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THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

Aaron Belenky, *et al.*,)
Plaintiffs,)
)
v.) Case No. 13C1331
)
Kris Kobach, *et al.*,) Division 7
Defendants.)
)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

COME NOW Plaintiffs, by and through their undersigned counsel, submit the following Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment. The undisputed facts establish that Defendants administer *ad hoc* registration procedures for Kansas citizens who register to vote using the federal voter registration form (the "Federal Form"), segregating them into a separate category of voters who are denied the right to vote in state and local elections, and who have fewer rights than other electors in a host of respects. This Court's recent ruling on August 21, 2015 ("Order") establishes that, as a matter of law, these "dual registration" procedures violate the Kansas Constitution and state law in at least three respects.

First, Plaintiffs have established as a matter of law that the Defendants' directives instructing counties to segregate voters into two groups—those who can vote in all elections, and those who can vote in federal elections only—creates an *ad hoc* dual system of registration and election administration that is "wholly without a basis of legislative authority" and contrary to

existing state statutes. Order at 27. *Second*, Defendants’ *ad hoc* system violates the Filing Act and remains unlawful whether or not an election includes a federal contest because the Defendants have refused to promulgate or publish the underlying rules and regulations for administering dual elections. *Third*, Plaintiffs have established as a matter of law that assigning vastly different rights to similarly situated voters violates the Kansas Constitution’s guarantee of equal protection and compromises the constitutional right to ballot secrecy without compelling justification.

For the reasons stated in the Court’s August 21, 2015 order, and outlined below, Plaintiffs have a right to relief as a matter of law.

STATEMENT OF UNCONTESTED MATERIAL FACTS

Voter Registration in Kansas

1. Kansas law provides that “[t]he secretary of state and deputy assistant secretaries of state may register voters on a statewide basis.” K.S.A. § 25-2323.
2. Kansas law requires the Secretary of State to establish a centralized voter registration database, which “shall include all necessary voter registration information from every county within the state of Kansas.” K.S.A. § 25-2304(b).
3. In Kansas, eligible voters may register to vote by using any one of the following three forms: (1) a state form approved by the Secretary of State (the “State Form”), *see* K.S.A. § 25-2309(a); (2) the Federal Form, as required by the National Voter Registration Act of 1993 (“NVRA”), *see id.*; or (3) the Federal Post Card Application (the “FPCA”), prescribed by federal law and used by overseas citizens including those in the federal services, *see* K.S.A. § 25-1215.

4. Prior to 2013, all three applications contained the same method for verification of U.S. citizenship: an attestation as to the applicant's U.S. citizenship, signed by the applicant under penalty of perjury. *See* K.S.A. §§ 25-2309(a)-(b), 25-1216(a); 52 U.S.C. § 20302(a)(3).

5. Prior to 2013, eligible voters completing any of these forms and attesting to their U.S. citizenship under oath were registered to vote in all elections, state and federal. *Id.*

6. On April 1, 2011, the Kansas State Legislature passed an omnibus elections reform bill H.B. 2067, the "Secure and Fair Elections Act" ("SAFE"). 2011 Kan. Sess. Laws 795-825 (ch. 56); *see also* Order at 16-17.

7. Pursuant to SAFE, K.S.A. § 25-2309(l) became effective January 1, 2013, and specifies, "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." K.S.A. § 25-2309(l); *see also* Order at 16-17; Defs.' Br. in Supp. of Mot. for Summ. J., July 9, 2014 ("Defs.' SJ Br."), at 14, attached hereto as Exhibit A.¹

8. To satisfy the "evidence of citizenship" requirement, K.S.A. § 25-2309(l) requires that an applicant present one of thirteen documents listed in the statute. K.S.A. § 25-2309(l)(1)-(13).

9. Voters registered prior to January 1, 2013 are "grandfathered in" to the registration rolls and excluded from the SAFE proof of citizenship requirement. Order at 17; K.S.A. § 25-2309(u).

¹ Statements contained in Defs.' SJ Br. are party admissions by Defendants, admissible as evidence in this matter pursuant to K.S.A. § 60-460(h).

Federal Voter Registration Requirements

10. Federal law requires states to allow eligible voters to register to vote in federal elections using a uniform Federal Form developed by the U.S. Election Assistance Commission (“EAC”). *See* NVRA, 52 U.S.C. §§ 20501 – 20511.

11. States are required to “accept and use” the Federal Form prescribed by the EAC. *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2251 (2013); *see* NVRA, 52 U.S.C. § 20505; Order at 18-19; Ex. A, Defs.’ SJ Br., at 7-8.

12. As required by the NVRA, the citizenship status of voter registration applicants who register using the Federal Form is verified by requiring that applicants attest to their U.S. citizenship under penalty of perjury. *See* 52 U.S.C. § 20508(b)(2).

13. On June 17, 2013, the U.S. Supreme Court ruled in *Arizona v. Inter Tribal Council of Arizona* that the NVRA requires states to register all Federal Form applicants who are eligible to vote and comply with the Federal Form’s requirements, and that the statute “precludes [a state] from requiring a Federal Form applicant to submit information beyond that required by the form itself.” *Inter Tribal Council*, 133 S. Ct. at 2260; 52 U.S.C. § 20505(a)(1).

14. The Court explained that any “state-imposed requirement of evidence of citizenship” as applied to Federal Form users beyond the attestation of citizenship required by the Federal Form itself “is inconsistent with the NVRA” and is preempted by it. *Inter Tribal Council*, 133 S. Ct. at 2257 (internal quotation marks omitted). Instead, “every eligible voter can be assured that if he does what the Federal Form says, he will be registered.” *Id.* at 2255 n.4.

15. In August 2012, Brad Bryant, the Kansas election director, requested that the EAC revise the Federal Form’s state-specific instructions to provide an instruction to reflect Kansas’s new proof-of-citizenship requirement that became effective January 1, 2013. *See*

Kobach v. U.S. Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1256 (D. Kan. 2014) (“*Kobach I*”).²

16. While that request was pending before the EAC, on August 21, 2013, the Secretary of State filed a lawsuit against the EAC in the U.S. District Court for the District of Kansas (the “EAC case”), seeking to require “the EAC to modify the State-specific instructions of the Federal Form” to include a Kansas state instruction that registrants must submit proof of citizenship with the Federal Form in addition to registrants’ current attestation to their age and U.S. citizenship under penalty of perjury. *See* Complaint at 29, *Kobach I*, No. 5:13-cv-04095 (D. Kan. Aug. 21, 2013), ECF No. 1, attached hereto as Exhibit B.³

17. On January 17, 2014, during the pendency of the EAC case in the District Court, the EAC denied Kansas’s request to add an additional documentation of citizenship requirement to the Federal Form. *See* Mem. of Decision Concerning State Reqs. to Include Additional Proof-of-Citizenship Instructions on Fed. Form, *Kobach I*, No. 5:13-cv-04095 (D. Kan. Jan. 17, 2014), ECF No. 129-1, attached hereto as Exhibit C.

18. The EAC determined that “[t]he Federal Form already provides safeguards to prevent noncitizens from registering to vote” and found that “the EAC is aware of no evidence suggesting that this reliance has been misplaced.” *Id.* at 28, 29.

² Plaintiffs request that the Court take judicial notice of the decision of the U.S. District Court in *Kobach I*. *Jones v. Bordman*, 243 Kan. 444, 459 (1988) (under Kansas judicial notice rules, K.S.A. §§ 60-409 to 60-411, “a court may take judicial notice of the outcome of another proceeding”).

³ Plaintiffs submit that statements made by the instant case’s Defendants as plaintiffs in *Kobach I* are party admissions, admissible as evidence in this matter pursuant to K.S.A. § 60-460(h).

19. On March 19, 2014, the U.S. District Court hearing the EAC case ruled in favor of Kansas and Arizona, granting in part the plaintiffs' motion for judgment. *Kobach I*, 6 F. Supp. 3d at 1271.

20. The court ruled, *inter alia*, that "the EAC's nondiscretionary duty is to perform the ministerial function of updating the instructions to reflect each state's laws" and ordered the EAC "to add the language requested by Arizona and Kansas to the state-specific instructions of the federal mail voter registration form immediately." *Id.*

21. On November 7, 2014, the U.S. Court of Appeals for the Tenth Circuit reversed the District Court's decision. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014) ("*Kobach II*").⁴

22. The Tenth Circuit determined that "the district court incorrectly interpreted the NVRA as subjecting the EAC to a nondiscretionary duty to approve state requests" and that the district court's holding "is inconsistent with the Supreme Court's statements that states must 'request' (rather than direct) the EAC to include the requested text, and must 'establish' (rather than merely aver) their need for it." *Id.* at 1196 (citing *Inter Tribal Council*, 133 S. Ct. at 2259-60).

23. The Tenth Circuit added, "[n]or can we credit [Kobach's and Bennett's] contention that the EAC's refusal to modify the Federal Form unconstitutionally precludes them from enforcing their laws intended to prevent noncitizen voting." *Kobach II*, 772 F.3d at 1199.

24. The Tenth Circuit instructed the district court "to vacate its order instructing the EAC to modify the Federal Form." *Id.*

⁴ Plaintiffs request that the Court take judicial notice of the decision of the Tenth Circuit Court of Appeals in *Kobach II*.

The Dual Registration System

25. On or around the pendency of the EAC case, Kansas implemented a system in which voters who registered using the Federal Form and attested to their citizenship status in accordance with the Federal Form's requirements, but who did not provide documentary evidence of citizenship under K.S.A. § 25-2309(l), are not entered into the registration books and may vote in federal elections only. *See* Ex. A, Defs.' SJ Br., at 14-15; Order at 40 (“[T]he Secretary of State has directed such ‘Federal Form’ registrants not to be entered into the registration books, but, rather, placed on a suspense list.”).

26. Voters using the State Form who comply with the documentary evidence of citizenship under K.S.A. § 25-2309(l) are duly registered voters who are registered to vote in all Kansas elections.

27. FPCA users are not subjected to the documentary evidence of citizenship requirement under K.S.A. § 25-2309(l). Voters who register using the FPCA and who attest to their citizenship status in accordance with the FPCA requirements are not required to provide documentary evidence of citizenship under K.S.A. § 25-2309(l), but rather are registered to vote in all elections. *See* K.S.A. § 25-1216.

28. On October 23, 2013, Secretary Kobach represented in federal court that, to administer the dual registration system, Kansas would use separate federal and state ballots in each county, with federal-only registrants receiving ballots only with federal offices on them. *See* Pls.' Prelim. Inj. Br. at 24, *Kobach I*, No. 5:13-cv-04095 (D. Kan. Oct. 23, 2013), ECF No. 17, attached hereto as Exhibit D; *see also* Pls.-Appellees' Opp'n to Mots. for Stay Pending

Appeal at 16, 18, *Kobach II*, No. 14-3062 (10th Cir. May 13, 2014), attached hereto as Exhibit E.⁵

29. On June 4, 2014, Secretary Kobach sent an email to election officials with a different plan, instructing election officials to “issue provisional ballots to federal-form incomplete applicants,” and, for such voters, “to count only the votes for federal offices.” Defendants’ June 4 directive, attached hereto as Exhibit F (filed previously as Ex. C to Pls.’ Br. in Supp. of Prelim. Inj.); *see* Order at 35-36 (quoting June 4 directive, reproduced in full).

30. The June 4, 2014 instruction explains that “[t]he process will be similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. 25-002(b)(3)”; informs county officials that the Federal Form registrants “are not registered voters under Kansas law”; and instructs county officials to “issue provisional ballots to these voters,” “separate their provisional ballots into a separate stack,” then “make a recommendation to the county board of canvassers to count only the votes for federal office.” Order at 36 (quoting Ex. F, June 4 directive).

31. On July 11, 2014, Secretary Kobach represented to this Court that federal-only registrants would receive provisional ballots that include both federal and state offices, but which would then only be counted for votes for federal offices. Prelim. Inj. Hr’g Tr. at 108, excerpt attached hereto as Ex. G (filed previously as Ex. 4 to Pls.’ Resp. to Mot. for Summ. J., Dec. 19, 2014 (“Pls.’ SJ Resp.”)).⁶

⁵ Plaintiffs submit that statements made by the instant case’s Defendants as plaintiffs in *Kobach II* are party admissions, admissible as evidence in this matter pursuant to K.S.A. § 60-460(h).

⁶ Statements made by Defendants are party admissions by Defendants, admissible as evidence in this matter pursuant to K.S.A. § 60-460(h).

32. Defendants have not publicized or promulgated formal rules for this method of administering bifurcated elections or for canvassing the votes of Federal Form registrants.

33. In 2014, Kansas held bifurcated elections in which federal-only registrants were permitted to vote only in federal elections, and were prohibited from voting in state or local contests. *See* Oral Arg. Tr. at 23, *Kobach II*, No. 14-3062 (10th Cir. Aug. 25, 2014), excerpt attached hereto as Ex. H (filed previously as Ex. 6 to Pls.’ SJ Resp.) (Defendant Kobach stating that, “[o]n August 5th in Kansas, there was a dual election, 180 people . . . had used the federal form [to] register, but they did not provide proof of citizenship. They were permitted to vote in only federal elections”).

Plaintiff Belenky

34. Plaintiff Aaron Belenky is a U.S. citizen and Kansas resident.

35. On or about August 2, 2013, Belenky applied to register to vote by filling out the Federal Form and attesting under penalty of perjury to his eligibility and U.S. citizenship. *See* Belenky Resps. to Defs.’ 1st Req. for Produc. No. 19, attached hereto as Exhibit I (filed previously as Ex. 6c to Defs.’ SJ Br.); Order at 61.

36. In compliance with the instructions on the Federal Form, Plaintiff Belenky submitted his completed Federal Form by mail to the Secretary of State in August 2013. *See* Federal Form at 1 (General Instructions: “Mail your application to the address listed under your State in the State Instructions.”), 8-9 (State Instructions for Kansas, listing the address of the Kansas Secretary of State), attached hereto as Exhibit J (filed previously as Ex. 2 to Pls.’ SJ Resp.); *see also* Order at 61.

37. On or about August 6, 2013, Belenky was sent a letter from the Johnson County Elections Office stating that his “application to register has been suspended until proof [of U.S.

citizenship] is provided.” Ex. A, Defs.’ SJ Br., at ¶ 4; First Letter from Johnson County Election Office, attached hereto as Exhibit K (filed previously as Ex. 6cA to Defs.’ SJ Br.); *see also* Second Letter from Johnson County Election Office (“Your application to register is pending until this documentation is received. The citizenship documentation must be received at the Election Office by the day before the next election in order for you to be eligible to vote in that election.”), attached hereto as Exhibit L (filed previously as Ex. 6cB to Defs.’ SJ Br.).

38. As a result, Belenky was unable to vote in the City of Overland Park election on October 8, 2013. Order at 63-64.

39. On or about November 25, 2013, Belenky applied for a Kansas driver's license and showed his passport to the drivers’ license examiner. *See* Ex. A, Defs.’ SJ Br., at ¶ 6; Order at 61-62.

40. On June 25, 2014, Defendants requested Belenky’s driver’s license records from the Department of Revenue in connection with this litigation. Defendants’ request to Department of Revenue re: Belenky (filed previously under seal as Ex. 3d to Defs.’ SJ Br.).

41. On or about July 7, 2014, approximately one year after Belenky applied to register to vote, approximately eight months after he applied for a driver’s license, and just four days before a preliminary injunction hearing in this matter, Defendants requested and Julie Earnest of the Kansas Department of Revenue executed an affidavit stating that Belenky’s driver’s license records show that he had provided a passport when he applied for a Kansas driver's license in 2013. Ex. A, Defs.’ SJ Br., at ¶ 9; Brad Bryant affidavit ¶ 10, attached hereto as Exhibit M (filed previously as Ex. 1 to Defs.’ SJ Br.); Julie Earnest affidavit (filed previously under seal as Ex. 3 to Defs.’ SJ Br.).

42. Belenky's driver's license records, accessed on July 3, 2014, indicate his U.S. passport number. Belenky driver's license records (filed previously under seal as Ex. 3b to Defs.' SJ Br.).

43. On or about July 7, 2014, Defendants forwarded the Earnest affidavit and accompanying driver's license records to the Johnson County Elections Office. Ex. A, Defs.' SJ Br., at ¶ 10; Ex. M, Brad Bryant affidavit, ¶ 11.

44. On or about July 7, 2014, Belenky's registration status was changed from incomplete to active. Ex. A, Defs.' SJ Br., at ¶ 11-12; Ex. M, Brad Bryant affidavit, ¶ 12.

45. On July 9, 2014, two days prior to a preliminary injunction hearing scheduled in this matter, and approximately one year after Belenky had submitted a completed Federal Form to Defendants, Belenky received notice that he had become registered to vote.

Plaintiff Jones

46. Plaintiff Scott Jones is a U.S. citizen and Kansas resident.

47. In or about July 2013, Jones applied to register to vote by filling out the Federal Form and attesting under penalty of perjury to his eligibility and U.S. citizenship. Ex. A, Defs.' SJ Br., at ¶¶ 13, 14.

48. On or about July 17, 2013, Jones applied for a Kansas driver's license and showed his passport to the driver's license examiner. Ex. A, Defs.' SJ Br., at ¶ 18.

49. On or about July 23, 2013, Jones was sent a letter from the Douglas County Clerk stating, "You have submitted an application for voter registration to our office; however, you have not submitted any proof of citizenship that, as of January 1, 2013, is required for new or re-registering applicants in the state of Kansas. . . . Citizenship documents must be received by the end of the day before any Douglas County election in order for your registration to be complete,

and for you to become eligible to vote in subsequent Kansas elections normally.” Ex. A, Defs.’ SJ Br., at ¶ 16; Letter from Douglas County Clerk, attached hereto as Exhibit N (filed previously as Ex. 7cA to Defs.’ SJ Br.).

50. On June 25, 2014, Defendants requested Jones’s driver’s license records from the Department of Revenue in connection with this litigation. Defendants’ request to Department of Revenue re: Jones (filed previously under seal as Ex. 3h to Defs.’ SJ Br.).

51. On or about July 7, 2014, approximately one year after Plaintiff Jones applied to register to vote and applied for a driver’s license, and just four days before a preliminary injunction hearing in this matter, Defendants requested and Ms. Earnest of the Kansas Department of Revenue executed an affidavit stating that Jones’s driver’s license records show that he had provided a passport when he applied for a Kansas driver's license. Ex. A, Defs.’ SJ Br., at ¶ 21; Ex. M, Brad Bryant affidavit ¶ 17; Julie Earnest affidavit (filed previously under seal as Ex. 3 to Defs.’ SJ Br.).

52. Jones’s driver’s license records, accessed on July 3, 2014, indicate his U.S. passport number. Jones’s driver’s license records (filed previously under seal as Ex. 3f to Defs.’ SJ Br.).

53. On or about July 7, 2014, Defendants forwarded the Earnest affidavit and accompanying driver’s license records to the Douglas County Clerk. Ex. A, Defs.’ SJ Br., at ¶ 22; Ex. M, Brad Bryant affidavit, ¶ 18.

54. On or about July 8, 2014, Jones’s registration status was changed from incomplete to active. Ex. A, Defs.’ SJ Br., at ¶ 23 - 24; Ex. M, Brad Bryant affidavit, ¶ 19.

55. On July 9, 2014, two days prior to a preliminary injunction hearing scheduled in this matter, and approximately one year after Jones submitted a completed Federal Form, Jones received notice that he had become registered to vote for purposes of all elections.

PROCEDURAL HISTORY

On November 21, 2013, Plaintiffs filed the current lawsuit challenging Defendants' *ad hoc* dual registration system as unconstitutional and in violation of Kansas state law. Defendants removed this matter to federal court on December 20, 2013. *See* Notice of Removal, Dec. 20, 2013. Plaintiffs opposed removal and the U.S. district court ordered the case remanded back to state court on April 8, 2014. *See Belenky v. Kobach*, No. 13-4150-EFM-KMH, 2014 WL 1374048 (D. Kan. Apr. 8, 2014). On June 27, 2014, Plaintiffs filed for a preliminary injunction in light of the 2014 elections. *See* Mot. for Prelim. Inj., June 27, 2014. A hearing was scheduled for July 11, 2014. *See* Notice of Hearing, June 6, 2014. Defendants opposed Plaintiffs' motion for a preliminary injunction and moved for summary judgment on July 9, 2014, two days before the scheduled hearing. *See* Defs.' Mot. for Summ. J., July 9, 2014. A hearing was held on July 11, 2014 in which the Court denied preliminary relief and reserved on summary judgment. On December 19, 2014, Petitioners opposed Defendants' motion for summary judgment. *See* Pls.' SJ Resp. On August 21, 2015, the Court deemed Defendants' motion for summary judgment fully submitted and denied Defendants' motion. *See* Order.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn

from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.” *Fawcett v. Oil Producers, Inc. of Kan.*, 352 P.3d 1032, 1038 (Kan. 2015) (citation omitted).

ARGUMENT

I. There is no dispute as to the material facts underlying Plaintiffs’ standing.

This Court has held that Plaintiffs Belenky and Jones have standing to litigate this matter. Order at 53-66. This Court’s recognition of Plaintiffs’ standing eliminates the need for any further discovery as to Plaintiffs’ standing at this time. Nevertheless, for the sake of completeness, the undisputed facts establishing Plaintiffs’ standing set forth above are discussed in brief below.

Both Plaintiffs are U.S. citizens who registered to vote in Kansas by submitting completed Federal Forms to election officials, and had their respective registrations held in “suspense,” by Defendants. Pls.’ Statement of Material Facts (“Pls.’ SMF”), *supra*, ¶¶ 34, 35, 46, 47; *see* Order at 61 (Belenky), 62-63 (Jones); Ex. A, Defs’ SJ Br. at ¶¶ 4, 16; *see also* Registrant Detail for Belenky (filed previously under seal as Exs. 1a & 1b to Defs.’ SJ Br.); Registrant Detail for Jones (filed previously under seal as Exs. 2a & 2b to Defs.’ SJ Br.). Plaintiffs both used the Federal Form to register, which is “a Kansas statutorily authorized, federally prescribed, method to register Kansas voters, which the State has agreed to ‘accept and use.’” Order at 41. Both registrants’ voter registration applications were complete when submitted to Defendants. Order at 40. Yet, both were identified as “in suspense” and were sent letters demanding extrinsic proof of citizenship. Order at 60. Both were denied the rights of

electors for approximately one year after submitting their voter registration forms. Pls.' SMF, *supra*, ¶¶ 44, 54. Petitioner Belenky was denied the right to vote in a local election on October 8, 2013 because of Defendants' dual registration system. Order at 63-64; Pls.' SMF, *supra*, ¶ 38.

These undisputed facts establish that Plaintiffs "clearly state a 'cause of action', which equates to 'an injury in fact' under the rules governing standing." Order at 65. Plaintiffs demonstrated that they "suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 49 Kan. App. 2d 354, 363-64 (2013); *see Moorhouse v. City of Wichita*, 259 Kan. 570, 574 (1996) (setting forth the requirements for standing); *Sawyer v. Chapman*, 240 Kan. 409, 411 (1986) (describing the general rule of standing to sue). Plaintiffs' injury is different in character from the public at large. *See Bldg. Indus. Workers Comp.*, 49 Kan. App. 2d at 366-67 ("Where an individual suffers damage different in character from that sustained by the public at large, he is held to be entitled to maintain an action to restrain illegal acts by public officials."); Order at 60.

Moreover, this Court has determined that Petitioners' claims are not moot, and that this action remains "a controversy [with] real facts and real issues." Order at 65. To be sure, approximately one year after Plaintiffs submitted their completed voter registration forms, and just days prior to this Court's July 2014 preliminary injunction hearing, Defendants inexplicably violated their normal voter registration practices with respect to proof of citizenship and suddenly registered Petitioners to vote in all elections. Pls.' SMF, *supra*, ¶¶ 43-44, 53-54; *see* Order at 63. But that does not moot Plaintiffs' claims, for several reasons.

As an initial matter, this case is a declaratory judgment action, and, as this Court has already explained, "[a] declaratory judgment action can be maintained even if no relief is sought

or to be accorded.” Order at 56 (citing K.S.A. §§ 60-1701; 60-1702).⁷ Moreover, in Kansas, the mootness doctrine is not jurisdictional but rather a court policy. *See State v. Hilton*, 295 Kan. 845, 849 (2012). Kansas Courts may entertain issues which were subjects of real controversy and included issues of statewide interest and public importance, or when “dismissal of an appeal adversely affects any rights vital to the parties, even when its judgment will not be directly enforceable because of lapse of time or other changed circumstances.” *State ex rel. Anderson v. Engler*, 181 Kan. 1040, 1042 (1957); *see Edgington v. City of Overland Park*, 15 Kan. App. 2d 721, 725-26 (1991) (addressing the merits of an appeal that is moot “since the issues presented with respect to the charter ordinance are of statewide interest and importance”); *see also* Order at 65-66 (citing *State v. Montgomery*, 295 Kan. 837, 840-41 (2012)); *State v. Hilton*, 295 Kan. 845, 850-51 (2012) (“individual members of the public are interested in the decision . . . because it may bear upon their individual rights or serve as a guide for their future conduct as individuals” (citation omitted)).

As this Court has already noted, this case both raises issues of public importance and is capable of repetition. Order at 64-65. *First*, by challenging Defendants’ dual registration policy, Plaintiffs raise an issue of great public importance that must be addressed for elections to go forward without large scale deprivation of fundamental rights. Order at 65-66; *see Belenky v. Kobach*, No. 13-4150-EFM-KMH, 2014 WL 1374048, at *4 (D. Kan. Apr. 8, 2014) (remanding

⁷ In seeking declaratory relief, Plaintiffs may pursue action directly against the Defendants, who created the dual registration policy and administer the dual registration system, and a decision from this Court that the policy is unlawful or unconstitutional will redress Plaintiffs’ injury. *See Bldg. Indus. Workers Comp.*, 49 Kan. App. 2d at 368. Kansas courts often permit Plaintiffs “to jump over the entity obeying the orders in order to challenge the body making the orders.” *Id.* at 369 (citing *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566 (10th Cir. 2000) (allowing plaintiffs to bypass naming distributors who actually tax tribes and sue the Department of Revenue, which administers the law)).

this matter in part because it raises “unique and important interpretations of state election law”). The Kansas Supreme Court has recognized the extraordinary importance of protecting the fundamental right to vote.⁸ The dual registration system presents a novel legal question that implicates the fundamental rights of all voting Kansans. As this court noted, the urgency of resolving whether or not Plaintiffs, and others, are registered and eligible to vote after using the Federal Form has only grown since similarly situated voters could now face prosecution for voting for state or local contests. *See* Order at 15; 2015 Kan. Sess. Laws 1146 (ch. 87, § 2).

Second, this issue is capable of repetition, which applies where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *See Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (citation omitted); *see also Hilton*, 295 Kan. at 850-51. Defendant may not moot a claim for relief simply by temporarily ceasing the unlawful conduct. A contrary rule would encourage the resumption of unlawful conduct following the dismissal of litigation. The prospect of the same injury in later elections is sufficient to show that Defendants violation is capable of repetition in future elections. Order at 64-65. As the Court recognized, if Plaintiffs were to move out of state, their registrations would be cancelled.⁹ *Id.*; K.S.A. § 25-2316c. To re-register, Plaintiffs would be

⁸ *See State v. Beggs*, 271 P. 400, 402 (Kan. 1928) (striking down as unconstitutional a law that required registered voters voting for the first time in a primary to declare their party affiliation, and finding that the “right to vote . . . is a constitutional right, which cannot be abridged by the Legislature, or by any other power except the entire people of the state by way of amendment to the Constitution.” (citation omitted)); *see also Burke v. State Bd. of Canvassers*, 107 P.2d 773, 779 (Kan. 1940) (upholding the right to ballot secrecy and noting, “[e]lection laws are liberally construed to permit exercise of the right of suffrage conferred by the Constitution and laws of the state.”).

⁹ Plaintiffs note that Jones was also initially registered on September 26, 2013, then removed from the rolls as a “clerical error.” Defs.’ Answer at 4, *Belenky v. Kobach*, No. 5:13-CV-04150

required to re-submit documentation of their citizenship. Should they then exercise their right to register using the Federal Form at a new address, Defendants would subject them to the same bifurcated registration system and likely prohibit them from voting in state and local elections once again.

Accordingly, for the reasons stated above and set forth in this Court's previous order, Plaintiffs have standing to maintain this action.

II. Plaintiffs have established as a matter of law that the Defendants' directives instructing counties to segregate voters into two groups is "wholly without a basis of legislative authority" and contrary to existing state statute. Order at 27-28.

Defendants' system of marking Federal Form registrants with the "scarlet letter" of the suspense list, demanding extrinsic documentation of their citizenship, then subjecting them to a separate and unprecedented balloting procedure simply for choosing a lawful registration method stands beyond the authority granted to the Secretary by the legislature. Order at 33. "[T]he Secretary is not instructing on, nor even interpreting, any applicable Kansas statute, but rather he is proclaiming now as law that which does not exist and, in fact, is contrary to existing state law and federal law." Order at 47. Defendants' dual registration system is *ultra vires* and unauthorized as a matter of law.

The Federal Form is "a Kansas statutorily authorized federally prescribed, method to register Kansas voters, which the State has agreed to 'accept and use.'" Order at 41; *see* K.S.A. § 25-2309(a). Federal Form registrations are complete when the application is submitted. Order at 40. At that point, Federal Form registrants "stand as fully qualified electors." *Id.* at 44-45. The U.S. Supreme Court in *Inter Tribal Council* "made null and void Kansas's K.S.A. § 25-

(D. Kan. Dec. 27, 2013), ECF No. 6 ("[O]n or about September 26, 2013, Jones was only listed on the Secretary of State's website as registered to vote due to a clerical error. Because Jones failed to provide proof of citizenship, he should not have been listed as registered to vote.").

2309(l)'s second step[]proof of citizenship requirement requiring extrinsic documentation for Federal Form registrants.” Order at 43. Despite Defendants’ attempts, it is clear that the U.S. Supreme Court does not intend to revisit a state’s obligation to accept and use the Federal Form in the EAC case. *See Kobach v. U.S. Election Assistance Comm’n*, 135 S. Ct. 2891 (2015) (denial of certiorari).

Defendants’ *ad hoc* administration of a dual registration system for Plaintiffs and other Federal Form registrants is nowhere authorized by state law. The system, as outlined by Defendants, requires Federal Form registrants to vote by provisional ballot, treats those ballots as challenged ballots, then requires the County Canvassers to partially count the ballots so that their votes are only counted in federal elections. *See* Pls.’ SMF ¶¶ 29-31; Order at 36, 38. Kansas law does not authorize the process described by Defendants, for several reasons.

First, Kansas state statutes envision a unitary ballot. Order at 25; *see* K.S.A. §§ 25-610, 25-611, 25-616, 25-617. Kansas’s unitary registration and balloting system does not authorize the dual system of elections that Defendants have implemented. The Kansas Legislature did not authorize a separate ballot for federal office candidates, and thus intended that ballots cast by registrants for use in all elections would be accepted. Order at 26.

Second, the Kansas state statutes governing provisional ballots also do not authorize Defendants’ system. Defendants “ha[ve] declared all such ballots [cast by Federal Form registrants] to be ‘provisional’, hence, effectively challenging such ‘Federal Form’ registrants who present themselves to vote, but [they] do[] so on grounds neither *specified by statute* as a basis for challenge nor based on independent knowledge held by the Secretary or local election officials of such voters’ non-qualification to vote for federal offices.” Order at 38. As fully registered eligible voters, Federal Form registrants cannot be required to vote by provisional

ballot, or forced to submit to ballot challenges, in order to exercise their fundamental right to vote.

