have been done, by the United States Department of Justice. The bill was signed into law nearly three years ago and, to my knowledge, has not received a federal court challenge. Regardless, it seems this type of review would be outside of the direct scope of the EAC.

As a practical matter, non-approval of this requested change, combined with legal interpretation of the recent Supreme Court decision, Arizona v. Inter Tribal Council, has left Kansas election administrators to track registrants who have completed this federal form, that is not compliant with Kansas law, separately from those who have completed the registration form in Kansas that is compliant with Kansas law. The implication for administrators is that only those registrants who have completed the Kansas form are eligible to vote in all Kansas races and contests.

By not acting upon the Secretary of State’s request, the EAC actually has brought to light a broader policy issue. Specifically, there is no federal requirement for local jurisdictions to conduct federal elections. Unless the federal form mirrors that of the legal state form, the natural outcome of a separate federal policy is the one we are left with—where we have two categories of voters.

As an administrator, I believe this creates unnecessary confusion on the part of voters and introduces new training issues for us with our election workers. I believe this confusion to be unnecessary because the reluctance to make the change—as I understand it—is not based upon a legal consideration of the Kansas law but rather a definition of “policy implications” that doesn’t seem germane to the request made.

I respectfully ask that the EAC immediately take action to modify the registration form as requested by the Kansas Secretary of State in 2012. If there is a need for a separate federal legal review of the Kansas law itself, I support that. I’m assuming such a review has been conducted, however, and, regardless, do not believe that review falls under the role of the EAC. Therefore, I ask that the EAC assist us by enabling one, consistent, and lawful method of voter registration for Kansans.

Thank you for your time and consideration of these comments.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0415
Comment from Daniel Buller

Submitter Information

Name: Daniel Buller
Address:
   202 W 13th Ave
   Emporia, KS, 66801

General Comment

I live in Kansas. The EAC needs to update the National Mail Voter Registration Form so that it includes instructions that Kansas will require documents verifying American citizenship. A person should have to prove they are a citizen. Voting has an enormous effect on our country.
Kansas takes seriously the franchise that only citizens are entitled to vote and has enacted a reasonable law to protect that franchise. The EAC has refused to maintain the federal form, which is the commission's sole regulatory authority.

By failing to update the federal form consistent with Kansas law, the EAC has created havoc for elections in Kansas. By failing to notify applicants who use the federal form of the requirement to provide evidence of citizenship with the form, those applicants who do not provide proof will only have met the requirements that allow them to vote a federal ballot. They will not have met the requirements to vote in state and local elections.

Kansas strives to maintain the integrity of the voting process and has taken steps to ensure that illegals and undocumented residents are unable to vote. Kansas upholds the Constitution which states that only legal citizens have the right to vote. Kansas does not want to have the voter fraud that has occurred in other states. The citizens of Kansas uphold the Constitution and the rights of legal citizens.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0417
Comment from Mike Collette

Submitter Information

Name: Mike Collette
Address: 28885 Cody Drive
         Louisburg, KS, 66053

General Comment

I reside in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions for Kansas, which requires a copy of one of 13 documents to verify that the applicant using the federal form is a legal citizen of the United States.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0418
Comment from THOMAS ROURKE

Submitter Information

Name: THOMAS ROURKE
Address:
    1714 RIDGE ROAD
    LEAVENWORTH, KS, 66048

General Comment

"I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States.

The EAC is charged with maintaining state-specific instructions on the National Mail Voter Registration Form. The EAC has refused to do so in a limited case - that of protecting Kansas voter rolls from including noncitizens. Kansas takes seriously the franchise that only citizens are entitled to, and has enacted a reasonable law to protect that franchise. The EAC has refused to maintain the federal form, which is the commission's sole regulatory authority.

By failing to update the federal form consistent with Kansas law, the EAC has created havoc for elections in Kansas. By failing to notify applicants who use the federal form of the requirement to provide evidence of citizenship with the form, those applicants who do not provide proof will only have met the requirements that allow them to vote a federal ballot. They will not have met the requirements to vote in state and local elections.

The right to vote in state and local elections should not be hindered by incorrect and outdated Kansas-specific instructions on the federal form. A bifurcated voter registration system is bad for voters and is bad for election administration."

EAC001837
PUBLIC SUBMISSION

**Docket:** EAC-2013-0004
National Mail Voter Registration Form

**Comment On:** EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

**Document:** EAC-2013-0004-0419
Comment from Helen Butler

---

**Submitter Information**

**Name:** Helen Butler

**Address:**
Georgia Coalition for the Peoples' Agenda, 100 Edgewood Avenue, Suite 1008
Atlanta, GA, 30303

**Email:** hbutlergcpa@gmail.com

**Phone:** (404) 653-1199

**Submitter's Representative:** Helen Butler, GA Coalition for the Peoples' Agenda

**Organization:** Coalition of Georgia Organizations

---

**General Comment**

Please see the attached comment on behalf of a coalition of Georgia organizations.

---

**Attachments**

Final Georgia EAC comment
January 3, 2014

To the Election Assistance Commission:

We are a coalition of Georgia organizations writing in response to the EAC’s request for comments on states’ requests, including Georgia’s, to add proof-of-citizenship requirements to the federal voter registration form. We write to urge the EAC to deny this request.

Our organizations aim to improve the quality of governance in Georgia, to help create a more informed and active electorate and to have responsive and accountable elected officials. One important aspect of our mission is voter registration. Our organizations support and conduct voter registration drives as a way of informing and engaging the electorate. Together, we have conducted hundreds of voter registration drives. Our programs involve students and adults alike and strive to empower the overall electorate.

Voter registration should be easily accessible to all eligible citizens. A streamlined voter registration process is extremely important to the ability to conduct voter registration drives in our communities. Requirements that make it harder to register to vote hurt individuals and our organizations’ ability to engage our communities.

Georgia has not yet implemented its documentary proof of citizenship requirements. Implementing this requirement, including with the federal form, would be harmful to voter registration. Specifically, not all individuals have any proof of citizenship documents, and obtaining documents such as passports can be difficult and expensive. Citizens in communities of color and low-income communities are less likely to have those documents. People with passports or birth certificates also do not generally carry them around. As a result, conducting voter registration at a church or community event would be much harder to do. In addition, organizations conducting voter registration do not generally have the capacity to photocopy documents where they help voters register at community events, houses of worship, or shopping malls. And even if that were possible, some individuals may be comfortable filling out a form with strangers but may not be comfortable providing their citizenship documents to strangers.

Further, even for citizens who do have the documents Georgia and the other states seek to require, the additional requirements and time spent to register would make the registration process harder for all voters. Voter registration should be a simple, quick process that maximizes citizen participation in the electorate.

We urge the EAC to reject Georgia’s request to add documentary proof of citizenship requirements to the federal voter registration form.

Signed,
Asian American Legal Advocacy Center, Inc.
Helen Kim Ho, Executive Director

Georgia 9 to 5
Charmaine Davis, Executive Director

Georgia Association of Black Elected Officials
Rep. Tyrone Brooks, President

Georgia Association of Latino Elected Officials
Jerry Gonzalez, Executive Director

Georgia Chapter Southern Christian Leadership Conference
Rev. Samuel Mosteller, President

Georgia Coalition for the People's Agenda
Helen Butler, Executive Director

Georgia Equality
Jeff Graham, Executive Director

Georgia Rural Urban Summit
Larry Pelligrini, Executive Director

Georgia Stand Up
Deborah Scott, Executive Director

Georgia State Conference of NAACP Branches
Dr. Francys Johnson, President

Georgia Women for a Change
Stephanie Davis, Executive Director

Georgia Women's Actions for New Directions
Becky Rafter, Executive Director

League of Women Voters of Georgia
Elizabeth Poythress, Executive Director

Partnership for Southern Equity
Nathaniel Smith, Executive Director

ProGeorgia
Page Gleason, Executive Director

Rainbow/PUSH Coalition, Georgia Bureau
Janice Mathis, Vice President
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0420
Comment from Carol Ayres

Submitter Information

Name: Carol Ayres
Address:
    2413 Grand Avenue
    Leavenworth, KS, 66048
Email: leoayres@aol.com
Phone: 913-682-8736

General Comment

I support the additional proof of citizenship requirement to register to vote in Kansas. Only United States citizens should be allowed to vote in elections.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0421
Comment from Connie Young

Submitter Information

Name: Connie Young
Address:
3220 S Oak
Wichita, KS, 67217

General Comment

"I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don't do this!"
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0422
Comment from Carmen Metzger

Submitter Information

Name: Carmen Metzger
Address:
    311 SW Cortland Ave
    Topeka, KS, 66606

General Comment

I am for showing proof of citizenship and the right to vote.
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0423
Comment From Jenna Engels

Submitter Information

Name: Jenna Engels
Address:
   2367 N Richmond
   Wichita, KS, 67204
Email: jengels3@cox.net
Phone: 316-737-9080

General Comment

See attached

Attachments

20131215 Comment From Jenna Engels
Full Name: Jenna Engels  
Address 1: 2367 N Richmond  
Address 2:  
City: Wichita  
Postal Code: 67204  
Country: United States  
Message: Please take control of Kris Kobach our Secretary of State. He's trying to create two different class of voters in Kansas. That is a massive issue our state is not prepared to deal with. It's is violation of our civil rights as citizen of Kansas and of the United States. The Supreme court has already ruled against his plan in Arizona. You need to tell him in no uncertain terms, "NO!". Thank you.  
Phone: 316-737-9080  
Email Address: jengels3@cox.net  
Question: Other
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0424
Comment From Denise Cochran

Submitter Information

Name: Denise Cochran
Address:
    346 NE 62
    Topeka, KS, 66617
Email: kdcboch@cox.net

General Comment

See attached

Attachments

20140101 Comment From Denise Cochran
Full Name: Denise Cochran
Address 1: 346 NE 62
City: Topeka
Postal Code: 66617
Country: United States
Message: "I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. Please update the form so there will be no confusion in the state of Kansas.

Phone: 
Email Address: kdcoch@cox.net
Question: Other
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0425
Comment From Daniel Bush

Submitter Information

Name: Daniel Bush
Address:
   1721 Little Kitten Avenue
   Manhattan, KS, 66503
Email: faithinchrists@yahoo.com

General Comment

See attached

Attachments

20140102 Comment From Daniel Bush
Full Name: Daniel Bush
Address 1: 1721 Little Kitten Avenue
Address 2:
City: Manhattan
Postal Code: 66503
Country: United States
Message: I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States.

The EAC is charged with maintaining state-specific instructions on the National Mail Voter Registration Form. The EAC has refused to do so in a limited case - that of protecting Kansas voter rolls from including non-citizens. Kansas takes seriously the franchise that only citizens are entitled to, and has enacted a reasonable law to protect that franchise. The EAC has refused to maintain the federal form, which is the commission's sole regulatory authority.

By failing to update the federal form consistent with Kansas law, the EAC has created havoc for elections in Kansas. By failing to notify applicants who use the federal form of the requirement to provide evidence of citizenship with the form, those applicants who do not provide proof will only have met the requirements that allow them to vote a federal ballot. They will not have met the requirements to vote in state and local elections.

The right to vote in state and local elections should not be hindered by incorrect and outdated Kansas-specific instructions on the federal form. A bifurcated voter registration system is bad for voters and is bad for election administration."

Phone:
Email Address: faithinchrists@yahoo.com
Question: Voter Resources
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0426
Comment From Patricia Bride

Submitter Information

Name: Patricia Bride
Address: 3904 W. 140th Drive
          Leawood, KS, 66224
Email: pbride@kc.rr.com
Phone: 913-685-0223

General Comment

See attached

Attachments

20140102 Comment From Patricia Bride
Full Name: Patricia Bride
Address 1: 3904 W. 140th Drive
City: Leawood
Postal Code: 66224
Country: United States
Message: Kansan who supports KS Voter ID Law:

Comment: "I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States.

