IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, et al.

Plaintiffs,

v.

UNITED STATES ELECTION ASSISTANCE
COMMISSION, et al.,

Defendants.

CIVIL ACTION NO.
5:13-CV-4095-EFM-DJW

CERTIFICATION OF ADMINISTRATIVE RECORD

Pursuant to 28 U.S.C. § 1746, I, WILLIAM P. BOEHM, declare as follows:

1. I am William P. Boehm, Deputy Director for Policy in the Division of Research, Policy, and Programs of the United States Election Assistance Commission. I am over the age of 18 and competent to testify as to the facts contained herein. I am the staff member principally responsible for processing state requests for modifications to the National Mail Voter Registration Form (“Federal Form”) maintained by the Commission pursuant to Section 9 of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-7, and the Commission’s implementing regulations, 11 C.F.R. Part 9428.

2. I certify that, to the best of my knowledge, information, and belief, the annexed documents constitute a true and complete copy of the agency records underlying the Commission’s actions concerning the State of Arizona’s December 12, 2005, request for modifications to the state-specific instructions of the Federal Form, in which a final decision was issued on March 6, 2006.


I certify under penalty of perjury that the foregoing is true and correct.

This 25th day of November, 2013.

WILLIAM P. BOEHM
Deputy Director for Policy
Division of Research, Policy, and Programs
United States Election Assistance Commission

EAC000001
Dear Secretary Brewer,

This letter responds to your office’s December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form (“Federal Registration Form” or “Federal Form”). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC’s requests for updates pertaining to the Federal Registration Form.

As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg et seq., (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona’s Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver’s license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State’s registration form and verification of the form. The proposition did not amend Arizona’s registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form’s acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form would have their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and March 6, 2006
Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States’ voter registration process for Federal elections. Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)); Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 793 -794 (7th Cir. 1995) (citing Smiley, 285 U.S. at 366, Ex parte Siebold, 100 U.S. 371 (1879) and United States v. Original Knights of the Ku Klux Klan, 250 F.Supp 330, 351 - 355 (E.D.La 1965)); Association of Community Organizations for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution “explicitly grants Congress the authority either to ‘make’ laws regarding federal elections... or to ‘alter’ the laws initially promulgated by the states. Thus... article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.” Miller, 129 F.3d at 836.

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (Edgar at 794), this does not limit the Federal authority to set voter registration procedures for such elections. Voting Rights Coalition, at 1413. This is true even where States have declared voter registration to be a voting qualification (Wilson, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (Edgar at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA’s regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. Voting Rights Coalition, 60 F.3d F.3d 1411; Edgar, 56 F.3d 791; Miller, 129 F.3d 833. The NVRA mandates that States “shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.” 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form. The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the

1 The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).
Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona’s voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101. These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state’s voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona’s statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a “checkbox.” (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C.§15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as “not necessary or consistent with the purpose of [the NVRA].” The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both “accept” and “use” the Federal Form. Any 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. Such acceptance and use of the Federal Form is subject only to HAVA’s verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

Thomas R. Wilkey
Executive Director

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2 These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

Dear Chairman DeGregorio:

I was extremely disappointed to receive a letter from the Election Assistance Commission's executive director, Thomas Wilkey, on Monday, March 6, 2006, that expresses his opinion that our State's proof of citizenship requirement when registering to vote is preempted by federal law with regard to the Federal Mail Voter Registration Form (Federal Form).

On November 2, 2004, over one million Arizona citizens passed into law Proposition 200, which requires all applications for voter registration in Arizona to be accompanied by satisfactory evidence of United States citizenship. Mr. Wilkey's letter provides questionable legal support for its conclusion that a state may not condition acceptance of the Federal Form upon receipt of proof of citizenship and I have asked the Arizona Attorney General to advise me on this matter.

What upsets me most is the manner in which the EAC has handled this issue. My staff proposed changes to the Arizona instructions to the Federal Form in December of 2005, to reflect our new proof of citizenship requirement. At no point over the past three months was my office ever told that the EAC was questioning whether federal law preempted Arizona's proof of citizenship requirement for registrants using the Federal Form. Moreover, I am told the Commission spent a lot of time researching this question, but never had the courtesy to ask the State of Arizona for its input. Although Mr. Wilkey and the other Commissioners attended the NASS/NASED meeting in early February along with my State Election Director Joseph Kanefield, no one reached out to him to inform me about this issue.

In addition, to make matters worse, my office began getting press inquiries shortly after receiving the letter. It is my understanding that one of the Commissioners distributed this letter before I even had a chance to review it with my staff. I find this very upsetting coming from a federal agency that I believe should be working with the States to implement the National Voter Registration Act and not against them.
Perhaps most importantly, this matter never appeared as an agenda item at any of the EAC's past public meetings and no formal vote was ever taken by the EAC to support Mr. Wilkey's opinion. I cannot help but feel that in your staff's haste to opine on this issue, the matter was not appropriately vetted by the Commission.