Moreover, if a provisional ballot is challenged, “the statute provides for no partial or limited acceptance of the voter’s ballot.” Order at 30. Partial provisional ballot counting only occurs, as authorized by statute, in the case of a registered voter casting a ballot in a precinct other than the precinct in which the voter resides but located in the same county. K.S.A. § 25-3002(b)(3). Otherwise, challenged ballots cannot be partially counted, and are either rejected or accepted, as required by K.S.A § 25-409. *See also* Op. Kan. Att’y Gen. No. 2012-31, 2012 WL 6502389, at *2 (Dec. 11, 2012) (“[T]he duty of county boards of canvassers has been found to be ministerial only and its sole function is to meet, canvass the vote, and declare the results.”)

Third, Defendants’ *ad hoc* system contravenes basic constitutional protections. The Kansas Constitution protects the secrecy of a voter’s ballot. *See* Order at 37; Kan. Const. art. 4, § 1 (“All elections by the people shall be by ballot or voting device or both, as the legislature shall by law provide.”). Once a voter casts his or her ballot, there are no grounds for interfering with it. Order at 37-38. Third party alteration of a fully qualified voter’s ballot has no basis in law. Order at 42 (“Without some clear legislative direction compatible with the Kansas Constitution such a voter should not have his or her ballot seized or be subjected to the loss of anonymity by his or her choice of an otherwise authorized method of registration and forced to waive ballot secrecy simply by virtue of the State’s failure to provide a constitutionally conforming ballot.”).

The legislature’s decision not to create different ballots for Federal Form registrants does not authorize the Secretary to invade a voter’s right to ballot secrecy. Order at 39-40 (“Thus, if any error exists, it is a post-vote error, not a registration error, and the error would rest with the

State and its election officials, not the voter, in failing to provide a suitable ballot – one conforming to the Kansas Constitution, that is, a ballot that secures, except in the event of a voter error that the legislature has accepted and authorized as grounds to invade the secrecy of the ballot itself.”). Quite the opposite: it is most likely “a judgment made by the legislature to fully ‘accept and use’ the Federal Form premised as it is on oath or affirmation in all elections.” Order at 40.

III. Defendants’ *ad hoc* administration of a dual registration system violates the Filing Act.

There is no dispute that Defendants failed to promulgate the rules used to administer the dual election system. Pls.’ SMF, ¶ 32. There is no dispute between the parties as to the requirements for promulgating a rule. *See* K.S.A. § 77-415(c)(4) (providing the definition of rules and regulations). Agency rules must be formally promulgated in accordance with the Filing Act. Specifically, K.S.A. § 77-421 sets forth the requirements state agencies must comply with *prior to* the adoption of any rule and regulation. Adherence to the Filing Act is mandatory, not discretionary. K.S.A. § 77-425. Where, as here, the requirements of the Filing Act are not followed to promulgate rules, the court must declare those rules void. *See Am. Trust Adm’rs, Inc. v. Sebelius*, 273 Kan. 694, 694-95 (2002) (voiding an administrative agency policy bulletin for the Commissioner’s failure to promulgate it as a rule); *Taylor v. Kan. Dep’t of Health & Env’t*, 49 Kan. App. 2d 233, 238 (2013) (“If a state agency fails to submit a policy that by content and effect is a regulation to the notice and publication requirements of the Act, the policy is void.”); *see also* K.S.A. § 77-415(b)(1) (“Except as provided in this section, any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the rules and regulations filing act.”).

Defendants' dual registration policy, a rule of election administration, is a rule because it (1) does not permit discretion; (2) has general application; and (3) has the effect of law, which constitutes a rule or regulation for the purposes of the Filing Act. *See Bruns v. Kan. State Bd. of Technical Professions*, 255 Kan. 728, 734 (1994) (The Kansas Supreme Court set the parameters for defining what is a "rule" or "regulation," holding that an internal written policy of the Kansas Board of Technical Professionals ("BTP") regarding licensure requirements for engineers was a "rule" or "regulation" as defined by Filing Act.). *First*, the policy gives a clear directive and does not grant exceptions, list criteria for exceptions, or inform county election officials that the directive is a mere suggestion which they are not required to follow. *See Am. Trust Adm'rs*, 273 Kan. at 702-03 (determining that a policy constitutes a "standard" for the purposes of K.S.A. § 77-415 in part because although the policy alludes to a Commissioner's discretion, it does not contain criteria with which the Commissioner could make exceptions to the policy). *Second*, the policy has general application to all Federal Form registrants in Kansas. *See Bruns*, 255 Kan. at 734 (the policy at issue to "all persons applying for a professional engineering license by reciprocity or comity" was "broad enough to satisfy the requirement of 'general application'"). *Third*, the effect of the dual registration policy is that all Federal Form applicants in every county in Kansas must vote by provisional ballot and have their vote in state and local contests voided. *See id.* (the Court observed that under the BTP's policy, the BTP summarily denied licenses to any applicant who seeks comity for a lapsed out-of-state license, and therefore it treated its internal policy as having the effect of law). Because the dual registration system constitutes a rule or regulation, and Defendants failed to promulgate the rules used to administer the system, these rules violate the Filing Act.

IV. Plaintiffs have established as a matter of law that assigning vastly different rights to similarly situated voters violates the Kansas Constitution’s guarantee of equal protection.

There is no rational justification for assigning Federal Form registrants different, and lesser, rights from other registrants. This haphazard, irrational distinction in the dual registration system violates the Kansas Constitution. Federal Form voter registration applications, like FPCA applications, do not require extrinsic documentation of U.S. citizenship. *See* Order at 43; Pls.’ SJ Resp. at 22-25. *First*, the dual registration system treats registration applicants—materially similar in all respects—differently based on nothing more than which federal registration form they use, the FPCA or the Federal Form. Pls.’ SJ Resp. at 22.¹⁰ *Second*, although the SAFE Act purports to require that State Form registration applications are not complete until the applicant submits documentation of citizenship, Federal Form applications are complete when submitted. Order at 43. The Kansas Constitution does not allow for differential treatment of voters who register by completing the Federal Form and voters who register by completing the State Form. Defendants have offered no justification for diminishing the rights of Federal Form registrants. Pls.’ SJ Resp. at 26. There is no rational basis for Kansas’s dual registration system.¹¹

¹⁰ Defendants’ sole justification for treating Federal Form applicants differently from FPCA applicants—namely, that people “absent from the State” will have trouble obtaining documentation of citizenship, and delivering copies of such documents to county election officials—is unavailing. *See* Pls.’ SJ Resp. at 22-25.

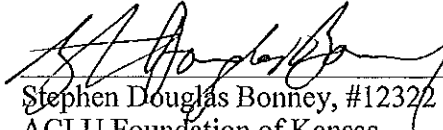
¹¹ Other states have held there is no rational basis for dual registration, and have found bifurcated registration systems unconstitutional under their respective state constitutions. *See, e.g., Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966) (holding that Virginia’s dual registration system violated the Virginia constitution because “[n]o rational basis exists for distinction between persons registered to vote only in federal elections and those registered to vote in all elections”). States have also rejected Defendants’ argument that the NVRA mandates a dual registration system, and held that bifurcated elections violate state constitutions. *Orr v. Edgar*, 670 N.E.2d 1243, 1253 (Ill. App. Ct. 1996) (holding unconstitutional an Illinois two-tiered voter registration

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' Motion for Summary Judgment.

Dated: September 4, 2015

Respectfully submitted,



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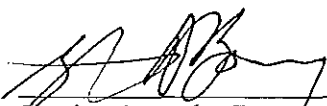
ATTORNEYS FOR PLAINTIFFS

system which included "the state's decision to classify state and federal registrants, assigning lesser voting rights to NVRA registrants"); *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214 (Md. Ct. App. 2003) (finding that Maryland's two-tiered voter registration system violated the state constitution).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 4th day of September, 2015, a copy of the above and foregoing document was hand-delivered to the chambers of the Honorable Franklin R. Theis, and was served concurrently by electronic mail delivery on the following parties:

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EXHIBIT A

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

FILED BY CLERK
K. S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

2014 JUL -9 P 3:40

AARON BELENKY,)
SCOTT JONES, and)
EQUALITY KANSAS,)
)
Plaintiffs,)
vs.)
)
KRIS KOBACH, KANSAS)
SECRETARY OF STATE, and)
BRAD BRYANT, KANSAS)
ELECTIONS DIRECTOR, in their)
official capacities,)
)
Defendants.)
_____)

Case No. 13C1331

Division 7

**COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

COME NOW the Defendants, by and through the undersigned counsel, and submit the following Combined Memorandum in Support of Defendants’ Motion for Summary Judgment, filed contemporaneously herewith, and in Opposition to Plaintiffs’ Motion for Preliminary Injunction, previously filed herein.

I. STATEMENT OF UNCONTROVERTED FACTS

The Defendants assert that the following facts are uncontroverted in this matter:

1. On or about August 2, 2013, Plaintiff Aaron Belenky (hereinafter “Belenky”) applied to register to vote by submitting a National Mail Voter Registration Form to the Johnson County, Kansas, Elections Office. Petition ¶ 1.
2. Belenky chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 6b, Belenky Admission No. 8.

3. Belenky did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 1, above. Exhibit 6a, Belenky Interrog. Resp. No. 6, 10.

4. On or about August 6, 2013, Belenky was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 1b.

5. Belenky is in possession of his birth certificate and United States Passport. Exhibit 6a, Belenky Interrog. Resp. No. 7.

6. On or about November 25, 2013, Belenky applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3a; Exhibit 6a, Belenky Interrog. Resp. No. 13.

7. Belenky was offered the opportunity to apply to register to vote at the time he applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 6a, Belenky Interrog. Resp. No. 14.

8. Belenky is not a member of Plaintiff Equality Kansas (hereinafter "Equality Kansas"). Exhibit 6b, Belenky Admissions No. 10.

9. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Belenky, executed an affidavit with driver's license records for Belenky showing that Belenky provided a passport when he applied for a Kansas driver's license. Exhibit 3.

10. On July 7, 2014, Defendant Bard Bryant (hereinafter "Bryant") sent the Earnest affidavit and accompanying documents to the Johnson County Elections Office to be evaluated as sufficient proof of citizenship for Belenky. Exhibit 1.

11. On July 7, 2014, the Johnson County Elections Office determined that Belenky had provided sufficient proof of citizenship and changed Belenky's registration status from incomplete to active. Exhibit 1.

12. Effective July 7, 2014, Belenky is registered to vote for all elections held in Kansas, including federal, state, and local elections. Exhibit 1.

13. On or about late July, 2013, Plaintiff Scott Jones (hereinafter "Jones") applied to register to vote by submitting a National Mail Voter Registration Form to the Douglas County, Kansas Elections Office. Petition ¶ 2.

14. Jones chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 7b, Jones Admission No. 7.

15. Jones did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 13, above. Petition ¶ 2; Exhibit 7a, Jones Interrog. Resp. No. 10.

16. On or about July 23, 2013, Jones was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 2b.

17. Jones is in possession of his United States Passport. Exhibit 7a, Jones Interrog. Resp. No. 7.

18. On or about July 17, 2013, Jones applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3e; Exhibit 7a, Jones Interrog. Resp. No. 13.

19. Jones was offered the opportunity to apply to register to vote at the time he applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 7a, Jones Interrog. Resp. No. 14.

20. Jones is not a member of Equality Kansas. Exhibit 7b, Jones Admission No. 9.

21. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Jones, executed an affidavit with driver's license records for Jones showing that Jones provided a passport when he applied for a Kansas driver's license. Exhibit 3.

22. On July 7, 2014, Bryant sent the Earnest affidavit and accompanying documents to the Douglas County Clerk to be evaluated as sufficient proof of citizenship for Jones. Exhibit 1.

23. On July 8, 2014, the Douglas County Clerk determined that Jones had provided sufficient proof of citizenship and changed Jones's registration status from incomplete to active. Exhibit 1.

24. Effective July 8, 2014, Jones is registered to vote for all elections held in Kansas, including federal, state, and local elections. Exhibit 1.

25. Equality Kansas's mission is to end discrimination based on sexual orientation and gender identity or expression, and to ensure the dignity, safety, and legal equality of all Kansans. Exhibit 8a, Equality Kansas Interrog. Resp. No. 10.

26. The "dual registration system" only applies to voter registration applicants who apply to register to vote utilizing the National Mail Voter Registration Form and fail to submit proof-of-citizenship documents prior to election day. Exhibit 9.

II. LEGAL STANDARDS

A. SUMMARY JUDGMENT

The Kansas Supreme Court has described the familiar standard for ruling upon a motion for summary judgment as follows:

"Summary Judgment is appropriate when the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial

court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against who the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.”

Miller v. Westport Ins. Corp., 288 Kan. 27, 32 (2009) (quotation omitted). As is explained below, the Defendants are entitled to summary judgment in their favor.

B. PRELIMINARY INJUNCTION

To obtain a temporary or preliminary injunction the moving party must establish that: (1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Board of County Com'rs of Leavenworth County v. Whitson*, 281 Kan. 678, 683 (2006) (quotation omitted). The movant must also establish “a substantial likelihood of prevailing on the merits.” *Steffes v. City of Lawrence*, 284 Kan. 380, 395-96.

III. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW AND, THUS, THE PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

As is shown below, (1) the Plaintiffs have no standing to litigate the current matter; (2) this matter is moot; (3) the Defendants possess statutory authority to issue the guidance that is the subject of this litigation, and (4) the purported dual registration system does not violate the equal protection provisions of the Kansas Constitution. Accordingly, not only are the Defendants are entitled to judgment as a matter of law but, accordingly, the Plaintiffs are not likely to succeed on the merits. Therefore, the Court should grant the Defendants’ Motion for Summary Judgment,

deny the Plaintiffs' Motion for Preliminary Injunction, and enter judgment in favor of the Defendants.

A. PLAINTIFFS DO NOT HAVE STANDING TO LITIGATE THE CLAIMS ASSERTED IN THEIR PETITION

The Plaintiffs have no standing to assert the claims made in their Petition. Where a party has no standing, “the matter is not justiciable; therefore, the court has no subject matter jurisdiction...” *Kansas Bldg. Industry Workers Compensation Fund v. State*, 249 Kan.App.2d 354, 364 (2013). As is shown below, Belenky and Jones inflicted the purported injury on themselves. Thus, there is no causal connection between the purported injury and the alleged actions of the Defendants. Furthermore, Equality Kansas has not established that it has associational standing in this matter. Lastly, the requested relief will not redress the harm asserted in the Petition. Therefore, this case must be dismissed due to the Plaintiffs' lack of standing.

i. Plaintiffs Belenky and Jones inflicted the purported harm upon themselves

“Standing to sue means that a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” *Id.* “A person must demonstrate that he or she suffered a cognizable injury and that there is a *causal connection between the injury and the challenged conduct...*” *Id.* (emphasis added). If the alleged injury was incurred as a result of the plaintiff's own choices and voluntary actions, then there is no causal connection between the injury and the challenged conduct. *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F.2d 433, 438 (D.C.Cir. 1989) (“This potential liability, however, insofar as it is incurred voluntarily, is not an injury that fairly can be traced to the challenged action as required by Supreme Court decisions interpreting Article III of the Constitution.”) (internal quotations omitted). *See also, Brotherhood of Locomotive Engineers and Trainmen*, 457 F.3d 24, 28 (D.C.Cir. 2006) (“This

injury was not in any meaningful way ‘caused’ by the Board; rather, it was entirely self-inflicted and therefore insufficient to confer standing upon the Union.”). The Kansas Court of Appeals has taken a strong stance against allowing plaintiffs to gain standing by voluntarily submitting themselves to the purported injury. *Bonner Springs Unified School Dist. No. 204 v. Blue Valley Unified School Dist. No. 229*, 32 Kan.App.2d 1104, 1111 (2004) (“[W]e hold that plaintiffs cannot acquire legal standing by submitting themselves unnecessarily to a purported injury (*volenti non fit injuria*)[.]”).

In the case at bar, Belenky and Jones (hereinafter “the Individual Plaintiffs”) have voluntarily submitted themselves to the dual registration system. Therefore, any harm allegedly suffered by Individual Plaintiffs as a result of the dual registration system was inflicted upon the Individual Plaintiffs by themselves. Under Kansas law, potential voters can apply to register to vote by three different means. They can use the Kansas state voter registration application, they can use the national mail voter registration form (hereinafter the “Federal Form”), or they can apply to register to vote as part of an application for a driver’s license. K.S.A. 25-2309(a) and K.S.A. 25-2352. An electronic version of the Kansas state voter registration application is used when registering through the driver’s license process. There is no law mandating which voter registration application a potential voter must use. Therefore, a potential voter is free to select any of the three application types. Moreover, the dual registration system only applies to voter registration applicants who apply to register to vote utilizing the Federal Form and who choose not to provide proof-of-citizenship documents. Exhibit 9. This result, of course, is necessitated by the United States Supreme Court’s holding in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (hereinafter “*Inter Tribal Council*”), which requires the States to “accept and use”

a completed Federal Form to register applicants for elections for *federal office* without requiring information beyond that listed on the Federal Form itself.

Both Individual Plaintiffs applied for a Kansas driver's license in 2013. Exhibits 3a, 3b, 3e, 3f. At the time they applied for a driver's license, each Individual Plaintiff provided the driver's license examiner with a copy of his United States passport. Exhibit 7a, Jones Resp. to Interrog. No. 13; Exhibit 6a, Belenky Interrog No. 13. United States passports are accepted as proof of citizenship for the purposes of registering to vote in Kansas. K.S.A. 25-2309(1)(3). Furthermore, each Individual Plaintiff was offered the opportunity to register to vote and declined to register to vote at the time he applied for a driver's license. Exhibit 7a, Jones Resp. to Interrog. No 14; Exhibit 6a, Belenky Interrog No. 14. If the Individual Plaintiffs would simply have said "yes" when asked if they'd like to register to vote at the end of their driver's license application, they would have been properly registered to vote in the State of Kansas and eligible to vote local, state, and federal elections. As such, the dual registration system would not apply to the Individual Plaintiffs.

Instead of applying to register to vote at the same time that they applied for driver's licenses, the Individual Plaintiffs applied to register to vote using the Federal Form. Exhibit 7a, Jones Interrog 9, Exhibit 6a, Belenky Interrog 9. The decision to use the Federal Form was made by the Individual Plaintiffs of their own volition. Exhibit 7b, Jones Admission 7; Exhibit 6b, Belenky Admisssion 8. Neither state law nor the Defendants forced the Individual Plaintiffs to utilize the Federal Form. The dual registration system only applies to voter registration applicants who utilize the Federal Form and do not provide proof of citizenship. Exhibit 9.

After submitting the Federal Form without proof-of-citizenship documents, the Individual Plaintiffs were sent notice that their voter registration applications would not be completed until proof-of-citizenship documents were received. Exhibit 1b, 2b. The Individual Plaintiffs

acknowledge that they each possessed a proof-of-citizenship documents—their passports and/or their birth certificates. They could have responded to the notices by emailing, faxing, sending or delivering copies of their documents to the relevant county election office.¹ Doing so would have completed their voter registrations. But the Individual Plaintiffs did not want to complete their voter registrations. Instead, the Individual Plaintiffs chose not to submit any proof-of-citizenship documents and filed a lawsuit claiming that the dual registration system deprived the Individual Plaintiffs of their right to vote. However, it was the Individual Plaintiffs' voluntary decisions (1) to decline to register to vote at the time of their driver's license applications (2) to submit the Federal Form without proof-of-citizenship, and (3) to neglect to provide a copy of their proof-of-citizenship document, that has subjected them to the bifurcated election system. Nothing the Defendants have done has caused the Individual Plaintiffs to be potentially subject to the dual registration system.

Notably, the Individual Plaintiffs *make no claim whatsoever that the statute requiring proof-of-citizenship documents is invalid in any way or that providing such documents would place any kind of burden on them*. Of course, the Individual Plaintiffs would be hard pressed to make such arguments considering the fact that they have already submitted passports to the State of Kansas as part of the driver's license application process. Exhibit 7a, Jones Resp. to Interog. No. 13; Exhibit 6a, Belenky Resp. to Interog. No. 13. Because the Individual Plaintiffs chose to apply to register to vote using the Federal Form and chose not to provide proof-of-citizenship documents, there is no causal connection between any actions of the Defendants and the harm alleged by the Individual Plaintiffs. Therefore, this matter must be dismissed for lack of standing.

¹ In Johnson County, it is also possible for registrants to text images of their documents to the County Election Office using a smartphone.

ii. Equality Kansas has not established that it meets the elements required for associational standing and it possesses no interest that it may assert in this matter

“An association has standing to sue on behalf of its members when (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members.” *Sierra Club v. Moser*, 298 Kan. 22, 33 (2013). For the reasons set forth below, Equality Kansas fails to meet all three prongs of the associational standing test. Therefore, Equality Kansas also lacks standing and this matter must be dismissed.

The first element of associational standing requires the association to establish that its members have standing to sue individually. *Id.* Neither Belenky nor Jones are members of Equality Kansas. Exhibit 6b, Belenky Admission 10; Exhibit 7b, Jones Admission 9; and Exhibit 8b, Equality Kansas Admissions 1 and 2. Consequently, they cannot be used to establish standing for Equality Kansas. Furthermore, neither the pleadings submitted by Equality Kansas nor the discovery responses submitted by Equality Kansas identify a single member of Equality Kansas who is harmed by the dual registration system. To do so, Equality Kansas would have to identify a member of the association who applied to register to voter using the Federal Form and who was *unable* to prove his United States citizenship. The association has not identified any such member. Therefore, Equality Kansas has failed to establish that its members have standing to sue individually.

Equality Kansas also fails to satisfy the second requirement for associational standing. It has failed to establish that the interests it seeks to protect in this matter are germane to its purposes. According to its discovery responses, Equality Kansas's mission is “to end discrimination based on sexual orientation and gender identity or expression, and to ensure the dignity, safety and legal equality of all Kansans.” Exhibit 8a, Equality Kansas Interrogatory No. 10. However, the Petition

makes no allegation that the dual registration system adversely impacts issues related to sexual orientation, gender identity, or gender expression. Therefore, Equality Kansas has not established that the interests it seeks to protect in this matter are germane to its purposes.

With respect to the third requirement for association standing, Equality Kansas has failed to establish that neither the claim asserted nor the relief requested requires participation of individual members. Quite the opposite is true in this matter. Registering to vote is an act undertaken by an individual, in which that individual signs an oath affirming the truth of statements made on the registration form, and provides documents specific to that individual proving the individual's United States citizenship. In order to assert a claim that individual members have been denied the right to vote it must be established that such specific members are United States citizens qualified to vote and that those specific members have attempted to register to vote and have been unable to do so. The establishment of these facts requires the participation of members that have allegedly been denied the right to vote.

Finally, there is an additional reason why Equality Kansas does not have standing in this matter. Equality Kansas attempts to present an injury by alleging that the dual election system hinders its ability to effectively register voters for state and local elections. Petition at ¶ 3. However, the right to vote and the right to register to vote belong to the individuals themselves and not to third-party organizations such as Equality Kansas. Indeed, the right to vote is so personal to the individual that it includes the right *not* to vote. See *Dixon v. Maryland*, 878 F.2d 776, 782 (4th Cir. 1989); *Wrzeski v. City of Madison, Wisconsin*, 558 F. Supp. 664, 667 (W.D. Wis. 1983); *Beare v. Smith*, 321 F. Supp. 1100, 1103 (S.D. Tex. 1971). Furthermore, to the extent completing voter registration applications are protected speech or activity under the First Amendment, such protections inure to the *applicant*, not the person aiding the applicant.

“Assuming a voter registration application is speech, it is the *voter’s* speech indicating his desire to be registered.” *Voting for American, Inc. v. Steen*, 732 F.3d 382, 390 (5th Cir. 2013) (emphasis in original). Therefore, Equality Kansas has no standing to assert an interest in whether individual voter registration applicants unknown to it are actually registered to vote.

The Defendants acknowledge that Equality Kansas has an interest in conducting voter registration drives. However, the dual registration system does not burden the ability to conduct such drives. For example, nothing limits the number of voter registration drives that may be conducted or restricts the locations at which voter registration drives may be held. Equality Kansas will be able to conduct the same number of voter registration drives at the same locations it always has. As noted above, it is not necessary for an individual who fills out a registration form at such a drive to provide proof-of-citizenship at that time; Kansas law allows the individual to provide proof-of-citizenship at a later time from his or her own home. Whether an individual actually chooses to become a registered voter as the result of a voter registration drive is an interest that belongs to the individual, not to Equality Kansas. Therefore, Equality Kansas lacks standing in this matter.

iii. All Plaintiffs lack standing because the purported harm is not redressable by a favorable ruling against the Defendants.

There is an additional fatal flaw in the standing of the Plaintiffs. In order to establish standing, the injury alleged by a plaintiff must be “redressable by a favorable ruling.” *Ternes v. Galichia*, 297 Kan. 918, 921 (2013). The relief sought by the Plaintiffs in this matter will not redress the injury that the Plaintiffs assert. The Plaintiffs assert that guidance issued by the Defendants to county election officials regarding the dual registration system has deprived the Individual Plaintiffs of the right to vote in state and local elections. Petition at Page 2. See also Petition at ¶¶ 33 and 34. Additionally, the Plaintiffs assert that the dual registration system hinders

Equality Kansas's ability to conduct effective voter registration Drives. Petition at ¶ 3. The Plaintiffs then ask for the following relief:

1. "An order declaring that the Dual Registration Directive is invalid." Petition at ¶ 56(a).
2. "Injunctive relief enjoining Respondent Kobach, his successors in office, agents, employees, attorneys, and those persons acting in concert with him or at his direction from using and implementing the dual registration system or arbitrarily assigning different voting rights to petitioners and other qualified electors who register t[o] vote using the Federal Form their right to vote in all Kansas elections. Petition at ¶ 56(b).
3. Injunctive relief ordering Respondents Kobach and Bryant to employ their full authority to direct all county elections officers to cease compiling a dual registration system and register all qualified electors as registered electors. Petition at ¶ 56(c).
4. Injunctive relief ordering corrective measures to be taken by Respondents, including but not limited to registering Petitioners to vote in all Kansas elections, and providing accurate information to registration applicants on the suspense list. Petition at ¶ 56(d).

However, the requested relief either cannot be granted by the Court or will not redress the alleged harm asserted by the Plaintiffs. There are multiple reasons that the Plaintiffs cannot obtain the relief they seek in this matter.

An order declaring the so called "Dual Registration Directive" invalid will not give the Plaintiffs the ability to vote in state and local elections. In the first instance, and as shown more fully below, the "Dual Registration Directive" does not have the force of law, but is rather non-

binding instruction to county election officials regarding how to conduct election. While the Secretary of State is required to give this instruction pursuant to K.S.A. 25-124, the instruction is merely guidance the “invalidation” of which would have no legal effect.

Rather, it is the statutes of the State of Kansas, not the “Dual Registration Directive,” that prevents the Plaintiffs from being registered to vote in state and local elections until they provide proof-of-citizenship documents. K.S.A. 25-2309(a)(2) allows any person to apply to register to vote using the Federal Form. That same statute, however, states in pertinent part that “[t]he county election officer or secretary of state's office shall accept any completed application for registration, *but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.*” K.S.A. 25-2309(l) (emphasis added). Thus, the statute does not make an exception to the proof-of-citizenship requirement for applicants that utilize the Federal Form. Therefore, the proof-of-citizenship requirement in K.S.A. 25-2309(l) applies to voter registration applicants who submit the Federal Form, and such applicants *cannot* be registered under Kansas law until they provide proof of citizenship. Importantly, the Plaintiffs do not allege in this matter that K.S.A. 25-2309(l) does not apply to Federal Form applicants.

This clear directive in K.S.A. 25-2309(l) establishes the default position of Kansas law: in order to become registered to vote, every registrant after January 1, 2013, must provide proof of citizenship. However, in 2013 the United States Supreme Court issued a ruling that creates a carve-out for registrants who use the Federal Form. The Supreme Court ruled that applicants who submit the Federal Form must be allowed to vote in elections “*for federal office*” unless the Federal Form is modified to include a proof-of-citizenship requirement. *Inter Tribal Council*, 133 S. Ct. at 2260 (emphasis added). The Supreme Court’s decision in *Inter Tribal Council* was based on 42 U.S.C. § 1973gg-4, found in the National Voter Registration Act (hereinafter “the NVRA”). *Id.*

42 U.S.C. § 1973gg-4, as well as the NVRA as a whole, explicitly states that it only applies to “elections for Federal office.” 42 U.S.C. § 1973gg-4. Furthermore, the Supreme Court made it clear that its decision in *Inter Tribal Council* only applies to elections for federal office, not to elections for state office. *See Inter Tribal Council* at 2251 and 2255-56. Therefore, by the Supreme Court’s own words, the *Inter Tribal* decision can only apply to elections for federal office; it has no effect on state and local elections.

Thus, current United States Supreme Court precedent requires that applicants who submit the Federal Form, without providing proof of citizenship, must be allowed to vote in elections for *federal office* unless the Federal Form is modified to include a proof-of-citizenship requirement. *It is this precedent that requires the creation of a dual registration system*, not anything the Defendants have done.. The so called “Dual Registration Directive” is nothing more than guidance to county election officials providing instructions on how to comply with both Kansas law (i.e., K.S.A. 25-2309) and federal law (the NVRA and *Inter Tribal Council*). Notably, the Plaintiffs do not claim or assert that Kansas’s proof-of-citizenship requirement, found in K.S.A. 25-2309(l), is invalid. Therefore, even if this Court were to declare the “Dual Registration Directive” to be invalid, K.S.A. 25-2309(l) would remain in effect and the Plaintiffs would still be subject to the dual registration system because county election officers are bound to follow both Kansas and federal law. Thus the relief request in ¶ 56(a) of the Petition will not redress the injury asserted by the Plaintiffs.

A second problem regarding the redressability of the Plaintiffs’ purported injury is that the Defendants cannot provide the relief the Plaintiffs seek. An order enjoining the Defendants from implementing the dual registration system, as requested in ¶ 56(b) of the Petition, will not redress the Plaintiffs’ alleged injury of being prevented from voting in state and local elections *because*

the Defendant do not decide whether to register applicants to vote. As explained at length below, the Defendants have the statutory authority to provide guidance and instructions to county election officials regarding the procedures to be used in the conduct of election, including the dual registration system. K.S.A. 25-1240. However, *it is the county election officials that are ultimately responsible for processing applications to register to vote.* See K.S.A. 25-2309(g) (“A person who completes an application for voter registration shall be considered a registered voter when the county election officer adds the applicant's name to the county voter registration list.”). Therefore, even if the Court enjoined the Defendants from implementing the dual registration system, the county election officers would remain bound by state and federal law to implement the dual registration system. There is simply no official duty of the Defendants that this Court could enjoin to prevent the dual registration system from occurring. In other words, Plaintiffs have not sued all of the Defendants necessary for this Court to grant relief in this matter. Assuming that the many other jurisdictional deficiencies in this case could be overcome, Plaintiffs would also need to sue all 105 county election officers for this Court to remedy Plaintiffs’ alleged injuries.

Moreover, an injunction issued by the Court ordering the Defendants to direct county election officers to register the Plaintiffs would be just as ineffective. As discussed above, county election officers are ultimately responsible under Kansas law for processing voter registration applications. Furthermore, there is no statute giving the Defendant’s the authority to order county election officers to add an applicant’s name to the county voter registration list. Simply put, county election officers are free to disregard guidance and instruction from the Secretary of State, and there is no assurance that an injunction ordering the Defendants to direct county election officials to register the Individual Plaintiffs to vote would in fact result in the registration of the Individual Plaintiffs.