Phone: 913-685-0223
Email Address: pbride@kc.rr.com
Question: Voter Resources
Case 5:13-cv-04095-EFM-DJW   Document 132-17   Filed 01/25/14   Page 50 of 110

PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0427
Comment From Walter Cunningham

Submitter Information

Name: Walter Cunningham
Address: 252 S. Forestview Ct.
Wichita, KS, 67235
Email: cunninghambible@hotmail.com
Phone: 316-722-6613

General Comment

See attached

Attachments

20140102 Comment From Walter Cunningham
Full Name: Walter Cunningham
Address 1: 252 S. Forestview Ct.
City: Wichita
Postal Code: 67235
Country:
Message: "I live in Kansas. The EAC must update the National Mail Voter Registration Form to include instructions that Kansas requires a copy of one of 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don't do this!
Phone: 3167226613
Email Address: cunninghambible@hotmail.com
Question: Other
PUBLIC SUBMISSION

Docket: EAC-2013-0004
National Mail Voter Registration Form

Comment On: EAC-2013-0004-0001
National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions

Document: EAC-2013-0004-0428
Comment From Aaron Cunningham

Submitter Information

Name: Aaron Cunningham
Address:
250 n rock rd 300n
wichita, KS, 67206
Email: onfireforchrist@outlook.com
Phone: 316-871-9029

General Comment

See attached

Attachments

20140103 Comment From Aaron Cunningham
Full Name: Aaron Cunningham
Address 1: 250 n rock rd 300n
Address 2: 
City: wichita
Postal Code: 67206
Country: United States
Message: I live in Kansas. The EAC must update the National mail voter registration form to include instructions that Kansas requires a copy of one of the 13 documents to verify that the applicant using the federal form is a citizen of the United States. This will create chaos in Kansas if you don't do this!
Phone: 3168719029
Email Address: onfireforchrist@outlook.com
Question: Other
The Office of the Secretary of State

Brian P. Kemp
SECRETARY OF STATE

August 1, 2013

Ms. Alice Miller
Acting Executive Director
Election Assistance Commission
1201 New York Ave., NW
Washington, DC 20005

Dear Ms. Miller,

As the chief state election official for the State of Georgia, I am writing to request that the Election Assistance Commission ("EAC") revise the state-specific instructions for Georgia in the National Voter Registration Mail Application Form (the "Federal Form"). In addition to updating the mailing address for my office's Elections Division, the Federal Form needs to be altered to include information that the State of Georgia has deemed necessary to enable state election officials to assess the eligibility of an applicant and to administer voter registration.

Specifically, I am requesting that the EAC alter the state-specific instructions for Georgia in the Federal Form as follows:

1. In Georgia, a person is not qualified to vote unless such person is registered as an elector in the manner prescribed by Georgia law, a citizen of the State of Georgia and of the United States, and possess all other qualifications set by law. O.C.G.A. § 21-2-216(a). Act 143 of the 2009 Georgia General Assembly, codified at O.C.G.A. § 21-2-216(g), along with the implementing regulations contained in Ga. Comp. R. & Regs. r. 183-1-6-.06 and Ga. Comp. R. & Regs. r. 590-8-1-.02, directs applicants for voter registration to provide satisfactory evidence of United States citizenship so that the board of registrars can determine the applicant's eligibility. Upon the receipt of an application without satisfactory evidence of citizenship, the board of registrars shall accept the application and notify the applicant in writing of the requirement to provide satisfactory evidence of citizenship. Failure to respond to such request will result in the rejection of the application.

Accordingly, we request the insertion of an additional bullet after the last bullet in the "Signature" section with the following text: "be found eligible to vote by supplying satisfactory evidence of U.S. citizenship."

2. Additionally, the mailing address for the Elections Division in the Federal Form should be revised as follows: Elections Division, Office of the Secretary of State, 2 Martin Luther King Jr. Drive, Suite 802 Floyd West Tower, Atlanta, Georgia 30334.
Since this information is necessary to enable state election officials to assess the eligibility of an applicant, your prompt consideration of this request is appreciated. In the event we do not receive the EAC's response to this request in the next ten (10) days, we will understand that to mean the EAC is unable to make a determination on our request. Thank you in advance for your attention to this request, and please contact me if you have any questions.

Sincerely,

Brian P. Kemp
Secretary of State
August 6, 2013

Honorable Brian P. Kemp
Secretary of State
214 State Capitol
Atlanta, GA 30334

Dear Secretary Kemp:

Thank you for your correspondence dated August 1, 2013 to this office requesting modification of instructions relative to Georgia on the Federal mail voter registration form. Please be advised that staff is currently reviewing your request. Once the decision on your request is finalized, I will notify your office. Should you have any questions, please feel free to contact Mr. William Boehm, Deputy Director of Policy, Division of Research, Policy and Programs at wboehm@eac.gov or 202-566-3126. Mr. Boehm is responsible for NVRA policy issues in this office.

Sincerely,

[Signature]

Alice Miller,
Acting Executive Director &
Chief Operating Officer

c: Mr. William P. Boehm
August 15, 2013

Honorable Brian P. Kemp
Secretary of State
214 State Capitol
Atlanta, GA 30334

Dear Secretary Kemp:

Thank you for your correspondence dated August 1, 2013 to this office requesting modification of instructions relative to Georgia on the national mail voter registration form (Federal Form). You requested that EAC revise the Georgia state-specific instructions by making the following changes:

1. Insertion of an additional bullet after the last bullet in the “Signature” section with the following text:
   
   • Be found eligible to vote by supplying satisfactory evidence of U.S. citizenship

2. Revision of the mailing address as follows:

   Elections Division
   Office of the Secretary of State
   2 Martin Luther King, Jr. Drive
   Suite 802 Floyd West Tower
   Atlanta, GA 30334

   EAC staff is authorized to approve the change related to mailing address and will accordingly make the change to the Georgia instructions on the Federal Form. However, as you know, EAC currently has four vacancies on the Commission. EAC staff is authorized to process State requests to modify state-specific instructions on the Federal Form but according to current procedures must defer any requests that raise “issues of broad policy concern to more than one state” until EAC has a quorum. I have attached a copy of the memo to former EAC Commissioners Donetta Davidson and Gineen Bresso from former Executive Director Thomas Wilkey, November 9, 2011 which delineates the process EAC staff must follow when receiving State requests to modify their state-specific instructions on the Federal Form.

Your correspondence states that

Upon receipt of an application without satisfactory evidence of citizenship, the board of registrars shall accept the application and notify the applicant in writing of the requirement to provide satisfactory evidence of citizenship. Failure to respond to such request will result in the rejection of the application.

(Emphasis added).
Honorable Brian P. Kemp  
August 15, 2013

Thus the result would be that the Federal Form would be rejected in Georgia without the proper citizenship documentation. Failure to “accept and use” the Federal Form has broad policy impact that could affect more than one State.

In addition, citizenship documentation is not addressed in the National Voter Registration Act of 1993 or the Help America Vote Act of 2002 and the inclusion of such information with the Federal Form constitutes a policy question which EAC Commissioners must decide. EAC staff has no authority to establish policy for the EAC.

The requested modification to the state-specific instruction on the Federal Form regarding citizenship documentation appears to raise issues of broad policy concern to more than one state. EAC staff is therefore constrained to defer the request until EAC has a quorum.

If you have any questions on this matter, please do not hesitate to contact me.

Sincerely,

[Signature]

Alice Miller,  
Acting Executive Director &  
Chief Operating Officer
Mr. Boehm,

Thanks again for your efforts to accommodate our request for expedited review. I hate to pester you, but we wanted to check on the status of the EAC's response.

Thanks,

Vincent

From: Russo, Vincent
Sent: Tuesday, August 6, 2013 12:21 PM
To: 'William P. Boehm'
Cc: AliceMiller; KarenLynn-Dyson; BryanWhitener
Subject: RE: Georgia NVRA Request

Mr. Boehm,

Thank you for the quick response.

We appreciate the EAC's effort to accommodate our expedited request and understand that our request is not the only one your office has received. Please let me know if you need anything from our office in the meantime, and thank you again for your consideration of our request.

Best regards,

Vincent

Vincent R. Russo
General Counsel
Office of Secretary of State Brian P. Kemp
(404) 656-2881

From: William P. Boehm [mailto:WBoehm@eac.gov]
Sent: Tuesday, August 06, 2013 1:09 PM
To: Russo, Vincent
Cc: AliceMiller; KarenLynn-Dyson; BryanWhitener
Subject: RE: Georgia NVRA Request

Mr. Russo,

Thank you for your email.

We will make every effort to process your request as soon as possible. Please understand, however, that we process state requests in the order we receive them and yours is the fourth request we have received. Two of them should be completed today. I will keep you informed on the status of your request.

Regards

Bill Boehm
From: Russo, Vincent [mailto:vrusso@sos.ga.gov]
Sent: Tuesday, August 06, 2013 1:02 PM
To: William P. Boehm
Cc: AliceMiller; KarenLynn-Dyson; BryanWhitener
Subject: RE: Georgia NVRA Request

Mr. Boehm,

Thank you for contacting us about our request to modify the state-specific instructions for Georgia on the Federal mail voter registration form. While I understand from your email that you anticipate a two week turnaround on the EAC's response, I would like to request an expedited review if possible. Additionally, if you need anything from us to help expedite the process, please let me know.

Thank you again for your assistance with this matter, and please do not hesitate to contact me if you need anything from our office.

Best regards,

Vincent R. Russo
General Counsel
Office of Secretary of State Brian P. Kemp
214 State Capitol
Atlanta, Georgia 30334
P: (404) 656-2881
F: (404) 656-0513

From: Haygood, Cait
Sent: Tuesday, August 06, 2013 10:52 AM
To: 'William P. Boehm'
Cc: AliceMiller; KarenLynn-Dyson; BryanWhitener; Russo, Vincent
Subject: RE: Georgia NVRA Request

William,

I received your email this morning, please contact Vincent Russo, General Counsel for the Office of the Secretary of State Brian P. Kemp. His email address is vrusso@sos.ga.gov<mailto:vrusso@sos.ga.gov> and he is copied on this email. If you need to contact him by phone, you can at (404) 657-7778.

Thank you.

--
Cait Haygood
Public Affairs Coordinator
Office of Secretary of State Brian P. Kemp Georgia
EMAIL: chaygood@sos.ga.gov<mailto:chaygood@sos.ga.gov>
OFFICE: (404) 651-8679

From: William P. Boehm [mailto:WBoehm@eac.gov]
Sent: Tuesday, August 06, 2013 8:27 AM
To: Haygood, Cait
Cc: AliceMiller; KarenLynn-Dyson; BryanWhitener
Subject: Georgia NVRA Request

Thank you for your email to Alice Miller, Executive Director, U. S. Election Assistance Commission which included a letter from Secretary of State Brian P. Kemp dated August 1, 2013 to this office requesting modification of instructions relative to Georgia on the Federal mail voter registration form. Please be advised that EAC staff is currently reviewing your request and anticipate completion within the next two weeks. Once the decision on your request is finalized, EAC will notify your office. If there is another contact person for Secretary Kemp.
Should you have any questions, please feel free to contact me at this email address.

William P. Boehm
Deputy Director for Policy
Division of Research, Policy and Programs
U.S. Election Assistance Commission
1201 New York Ave, NW
Washington, DC 20005
MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (DOCKET NO. EAC-2013-0004)

The United States Election Assistance Commission (hereinafter “EAC” or “Commission”) issues the following decision with respect to the requests of Arizona, Georgia, and Kansas (hereinafter, collectively, “States”) to modify the state-specific instructions on the National Mail Voter Registration Form (“Federal Form”). Specifically, the States request that the EAC include in the applicable state-specific instructions on the Federal Form a requirement that, as a precondition to registering to vote in federal elections in those states, applicants must provide additional proof of their United States citizenship beyond that currently required by the Federal Form. For the reasons set forth herein, we deny the States’ requests.¹

I. INTRODUCTION

A. State Requests

1. Arizona

   In 2004, Arizona voters approved ballot Proposition 200 amending Arizona’s election laws, as relevant here, by requiring voter registration applicants to furnish proof of U.S. citizenship beyond the attestation requirement of the Federal Form. Ariz. Rev. Stat. Ann. § 16-

¹ As explained below, this decision follows a court order in Kobach v. EAC, No. 5:13-cv-4095 (D. Kan. Dec. 13, 2013) remanding the matter to the agency and a subsequent request for public comment. The undersigned Acting Executive Director has determined that the authority exists to act on the requests and therefore issues this decision on behalf of the agency.
166(F). According to the state law, a county recorder must “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.” Id.

On March 6, 2006, the Commission, acting through its Executive Director, denied Arizona’s original 2005 request to include additional proof of citizenship instructions on the Federal Form, finding, inter alia, that the form already required applicants to attest to their citizenship under penalty of perjury and to complete a mandatory checkbox indicating that they are citizens of the United States. EAC00002-04. Further, the Commission observed that Congress itself had found that a documentary proof-of-citizenship requirement was “not necessary or consistent with the purposes of” the National Voter Registration Act (“NVRA”). Id.