I therefore respectfully request that the Commission provide me an opportunity to respond to the legal points raised by Mr. Wilkey before taking a position on this issue, and then properly notice this matter for a future meeting at which time my input can be taken into consideration before a final vote is taken by the EAC. Thank you for considering my request.

Sincerely,

Janice K. Brewer
Arizona Secretary of State

cc: The Honorable John McCain
The Honorable John Kyl
The Honorable Rick Renzi
The Honorable Trent Franks
The Honorable John Shadegg
The Honorable Ed Pastor
The Honorable J.D. Hayworth
The Honorable Jeff Flake
The Honorable Raul Grijalva
The Honorable Jim Kolbe
The Honorable Terry Goddard
The Honorable Sam Reed, President,
National Association of Secretaries of State
Linda Lamone, President,
National Association of State Elections Directors
March 13, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue, N.W.
Washington, DC 20005

Dear Chairman DeGregorio,

As the Secretary of State and Chief Election Officer for the State of Arizona, I have significant concerns about the March 6, 2006, letter from your executive director asserting that Arizona may not implement its proof of citizenship law with respect to voters who register using a Federal Mail Voter Registration Form (Federal Form). In my mind, such a policy is completely inconsistent, unlawful, and without merit.

The executive director’s opinion is incorrect and unlawfully prevents the State of Arizona from implementing an important voting security measure with respect to those voters using the Federal Form. Arizona’s proof of citizenship requirement was passed by over one million voters in 2004, and was pre-cleared by the U.S. Department of Justice (DOJ) on January 24, 2005. In addition, DOJ separately pre-cleared our Arizona Voter Registration Form on May 6, 2005, which includes the proof of citizenship instructions now required of all citizens registering to vote in Arizona. The DOJ has civil enforcement power over the National Voter Registration Act, and has expressed no concern about Arizona’s proof of citizenship requirement when registering to vote.

As I stated in my March 9, 2006, letter, I believe your letter provides questionable legal support for its conclusion. After consulting with the Arizona Attorney General, I will instruct Arizona’s county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).
As I requested of you in December, I urge you to instruct voters using the Federal Form to register in Arizona that they provide sufficient proof of citizenship. To do otherwise would be incredibly irresponsible and may unnecessarily disenfranchise voters using the Federal Form to register.

Sincerely,

Janice K. Brewer
Arizona Secretary of State

JKB:kt
March 23, 2006

The Honorable Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

We have received your letter of March 13, 2006. While I know that both your office and the Election Assistance Commission (EAC) share the desire to serve the best interests of the citizens of Arizona, the Commission was disappointed to hear of your refusal to accept the Federal Voter Registration Form.

As you know, on March 6, 2006, the EAC sent you a letter stating that Arizona could not impose state registration requirements (mandating documentary evidence of citizenship as a condition of registration) on the Federal Voter Registration Form (Federal Form). The Federal Form is created by the EAC, consistent with and pursuant to the National Voter Registration Act (NVRA). This statute specifically mandates that all states use and accept the Federal Form. The authority of the Federal government to regulate Federal voter registration through the NVRA is a well settled matter of law. The Commission’s previous letter discussed the relevant authorities supporting our conclusions on this matter.

Your correspondence of March 13 did not provide any additional facts or legal analysis for the Commission’s consideration. The letter only noted your disagreement with our statement of the law and the fact that the state’s proof of citizenship requirement was pre-cleared by the Department of Justice (DOJ). However, the DOJ’s pre-clearance has no bearing on this issue. When the DOJ pre-clears state voting changes under Section 5 of the Voting Rights Act of 1965, they consider only “whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.” (28 C.F.R. §51.52). DOJ pre-clearance does not address NVRA compliance and certainly does not alter the requirements of the Federal Form.

It is clear from your letter that Arizona will refuse to accept the Federal Form unless it is supplemented with additional citizenship documentation. As stated in our prior letter, this policy is tantamount to rejecting the Federal Form. As the NVRA requires that each State use and accept the Federal Form, the EAC has no choice but to forward this matter to the DOJ for action. As always, we remain available to answer any questions or consider any additional information that you may have regarding this matter.

Sincerely,

[Signature]

Thomas R. Wilkey
Executive Director

Tel: (202) 566-3100  www.eac.gov  Fax: (202) 566-3127
Toll free: 1 (866) 747-1471
BEFORE THE ELECTION ASSISTANCE COMMISSION

In the Matter of )
) )
Arizona Request for Accommodation )
)

CERTIFICATION

I, Paul S. DeGregorio, Chairman of the U.S. Election Assistance Commission, do hereby certify that on July 11, 2006, the Commissioners voted on the above referenced matter. This matter proposed that the Commission accommodate Arizona’s proof of citizenship procedure by amending the state specific portion of the Federal Voter Registration Form. The matter also proposed a letter to communicate this decision to the state. All ballots were timely submitted.