Further, the Court cannot order the Defendant's to take an action that they have no duty to undertake. The Kansas Supreme Court has consistently emphasized:

“As long ago as 1888, it was said: ‘the only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus, are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.’”

Huser v. Duck Creek Watershed (Joint) Dist. No. 59, 234 Kan. 1, 4 (1983) (quoting *Martin, Governor v. Ingham*, 38 Kan. 641 (1888)). Therefore, the Court has no ability to grant the relief requested in Paragraph 56(c) of the Petition. To obtain that relief, the Plaintiffs would have to file suit against the county election official for their counties of residence.

Finally, an order by the Court directing the Defendants themselves to register the Plaintiffs would be ineffective. Once again, it is the county election officers who process voter registration applications, not the Defendants. K.S.A. 25-2309(g). While K.S.A. 25-2323 provides that “[t]he secretary of state and deputy assistant secretaries of state *may* register voters on a statewide basis,” the statute is discretionary and does not place a duty on the Defendants to implement a statewide voter registration system. K.S.A. 25-2323 (emphasis added). Furthermore, despite the discretionary power provided by this statute, the Secretary of State's Office has never undertaken to register individuals to vote. Exhibit 1.

The Court cannot order the Defendants to take an action that is not mandatory; the Court can only order the Defendants to act under circumstances in which the Defendants have a duty to act. *Huser*, 234 Kan. at 4. Other statutes make it clear that county election officers have the responsibility to process voter registration applications. See K.S.A. 25-2303(a) (“The officer responsible for administering the provisions of this act shall be the county election officer. ‘County election officer’ means the election commissioner in counties having an election commissioner,

and the county clerk in counties which do not have an election commissioner.”), and K.S.A. 25-2309(g) (“A person who completes an application for voter registration shall be considered a registered voter when the county election officer adds the applicant’s name to the county voter registration list.”). Furthermore, K.S.A. 25-2322 provides that “[i]f the county election officer refuses to register any person who makes application therefor as provided in this act, such person may bring an action in mandamus to require such registration in the district court of the district in which the county election officer is located.” There is no statute authorizing such a mandamus action against the Defendants. Thus, the court cannot order the Defendants to register the Plaintiffs. If such an order is to be issued, it must be issued against the appropriate county election officer (who, of course, are not parties to this action and over whom this Court does not have personal jurisdiction). Therefore, the Court has no ability to grant the relief requested in Paragraph 56(d) of the Petition and this matter must be dismissed for lack of standing.

B. THIS MATTER MUST BE DISMISSED BECAUSE IT HAS BECOME MOOT

As shown by Exhibit 1, 1a, and 2a attached hereto, Plaintiffs Belenky and Jones are currently registered to vote in all federal, state, and local elections. Their respective registrations were completed on July 7 and July 8, 2014, respectively, when the Kansas Department of Revenue transmitted affirmations that Belenky and Jones had presented their passports at the time they applied for their driver’s licenses, and the county election officers accepted those transmissions as sufficient evidence of citizenship.² Accordingly, this case should be dismissed because the claims

² This process of such affirmations from the Department of Revenue being transmitted to the relevant county election officer is done daily throughout Kansas to complete voter registration applications. Indeed, it is the most common manner in which proof of citizenship is obtained, since many of those who register to vote at the DMV provide proof of citizenship in order to gain their driver’s licenses. Had Individual Plaintiffs requested that they be registered when they applied for their driver’s licenses, then the affirmations that they had produced their passports would have been transmitted to the relevant county election officers immediately thereafter. However Individual Plaintiffs did not do so. In such cases, where the Department of Revenue possesses proof of citizenship, but the registrant does not register

advanced by the Plaintiffs are moot. The Individual Plaintiffs' votes will be counted for all federal, state, and local races, not just federal races. "A court has a duty only to decide actual controversies and will not give opinions upon moot questions or abstract propositions. A case will be dismissed as moot when it clearly and convincingly appears that the actual controversy has ceased and any judgment rendered in the case will be an idle act insofar as the rights involved in the actions are concerned." *In re Horst*, 270 Kan. 510, 519 (2000) (quoting *Moorhouse v. City of Wichita*, 259 Kan. 570, 574 (1996)). Here, the actual controversy has ceased; no controversy currently exists between the Plaintiffs and the Defendants. The Plaintiffs are registered to vote, so any judgment rendered would be an idle act insofar as their rights are concerned. Thus, this case is moot and must be dismissed.

C. THE DEFENDANTS POSSESS STATUTORY AUTHORITY TO ISSUE THE "DUAL REGISTRATION DIRECTIVE"

As explained at length above, there are multiple, fatal jurisdictional defects in the Plaintiffs' case. Assuming *arguendo* that the Plaintiffs could overcome their standing and mootness hurdles, and that this case was justiciable, the Defendants would prevail as a matter of law on the merits. The Plaintiffs assert that the Defendants violated the Filing Act, K.S.A. 77-415 *et seq.*, by issuing the so-called "Dual Registration Directive" on July 30, 2013. *See* Petition ¶¶ 43-50. As a necessary prerequisite to their claim that the Defendants violated the Rules and Regulations Filing Act (hereinafter "the Filing Act"), the Plaintiffs also assert in their Petition, without any legal support, that the Defendants' guidance is "binding" upon the county election officers. Petition ¶ 32. The Plaintiffs likewise assert that this guidance is "binding" in their motion for a preliminary

through the DMV, the Department of Revenue transmits confirmation of proof of citizenship on an ad hoc basis, whenever requested by the Secretary of State or the county election officer, or en masse, whenever the Secretary of State provides a list of incomplete registrations to see if the Department of Revenue possesses citizenship documentation for any of the individuals on the list.

injunction, again without legal support. Pl. Memorandum at ¶ 13. The Plaintiffs' entire claim hinges on this assertion; because by the Plaintiffs' own admission the requirements of the Filing Act only apply to rules and regulations that "hav[e] the effect of law." Id. at ¶ 32. However, the guidance submitted to county election officials by the Defendants is (1) specifically authorized by Kansas law, and (2) is not binding. Accordingly, for both of these reasons the guidance did not violate the Filing Act.

Defendants' principal legal authority to issue guidance or instructions to the county election officers concerning the conduct of elections is found in K.S.A. 25-124, which provides:

"County election officers, as defined in K.S.A. 25-2504, and amendments thereto, shall receive instruction relating to their duties in conducting official elections, including procedures for complying with federal and state laws and regulation. The form and content of the instruction shall be determined by the secretary of state."

This statute grants the Secretary of State the authority to provide guidance or instruction to county election officials *apart* from the Filing Act. No rule or regulation needs to be promulgated in order for the Secretary of State to issue instructions to county election officers under K.S.A. 25-124. Thus, even if the guidance provided by the Secretary of State was binding, the guidance cannot be said to violate the Filing Act because it is specifically authorized by K.S.A. 25-124. That being said, the Court need not reach that holding because the guidance provided by the Secretary under K.S.A. 25-124 is clearly not binding.

The language of K.S.A. 25-124 makes clear that the Secretary is only authorized to provide "instructions." Notably, the phrasing of the provision makes clear that instructions are not the same thing as binding "laws or regulations." Instructions are merely guidance on how to "comply[] with federal and state laws and regulation." K.S.A. 25-124. If instructions issued by the Secretary of State under K.S.A. 25-124 constituted binding regulations with the force of law, as Plaintiffs

suppose, then the phrasing of K.S.A. 25-124 would make no sense. Nor does anything else in the statute suggest the instructions to county election officers are binding upon them.

Furthermore, other statutes make it clear that county election officials have independent decision-making authority regarding any individual's voter registration. K.S.A. 25-2303(a), for example, provides in pertinent part that "[t]he officer responsible for administering the provisions of this act shall be *the county election officer*." (emphasis added). Likewise, K.S.A. 25-2309(g) states, "[a] person who completes an application for voter registration shall be considered a registered voter when the *county election officer* adds the applicant's name to the county voter registration list." (emphasis added). County election officers therefore retain the authority and discretion to administer state and federal voter registration laws regardless of the guidance provided by the Secretary of State.

The Filing Act is concerned with "rules" and "regulations," which are defined by the Act as "a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation." K.S.A. 77-415(c)(4). In this case, the guidance provided by the Defendants cannot be a "rule" or "regulation" under the Filing Act because the guidance does not have the force and effect of law. Moreover, as noted above, the phrasing of K.S.A. 25-124 makes clear that instructions to the county election officers from the Secretary of State are not the same thing as "laws or regulations." Thus, the Plaintiffs' claims under the Filing Act are without merit and their Petition should be dismissed.

D. THE DUAL REGISTRATION SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE KANSAS CONSTITUTION.

The Plaintiffs assert that the dual registration system violates the equal protection guarantees of Section 1 of the Kansas Bill of Rights. They allege that under the dual registration

system, voter registration applicants who submit the Federal Form and fail to provide proof of citizenship constitute a class of voters that are arbitrarily denied the right to vote in state and local elections. Petition at ¶ 52. They then attempt to compare Federal Form applicants who fail to provide proof of citizenship to (1) all persons who registered to vote on or before January 1, 2013, (2) persons who apply to register to vote using the Federal Services Post Card Application, and (3) persons who apply to register to voter using the state form and provide documentary proof of citizenship.

The first comparison drawn by the Plaintiffs is with individuals who were registered to vote on or before January 1, 2013, and individuals who submitted the Federal Form without providing proof of citizenship after January 1, 2013. January 1, 2013, is the effective date of Kansas's proof-of-citizenship requirement. K.S.A 25-2309(u). Such claims have already been rejected by the Kansas Supreme Court. The Court has held that classifications based on the effective date of a statute cannot serve as the basis of an equal protection claim. *Holt ex rel. Holt v. Wesley Medical Center, LLC*, 277 Kan. 536, 549 (2004) (“Because legislation cannot become effective without an effective date and an effective date always will create before-and-after classifications, equal protection analysis of classifications created by an effective date is of little utility.”). Consequently, the classification asserted by the Plaintiffs based on the effective date of Kansas's proof-of-citizenship requirement cannot be used as the basis for an equal protection claim in this matter.

The second comparison drawn by the Plaintiffs is between individuals who apply to register to vote using the Federal Services Post Card Application and individuals that submit the Federal Form after January 1, 2013, without providing proof of citizenship. The first step under an equal protection analysis is to determine if a classification actually exists that is relevant to the case at

hand. *Miami County Bd. of Com'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315 (2011). The Defendants contend that the Plaintiffs control whether they are fully registered to vote in all elections. That is, it is undisputed that Plaintiffs possess proof-of-citizenship documents. Exhibit 6b, Belenky Admission No. 3, 4; Exhibit 7b, Jones Admission No. 3. Furthermore, it is undisputed that Plaintiffs provided proof-of-citizenship documents to the Kansas Department of Revenue at the time they applied for a Kansas driver's license. Exhibit 6a, Belenky Interrog. Resp. No. 13; Exhibit 7a, Jones Interrog. Resp. No. 13. Therefore, the Plaintiffs have the ability to submit proof-of-citizenship documents to the appropriate county election officer at any time. The Plaintiffs would then be registered to vote in all elections and would be treated exactly the same as individuals who use the Federal Services Post Card Application.

Significantly, *the Plaintiffs have not asserted that the Kansas statute requiring proof of citizenship is invalid*. Furthermore, they have not alleged that they are unable to comply with the proof-of-citizenship requirement or that such requirement places a burden of any type on the Plaintiffs. The Plaintiffs simply chose to not comply with the proof-of-citizenship requirement. It defies reason to allow individuals to assert that they are being unconstitutionally treated differently than others when such individuals created the difference by their own choice. Moreover, it is federal law, not the actions of the Defendants, which directs the manner in which Federal Form applicants are treated. *See* 42 U.S.C. § 1973gg *et seq.*; *Inter Tribal Council*, 133 S. Ct. at 2259-60.

If it were determined that a classification that treated similarly situated individuals differently did exist in the instant case, the next step would be to determine what level of scrutiny should apply. *Miami County Bd. of Com'rs*, 292 Kan. 285 at 316. Unless a law burdens a fundamental right or uses a suspect classification, the Court should apply a rational basis test.

Downtown Bar and Grill, LLC v. State, 294 Kan. 188, 194 (2012). In the instant case, the asserted classification is based on the type of application form used by an individual. The type of application form used clearly does not fall into any of the traditional suspect classifications that would require a higher level of scrutiny.

Alternatively, the Plaintiffs might argue that the subject matter of the present case involves voting and therefore claim that a higher level of scrutiny applies. The right to vote as a fundamental right *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). However, courts have also ruled that “[i]f a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.” *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). In the case at bar, nothing prevents the Plaintiffs from providing proof of citizenship and being registered to vote in all elections. Furthermore, *the Plaintiffs have not alleged that providing proof of citizenship places any burden on them whatsoever*. Thus, the Plaintiffs have simply alleged that they have been treated differently without alleging any burden on the right to vote, and the rational basis standard of review must be applied.³

A rational basis for not requiring proof-of-citizenship documents for individuals utilizing the Federal Services Post Card Application clearly exists. Only persons absent from the State of Kansas are eligible for a Federal Services Post Card Application. K.S.A. 25-1215. Therefore, it is more difficult for such persons to obtain and deliver proof-of-citizenship document to county election officers.

³ Even if a burden on the right to vote exists, courts do not automatically apply strict scrutiny. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (weighing the burden imposed on the right to vote against the state’s interest in protecting the integrity of elections).

Finally, the Plaintiffs' attempt to compare persons who apply to register to vote using the state form and provide documentary proof of citizenship with individuals that submit the Federal Form without providing proof of citizenship. However, this is not a valid comparison. In order to sustain an equal protection claim the Plaintiffs must assert that they are treated differently than other *similarly situated individuals*. *Miami County Bd. of Com'rs*, 292 Kan. 285 at 315. Individuals who utilize the state form and provide proof of citizenship are not similarly situated to persons who utilize the Federal Form and fail to provide proof of citizenship. The obvious distinction is that one group has provided proof of citizenship while the other group has not. Any person who submits the Federal Form and provides proof of citizenship will be registered to vote in local, state, and federal elections. Exhibit 9. Conversely, any individual who submits a state form without providing proof of citizenship will not be registered to vote in any elections. K.S.A. 25-2309(l). Therefore, individuals who submit a state form are not given preferential treatment when compared to individuals that submit the Federal Form. Indeed, quite the opposite is true: individuals that submit the Federal Form without proof of citizenship are currently allowed to vote in elections for Federal office, while those who submit the state form without proof of citizenship are not eligible to vote in any elections. Thus, individuals who submit the Federal Form without proof of citizenship are given preferential treatment when compared to similarly situated individuals who submit a state form without proof of citizenship. That preferential treatment is a direct result of federal law (the NVRA), as interpreted by the Supreme Court in *Inter Tribal Council*. The Supreme Court repeatedly made clear that its holding only applied to users of the Federal Form, and that using the Federal Form entitled registrants to be registered to vote in "federal elections," not all elections. *Inter Tribal*, 133 S. Ct. at 2260. Thus the Supreme Court itself drew the distinction between Federal Form users who fail to provide proof of citizenship and

voters who register using state registration forms. Clearly, the Supreme Court would not give credence to a distinction that deprived voters of equal protection of the law. For all of these reasons, the Plaintiffs cannot prevail on the merits of their equal protection claim.

IV. THE PLAINTIFFS CANNOT SHOW IRREPARABLE HARM

In order to obtain a preliminary injunction, the Plaintiffs must demonstrate a reasonable probability of irreparable future injury. *Board of County Com'rs*, 281 Kan. 678 at 683. The only harm asserted by the Plaintiffs in their Memorandum in Support of Petitioners' Motion for Preliminary Injunction is that Plaintiffs Belenky and Jones will be denied the right to vote in the upcoming primary elections. Pl. Mem. at 20-23. However, Plaintiffs Belenky and Jones are now registered to vote in all elections, including state and local elections. Exhibit 1. Therefore, denying a preliminary injunction in this matter will cause no harm to the Plaintiffs at all.

V. THE HARM CAUSED TO THE DEFENDANTS BY THE PROPOSED INJUNCTION WOULD OUTWEIGH THE ALLEGED INJURY TO THE PLAINTIFFS

To obtain a preliminary injunction, the Plaintiffs must establish that "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party." *Board of County Com'rs*, 281 Kan. at 683. In the case at bar, the exact opposite is true. As is shown above, the only injury asserted by the Plaintiffs is that Plaintiffs Belenky and Jones will be prevented from voting in the upcoming primary election unless a preliminary injunction is granted. However, Plaintiffs Belenky and Jones are currently registered to vote in all elections. Exhibit 1. Therefore, the Plaintiffs have not established any injury.

On the other hand, the Defendants have been named in this lawsuit in their official capacities as an elected official and employee of the State of Kansas. Thus, the Defendants represent the interests of the State of Kansas in this matter. The State of Kansas has a strong

interest in insuring that its laws are enforced. Indeed, an injunction that infringes upon Kansas's sovereign power to enact such laws would cause the state *irreparable injury*. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006). If a preliminary injunction is granted, Kansas's proof-of-citizenship requirement, as to voter registration applicants who submit the Federal Form, will not be enforced. Therefore, the lack of a preliminary injunction will cause no harm to the Plaintiffs, but the granting of a preliminary injunction will cause substantial harm to the Defendants.

VI. A PRELIMINARY INJUNCTION WOULD BE ADVERSE TO THE PUBLIC INTEREST

To obtain a preliminary injunction, the Plaintiffs must show that “the injunction, if issued, would not be adverse to the public interest.” *Board of County Com'rs*, 281 Kan. at 683. As is explained below, the granting of a preliminary injunction in this case would upset the *status quo* preserved by the United States Court of Appeals for the Tenth Circuit in a substantially related case. It is axiomatic that such interference with pending litigation concerning the meaning of the United States Constitution and the meaning of federal law is adverse to the public interest when the integrity and orderly administration of elections is at issue.

The instant case is not being litigated in a vacuum. Indeed, the opposite is true. If Plaintiffs were to overcome the jurisdictional hurdles facing them, and this Court were to address the merits of Plaintiffs' challenge, the outcome of this case would depend upon the decision of the United States Court of Appeals in the pending case of *Kobach v. Election Assistance Commission*, Nos. 14-3062 and 14-3072 (10th Cir.).⁴ In that case, the States of Kansas and Arizona and their

⁴ If the Tenth Circuit affirms the decision of the District of Kansas and the States prevail in the EAC litigation, then the instructions on Federal Form will be changed to reflect the proof-of-citizenship requirements of Kansas and Arizona. At that point, there would be no difference between the requirements of the Federal Form and the requirements of state form in Kansas. No dual registration system would be necessary from that point forward.

respective secretaries of states sued the United States Election Assistance Commission (hereinafter “the EAC”) seeking an injunction to compel the EAC to modify the Federal Form to reflect the Kansas and Arizona proof-of-citizenship requirements. The States prevailed in federal district court, and the court issued the sought-after injunction. *Kobach v. Election Assistance Commission*, 2014 U.S. Dist. LEXIS 35696 (D. Kan. March 19, 2014). However, the EAC appealed to the Tenth Circuit, requesting a stay of the district court’s injunction pending appeal, as well as expedited review of the case.

On May 19, 2014, the Tenth Circuit granted the stay pending appeal and expedited the briefing of the case. *Kobach v. Election Assistance Commission*, Nos. 14-3062 and 14-3072, Order of May 19, 2014, Doc. 01019252101. Briefing in the matter is nearly completed, oral argument is scheduled for August 25, 2014, and a decision is expected before the November 4, 2014, general election. Importantly, before the stay was issued, *the Tenth Circuit was informed that if a stay were to be granted, a dual registration system would be used in the August 5, 2014, primary election, and the votes of Federal Form registrants in Kansas who had not yet provided proof of citizenship would be counted for federal races only. See Appellees’ Brief, Kobach v. Election Assistance Commission*, Nos. 14-3062 and 14-3072, Document: 01019248750. With that understanding, the Tenth Circuit granted the stay pending appeal. *See Kobach v. Election Assistance Commission*, Nos. 14-3062 and 14-3072, Order of May 19, 2014.

It must be recognized that the Tenth Circuit has already acted to preserve the *status quo*. And that *status quo* involves Kansas’s using of the dual registration system and counting of votes for federal races only during the August 5 primary election that the Plaintiffs in the instant case seek to enjoin. Out of deference to the Tenth Circuit, this Court should be wary of disrupting the

status quo that the Tenth Circuit assumed would be in place when that court issued its stay pending appeal. Such deference is grounded in fundamental principles of state-federal comity.

“Comity is practiced when a court of one jurisdiction voluntarily restrains itself from interfering in a matter falling within the purview of a court of another jurisdiction. ... Comity is grounded in notions of accommodation and good-neighborliness, and is a necessary expedient to preserve the delicate balance of power and harmonious relations among the various sovereigns of our federalist system.”

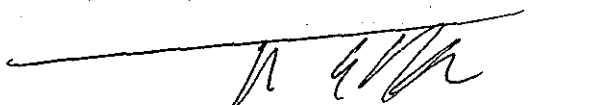
Thompson v. City of Atlantic City, 190 N.J. 359, 382 (N.J. 2007) (internal citations omitted).

“[T]he rule of comity is a matter of courtesy, complaisance, [and] respect,” *Ex parte Noble Trucking Co.*, 675 So. 2d 356, 359 (Ala. 1996) (quoting *State ex rel. Dykhouse v. Edwards*, 908 S.W.2d 686, 689 (Mo. 1995)) (internal quotations omitted). Deference in this matter is also based on the first-to-file rule. The first-to-file rule is based on “principles of comity and sound judicial administration.” *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). See also *Baden-Wurtemberg v. Walton Seattle Mezz Holdings VI-B, LLC*, 2013 Del. Ch. LEXIS 81 (Del. Ch. 2013) (“[T]his Court must carefully consider whether principles of comity and economy dictate deference to the court overseeing the first-filed action.”) The *EAC* case in the Tenth Circuit was filed first, is at an advanced stage, and may ultimately render the instant case moot. Such considerations militate strongly against changing the *status quo* that the Tenth Circuit has attempted to preserve.

VII. CONCLUSION

For the foregoing reasons, the Court should grant the Defendants’ Motion for Summary Judgment and deny the Plaintiffs’ Motion for Preliminary Injunction.

Respectfully Submitted,



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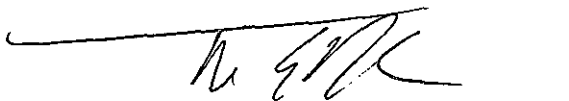
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of July, 2014, I caused a copy of the foregoing to be hand-delivered to the chambers of the Honorable Franklin R. Theis, and I further certify that I caused a copy to be served on the following parties, by electronic mail, addressed as follows:

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EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KRIS W. KOBACH, KANSAS)	
SECRETARY OF STATE;)	
)	
KEN BENNETT, ARIZONA)	
SECRETARY OF STATE;)	
)	
THE STATE OF KANSAS;)	
)	
THE STATE OF ARIZONA;)	
)	
Plaintiffs,)	
vs.)	Case No. <u>13-4095-EFM-DJW</u>
)	
THE UNITED STATES ELECTION)	Designation of Trial Location:
ASSISTANCE COMMISSION;)	Topeka, Kansas
)	
ALICE MILLER, in her capacity as the)	
ACTING EXECUTIVE DIRECTOR &)	
CHIEF OPERATING OFFICER OF THE)	
UNITED STATES ELECTION)	
ASSISTANCE COMMISSION;)	
)	
Defendants.)	
_____)	

COMPLAINT

COME NOW the above-named Plaintiffs, and for their Complaint against the United States Election Assistance Commission and Alice Miller, Acting Executive Director and Chief Operating Officer of the United States Elections Assistance Commission, hereby state and allege the following upon current information and belief:

Introduction

1. This is an action seeking a writ of mandamus, pursuant to 28 U.S.C. § 1361 and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (hereinafter “the APA”), to order the United States Election Assistance Commission (hereinafter “the EAC”) or its Acting Executive

Director Alice Miller (hereinafter “Miller”) to make modifications to the Kansas- and Arizona-specific instructions of the mail voter registration application form (hereinafter “the Federal Form”), which is developed by the EAC in consultation with the chief election officers of the several States pursuant to the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* (hereinafter “the NVRA”), or to otherwise permit the States of Kansas and Arizona to require voter registration applicants utilizing the Federal Form to submit proof-of-citizenship documentation in accordance with Kansas and Arizona law. The current version of the Federal Form only requires a voter registration applicant to make a mere oath that the applicant is a United States citizen, while the State laws of Plaintiffs require that voter registration applicants utilizing the Federal Form also submit concrete documentation evidencing United States citizenship.

2. The EAC and Miller have refused to make modifications to the State-specific instruction of the Federal Form as requested by Plaintiffs, even though the proposed modifications are necessary due to changes in the State laws of the Plaintiffs. Pursuant to the NVRA, the EAC and Miller are under a nondiscretionary duty to make the proposed modifications to the Federal Form because the proposed modifications reflect the respective voter qualification and registration laws of Plaintiffs, and include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs’ voter qualifications. This action therefore seeks a writ of mandamus ordering the EAC and Miller to make the modifications to the State-specific instructions of the Federal Form as requested by Plaintiffs.

3. This is also an action seeking declaratory judgment and injunctive relief, pursuant to 28 U.S.C. §§ 2201 and 2202, the APA, 5 U.S.C. § 500 *et seq.*, and the Tenth Amendment,

declaring that the Help America Vote Act of 2002 (hereinafter “HAVA”), 42 U.S.C. § 15301 *et seq.*, and the NVRA, 42 U.S.C. §§ 1973gg *et seq.*, are unconstitutional as applied by the EAC or as applied to Plaintiffs. As sovereign States, Plaintiffs have the constitutional right, power, and privilege to establish voting qualifications, including voter registration requirements. This power includes the power to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs’ voter qualifications.

4. Insofar as Plaintiffs have been precluded from obtaining modifications to their State-specific instruction on the Federal Form, while at the same time Plaintiffs are required under the NVRA to accept and use the Federal Form, HAVA and the NVRA are unconstitutional, as applied, in the following ways:

- a. The exercise of discretionary authority by the EAC, its officers, or its staff, in refusing to modify the State-specific instruction of the Federal Form as requested by Plaintiffs constitute unconstitutional Acts of Congress which are not authorized by one of the powers delegated to Congress in the Constitution, and are unconstitutional invasions of the provinces of State sovereignty in violation of the Tenth Amendment;
- b. To the extent the EAC’s lack of quorum precludes the EAC from modifying the State-specific instructions of the Federal Form as requested by Plaintiffs, the lack of quorum unconstitutionally prevents Plaintiffs, in violation of the Tenth Amendment, from exercising their constitutional right, power, and privilege of establishing and enforcing voting qualifications, including voter registration requirements;

- c. Insofar as HAVA and the NVRA, as applied by the EAC or as applied to Plaintiffs, preclude Plaintiffs from requiring Federal Form applicants to provide concrete evidence of citizenship, HAVA and the NVRA constitute unconstitutional Congressional Acts establishing voting qualifications or voter registration requirements which are not supported by a power specifically conferred upon Congress by the Constitution, and which invade the province of State sovereignty reserved by the Tenth Amendment.

5. The Supreme Court of the United States recently acknowledged the inviolable power of States to establish and enforce voting requirements, stating, “[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.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, ___ U.S. ___, 133 S.Ct. 2247, 2258-59 (2013) (emphasis added). The court further encouraged the present action by stating, “[s]hould the EAC’s inaction persist, [the States] would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate [their] citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include [the States’] concrete evidence requirement on the Federal Form.” *Inter Tribal Council*, 133 S.Ct. at 2260.

Parties

6. Plaintiff Kris W. Kobach (hereinafter “Secretary Kobach”) is the duly-elected Secretary of State for the State of Kansas, which is a sovereign State in the United States of

America. Pursuant to Kansas Statutes Annotated (hereinafter “K.S.A.”) 25-2504, Secretary Kobach is the Chief Election Officer of the State of Kansas as that phrase is used in the NVRA.

7. Plaintiff Ken Bennett (hereinafter “Secretary Bennett”) is the duly-elected Secretary of State for the State of Arizona, which is a sovereign State in the United States of America. Pursuant to Arizona Revised Statutes (hereinafter “A.R.S.”) § 16-142, Secretary Bennett is the Chief Election Officer of the State of Arizona as that phrase is used in the NVRA.

8. The State of Kansas is a sovereign State in the United States of America.

9. The State of Arizona is a sovereign State in the United States of America.

10. Defendant The United States Election Assistance Commission is an agency of the United States, 42 U.S.C. §§ 15321 – 30, 42 U.S.C. § 1973gg-7, and is an “agency” as that term is use in the APA, 5 U.S.C. § 551(1). The EAC has an ongoing responsibility to develop the Federal Form, in consultation with the chief election officers of the States, for the registration of voters for elections for Federal office, 42 U.S.C. § 1973gg-7(a)(2).

11. Defendant Alice Miller is the Acting Executive Director and Chief Operating Officer of the EAC, and is named as a party in her official capacity.

Jurisdiction and Venue

12. This action is against the EAC, an agency of the United States, and against Miller, the Acting Executive Director of the EAC and an officer of the United States. This action arises under the EAC’s enabling statutes, 42 U.S.C. § 15321 *et seq.*, the NVRA, 42 U.S.C. § 1973gg *et seq.*, the APA, 5 U.S.C. § 500 *et seq.*, and the Tenth Amendment to the United States Constitution. This action is in the nature of mandamus to compel an officer or employee of the United States, or an agency thereof, to perform a duty owed to the Plaintiffs, as well as for

declaratory and injunctive relief. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 1651, 2201, and 2202.

13. The relief requested herein is specifically authorized pursuant to 28 U.S.C. § 1651 (writs), 28 U.S.C. § 2201 (declaratory relief), 28 U.S.C. § 2202 (further relief), and 28 U.S.C. 2412 (costs and fees).

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) because Defendant Alice Miller is an officer or employee of the United States acting in her official capacity or under color of legal authority, Defendant EAC is an agency of the United States, Plaintiff Secretary Kobach and the State of Kansas are located in this judicial district, and no real property is involved in the action.

Factual Background

15. In 1993, the United States Congress passed and the President signed into law the NVRA. See 42 U.S.C. § 1973gg *et seq.* The various provisions of the NVRA were originally administered by the Federal Election Commission (hereinafter “the FEC”).

16. In 2002, Congress enacted HAVA, 42 U.S.C. § 15301 *et seq.*, and in so doing created the EAC, 42 U.S.C. § 15321 *et seq.*, an agency of the United States consisting of four Commissioners. Pursuant to HAVA, Congress transferred from the FEC to the EAC the responsibility of administering the NVRA. 42 U.S.C. § 15532.

17. Pursuant to HAVA, the President was required to appoint the original four members of the EAC Commission, by and with the advice of the Senate, within 120 days of the enactment of HAVA, and vacancies on the EAC Commission were required to be filled in the same manner in which the original appointments were made. 42 U.S.C. § 15323.

18. The NVRA requires each State to permit prospective voters to register to vote in elections for Federal office by any of three methods: simultaneously with a driver's license application, in person, or by mail. 42 U.S.C. § 1973gg-2(a).

19. Pursuant to the NVRA, the Federal Form shall include a statement that (a) specifies each eligibility requirement, including citizenship; (b) contains an attestation that the applicant meets each such requirement; and (c) requires the signature of the applicant, under penalty of perjury. 42 U.S.C. § 1973gg-7(b)(2). The NVRA does not require applicants utilizing the Federal Form to provide concrete evidence of citizenship.