In July 2006, after receiving several letters of protest from Arizona’s Secretary of State, the EAC’s then-chairman requested that the EAC commissioners accommodate the State by reconsidering the agency’s final decision and granting Arizona’s request. EAC000007-08, EAC00000011, EAC00000013-14. On July 11, 2006, the EAC commissioners denied the chairman’s motion for an accommodation by a tie vote of 2-2. EAC000010.\(^2\)

Subsequently, Arizona refused to register Federal Form applicants who did not provide the documentation required by Proposition 200. Private parties filed suit against Arizona, challenging Arizona’s compliance with the NVRA. In June 2013, the Supreme Court ruled that the NVRA preempts inconsistent state law and states must accept and use the Federal Form to register voters for federal elections without requiring any additional information not requested on the Form. Arizona v. Inter Tribal Council of Arizona, Inc., __ U.S. __, 133 S. Ct. 2247, 2253-60 (2013) (hereinafter “Inter Tribal Council”). The Court further stated, “Arizona may, however,

\(^2\) Arizona did not seek to challenge the EAC’s final decision on the 2006 request under the APA, and the time for doing so has now expired. See 28 U.S.C. § 2401(a).
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.” *Id.* at 2260.

On June 19, 2013, Arizona’s Secretary of State again requested that the EAC include state-specific instructions on the Federal Form relating to Arizona’s proof-of-citizenship requirements. On July 26, 2013, Arizona’s Attorney General submitted a follow-up letter in support of the state’s request. EAC000034-35; EAC000044-46. In a letter dated August 13, 2013, the Commission informed Arizona that its request would be deferred until the reestablishment of a quorum of EAC commissioners, in accordance with the November 9, 2011, internal operating procedure issued by the EAC’s then-Executive Director, Thomas Wilkey (“Wilkey Memorandum”). EAC000048. That memorandum set forth internal procedures for processing state requests to modify the state-specific instructions on the Federal Form, instructing that “[r]equests that raise issues of broad policy concern to more than one State . . . be deferred until the re-establishment of a quorum [of EAC commissioners].” EAC000049-50.

2. **Georgia**

By letter dated August 1, 2013, Georgia’s Secretary of State requested, *inter alia*, that the EAC revise the Georgia state-specific instructions of the Federal Form due to a 2009 Georgia law that requires voter registration applicants to provide “satisfactory evidence of United States citizenship so that the board of registrars can determine the applicant’s eligibility.” EAC001856-57; Ga. Code Ann. § 21-2-216(g). The Commission responded to Georgia’s request on August 15, 2013, by informing the state that its request would be deferred in accordance with the Wilkey Memorandum. EAC001859-60.
3. Kansas

On August 9, 2012, Kansas’s Election Director requested, *inter alia*, that the EAC provide an instruction on the Federal Form that “[a]n applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote.” EAC000099, Kan. Stat. Ann. § 25-2309(f). The EAC responded to the state by letter dated October 11, 2012, indicating that a decision on Kansas’s request regarding proof of citizenship would be deferred in accordance with the Wilkey Memorandum. EAC000101-02.

On June 18, 2013, after the Supreme Court decision in *Inter Tribal Council*, Kansas Secretary of State Kris Kobach renewed the state’s August 9, 2012, request to provide an instruction on the Federal Form regarding the state’s proof of citizenship requirements. EAC000103. In a follow-up August 2, 2013 letter, Mr. Kobach clarified that he had instructed county election officials to accept the Federal Form without proof of citizenship, but that those registrants would be eligible to vote only in federal elections. EAC000112-13. The EAC again deferred Kansas’s request in accordance with the Wilkey Memorandum. EAC000116-17.

Kansas and Arizona subsequently filed suit against the EAC in the United States District Court for the District of Kansas, challenging the EAC’s deferral of these requests. *See Kobach v. EAC*, No. 5:13-cv-4095 (D. Kan. filed Aug. 21, 2013). On December 13, 2013, the district court remanded the Kansas and Arizona matters to the EAC with instructions to render a final agency action by January 17, 2014. The Georgia request is not part of this pending federal

---

3 Although the EAC’s Executive Director had been delegated the authority to act for the Commission in responding to the States’ requests, the current Acting Executive Director initially followed her predecessor’s internal operating procedure (i.e., the Wilkey Memorandum), which stated that such requests should be deferred until there was a quorum of commissioners available to provide additional policy guidance. The Acting Executive Director believed that deferring the requests in accordance with the Wilkey Memorandum was the prudent course, and in the pending litigation the Commission argued that the district court should give deference to her decision. The district court determined that the Commission had unreasonably delayed in deciding Arizona’s and Kansas’s requests and therefore directed the Commission to take final action on those requests by January 17, 2014.
court litigation; however, as it presents similar issues, the Commission proceeds to take final action on that request as well.

**B. Summary of Public Comments**

On December 19, 2013, the EAC issued a Notice and Request for Public Comment (“Notice”) on the Arizona, Georgia, and Kansas requests. EAC210-11; 78 Fed. Reg. 77666 (Dec. 24, 2013). The Commission also emailed its public comment request to its list of NVRA stakeholders and published the Notice on its website. In response to its request, the Commission received 423 public comments: one on behalf of the Arizona Secretary of State, one from the Kansas Secretary of State, twenty-two from public officials at thirteen different agencies at various levels of government, 385 from individual citizens, four from the groups of individuals and advocacy organizations that intervened in the pending lawsuit, and ten from other advocacy groups. Neither the Georgia Secretary of State nor any other Georgia state official submitted comments.

1. **Arizona submission**

The Office of the Solicitor General for the State of Arizona submitted Arizona’s comments in support of its request to add Arizona’s documentary proof of citizenship requirements to its state-specific instructions on the Federal Form. EAC001700-02. Arizona included in its submission: Proposition 200, the initiative passed by the Arizona electorate establishing the voter registration citizenship requirements at issue here, EAC001626-30; the 2004 official canvassing showing the percentage of the electorate that voted in favor of Proposition 200, EAC001632-49; and the district court’s findings of fact and conclusions of law.

---

The above count excludes one comment which was a prank and three sets of supporting documents that were uploaded as separate comments. Thus, the website through which the public commenting process is managed shows a total of 427 comments received. See [http://www.regulations.gov/#/documentDetail;D=EAC-2013-0004-0001](http://www.regulations.gov/#/documentDetail;D=EAC-2013-0004-0001).

EAC001651-99. Arizona also submitted declarations of various Arizona state and county officials purporting to demonstrate the undue burden that would result from the maintenance of a dual voter registration system (i.e., maintaining separate voter registration lists for federal elections and state elections), which Arizona argues would be required by Arizona law if the EAC does not accede to Arizona’s request, and instances in which the Arizona officials indicate they determined that non-citizens had registered to vote, or actually had voted. EAC001703-48. Finally, Arizona submitted documents showing that the Department of Defense Federal Voting Assistance Program granted Arizona’s request to add Arizona’s documentary proof of citizenship requirements to the Federal Post Card Application, a voter registration and absentee ballot application created under the Uniformed and Overseas Citizens Absentee Voting Act. EAC001749-1802.

2. **Kansas submission**

The Kansas Secretary of State reiterated Kansas’s request that the EAC include the state’s documentary proof of citizenship requirements on the Federal Form, based on the Secretary’s view that under the Supreme Court’s decision in *Inter Tribal Council*, the EAC has a non-discretionary duty under the U.S. Constitution to do so. EAC000563-65; EAC000578-610. Kansas provided affidavits and supporting documents from various state and local election officials that purport to demonstrate the number of non-citizens who illegally registered to, and did, vote in Kansas elections and to support Kansas’s position that additional proof of citizenship is necessary to enforce its voter qualification requirements. EAC000611-68. Kansas further
argued that unless the EAC adds the requested language to the Federal Form, the state will be required to implement a costly dual registration system.

3. **Kobach v. EAC intervenor submissions**

The four groups of individuals and advocacy organizations that intervened as defendants in the pending litigation each submitted public comments in response to the EAC’s Notice. EAC000710-20, EAC000723-51, EAC000754-887 (League of Women Voters group); EAC000910-1256, EAC001260-1542 (Valle del Sol group); EAC001809-26 (Project Vote); EAC001546-94 (ITCA group). The League of Women Voters and Valle del Sol groups argued that the EAC lacks authority to grant the states’ requests because it lacks the requisite quorum of commissioners. The Valle del Sol and Project Vote groups argued that the requested changes were inconsistent with the NVRA’s purpose and that the states had not demonstrated a need for additional proof of citizenship to prevent fraudulent registrations. Project Vote contended that the documentary requirements would burden voter registration applicants, reduce the number of eligible voters, and violate the NVRA’s prohibition on formal authentication of eligibility requirements. The Inter Tribal Council of Arizona group conceded that the EAC has authority to grant or deny the states’ requests, but agreed with the other intervenor-defendant groups that the states have not demonstrated the necessity for their instructions because they have other means of verifying voter eligibility.

4. **Other advocacy group submissions**

Of the ten comments from advocacy groups that have not intervened in the pending litigation, four supported and six opposed the states’ requests. True the Vote cited to voter registration processes in Canada and Mexico to support its claim that the instructions at issue are necessary for the states to assess voter eligibility and suggested that the requested state-specific instructions would lead to greater perceived legitimacy in the electoral process. EAC000707-09.
Similarly, Judicial Watch argued that if the EAC failed to update the form, it would undermine Americans’ confidence in the fairness of U.S. elections and thwart states’ ability to comply with the provisions of Section 8 of the NVRA regarding maintenance of voter rolls. EAC000474-80. Judicial Watch and the Federation for American Immigration Reform both suggested that the denial of the states’ requests would hinder individual states’ ability to maintain the integrity of elections. EAC001605-09. The Immigration Reform Law Institute argued that the EAC should grant the states’ requests because, in its view, the Supreme Court ruling in *Inter Tribal Council* requires it to do so. EAC001543-45.

The ACLU was one of seven non-intervenor advocacy groups that opposed the states’ requests. It argued that the documentation requirement would be overly burdensome, would violate the NVRA, and would discourage voter registration. EAC000888-96. The Asian American Legal Defense and Education Fund argued that Arizona, Georgia, and Kansas have histories of discrimination against Asian Americans, and argued that the true intent of the states’ laws was to disenfranchise eligible citizens. EAC001598-1603. The Coalition of Georgia Organizations contended that the additional requirements would make the registration process harder instead of simplifying it, as they contend the NVRA intended. EAC001838-40.

Communities Creating Opportunity argued that the proposed requirement would adversely impact vulnerable and marginalized communities (low-income and people of color) the most. Further, the group asserted that the requested change would be costly and unnecessary, and would complicate, delay, and deter participation in the electoral process. EAC000699-700. Demos pointed to the decrease in voter registration since the enactment of Arizona’s Proposition 200 and contended that the requested instructions would impair community voter registration drives by requiring documents that many citizens do not generally carry with them and may not
possess at all. EAC000900-07. The League of United Latin American Citizens ("LULAC") shares that view and cited data purporting to show the small number of voter fraud cases between 2000 and 2011 in Arizona compared to the millions of ballots cast in that timeframe. EAC000701-03.

5. State and local official submissions

Officials from Arizona’s Apache (EAC000560-61), Cochise (EAC000218), Mohave (EAC000226-34) and Navajo (EAC000219) counties and Kansas’s Ford (EAC000220), Harvey (EAC000421-23), Johnson (EAC001831-33) and Wyandotte (EAC001258-59) counties urged the EAC to grant the States’ requests. Angie Rogers, the Commissioner of Elections for the Louisiana Secretary of State, supported the States’ requests because she believes states have “the constitutional right, power and privilege to establish voting qualifications, including voter registration requirements[.]” EAC000216.

Rep. Martin Quezada of the Arizona House of Representatives and defendant-intervenor Sen. Steve Gallardo of the Arizona State Senate opposed Arizona’s request because they contend that the warnings and advisories contained on the Federal Form already deter non-citizens from voting, that there is no evidence of voter registration fraud, and that the requirement for additional proof of citizenship would burden citizens who do not possess the documents and would contravene the NVRA’s goal of creating a uniform, national voter registration process. EAC000704-05; EAC001618-21. Mark Ritchie, the Minnesota Secretary of State, asserted that some senior citizens in Minnesota do not have and cannot obtain proof of citizenship, that the expense of obtaining relevant documents might be tantamount to a poll tax, and that implementing the States’ proposals in his state would make it more difficult for citizens to register and could be an equal protection violation. EAC001804. U.S. Representative Robert Brady of Pennsylvania argued that the States’ requests are an attempt to disenfranchise eligible
voters and that the Federal Form already adequately requires applicants to affirm their citizenship. EAC001595.