After review of the ballots, I certify that the measure fails, having not achieved the requisite 3 votes required by law. Commissioners Davidson and DeGregorio voted affirmatively, and Commissioners Martinez and Hillman objected.

Attest:

July 31, 2006
Date

Paul S. DeGregorio
Chairman
MEMORANDUM

TO: EAC Commissioners

FROM: Paul S. DeGregorio, Chairman

SUBJECT: Arizona's Request for Accommodation

On June 20, 2006, the Arizona Secretary of State, Jan Brewer, forwarded a letter to my office (attached) requesting that the EAC change Arizona's state specific instructions on the Federal Voter Registration Form to incorporate the state's additional proof of citizenship procedures. This letter was sent following a U.S. District Court's decision denying a request for a Temporary Restraining Order filed to prevent enforcement of the proof of citizenship requirement (Proposition 200).

As you know, the EAC has previously refused Arizona's request to amend the Federal Form's state specific instructions. However, at present, that prior determination, the preliminary determination of the Court, and Arizona's position regarding the Federal Form have created significant confusion for the Arizona voters. Given this fact and our shared desire not to allow this confusion to disenfranchise Arizona voters, I recommend that we amend the Federal Form's state specific instructions to accommodate Arizona’s proof of citizenship procedure. To this end, I have attached a letter for your consideration. This letter communicates (1) the EAC decision to change to the Federal Form, and (2) its position regarding Federal authority over the Federal Registration Form.

RECOMMENDATIONS:

(1) Approve, via tally vote, the accommodation of Arizona's proof of citizenship procedure by amending the state specific portion of the Federal Voter Registration Form; and

(2) Review and approve, via tally vote, the attached letter to communicate the decision.
The Honorable Jan Brewer  
Arizona Secretary of State  
1700 West Washington Street, 7th Floor  
Phoenix, AZ 85007-2888

Secretary Brewer,

This letter responds to your correspondence of June 20, 2006, in which you requested that the U.S. Election Assistance Commission ("EAC") change Arizona’s state specific instructions on the Federal Voter Registration Form to incorporate the state’s additional proof of citizenship procedures. You have made this request in light of a recent U.S. District Court decision on a Temporary Restraining Order (Gonzalez v. State of Arizona, No. CV 06-1268-PHX-ROS). Ultimately, this preliminary decision has raised considerable confusion regarding Arizona’s registration process. As such, the EAC is persuaded by your request to stem this confusion and prevent the potential disenfranchisement of Arizona voters. To this end, the EAC will amend the Federal Form to accommodate Arizona’s proof of citizenship procedure.

The EAC reviewed the Court’s opinion referenced in your letter. Unfortunately, its application to the Federal regulation of voter registration under the National Voter Registration Act is unclear. The judge’s opinion ultimately concluded only that Proposition 200 does not “conflict with a plain language reading of the NVRA.” A conclusion which the EAC does not and has not challenged. While the court clearly stated that the NVRA sets the “floor” regarding voter registration in Federal elections, it failed to discuss the impact of Federal regulatory action. The NVRA allows for the use of two forms to be used in voter registration, a state form and a Federal form. While the state may determine the requirements of its voter registration form (consistent with the minimum requirements of the NVRA), the EAC determines the requirements of the Federal Form. This form must be accepted and used by states. Ultimately, the Court’s opinion did not address the significance of specific action taken by a Federal Regulatory Agency in the creation of the Federal Form. To address this confusion, the EAC has decided to make its issuance of Federal regulations regarding the NVRA’s Federal Form a priority. The EAC is required to prescribe such regulation pursuant to the NVRA (42 U.S.C. 1973gg-7).

EAC staff will contact your office promptly to coordinate the changes to Arizona’s state specific instructions on the Federal Form. Your cooperation in this matter is appreciated. If you have any questions or concerns regarding the above, please contact the undersigned.

Sincerely,

Paul S. DeGregorio  
Chair

1 In fact, in the original March 6, 2006 letter to your office, the EAC clearly stated that Arizona may apply Proposition 200 citizenship requirements to its state form as long as it did so in a manner that met the minimum requirements of the NVRA.
June 20, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue N.W.
Washington, DC 20005

Dear Chairman DeGregorio:

Yesterday the United States District Court for the District of Arizona in Gonzalez v. State of Arizona, No. CV 06-1268-PHX-ROS, held that the National Voter Registration Act’s (NVRA) language regarding the Federal Mail Voter Registration Form (Federal Form) does not preempt Arizona’s requirement that individuals present proof of citizenship at the time they attempt to register using that form.

As you know, the correspondence dated March 6, 2006, from the Election Assistance Commission’s Executive Director, Thomas Wilkey, precipitated this lawsuit and was used as an exhibit by the plaintiffs. In that letter Mr. Wilkey asserted that Arizona’s proof of citizenship requirement when registering to vote with the federal form conflicted with the NVRA. Yesterday’s 15 page court opinion and order clearly ruled to the contrary:

Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose and goal is to increase registration of “eligible citizens.” 42 U.S.C. § 1973gg(b)(1)-(2). Providing proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants. Arizona’s proof of citizenship requirement does not conflict with the plain language of the NVRA.