20. A copy of the current Federal Form, accessed at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf on August 16, 2013, is attached hereto as "Exhibit 1," and is incorporated herein by reference.

21. The NVRA places upon the EAC the ongoing responsibility of developing the Federal Form, in consultation with the chief election officers of the States, for the registration of voters for elections for Federal office, 42 U.S.C. § 1973gg-7(a)(2), and in turn requires the States to accept and use the Federal Form for the registration of voters for elections for Federal office. 42 U.S.C. § 1973gg-4(a)(1).

22. Under the NVRA, the EAC is under a nondiscretionary duty, at the request of the States, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of the States, and to include State-specific instructions that enable the States to obtain information the States deem necessary to assess the eligibility of voter registration applicants and to enforce the States' voter qualifications. See 42 U.S.C. §§ 1973gg-7(a)(2) and 1973gg-7(b)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

23. Pursuant to 42 U.S.C. § 15328, certain actions that the EAC is authorized to take under Chapter 146 of Title 42 of the United States Code, may be carried out only with the approval of at least three of its members.

24. Pursuant to 42 U.S.C. § 15324(a), the EAC shall have an Executive Director and a General Counsel, each appointed by the Commission.

25. There is established within the EAC the position of Chief Operating Officer, which officer serves under the Executive Director.

26. There is established within the EAC the Division of Research, Programs and Policy (hereinafter “the RPP”), which serves under the Chief Operating Officer.

27. The EAC has not had a quorum of commissioners since December 2010, and has not had any commissioners since December 2011. The EAC has not had an Executive Director since December 2011, and has not had a General Counsel since May 2012.

28. Plaintiffs state and allege on current information and belief that no Presidential nominations to the EAC are pending on the Executive Calendar of the United States Senate, and that the President has nominated only two individuals to serve as Commissioners on the EAC, and such nominations are pending in the Senate Committee of Rules and Administration, to-wit: PN538, Myrna Perez, of Texas, for a term expiring December 12, 2015 (received June 7, 2013), and PN537, Thomas Hicks, of Virginia, for a term expiring December 12, 2017 (received June 7, 2013), *vice* PN536, Thomas Hicks, of Virginia, for a term expiring December 12, 2013 (received June 7, 2013), which nominations will not establish a quorum of the EAC.

29. On November 9, 2011, Thomas Wilkey, then-Executive Director of the EAC, sent a memorandum (hereinafter “the Wilkey Memorandum”) to then-EAC Commissioners Donetta Davidson and Gineen Bresso. The Wilkey Memorandum was issued due to the lack of quorum

of commissioners on the EAC, and purports to implement a procedure for reviewing and processing State requests for modifications to the Federal Form. A copy of the Wilkey Memorandum is attached hereto as “Exhibit 2,” and is incorporated herein by reference.

30. Due to the lack of quorum of commissioners on the EAC, the Wilkey Memorandum purported to confer authority to the RPP to make modifications to the Federal Form at the request of States when the proposed modifications are required by a change in State law, including proposed modifications that clarify existing State law. The Wilkey Memorandum also stated: “Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum.”

31. Plaintiffs state and allege on current information and belief that subsequent to the Wilkey Memorandum, the EAC and the RPP have approved requests from various States for modifications to State-specific instructions on the Federal Form on the basis of the authority conferred to the RPP by the Wilkey Memorandum. These approved requests include requests similar to those made by Plaintiffs as described herein.

32. Plaintiffs state and allege on current information and belief that Defendant Miller and the RPP, and other staff of the EAC, have conducted the business and duties of the EAC without a quorum of EAC Commissioners since at least December 2010.

Kansas

33. Since Kansas became a State in 1861, eligibility to vote in any election has been conditioned upon United States citizenship. Kan. Const. art. V, § 1.

34. Since Kansas became a State in 1861, the Kansas Constitution has provided that “[t]he legislature shall provide by law for proper proofs of the right to suffrage.” Kan. Const. art. V, § 4.

35. Since 1996, Kansas statutory law has allowed individuals to register to vote using the Federal Form in addition to the Kansas state registration form approved by the Kansas secretary of state. See Section 7(a) of 1996 Kan. Sess. Laws Ch. 187, codified as K.S.A. 1996 Supp. 25-2309(a).

36. Although both Kansas and federal law require that individuals be citizens of the United States in order to register and vote, non-citizens have improperly registered to vote in Kansas and have unlawfully voted in Kansas elections.

37. In 2011, the Kansas legislature passed and the Kansas Governor signed into law HB 2067, the “Secure and Fair Elections Act,” which amended various Kansas statutes concerning elections in the State of Kansas. HB 2067 took effect on January 1, 2012.

38. Section 8(l) of HB 2067, codified as K.S.A. 25-2309(l), provides: “The county election officer or secretary of state’s office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.” The statute enumerates 13 different documents that constitute satisfactory evidence of citizenship.

39. Section 8(m) of HB 2067, codified as K.S.A. 25-2309(m), also allows an applicant to submit any other evidence that the applicant believed demonstrates the applicant’s United States citizenship, and provides for a procedure by which such other evidence may be assessed and accepted.

40. The proof of citizenship provisions of HB 2067 enable State election officials to assess the eligibility of voter registration applicants.

41. Pursuant to Section 8(u) of HB 2067, codified as K.S.A. 25-2309(u), the proof of citizenship requirement of HB 2067 took effect on January 1, 2013.

42. Pursuant to Section 8(n) of HB 2067, codified as K.S.A. 25-2309(n), persons who were properly registered to vote in Kansas prior to January 1, 2013, are not required to submit evidence of citizenship.

43. On August 9, 2012, the Kansas Secretary of State's Office sent a letter to the EAC requesting that the Kansas-specific instructions for the Federal Form be modified by the EAC in three ways. A copy of this letter is attached hereto as "Exhibit 3," and is incorporated herein by reference.

44. The August 9, 2012, letter to the EAC requested that the Kansas-specific instruction for the Federal Form be modified to change the voter registration deadline from 15 days before the election to 21 days before the election. This request was made due to a change in Kansas law.

45. The August 9, 2012, letter to the EAC also requested that the Kansas-specific instruction for the Federal Form be modified by deleting the words "for mental incompetence" from the portion of the instruction stating that to register to vote in Kansas an applicant must not be excluded from voting by a court of competent jurisdiction. This request was made to clarify existing Kansas law under K.S.A. 25-2316c(f).

46. The August 9, 2012, letter to the EAC also requested that the Kansas-specific instructions for the Federal Form be modified by the EAC to reflect changes in Kansas law resulting from the passage of HB 2067. This letter requested the following proposed instruction be added to the Kansas-specific instructions on the Federal Form: "An applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote."

47. On October 11, 2012, Defendant Miller sent a letter to the Kansas Secretary of State's Office, which indicated that the requests for modification of the Kansas-specific instructions of the Federal Form relating to the voter registration deadline and requesting deletion of the words "for mental incompetence" had been approved subject to review by legal counsel. A copy of this letter is attached hereto as "Exhibit 4," and is incorporated herein by reference.

48. The October 11, 2012, letter further indicated that no action would be taken by the EAC on the request for modification of the Kansas-specific instruction of the Federal Form relating to proof of citizenship documentation. The letter indicated that this request "appears to have broad policy impact and would require consideration and approval of the EAC Commissioners. The authority of staff to modify the state instructions is limited to issues that do not have any policy impact." The letter noted that the EAC was without any Commissioners at the time, and therefore no action be taken by the EAC regarding this request.

49. On June 18, 2013, Secretary Kobach sent a letter to the EAC renewing Kansas's request that the Kansas-specific instructions be modified to include an instruction reflecting Kansas's law requiring that proof of citizenship documentation be submitted with voter registration applications. This renewed request was made in light of the decision of the United States Supreme Court in *Inter Tribal Council*, 133 S.Ct. at 2258-60. A copy of this letter is attached hereto as "Exhibit 5," and is incorporated herein by reference.

50. On July 31, 2013, Defendant Miller sent a letter to Secretary Kobach in which Miller again informed Secretary Kobach that the EAC could not process Kansas' request to modify in the Federal Form to reflect Kansas's proof of citizenship requirement due to a lack of a quorum on the Commission. In this letter, Miller stated that staff of the EAC is authorized to

process State requests to modify State-specific instructions on the Federal Form, but that according to procedures then in place EAC staff must defer determination on Kansas's request until the EAC has a quorum because the request raises "issues of broad policy concern to more than one state." A copy of this letter is attached hereto as "Exhibit 6," and is incorporated herein by reference.

51. The July 31, 2013, letter cited the Wilkey Memorandum as authority for the ability of EAC staff to process State requests for modifications to the Federal Form as well as for the policy to defer requests raising "issues of broad policy concern to more than one state" until the EAC has a quorum.

52. The July 31, 2013, letter from the EAC also suggested that the June 18, 2013, letter from the Kansas Secretary of State's Office indicated that Kansas would not accept and use the Federal Form without proper citizenship documentation.

53. On August 2, 2013, Secretary Kobach sent a letter to the EAC clarifying to the EAC that Kansas will accept and use the Federal Form submitted without proof of citizenship documentation to register voters for elections for Federal office until the EAC adds the requested Kansas-specific instruction to the Federal Form or until Kansas is otherwise relieved of that duty by a court of competent jurisdiction. This letter further clarified that once the Kansas-specific instruction was added, the Federal Form would be accepted for registering voters for both Federal and State elections. A copy of this letter is attached hereto as "Exhibit 7," and is incorporated herein by reference.

54. The August 2, 2013, letter also made the following modification to the proposed Kansas-specific instruction to remove a possible ambiguity in the language of the proposed

instruction: “To cast a regular ballot an applicant must provide evidence of U.S. citizenship prior to the first election day ~~after applying to register to vote.~~”

55. On August 6, 2013, Defendant Miller sent a letter to Secretary Kobach in which Miller again informed Secretary Kobach that the EAC could not process Kansas’ request to modify in the Federal Form to reflect the Kansas proof of citizenship requirement due to a lack of a quorum on the Commission. This letter again stated that according to procedures then in place EAC staff must defer determination on Kansas’s request until the EAC has a quorum because the request raises “issues of broad policy concern to more than one state.” A copy of this letter is attached hereto as “Exhibit 8,” and is incorporated herein by reference.

56. The August 6, 2013, letter again cited the Wilkey Memorandum as authority for the ability of EAC staff to process State requests for modifications to the Federal Form as well as for the policy to defer requests raising “issues of broad policy concern to more than one state” until the EAC has a quorum.

57. The August 6, 2013, letter from the EAC to the Kansas Secretary of State’s Office constitutes final agency action.

Arizona

58. Since Arizona became a State in 1912, eligibility to vote in any election has been conditioned upon United States citizenship. Ariz. Const. art. VII, § 2; A.R.S. § 16-101(A)(1).

59. The Arizona Constitution provides that, “[t]here shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.” Ariz. Const. art. VII, § 12.

60. Although both Arizona and federal law require that individuals be citizens of the United States in order to register and vote, non-citizens have improperly registered to vote in Arizona and have unlawfully voted in Arizona elections.

61. In 2004, Arizona voters passed Proposition 200, a citizens' initiative, declaring that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct... demeans the value of citizenship." The initiative was designed in part "to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day." *Purcell v. Gonzalez*, 549 U.S. 1, 2, 127 S.Ct. 5 (2006). A copy of Proposition 200 is attached hereto as "Exhibit 9," and is incorporated herein by reference.

62. One of Proposition 200's provisions, codified as A.R.S. § 16-166, required prospective voters to provide satisfactory evidence of United States citizenship in order to register to vote.

63. Proposition 200, codified as A.R.S. § 16-166(F), permits a variety of documents and identification numbers to be used as evidence of citizenship.

64. The proof-of-citizenship provisions of Proposition 200 enable State election officials to assess the eligibility of voter registration applicants.

65. Following approval of Proposition 200 by Arizona voters, the Arizona Attorney General submitted Proposition 200 to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. In that submission, Arizona specifically stated that the measure would "require applicants registering to vote to provide evidence of United States citizenship with the application."

66. The Department of Justice precleared Proposition 200 on January 24, 2005.

67. On December 12, 2005, Arizona, through the Secretary of State's Office, requested the EAC to apply Arizona state policy derived from Proposition 200 to the state-specific instructions for the Federal Form.

68. On March 6, 2006, Thomas Wilkey, then-Executive Director of the EAC, wrote to then-Arizona Secretary of State Jan Brewer, stating that Federal law set forth in the NVRA and HAVA preempted Arizona's statutory requirement that applicants submit proof of citizenship with their registration forms. As a result, the EAC refused to include a proof of citizenship requirement in the Arizona-specific instructions for the Federal Form. Plaintiffs state and allege on current information and belief that Mr. Wilkey made this decision unilaterally and not with the agreement of a minimum of three Commissioners. A copy of Mr. Wilkey's March 6, 2006, letter is attached hereto as "Exhibit 10," and is incorporated herein by reference.

69. On March 13, 2006, then-Secretary Brewer wrote to Paul DeGregorio, then-Chairman of the EAC, to request reconsideration of Mr. Wilkey's decision. A copy of this letter is attached hereto as "Exhibit 11," and is incorporated herein by reference.

70. On May 9, 2006, a group of individual Arizona residents filed suit seeking to enjoin the voting provisions of Proposition 200 in the U.S. District Court for the District of Arizona. *Gonzalez v. Arizona*, D. Ariz. Cause No. CV 06-1268-PHX-ROS. A separate complaint was filed by the Inter Tribal Council of Arizona, Inc. (hereinafter "ITCA"). These two cases were later consolidated (hereinafter "*Gonzalez/ITCA*").

71. On June 19, 2006, the district court issued an opinion and order in *Gonzalez/ITCA*, denying the plaintiffs' request for a temporary restraining order preventing Arizona officials from enforcing Proposition 200. The opinion and order provided:

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. (Dkt. 68 at 9.)

72. On June 20, 2006, then-Secretary Brewer sent a letter to the EAC renewing Arizona’s request that the EAC approve the Arizona-specific instructions giving effect to Proposition 200’s proof-of-citizenship requirement. A copy of this letter is attached hereto as “Exhibit 12,” and is incorporated herein by reference.

73. Then-EAC Chair DeGregorio, in response to then-Secretary Brewer’s June 20, 2006 letter and the district court order, submitted a Tally Vote to change the state-specific instructions. The Tally vote failed on a 2 to 2 vote, which vote was accompanied by position statements by EAC Chairman Paul DeGregorio and Vice Chairman Ray Martinez III. A copy of the Tally Vote, including the position statements, is attached hereto as “Exhibit 13,” and is incorporated herein by reference.

74. The *Gonzalez/ITCA* consolidated case proceeded through the courts and went twice through the Ninth Circuit and the U.S. Supreme Court. On June 17, 2013, the Supreme Court issued its Opinion in *Inter Tribal Council*, 133 S.Ct. 2247. The court held that Arizona must accept and use the Federal Form to register voters for elections for federal office, but that nothing precluded Arizona from renewing its request that the EAC modify the Federal Form to include the Arizona-specific instruction and challenging the EAC’s rejection of that request under the APA. *Inter Tribal Council*, 133 S.Ct. at 2259-60.

75. On June 19, 2013, Secretary Bennett wrote to Defendant Miller to renew Arizona’s request that the EAC modify the Federal Form to include the Arizona-specific instructions regarding Arizona’s proof of citizenship requirement as codified in A.R.S. § 16-166. A copy of this letter is attached hereto as “Exhibit 14,” and is incorporated herein by reference.

76. On July 22, 2013, counsel for ITCA submitted a letter to Defendant Miller urging the EAC to reject Arizona's request. A copy of that letter is attached hereto as "Exhibit 15," and is incorporated herein by reference.

77. On July 26, 2013, Arizona Attorney General Thomas C. Horne wrote to Defendant Miller to join in Secretary Bennett's request that the EAC modify the Federal Form to include Arizona's proof-of-citizenship requirement in the Arizona-specific instructions of the Federal Form. Attorney General Horne noted that the EAC had recently approved the State of Louisiana's request for state-specific instructions that required applicants that do not have a Louisiana driver's license, a Louisiana special identification card, or a social security number to attached additional documentation to the Federal Form pursuant to Louisiana statutes. Attorney General Horne further encouraged the EAC to treat Arizona fairly in light of its approval of Louisiana's request. A copy of Attorney General Horne's July 26, 2013, letter is attached hereto as "Exhibit 16," and is incorporated herein by reference.

78. On August 13, 2013, Defendant Miller sent a letter to Secretary Bennett in which she informed Secretary Bennett that the EAC could not process Arizona's request to modify the Federal Form to reflect Arizona's proof of citizenship requirement due to a lack of a quorum on the Commission. The letter cited the Wilkey Memorandum as authority for the ability of EAC staff to process State requests for modifications to the Federal Form as well as for the policy to defer requests raising "issues of broad policy concern to more than once state" until the EAC has a quorum. A copy of the August 13, 2013, letter is attached hereto as "Exhibit 17," and is incorporated herein by reference.

79. The August 13, 2013, letter from the EAC to the Arizona Secretary of State's Office constitutes final agency action.

Causes of Action

Cause I: Agency Action Unlawfully Withheld or Unreasonably Delayed

80. Plaintiffs hereby incorporate all of the foregoing allegations into the allegations supporting Cause I.

81. As sovereign States in the United States of America, Plaintiffs have the constitutional right, power, and privilege to establish voting qualifications, including voter registration requirements. *See* U.S. Const. article I, § 2, cl. 1; U.S. Const. amend. X and XVII. This power includes the power to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. *Inter Tribal Council*, 133 S.Ct. at 2258-59; 42 U.S.C. § 1973gg(b)(2).

82. A mere oath without concrete evidence of citizenship, as allowed for by the current version of the Federal Form, does not suffice to effectuate the State laws of Plaintiffs or enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter qualifications. The EAC is therefore under a nondiscretionary duty to include Plaintiffs' concrete evidence requirements on the Federal Form. Justice Scalia, who authored the Opinion of the Court in *Inter Tribal Council*, specifically noted during oral argument that a mere oath is virtually meaningless and does not enable the States to ensure that a voter registration applicant is actually qualified to vote: "The proof [the EAC] requires is simply the statement, 'I'm a citizen.' That is proof?... That is not proof at all... Under oath is not proof at all. It's just a statement." Transcript of oral argument, p. 44.

83. Pursuant to the NVRA, Plaintiffs may request that the EAC alter the Federal Form to reflect Plaintiffs' voter qualification and registration laws and to include information the Plaintiffs deem necessary to enable Plaintiffs to assess the eligibility of voter registration

applicants and to enforce Plaintiffs' voter qualifications. 42 U.S.C. § 1973gg-7(a)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

84. Pursuant to the NVRA, the EAC is under a nondiscretionary duty, at the request of Plaintiffs, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of the Plaintiff States, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. See 42 U.S.C. §§ 1973gg-7(a)(2) and 1973gg-7(b)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

85. The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

86. The APA provides that this Court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

87. Pursuant to the APA, "agency action" includes the whole or a part of an agency rule, order, relief, or the equivalent or denial thereof, and includes an agency's failure to act. 5 U.S.C. § 551(13).

88. The letters from the EAC to Plaintiffs, denying Plaintiffs requests to modify the Federal Form, constitute final agency actions.

89. To the extent that the NVRA or HAVA provide that the EAC's lack of quorum precludes the EAC from modifying the State-specific instructions of the Federal Form as requested by Plaintiffs, while at the same time requiring Plaintiffs to accept and use the Federal Form to register individuals to vote, the NVRA or HAVA result in an unconstitutional invasion

of the province of State sovereignty in violation of Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment.

90. The EAC's and the RPP's failure to modify the State-specific instructions on the Federal Form as requested by Plaintiffs constitutes agency action unlawfully withheld or unreasonably delayed under the APA, 5 U.S.C. § 706(1).

Cause II: Agency Action, Findings, and Conclusions
Contrary to Constitutional Right, Power, Privilege, or Immunity

91. Plaintiffs hereby incorporate all of the foregoing allegations into the allegations supporting Cause II.

92. The APA provides that this Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be... contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

93. Pursuant to the APA, “agency action” includes the whole or a part of an agency rule, order, relief, or the equivalent or denial thereof, and includes an agency's failure to act. 5 U.S.C. § 551(13).

94. The letters from the EAC to Plaintiffs, denying Plaintiffs requests to modify the Federal Form, constitute final agency actions.

95. As sovereign States in the United States of America, Plaintiffs have the constitutional right, power, and privilege of establishing voting qualifications, including voter registration requirements. *See* U.S. Const. article I, § 2, cl. 1; U.S. Const. amend. X and XVII.

96. The constitutional rights, powers, and privileges of establishing voter qualifications, including voter registration requirements, are incidents of State sovereignty protected by Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment. This power includes the power to obtain information the States deem necessary to

assess the eligibility of voter registration applicants and to enforce their voter qualifications. *Inter Tribal Council*, 133 S.Ct. at 2258-59.

97. A mere oath without concrete evidence of citizenship, as allowed for by the current version of the Federal Form, does not suffice to effectuate the State laws of Plaintiffs or enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter qualifications. Justice Scalia, who authored the Opinion of the Court in *Inter Tribal Council*, specifically noted during oral argument that a mere oath is virtually meaningless and does not enable the States to ensure that a voter registration applicant is actually qualified to vote: “The proof [the EAC] requires is simply the statement, ‘I’m a citizen.’ That is proof?... That is not proof at all... Under oath is not proof at all. It’s just a statement.” Transcript of oral argument, p. 44.

98. Under the NVRA and the Tenth Amendment, the EAC is under a nondiscretionary duty, at the request of Plaintiffs, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of Plaintiffs, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs’ voter qualifications. See 42 U.S.C. §§ 1973gg-7(a)(2) and 1973gg-7(b)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

99. The EAC’s and the RPP’s failure to modify the State-specific instructions on the Federal Form as requested by Plaintiffs constitutes agency action contrary to the constitutional rights, power, and privileges of Plaintiffs, under the Tenth Amendment, to establish voter qualifications, including voter registration requirements, to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter

qualifications, and otherwise infringes upon incidents of State sovereignty of the Plaintiff States, under the APA, 5 U.S.C. § 706(2)(B).

Cause III: Agency Action, Findings, and Conclusions that are
Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

100. Plaintiffs hereby incorporate all of the foregoing allegations into the allegations supporting Cause III.

101. The APA provides that this Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

102. Pursuant to the APA, “agency action” includes the whole or a part of an agency rule, order, relief, or the equivalent or denial thereof, and includes an agency’s failure to act. 5 U.S.C. § 551(13).

103. The letters from the EAC to Plaintiffs, denying Plaintiffs requests to modify the Federal Form, constitute final agency actions.

104. The agency action taken by the EAC pursuant to the Wilkey Memorandum vested nondiscretionary authority in the RPP to make modifications to the Federal Form at the request of States when the proposed modifications are required by a change in State law, including proposed modifications that clarify existing State law.

105. To the extent that the Wilkey Memorandum vested discretionary authority in the RPP to refuse to make modifications to the Federal Form at the Plaintiffs’ request, the Wilkey Memorandum constitutes final agency action that was arbitrary, capricious, an abuse of discretion, and was otherwise made not in accordance with law.

106. By their requests to the EAC, Plaintiffs sought to modify their respective State-specific instructions on the Federal Form to reflect the State law of Plaintiffs, and to include

instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. Because these requests concern only Plaintiffs' State-specific instructions, these requests do not "raise issues of broad policy concern to more than one State."

107. In 2012, the EAC approved a modification to the Louisiana-specific instructions of the Federal Form similar to the proposed instructions of Plaintiffs, and the EAC's failure to include Plaintiffs' proposed State-specific instruction therefore constitutes agency action that is arbitrary, capricious, and an abuse of discretion. In *Inter Tribal Council*, the United States Supreme Court specifically noted that it would be arbitrary to refuse to include Arizona's proposed instruction when the EAC has accepted a similar instruction requested by Louisiana. *Inter Tribal Council*, 133 S.Ct. at 2260.

108. The EAC's and the RPP's failure to modify the State-specific instructions on the Federal Form as requested by Plaintiffs constitutes agency action that was arbitrary, capricious, an abuse of discretion, and was otherwise made not in accordance with law under the APA, 5 U.S.C. § 706(2)(A).

Cause IV: Agency Action, Findings, and Conclusions that were
in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right

109. Plaintiffs hereby incorporate all of the foregoing allegations into the allegations supporting Cause IV.

110. The APA provides that this Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

111. Pursuant to the NVRA, the EAC is under a nondiscretionary duty to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and

registration laws of Plaintiffs, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. See 42 U.S.C. §§ 1973gg-7(a)(2) and 1973gg-7(b)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

112. Pursuant to the NVRA, the EAC and the RPP do not have the authority or right to decline Plaintiffs' requests to include State-specific instructions on the Federal Form that reflect the respective voter qualification and registration laws of Plaintiffs, or that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter qualifications.

113. To the extent the EAC interprets its own authority under the NVRA as sufficient to effectively prevent a State from requiring voter registration applicants to provide concrete evidence of citizenship, such an interpretation assumes that Congress has delegated authority to the EAC that Congress itself does not possess. Congress may not delegate power to an administrative agency that Congress itself does not have. Thus, such an interpretation would be in excess of statutory authority.

114. The EAC's and the RPP's failure to modify the State-specific instructions on the Federal Form as requested by Plaintiffs constitutes agency action that was in excess of statutory jurisdiction, authority, limitations, or short of statutory right under the APA, 5 U.S.C. § 706(2)(C).

Cause V: The Tenth Amendment

115. Plaintiffs hereby incorporate all of the foregoing allegations into the allegations supporting Cause V.

116. The Constitution established a system of dual sovereignty in which the States surrendered many of their powers to the Federal Government, but retained a residual and inviolable sovereignty.

117. Residual State sovereignty is implicit in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

118. The Federal Government is a government of enumerated powers with judicially enforceable limits, which means that Congress has no power to act unless the Constitution authorizes it to do so.

119. An act of Congress not supported by a power specifically conferred upon it by the Constitution is unconstitutional and is an invasion of the province of State sovereignty in violation of the Tenth Amendment. Further, an agency created by Congress cannot exercise powers that Congress itself does not possess.

120. As sovereign States in the United States of America, Plaintiffs have the constitutional right, power, and privilege to establish voting qualifications, including voter registration requirements. *See* U.S. Const. article I, § 2, cl. 1; U.S. Const. amend. X and XVII. This power includes the power to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter qualifications. *Inter Tribal Council*, 133 S.Ct. at 2258-59; 42 U.S.C. § 1973gg(b)(2).

121. No enumerated power in Article I, or anywhere else in the Constitution, confers upon Congress the power to establish voting qualifications or voter registration requirements, or

the power to prohibit, limit, or hinder the power of the States to establish voter qualifications or voter registration requirements. *Inter Tribal Council*, 133 S.Ct. at 2258.

122. No enumerated power in Article I, or anywhere else in the Constitution, confers upon Congress the power to prohibit, limit, or hinder the power of the States to obtain information the States deem necessary to assess the eligibility of voter registration applicants or to enforce their voter qualifications. *Inter Tribal Council*, 133 S.Ct. at 2258-59.

123. Pursuant to the NVRA, the EAC is under a nondiscretionary duty to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of Plaintiffs, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. See 42 U.S.C. §§ 1973gg-7(a)(2) and 1973gg-7(b)(2); *Inter Tribal Council*, 133 S.Ct. at 2259.

124. To the extent that the NVRA vests discretionary authority with the EAC to refuse to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of Plaintiffs, while at the same time requiring that Plaintiffs accept and use the Federal Form to register individuals to vote, the NVRA is an unconstitutional Act of Congress, as applied by the EAC or as applied to Plaintiffs, which is not authorized by one of the powers delegated to Congress in the Constitution, and is an unconstitutional invasion of the province of State sovereignty in violation of Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment.

125. To the extent that the NVRA vests discretionary authority with the EAC to refuse to include State-specific instructions on the Federal Form that Plaintiffs deem necessary to enable Plaintiffs to assess the eligibility of voter registration applicants and to enforce their voter

qualifications, while at the same time requiring that Plaintiffs accept and use the Federal Form to register individuals to vote, the NVRA is an unconstitutional Act of Congress, as applied by the EAC or as applied to Plaintiffs, which is not authorized by one of the powers delegated to Congress in the Constitution, and is an unconstitutional invasion of the province of State sovereignty in violation of Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment.

126. To the extent that HAVA or the NVRA provide that the EAC's lack of quorum precludes the EAC from modifying the State-specific instructions of the Federal Form as requested by Plaintiffs, while at the same time requiring Plaintiffs to accept and use the Federal Form to register individuals to vote, the NVRA or HAVA result in an unconstitutional invasion of the province of State sovereignty, as applied by the EAC or as applied to Plaintiffs, in violation of Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment.

127. As applied by the EAC or as applied to Plaintiffs, the NVRA effectively compels Plaintiffs to choose between two options, neither of which Congress has the constitutional authority to enact. Either: (1) Plaintiffs must abandon their proof-of-citizenship requirements for Federal Form applicants and allow such applicants to register to vote for federal elections but not state elections; or (2) Plaintiffs must abandon their proof-of-citizenship requirements altogether, and allow applicants using any registration form to register to vote for both federal and state elections.

128. Because “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all,” *New York v. United States*, 505 U.S. 144, 176, 112 S.Ct. 2408, 2428 (1992), the EAC has invaded the province of State sovereignty and has unconstitutionally

commandeered Plaintiffs into enacting a federal voter eligibility and registration policy which Congress has not authority to enact in the first place.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Find, hold unlawful, and set aside the EAC's and the RPP's findings and decisions, or alternatively, the EAC's and the RPP's failure to modify State-specific instructions of the Federal Form as requested by Plaintiffs as agency action unlawfully withheld or unreasonably delayed; as agency action that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; as agency action contrary to constitutional right, power, privilege, or immunity; and as agency action in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

B. Issue a writ of mandamus ordering the EAC to modify the State-specific instructions of the Federal Form as requested by the respective Plaintiffs;

C. Declare that, to the extent that the NVRA vests discretionary authority with the EAC to refuse to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of the States, while at the same time requiring that the States accept and use the Federal Form to register individuals to vote, the NVRA is unconstitutional as applied by the EAC or as applied to Plaintiffs;

D. Declare that, to the extent that the NVRA vests discretionary authority with the EAC to refuse to include State-specific instructions on the Federal Form that the States deem necessary to enable the States to assess the eligibility of voter registration applicants and to enforce their voter qualifications, while at the same time requiring that the States accept and use

the Federal Form to register individuals to vote, the NVRA is unconstitutional as applied by the EAC or as applied to Plaintiffs;

E. Declare that the Wilkey Memorandum is an unlawful regulation promulgated without observance of the requirements of the APA;

F. Declare that, to the extent that the Wilkey Memorandum vested discretionary authority to the RPP to refuse to make modifications to the Federal Form at the request of States, the Wilkey Memorandum constitutes agency action that was arbitrary, capricious, an abuse of discretion, and was otherwise made not in accordance with law;

G. Declare that, to the extent that HAVA or the NVRA provide that the EAC's lack of quorum precludes the EAC from modifying the State-specific instructions of the Federal Form as requested by the States, while at the same time requiring that the States accept and use the Federal Form to register individuals to vote, HAVA and the NVRA result in an unconstitutional invasion of the province of State sovereignty, as applied by the EAC or as applied to Plaintiffs, in violation of Article I, § 2 of the Constitution, the Tenth Amendment, and the Seventeenth Amendment;

H. Enjoin the EAC and any employee or officer acting on the EAC's behalf from exercising discretion to refuse, at the request of Plaintiffs, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registration laws of the States;

I. Enjoin the EAC and any employee or officer acting on the EAC's behalf from exercising discretion to refuse, at the request of Plaintiffs, to include State-specific instructions on the Federal Form that Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce their voter qualifications.