6. Individual citizen submissions

Of the 385 citizen comments, the vast majority of which were made by Kansas residents, 372 were in favor of the States’ requests. Several respondents expressed “high support” for the requests as crucial to preventing voter fraud, and argued that failure to grant the requests would create “havoc” in future elections, presumably because the States may be required to create separate registration databases for federal and state registrants. Others argued that the right to vote should not be hindered by what they consider incorrect and outdated state-specific instructions. Other citizens expressed the desire for elections to be orderly and their view that the EAC’s denial of the States’ requests would violate what they believe is the States’ exclusive power to set voter qualifications. Hans A. von Spakovsky, an attorney, former member of the Federal Election Commission, and former local election official in Fairfax County, Virginia, argued that the EAC has no authority to refuse to approve state-specific instructions that deal with the eligibility and qualification of voters and that extant citizenship provisions on the Federal Form have been ineffective in discouraging non-citizens from illegally registering and voting. EAC000680-85.

Thirteen citizen commenters opposed the States’ requests because they believed that the proposals were unconstitutional, would limit and suppress the vote of certain classes of disadvantaged Americans, would make the voting process more restrictive, would discourage legitimate voters from voting, and were otherwise unnecessary.
II. CONSTITUTIONAL, STATUTORY, AND REGULATORY BACKGROUND

A. Constitution

The Qualifications Clause of the United States Constitution, Art. I, § 2, cl. 1, provides that in each state, electors for the U.S. House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” See also U. S. Const. amend. XVII (same for the U.S. Senate). This clause and the Seventeenth Amendment long have been held to give exclusive authority to the states to determine the qualifications of voters for federal elections. Inter Tribal Council, 133 S. Ct. at 2258.

By contrast, the Elections Clause of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, Cl. 1. In Inter Tribal Council, the Supreme Court held that the Election Clause’s “substantive scope is broad.” Inter Tribal Council, 133 S. Ct. at 2253. “‘Times, Places, and Manner,’ [the Supreme Court has] written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including, as relevant here . . . regulations relating to ‘registration.’” Id. at 2253 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added)). Thus, in its latest decision on the Elections Clause, the Supreme Court reaffirmed its long held determination that the Elections Clause gives Congress plenary authority over voter registration regulations pertaining to federal elections. Although the states remain free to regulate voter registration procedures for state and local elections, they must yield to federal regulation of voter

5 Such regulations, however, may not violate other provisions of the Constitution, such as by discriminating against United States citizens on the basis of their race, color, previous condition of servitude, sex, or age over 18 years. U.S. Const. amend. XIV, XV, XIX, XXVI.
registration procedures for federal elections. *Id.*; *see also* Cook *v.* Gralike, 531 U. S. 510, 523 (2001); *Roudebush v.* Hartke, 405 U. S. 15, 24 (1972).

B. **National Voter Registration Act and Help America Vote Act**

Exercising its authority under the Elections Clause, Congress enacted the NVRA in 1993 in response to its concern that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office.” 42 U.S.C. § 1973gg(a)(3). As originally enacted, the NVRA assigned authority to the Federal Election Commission “in consultation with the chief election officers of the States” to “develop a mail voter registration application form for elections for Federal office” and to “prescribe such regulations as are necessary to carry out” this responsibility, and further provides that “[e]ach State shall accept and use the mail voter registration application form prescribed by the [FEC].” 42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2). The FEC undertook this responsibility, in consultation with the States, and issued the original regulations on the Federal Form in 1994. NVRA Final Rule Notice, 59 Fed. Reg. 32,311 (June 23, 1994). In the Help America Vote Act of 2002 (“HAVA”), all of the NVRA functions originally assigned to the FEC were transferred to the EAC. 42 U.S.C. § 15532. Congress mandated in part the contents of the Federal Form and explicitly limited the information the EAC may require applicants to furnish on the Federal Form. In particular, the form “may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Further, it “may not include any requirement for notarization or other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). The Federal Form must, however, “include a statement that . . . specifies each eligibility requirement (including citizenship)”; “contains an attestation that the applicant meets each such requirement”; and “requires the signature of the
applicant, under penalty of perjury.” 42 U.S.C. § 1973gg-7(b)(2). Additionally, pursuant to HAVA, the Federal Form must include two specific questions and check boxes for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 42 U.S.C. § 15483(b)(4)(A).

C. The Federal Form

Pursuant to its rulemaking authority, the EAC has promulgated the requirements for a Federal Form that meets NVRA and HAVA requirements. See 11 C.F.R. part 9428 (implementing regulations); 42 U.S.C. §§ 1973gg-7(a), 15329. The form consists of three basic components: the application, general instructions, and state-specific instructions. 11 C.F.R. §§ 9428.2 (a), 9428.3 (a); see also EAC000073-97. The application portion of the Federal Form “[s]pecifies] each eligibility requirement,” including “U.S. Citizenship,” which is “a universal eligibility requirement.” 11 C.F.R. § 9428.4(b)(1). To complete the form, an applicant must sign, under penalty of perjury, an “attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state’s specific eligibility requirements.” 11 C.F.R. §§ 9428.4(b)(2), (3). The state-specific instructions for Arizona, Georgia and Kansas include the requirement that applicants be United States citizens. See EAC000081, EAC000083, EAC000085.

Neither the NVRA nor the EAC regulations specifically provide a procedure for states to request changes to the Federal Form. The NVRA simply directs the EAC to develop the Federal Form “in consultation with the chief election officers of the States.” 42 U.S.C. §§ 1973gg-7(a)(2). To that end, the regulations provide that states “shall notify the Commission, in writing, within 30 days of any change to the state’s voter eligibility requirements[.]” 11 C.F.R. § 9428.6(c). The regulations leave it solely to the EAC’s discretion whether and how to incorporate those changes. Indeed, the Supreme Court has described the EAC’s authority and
duty to determine the contents of the Federal Form, including any state-specific instructions included therein, as “validly conferred discretionary executive authority.” *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis added). Thus, the EAC is free to grant, deny, or defer action on state requests, in whole or in part, so long as its action is consistent with the NVRA and other applicable federal law. The EAC (and before it the FEC) received and acted upon numerous requests over the years from States to modify the Federal Form’s State-specific instructions in various respects.

**III. THE COMMISSION’S ABILITY TO ACT ON THE REQUESTS IN THE ABSENCE OF A QUORUM OF COMMISSIONERS**

Sections 203 and 204 of HAVA provide that the Commission shall have four members, appointed by the President with the advice and consent of the Senate, as well as an Executive Director, General Counsel, and such additional personnel as the Executive Director considers appropriate. 42 U.S.C. §§ 15323, 15324. Section 208 of HAVA provides that “[a]ny action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members.” *Id.* § 15328. Finally, Section 802(a) of HAVA directs that the functions previously exercised by the Federal Election Commission under Section 9(a) of the NVRA, *id.* § 1973gg-7(a), would be transferred to the EAC. *Id.* § 15532.

All four of the appointed commissioner seats are currently vacant. Accordingly, several commenters have suggested that the EAC presently lacks the authority, in whole or in part, to act on the States’ requests for modifications to the state-specific instructions on the Federal Form. 6 Notably, the States do not assert that the Commission currently lacks authority to act on their

---

6 The Valle del Sol group of commenters, for example, asserts the Commission’s staff cannot take any action on the requests in the absence of a quorum. See EAC001448-55. The League of Women Voters and Project Vote commenters, by contrast, argue that the Commission’s staff may act to deny the requests and thus maintain the Federal Form as it stands, but not to grant them and thus change the Form. See EAC000764-66; EAC001810-13.
requests; indeed, the States believe that the EAC has a nondiscretionary duty to grant their requests. EAC000564-65, EAC000593-97. As explained below, under current EAC policy, as previously established in 2008 by a quorum of EAC commissioners, EAC staff has the authority to act on all state requests for modifications to the instructions on the Federal Form.

A. The 2008 Roles and Responsibilities Policy Delegates Federal Form Maintenance Responsibilities to the Executive Director.

In 2008, the three EAC commissioners who were then in office unanimously adopted a policy entitled, “The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission.” See EAC000064-72 (“R&R Policy”). This policy “supersede[d] and replace[d] any existing EAC policy that [was] inconsistent with its provisions.” EAC000072. “The purpose of the policy,” according to the commissioners, was “to identify the specific roles and responsibilities of the [EAC’s] Executive Director and its four Commissioners in order to improve the operations of the agency.” EAC000065 (emphasis added).

The commissioners were well aware of and cited to the general quorum requirements contained in Section 208 of HAVA, as well as the notice and public meeting requirements contained in the Government in the Sunshine Act, 5 U.S.C. § 552b(a)(2), which apply whenever a quorum of commissioners meets to discuss official agency business. EAC000065. Further, the commissioners were cognizant of the practical reality that, “[u]ltimately, if all functions of the Commission (large and small) were performed by the commissioners, the onerous public meeting process would make the agency unable to function in a timely and effective matter [sic]. Recognizing these facts, HAVA provides the EAC with an Executive Director and staff. (42 U.S.C. § 15324).” EAC000065. Finally, the commissioners recognized that “HAVA says little about the roles of the Executive Director and the Commissioners,” but that “a review of the
statute, the structure of the EAC and EAC’s mission suggest a general division of responsibility” among them, whereby the commissioners would set policy for the agency, and the Executive Director would implement that policy and otherwise take operational responsibility for the agency. EAC000065.

More specifically, under the R&R Policy, the commissioners are responsible for developing agency policy, which is defined as “high-level determination, setting an overall agency goal/objective or otherwise setting rules, guidance or guidelines at the highest level.” EAC000064. The Commission “only makes policy through the formal voting process” of the commissioners. Id. Among the policy matters specifically reserved to the commissioners, for example, are “[a]doption of NVRA regulations” and “[i]ssuance of Policy Directives.” EAC000065.

The EAC commissioners delegated the following responsibilities (among others) to the Executive Director under the R&R policy: “[m]anage the daily operations of EAC consistent with Federal statutes, regulations, and EAC policies”; “[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners”; “[a]nswer questions from stakeholders regarding the application of NVRA or HAVA consistent with EAC’s published Guidance, regulations, advisories and policy”; and “[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies.” EAC000070-71.

The Executive Director was further directed to “issue internal procedures which provide for the further delegation of responsibilities among program staff and set procedures (from
planning to approval) for all program responsibilities.” 7 EAC000072. Finally, while the R&R policy directs the Executive Director to keep the commissioners informed of “all significant issues presented and actions taken pursuant to the authorities delegated [by the R&R policy],” it also specifically provides that “the commissioners will not directly act on these matters.” Id. (emphasis added). Rather, the commissioners will use the information provided by the Executive Director to “provide accurate information to the media and stakeholders” and to determine “when the issuance of a Policy Directive is needed to clarify or set policy.” Id.

B. The Commissioners’ Delegation of Federal Form Maintenance Responsibilities to EAC Staff is Presumptively Valid Under Federal Law and Does Not Contravene HAVA.

The three EAC commissioners’ unanimous adoption of the 2008 Roles and Responsibilities policy, wherein agency policy implementation and operational responsibilities (including Federal Form maintenance responsibilities) were delegated to the Executive Director, was “carried out . . . with the approval of at least 3 of [the EAC’s] members,” as required by Section 208 of HAVA. As a general matter, “[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.” U.S. Telecom Ass’n v. F.C.C., 359 F.3d 554, 565 (D.C. Cir. 2004). “Express statutory authority is not required for delegation of authority by an agency; delegation generally is permitted where it is not inconsistent with the statute.” National Ass’n of Psychiatric Treatment Centers for Children v.

7 The Valle del Sol commenters mistakenly cite to the 2011 Wilkey Memorandum as the source of the Executive Director’s authority to act on requests for modifications to the Federal Form’s instructions. EAC001448-55. In fact, the Executive Director derives authority to act on Federal Form maintenance matters from the 2008 R&R policy. The 2011 Wilkey Memorandum was merely an internal operating procedure that described how the then-executive director sought to exercise and delegate (or temporarily refrain from acting upon) the responsibilities that the Commission had delegated to him. That memorandum did not and could not have limited the scope of the commissioners’ original delegation to the Executive Director, which included plenary authority to implement the EAC’s NVRA regulations and NVRA and HAVA requirements, and to maintain the Federal Form consistent therewith.