Order at p. 9. (Emphasis added)

Given the court’s sound rejection of Mr. Wilkey’s analysis, I once again implore you to properly instruct Arizona voters using the Federal Form about our proof of citizenship requirement. To do otherwise would further disenfranchise Arizona voters using the federal form who unknowingly rely on your erroneous instructions. I am sure that the Commission agrees with me that we should do everything possible to properly
educate and inform voters about our new voter registration requirements, and I look forward to your cooperation in this matter.

For your convenience, I have attached the proposed Arizona instructions that were submitted by my staff to yours on December 12, 2005.

Sincerely,

Janice K. Brewer
Arizona Secretary of State

Enclosure

cc: The Honorable John McCain
    The Honorable John Kyl
    The Honorable Rick Renzi
    The Honorable Trent Franks
    The Honorable John Shadegg
    The Honorable Ed Pastor
    The Honorable J.D. Hayworth
    The Honorable Jeff Flake
    The Honorable Raul Grijalva
    The Honorable Jim Kolbe
    The Honorable Terry Goddard
    The Honorable Sam Reed, President, National Association of Secretaries of State
    Kevin Kennedy, President, National Association of State Elections Directors
4 Revised 10/29/2003 State Instructions

Arizona

Registration Deadline — 29 days before the election.

6. ID Number. Your completed voter registration form must contain the number of your Arizona driver license, or non-operating identification license issued pursuant to A.R.S. § 28-3165, if the license is current and valid. If you do not have a current and valid Arizona driver license or non-operating identification license, you must include the last four digits of your social security number if one has been issued to you. If you do not have a current and valid driver license or non-operating identification license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the Secretary of State.

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or non-operating identification license issued after October 1, 1996, this will serve as proof of citizenship and no additional documents are needed. If not, you must attach proof of citizenship to the form. Only one acceptable form of proof is needed to register to vote.

The following is a list of acceptable documents to establish your citizenship:

- A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your current legal name
- A legible photocopy of pertinent pages of a United States passport identifying the applicant
- Presentation to the County Recorder of United States naturalization documents or the number of the certificate of naturalization in box 629 on the front of this form
- The applicant’s Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal Enrollment Number in box 48 on the front of this voter registration form
- A legible photocopy of a driver license or non-operating identification from another state within the United States if the license indicates that the applicant has provided satisfactory proof of citizenship
- A legible photocopy of a Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.

If you need to include a photocopy of proof of citizenship, please fold the proof along with the Voter Registration Application and place both items in an envelope and mail to the address provided below.

7. Choice of Party. If you are registered in a political party which has qualified for ballot recognition, you will be permitted to vote the primary election ballot for that party. If you are registered as an independent, no party preference or as a member of a party which is not qualified for ballot recognition, you may select and vote one primary election ballot for one of the recognized political parties.


9. Signature. To register in Arizona you must:

- Must be a Citizen of the United States of America
- Must be a resident of Arizona and the county listed on your registration
- Must be 18 years of age or more on or before the day of the next regular General Election
- Must not be a convicted felon, unless your civil rights have been restored
- Must not have been adjudicated incompetent
Attention: Proof of Voter Identification

(Pursuant to the Help America Vote Act of 2002)

If this form is submitted by mail and it is the first time you have registered to vote in your jurisdiction, you MUST submit current, valid proof of identification with this application or the first time you vote in a federal election. To send it with this application you should enclose one of the following:

1. A COPY of a current and valid photo identification OR
2. A COPY of a current utility bill, bank statement, government check, paycheck, or other government document that shows your name and address in the jurisdiction.

Submitting your proof of identification now with the application will allow you to avoid the federal requirement to show this proof at the polling place or, if voting by mail, to avoid sending it with your mail-in ballot. If you do not provide proof of identification, you may cast a provisional ballot.

Voters may also be required to show proof of identification under State law.

Mailing address:
Secretary of State/Elections
1700 W. Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Website: www.azsos.gov
TALLY VOTE MATTER

DATE & TIME OF TRANSMITTAL: July 6, 2006, 5:00 p.m.

BALLOT DEADLINE: July 10, 2006, 7:00 p.m. (time extension)

COMMISSIONERS: DAVIDSON, DeGREGORIO, HILLMAN, MARTINEZ

SUBJECT: ARIZONA'S REQUEST FOR ACCOMMODATION

(✓) I approve the recommendation.

( ) I disapprove the recommendation.

( ) I object to the recommendation.

( ) I am recused from voting.

COMMENTS: __________________________________________

__________________________________________

DATE: July 10, 2006  SIGNATURE: Paul DeGregorio

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the EAC Chairman. Please return the ballot no later than date and time shown above.