J. Award Plaintiffs their costs and grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

s/ Thomas E. Knutzen

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Dated: August 21, 2013

EXHIBIT C



U. S. ELECTION ASSISTANCE COMMISSION
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

**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. EAC000002-04. 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(I). 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, 2014.³ 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.⁴ 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

⁴ 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>.

in *Gonzales v. State of Arizona*, Civ. Action No. 06-128 (D. Ariz. Aug. 20, 2008) (ECF No. 1041) (district court case culminating in *Arizona v. ITCA*), denying a permanent injunction against the enforcement of Arizona's documentary proof of citizenship requirements, 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,⁵ 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. amends. 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]pecif[ies] 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.

Mendez, 857 F. Supp. 85, 91 (D.D.C. 1994); accord *Ashwood Manor Civic Ass'n v. Dole*, 619 F. Supp. 52, 65-66 (E.D. Pa. 1985).

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

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.").⁹

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 th[e] 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 statute as enacted prohibits the Federal Form from requiring "formal authentication." 42 U.S.C. § 1973gg-7(b)(3). 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.

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,¹⁰ an in-state change of address in Kansas,¹¹ or an application for permanent advance voting status in Kansas due to disability.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.

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.¹³ The evidence is summarized as follows:

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.

¹⁰ See <http://www.azsos.gov/election/VoterRegistration.htm>.

¹¹ See <http://www.kssos.org/forms/Elections/voterregistration.pdf>.

¹² See Kan. Stat. § 25-1122d(c); <http://www.kssos.org/forms/Elections/AV2.pdf>.

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.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.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,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

¹⁵ *See* State of Kansas Office of the Secretary of State, 2013 January 1st (Unofficial) Voter Registration Numbers, *available at* http://www.kssos.org/elections/elections_registration_voterreg.asp (last visited Jan. 12, 2014).

¹⁶ *See* State of Arizona Registration Report, January 2005, <http://azsos.gov/election/voterreg/2005-01-01.pdf>.

¹⁷ *See* State of Arizona Registration Report, January 2005, <http://azsos.gov/election/voterreg/2005-01-01.pdf>.

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.

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.

²¹ Georgia and Kansas have reported that they are fully compliant with the REAL ID Act. See Department of Homeland Security, *REAL ID Enforcement in Brief* (Dec. 20, 2013), <http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20131220.pdf> (last accessed Jan. 12, 2014). And while Arizona has not yet reported its full compliance with the REAL ID Act, Arizona law nevertheless mandates that the state may not "issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D); Ariz. Dep't of Transp., Motor Vehicle Div., *Identification Requirements*, Form 96-0155 R09/13, <http://www.azdot.gov/docs/default-source/mvd-forms-pubs/96-0155.pdf?sfvrsn=2> (last accessed Jan. 12, 2014).

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.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.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. *Cf. Inter-Tribal Council*, 133 S. Ct. at 2259-60. Thus, the States have not shown that the EAC is under a "nondiscretionary duty," *id.* at

²³ See NAPHSIS, *EVVE Vital Records Implementation: Birth Queries (December 2013)*, http://www.naphsis.org/about/Documents/EVVE_Implementation_Dec_2013%20Birth%20Queries%20with%20years.pptx (last accessed Jan. 12, 2014).

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.²⁵ 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

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, KANSAS)
 SECRETARY OF STATE;)
)
 KEN BENNETT, ARIZONA)
 SECRETARY OF STATE;)
)
 THE STATE OF KANSAS;)
)
 THE STATE OF ARIZONA;)
)
 Plaintiffs,)
 vs.)
)
 THE UNITED STATES ELECTION)
 ASSISTANCE COMMISSION, *et al.*,)
)
 Defendants.)

Case No. 13-4095-EFM-DJW

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

The National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* (hereinafter “the NVRA”) requires the United States Election Assistance Commission (hereinafter “the EAC”) to develop a mail voter registration application form (hereinafter “the Federal Form”) in consultation with the chief election officers of the States. 42 U.S.C. § 1973gg-7(a)(2); *Arizona v. Inter Tribal Council of Ariz., Inc.*, ___ U.S. ___, 133 S. Ct. 2247, 2252 (2013) (hereinafter “*Inter Tribal Council*”). Plaintiffs initiated this action because the EAC and the EAC’s Acting Executive Director, Alice Miller (hereinafter “Miller”), refused to honor Plaintiffs’ requests to modify the Federal Form to include State-specific instructions. Consistent with the holding in *Inter Tribal Council*, the EAC is under a nondiscretionary duty to include instructions that reflect the respective voter qualification and registration laws of Plaintiffs, and which enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applications and to enforce Plaintiffs’ voter qualification laws. This Brief is filed in support of Plaintiffs’ Motion for Preliminary Injunctive Relief, which seeks a preliminary injunction requiring the Defendants to include on the Federal Form the instructions requested by Plaintiffs.

STATEMENT OF FACTS

Facts supporting Plaintiffs’ Motion for Preliminary Injunction are set forth in detail in the Complaint. To avoid repetition, Plaintiffs incorporate by reference the facts contained therein, including all exhibits attached thereto. In addition, Plaintiffs offer the following facts supported by affidavits of Kansas Deputy Assistant Secretary of State Brad Bryant, Sedgwick County (KS) Election Commissioner Tabitha Lehman, Arizona Secretary of State Ken Bennett, Maricopa County (AZ) Elections Director Karen Osborne, and Maricopa County Federal Compliance

Officer Tammy Patrick, attached hereto respectively as Exhibits “A” through “E,” which are incorporated herein by reference:

In accordance with their authority under the United States Constitution to establish qualifications for their respective voters, Plaintiffs Kansas and Arizona (collectively “Plaintiff States”) both enacted statutes requiring applicants seeking to register to vote to provide proof of citizenship. (Exhibit A at ¶ 6; Exhibit C at 7.) Both States have experienced situations in which non-citizens have been permitted to register and have in fact voted. (Exhibit A at ¶¶ 3-4; Exhibit B; Exhibit D at ¶¶ 8-10.)

Both Plaintiffs requested the EAC to modify the State-specific instructions to include their respective proof-of-citizenship requirements, which unlike the sworn attestation included on the Federal Form, will enable the States to verify that applicants are United States citizens and are therefore eligible to vote. (Exhibit A at ¶¶ 8-13; Exhibit C at ¶¶ 6-10, 14, 18-19.) The EAC has refused to approve Plaintiffs’ requests. (Exhibit A at ¶¶ 10, 12, 14; Exhibit C at ¶¶ 9, 14, 19.) However, the Department of Defense promptly approved the same request for Arizona’s proof-of-citizenship requirement to be included in the instructions for the Federal Post Card Application used by military and overseas absentee voters. (Exhibit C at ¶ 11.)

As a direct result of the EAC’s refusal to modify the State-specific instructions as requested by Plaintiffs, the Plaintiff States are being forced to establish dual voter registration systems in which applicants submitting the Federal Form without evidence of citizenship are eligible to vote in elections for federal office only while other applicants who have provided evidence of citizenship are eligible to vote in all elections. (Exhibit A at ¶ 16; Exhibit C at ¶¶ 4, 17, 20-23.) Implementing dual voter registration systems is already costing Plaintiffs a tremendous and incalculable amount in lost voter confidence and in increased voter confusion.

(Exhibit A at ¶¶ 16-18; Exhibit C at ¶¶ 4, 23, 36-38.) In addition to these incalculable and irreparable costs, Plaintiffs will be forced to expend thousands of dollars and man-hours to implement these dual registration systems. (Exhibit A at ¶¶ 16-18; Exhibit C at ¶¶ 21-35; Exhibit E at ¶¶ 8-22.)

ARGUMENTS AND AUTHORITIES

The granting or denial of a preliminary injunction rests within the discretion of the district court. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940); *see also*, *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). A movant is entitled to a preliminary injunction upon establishing the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party resulting from the preliminary injunction; and (4) the injunction is not adverse to the public interest. *Westar Energy*, 552 F.3d at 1224; *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001) (hereinafter “*Prairie Band*”). As demonstrated below, these four factors weigh heavily in Plaintiffs’ favor and the Court should therefore enter the requested preliminary injunction.

I. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs seek a writ of mandamus pursuant to 28 U.S.C. § 1361 and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (hereinafter “the APA”), ordering the EAC and Miller to make modifications to the State-specific instructions of the Federal Form as requested by Plaintiffs. Plaintiffs are likely to succeed on the merits because under Article I, § 2, cl. 1, Article II, § 1, cl. 2, and the Tenth and Seventeenth Amendments of the United States Constitution, the States have the sole authority to establish and enforce the qualifications of its voters. Moreover,

as the U.S. Supreme Court recently determined, the EAC is under a nondiscretionary duty to include instructions that reflect the respective voter qualification and registration laws of the Plaintiff States. *Inter Tribal Council*, 133 S. Ct. at 2259-60. Likewise, the EAC is under a nondiscretionary duty to include instructions which enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualification laws. *Id.* As a result, the EAC is absolutely required to include the instructions requested by Plaintiffs.

A. Plaintiffs are entitled to judicial review of the EAC's agency action.

Plaintiffs have stated four causes of action arising from the APA: (1) that the EAC unlawfully withheld or unreasonably delayed approval of Plaintiffs' requested State-specific instructions; (2) that the EAC's refusal of Plaintiffs' State-specific instructions violated Plaintiffs' constitutional rights; (3) that the EAC's refusal of Plaintiffs' State-specific instructions was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and (4) that the EAC's refusal of Plaintiffs' State-specific instructions exceeded the EAC's statutory jurisdiction. (Doc.¹ 1 at ¶¶ 80-114.) In each of these claims, the Court must first determine that the EAC's action was final, such that judicial review is appropriate.

The EAC is a federal agency of the United States whose actions are subject to judicial review under the APA. 5 U.S.C. § 551(1); 42 U.S.C. § 15321 *et seq.*; *see also Inter Tribal Council*, 133 S. Ct. at 2250. The APA allows for judicial review of agency decisions and authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702; *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). In reviewing the

¹ “Doc.” refers to the Document filed on the Court's ECF system. Here, Doc. 1 is the Complaint.

decision of a federal agency, “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court reviews questions of law de novo and does not defer to an agency’s construction of a statute if “the agency’s construction is unreasonable or impermissible.” *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010) (internal citation and quotation marks omitted).

Under the APA, “agency action” includes “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Where no other statute provides a private right of action, judicial review of an agency action is appropriate if it constitutes a “final agency action.” 5 U.S.C. § 704; *Norton*, 542 U.S. at 62. In explaining whether an agency action is final, the U.S. Supreme Court has stated:

To determine when an agency action is final, we have looked to, among other things, whether its impact “is sufficiently direct and immediate” and has a “direct effect on . . . day-to-day business.” An agency action is not final if it is only “the ruling of a subordinate official,” or “tentative.” The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.

Franklin v. Massachusetts, 505 U.S. 788, 796-97 (1992) (citations omitted). Similarly, the Tenth Circuit Court of Appeals has held that, a final agency action occurs when two conditions have been met: “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1236 (10th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (internal quotation marks omitted). Second, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.*

Importantly, an agency's failure to act can be a final agency action. For purposes of assessing agency action, a "failure to act, is . . . a failure to take an *agency action* – that is, a failure to take one of the agency actions (including their equivalents) earlier described in § 551(13)." *Norton*, 542 U.S. at 62 (emphasis provided) (internal quotation marks omitted). The U.S. Supreme Court has stated:

A "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline. The important point is that a "failure to act" is properly understood to be limited, as are the other items in § 551(13), to a discrete action."

Id. at 63.

Here, the letters from the EAC to Kansas Secretary of State Kris W. Kobach (Doc. 1-9²), and to Arizona Secretary of State Ken Bennett (Doc. 1-18), denying Plaintiffs' requests to modify the State-specific instructions of the Federal Form to reflect Plaintiffs' voter qualification laws, constitute "final agency actions." In sending these letters to Plaintiffs, the EAC completed its decisionmaking process. The actions were not merely tentative, and the results directly affect Plaintiffs because of the subsequent legal consequences to Plaintiffs' constitutional rights to establish and enforce voting qualifications. While the EAC's letters to Plaintiffs indicate the agency's decision to "defer" Plaintiffs' request until "the reestablishment of a quorum at EAC," (Doc. 1-9) the EAC has not had a quorum for almost three years, has not had a single commissioner for almost two years, and "there is no reason to believe that [the Commission] will be restored to life in the near future." *Inter Tribal Council*, 133 S. Ct. at 2273 (Alito, J., dissenting). There being no prospect for reconsideration of the EAC's decision for the

² These references are to the Exhibits to the Complaint. For example, this refers to Document 1, Exhibit 9 as set forth on the Court's ECF Docket.

foreseeable future, Plaintiffs submit that the EAC's letters to Plaintiffs constitute denials of Plaintiffs' requests, and that such denials constitute "final agency actions."

Alternatively, at the very least, the EAC has "failed to act" as that phrase is used in 5 U.S.C. § 551(13) and *Norton*. As argued *infra*, the EAC is under a nondiscretionary duty, at the request of Plaintiffs, to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registrations laws of the Plaintiff States, and to include State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs' voter qualifications. The discrete agency action that the EAC should have taken was to grant Plaintiffs' requests to modify their State-specific instructions on the Federal Form. The EAC's failure to not only grant the requests but to take any action whatsoever other than deferring any decision into the indefinite future constitutes "agency action" under 5 U.S.C. § 551(13), and is therefore subject to review under the APA.

B. The EAC's failure to modify the State-specific instructions of the Federal Form as requested by Plaintiffs violates Plaintiffs' constitutional rights to establish and enforce voter qualifications.

An agency action should be reversed if it violates constitutional rights. Here, as discussed more fully below, the EAC's refusal to approve Plaintiffs' requested State-specific instructions violates the Plaintiff States' constitutional rights and must be overturned.

1. The United States Constitution affirmatively vests the States with the authority to establish and enforce voter qualifications.

The federal government's powers are specifically enumerated in the U.S. Constitution, which means that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Since

Congress has no power to act unless the Constitution authorizes it to do so, Congress's enumerated powers have "judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566 (1995). As recently recognized by the U.S. Supreme Court in *Inter Tribal Council*, the Constitution expressly reserves to the States, to the exclusion of Congress, the power to establish and enforce voter qualifications for the federal elections.

Article I, § 4, clause 1 of the U.S. Constitution, often referred to as the Elections Clause, states, "The 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." Although the Elections Clause gives Congress the power to alter or supplant state regulations related to the "Times, Places, and Manner" of elections, the *Inter Tribal Council* Court held that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257.

In fact, the Court determined that three different sections of the Constitution expressly reserve to the States, to the exclusion of Congress, the power to establish and enforce voter qualifications for federal elections: Article I, § 2, clause 1 (providing that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); Article II, § 1, clause 2 (providing that "Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors); and the Seventeenth Amendment (providing that electors in each State for the Senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"). *Inter Tribal Council*, 133 S. Ct. at 2258.

Reflecting on these provisions of the Constitution, the *Inter Tribal Council* Court concluded that “[o]ne cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly . . . ‘Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.’” *Inter Tribal Council*, 133 S. Ct. at 2258 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J. concurring in part and dissenting in part)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 833-34 (1995). The Court therefore determined that “Prescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause.” *Id.* (quoting *The Federalist* No. 60, at 371 (A. Hamilton)). Rather, the Court held that these provisions of the Constitution expressly assign the power of establishing voter qualifications to the States. *Inter Tribal Council*, 133 S. Ct. at 2258-59. Further, the Court held that this power includes the power to enforce voter qualifications. *Id.*

In light of this power, the United States Supreme Court has elsewhere held, “States are thus entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quotation marks omitted). Thus, *the States possess the sole authority to determine the manner by which their voter qualification laws are enforced.* Kansas and Arizona are acting well within this authority when they require voter registration applicants to prove their United States citizenship. The EAC’s refusal to modify the Federal Form as requested by Plaintiffs infringes on that power, and therefore violates Article I, § 2, Article II, § 1, and the Seventeenth Amendment of the Constitution.

2. The Tenth Amendment reinforces the States' authority to establish and enforce voter qualifications.

Not only do the States have explicit authority under the U.S. Constitution to establish and enforce voter qualifications for federal elections, but the States also have implicit authority to do so pursuant to the Tenth Amendment. The Tenth Amendment to the United States Constitution provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. The Tenth Amendment thus makes explicit what is implied by the enumeration, and therefore limitation, of powers granted to the Federal Government. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” *New York v. United States*, 505 U.S. 144, 156 (1992) (citations omitted).

Further, the Tenth Amendment and the structure of the Constitution highlight the importance of state sovereignty. “It is incontestable that the Constitution established a system of ‘dual sovereignty.’” *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). “Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and *inviolable* sovereignty,’ . . . [which] is reflected throughout the Constitution’s text.” *Id.* at 919 (quoting The Federalist No. 39 (J. Madison)) (emphasis added). Indeed, “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.” *Printz*, 521 U.S. at 928. The Constitution’s concern for state sovereignty is therefore central to the limited nature of federal power. “Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only

discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Printz*, 521 U.S. at 919.

To that end, the Constitution's establishment of this system of "dual sovereignty" "is one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921. Likewise, the "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). But the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' *Ibid.* (internal quotation marks omitted)." *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 2623 (2013) (hereinafter "*Shelby County*").

Relying in part on the Tenth Amendment, the *Shelby County* Court recently emphasized the power of the States to establish and enforce voter qualifications laws. In doing so, the Court explained, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County*, 133 S. Ct. at 2623 (quotation omitted). Therefore, the "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Id.* (quotation omitted). As such, the Tenth Amendment reinforces the power of the States to establish and enforce voter qualifications laws.

3. The NVRA must be interpreted to place upon the EAC a nondiscretionary duty to modify the Federal Form at the Plaintiffs' request to avoid raising serious constitutional doubts.

Since, as shown *supra*, the States have the exclusive power to both establish and enforce voter qualifications, the *Inter Tribal Council* Court interpreted the NVRA to place upon the EAC

the nondiscretionary duty of including on the Federal Form State-specific instructions that the States deem necessary to determine voter eligibility. *Inter Tribal Council*, 133 S. Ct. at 2258-59. This interpretation was necessary to avoid “rais[ing] serious constitutional doubts” regarding the NVRA’s requirement that the States “accept and use” the Federal Form. *Id.* The Court noted that “[a]t oral argument, the United States expressed the view that the phrase ‘may require only’ in § 1973gg-7(b)(1) means that the EAC ‘shall require information that’s necessary, but may only require that information.’” *Inter Tribal Council*, 133 S. Ct. at 2259 (emphasis provided). This interpretation of 42 U.S.C. § 1973gg-7(b)(1) would have vested discretion with the EAC to decide whether or not to include State-specific instructions on the Federal Form. Rejecting this reading, the Court instead interpreted that provision in the only manner that could pass constitutional muster; namely, that the EAC had no such discretion.

“We need not consider the Government’s contention that despite the statute’s statement that the EAC ‘may’ require on the Federal Form information ‘necessary to enable the appropriate State election official to assess the eligibility of the applicant,’ other provisions of the [NVRA] indicate that such action is statutorily required. That is because we think that—by analogy to the rule of statutory interpretation that avoids questionable constitutionality—validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt. That is to say, it surely permissible if not requisite for the Government to say that necessary information which *may* be required *will* be required.”

Inter Tribal Council, 133 S. Ct. 2259 (emphasis provided).

Construing the NVRA to place upon the EAC the nondiscretionary duty of including Plaintiffs’ requested State-specific instructions on the Federal Form is also necessary to avoid raising serious constitutional doubts because the contrary interpretation—that the EAC has discretion regarding these requests—would result in Plaintiff States effectively needing preclearance from the EAC before exercising their authority to establish and enforce voter qualifications.

Recently in *Shelby County*, the U.S. Supreme Court struck down Section 4(b) of the Voting Rights Act of 1965, which implemented a coverage formula requiring certain states to obtain federal permission, pursuant to Section 5 of the Act, before enacting any laws relating to voting. 133 S. Ct. at 2631. In doing so, the Court emphasized that when the Voting Rights Act was originally upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), it was because “exceptional conditions can justify legislative measures not otherwise appropriate.” *Shelby County*, 133 S. Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 334). Indeed, the extraordinary nature of the Voting Rights Act was emphasized throughout the *Shelby County* opinion. *See, e.g., Shelby County*, 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 334) (“We recognized that it ‘may have been an uncommon exercise of congressional power,’ but concluded that ‘legislative measures not otherwise appropriate’ could be justified by ‘exceptional conditions.’”); *id.* at 2625 (quoting *Katzenbach*, 383 U.S. at 334-35) (“In short, we concluded that ‘[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.’”).

The *Shelby County* Court contrasted the extraordinary provisions of the Voting Rights Act with the fundamental and well-established principles of federalism and state sovereignty, stressing that the federal government does not have a right to veto state enactments before they go into effect:

The Constitution and laws of the United States are “the supreme Law of the Land.” State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to ‘negative’ state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.

...

More specifically, the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. But States have broad powers to determine the conditions under which the right of suffrage may be exercised.

...

The Voting Rights Act sharply departs from these basic principles. It suspends “all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.” (citation omitted). States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.

Shelby County, 133 S. Ct. at 2623-24 (internal citations omitted).

The same analysis applies here. All nine justices in *Inter Tribal Council* agreed that the States have the exclusive power to both establish and enforce voter qualifications for federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59 (majority opinion), *id.* at 2261 (Kennedy, J., concurring), *id.* at 2262 (Thomas, J., dissenting), *id.* at 2270 (Alito, J., dissenting). Requiring the Plaintiff States to beseech the EAC to include Plaintiffs’ requested instructions on the Federal Form amounts to preclearance of the kind criticized in *Shelby County*. What is more, the preclearance dictated by the Voting Rights Act was constitutional only in light of the exceptional circumstances when it was enacted. *Shelby County*, 133 S. Ct. at 2624-25. No such exceptional circumstances support a requirement that Plaintiffs obtain preclearance from the EAC before being allowed to establish and enforce their voter qualifications laws.

Further, the Voting Rights Act was supported by the Constitution itself; the Fifteenth Amendment enables Congress to pass legislation protecting the right to vote without discrimination on the basis of race or color. *Shelby County*, 133 S. Ct. at 2629. No such constitutionally enumerated power supports granting the EAC discretion to preclude Plaintiffs

from enforcing their voter qualifications laws. Since requiring Plaintiffs to register people to vote who have not fulfilled Plaintiffs' proof-of-citizenship requirement "would exceed Congress' powers under Article I, § 4, and violate Article I, § 2," *Inter Tribal Council*, 133 S. Ct. at 2269 (Thomas, J., dissenting), the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs' requested instructions on the Federal Form. *Id.* at 2259.

It is important to note that the constitutional provisions and principles articulated above provide Plaintiffs with an independent basis for relief apart from the APA. (Doc. 1 at ¶¶ 115-128.) These constitutional provisions and principles, however, are also important for the relief requested by Plaintiffs under the APA as described below.

C. The EAC's refusal to modify the Federal Form constitutes agency action contrary to Plaintiffs' constitutional right and power to establish and enforce voter qualifications for federal elections.

The APA directs that this Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). "Because constitutional questions arising in a challenge to agency action under the APA 'fall expressly within the domain of the courts,' [a court reviews] *de novo* whether agency action violated a claimant's constitutional rights." *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010) (citing *Darden v. Peters*, 488 F.3d 277, 283-84 (4th Cir. 2007)).

As shown *supra*, the Plaintiff States have the right and power, exclusive of the federal government, of establishing and enforcing voter qualifications for federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59. This exclusive right and power is derived from Article I, § 2, Article II, § 1, and the Seventeenth Amendment of the Constitution, *Inter Tribal Council*, 133 S.

Ct. at 2258, as well as the Tenth Amendment. By refusing to include Plaintiffs' requested instructions on the Federal Form, the EAC violated Plaintiffs' rights and powers under these constitutional provisions. Therefore, this Court should hold the EAC's action unlawful, set it aside, and enter an injunction directing the EAC to include Plaintiffs' requested instructions on the Federal Form.

D. The EAC's refusal to modify the Federal Form was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The APA directs that this Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In performing arbitrary and capricious review, we accord agency action a presumption of validity; the burden is on the petitioner to demonstrate that the action is arbitrary and capricious." *Copar Pumice*, 603 F.3d at 793 (citing *Sorenson Commc'ns, Inc. v. Fed. Commc'ns Comm'n.*, 567 F.3d 1215, 1221 (10th Cir. 2009)). A court considers several factors in determining whether an agency action is arbitrary and capricious:

Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Copar Pumice, 603 F.3d at 793 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Because the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs' requested instructions on the Federal Form, the Wilkey Memorandum's (Doc No. 1-3) conferral of authority to the EAC's Division of

Research, Programs and Policy (hereinafter “the RPP”) to process State requests for modifications to the Federal Form can only have conferred nondiscretionary authority. The Wilkey Memorandum could not have constitutionally conferred discretionary authority to the RPP for the simple reason that the EAC itself lacks discretionary authority to refuse to include State-specific instructions that reflect state voter qualification laws. Thus, to the extent the Wilkey Memorandum vested discretionary authority in the RPP to refuse to make modifications to the Federal Form at the Plaintiffs’ request, the Wilkey Memorandum constitutes final agency action that was arbitrary, capricious, an abuse of discretion, and was otherwise made not in accordance with law. This Court should hold unlawful and set aside the Wilkey Memorandum, and enter an injunction directing the EAC to include Plaintiffs’ requested instructions on the Federal Form.

Even if the Wilkey Memorandum validly conferred discretionary authority to the RPP, such discretion was still abused. The Wilkey Memorandum provided that “Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum.” This portion of the Wilkey Memorandum was cited a basis for the decision in the EAC’s letters to Plaintiffs denying their requests for modifications to the Federal Form instructions. However, this explanation runs counter to the evidence before the EAC because there is no evidence that Plaintiffs’ proposed State-specific instructions is of *any* concern to other States. Just as the Plaintiff States have the power to establish and enforce voter qualifications, other States have the power to maintain their voter qualification laws without any regard to the laws of Plaintiffs.

The EAC’s actions, or non-actions, are also arbitrary. In 2012, the EAC approved a modification to the Louisiana-specific instructions of the Federal Form similar to the instructions

requested by Plaintiffs. Decisions of an agency that are internally inconsistent are arbitrary. See *Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011); *Ace Motor Freight, Inc. v. I.C.C.*, 557 F.2d 859, 861-62 (D.C. Cir. 1977). Disparate treatment of sovereign states heightens the concern for inconsistent treatment because “there is also a fundamental principle of equal sovereignty among the States.” *Shelby County*, 133 S. Ct. at 2623. Then, in *Inter Tribal Council*, the United States Supreme Court specifically noted that Arizona could argue that it would be arbitrary for the EAC to refuse to include Arizona’s proposed instruction when it had accepted a similar instruction requested by Louisiana. *Inter Tribal Council*, 133 S. Ct. at 2260.

For these reasons, the decision of the RPP and the EAC denying Plaintiffs’ requests to their State-specific instructions on the Federal Form was arbitrary and capricious. This Court should hold that action unlawful, set it aside, and enter an injunction directing the EAC to include Plaintiffs’ requested instructions on the Federal Form.

E. The EAC’s refusal to modify the Federal Form was in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

The APA directs that this Court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). As explained *supra*, the only way to construe the NVRA in a constitutional manner is that the EAC is under a nondiscretionary duty to include Plaintiffs’ requested instructions on the Federal Form. *Inter Tribal Council*, 133 S. Ct. at 2260. Congress may not delegate power to an administrative agency that Congress itself does not have. Thus, any discretion exercised by the EAC in denying Plaintiffs’ requests was in excess of statutory authority and limitation, or short of statutory right.

F. The EAC’s refusal to modify the Federal Form constitutes agency action unlawfully withheld or unreasonably delayed.

The EAC’s refusal to approve Plaintiffs’ State-specific instructions constitutes a final “agency action” that is subject to this Court’s review pursuant to the APA. If, however, the Court finds that the EAC has not made a final determination, then as discussed below, that failure to act is itself subject to this Court’s review.

The APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Further, the APA directs that this Court “shall compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). “[T]he only agency action that can be compelled under the APA is action legally required.” *Norton*, 542 U.S. at 63. Thus, “§ 706(1) empowers a court only to compel an agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a matter, without directing how it shall act.’” *Id.* (quoting Attorney General’s Manual on the Administrative Procedure Act 108 (1947)). In sum, then, “a claim under [5 U.S.C. § 706(1)] can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *Id.* at 64.

Because the EAC unlawfully withheld or unreasonably delayed agency action pursuant to 5 U.S.C. § 706(1), this Court must compel the agency action so withheld or delayed; neither this Court nor the EAC has discretion to allow the EAC to avoid discharging the duties that Congress intended the EAC to perform. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-89 (10th Cir. 1999); *see also, Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) (“As a reviewing court, we must ‘compel agency action unlawfully withheld or unreasonably delayed.’ 5 U.S.C. § 706(1).”); *Health Sys. Agency of Okla. v. Norman*, 589 F.2d 486, 492 (10th Cir. 1978) (“trial court must ‘compel’” agency action unlawfully withheld).

As the court in *Forest Guardians* explained, a trial court must compel agency action upon a finding that such action was unreasonably delayed:

[I]f an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions—such as the APA’s general admonition that agencies conclude matters presented to them “within a reasonable time,” *see* 5 U.S.C. § 555(b)—a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and court, upon proper application, must compel the agency to act.

Forest Guardians, 174 F.3d at 1190. Similarly, “once a court deems agency delay unreasonable, it must compel agency action.” *Id.* at 1191.

In the instant case, the EAC is under a nondiscretionary duty to modify the State-specific instructions of the Federal Form to reflect the respective voter qualification and registrations laws of the Plaintiff States. Specifically, the EAC is under a nondiscretionary duty to include requested State-specific instructions that enable Plaintiffs to obtain information Plaintiffs deem necessary to assess the eligibility of voter registration applicants and to enforce Plaintiffs’ voter qualifications. Withholding Plaintiffs’ requested instructions from the Federal Form was unlawful because the EAC does not have the discretion, under the NVRA and *Inter Tribal Council*, to refuse Plaintiffs’ requests. This Court should therefore issue a preliminary injunction directing the EAC to include Plaintiffs’ requested instructions on the Federal Form.

Further, the EAC’s failure to modify the State-specific instructions of the Federal Form as requested by Plaintiffs constitutes agency action unreasonably delayed. Kansas made its initial request to have its State-specific instructions modified on August 9, 2012, more than one year prior to the initiation of the instant action. (Exhibit A at ¶ 8.) Worse yet, Arizona made its initial request to have its State-specific instructions modified on December 12, 2005, roughly eight years prior to the initiation of this case. (Exhibit C at ¶ 9.) As if these delays are not bad

enough, the EAC currently lacks any Commissioners and is not expected to have a quorum in the foreseeable future.

Since the EAC is under a nondiscretionary duty to modify the State-specific instructions as requested by Plaintiffs, these requests should have been fulfilled as a matter of course. The EAC's lengthy delays in granting these requests are also unreasonable, and this Court should issue a preliminary injunction requiring the EAC to fulfill its nondiscretionary duties.

II. Plaintiffs Have Already Suffered and Will Continue to Suffer Irreparable Injury Unless the Court Issues a Preliminary Injunction.