In the absence of an express statutory authorization for an agency to delegate authority to a subordinate official, one must look to “the purpose of the statute” to determine the parameters of the delegation authority. Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 702 (9th Cir. 1996). Obviously, “[i]f Congress clearly expresses an intent that no delegation is to be permitted, then that intent must be carried out.” Ashwood Manor Civic Ass’n, 619 F. Supp. at 66. On the other hand, in the absence of a specific statutory prohibition or limitation of an agency’s delegation authority, the default rule is that an agency can do so. See, e.g., Loma Linda University v. Schweiker, 705 F.2d 1123, 1128 (9th Cir. 1983) (upholding delegation of HHS Secretary’s statutory review authority to subordinate official where “Congress did not specifically prohibit delegation”).

As the EAC commissioners themselves recognized in the R&R policy, “HAVA says little about the roles of the Executive Director and the Commissioners,” but the statute and the EAC’s structure suggest that there should be a “general division of responsibility” as between the commissioners and the Executive Director. EAC000064. Additionally, HAVA contains no provisions which speak directly to the issue of delegation. As Congress noted, HAVA was enacted, in part, “to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs.” H.R. Rep. No. 107-730, at 2 (Oct. 8, 2002) (Conf. Rep.). There is nothing about that statutory purpose that suggests that it would be inappropriate for the EAC to delegate agency functions to the agency’s staff. Indeed, as the EAC commissioners acknowledged, such division of responsibilities would “improve the operations of the agency.”
and avoid creating situations where the agency was “unable to function in a timely and effective [manner].”

Thus, the delegations of authority to the Executive Director in the R&R policy do not appear to conflict with HAVA. In particular, the existence of a quorum provision in Section 208 of HAVA does not prohibit the Commission from delegating administrative and implementing authority to its subordinate staff, so long as such delegation of authority is “carried out . . . with the approval of at least 3 of its members,” as it was in this instance. Cf. 42 U.S.C. § 15328.8 The R&R policy does not cede policymaking authority to EAC staff; rather, it directs the staff to “implement and interpret” the agency’s policies consistent with federal law and EAC regulations.

Included within the general duty to implement and interpret the agency’s policies is the specific duty to “[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies.” EAC000072. “Maintain” means “to keep (something) in good condition by making repairs, correcting problems, etc.” See Merriam-Webster Online, http://www.merriam-webster.com/dictionary/maintain (last visited Jan. 12, 2014). In the context of the Federal Form, “maintain” includes making such changes to the general and state-specific instructions as is necessary to ensure that they accurately reflect the requirements for registering to vote in federal elections.

---

8 In similar circumstances, courts have upheld agency delegations of authority to subordinate staff, even when, at the time the staff takes the action in question, the agency lacks its statutorily required quorum. See, e.g., Overstreet v. NLRB, 943 F. Supp. 2d 1296, 1297-1303 (D.N.M. 2013) (upholding NLRB general counsel’s limited exercise of agency’s enforcement authority, pursuant to a previous delegation by a qualifying quorum, and stating that such prior delegation “survives the loss of a quorum”); California Livestock Prod. Credit Ass’n v. Farm Credit Admin., 748 F. Supp. 416, 421-22 (E.D. Va. 1990) (agency’s sole board member was authorized to act, even in absence of statutorily required quorum based on previous delegation of authority by a qualifying quorum).
The EAC’s regulations do not prescribe and have never prescribed the text of the Federal Form’s general and state-specific instructions. Rather, they mandate that in addition to the actual application used for voter registration, the Federal Form shall contain such instructions, and they partially define what should be included within those instructions. See 11 C.F.R. § 9428.3. EAC staff (and before it, FEC staff) has always had the responsibility and discretion to develop and, where necessary, revise and modify the text of the Federal Form’s instructions in a manner that comports with the requirements of federal law and the EAC’s regulations and policies. That remains the case whether or not a quorum of commissioners exists at any given time.

Having determined, based on the foregoing, that the Commission has the authority to act on these requests even in the absence of a quorum of commissioners, we proceed to address the merits of the States’ requests.

IV. Analysis

A. Congress Specifically Considered and Rejected Proof-of-Citizenship Requirements When Enacting the NVRA.

In determining whether and how to implement state-requested revisions to the Federal Form, the EAC has been guided in part by the NVRA’s legislative history. When considering the NVRA, Congress deliberated about—but ultimately rejected—language allowing states to require “presentation of documentary evidence of the citizenship of an applicant for voter registration.” See H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA that included this language, the conference committee determined that such a requirement was “not necessary or consistent with the purposes of this Act,” could “permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act,” and “could also adversely affect the administration of the other registration programs . . . .” Id. (emphasis added). Congress’s rejection of the very requirement

20
that Arizona, Georgia, and Kansas seek here is a significant factor the EAC must take into
account in deciding whether to grant the States’ requests. See, e.g., Hamdan v. Rumsfeld, 548
U.S. 557, 579-80 (2006) ("Congress’ rejection of the very language that would have achieved the
result the [States] urge[] here weighs heavily against the [States’] interpretation.").

B. The Requested Proof-of-Citizenship Instructions Are Inconsistent With the
EAC’s NVRA Regulations.

In promulgating regulations under the NVRA, the FEC “considered what items are
deemed necessary to determine eligibility to register to vote and what items are deemed
necessary to administer voter registration and other parts of the election process in each state.”
59 Fed. Reg. 32311 (June 23, 1994) (NVRA Final Rules). The FEC observed that it was
“charged with developing a single national form, to be accepted by all covered jurisdictions, that
complies with the NVRA, and that . . . specifies each eligibility requirement (including
citizenship).” Further, while determining that the “application identify U.S. Citizenship (the only
eligibility requirement that is universal),” the FEC rejected public comments proposing that
naturalization information be collected by the Federal Form because the basis of citizenship was
deemed irrelevant. As the FEC explained:

The issue of U.S. citizenship is addressed within the oath required by the Act and
signed by the applicant under penalty of perjury. To further emphasize this
prerequisite to the applicant, the words “For U.S. Citizens Only” will appear in
prominent type on the front cover of the national mail voter registration form. For
these reasons, the final rules do not include the additional requirement [that the
Federal Form collect naturalization information].

59 Fed. Reg. at 32316. Furthermore, in response to other public comments suggesting that states
could simplify their eligibility requirements so that they can be listed on the Federal Form along

---

9 In addition to Congress’s specific rejection of the type of instructions the States now seek, the text of the
As Project Vote notes in its comment, requiring additional proof of citizenship would be tantamount to requiring
“formal authentication” of an individual’s voter registration application. EAC001820-21.
with citizenship, the FEC expressed a concern not to “unduly complicate the application” in light of the “variations in state eligibility requirements[].” Id. at 32314.

As a result of HAVA, the FEC and the EAC engaged in joint rulemaking transferring the NVRA regulations from the FEC to the EAC, but made “no substantive changes to those regulations.” 74 Fed. Reg. 37519 (July 29, 2009). Accordingly, the FEC and the EAC, in their implementing regulations, specifically considered and determined, in their discretion, that the oath signed under penalty of perjury, the words “For U. S. Citizens Only” and later the relevant HAVA citizenship provisions, see 42 U.S.C. § 15483(b)(4)(A) (adding to the Federal Form two specific questions and check boxes indicating the applicant’s U.S. citizenship), were all that was necessary to enable state officials to establish the bona fides of a voter registration applicant’s citizenship. Thus, granting the States’ requests here would contravene the EAC’s deliberate rulemaking decision that additional proof was not necessary to establish voter eligibility.

C. The Requested Proof-of-Citizenship Instructions Are Inconsistent With the EAC’s Prior Determinations.

In addition, the EAC, both by the staff and a duly-constituted quorum of commissioners, has already denied the very same substantive request that is at issue here. As set forth above, by letter dated March 6, 2006, the Commission rejected Arizona’s December 2005 request to add its citizenship documentation requirement to the state-specific instructions for the Federal Form. EAC000002-04. We explained that the “NVRA requires States to both ‘accept’ and ‘use’ the Federal Form,” and that “[a]ny Federal Registration Form that has been properly and completely filled out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements.” EAC000004. We concluded that a “state may not mandate additional registration procedures that condition the acceptance of the Federal Form.” Id.
Arizona’s then-Secretary of State, Jan Brewer, wrote several letters of protest to the EAC’s then-Chairman, Paul DeGregorio, who recommended to his fellow commissioners that they grant Arizona an “accommodation” and include Arizona’s proof of citizenship requirements in the state-specific instructions on the Federal Form. See EAC000007-08, EAC000011, EAC000013-14. The four sitting Commissioners rejected Chairman DeGregorio’s proposal by a 2-2 vote. EAC000010. By virtue of this decision not to amend the decision, the EAC established a governing policy for the agency, consistent with the NVRA, HAVA, and EAC regulations, that the EAC will not grant state requests to add proof of citizenship requirements to the Federal Form.

The States’ current requests for inclusion of additional proof-of-citizenship instructions on the Federal Form are substantially similar to Arizona’s 2005 request. (Indeed, Arizona’s request is essentially the same request, involving the exact same state law.) As discussed herein, the States have not submitted sufficiently compelling evidence that would support the issuance of a decision contrary to the one that the Commission previously rendered with respect to Arizona in 2006.

D. The Supreme Court’s Inter-Tribal Council Opinion Guides the EAC’s Assessment of the States’ Requests.

As noted above, several organizations challenged Arizona’s implementation of its proof-of-citizenship requirement, culminating in the Supreme Court’s 2013 ruling in *Inter Tribal Council*, 133 S. Ct. 2247. It is clear from *Inter Tribal Council* that the EAC’s task in responding to the States’ requests is to determine whether granting their requests is necessary to enable state officials to assess the eligibility of Federal Form applicants.
1. **The scope of the Elections Clause is broad.**

The Supreme Court began its analysis in *Inter Tribal Council* by observing that the Elections Clause “imposes the duty . . . [on States] to prescribe the time, place, and manner of electing Representatives and Senators” but “confers [on Congress] the power to alter those regulations or supplant them altogether.” *Id.* at 2253. “The Clause’s substantive scope is broad,” the Court continued. “‘Times, Places, and Manner’ . . . are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including, as relevant here . . ., regulations relating to ‘registration.’” *Id.* at 2253 (citing, *inter alia, Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

2. **The NVRA requirement that states accept and use the Federal Form preempts the States’ proof-of-citizenship requirements.**

Having established that the Elections Clause empowers Congress to regulate voter registration procedures for federal elections, the Court examined the text of the NVRA’s provisions governing the Federal Form. It noted that in addition to creating the Federal Form and requiring states to “accept and use” it, the statute also authorizes states “to create their own, state-specific voter-registration forms, which can be used to register voters in both state and federal elections.” *Id.* at 2255 (citing 42 U.S.C. § 1973gg-4(a)(2)). Any state form must “meet all of the criteria” of the Federal Form “for the registration of voters in elections for Federal office.” 42 U.S.C. §§ 1973gg-4(a)(2). The authority given to states to develop their own form for use in state and federal elections “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.” *Id.* at 2255.

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

3. The NVRA provisions governing the contents of the Federal Form are consistent with the Constitution’s allocation of power over federal elections.

In reaching its ruling, the Court was cognizant of the Constitution’s clauses in Article I and the Seventeenth Amendment empowering states to set voter qualifications for federal elections. “Prescribing voting qualifications,” it stated, “forms no part of the power to be conferred upon the national government’ by the Elections Clause.” Id. at 2258 (quoting The Federalist No. 60, at 371 (A. Hamilton)). The Court characterized the voter qualification clauses and the Elections Clause as an “allocation of authority” that “sprang from the Framers’ aversion to concentrated power.” Id. at 2258.

In other words, the Court recognized some potential tension between the Elections Clause and the voter qualification clauses. In particular, it noted that “[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements, . . . it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.” Id. at 2258-59.

The Court concluded, however, that the NVRA, as interpreted by the United States, did not run afoul of this limitation on Congress’s power because it compels the Federal Form to require from applicants “such . . . 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); see Inter Tribal Council, 133 S. Ct. at 2259. As a result of this requirement, the Court concluded, “a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility” and may challenge a rejection of such a request under the Administrative Procedure Act. Id. at 2259. Therefore, “no constitutional doubt is raised” by the statute. Id. at 2259.