FROM THOMAS WILKEY, EXECUTIVE DIRECTOR
To Juliet E. Thompson/EAC/GOV, Gavin S. Gilmour/EAC/GOV,
DeAnna M. Smith/EAC/GOV@EAC, Amie J.
Sherrill/EAC/GOV
cc
bcc
Subject Tally Vote on AZ Accommodation letter

This is to authorize my Special Assistant, Amie Sherrill, to mark my vote as approving the recommendation regarding the Arizona Accommodation letter referenced in the Tally Vote and to affix my signature to that Tally Vote document, a copy of which is attached to this e-mail.

Tally Vote AZ Accommodation July 2006.pdf

Paul DeGregorio
Chairman
US Election Assistance Commission
1225 New York Ave, NW
Suite 1100
Washington, DC 20005
1-866-747-1471 toll-free
202-566-3100
202-566-3127 (FAX)
pdeggregorio@eac.gov
www.eac.gov
TALLY VOTE MATTER

DATE & TIME OF TRANSMITTAL: July 6, 2006, 5:00 p.m.

BALLOT DEADLINE: July 11, 2006, 7:00 p.m. (date and time extension)

COMMISSIONERS: DAVIDSON, DEGREGORIO, HILLMAN, MARTINEZ

SUBJECT: ARIZONA'S REQUEST FOR ACCOMMODATION

( ) I approve the recommendation.

(✓) I disapprove the recommendation.

( ) I object to the recommendation.

( ) I am recused from voting.

COMMENTS: Please see Position Statement

DATE: 7/11/06   SIGNATURE: Ray Martinez

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the EAC Chairman. Please return the ballot no later than date and time shown above.

FROM THOMAS WILKEY, EXECUTIVE DIRECTOR
POSITION STATEMENT
COMMISSIONER RAY MARTINEZ III
JULY 10, 2006

ON THE MATTER REGARDING EAC TALLY VOTE DATED JULY 6, 2006:
"ARIZONA’S REQUEST FOR ACCOMMODATION"

On Thursday, July 6, 2006, EAC Chairman Paul DeGregorio proposed, via a Tally Vote, that the EAC “...amend the Federal Form’s state specific instructions to accommodate Arizona’s proof of citizenship procedure.” In a letter from EAC Executive Director Tom Wilkey to the State of Arizona, dated March 6, 2006, the EAC had previously refused Arizona’s request to amend its state specific instructions affixed to the Federal Form and condition the use and acceptance of the Federal Form upon an applicant providing proof of citizenship.\(^1\) Because of the significance of this proposed Tally Vote, I write today to briefly explain my rationale for disapproval.

INAPPROPRIATE USE OF TALLY VOTE PROCEDURE

Throughout its 32-month history, the EAC has utilized Tally Votes for routine matters, most typically, for disbursement of Requirements Payments to States under Title II of HAVA.\(^2\) Never has the EAC utilized a Tally Vote procedure to overrule a decision of our executive director. To date, the EAC has recorded public votes on matters such as election of officers, adoption of the first set of voluntary guidance regarding statewide voter registration systems, and adoption of the Voluntary Voting System Guidelines of 2005. Moreover, on the one previous occasion when the EAC did consider a significant

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\(^1\) See, \textit{Letter from Thomas Wilkey to Arizona Secretary of State}, dated March 6, 2006.
matter related to the National Voter Registration Act of 1993, the EAC took a public (and unanimous) vote to decide the issue. In my view, this decision is too significant to be taken without the benefit of a properly noticed and convened public meeting or hearing. This is particularly true in light of the fact that if the EAC were to approve this Tally Vote, we would be drastically altering our agency’s interpretation of NVRA on a matter of fundamental importance to the American public.

Importantly, while each commissioner possesses the authority under rules adopted by the EAC to procedurally object to any Tally Vote, delay its final implementation and require it to be debated at a future EAC public meeting, I will not exercise such authority today. In short, I stand by the EAC’s previously articulated legal rationale on this matter and I believe no further EAC action is currently warranted, especially in light of the fact that the EAC is not a party to any litigation on this matter nor has the EAC been ordered to take specific action by any court.

My further rationale for disapproval of this proposed Tally Vote is stated below:

1. **Confusion for Arizona Voters.** Chairman DeGregorio contends that the EAC’s prior determination of this matter, together with the “preliminary” decision by U.S. District Court Judge Roslyn Silver as well as Arizona’s current position regarding the Federal Form “...have created significant confusion for the Arizona voters.” As a result, Chairman DeGregorio proposes that we “…not allow this confusion to disenfranchise Arizona voters [and that] we amend the Federal Form’s state specific instructions to accommodate Arizona’s proof of citizenship procedure.”