In order to obtain a preliminary injunction, a plaintiff must show that they will suffer an irreparable injury. *Westar Energy*, 552 F.3d at 1224. "A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citations omitted). In the present case, the failure of the EAC to modify the Federal Form to include Plaintiffs' State-specific instructions that would allow the Plaintiff States to obtain information they deem necessary to assess the eligibility of voter registration applicants has inflicted and is continuing to inflict three distinct irreparable injuries. First, Plaintiffs have been and are being deprived of their sovereign and constitutional right to establish and enforce voting qualifications with respect to those applicants who use the Federal Form to register to vote. Second, unqualified individuals, namely aliens, have been and continue to be registered as voters for federal elections in Kansas and Arizona. Third, Plaintiffs are being forced to implement a bifurcated voter registration system that is unduly burdensome.

A. Plaintiffs are being deprived of their sovereign and constitutional right to establish and enforce voting qualifications.

The Tenth Circuit Court of Appeals has determined that a deprivation of constitutional rights constitutes an irreparable injury as a matter of law. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005). The court has additionally declared that “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Kikumura*, 242 F.3d at 963. Additionally, the U.S. Supreme Court has ruled that the deprivation of a constitutional right, such as a First Amendment right, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). An agency’s decision that places a State’s sovereign interests and public policies at stake are deemed to cause irreparable injury to that state. *Kansas v. U.S.*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). Likewise, the Tenth Circuit Court of Appeals has ruled that an intrusion of an Indian Nation’s sovereignty constitutes irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

The U.S. Constitution confers to the Plaintiff States the constitutional right and power, exclusive of the federal government, to establish and enforce the qualifications for voting in both state and federal elections. *See, supra* Section I.B. Nevertheless, the EAC has refused to modify the State-specific instructions on the Federal Form to reflect the voter qualification and registration laws of Plaintiffs, and which would enable Plaintiffs to obtain information Plaintiffs deem necessary to determine whether applicants are qualified to vote. By such refusal, the Defendants have invaded the constitutional rights of and infringed on the sovereignty of the Plaintiffs. Consequently, the Plaintiffs have suffered and continue to suffer an irreparable injury.

B. Unqualified individuals have been and continue to be registered as voters in Kansas and Arizona, and non-citizens have and will continue to vote in Kansas and Arizona elections.

Plaintiff States have constitutional provisions establishing citizenship as a qualification for being able to vote in state and federal elections. Kan. Const. art. V, § 1; Ariz. Const. art. VII, § 2. Their respective constitutions also mandate that the state legislatures shall enact laws to ensure that voting qualifications are enforced. Kan. Const. art. V, § 4, Ariz. Const. art. VII, § 12. Pursuant to these constitutional provisions, the Kansas Legislature and the Arizona voters through the initiative power have enacted statutes requiring voter registration applicants to provide documentary evidence of their citizenship. K.S.A. 25-2309(1); A.R.S. § 16-166. Nevertheless, Defendants have refused to modify the Plaintiffs' State-specific instructions to require applicants utilizing the Federal Form to provide documentary evidence of citizenship. As held in *Inter Tribal Council*, the NVRA requires Plaintiffs to "accept and use" the Federal Form to register voters for federal election even though the Federal Form does not currently effectuate Plaintiffs' proof-of-citizenship requirements. *Inter Tribal Council*, 133 S. Ct. at 2259-60; 42 U.S.C. § 1973gg-4(a)(1). As Justice Scalia noted during oral argument in *Inter Tribal Council*, a mere oath is virtually meaningless and does not enable the States to ensure that a voter registration application is actually qualified to vote: "The proof [the EAC] requires is simply the statement, 'I'm a citizen.' That is proof? . . . That is not proof at all... Under oath is not proof at all. It's just a statement." Transcript of Oral Argument at 44, *Inter Tribal Council*, 133 S. Ct. 2247 (2013) (No. 12-71).

There is concrete evidence that non-citizens register to vote in Kansas and Arizona when Plaintiffs' proof-of-citizenship requirements are not enforced, and that some such non-citizens unlawfully vote in Kansas and Arizona elections. (Exhibit A, at ¶¶ 3-4; Exhibit B; Exhibit D, at ¶¶ 8-10.) Accordingly, Plaintiffs are being forced to register unqualified non-citizens as voters

due to the EAC's failure to include their requested instructions on the Federal Form. Once such persons are registered to vote, there is no meaningful procedure by which such unlawfully registered non-citizens can be detected and removed from the voter registration rolls. What is more, non-citizens have unlawfully voted in Kansas and Arizona elections after being unlawfully registered, effectively "cancelling out" the votes of citizens. Therefore, Plaintiffs are suffering irreparable harm as long as their proof-of-citizenship requirements go unenforced.

C. Plaintiffs are being forced to implement a bifurcated voter registration system that is unduly burdensome.

As a result of the *Inter Tribal Council* decision, Plaintiffs are currently required to accept the Federal Form to register individuals to vote in federal elections without documentary evidence of citizenship as required by the state laws of Plaintiffs. However, such registrants are not properly registered to vote in state and local elections. Therefore, the Plaintiffs must administer one system for voters registered only for federal elections and one system for voters registered for both state and federal elections.

As shown by Exhibits A, C and E, incalculable amounts of time, money, and other resources will need to be expended to reprogram statewide voter registration systems and to train county and state election officials to administer the bifurcated system in the primary elections scheduled for August 2014 and the general election in November 2014. For example, in Maricopa County, Arizona, election officials have estimated that the cost of designing, printing, and mailing additional ballots will cost over \$230,000 and the other tasks, including reprogramming computer systems, educating voters, training staff and poll workers, and increased costs related to provisional ballots may exceed \$100,000. (Exhibit E at ¶¶ 13-24.) These costs may be extrapolated to Arizona's fourteen other counties.

In addition to these quantifiable costs, Plaintiff States' voters will suffer confusion in their own individual voter registrations and eligibility to vote in certain elections. (Exhibit B at ¶ 37.) Those voters may also lose confidence in the electoral process. (*Id.* at ¶ 38.)

As shown above, Plaintiffs are being deprived of their constitutional rights, are being deprived of attributes of their sovereignty, are being forced to register unqualified voters, and are being required to maintain a bifurcated voter registration system. Consequently, Plaintiffs are suffering irreparable harms. All of these harms would be discontinued if this Court grants the requested preliminary injunctive relief.

III. The Injury to Plaintiffs Greatly Outweighs Any Purported Injury to Defendants.

As has been shown above, Plaintiffs are being deprived of their constitutional and sovereign right to establish and enforce qualifications for voter registration, are being forced to register unqualified voters, and are being required to maintain a bifurcated voter registration system that is unduly burdensome. If a preliminary injunction is not granted, the harm caused by such injuries will continue to mount. Defendants on the other hand will incur minimal economic costs if a preliminary injunction is granted.

Such economic costs would be limited to the negligible costs of adding the required wording to the Kansas-specific and Arizona-specific instructions for the Federal Form. This is a routine task that is part of the Defendant's statutory duty under the NVRA. As a matter of fact, the EAC recently modified two Kansas-specific instructions unrelated to Kansas's proof-of-citizenship requirement, but arbitrarily refused to add the instruction reflecting Kansas's proof of citizenship requirement. Furthermore, the EAC recently modified the Louisiana-specific instructions to require additional documentation of identity that is similar to the information that Plaintiffs are requesting. Consequently, the slight economic harm that the EAC might incur if

the preliminary injunction is granted is far outweighed by the deprivation of constitutional rights, the infringement on state sovereignty, the registration of unqualified voters, and the harms of maintaining a bifurcated voter registration system that Plaintiffs will suffer if the preliminary injunction is not granted.

IV. Injunctive Relief Is Not Adverse to the Public Interest.

A movant is entitled to a preliminary injunction upon establishing that the injunction is not adverse to the public interest. *Westar Energy*, 552 F.3d at 1224. In the present case, injunctive relief will prevent an infringement of the sovereign and constitutional rights of Plaintiffs. Therefore, the requested injunction is not only not against the public interest, but it strongly favors the public interest.

The Tenth Circuit Court of Appeals has unequivocally declared that, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013). The Ninth Circuit Court of Appeals has succinctly summarized the same point by stating, “[g]enerally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.” *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Thus, a preliminary injunction that prevents a violation of a constitutional right is in the public interest as a matter of law.

The same reasoning can be applied to an infringement on a state’s sovereignty. The sovereign authority of the states is ensured by the Tenth Amendment. U.S. Const. amend. X. Moreover, all citizens have a stake in maintaining the sovereignty of the states. Accordingly, a preliminary injunction that prevents an infringement on a state’s sovereignty is in the public interest. What is more, neither the EAC nor the Federal Government have any power to establish

voter qualifications. Thus, granting the requested preliminary injunction cannot be adverse to the public interest from the Federal Government's perspective.

There is also an immense public interest in ensuring that aliens do not cast illegal votes in elections. Of the fifteen aliens who registered to vote in Kansas as described in Exhibit A, five proceeded to vote illegally. One alien voted in five successive elections. Whenever an alien votes, it effectively cancels out the vote of a United States citizen. The public has a significant interest in protecting the franchise of United States citizens and thereby preserving the integrity of elections. Indeed, the States are entrusted with the responsibility of protecting this important public interest. "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Anderson v. Celebrezze*, 103 S. Ct. 1564, 1570, n. 9 (1983)).

Plaintiffs have clearly shown that the failure to grant the requested preliminary injunction will violate Kansas's and Arizona's constitutional and sovereign right to establish and enforce voter qualifications. Furthermore, the citizens of Kansas and Arizona have a strong interest in ensuring the integrity and efficiency of their elections. Yet, if the Court does not grant the requested injunction, Kansas and Arizona will be forced to register unqualified voters and implement a bifurcated registration system that is unduly burdensome. Therefore, the requested preliminary injunction is in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to enter a preliminary injunction in their favor requiring Defendants to modify their State-specific instructions to the Federal Form as Plaintiffs have requested.

Respectfully submitted this 23rd day of
October, 2013.

s/ Thomas E. Knutzen

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 23rd day of October, 2013, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

s/ Thomas E. Knutzen

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EXHIBIT E

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

KRIS W. KOBACH, KANSAS)
SECRETARY OF STATE, *et al.*,)
)
Plaintiffs-Appellees,)
vs.) Case Nos. 14-3062, 14-3072
)
THE UNITED STATES ELECTION)
ASSISTANCE COMMISSION, *et al.*,)
)
Defendants-Appellants,)
)
and)
)
PROJECT VOTE, INC., *et al.*,)
)
Intervenors-Appellants.)

**PLAINTIFFS-APPELLEES' COMBINED BRIEF IN OPPOSITION TO
DEFENDANTS-APPELLANTS' AND INTERVENORS-APPELLANTS'
MOTIONS FOR STAY PENDING APPEAL**

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INTRODUCTION

“Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.” *Arizona v. Inter Tribal Council of Ariz., Inc.* (hereinafter “*Inter Tribal Council*”), 133 S. Ct. 2247, 2258-59 (2013). With this statement, the United States Supreme Court reiterated the longstanding principle that it is the province of the States to establish voting qualifications, not the Congress. *Id.* at 2258. As the Court recognized, the Framers were averse to concentrated power and sought to avoid a Congress “empowered to regulate the qualifications of its own electorate.” *Id.* Thus, the Elections Clause of the U.S. Constitution empowers Congress to regulate only *how* federal elections are held, but not *who* may vote in them. *Id.* Since Congress lacks the power to set voter qualifications, it necessarily follows that a federal agency created by Congress lacks that power as well.

Here, the district court correctly recognized that (1) Arizona and Kansas modified their respective voter registration qualifications to require applicants to present proof of citizenship along with registration forms, and (2) the Election Assistance Commission (“EAC”) lacked the authority to refuse to incorporate those requirements into the state-specific instructions for the National Voter Registration Form (“Federal Form”). On March 19, 2014, the district court ordered the EAC, or its acting executive director, “to add the language requested by Arizona and Kansas to the state-specific instructions on the federal mail voter registration form, effective *immediately*.” (March 19, 2014 Memorandum and Order (ECF No. 157), attached as Exhibit B to EAC Motion at 1, hereinafter “March 19 Order.”) (emphasis added). The Defendants-Appellants refused to

add the state-specific instructions and, twelve days later, requested a stay. The district court considered the motion for stay filed by the Defendants-Appellants, along with the separate motions of each of the Intervenors-Appellants, and denied relief, specifically finding “that any harm to the moving parties does not outweigh the harm to the states, that the public interest does not support a stay, and that the movants have not demonstrated a strong likelihood of success on appeal.” (May 7, 2014 Order (ECF No. 195), attached as Exhibit A to EAC Motion at 1, hereinafter “May 7 Order.”) The district court ordered the EAC to comply with the March 19 Order “forthwith without further delay.” *Id.* at 8. By that time, the EAC had refused to obey the district court’s March 19 Order for a full 49 days.

The Defendants-Appellants and the Intervenors-Appellants now ask this Court to grant a stay pending appeal even though the district court has already determined that they do not meet the elements required for a stay—an extraordinary and rarely granted device. They ask this Court to disregard the basic separation-of-powers principle reiterated by *Inter Tribal Council* and followed by the district court below, by seeking a ruling from this Court that a federal agency can disregard what the States themselves established as voting qualifications. Because the EAC and the Intervenors-Appellants have distorted the facts and procedural history that led to the district court’s decision and misconstrue the decision itself, the Plaintiffs-Appellees (“the States”) provide the following background in support of their opposition to the Appellants’ motions for stay.

BACKGROUND

In 2004, Arizona’s voters approved a citizens’ initiative known as Proposition 200, which among other things, provided that applicants must provide evidence of citizenship when registering to vote. *Inter Tribal Council*, 133 S. Ct. at 2252.

Proposition 200 required election officials to reject voter registration forms that did not bear evidence of citizenship. *Id.* Two groups of plaintiffs sued to enjoin the implementation of Proposition 200, but failed to demonstrate that they were entitled to a preliminary injunction. *Id.* Although the Ninth Circuit briefly enjoined Proposition 200's proof-of-citizenship requirement, the United States Supreme Court reversed and allowed Arizona to conduct the 2006 election under the new rules instituted by Proposition 200. *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). From that time until shortly before the 2012 election, Arizona's county recorders implemented Proposition 200, rejecting the registration forms from prospective registrants who did not provide evidence of citizenship.

After the Supreme Court remanded that case to the district court, the parties presented evidence in a six-day bench trial and the district court issued an order setting forth detailed findings of fact and conclusions of law. *Gonzalez v. State of Arizona*, D. Ariz. CV06-01268-PHX-ROS, ECF No. 1041, identified as EAC001651-99 in the underlying EAC Record here, and attached hereto as Exhibit 1. The plaintiffs—many of whom are Intervenor-Appellants in this matter—asserted that Proposition 200 violated the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, Section 2 of the Voting Rights Act, and Title VI of the Civil Rights Act of 1964. Exhibit 1 at EAC001652. The district court denied relief on all claims, holding that Proposition 200 serves the important governmental interests of preventing voter fraud and maintaining voter confidence. Exhibit 1 at EAC001684-85. The district court made specific factual findings that, under other circumstances, at least 208 individuals were not deterred by the threat of a conviction of perjury to falsely declare *under oath* that they were not citizens and that for this and other reasons, Arizona's citizens voted in favor of requiring

registration applicants to show affirmative proof of citizenship, rather than merely a sworn statement. Exhibit 1 at EAC001666. On July 11, 2012, after the Ninth Circuit reheard the case en banc and ordered injunctive relief, the district court ordered that the Arizona election officials could not reject Federal Forms for lack of proof-of-citizenship information and had to register those applicants for the upcoming 2012 election. (*See Gonzalez v. State of Arizona*, D. Ariz. CV06-01268-PHX-ROS, ECF No. 1073, attached hereto as Exhibit 2.)

In this appeal, the Intervenors-Appellants claim that *Inter Tribal Council* completely resolved all issues in their favor and held that through the NVRA, Congress preempted the States' rights to establish voter qualifications. Intervenors-Appellants' Motion for Stay (hereinafter "Intv. Motion") at 2-3. But they misread and improperly extend the holding of *Inter Tribal Council*. There, the Supreme Court did not hold that the EAC had the discretion to refuse to include a voter qualification requirement that a State deemed necessary to determine voter eligibility; nor did the Court hold that the EAC had the authority to engage in a quasi-judicial weighing of evidence to determine itself what was "necessary" to prove U.S. citizenship.¹ Instead, the Court strongly indicated that the EAC lacks such discretion and authority.

¹ In its Motion, the EAC quotes the Court's statement that the EAC must approve each state-specific instruction to support its contention that the EAC, not the States, determines whether information is necessary for a state official to assess an applicant's eligibility. EAC Motion at 11-12 (quoting *Inter Tribal Council*, 133 S. Ct. at 2252). But the Court's quoted statement is merely describing how the EAC in consultation with the States develop the state-specific instructions. The Court was not addressing whether Congress intended the EAC to have the discretion to determine what information is necessary "to enable the appropriate State election official to assess the eligibility of the applicant" when it enacted 42 U.S.C. § 1973gg-7(b)(1).

In *Inter Tribal Council*, the Supreme Court emphasized that the States have the exclusive constitutional authority to determine who may vote in federal elections, which necessarily includes the power to enforce those qualifications. *Inter Tribal Council*, 133 S. Ct. at 2257-59. The Court then suggested that Arizona should request that the EAC modify the Federal Form to include Arizona’s proof-of-citizenship requirement and, if the EAC refused, Arizona should file suit to contest the EAC’s refusal. *Id.* at 2260. The Supreme Court recognized that (1) “validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt”; (2) a State may challenge the EAC’s rejection of its request to “alter the Federal Form to include information the *State deems necessary* to determine eligibility”; and (3) in the event the EAC failed to act on Arizona’s request, it “would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a *nondiscretionary* duty to include Arizona’s concrete evidence requirement on the Federal Form.” *Id.* at 2259-60 (emphasis added) (citing 5 U.S.C. § 706(1)).

The district court in this case correctly followed the Supreme Court’s roadmap. Because the *Inter Tribal Council* Court unanimously concluded that it would raise serious constitutional doubts “if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications” 133 S. Ct. at 2258-59, the district court determined that “Congress has no authority to preempt a State’s power to enforce voter qualifications.” March 19 Order at 11. And the district court found that “[b]y denying the states’ request to update the instructions on the federal form, the EAC effectively strips state election officials of the power to enforce the states’ voter

eligibility requirements,” which “has the effect of regulating *who* may vote in federal elections.” *Id.* at 12 (emphasis in original).

Recognizing its duty to construe the NVRA so as to avoid serious constitutional doubts, the district court rejected the EAC’s construction of the NVRA, under which the EAC argued it had the authority to refuse Arizona’s and Kansas’s state-specific instructions. *Id.* at 26. Instead, the district court held that the language of NVRA did not preclude states from requiring proof of citizenship and that the EAC’s own regulations anticipated that the states would notify it of necessary changes to the state-specific forms. *Id.* at 20-23.

As explained below, this Court should deny the Appellants’ requests for a stay and order the EAC to obey the district court’s Order and include Arizona’s and Kansas’s state-specific instructions on the Federal Form immediately.

LEGAL ARGUMENT

I. Legal Standard

The Appellants correctly state the elements that a court must consider in determining whether to grant a stay. But they fail to mention the limited review that an appellate court should engage in after a district court has already reviewed a motion seeking a stay pending appeal. Both the district courts and the courts of appeals consider whether a stay applicant has established the following: (1) likelihood of success on appeal; (2) the threat of irreparable harm to the moving parties if the stay is not granted; (3) the absence of harm to the opposing parties if the stay is granted; and (4) any risk of harm to the public interest. *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft* (hereinafter “*O Centro*”), 314 F.3d 463, 465-66 (10th Cir. 2002); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). However, the court of appeals

“must consider, based on a preliminary record, whether the district court abused its discretion and whether the movant has demonstrated a clear and unequivocal right to relief.” *Homans*, 264 F.3d at 1243. Similarly, when reviewing a district court’s grant of preliminary injunctive relief, this Court may set it aside only for an abuse of discretion, an error of law, or clearly erroneous factual findings. *O Centro*, 314 F.3d at 466. The Appellants failed to meet this high standard.

II. The Balance of the Harms Does Not Weigh Decidedly in Favor of the Appellants.

Because the applicability of the relaxed likelihood of success factor turns on whether the three harm factors tip decidedly in the Appellants’ favor, this brief will first address the three harm factors and will then address the likelihood of success factor. As explained below, the balance of the harm factors tips strongly in the States’ favor, and thus the Appellants are not entitled to the relaxed likelihood of success factor.

A. The Appellants Have Failed to Demonstrate That They Will Suffer Irreparable Harm Absent a Stay of the District Court’s Order.

In order to obtain a stay pending an appeal, the movant must demonstrate an injury that is “certain, great, actual, and not theoretical.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks and citation omitted). In fact, “irreparable harm is not harm that is merely serious or substantial.” *Id.* (internal quotation marks and citation omitted). Instead, a party seeking to demonstrate irreparable harm “must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.*

i. The alleged harm that eligible voters will be prevented from registering to vote is merely theoretical.

The Appellants speculate that unless a stay is granted, irreparable harm will be incurred because eligible voters might be prevented from registering to vote. EAC Motion at 16 and 17; Intv. Motion at 2, 4, 13, 14, and 16. However, the alleged harm of eligible voters being prevented from registering to vote is purely theoretical. “To constitute irreparable harm, an injury must be certain, great, actual ‘and not theoretical.’” *Heideman*, 348 F.3d at 1189 (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). “The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.” *Wisconsin Gas Co.*, 758 F.2d at 674.

The Appellants fail to identify a single person that (1) has proven he or she is a United States Citizen, (2) has attempted to follow all of the avenues allowable under Arizona and Kansas law for providing proof of citizenship, and (3) has nevertheless been unable to register to vote in either Arizona or Kansas. Instead, the Appellants simply refer to the number of persons in Arizona and Kansas that have applied to register to vote without providing proof of citizenship documentation.² Intv. Motion at 15-16. The Appellants assume, without evidence, that those individuals are United States citizens who are somehow unable to comply with the proof of citizenship requirements of Kansas and Arizona. Indeed, in its May 7 Order the district court found that “the Intervenors have not shown facts in the record to support the idea that any eligible citizen has been or

² In *Gonzalez v. Arizona*, the U.S. District Court for the District of Arizona held that the Gonzalez plaintiffs failed to demonstrate “that the persons rejected are in fact eligible to vote.” See Exhibit 1 at EAC001682.

will be denied the right to vote as a result of the States' laws requiring proof of citizenship." May 7 Order at 7.³

The Appellants could not make such a showing, because no such person exists. The Kansas and Arizona proof-of-citizenship requirements are designed to ensure that every eligible United States citizen is able to complete his or her registration. For example, in Kansas, the State provides free replacement birth certificates for any registrant who has lost a birth certificate. K.S.A. 65-2418(a)(3). In addition, twelve other documents suffice to prove citizenship under the Kansas law. K.S.A. 25-2309(1). Kansas also provides that any person without one of the qualifying documents proving citizenship may nonetheless demonstrate his or her citizenship by providing other information or affidavits to the State Election Board. K.S.A. 25-2309(m). The Appellants have not identified a single United States citizen in the State of Kansas who is unable to register through these procedures.

Similarly, the State of Arizona has taken steps to ensure that every eligible United States citizen is able to register to vote, by establishing six different categories of information that may be used to demonstrate citizenship. Ariz. Rev. Stat. ("A.R.S.") § 16-166(F). In addition, Arizona is currently subject to a permanent injunction as part of the final judgment in the *Gonzalez v. Arizona* matter. See *Gonzalez v. Arizona*, D. Ariz. CV06-1268-PHX-ROS, ECF No. 1123. Under that injunction, all applicants using the Federal Form without providing information required by A.R.S. § 16-166(F) but who

³ Similarly, the district court in found "there is no evidence, only speculation, that [incomplete voter registration applicants] are unable to provide [proof of citizenship]. All the Court knows, from the evidence in the record, is that they have not—it hasn't been shown that they cannot." May 7 Order at 7.

otherwise meet the requirements of the Federal Form must be registered and are eligible to vote in elections for Federal Office. Arizona's county recorders then contact these Federal Form users to let them know that they are not currently eligible to vote in state and local elections and explain how they may become eligible by providing the information required by A.R.S. § 16-166(F). *See* Declaration of Ken Bennett, ECF No. 21 at ¶ 24, attached hereto as Exhibit 3.

For these reasons, the Appellants' claims that eligible voters will be prevented from registering to vote unless a stay is granted is unsupported by any evidence and is merely theoretical.

ii. The Appellants cannot show irreparable harm by asserting an injury that, if actual, would harm individual voter registration applicants and not the Appellants.

Even if the alleged harm of eligible voters being prevented from registering to vote were actual and not merely theoretical, the Appellants are unable to assert such harm as a basis for a stay in this matter. In order to obtain a stay pending an appeal, the movant "must make a showing of a threat of irreparable injury *to interests that he properly represents.*" *Graddick v. Newman*, 453 U.S. 928, 933 (1981) (emphasis added). That is, an injury that a movant asserts as the basis for a stay must be an injury that the movant has standing to assert.⁴ *Id.* The Appellants do not have standing to assert the rights of individuals that have allegedly been prevented from registering to vote.

⁴ By raising the subject of standing, the States are not seeking to relitigate the issue of intervention. The States simply argue that the harm asserted in support of a stay must be an injury to the party asserting the harm and not an injury to another person. The subject of standing was not decided by Judge Waxse's order allowing Intervenors-Appellants to permissively intervene in this action. December 12, 2013 Memorandum and Order, ECF No. 105.

The United States Supreme Court requires a plaintiff to have suffered an injury-in-fact; that is, an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Appellants do not satisfy this requirement for standing because they possess no legally protected interest that has been allegedly invaded. The Appellants are a governmental agency and various associations and organizations; as such, they do not possess the right to register to vote in elections. Only individuals have the right to register to vote in elections. This personal right of individuals also includes the right *not* to vote. *See Dixon v. Maryland*, 878 F.2d 776, 782 (4th Cir. 1989); *Wrzeski v. City of Madison, Wisconsin*, 558 F. Supp. 664, 667 (W.D. Wis. 1983). Further, Appellants have no legally protected interest in ensuring that any particular individual is registered to vote. The alleged harm of individuals being prevented from registering to vote is an injury to the interests of individual voter registration applicants, not an injury to the Appellants.

iii. If this Court reverses the district court's order, any harm to voters can be easily avoided.

The Intervenor-Appellants claim that if a stay is granted and the district court's order is subsequently overturned on appeal, "U.S. citizens will have illegally been prevented from voting and restoration of their rights will be contingent on the States' ability to locate and reinstate them to the voter rolls." Intv. Motion at 16-17. The Intervenor-Appellants then assert that Kansas and Arizona have no ability to locate and add such persons to their voter registration rolls. *Id.* at 17. The Intervenor-Appellants are simply misinformed; both states would be able to retroactively register such applicants for Federal elections. Arizona has already proven its capability to do so and will do so again, if ordered to. In the *Gonzalez* case, the Arizona district court ordered

the retroactive registration of all applicants using the Federal Form that had been submitted on or after August 1, 2011 and that had been rejected for failing to provide proof of citizenship. (*Gonzalez v. State of Arizona*, D. Ariz. Case No. CV06-01268-PHX-ROS, ECF No. 1093, attached hereto as Exhibit 4.) Likewise, Kansas also has the ability to retroactively register Federal Form applicants for federal elections if the district court's Order is later overturned. (*See* Declaration of Brad Bryant, attached hereto as Exhibit 5.) Thus, if a stay is denied and the March 19 Order is later overturned, no irreparable harm will occur to voter registration applicants. The district court was correct that "any such harm would prove to be temporary and reversible if this Court's order is overturned on appeal." May 7 Order at 5.

iv. The alleged hindrance to conducting voter registration drives does not constitute irreparable harm.

The Appellants also assert that unless a stay is granted, their ability to conduct voter registration drives will be hindered and that such hindrance constitutes irreparable harm. The alleged hindrance to voter registration drives consists of two assertions. First, the Intervenor-Appellants claim they will be forced to expend more effort and resources to carry out their voter registration drives. Second, they assert that their voter registration drives will result in fewer individuals being registered to vote.

The expense of effort and resources is insufficient to show irreparable harm in the context of a motion for stay pending appeal. The United States Supreme Court has declared that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (citation omitted). Therefore, the Intervenor-Appellants' claims that, unless a stay is granted, they will be forced to expend additional effort and resources to

conduct voter registration drives are insufficient to prove the irreparable harm required for a stay pending an appeal.

Similarly, the Intervenors-Appellants' claims that fewer individuals will be registered to vote as a result of voter registration drives conducted by the Intervenors-Appellants are insufficient to prove the irreparable harm necessary for a stay pending an appeal because, as shown above, this alleged harm is hypothetical and not a legally protected interest of the Intervenors-Appellants. *See* Section II.A.i. and II.A.ii. above. Notably, the Intervenors-Appellants make no claim that the absence of a stay will result in any direct infringement on their ability to *conduct* voter registration drives. This is because the placement of the States' documentary proof-of-citizenship requirements on their respective state-specific instructions places no direct burden on the Intervenors-Appellants.⁵

v. Denying the Appellants' request for a stay will not impede the EAC's ability to regulate the registration process for federal elections.

The EAC asserts that unless a stay is granted, it will be unable "to carry out its statutory mandate of regulating the registration process for federal elections." EAC Motion at 17-18. However, as is shown below, nothing in the NVRA requires the EAC to deny the States' requested modification to their state-specific instructions. Furthermore, the EAC has a nondiscretionary duty to implement the modifications requested by the states. Therefore denying a stay will not prevent the EAC from carrying

⁵ The League of Women Voters claims that it "has stopped conducting voter registration drives in certain counties in Kansas" as a response to Kansas's proof-of-citizenship requirement. Intv. Motion at 14. However, the League of Women Voters made this choice of its own volition; it was not required by Kansas's proof-of-citizenship requirement.

out its asserted statutory mandate. What is more, this abstract and theoretical “harm” to the EAC’s claimed regulator power rests on the assumption that the district court’s decision on the merits was incorrect. As such, it cannot serve as a basis for a stay pending appeal.

B. Granting a Stay In This Case Will Substantially Injure the States.

When determining whether to grant a stay pending an appeal a court must consider whether a stay will substantially injure the other parties involved in the proceeding. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The movant has the burden of demonstrating that the harms caused absent a stay outweigh the harms caused to the opposing party in the event that the court issues a stay. *See, e.g., First Savings Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 614 (D. Kan. 1995); *United States v. RX Depot, Inc.*, 297 F. Supp. 2d 1306, 1310 (N.D. Okla. 2003). In the present case, a stay will inflict three distinct injuries on the States.

i. Granting a stay would prevent the States from effectuating their statutes requiring proof of citizenship.

The United States Supreme Court has ruled that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of Cal. v. Orrin E. Fox Co.*, 434 U.S. 1345, 1351 (1977). Granting a stay would prevent the States from effectuating their proof-of-citizenship statutes with respect to voter registration applicants that utilize the Federal Form. This would create a massive loophole in the States’ proof-of-citizenship requirements, allowing noncitizens to register without complying with the States’ registration requirements. Therefore, granting a stay in this matter would not only cause

the States to suffer a substantial injury, but would inflict an *irreparable injury*, i.e. preventing the States from effectuating their proof-of-citizenship statutes.