4. The EAC is bound by both the NVRA and the Court’s opinion in Inter Tribal Council to determine whether the States’ requests are necessary to enable them to assess the eligibility of Federal Form applicants.

As described above, while Congress provided that the EAC must consult with the nation’s chief state election officials in the development of the Federal Form, it is the EAC that ultimately has the responsibility and discretionary authority to determine the Federal Form’s contents, to prescribe necessary regulations relating to the Federal Form, and to “provide information to the States with respect to the responsibilities of the States under [the NVRA].” Id. § 1973gg-7.

This discretionary authority, however, is limited by the terms of the statute, which provide, among other things, that the Federal Form may only require from applicants “such . . . information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant . . . .” Id. § 1973gg-7(b)(1).

Kansas and Arizona argue that the Constitution’s voter qualification clauses as interpreted by the Court in Inter Tribal Council bestow on the EAC a nondiscretionary duty to grant the States’ requests and relieve the agency of its obligation to develop the form consistent with the NVRA’s limitations. EAC000564, EAC000593-97. However, neither the language of the Constitution nor of Inter Tribal Council supports such an argument.
First, the States claim that the Constitution “expressly” grants to states “the power to establish and enforce voter qualifications for federal elections” and does so “to the exclusion of Congress.” EAC000590 (emphasis added). To the contrary, nothing in the Constitution prohibits the federal government from also enforcing state-established voter qualifications relating to federal elections, so long as the states are not precluded from doing so. Second, the Court describes the NVRA’s delegation of authority to the EAC to develop the Federal Form subject to the prescribed limitations as “validly conferred discretionary executive authority.” Id. at 2259. The Court uses this phrase in approving the United States’ interpretation of the NVRA as requiring the Federal Form to contain the information necessary to enable states to enforce their voter qualifications, as well as limiting the Form to that information. See id. at 2259. In the EAC’s judgment, the States attempt to impose an unnatural reading on the Court’s language. Furthermore, the language of the NVRA confers on the agency the authority and the duty to exercise its discretion in carrying out the statute’s provisions. The agency will not adopt such a strained reading of this brief passage to circumvent statutory language by which it would otherwise be bound.

We conclude that the States’ contention that the EAC is under a nondiscretionary duty to grant their requests is incorrect. Rather, as the Court explained in Inter Tribal Council, the EAC is obligated to grant such requests only if it determines, based on the evidence in the record, that it is necessary to do so in order to enable state election officials to enforce their states’ voter qualifications. If the States can enforce their citizenship requirements without additional proof-of-citizenship instructions, denial of their requests for such instructions does not raise any constitutional doubts.
E. The Requested Proof-of-Citizenship Instructions Would Require Applicants to Submit More Information Than is Necessary to Enable Election Officials to Assess Eligibility.

The States’ primary argument in support of their requests is that the EAC is under a constitutional, nondiscretionary duty to grant those requests, see EAC000563-65, which as discussed above, is incorrect. However, both Arizona and Kansas also indicate that they believe their requested changes are necessary to enforce their citizenship requirements and not merely a reflection of their legislative policy preferences. See EAC000044-46, EAC000564. Therefore, to ensure that the Federal Form continues to comply with the constitutional standard set out in *Inter Tribal Council* and the statutory standard set out in the NVRA, the Commission must consider whether the States have demonstrated that requiring additional proof of citizenship is necessary for the States to enforce their citizenship requirements. For the reasons discussed below, we conclude that the States have not so demonstrated.

1. The Federal Form currently provides the necessary means for assessing applicants’ eligibility.

The Federal Form already provides safeguards to prevent noncitizens from registering to vote. The Form requires applicants to mark a checkbox at the top of the Form answering the question, “Are you a citizen of the United States of America,” and directs applicants (in bold red text) that they must not complete the Form if they check “No” in response to the question. Should applicants proceed to complete the application, they are also required to sign at the bottom of the Form an attestation that “I am a United States citizen” and “The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.” EAC000078. In addition, the cover page for the Form states in large, boldface type, “For U.S. Citizens.” EAC000073.
In Arizona’s correspondence with the EAC and in the States’ brief filed in *Kobach v. EAC*, the States argue that a sworn statement such as that required by the Federal Form is “virtually meaningless” and “not proof at all.” EAC000045; EAC000605. In support of this argument, the States rely on a remark made by a Supreme Court justice during oral argument in *Inter Tribal Council*. However, remarks by justices at oral argument have no force of law and cannot serve as the basis for this agency’s decision-making.

In fact, a written statement made under penalty of perjury is considered reliable evidence for many purposes. See, e.g., Fed. R. Civ. P. 56(c)(1)(A) (permitting parties in civil cases to cite written affidavits or declarations in support of an assertion that a fact is not in genuine dispute); *United States v. Reed*, 719 F.3d 369, 374 (5th Cir. 2013) (criminal defendant’s affidavit “constitutes competent evidence sufficient, if believed, to establish” facts in support of his ineffective assistance of counsel claim); *United States v. Haymond*, 672 F.3d 948, 959 (10th Cir. 2012) (FBI agent’s affidavit provided sufficient evidence of probable cause to search criminal defendant’s home); *Siddiqui v. Holder*, 670 F.3d 736, 742-743 (7th Cir. 2012) (amnesty applicant may satisfy his burden of proof by submitting credible affidavits sufficient to establish the facts at issue); 26 U.S.C. § 6065 (requiring any tax return, declaration, statement, or other document required under federal internal revenue laws or regulations to be made under penalty of perjury).

The overwhelming majority of jurisdictions in the United States have long relied on sworn statements similar to that included on the Federal Form to enforce their voter qualifications, and the EAC is aware of no evidence suggesting that this reliance has been misplaced. As discussed below, the evidence submitted by Arizona and Kansas in connection with their requests does not change this conclusion. Rather, the EAC finds that the possibility of
potential fines, imprisonment, or deportation (as set out explicitly on the Federal Form) appears to remain a powerful and effective deterrent against voter registration fraud. As several commenters note, Arizona, Kansas, and Georgia all relied on such sworn statements for many years prior to their recent enactment of additional requirements. EAC000769; EAC001816-17.

Additionally, two commenters note that Arizona election officials have previously recognized that the benefit to a non-citizen of fraudulently registering to vote is distinctly less tangible than the loss of access to his or her home, job, and family that would come with deportation. See EAC001820; EAC001558 (citing Letter from Office of the Secretary of State of Arizona, July 18, 2001, Joint Appendix at 165-66, Inter Tribal Council, 133 S. Ct. 2247 (No. 12-71), 2012 WL 6198263 (“It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.”)); see also EAC001558-59, EAC001571 (citing 30(b)(6) Dep. of Maricopa County Elections Dep’t (through Karen Osborne) at 29:16-23, Jan. 14, 2008, Gonzalez v. Arizona, No. 06-CV-1268 (D. Ariz.) (“I cannot believe that [any noncitizen] would want to jeopardize their situation after having lived here for many years, make their reports every year to the INS, pay their taxes, and do everything, I cannot believe that they would want to jeopardize, especially at the cost of a felony, and then the thought of not being able to stay and not get citizenship . . . .”)).

Finally, as also noted by one commenter, Arizona and Kansas still accept sworn statements as sufficient for certain election-related purposes—for example, for an in-county
change of address in Arizona,\textsuperscript{10} an in-state change of address in Kansas,\textsuperscript{11} or an application for permanent advance voting status in Kansas due to disability.\textsuperscript{12} EAC000893.

The EAC finds that the evidence in the record is insufficient to support the States’ contention that a sworn statement is “virtually meaningless” and not an effective means of preventing voter registration fraud.

\textbf{2. Evidence submitted by Arizona and Kansas}

In further support of their requests, Arizona and Kansas submit evidence in the form of declarations and affidavits by several state and county election officials, letters from the Kansas Secretary of State referring several matters to county attorneys, and documents reflecting heavily redacted voter registration and motor vehicle records. EAC001738-40, EAC000611-68. Georgia did not submit any evidence or arguments in support of its request other than a description of its voter registration procedures, either at the time of its request or in response to the EAC’s Notice requesting public comment. EAC001856-57. With the exception of the referral letters and documents reflecting voter registration and motor vehicle records at EAC000629-68, all of the evidence submitted by Arizona and Kansas was included in public court filings prior to the start of the public comment period.\textsuperscript{13} The evidence is summarized as follows:

\textbf{Arizona}

- According to an election official in Maricopa County, Arizona, between 2003 and 2006, at least 37 individuals contacted the recorder’s office in Maricopa County and indicated that they were in the process of applying for U.S. citizenship, but were found to have previously registered to vote in Arizona. EAC001739 ¶ 8.

\textsuperscript{10} See http://www.azsos.gov/election/VoterRegistration.htm.
\textsuperscript{11} See http://www.kssos.org/forms/Elections/voterregistration.pdf.
\textsuperscript{12} See Kan. Stat. § 25-1122(d(c); http://www.kssos.org/forms/Elections/AV2.pdf.
\textsuperscript{13} See Kobach v. EAC, No. 13-CV-4095 (D. Kan.), ECF Nos. 19, 20, 25, 101-1, 103.
• According to the Maricopa County election official, in 2005, the recorder’s office in Maricopa County referred evidence to the county attorney indicating that some individuals who had registered to vote in the county may have been noncitizens. To the best of the official’s recollection, there were 159 individuals implicated. A large number of these individuals had submitted statements to the jury commissioner that they were not citizens. The county attorney brought felony charges against ten noncitizens for filing false voter registration forms. EAC001740 ¶ 10.

Kansas

• According to an election official in the Kansas Secretary of State’s office, the office is able to review state driver license data to determine whether individual registrants may have been unlawfully registered to vote. For example, in 2009 and 2010, the office obtained a list of individuals who had obtained temporary driver’s licenses in Kansas, which are issued only to noncitizens, and compared that list to its list of registered voters. EAC000611 ¶ 2.

• According to the Kansas election official, upon comparing the temporary license and voter lists in 2009, the Kansas Secretary of State’s office identified 13 individuals who had been issued temporary driver’s licenses and were also registered to vote. EAC000611-12 ¶ 3. One of these individuals provided a naturalization number on his/her voter registration application. EAC000619 ¶¶ 3-4.

• According to referral letters sent in 2009 by the Kansas Secretary of State to four county attorneys, the information for these 13 individuals matched on name, date of birth, and last four digits of social security number. EAC000632; EAC000637; EAC000640; EAC000659. Documentation provided with the letters indicates that 9 of these individuals had submitted completed Kansas Voter Registration Application forms, EAC000634, -38, -42, -44, -46, -48, -61, -63, -66, and 2 had submitted voter registration applications through the Division of Motor Vehicles, EAC000650, -54. The documents do not indicate how the remaining 2 individuals registered.

• According to the Kansas election official, upon comparing the temporary license and voter lists in 2010, the Kansas Secretary of State’s office identified 6 individuals who had been issued temporary driver’s licenses and were registered to vote. EAC000620 ¶ 5. No additional information about these individuals has been submitted.

• According to the Kansas election official, in 2010, the election commissioner for Sedgwick County, Kansas, notified the Kansas Secretary of State’s office that he had been contacted by the U.S. Department of Homeland Security and provided the name of a noncitizen who was found to have registered to vote in Kansas. EAC000612 ¶ 4.
• According to the election commissioner for Sedgwick County, Kansas, in 2013, her office received a voter registration application submitted through the Kansas Division of Motor Vehicles by an individual who subsequently informed the office that he/she is not a U.S. citizen. EAC000625-26.

• According to the county clerk for Finney County, Kansas, in 2013, an individual submitted to her office a completed and signed Kansas Voter Registration Application form along with copies of a foreign birth certificate and a U.S. Permanent Resident Card. EAC000627-31.

The States argue that this evidence demonstrates that requiring additional proof of citizenship is necessary to enable them to enforce their citizenship requirements. EAC000564. However, we conclude that this is incorrect because (a) the evidence fails to establish that the registration of noncitizens is a significant problem in either state, sufficient to show that the States are, by virtue of the Federal Form, currently precluded from assessing the eligibility of Federal Form applicants, and (b) the evidence reflects the States’ ability to identify potential non-citizens and thereby enforce their voter qualifications relating to citizenship, even in the absence of the additional instructions they requested on the Federal Form.

The States argue that the evidence submitted demonstrates generally that noncitizens have registered to vote in Arizona and Kansas, EAC000605, and specifically that 20 noncitizens have registered to vote in Kansas, EAC000564-65. Several commenters question the reliability of the States’ contentions.14 For present purposes, however, we assume that Arizona has demonstrated that 196 noncitizens were registered to vote in that state and that Kansas has demonstrated that 21 noncitizens were registered to vote or attempted to register in that state.