   However, nothing has changed with regard to how Arizona treats the Federal Form, even after the opinion issued last month by Judge Silver. That is, Arizona Secretary of State Jan Brewer, pursuant to Proposition 200, has previously

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4 See, EAC Tally Vote “Procedures for Voting by Circulation,” certified by a vote of 4-0 on May 4, 2004.
5 *Letter from Thomas Wilkey to Arizona Secretary of State*, dated March 6, 2006.
instructed Arizona county recorders to treat the Federal Form as incomplete if an applicant submits the form without appropriate proof of citizenship. Judge Silver’s opinion does not bar the State of Arizona from requiring proof of citizenship upon receipt of the Federal Form. Accordingly, any voter registration applicant utilizing the Federal Form in Arizona is today treated in the exact same manner as before Judge Silver’s opinion. Furthermore, since continued litigation and/or appeals on this matter are likely – including a hearing currently pending before Judge Silver later this month to decide the merits of a preliminary injunction sought by the plaintiffs in Gonzalez v. State of Arizona, (No. CV 06-1268-PHX-ROS) – it is evident that any action today by the EAC may be premature.

Furthermore, reversing our current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue. Already, at least one state is considering legislation in the wake of Arizona’s decision to require proof of citizenship upon voter registration. Other states are likely to follow. For the EAC to reverse its position at a time when the courts have only just begun to contemplate this important issue is untimely at best. What about the confusion that will be caused if today we grant Arizona its request for an accommodation and other States are left wondering whether they too, should (or can) be requiring proof of citizenship with the Federal Form? Will each State need to specifically come before the EAC to request an accommodation? Will each State need to pass a law or promulgate an administrative rule requiring proof of citizenship with the Federal Form before requesting an accommodation from the EAC? Or, will this specific decision for Arizona be deemed by the EAC as applicable across the board for all NVRA-covered jurisdictions? These are but a few of the many questions which will inevitably arise if we were to approve this Tally Vote – questions, by the way,

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which this Tally Vote does not address. State and local jurisdictions are best served by an EAC that exercises its limited authority under both NVRA and HAVA in a measured, deliberate and consistent manner.

Given that the EAC is not a party to the specific litigation referenced by Chairman DeGregorio; that the EAC has not been ordered by Judge Silver or any other court to take any specific action on this matter; that a voter registration applicant in Arizona is treated exactly the same today as before last month’s opinion by Judge Silver; that other States will be influenced by actions taken on this matter both by the courts and the EAC; and, that continued litigation and appeals are likely on this matter, it is clear that the EAC should today refrain from any further action that may ultimately cause even greater uncertainty not just for voters in Arizona, but for the entire country.

2. **EAC Precedent Already Established.** Last year, the EAC was presented with an analogous situation as that which confronts us today regarding the citizenship requirement in Arizona. That is, after passage of a new Florida law mandating that a voter registration applicant check a box attesting to the applicant’s mental capacity, the State of Florida requested that the EAC amend its state-specific instructions affixed to the Federal Form to condition the use and acceptance of the Federal Form in a similar manner as is now done on the state-issued Florida voter registration form.

In rejecting Florida’s request to allow conditional use and acceptance of the Federal Form, the EAC general counsel’s office, with the unanimous consent of the EAC commissioners, wrote the following:

“...Florida’s proposed policy, to treat all Federal Mail Registration Forms as incomplete, violates the provisions of the NVRA. The NVRA requires States to both “accept” and “use” the Federal Form. Under Florida’s policy, State officials would take in the Federal Form, only to turn around and require its user to re-file or otherwise supplement their
federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither “accepted” nor “used” by the State. That language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. **Such acceptance and use of the Federal Form is subject only to HAVA’s verification mandate.** 42 U.S.C. 15483.\(^8\) (Emphasis added.)

Clearly, in refusing Florida’s request last year, the EAC not only established its own interpretive precedent regarding the use and acceptance of the Federal Form, but it also upheld established precedent from our predecessor agency, the Federal Election Commission. It is difficult for me to understand how today, we could reverse our agency’s position on this matter as it relates specifically to Arizona, and yet, somehow distinguish why Florida should not also be allowed to similarly condition the Federal Form. And, if this were to result, we would find ourselves headed down that perilous “slippery slope” where registration requirements would be markedly different from state to state for any applicant using the Federal Form – one of the principle reasons why Congress passed NVRA and created the Federal Form in the first place.

3. **Break from Consensus Decision-Making by the EAC.** This proposed Tally Vote will mark the first time that a decision by the EAC commissioners will be decided by a less than unanimous basis.\(^9\) As such, regardless of the ultimate outcome, I am deeply troubled that a Tally Vote on this matter could produce a fundamental turning point in how present and future EAC commissioners approach contentious election administration issues. This, in my view, would be an unfortunate development for this agency. While public opinion among EAC

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\(^8\) See, Letter from Gavin Gilmour, Associate General Counsel, to Dawn Roberts, Director of the Division of Elections, July 26, 2005.

\(^9\) At least one hundred Tally Votes have been recorded by the EAC, with all Commissioners voting in the affirmative for each of the prior Tally Votes.
stakeholders is still mixed as to the benefits and drawbacks of a federal agency such as the EAC, there has been praise from nearly all fronts for the way the EAC has previously navigated difficult, politically-tinged issues while still maintaining unanimity on such matters.