The harm caused by preventing the States from effectuating their proof-of-citizenship statutes is not merely theoretical. As was established to the district court, there is concrete evidence that noncitizens register to vote in Kansas and Arizona when the States' proof-of-citizenship requirements are not enforced. *See* Declaration of Brad Bryant, attached hereto as Exhibit 6; Declaration of Tabitha Lehman, attached hereto as Exhibit 7, and Declaration of Karen Osborne, attached hereto as Exhibit 8. The factual record shows that multiple noncitizens have continued to attempt to register to vote since the inception of this case. Fortunately, the proof-of-citizenship requirement prevented these applicants from completing their registrations. In the absence of the requirement, it is highly unlikely that any of these noncitizens would have been discovered on the voter rolls after being registered. Thus, the injury to the State is irreparable.

ii. Granting a stay would deprive the States of their sovereign and constitutional right to establish and enforce voting qualifications.

The Tenth Circuit has determined that a deprivation of constitutional rights constitutes an irreparable injury as a matter of law. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005). Additionally, the Supreme Court has ruled that the deprivation of a constitutional right, such as a First Amendment right, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). An action that places a state's sovereign interests and public policies at stake is deemed to cause irreparable injury to that state. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). Likewise, the this Court has

ruled that an intrusion of an Indian Nation's sovereignty constitutes irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

The U.S. Constitution confers to the States the constitutional right and power, exclusive of the federal government, to establish and enforce the qualifications for voting in both state and federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59. If a stay is granted, the States will be prevented from enforcing their voter qualifications. Therefore, a stay will infringe on the States' sovereignty and constitutional rights. Consequently, the granting of a stay will inflict irreparable harm on the States.

iii. Granting a stay would force the States to implement a bifurcated voter registration system that is unduly burdensome.

The States commenced this case to ensure that their proof-of-citizenship requirements are applied equally to voter registration applicants that utilize state registration forms and those applicants that utilize the Federal Form. If a stay is granted, the States will be required to accept the Federal Form to register individuals to vote in federal elections without documentary evidence of citizenship as required by the States' laws. *Id.* at 2260. However, such registrants are not properly registered to vote in state and local elections under Kansas and Arizona law. K.S.A. 25-2309(l); A.R.S. § 16-166(F). Therefore, the Plaintiffs will need to administer one election system for voters registered only for federal elections and one system for voters registered for both state and federal elections.

As noted above, Arizona is already required to accept Federal Form applicants without additional proof of citizenship and must register such applicants as eligible to vote in elections for Federal Office. *See* Section II.A.i. above. As a result, there are numerous existing voters in this scenario. Arizona has already begun implementing its

dual registration system and has incurred significant costs associated with that implementation. *See* Exhibit 3. However, so long as the Federal Form instructions remain unchanged, common sense dictates that this pool of “Fed Only” voters will continue to grow. If, however, the EAC modifies the instructions, the pool is closed and the county recorders can focus their efforts on getting those persons to comply with the proof-of-citizenship requirement and thereby transfer them to the pool of “Full Ballot” voters who are eligible to vote in federal, state, and local races.

Kansas is in a different circumstance. It is not bound by a federal court injunction concerning Federal Form applicants. One of the principal reasons that Kansas pursued a quick resolution of this case was to avoid having to implement a bifurcated system like Arizona’s. But if the August 5, 2014 primary election date arrives and the EAC has still not added the Arizona- and Kansas-specific instructions requiring proof of citizenship, Kansas will likely have to implement a bifurcated election in which certain Federal Form registrants are permitted to vote in federal elections only. Comparing these real burdens with the Appellants’ purely theoretical burdens, it is clear that “any potential harm to the EAC and intervenors does not outweigh the harm to the States.” May 7 Order at 6.

C. Granting the Stay Requested by the Appellants Is Not in the Public Interest.

There is a strong public interest in ensuring fair and honest elections. *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Furthermore, the public has an interest in preventing voter fraud and safeguarding confidence in the integrity of the electoral process. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194-97 (2008). The proof-of-citizenship requirements enacted by Arizona and Kansas ensure that noncitizens do not register to vote and do not actually vote in elections. Accordingly, the States’

proof-of-citizenship requirements advance the public interests of ensuring fair and honest elections, preventing voter fraud, and safeguarding confidence in the integrity of the electoral process. Granting a stay would prevent the States from protecting such public interests. Moreover, the States' proof-of-citizenship requirements were enacted by the elected representatives of Kansas and the people of Arizona. As succinctly stated by the district court, "Public interest is best expressed through laws enacted through the public's elected representatives." May 7 Order at 7. Therefore, granting a stay is not in the public interest.

The Appellants argue that not granting a stay is contrary to the public interest because implementing the March 19 Order may cause voter confusion. However, if a stay is granted, confusion is far *more* likely because the State of Kansas will be forced to implement a bifurcated election system. Some individuals will be registered to vote only in federal elections while others will be registered to vote in federal, state, and local elections. Many of those individuals will be confused as to why their ballot does not include state and local elections. It is likely that many voters will be confused as to which election they are registered to vote in. Furthermore polling places will be required to distribute a different ballot to each category of voter. Thus, a bifurcated election system will lead to more voter confusion than implementing the Court's order.

Further, the Appellants argue that denying a stay will hamper the enforcement of the NVRA and is thus adverse to the public interest. However, as shown below, the modifications to the state-specific instructions are not contrary to the provisions of the NVRA. Quite the opposite, the United States Constitution, as well as the EAC's own regulations, mandate that the EAC implement the requested modifications. Therefore, denying a stay cannot hamper the enforcement of the NVRA.

III. The Appellants Are Not Likely to Succeed on the Merits.

A. The Tenth Circuit's Relaxed Standard Does Not Apply to the Motions to Stay Pending Appeal Filed by the Appellants.

The Appellants assert that the Tenth Circuit's relaxed "probability of success requirement" applies to their motions. Under that standard, probability of success is demonstrated when the movant has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. *Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852-53 (10th Cir. 2003). However, there are two reasons why this relaxed standard does not apply.

First, as the Tenth Circuit has emphasized, the relaxed standard only applies "where the moving party has established the three 'harm' factors tip *decidedly* in its favor." *Heideman*, 348 F.3d at 1189 (citations omitted; emphasis provided). As argued *supra*, and as found by the district court, May 7 Order at 8, the three harm factors do not tip in favor of the Appellants at all; instead, they tip in favor of the States.

Second, the less rigorous standard should not be applied to requests to stay governmental action taken in the public interest pursuant to a statutory and regulatory scheme. *Heideman*, 348 F.3d at 1189. In keeping with their constitutional prerogative to establish and enforce voter qualifications, the legislature of Kansas and the citizens of Arizona enacted documentary proof-of-citizenship requirements for voter registration applicants. To protect the public interest, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (citation omitted). The states are entitled to adopt generally applicable and evenhanded

restrictions that protect the integrity and reliability of the electoral process itself. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (citing *Celebrezze*, 460 U.S. at 788, n. 9). For these reasons, the relaxed standard should not be applied in this case.

B. The Appellants Are Not Likely to Succeed On the Merits.

i. The EAC Decision raises serious constitutional doubt, and the district court therefore correctly applied the canon of constitutional avoidance.

The canon of constitutional avoidance is a cardinal principle of statutory interpretation requiring courts to construe a federal statute to avoid serious constitutional doubt. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011). This canon of statutory interpretation was of central importance to the district court's March 19 Order, especially on the questions of preemption, the nature of the EAC's discretion, and the applicability of *Chevron*⁶ deference.⁷ The Appellants, however, disagree with the district court's conclusion that the EAC Decision and its interpretations of the NVRA raised serious constitutional doubts, and that the court was therefore required to adopt a construction of the NVRA that avoids constitutional doubt. Instead, the Appellants argue that the *Inter Tribal Council* decision resolved *all* constitutional doubt.

This argument, however, misconstrues *Inter Tribal Council*, which merely stated that Arizona's request, along with its accompanying constitutional questions, should be submitted to the EAC and that the EAC's decision should be reviewed under the

⁶ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 715 (2006).

⁷ See, e.g., March 19 Order at 11-12 (utilizing canon of constitutional avoidance in determining the NVRA does not preempt the Plaintiff's proof-of-citizenship requirements); *id.* at 14-15 (canon of constitutional avoidance trumps *Chevron* deference); *id.* at 26-27 (the EAC's discretion is limited by constitutional concerns).

Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (hereinafter “the APA”). The APA itself contemplates relief for constitutional violations, 5 U.S.C. § 706 (2)(B), and constitutional questions that arise during APA review fall expressly within the domain of the courts which conduct review *de novo*. *Darden v. Peters*, 488 F.3d 277, 284-85 (4th Cir. 2007); *Westar Energy Co. v. U.S. Dep’t of Interior*, 932 F.2d 807, 809 (9th Cir. 1991). The *Inter Tribal Council* decision clearly anticipated that constitutional questions would remain to be resolved through judicial review under the APA.⁸ And the Court specifically contemplated that the EAC’s authority could be construed either in a manner that raised constitutional doubts or in a manner that avoided constitutional doubts, and advised the latter. *Inter Tribal Council*, 133 S. Ct. at 2259. Thus, it did not “resolve” all constitutional questions.

Relying on *Miller v. French*, 503 U.S. 527 (2000), the EAC now asserts for the first time that the canon of constitutional avoidance cannot justify the district court’s interpretation of the NVRA because the interpretation is unreasonable and “plainly contrary to the intent of Congress.” However, the district court correctly held that its interpretation was not contrary to the intent of Congress “because the NVRA is silent as to the issue.”⁹ It is preposterous for the EAC to infer from congressional silence a plain

⁸ Indeed, there would otherwise been no reason for the *Inter Tribal Council* court to have noted that Arizona might be in a position to assert a constitutional right to enforce its proof of citizenship requirement apart from the Federal Form if the EAC was without authority to act on Arizona’s renewed request, thereby foreclosing effective APA review. *Inter Tribal Council*, 133 S. Ct. at 2260, n. 10.

⁹ March 19 Order at 27 (citing *Miller*, 530 U.S. at 341). The district court also rejected the Appellants’ claim that Congress considered and rejected proof-of-citizenship requirements when enacting the NVRA:

(continued...)

intent to create a federal agency empowered to override the States' constitutional powers to establish and enforce voter qualifications.

ii. The NVRA does not preempt the States' proof-of-citizenship requirements.

The Appellants assert that the NVRA completely preempts the States' proof-of-citizenship laws, and that the *Inter Tribal Council* decision recognized this complete preemption. The Appellants therefore maintain that the States' proof-of-citizenship requirements can only be included in the state-specific instructions on the Federal Form if the States prove to the EAC's satisfaction that such requirements are necessary. The Appellants' reading of *Inter Tribal Council*, however, is simply wrong. If, as the Appellants assert, *Inter Tribal Council* held that the NVRA preempted state proof-of-

“According to the EAC decision, Congress considered including language that would allow states to require documentary evidence of citizenship (a requirement that no state had at the time) and decided not to include such language in the NVRA. [EAC Decision, ECF No. 129, at 20]. In its motion, the [States] point to other parts of the legislative history that purport to show that the NVRA's sponsor argued that the proposed language was unnecessary as redundant because nothing in the NVRA prevented a state from requiring proof of citizenship. Doc. 140, at 8-9. Either way, the Court is not impressed with the legislative history presented in the absence of statutory language addressing the subject. See *U.S. v. Cheever*, 423 F. Supp. 2d 1181, 1191 (D. Kan. 2006) (noting that ‘it can be a dangerous proposition to interpret a statute by what it does *not* say’ and that ‘[s]uch a negative inference is a weak indicator of legislative intent.’). The Court finds it unnecessary to consider the legislative history here. See *Shannon v. U.S.*, 512 U.S. 573, 583 (1994) (noting that courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point).”

Id. at 21, n. 92.

citizenship laws, there would be no reason for the Supreme Court to have discussed at length the serious constitutional doubts that would arise “if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.” *Id.* at 2258-59. As the district court correctly recognized,¹⁰ the question of whether the NVRA attempts to preempt state proof-of-citizenship requirements was expressly *not* decided in *Inter Tribal Council*.

What is more, the Appellants do not articulate any alternative to the test utilized in the March 19 Order by which the district court determined that the NVRA does not preempt the States’ laws. March 19 Order at 18-22. Instead, the Appellants baldly assert that the NVRA expressly preempted the States’ proof-of-citizenship requirement even though they fail to identify one NVRA provision that conflicts with the States’ proof-of-citizenship requirements.¹¹ It should further be noted that the Appellants’ motions to stay do not apply the canon of constitutional avoidance to the question of preemption. Simply put, the States’ proof-of-citizenship requirements do not conflict with any provision of the NVRA, and the district court’s determination of non-preemption is likely to be upheld on appeal.

¹⁰ See 12/13/2013 Hr’g Tr. at 27:10-21; 57:19-58:2, attached hereto as Exhibit 9.

¹¹ Indeed, the Appellants are essentially advancing the quite novel argument that while the NVRA does not by its own terms preempt the States’ proof-of-citizenship requirements, the States’ requirements are nevertheless preempted because a federal agency, the EAC, has decided in its discretion not to include the States’ proof-of-citizenship requirements on the Federal Form. The States, however, are not aware of any legal authority holding that an otherwise non-preemptive federal statute can become imbued with preemptive powers at the whim of a federal agency.

iii. The EAC does not have discretion to infringe upon the States' exclusive constitutional power to establish and enforce voter qualifications.

The Appellants maintain that the EAC has the discretion to determine whether the States' proof-of-citizenship requirements are "necessary" under the NVRA, 42 U.S.C. § 1973gg-7(b)(1), or, as articulated in *Inter Tribal Council*, whether "a mere oath will not suffice to effectuate [their] citizenship requirement[s]." *Inter Tribal Council*, 133 S. Ct. at 2258-59, 2260. However, as recognized in *Inter Tribal Council*, such unlimited discretion involves "serious constitutional doubts" in light of the states' exclusive power to establish and enforce voter qualifications. *Id.* at 2258-59. As the Appellants would have it, the States' constitutional powers and rights are subject to the EAC's discretion. This proposition contradicts common sense—a constitutional power subject to an agency's discretion is no constitutional power at all—and also established precedent. *See Darden*, 488 F.3d at 284-85 (constitutional questions arising during APA review fall expressly within the domain of the courts which conduct review *de novo*); *Westar Energy Co.*, 932 F.2d at 809 (same).

The *Inter Tribal Council* Court did not find that the EAC had the discretion to refuse to include a voter qualification requirement that a State deemed necessary to determine voter eligibility. Instead, although the Court did not reach this legal question, it strongly indicated that it would find that the EAC lacks such discretion. The Supreme Court emphasized that the States have the exclusive constitutional authority to determine who may vote in federal elections, which necessarily includes the power to enforce those qualifications. In light of the states' exclusive constitutional authority to establish and enforce voter qualifications, the Supreme Court recognized that 1) "validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional

doubt”; 2) a State may challenge the EAC’s rejection of its request to “alter the Federal Form to include information the *State deems necessary* to determine eligibility”; and 3) in the event EAC failed to act on a Arizona’s request, it “would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a *nondiscretionary* duty to include Arizona’s concrete evidence requirement on the Federal Form.” *Id.* at 2259-60 (emphasis added) (citing 5 U.S.C. § 706(1)).

Because of the “serious constitutional doubts” attending the EAC’s role in developing the Federal Form, the *Inter Tribal Council* court explicitly limited the EAC’s discretion by what it called an analogy to the canon of constitutional avoidance. *Inter Tribal Council*, 133 S. Ct. at 2259. The *Inter Tribal Council* Court therefore implicitly concluded that the canon of constitutional avoidance required that any ambiguity regarding who decides what information is necessary under the NVRA, 42 U.S.C. § 1973gg-7(b)(1) be resolved in favor of the states.

Yet the Appellants make much ado about the Court’s phrase, which they rip out of context: “validly conferred discretionary executive authority.” According to the Appellants, this phrase conclusively establishes that the *Inter Tribal Council* Court envisioned the EAC as having full discretion unrestrained by constitutional considerations.¹² This assertion, however, is shown to be false by the surrounding

¹² In an attempt to account for the *Inter Tribal Council* opinion’s holding that the EAC is under a nondiscretionary duty when a state has established that “a mere oath will not suffice to effectuate its citizenship requirement,” 133 S. Ct. at 2260, the Appellants assert that this nondiscretionary duty arises only when the EAC *determines* that the requested instruction is necessary. But this purported limitation on the EAC’s discretion is illusory because the Appellants further assert that the EAC’s determination regarding
(continued...)

language and the entirety of the opinion, which clearly acknowledged that the EAC's discretion must be limited to avoid serious constitutional doubts. *Id.* at 2258-60.¹³ Accordingly, the district court was correct when it held that the "EAC's decision to deny the states' requested instructions has precluded the states from obtaining proof of citizenship that the states have deemed necessary to enforce voter qualifications. Therefore, the EAC's interpretation of the NVRA raises the same serious constitutional doubts as expressed in [*Inter Tribal Council*]." March 19 Order at 14.

iv. The EAC's determination that the States' proof-of-citizenship requirement are unnecessary is not entitled to deference.

Lastly, the Appellants argue that the district court did not give proper deference to the EAC's determination that the States' proof-of-citizenship requirements were unnecessary. However, as previously noted, the APA itself contemplates relief for constitutional violations, 5 U.S.C. § 706(2)(B), and constitutional questions that arise

an instruction's necessity is itself reviewed for abuse of discretion under the APA. An agency's discretion limited by its own discretionary determination is not limited at all.

¹³ The Appellants further argue that *Inter Tribal Council* must have held the EAC to have full discretion to determine whether Arizona's proof of citizenship requirement is necessary because it would have been futile to direct Arizona to renew its request with the EAC if Arizona had the power to determine what is necessary. The Appellants similarly suggest the March 19 Order is erroneous because it effectively converts the agency into a rubber stamp containing authority only to approve state requests but not to deny them. The States disagree that this result necessarily follows. Indeed, in oral argument before the district court, both the EAC and the States agreed that the EAC retains discretion over "voter registration procedures," while the states have exclusive authority over enforcement of substantive registration requirements. 12/13/2013 Hr'g Tr. at 57:9-18; 115:16-20. In addition, the EAC retains the discretion to determine if a state's requested instruction accurately reflects that state's laws, and to determine if the proposed wording of the instruction would be confusing to voters. These are the areas in which the EAC retains discretion—areas that do not intrude upon the States' constitutional right to establish and enforce substantive voter registration requirements.

during APA review fall expressly within the domain of the courts which conduct review *de novo*. *Darden*, 488 F.3d at 284-85; *Westar Energy Co.*, 932 F.2d at 809.

Deference to the EAC's determination is particularly inappropriate where constitutional claims are made because, by the EAC's own admission, EAC proceedings are informal, non-adjudicatory in nature, and lack any means of discovery. 12/13/2013 Hr'g Tr. at 85:17-86:7, attached hereto as Exhibit 10. Giving deference to the EAC's informal adjudication of the States' constitutional powers and rights made in the absence of discovery or other formal procedures would raise serious procedural due process concerns. Further, there is absolutely nothing in the NVRA that suggests that Congress intended the EAC to undertake this type of quasi-judicial inquiry.

Moreover, the district court correctly determined that its construction of the NVRA and EAC's regulations was necessary to avoid a constitutional question and that the "canon of constitutional avoidance trumps *Chevron* deference owed to an agency's interpretation of a statute." March 19 Order at 15 and n. 57 (citing authority from the Tenth, Eighth, Ninth, and D.C. Circuits). The Appellants do not address the authority cited by the district court or explain why the canon of constitutional avoidance does not trump any deference owed to EAC.

v. This Court can affirm the judgment of the district court on alternative grounds.

The scope of appellate review is significant in determining whether the Appellants are likely to succeed on the merits on appeal. Appellate courts are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court. *D.A. Osguthorpe Family*

Partnership v. ASC Utah, Inc., 705 F.3d 1223, 1231 (10th Cir. 2013) (citation omitted).

This Court should consider at least two alternative bases for affirmance.

First, although the March 19 Order discussed the EAC's regulations, particularly 11 C.F.R. § 9428.3(b)¹⁴, it does not appear that the district court held that this regulation standing alone affords a basis for granting relief to the States. It was not necessary for the court to do so, since the court had already established that the correct interpretation of the NVRA favored the States' position. However, the EAC's failure to comply with its own regulation provides an additional ground for affirming the district court.¹⁵

Second, the States maintain that vesting the EAC with authority or discretion to nullify state laws enacted in furtherance of the state's exclusive authority to establish and enforce voter qualifications would constitute a system of preclearance of the kind specifically disapproved of in *Shelby County, Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612 (2013). If the NVRA were interpreted to afford the EAC such authority, then the NVRA would violate Article I, Section 2, of the United States Constitution; and the EAC's action would be invalid on that basis as well.

¹⁴ The district court relied particularly on the EAC's regulation 11 C.F.R. § 9428.3(b), which states, "[t]he state-specific instructions shall contain the following information for each state...: the state's specific voter eligibility *and registration requirements*." March 19 Order at 16. The district court correctly concluded that this regulation uses mandatory language requiring the EAC to include the States' requested instructions. *Id.* at 22-24. Remarkably, the Appellants completely ignore this regulation.

¹⁵ It is arbitrary, capricious, an abuse of discretion, and not in accordance with law for an agency to fail to comply with its own regulations. *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (citations omitted).

CONCLUSION

For the reasons stated above, the Appellants' Motions for Stay Pending Appeal should be denied. For the same reasons, and if the Motions for Stay Pending Appeal are denied, the State oppose the Appellants' motions for an expedited briefing and hearing schedule. The efficient administration of the election in 2014 demands that the district court's correct decision remain in place and that additional uncertainty not be created by the prospect of litigation-driven, last-minute changes in the weeks before the elections.

Respectfully submitted this 13th day of
May, 2014.

s/ Thomas E. Knutzen

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 13th day of May, 2014, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

s/ Thomas E. Knutzen

Thomas E. Knutzen, KS Bar No. 24471
Attorney for Plaintiffs-Appellees

EXHIBIT F

Office of the Kansas Secretary of State**Update and Instructions Regarding
Federal-Form Voter Registration Applicants**

June 4, 2014

Previous instructions to county election officers dated and issued May 23, 2014 provided an update on *Kobach et al. vs. United States Election Assistance Commission*, which is the case filed jointly by Kansas and Arizona on August 21, 2013. As noted in the May 23 instructions, the district court decision in our favor was appealed. The Court of Appeals had indicated it would expedite its review of the case, and the Secretary of State's office hoped for a ruling before the August 5 primary. A favorable ruling issued by the Court of Appeals before August 5 would have meant there would have been no need for a bifurcated election system wherein voter registration applicants who submitted the federal form without documentary proof of U.S. citizenship would be permitted to vote in elections for Federal office only.

However, on June 3, 2014, our office received word that the Court of Appeals had scheduled arguments for August 25, 2014, which is after the Kansas primary. We still hope for a final decision before the November general election. However, because there will be no decision before the primary, we have revised the procedure to be followed by county election officers. Please note the following instructions.

Actions by County Election Officers

1. Continue the practice of maintaining a list, outside of ELVIS, of voter registration applicants who submitted federal forms without proof of citizenship. The list should include all such applicants who submitted federal forms without proof of citizenship **between January 1, 2013 and July 15, 2014**, which is the voter registration deadline for the primary.
2. Continue to contact all incomplete-status applicants (those who used the Kansas form) at least twice to request citizenship documents. Also, if you have federal-form incomplete applicants, continue the expanded effort to contact federal-form applicants at least one additional time by phone or personal visit, if necessary, with a goal of reducing the list of federal-form applicants to zero. Note that these federal form applicants can provide proof of citizenship as late as August 4, 2014, and still complete their registration in time for the August 5, 2014, primary. At some point during the week before the primary provide your list of federal form incomplete applicants to the Secretary of State's Office.

EXHIBIT**7**

3. Prepare to issue provisional ballots to federal-form incomplete applicants at the primary election and count only the votes for federal offices (U.S. Senate and U.S. House of Representatives). The process will be similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. 25-3002(b)(3).

Use the following procedure for issuing provisional ballots to federal-form incomplete applicants:

- a. Maintain a list of federal-form incomplete applicants in the county election office.
- b. Do not print these applicants' names on the poll book. They are not registered voters under Kansas law, even though they will be permitted to vote for federal offices during the August 5, 2014, primary.
- c. Poll workers will issue provisional ballots to these voters the same as any other voters whose names do not appear in the poll book.
- d. When provisional ballots are returned to the election office after the close of polls on primary election day, use the list of federal-form incomplete applicants to separate their provisional ballots into a separate stack.
- e. Unless these provisional ballots are determined to be invalid for another reason, make a recommendation to the county board of canvassers to count only the votes for federal offices.
- f. Manually count the votes and add them to the other vote totals.

If you have any questions about this procedure, do not hesitate to contact Brad Bryant or Bryan Caskey at the Secretary of State's Office.

From: county-election-officials-bounces@list.ink.org [mailto:county-election-officials-bounces@list.ink.org] **On Behalf Of** Caskey, Bryan [KSOS]
Sent: Tuesday, June 03, 2014 4:39 PM
To: County Election Office List-Serve (county-election-officials@ink.org)
Subject: [County-election-officials] Federal Form Instructions

Dear County Election Officers:

Attached is a document containing an update and new instructions regarding federal-form voter registration applicants. Every county should review this update. Contact us if you have any questions.

Have a great afternoon.

BRYAN A. CASKEY | Assistant State Elections Director
Kansas Secretary of State | 785-296-3488 P | 785-291-3051 F | www.sos.ks.gov
Memorial Hall, 1st Floor | 120 S.W. 10th Avenue | Topeka, KS 66612-1594

EXHIBIT G

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IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
SEVENTH DIVISION

AARON BELENKY, SCOTT JONES, and)
EQUALITY KANSAS,)
)
) Plaintiffs,)
) CASE NO. 13-CV-1331
)
)
KRIS KOBACH, KANSAS SECRETARY OF)
STATE, and BRAD BRYANT, KANSAS)
ELECTIONS DIRECTOR, in their)
official capacities,)
)
)
Defendants.)

**TRANSCRIPT
OF
TEMPORARY INJUNCTION HEARING**

held on the 11th day of July 2014,
Division 7 of the District Court of Shawnee County,
Kansas, 200 S.E. Seventh Street, in the City of
Topeka, County of Shawnee, and State of Kansas
before the Honorable Franklin Theis, District Judge.

Geri Ann Noll, CCR
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ATTORNEY CALEB D. CROOK, 109 S.W. Ninth Street, Suite 600, Topeka, Kansas 66612-1215 and

ATTORNEY/DEFENDANT KRIS W. KOBACH, Memorial Hall-First Floor, 120 S.W. Tenth Avenue, Topeka, Kansas 66612-1594 and

ATTORNEY THOMAS E. KNUTZEN, 100 E. Washington Street, Suite D. Oskaloosa, Kansas 66066-0366, appeared on behalf of the Defendants.

ALSO PRESENT: The Honorable Larry Hendricks

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1 Department of Revenue transmitted affirmations that
2 Belenky and Jones had provided passports when they
3 got their driver's licenses. Both of these
4 individuals were getting their first driver's
5 licenses in Kansas. They moved in from
6 out-of-state. Kansas law requires that you provide
7 proof of citizenship when you get your driver's
8 license for the first time. Not when you and I
9 renew our driver's license, but when you get it for
10 the first time you have to prove citizenship. The
11 individual plaintiff's driver's license -- images of
12 their passports were then verified by DMV,
13 transmitted to the state, and then the state
14 transmitted the verification to the counties.

15 Now, sort of shooting from the hip
16 here. The plaintiff's attorney just suggested that,
17 oh, maybe they just completed this process -- they
18 just invented a new process so that they could
19 complete Belenky and Jones' registrations. No,
20 Your Honor, far from it. That is the most frequent
21 way that documents of citizenship are verified in
22 Kansas today. It is usually done -- the vast
23 majority of people, and as I would expect most
24 people in this room would guess, register at the
25 DMV. And when you register at the DMV, you can

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1 provide proof of citizenship. A lot of people do,
2 especially new driver's license applicants. And
3 that image is verified. And so an e-mail is sent
4 from the county DMV to the county clerk's office.
5 Bob Smith registered today, and we have verified
6 that he provided a copy of his passport, or his
7 birth certificate, or his naturalization document,
8 or one of the 13 possible documents. It happens all
9 the time.

10 Now, in some -- when a person
11 registers at the time they get their DMV -- when
12 they register to vote at the same time -- it goes
13 automatically. So the image and the verification go
14 automatically to the state, and then the
15 verification to the county. If the person doesn't
16 register, at the D- -- when they are getting their
17 driver's license and they don't register to vote,
18 then, it happens on an *ad hoc* basis. Because the
19 state processes the image of the birth certificate
20 or passport, but the county has not yet been
21 notified that it exists to complete the
22 registration.

23 This is not a new procedure. It's
24 been done all the time. And in our affidavits --
25 I'm not sure if plaintiffs had time to read the

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1 affidavits -- but our affidavits make this clear.

2 So, for example, last fall, we did a
3 batch of names that we sent to DMV, and said, hey,
4 do you have any information -- of citizenship
5 information on this batch of, literally, thousands
6 of names? Because DMV had told us that there is
7 this sort of gap in the process where if a person
8 doesn't say yes when they're getting a driver's
9 license but then subsequently registers, they would
10 have that citizenship information and it would be of
11 help to the voter. So we do it in batches, we also
12 do it *ad hoc*. Whenever the Secretary of State's
13 Office or a county election officer learns that DMV
14 may already have a person's birth certificate, then
15 we request it.

16 So, for example, in the cases of
17 Mr. Belenky and Mr. Jones, they both received
18 notification letters from the county election
19 officer saying, we received your voter registration
20 application; however, it is incomplete. You still
21 need to provide proof of citizenship. Many
22 people -- these two did not, because it appears they
23 want -- their lawyers want them to maintain standing
24 in this case. Most people pick up the phone and
25 say, oh, I gave you my birth certificate when I

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1 jurisdictional defects in this case that would have
2 to be solved before an injunction could be issued,
3 preliminary or permanent. And at this point, there
4 is no injury regarding the two individual plaintiffs
5 that are the basis for a preliminary injunction.
6 They have already got the relief they want. The
7 relief they wanted is they wanted to be able to vote
8 the whole ballot on August 5th. They can do it. So
9 it is unclear what a preliminary injunction would
10 serve. It would be truly an idle act to use the
11 Kansas Supreme Court's -- Court's orders.

12 THE COURT: Is there some other
13 remedy available to the voter to preserve their
14 vote?

15 MR. KOBACH: To all voters? Or to
16 these two voters?

17 THE COURT: Well, these two voters
18 you claimed aren't relevant right now.

19 MR. KOBACH: Right.

20 THE COURT: To the issue --

21 MR. KOBACH: To preserve their
22 vote --

23 THE COURT: Federal voters -- people
24 who go in, how many know that they are going to get
25 their state offices trashed?

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1 MR. KNUTZEN: Well, let's assume for
2 the sake of argument that there are 150 people who
3 have used the federal form and who are on this list.
4 And let's assume that half of them, 75 of them, vote
5 and their ballots are counted for the federal race
6 result. The provisional ballot process does -- the
7 original ballots are preserved and there would be a
8 record of that. Their vote would be counted in the
9 federal races. But their vote would not be counted
10 in the state races.

11 Now the question is -- I think your
12 question is, if something happened and it was
13 determined that they needed to be counted, in the
14 state races as well, could you -- is that your
15 question -- you could go back and recount those
16 votes after the fact?

17 THE COURT: Well, if I went in to --
18 if somebody gave me a ballot that had all the
19 offices on it, and I went and voted for everyone and
20 then I -- you know, not being a lawyer, and not
21 reading the Inter Tribal, and not caring what the
22 Secretary of State does on the weekends or anything
23 else, you know, find out that my vote doesn't count,
24 and I'm quite appalled by it, what do we do?