14 The commenters point to two specific shortcomings: (1) they note that statements made to a jury commissioner are not always reliable, since some citizens may falsely claim to be non-citizens in order to avoid jury service, EAC001560, EAC001589; EAC001475, EAC001145; and (2) they point out that it is possible that the driver license database information that Kansas relied upon may include citizens who became naturalized after obtaining their license, EAC001560-61; see also EAC001473-74.
This data nevertheless fails to demonstrate that the States’ requests must be granted in order to enable them to assess the eligibility of Federal Form applicants.

At the time Kansas’s new proof-of-citizenship requirement took effect in January 2013, there were 1,762,330 registered voters in the state.\textsuperscript{15} Thus Kansas’s evidence at most suggests that 21 of 1,762,330 registered voters, approximately 0.001 percent, were unlawfully registered noncitizens around the time its new proof-of-citizenship requirement took effect. EAC001561-62; see also EAC000770; EAC001472.

At the time Proposition 200 took effect in January 2005, there were 2,706,223 active registered voters in Arizona.\textsuperscript{16} Thus Arizona’s evidence at most suggests that 196 of 2,706,223 registered voters, approximately 0.007 percent, were unlawfully registered noncitizens around the time that Proposition 200 took effect. EAC001561.

There were 1,598,721 active registered voters in Maricopa County at this time,\textsuperscript{17} so these 196 noncitizens comprised just 0.01 percent of registered voters in Maricopa County, also a very small percentage. See EAC000770; EAC001475. Additionally, as noted in one comment, during the Inter Tribal Council litigation, election officials from three other Arizona counties gave deposition testimony stating that they were not able to find any evidence of noncitizens registering to vote between 1996 and 2006. EAC001476, EAC001236-46.

By any measure, these percentages are exceedingly small. Certainly, the administration of elections, like all other complex functions performed by human beings, can never be


completely free of human error. In the context of voter registration systems containing millions of voters, the EAC finds that the small number of registered noncitizens that Arizona and Kansas point to is not cause to conclude that additional proof of citizenship must be required of applicants for either state to assess their eligibility, or that the Federal Form precludes those states from enforcing their voter qualifications.

Our conclusion that some level of human error is inevitable is reinforced by the evidence Kansas submitted suggesting that three noncitizens have registered to vote by submitting applications through the state’s Division of Motor Vehicles. As one comment notes, Kansas requires driver’s license applicants to provide documentation of their citizenship status. EAC001559-60 (citing http://www.ksrevenue.org/dmvproof.html). Thus, these registrants were already required to show, apparently at the time they were applying to register to vote (in connection with their simultaneous driver license transaction), the type of citizenship evidence the States now seek to require and yet they were still offered the opportunity to register to vote and their registrations were still accepted, both presumably as a result of human error. These cases provide no support for the proposition that Kansas’s requested instruction is necessary to enable it to enforce its citizenship requirement.

Finally, we note, as have several commenters, that the proof-of-citizenship laws enacted in Arizona, Kansas, and Georgia all exempt individuals who were registered at the time the laws took effect from complying with the new proof-of-citizenship requirements. These laws therefore treat previously registered voters differently from voters yet to register, but the States have not provided any evidence suggesting that voters attempting to register before the laws took effect were any more or less likely to be noncitizens than those attempting to register after the laws took effect. This suggests that the information required by the Federal Form has
historically been considered sufficient to assess voter eligibility, even in the recent past.

EAC001817. In conjunction with the paucity of evidence provided by the States regarding noncitizens registering to vote, this aspect of the laws suggests that the new requirements reflect the States’ legislative policy preferences and are not based on any demonstrated necessity.

EAC001562; EAC000892.

3. **Additional evidence noted by comments**

Several comments note evidence of noncitizens registering to vote in other states. *See,* e.g., EAC001607-08; EAC001544; EAC000683-84. Other comments note that efforts in other states have identified only small numbers of noncitizens on the voter rolls, *see* EAC1474-75, and that voter fraud generally is rare, *see* EAC001620. The evidence submitted does not suggest that there have been significant numbers of noncitizens found to have registered to vote in other states. Rather, the evidence appears similar in magnitude to that which Arizona and Kansas have submitted. In any event, we find that the limited anecdotal evidence from other states does not establish that Arizona, Kansas, and Georgia will be precluded from assessing the eligibility of Federal Form applicants if the Commission denies their requested instructions.

4. **Additional means of enforcing citizenship requirements**

Occasional occurrences of unlawful registrations are no more reflective of the inefficacy of the existing oaths and attestations for voter registration than are the occasional violations of any other laws that rely primarily on oaths and attestations, such as those prohibiting the filing of false or fraudulent tax returns. As long as a state is able to identify illegal registrations and address any violations (whether through removal from the voter rolls, criminal prosecution, and/or other means), and the occurrence of such violations is rare, then the state is able to enforce its voter qualifications. And as the Supreme Court noted in *Inter Tribal Council,* nothing
precludes a State from “deny[ing] registration based on information in their possession establishing the applicant’s ineligibility.” *Inter Tribal Council*, 133 S. Ct. at 2257.\(^{18}\)

As discussed below, the States have a myriad of means available to enforce their citizenship requirements without requiring additional information from Federal Form applicants.

**a) Criminal prosecution**

Section 8 of the NVRA mandates that states inform voter registration applicants of the “penalties provided by law for submission of a false voter registration application.” 42 U.S.C. § 1973gg-6(a)(5)(B). Section 9 of the NVRA and EAC regulations likewise require that information regarding criminal penalties be provided on the Federal Form “in print that is identical to that used in the attestation portion of the application.” *Id.* § 1973gg-7(b)(4)(i); 11 C.F.R. § 9428.4(b)(4). Federal law and the laws of Arizona, Georgia, and Kansas all impose serious (usually felony-level) criminal penalties for false or fraudulent registration and voting.\(^{19}\) Additionally, unlawful registration or voting by a non-citizen can result in deportation or inadmissibility for that non-citizen. *See* 8 U.S.C. §§ 1227(a)(3)(D), (a)(6), 1182(a)(6)(C)(2), (a)(10)(D).

\(^{18}\) The converse is also true: absent any evidence in the state’s possession that contradicts the specific information on the voter registration application, to which the applicant has attested under penalty of perjury, the registration official should accept the sworn application as sufficient proof of the applicant’s eligibility and register that applicant to vote in Federal elections in accordance with Section 8(a)(1) of the NVRA. *See* 42 U.S.C. § 1973gg-6(a)(1) (requiring States to “ensure that any eligible applicant is registered to vote” in Federal elections “if the valid voter registration form of the applicant” is submitted or received by the close of registration).

\(^{19}\) *See, e.g.*, 18 U.S.C. § 1015(f) (false claim of citizenship in connection with voter registration or voting; imprisonment for 5 years and a $250,000 fine); 42 U.S.C. § 15544(b) (same); 18 U.S.C. § 611 (Class A misdemeanor penalty for voting by aliens; imprisonment for 1 year and a $100,000 fine); 42 U.S.C. § 1973gg-10(2) (false or fraudulent registration or voting generally; imprisonment for 5 years and a $250,000 fine); 18 U.S.C. § 911 (false and willful misrepresentation of citizenship; imprisonment for 3 years and a $250,000 fine); Ariz. Rev. Stat. §§ 16-182 (false registration; class 6 felony), 16-1016 (illegal voting; class 5 felony); Ga. Code Ann. §§ 21-2-561 (false registration; felony; imprisonment for 10 years and a $100,000 fine), 21-2-571 (unlawful voting; felony; imprisonment for 10 years and a $100,000 fine); Kan. Stat. §§ 25-2411 (election perjury; felony), 25-2416 (voting without being qualified; misdemeanor).
The evidence submitted by Arizona and Kansas shows that the States are able to enforce their voter qualifications through the initiation of criminal investigations and/or prosecutions under their state criminal laws, where necessary. EAC000632-68; EAC001738-40. To be sure, the numbers of these criminal investigations and prosecutions appear to be quite small; however, there is no evidence in the record to suggest that the small number of criminal referrals is attributable to anything other than the strength of the deterrent effect resulting from the existence of these criminal laws.\(^{20}\) Indeed, as the ITCA commenters point out, Arizona officials have previously acknowledged this very fact. EAC001558-60 & n.12.

\[ \text{b) Coordination with driver licensing agencies} \]

One available measure is suggested by Kansas’s own evidence describing procedures to identify potential non-citizens on its voter rolls by comparing the list with a list of Kansas residents who hold temporary driver’s licenses issued to noncitizens. EAC000611-12 ¶¶ 2-3; EAC000620 ¶ 5. Using accurate, up-to-date, and otherwise reliable data, this procedure could potentially be applied to prospective registrants. Indeed, Section 202 of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312-15 (2005), requires state driver licensing agencies that wish for their IDs to be honored by federal agencies to collect documentary proof of citizenship for U.S. citizens, verify it, and retain copies of it in their databases.\(^{21}\) Section 303 of HAVA requires that voter registrants provide their driver’s license number or the last four digits

\[^{20}\] The ITCA commenters also note that the vast majority of these criminal investigations do not result in prosecutions. EAC001559-62.

of their Social Security number if they have one, and mandates that state election agencies coordinate with state driver licensing agencies to share certain database information relevant to voter registration. 42 U.S.C. § 15483. While HAVA does not require states to seek to verify citizenship as part of database comparisons, states have the discretion to undertake such a comparison as an initial step in identifying possible non-citizens, bearing in mind that the information in driver license databases may be older than that in voter registration databases.22

c) Comparison of juror responses

Another measure is suggested by Arizona’s submission: using information provided to a jury commissioner. A person’s response under oath to a court official that he or she is not a citizen would certainly provide probable cause for an election official to investigate whether the person, if registered as a voter, does not meet the citizenship qualification. Such responses relating to citizenship therefore provide election officials with another means of enforcing their voter qualifications.

d) The SAVE database

The United States Citizenship and Immigration Services agency maintains a database of the immigration/citizenship status of lawful noncitizen and naturalized citizen residents of the United States. See USCIS, SAVE Program, http://www.uscis.gov/save (last accessed Jan. 12, 2014). Government agencies may apply to use and access the federal SAVE database as one potential means of attempting to verify applicants’ immigration/citizenship status under appropriate circumstances. Id. Several Arizona county election offices are already using this database to attempt to verify citizenship of voter registration applicants. EAC000771.

22 As the ITCA commenters note, a driver’s citizenship status at the time he or she initially applies for a driver’s license is not necessarily determinative of his or her citizenship status at the time of that driver’s registration to vote. EAC001560-61.
e) Requesting and verifying birth record data

The National Association for Public Health Statistics and Information Systems (NAPHSIS), a national association of state vital records and public health statistics offices, has developed and implemented an electronic system called Electronic Verification of Vital Events (EVVE). The EVVE system allows member jurisdictions to immediately confirm birth record information for citizens virtually anywhere in the United States. Currently 50 of 55 U.S. states and territories are either online or in the process of getting online with the EVVE birth record query system.\(^\text{23}\) Thus, to the extent election officials are unable to confirm an applicant’s oath and attestation of citizenship on the voter registration application through coordinating with a driver licensing bureau or using the SAVE Database, they could follow up directly with the affected applicant and request additional information that would enable them to make a query through the EVVE system (such as place of birth, mother’s maiden name, etc.).

The above methods appear to provide effective means for identifying individuals whose citizenship status may warrant further investigation.\(^\text{24}\)

In conclusion, the Commission finds, based on the record before it, that the States are not “precluded...from obtaining the information necessary to enforce their voter qualifications,” and that the required oaths and attestations contained on the Federal Form are sufficient to enable the States to effectuate their citizenship requirements. \textit{Cf. Inter-Tribal Council}, 133 S. Ct. at 2259-60. Thus, the States have not shown that the EAC is under a “nondiscretionary duty,” \textit{id. at


\(^{24}\) Federal law also provides states with additional tools for verifying voter registration applications by mail. The NVRA allows states to require first-time registrants by mail to vote in person the first time (with limited exceptions). 42 U.S.C. § 1973gg-4(c). HAVA also requires states to take certain verification steps with regard to first time registrants by mail (with limited exceptions). 42 U.S.C. § 15483.
2260, to include the States’ requested instructions despite Congress’s previous determination, when it enacted the NVRA, that such instructions are generally “not necessary or consistent with the purposes of this Act,” could “permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act,” and “could also adversely affect the administration of the other registration programs…” H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).