For example, in the months leading up to the November 2004 presidential election, the issue regarding “casting” and “counting” of provisional ballots received much media scrutiny, as well as significant litigation in both state and federal courts throughout the country. Rather than wade directly into the issue by utilizing our voluntary guidance authority under Sections 311 and 312 of HAVA\(^\text{10}\) and, despite significant pressure to do so from various partisan interests, the EAC was able to deftly navigate this contentious issue. Ultimately, the EAC unanimously passed a timely resolution regarding provisional voting\(^\text{11}\) and prudently allowed the courts to decide this controversial and politically-charged matter.

Likewise, the EAC faced similar issues on at least two occasions last year. In March of 2005, the EAC was apprised of a decision by the State of Arizona to condition the casting of provisional ballots in federal elections to the showing of proper voter identification as required by Proposition 200. In response, the EAC commissioners unanimously agreed to initiate collaborative discussions with the Department of Justice (DOJ) to interject our agency’s view that such conditioning of provisional ballots was inconsistent with HAVA. Ultimately, DOJ clarified its previously-issued pre-clearance letter to Arizona and Arizona in turn, eliminated the conflict between Proposition 200 and HAVA’s provisional voting requirements.

Similarly, as has already been explained, the EAC was asked last year by the State of Florida to amend its state-specific instructions affixed to the Federal Form in order to condition the use and acceptance of the Federal Form upon the applicant.


furnishing additional information regarding mental capacity. After careful analysis, the EAC’s general counsel, with the unanimous support of EAC commissioners, issued a determination to Florida which upheld the 13-year precedent of the NVRA – that the Federal Form, as promulgated by the EAC, must be unconditionally used and accepted by all NVRA-jurisdictions.

What is significant about the examples cited above – which involve issues that touch upon both the voluntary guidance and limited regulatory authority possessed by the EAC – is that when faced with these politically difficult decisions, the EAC commissioners have heretofore chosen a consensus-driven path that does not seek to alter the carefully crafted balance of federal/state roles regarding election administration. Such a measured and deliberate approach is most appropriate at this particular time for the EAC, especially as we approach a contentious 2006 general election in which state and local election administrators will need the support, resources and credibility of a fully functioning EAC. My strong concern is that this particular Tally Vote may lead the EAC down a path that many EAC stakeholders have explicitly said they do not want: an overly partisan federal agency that is more prone to deadlock than to fulfilling its ultimate and, in my view, most important promise of serving as a national clearinghouse and creating the “gold standard” in national voting system standards and certification.

CONCLUSION

Lastly, I would like to reiterate my ongoing commitment to the essential role played by state and local governments in administering the process of election administration. As an EAC commissioner, I have made it my priority to build a genuine and lasting partnership with election officials at all levels of government – irrespective of political party affiliation – and I have actively sought their input to guide my work on the EAC. I will continue to honor and support the strong tradition of state and local control over the process of election administration. I would also like to specifically mention the high personal regard I have for Arizona Secretary of State Jan Brewer. She and I have had a chance to extensively discuss this matter and, despite our obvious policy disagreement, I
believe she is committed to serving the people of Arizona with integrity and fairness – as she has throughout her extensive and notable career in public service.

Perhaps it is inevitable that someday, Congress will decide to vest greater authority upon the EAC, particularly as politically-charged issues become more frequent. While I reserve judgment today on whether or not such a development merits consideration, the EAC that currently exists – as envisioned by nearly all who participated in the development of HAVA – was one relegated largely to voluntary guidance and an advisory role on matters of election administration. As such, when any matter comes before this agency which would significantly alter the carefully crafted balance of federal/state authority that is implicit in laws such as NVRA and HAVA, I believe the EAC has an obligation to exercise its voluntary guidance and regulatory authority in the most limited, deliberative and transparent manner possible.

For the reasons put forth in Mr. Wilkey’s letter to Arizona dated March 6, 2006, and, after careful and due consideration of Judge Silver’s opinion, I continue to believe that our current agency position accurately reflects the plain language of NVRA, as well as Congressional intent in passing this historic law.

While I respect Chairman DeGregorio’s right to bring this matter before the EAC, for the reasons stated above, I respectfully disapprove of this proposed Tally Vote.

Respectfully Submitted,

Ray Martinez III

COMMISSIONER RAY MARTINEZ III

July 10, 2006
TALLY VOTE MATTER

DATE & TIME OF TRANSMITTAL: July 6, 2006, 5:00 p.m.

BALLOT DEADLINE: July 10, 2006, 5:00 p.m.

COMMISSIONERS: DAVIDSON, DEGREGORIO, HILLMAN, MARTINEZ

SUBJECT: ARIZONA’S REQUEST FOR ACCOMMODATION

(✓) I approve the recommendation.

( ) I disapprove the recommendation.

( ) I object to the recommendation.