F. The Requested Changes Would Undermine the Purposes of the NVRA.

1. The States’ requested changes would hinder voter registration for Federal elections.

As discussed above, Congress enacted the NVRA in part to “increase the number of eligible citizens who register to vote in elections for Federal office” and to “enhance[] the participation of eligible citizens as voters in elections for Federal office.” 42 U.S.C. § 1973gg(b). In enacting the statute, Congress found that “the right of citizens of the United States to vote is a fundamental right” and that “it is the duty of the Federal, State, and local governments to promote the exercise of that right.” Id. § 1973gg(a).

The district court in the Inter Tribal Council litigation found that between January 2005 and September 2007, over 31,000 applicants were “unable (initially) to register to vote because of Proposition 200.” Gonzalez v. Arizona, No. 06-CV-1268, slip op. at 13 (D. Ariz. Aug. 20, 2008), EAC001663. The court further found that of those applicants, only about 11,000 (roughly 30 percent) were subsequently able to register. Id. at 14, EAC001664. Several comments provide additional evidence showing that implementation of Arizona’s and Kansas’s heightened proof-of-citizenship requirements has hindered the registration of eligible voters for federal elections. The requirements impose burdens on all registrants, and they are especially burdensome to those citizens who do not already possess the requisite documentation.
EAC001821-23; EAC001465-71; EAC000771-73; EAC001563; EAC000705; EAC000895; EAC000901-07; EAC001620; EAC001804; EAC001839; EAC001601, EAC001603. Such burdens do not enhance voter participation, and they could result in a decrease in overall registration of eligible citizens. See, e.g., EAC0001823 (referencing news reports that since Kansas’s law took effect in January 2013, between 17,000 to 18,500 applicants have been placed in “suspense” status, mostly because of failure to satisfy the new citizenship proof requirements).

Based on this evidence, the EAC finds that granting the States’ requests would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA.

2. The States’ requested changes would thwart organized voter registration programs.

It is also clear from the text of the NVRA that one purpose of the statute’s mail registration provisions is to facilitate voter registration drives. Specifically, Section 6(b) requires state election officials to make mail voter registration forms, including the Federal Form, “available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.” 42 U.S.C. § 1973gg-4(b); see also Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349, 1353 (11th Cir. 2005) (NVRA encourages and protects community-based voter registration drives and obligates states to register eligible citizens if their valid registration forms are received by the registration deadline, thus “limit[ing] the states’ ability to reject forms meeting [the NVRA’s] standards”).

A number of comments state that the heightened proof of citizenship requirements imposed by Arizona and Kansas have led to a significant reduction in organized voter registration programs during the time those requirements have been in effect. The comments indicate that this is due primarily to the logistical difficulties in providing the required proof,
even for those that already possess it. EAC000772, EAC000710-19, EAC000737-42; EAC001466-67, EAC001469-70, EAC001176-80; EAC001620; EAC001825; EAC000904-07.

Based on the evidence submitted, the EAC finds that granting the States’ requests could discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form.

G. The Requested Proof-of-Citizenship Instructions Are Not Similar to Louisiana’s Request for Modifications to the State-Specific Instructions.

Arizona and Kansas contend that it would be unfair or arbitrary for the Commission to approve Louisiana’s 2012 request to modify the Federal Form’s state-specific instructions to include HAVA-compliant language, and not to approve Arizona’s and Kansas’s requests to include additional proof-of-citizenship instructions. In August 2012, the EAC approved Louisiana’s July 16, 2012, request to amend the state-specific instructions for Louisiana to provide that if the applicant lacks a Louisiana driver’s license or special identification card, or a Social Security number, he or she must attach to the registration application a copy of a current, valid photo identification, or a utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the applicant. EAC000167-71.

HAVA provides that federal voter registration applicants must provide their driver’s license number, if they have one, or the last four digits of their Social Security number. 42 U.S.C. § 15483(a)(5)(A)(i). If they do not provide such information at the time of registration and they are registering by mail for the first time in a state, they will generally be required to show one of the following forms of identification the first time they vote in a federal election, irrespective of state law: a “current and valid photo identification” or “a copy of a current utility

25 The Louisiana Secretary of State’s Office supports the States’ requests in this regard. EAC000216.
bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” Id. § 15483(b)(2)(A). One of the ways voters who register by mail can fulfill the HAVA ID requirement is to submit a copy of one of the HAVA-compliant forms of identification with their registration application. Id. § 15483(b)(3)(A).

Louisiana’s request to modify the state-specific instructions thus largely flowed from HAVA’s identification requirements.26 By contrast, the States’ requests here seek to require federal voter registration applicants to supply additional proof of their United States citizenship beyond the oaths and affirmations already included on the Federal Form, even though such a requirement had already specifically been rejected by Congress when it enacted the NVRA. These are fundamentally different types of requests, and the EAC does not act unfairly and arbitrarily by reasonably treating them differently.

H. The Decision by the Federal Voting Assistance Program to Grant Arizona’s Request Has No Bearing on the States’ Requests to the EAC.

Arizona notes that after passage of Proposition 200, the Federal Voting Assistance Program (“FVAP”) at the Department of Defense granted its request to add instructions regarding its proof-of-citizenship requirement to the Federal Post Card Application, a voter registration and absentee ballot application form for overseas citizens developed pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. § 1973ff(b)(2). EAC001702, EAC001750-51. However, the UOCAVA is a separate statute from the NVRA and contains no language similar to the NVRA’s limitation that the Federal Form “may require only

---

26 The League of Women Voters’ comments argue that Louisiana’s requested instructions regarding HAVA ID, see EAC000168, 000196, and the relevant portions of the Louisiana Election Code, see La. Rev. Stat. § 18:104(A)(16), (G), are not in full compliance with HAVA or the NVRA. EAC000760. The EAC will consider the issues the comments have raised. After consulting with Louisiana officials, the Commission will consider whether there are necessary and appropriate modifications to item 6 of the state-specific instructions for Louisiana on the Federal Form to clarify any lingering confusion and to ensure the instruction is in full compliance with the requirements of HAVA relating to federal elections.
such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 42 U.S.C. § 1973gg-7(b)(1). The FVAP’s decision therefore has no bearing on the States’ requests to the EAC.

I. The EAC’s Regulations Do Not Require Inclusion of State-Specific Instructions Relating Only to State and Local Elections.

Finally, Kansas contends that the EAC is required by its own regulations to include information relating to the state’s proof-of-citizenship requirements. EAC000565. Specifically, Kansas invokes 11 C.F.R. § 9428.3(b), which provides that “the [Federal Form’s] state-specific instructions shall contain . . . information regarding the state’s specific voter eligibility and registration requirements.” By the terms of the NVRA, the Federal Form is a “mail voter registration application form for elections for Federal office.” 42 U.S.C. § 1973gg-7(a)(2) (emphasis added). Thus, the EAC’s regulatory provision quoted above can only require the Form’s state-specific instructions to include voter eligibility and registration requirements relating to registration for Federal elections.

As discussed above, the Commission has determined, in accordance with Section 9 of the NVRA and EAC regulations and precedent, that additional proof of citizenship is not “necessary . . . to enable the appropriate State election official to assess the eligibility of the applicant,” cf. 42 U.S.C. § 1973gg-7(b)(1), and will not be required by the Federal Form for registration for federal elections. Accordingly, the EAC is under no obligation to include Kansas’s requested instruction because it would relate only to Kansas’s state and local elections.

V. Conclusion

For the foregoing reasons, the Commission DENIES the States’ requests.
**Final Agency Action:** This Memorandum of Decision shall constitute a final agency action within the meaning of 5 U.S.C. § 704. Notice of the issuance of this decision will be published in the Federal Register and posted on the EAC’s website, and copies of this decision will be served upon the chief election officials of the States of Arizona, Georgia, and Kansas, as well as all parties to the pending *Kobach v. EAC* litigation in the U.S. District Court for the District of Kansas.

**Done at Silver Spring, Maryland, this 17th day of January, 2014.**

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

BY:  

Alice P. Miller  
Chief Operating Officer and  
Acting Executive Director
January 17, 2014

Honorable Ken Bennett
Secretary of State
Office of the Arizona Secretary of State
1700 W. Washington Street, 7th Floor
Phoenix, AZ 85007-2808

Re: Docket No. EAC-2013-004: State Requests to Include Additional Proof of Citizenship Instructions on the National Mail Voter Registration Form

Dear Secretary Bennett:

I write in reference to your request dated June 19, 2013 for the U.S. Election Assistance Commission (“EAC”) to modify the state-specific instructions of the National Mail Voter Registration Form (“Federal Form”) to include instructions mandating that, as a precondition to registering to vote in federal elections in Arizona, applicants must provide additional proof of their United States citizenship not otherwise required by the Federal Form.

As you know, the EAC initially deferred consideration of your request pending the reestablishment of a quorum of EAC commissioners, in accordance with the EAC’s internal procedures. On December 13, 2013, the EAC was ordered by the United States District Court for the District of Kansas to render final agency action in regard to your request by January 17, 2014. The EAC solicited public comments regarding your request, see 78 Fed. Reg. 77666 (Dec. 24, 2013), and has reviewed those comments, including the submission from Arizona.

For the reasons discussed in the attached Memorandum of Decision, the Commission denies your request to modify the Federal Form’s state-specific instructions. The attached decision constitutes final agency action with respect to your request, in accordance with 5 U.S.C. § 704.

Sincerely,

Alice Miller
Acting Executive Director &
Chief Operating Officer
January 17, 2014

Honorable Brian P. Kemp
Secretary of State
214 State Capitol
Atlanta, Georgia 30334

Re: Docket No. EAC-2013-004: State Requests to Include Additional Proof of Citizenship Instructions on the National Mail Voter Registration Form

Dear Secretary Kemp:

I write in reference to your request dated August 1, 2013 for the U.S. Election Assistance Commission ("EAC") to modify the state-specific instructions of the National Mail Voter Registration Form ("Federal Form") to include instructions mandating that, as a precondition to registering to vote in federal elections in Georgia, applicants must provide additional proof of their United States citizenship not otherwise required by the Federal Form.

As you know, the EAC initially deferred consideration of your request pending the reestablishment of a quorum of EAC commissioners, in accordance with the EAC’s internal procedures. On December 13, 2013, the EAC was ordered by the United States District Court for the District of Kansas to render final agency action by January 17, 2014 in regard to requests submitted by the states of Arizona and Kansas which are similar to your request. Because the requests are similar, the EAC has determined that it would render a final determination on your request as well. The EAC solicited public comments regarding all three requests, see 78 Fed. Reg. 77666 (Dec. 24, 2013), and has reviewed those comments. The agency did not receive any comments from state officials in Georgia.

For the reasons discussed in the attached Memorandum of Decision, the Commission denies your request to modify the Federal Form’s state-specific instructions. The attached decision constitutes final agency action with respect to your request, in accordance with 5 U.S.C. § 704.

Sincerely,

Alice Miller
Acting Executive Director &
Chief Operating Officer
January 17, 2014

Honorable Kris W. Kobach
Secretary of State
Office of the Kansas Secretary of State
Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1594

Re: Docket No. EAC-2013-004: State Requests to Include Additional Proof of Citizenship Instructions on the National Mail Voter Registration Form

Dear Secretary Kobach:

I write in reference to your request dated August 9, 2012 for the U.S. Election Assistance Commission ("EAC") to modify the state-specific instructions of the National Mail Voter Registration Form ("Federal Form") to include instructions mandating that, as a precondition to registering to vote in federal elections in Kansas, applicants must provide additional proof of their United States citizenship not otherwise required by the Federal Form.

As you know, the EAC initially deferred consideration of your request pending the reestablishment of a quorum of EAC commissioners, in accordance with the EAC’s internal procedures. On December 13, 2013, the EAC was ordered by the United States District Court for the District of Kansas to render final agency action in regard to your request by January 17, 2014. The EAC solicited public comments regarding your request, see 78 Fed. Reg. 77666 (Dec. 24, 2013), and has reviewed those comments, including the submission from Kansas.

For the reasons discussed in the attached Memorandum of Decision, the Commission denies your request to modify the Federal Form’s state-specific instructions. The attached decision constitutes final agency action with respect to your request, in accordance with 5 U.S.C. § 704.

Sincerely,

Alice P. Miller
Chief Operating Officer and
Acting Executive Director

EAC001912