( ) I am recused from voting.

COMMENTS: ____________________________

__________________________________________

DATE: 7/7/06 SIGNATURE: ____________________________

E. Collier for Commissioner

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the EAC Chairman. Please return the ballot no later than date and time shown above.

FROM PAUL DEGREGORIO, CHAIRMAN
Donetta L.
Davidson/EAC/GOV
07/07/2006 04:53 PM
To: Elieen L. Collver/EAC/GOV@EAC
cc
bcc
Subject: Re: tally vote has been faxed...

Elle you can sign the Arizona’s tally vote for the letter for me that I approve

Sent from my BlackBerry Wireless Handheld
Elieen L. Collver

From: Elieen L. Collver
Sent: 07/07/2006 11:42 AM
To: Donetta Davidson
Subject: tally vote has been faxed...

Elle L.K Collver
U.S. Election Assistance Commission
1225 New York Avenue, Suite 1100
Washington, D.C. 20005
office: (202) 566-2256
blackberry: (202) 294-9251
www.eac.gov
DATE & TIME OF TRANSMITTAL: July 6, 2006, 5:00 p.m.

BALLOT DEADLINE: July 11, 2006, 7:00 p.m. (date and time extension)

COMMISSIONERS: DAVIDSON, DeGREGORIO, HILLMAN, MARTINEZ

SUBJECT: ARIZONA'S REQUEST FOR ACCOMMODATION

I approve the recommendation.

I disapprove the recommendation.

I object to the recommendation.

I am recused from voting.

COMMENTS: The attached memo is an integral part of my response to this Tally Vote.

DATE: 11 July 2006

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the EAC Chairman. Please return the ballot no later than date and time shown above.

FROM THOMAS WILKEY, EXECUTIVE DIRECTOR
MEMORANDUM

TO : Paul DeGregorio, Chairman
FROM: Gracia Hillman, Commissioner
DATE: July 11, 2006
RE: Tally Vote Matter, Arizona’s Request for Accommodation

I vote to disapprove the recommendation for the following reasons:

This is a premature decision. We do not yet have the full body of information that informs about the decision we have been asked to make (NVRA legislative history, DOJ’s opinion and supporting rationale, and the 9th Circuit Court’s final ruling with respect to the pending lawsuit).

The proposed response letter to Arizona, which is attached to the Tally Vote recommendation, says at the end of (draft) paragraph two that EAC has decided to make its issuance of Federal regulations regarding the NVRA Federal Form a priority. Passing the recommendation embodied in the Tally Vote would be putting the cart before the horse. Rather, I think it prudent that EAC put the horse before the cart and immediately undertake prioritized work to interpret NVRA and issue regulations before we make a decision on Arizona’s request.

To that end, I would welcome the opportunity for the commission to deliberate this matter in consultation with the chief election officers of States, the EAC Board of Advisors, the EAC Standards Board, and others with direct interest in this matter. And we should do so in the context of NVRA in its totality. We have a responsibility to honor Congress’s intent when it passed NVRA. We should make this deliberation a top priority for this summer, equal to the implementation of our program to test and certify voting systems.

Additionally, on March 23, 2006, EAC General Counsel Hodgkins forwarded information about Arizona’s position on its use of the NVRA form to John Tanner at DOJ as the federal agency charged with enforcement of NVRA. To date, we have not learned what DOJ’s opinion is on this matter and what it is doing to follow up on EAC’s referral.

With respect to the pending lawsuit, EAC should allow the legal process to run its full course. In the ensuing period, Secretary Brewer has instructed the county recorders to notify all eligible voters that proof of citizenship is required when registering to vote. Simultaneously, EAC should do its work to interpret NVRA and formulate regulations regarding the NVRA form to clarify any ambiguities that now exist.

We should not back peddle now but rather maintain confidence that the decision of our Executive Director to deny Arizona’s original request to change its state instructions on the NVRA form was right.

Again, I reiterate that EAC should begin immediately to establish a process that will provide the widest possible body of information for us to consider. We should then deliberate this matter in consultation with the chief election officers of States, the EAC Board of Advisors, the EAC Standards Board, and others with direct interest in this matter. And we should do so in the context of NVRA in its totality.
DATE & TIME OF TRANSMITTAL: July 6, 2006, 5:00 p.m.

BALLOT DEADLINE: July 10, 2006, 5:00 p.m.

COMMISSIONERS: DAVIDSON, DeGREGORIO, HILLMAN, MARTINEZ

SUBJECT: ARIZONA'S REQUEST FOR ACCOMMODATION

( ) I approve the recommendation.

( ) I disapprove the recommendation.

( ) I object to the recommendation.

( ) I am recused from voting.

COMMENTS: ____________________________________________________________

_______________________________________________________________________

_______________________________________________________________________

DATE: ________________ SIGNATURE: ________________________________

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the EAC Chairman. Please return the ballot no later than date and time shown above.

FROM PAUL DEGREGORIO, CHAIRMAN