25 MR. KOBACH: The provisional ballot

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1 process segregates these provisional ballots into
2 categories and they remain segregated in those
3 categories until the county canvass on the 6th or
4 9th day after the election. And so, if someone were
5 to raise an objection or if a challenge were to be
6 made, in those -- in that period, then those ballots
7 could still be pulled out and whatever, preserved or
8 something done with them.

9 THE COURT: Who makes the challenge?

10 MR. KOBACH: Well, a voter, I
11 suppose, can bring an action in court saying I
12 thought I was getting a regular ballot. I was given
13 a provisional ballot. I was told that -- I thought
14 my registration was complete. You know, a voter
15 could do something.

16 In addition, the voters who have been
17 sent notices -- any voter who hasn't completed his
18 proof of citizenship has been sent notices multiple
19 times since he registered that his registration is
20 incomplete. His registration is incomplete. Every
21 county in Kansas sends a written notice to the voter
22 and a phone call.

23 THE COURT: They haven't been told
24 that their vote will just be counted for the federal
25 election?

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EXHIBIT H

In The Matter of:

KRIS W. KOBACH,

v.

U.S. ELECTION ASSISTANCE COMMISSION

10TH CIRCUIT ARGUMENT

August 25, 2014

**In the United States Court of Appeals
For the Tenth Circuit
KRIS W. KOBACH, et al.,
Plaintiffs-Appellees,
v.
UNITED STATES ELECTION ASSISTANCE COMMITTEE, et al.,
Defendants-Appellants
AND
PROJECT VOTE, INC., et al.
Intervenors-Appellants.**

*Appeals from Order Granting in Part Plaintiffs' Motion for Judgment,
Entered on March 19, 2014 by the United States District Court
For the District of Kansas, Case No. 13-cv-4095-EFM-TJJ,
The Honorable Eric F. Melgren.*

1 political — we don't get involved in the political decisions. A political decision has been made
2 by the political branches that they wish not to appoint Commissioners to the EAC. Now, you
3 bring to us a case and throw a case in our lap that says what do the Courts do with a situation in
4 which Congress has chosen and the President has chosen not appoint and Congress has chosen
5 not to confirm or vice versa, not vice versa,, but one of those two prongs is missing, and all of a
6 sudden the Courts are asked to step into inherently political questions and make political
7 decisions. What in the Constitution requires that?

8 **Kris W. Kobach:** The Constitution requires that this Court and all Article III Courts uphold
9 Article I, Section 2 of it, which protects the states' exclusive authority to establish an enforcement
10 or qualifications. Congress has created a structure, which you described accurately, that has now
11 led us into this impasse and this impasse prohibits us from exercising our exclusive Article I,
12 Section 2 power. And so at that point, Congress has created a structure that is unconstitutional.

13 **Judge Lucero:** And that's the constitutional questions.

14 **Kris W. Kobach:** Right. And we would argue that —

15 **Judge Lucero:** Roughly, because not the Administrative Procedure Act appeal , but the
16 constitutional question.

17 **Kris W. Kobach:** And we would argue that even if you agree with their construction of the
18 word necessary and that they get to decide what necessary means, then that provision of the
19 NVRA is unconstitutional. Congress would not have had the authority to tells the states in the
20 NVRA, which they could have done, but they didn't, you can't require proof of citizenship.

21 **Judge Holmes:** No one is denying your right to do that. You can do that as it relates to
22 your own state form, that's why I'm just, I'm really puzzled by your Shelby County argument.
23 Because nobody's denying you the right to, and to do anything you want to do relative to the
24 qualifications of your voters. What they're saying is you can't put it on the federal form. You
25 can't require it as a requirement in the federal elections.

26 **Kris W. Kobach:** Right.

27 **Judge Holmes:** Those are two different things.

28 **Kris W. Kobach:** Well, but those two different things yield an unconstitutional result, Your

1 Honor. You're exactly right. The position of the EAC is that's fine, you can have that extra
2 qualifications on your state form and for your state elections, but we the Federal Government
3 decide what is on the federal form and we've decided that a lesser standard, a lesser standard of
4 qualifications will apply.

5 **Judge Lucero:** But you can be with them, you agree with them, you're arguing to us that
6 there is final agency action here, when, in fact, it seems to me that but for the result that you seek
7 to achieve, you would be partly arguing to us that the Executive Director has no power to act on
8 behalf of an agency.

9 **Kris W. Kobach:** We argue that the executive —

10 **Judge Lucero:** A more highly controversial policy, questions that on which the Congress
11 has delegated the authority to them because of their "special expertise," which is always required
12 for administrative agencies and engage these agencies.

13 **Judge Holmes:** Where would it leave us if we were to find that the Executive Director, Ms.
14 Miller, didn't have authority, how would you prevail?

15 **Kris W. Kobach:** At that point, we are exactly in footnote 10 of *ITCA*. The EAC is
16 powerless to act and that situation, that construction, gives us the authority or just a squeeze, as
17 we should then ask for writ of mandamus and you have the authority to issue a writ of mandamus
18 ordering the agency to act because inaction is unconstitutional. Inaction deprives us of our right.
19 And if I may, just quickly finish my answer to Judge Holmes. What happened is this, because the
20 EAC has said, well, we've got our standard for federal elections, you have your standard for state
21 elections. On August 5th in Kansas, there was a dual election, 180 people used the federal form,
22 had used the federal form for register, but they did not provide proof of citizenship. They were
23 permitted to vote in only federal elections. Tomorrow in Arizona, on August 26, there will be a
24 dual election. Many more people, perhaps more than a 1,000, will be only federal election only
25 voters. That situation is entirely at odds with Article I, Section 2 of the Constitution when the
26 founding fathers said, the House of Representatives shall be composed of members chosen every
27 second year by the people of several states and the electors in each state shall have the
28 qualifications requisite for electors of the most numerous grants of the state legislature.

1 According to our Constitution, there cannot be one voter roll for state and local elections and
2 another voter roll for federal elections, but that is what the defendants have done. By —

3 **Judge Holmes:** Well, there's also another provision of the Constitution. It speaks to the
4 power of Congress to define the manner in which federal elections are conducted. And so part of
5 this exercise is, is harmonizing those two provisions. Explain what they mean.

6 **Kris W. Kobach:** With all due respect, Your Honor, this Court's task is not harmonize those
7 two provisions. The *ITCA* Court says —

8 **Judge Holmes:** Interpret the law is not our job? That's exactly what our job is.

9 **Kris W. Kobach:** No, no, no, the Courts, it's not harmonizing. The qualifications cause
10 trumps the elections clause, and *ITCA* said that. The specific trumps the general and that is found
11 in our brief and it's a very important principal and Justice Thomas went on agreeing with the
12 majority on that point and —

13 **Judge Holmes:** He did in dissent, but how —

14 **Kris W. Kobach:** But the majority said this, in its opinion, it said that specific trumps the
15 general. And if I may just quickly touch on that point before I leave the podium here. It's found
16 at page 2258 or 2259 and, of course I'm forgetting the —

17 **Judge Holmes:** Don't waste your time on that, I'll find it.

18 **Kris W. Kobach:** Okay. You'll find it. And it's the specific trumps the general principal,
19 which is very important. The qualifications clause of Article I, Section 2 is specific. You know,
20 just states have specifically power to set and enforce these qualifications, the time, place and
21 manner clause of Article I, Section 4 is general. The general idea of how elections are
22 constructed. It doesn't say specifically what is included in all of those and that's what the Court
23 said. So Article 1, Section 4 is trumped by Article I, Section 2.

24 **Judge Holmes:** But the article — but *Inter Tribal* then, of course, goes on to explain that
25 you have an obligation to request —

26 **Kris W. Kobach:** Yes.

27 **Judge Holmes:** — using the language request from this federal agency to do things to
28 implement or to effectuate and your, what is — to get what is necessary for your qualification to

EXHIBIT I

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

AARON BELENKY,)
SCOTT JONES, and)
EQUALITY KANSAS,)
)
Petitioners,)
vs.)
)
KRIS KOBACH, KANSAS)
SECRETARY OF STATE, and)
BRAD BRYANT, KANSAS)
ELECTIONS DIRECTOR, in their)
official capacities,)
)
)
Respondents.)

Case No. 13C1331

Division 7

**PETITIONER’S RESPONSES TO RESPONDENTS’ FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS**

Aaron Belenky, by and through his attorneys, responds as follows to Respondents’ First Set of Requests for Production of Documents.

GENERAL RESPONSES AND OBJECTIONS

1. Petitioner renews his General Objections 1 – 4 to Respondents’ First Set of Interrogatories and incorporates those objections in response to Respondents’ First Set of Requests for Production of Documents.

RESPONSES TO REQUESTS FOR PRODUCTION

Request No. 1. Copies of all documents and exhibits that Plaintiff Aaron Belenky intends to offer as evidence or refer to during any hearing held in this matter.

Response: Petitioner intends to offer as exhibits his application for voter registration referenced in the Petition at ¶ 1, and documents submitted to this Court as attachments to Petitioners’ Motion for Preliminary Injunction, all of which were produced by Respondents or are in Respondents’ possession. That application was submitted to Respondents and is in Respondents possession. Petitioner will produce an additional copy, if necessary, upon issuance to a protective order.



Request No. 2. All documents in your possession, custody, or control which support or relate to your responses to the Interrogatories served concurrently herewith.

Objection: The documents requested contain sensitive confidential information, disclosure of which raises significant privacy concerns for Petitioner.

As required by K.S.A. § 60-226(c), Petitioners conferred with Respondents in good faith and proposed a stipulated protective order with a standard provision that confidential information disclosed pursuant to discovery shall not be used “except in connection with this litigation.” Respondents proposed a revision with the condition that Respondents could use confidential information obtained through discovery for the non-litigation “purpose of completing the voter registration applications of Petitioners Belenky and Jones.

Petitioners cannot agree to Respondents’ use of confidential information disclosed pursuant to discovery for purposes not connected with litigation and object to producing private, confidential documents and information until a protective order is in place. Alternatively, Petitioners object to this request on the grounds this document is not relevant to this action, in light of Petitioner’s admission in response to Respondents’ Requests for Admissions 1 and 4.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner possesses a birth certificate (Interrogatories 4, 7, 19); U.S. passport (Interrogatory 7); and Kansas driver’s license (Interrogatory 12). Petitioners have gathered the requested documents and will produce them upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively, Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 3. All documents in your possession, custody, or control which support or relate to your responses to the Requests for Admissions filed concurrently herewith.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner possesses a birth certificate (RFA 1) and U.S. passport (RFA 4). Petitioner has gathered copies of these documents and will produce them upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively, Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 4. All documents in your possession, custody, or control which you contend support each allegation in your Complaint. Designate which particular allegation or allegations each document produced applies to.

Response: Petitioner renews his General Objections 1 and 2 and incorporates those objections herein, and objects on the grounds that Respondents' request includes documents that are protected by the attorney-client privilege, the attorney work product privilege, or both, and that the request is overly broad, unduly burdensome, or would require production of information or documents outside of the scope of discovery.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner refers Respondents to his application for voter registration and to documents submitted to this Court as attachments to Petitioners' Motion for Preliminary Injunction, all of which were produced by Respondents or are in Respondents' possession.

Request No. 5. Aaron Belenky's driver's license or nondriver's identification card.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner will produce a copy of his Kansas driver's license upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively, Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 6. Aaron Belenky's birth certificate.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner will produce a copy of his birth certificate upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively, Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 7. Aaron Belenky's valid or expired passport.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner will produce a copy of his passport upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively,

Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 8. Aaron Belenky's United States naturalization documents.

Response: Petitioner does not possess such documents.

Request No. 9. Any documents, other than naturalization documents, issued by the federal government pursuant to the immigration and nationality act of 1952, and amendments thereto, which tend to prove that Aaron Belenky is a citizen of the United States.

Response: Petitioner does not possess such documents.

Request No. 10. Aaron Belenky's bureau of Indian affairs card or tribal treaty card.

Response: Petitioner does not possess such documents.

Request No. 11. Aaron Belenky's consular report of birth abroad of a citizen of the United States of America.

Response: Petitioner does not possess such documents.

Request No. 12. Aaron Belenky's certificate of citizenship issued by the United States citizenship and immigration services.

Response: Petitioner does not possess such documents.

Request No. 13. Aaron Belenky's certification of report of birth issued by the United States department of state.

Response: Petitioner does not possess such documents.

Request No. 14. Aaron Belenky's American Indian card, with KIC classification, issued by the United States department of homeland security.

Response: Petitioner does not possess such documents.

Request No. 15. Aaron Belenky's final adoption decree showing his name and United States birthplace.

Response: Petitioner does not possess such documents.

Request No. 16. Aaron Belenky's official United States military record of service showing his place of birth in the United States.

Response: Petitioner does not possess such documents.

Request No. 17. Aaron Belenky's extract from a United States hospital record of birth created at the time of his birth indicating his place of birth in the United States.

Response: Petitioner does not possess such documents.

Request No. 18. Aaron Belenky's Request for Consideration of U.S. Citizenship Documents by State Election Board of Kansas filed with the Kansas Secretary of State pursuant to K.S.A. 25-2309(m).

Response: Petitioner does not possess such documents.

Request No. 19. All voter registration applications submitted by Aaron Belenky to either a county election officer in any county in Kansas or the Kansas Secretary of State's Office.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein. Petitioner further objects to this request as unduly burdensome as it seeks a document submitted to one or both Respondents in August 2013 and in Respondents' possession.

Response: Subject to and without waiving the foregoing objections, Petitioner answers as follows: Petitioner will produce another copy of his voter registration application upon issuance of or agreement to a protective order, which limits use of the information to this litigation. Alternatively, Petitioners will agree to submit the requested documents to the Court for in-camera review.

Request No. 20. All correspondence between Aaron Belenky and a county election officer in any county in Kansas regarding any application to register to vote.

Response: Produced.

Request No. 21. All correspondence between Aaron Belenky and the Kansas Secretary of State's Office regarding any application to register to vote.

Objection: Petitioner renews his objections to RFP 2, and incorporates those objections herein. Petitioner further objects to this request as unduly burdensome as it seeks documents in Respondents' possession.

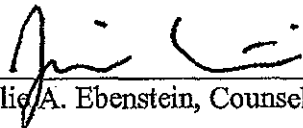
Response: Petitioner does not possess such documents, except as described in RFP 19.

VERIFICATION

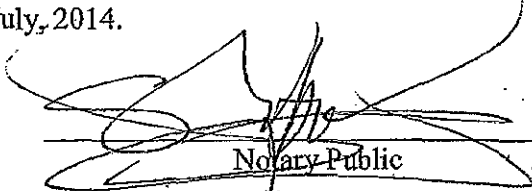
STATE OF NEW YORK)
) ss:
COUNTY OF New York)

COMES NOW Julie A. Ebenstein, of lawful age, bring first duly sworn and under oath, and states:

I am counsel for Petitioner Aaron Belenky in the above-entitled action; I have read the above and foregoing discovery requests and answers thereto, and said answers are true and correct to the best of my knowledge and belief.

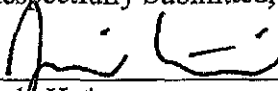

Julie A. Ebenstein, Counsel for Petitioners

Subscribed and sworn to before me this 3rd day of July, 2014.


Notary Public
Sheryl A. Douglas
Notary Public, State of New York
No. 01DO5049085
Qualified in Kings County
Commission Expires September 5, 2017

Dated: July 3, 2014

Respectfully Submitted,


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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 3rd day of July, 2014, a copy of the above and foregoing document was served on the following by electronic mail delivery and UPS:

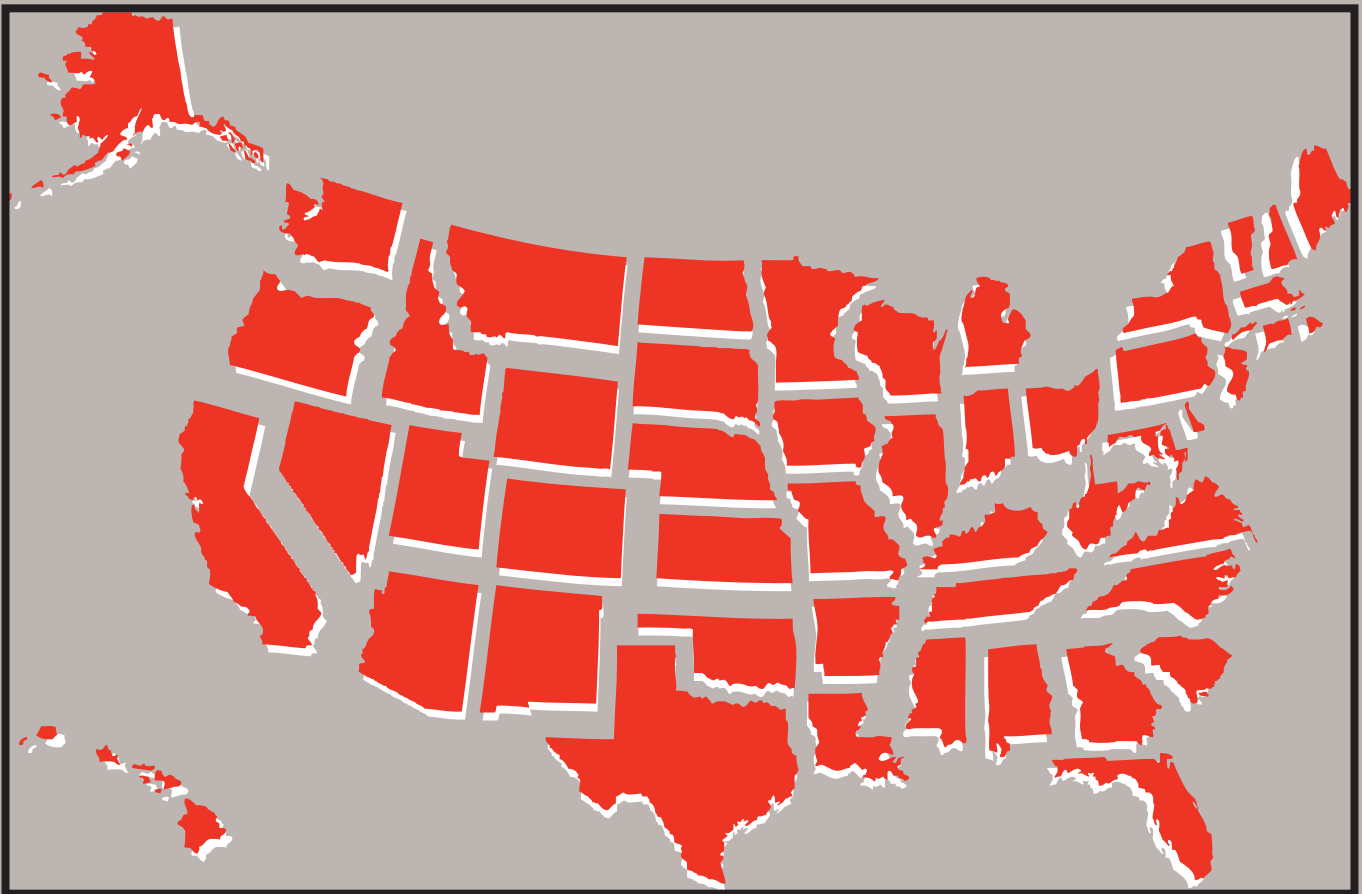
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*Admitted *pro hac vice*

Attorney for Petitioners

EXHIBIT J

Register To Vote In Your State By Using This Postcard Form and Guide



For U.S. Citizens

General Instructions

Who Can Use this Application

If you are a U.S. citizen who lives or has an address within the United States, you can use the application in this booklet to:

- Register to vote in your State,
- Report a change of name to your voter registration office,
- Report a change of address to your voter registration office, or
- Register with a political party.

Exceptions

Please do not use this application if you live outside the United States and its territories and have no home (legal) address in this country, *or* if you are in the military stationed away from home. Use the Federal Postcard Application available to you from military bases, American embassies, or consular offices.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form.

North Dakota does not have voter registration.

Wyoming law does not permit mail registration.

How to Find Out If You Are Eligible to Register to Vote in Your State

Each State has its own laws about who may register and vote. Check the information under your State in the State Instructions. All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election. You **cannot** be registered to vote in more than one place at a time.

How to Fill Out this Application

Use both the Application Instructions and State Instructions to guide you in filling out the application.

- First, read the Application Instructions. These instructions will give you important information that applies to everyone using this application.
- Next, find your State under the State Instructions. Use these instructions to fill out Boxes 6, 7, and 8. Also refer to these instructions for information about voter eligibility and any oath required for Box 9.

When to Register to Vote

Each State has its own deadline for registering to vote. Check the deadline for your State on the last page of this booklet.

How to Submit Your Application

Mail your application to the address listed under your State in the State Instructions. Or, deliver the application in person to your local voter registration office. The States that are required to accept the national form will accept copies of the application printed from the computer image on regular paper stock, signed by the applicant, and mailed in an envelope with the correct postage.

First Time Voters Who Register by Mail

If you are registering to vote for the first time in your jurisdiction and are mailing this registration application, Federal law requires you to show proof of identification the first time you vote. Proof of identification includes:

- A current and valid photo identification or
- A current utility bill, bank statement, government check, paycheck or government document that shows your name and address.

Voters may be exempt from this requirement if they submit a **COPY** of this identification with their mail in voter registration form. If you wish to submit a **COPY**, please keep the following in mind:

- Your state may have additional identification requirements which may mandate you show identification at the polling place even if you meet the Federal proof of identification.
- Do not submit original documents with this application, only **COPIES**.

If You Were Given this Application in a State Agency or Public Office

If you have been given this application in a State agency or public office, it is your choice to use the application. If you decide to use this application to register to vote, you can fill it out and leave it with the State agency or public office. The application will be submitted for you. Or, you can take it with you to mail to the address listed under your State in the State Instructions. You also may take it with you to deliver in person to your local voter registration office.

Note: The name and location of the State agency or public office where you received the application will remain confidential. It will not appear on your application. Also, if you decide not to use this application to register to vote, that decision will remain confidential. It will not affect the service you receive from the agency or office.

Application Instructions

Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen and whether you will be 18 years old on or before Election Day. If you answer no to either of these questions, you may not use this form to register to vote. However, state specific instructions may provide additional information on eligibility to register to vote prior to age 18.

Box 1 — Name

Put in this box your full name in this order — Last, First, Middle. Do not use nicknames or initials.

Note: If this application is for a change of name, please tell us in **Box A** (*on the bottom half of the form*) your full name before you changed it.

Box 2 — Home Address

Put in this box your home address (legal address). Do **not** put your mailing address here if it is different from your home address. Do **not** use a post office box or rural route without a box number. Refer to state-specific instructions for rules regarding use of route numbers.

Note: If you were registered before *but* this is the first time you are registering from the address in Box 2, please tell us in **Box B** (*on the bottom half of the form*) the address where you were registered before. Please give us as much of the address as you can remember.

Also Note: If you live in a rural area but do not have a street address, *or* if you have no address, please show where you live using the map in **Box C** (*at the bottom of the form*).

Box 3 — Mailing Address

If you get your mail at an address that is different from the address in Box 2, put your mailing address in this box. If you have no address in Box 2, you **must** write in Box 3 an address where you can be reached by mail.

Box 4 — Date of Birth

Put in this box your date of birth in this order — Month, Day, Year. *Be careful not to use today's date!*

Box 5 — Telephone Number

Most States ask for your telephone number in case there are questions about your application. However, you do **not** have to fill in this box.

Box 6 — ID Number

Federal law requires that states collect from each registrant an identification number. You must refer to your state's specific instructions for item 6 regarding information on what number is acceptable for your state. If you have neither a drivers license nor a social security number, please indicate this on the form and a number will be assigned to you by your state.

Box 7 — Choice of Party

In some States, you must register with a party if you want to take part in that party's primary election, caucus, or convention. To find out if your State requires this, see item 7 in the instructions under your State.

If you want to register with a party, print in the box the full name of the party of your choice.

If you do **not** want to register with a party, write "no party" or leave the box blank. Do **not** write in the word "independent" if you mean "no party," because this might be confused with the name of a political party in your State.

Note: If you do not register with a party, you can still vote in general elections and nonpartisan (nonparty) primary elections.

Box 8 — Race or Ethnic Group

A few States ask for your race or ethnic group, in order to administer the Federal Voting Rights Act. To find out if your State asks for this information, see item 8 in the instructions under your State. If so, put in Box 8 the choice that best describes you from the list below:

- American Indian *or* Alaskan Native
- Asian or Pacific Islander
- Black, *not of* Hispanic Origin
- Hispanic
- Multi-racial
- White, *not of* Hispanic Origin
- Other

Box 9 — Signature

Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that:

- (1) You meet your State's requirements, and
- (2) You understand **all** of Box 9.

Finally, sign your **full** name or make your mark, and print today's date in this order — Month, Day, Year. If the applicant is unable to sign, put in **Box D** the name, address, and telephone number (optional) of the person who helped the applicant.

Voter Registration Application

Exhibit J

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? <input type="checkbox"/> Yes <input type="checkbox"/> No Will you be 18 years old on or before election day? <input type="checkbox"/> Yes <input type="checkbox"/> No If you checked "No" in response to either of these questions, do not complete form. (Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)		This space for office use only.		
1	<input type="checkbox"/> Mr. <input type="checkbox"/> Miss <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms.	Last Name	First Name	Middle Name(s)
				<input type="checkbox"/> Jr <input type="checkbox"/> II <input type="checkbox"/> Sr <input type="checkbox"/> III <input type="checkbox"/> IV
2	Home Address		Apt. or Lot #	City/Town
				State
				Zip Code
3	Address Where You Get Your Mail If Different From Above		City/Town	State
				Zip Code
4	Date of Birth	5	Telephone Number (optional)	6
	_____ Month Day Year			
			ID Number - (See item 6 in the instructions for your state)	
7	Choice of Party <small>(see item 7 in the instructions for your State)</small>	8	Race or Ethnic Group <small>(see item 8 in the instructions for your State)</small>	
9	I have reviewed my state's instructions and I swear/affirm that: ■ I am a United States citizen ■ I meet the eligibility requirements of my state and subscribe to any oath required. ■ 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.		_____ Please sign full name (or put mark) ▲ Date: _____ Month Day Year	

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a **change of name**, what was your name before you changed it?

A	<input type="checkbox"/> Mr. <input type="checkbox"/> Miss <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms.	Last Name	First Name	Middle Name(s)
				<input type="checkbox"/> Jr <input type="checkbox"/> II <input type="checkbox"/> Sr <input type="checkbox"/> III <input type="checkbox"/> IV

If you were **registered before but this is the first time you are registering from the address in Box 2**, what was your address where you were registered before?

B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C	■ Write in the names of the crossroads (or streets) nearest to where you live. ■ Draw an X to show where you live. ■ Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.		NORTH ↑
	Example _____ _____ Public School ●	Route #2 _____ _____ X	_____ _____ ● Grocery Store Woodchuck Road

If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D	
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Mail this application to the address provided for your State.

FOR OFFICIAL USE ONLY

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MAILING



Print Application

Voter Registration Application

Exhibit J

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? <input type="checkbox"/> Yes <input type="checkbox"/> No Will you be 18 years old on or before election day? <input type="checkbox"/> Yes <input type="checkbox"/> No If you checked "No" in response to either of these questions, do not complete form. (Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)		This space for office use only.		
1	<input type="checkbox"/> Mr. <input type="checkbox"/> Miss <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms.	Last Name	First Name	Middle Name(s)
				<input type="checkbox"/> Jr <input type="checkbox"/> II <input type="checkbox"/> Sr <input type="checkbox"/> III <input type="checkbox"/> IV
2	Home Address		Apt. or Lot #	City/Town
				State
				Zip Code
3	Address Where You Get Your Mail If Different From Above		City/Town	State
				Zip Code
4	Date of Birth	5	Telephone Number (optional)	6
	_____ Month Day Year			
7	Choice of Party <small>(see item 7 in the instructions for your State)</small>	8	Race or Ethnic Group <small>(see item 8 in the instructions for your State)</small>	
				ID Number - (See item 6 in the instructions for your state)
9	I have reviewed my state's instructions and I swear/affirm that: ■ I am a United States citizen ■ I meet the eligibility requirements of my state and subscribe to any oath required. ■ 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.		_____ Please sign full name (or put mark) ▲ Date: _____ Month Day Year	

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a **change of name**, what was your name before you changed it?

A	<input type="checkbox"/> Mr. <input type="checkbox"/> Miss <input type="checkbox"/> Mrs. <input type="checkbox"/> Ms.	Last Name	First Name	Middle Name(s)
				<input type="checkbox"/> Jr <input type="checkbox"/> II <input type="checkbox"/> Sr <input type="checkbox"/> III <input type="checkbox"/> IV

If you were **registered before but this is the first time you are registering from the address in Box 2**, what was your address where you were registered before?

B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C	■ Write in the names of the crossroads (or streets) nearest to where you live. ■ Draw an X to show where you live. ■ Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.		NORTH ↑
	Example _____ _____ Public School ●	Route #2 ● Grocery Store Woodchuck Road _____ _____ X	_____ _____ _____ _____

If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D	
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Mail this application to the address provided for your State.

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State Instructions

Alabama

Updated: 03-01-2006

Registration Deadline — Voter registration is closed during the ten days preceding an election. Applications must be postmarked or delivered by the eleventh day prior to the election.

6. ID Number. Your social security number is requested (by authority of the Alabama Supreme Court, 17-4-122).

7. Choice of Party. Optional: You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. You are required to fill in this box; however, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Alabama you must:

- be a citizen of the United States
- be a resident of Alabama and your county at the time of registration
- be 18 years old before any election
- not have been convicted of a felony punishable by imprisonment in the penitentiary (or have had your civil and political rights restored)
- not currently be declared mentally incompetent through a competency hearing
- swear or affirm to "support and defend the Constitution of the U.S. and the State of Alabama and further disavow any belief or affiliation with any group which advocates the overthrow of the governments of the U.S. or the State of Alabama by unlawful means

and that the information contained herein is true, so help me God”

Mailing address:

Office of the Secretary of State
P.O. Box 5616
Montgomery, AL 36103-5616

Alaska

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide one of the following identification numbers; Alaska Driver's License or Alaska State Identification Card Number. If you do not have an Alaska Driver's License or Alaska State Identification Card, you must provide the last four digits of your Social Security Number. If you do not have any of these identification numbers, please write "NONE" on the form. A unique identifying number will be assigned to you for voter registration purposes. This information is kept confidential. Having this information assists in maintaining your voter record and may assist in verifying your identity (Title 15 of the Alaska Statutes).

7. Choice of Party. You do not have to declare a party affiliation when registering to vote. If you do not choose a party, you will be registered as Undeclared. Alaska has a closed primary election system. Each recognized political party has a separate ballot listing only candidates from that political party. Voters registered as a member of a political party may only vote that party's ballot. Voters registered as undeclared or non-partisan may choose one

ballot from the ballots available.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Alaska you must:

- be a citizen of the United States
- be at least 18 years old within 90 days of completing this registration
- be a resident of Alaska
- not be a convicted felon (unless unconditionally discharged)
- not be registered to vote in another State

Mailing address:

Division of Elections
State of Alaska
PO Box 110017
Juneau, AK 99811-0017

Arizona

Updated: 03-01-2006

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.

State Instructions

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.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Arizona you must:

- be a citizen of the United States
- be a resident of Arizona and your county at least 29 days preceding the next election
- be 18 years old on or before the next general election
- not have been convicted of treason or a felony (or have had your civil rights restored)
- not currently be declared an incapacitated person by a court of law

Mailing address:

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

Arkansas

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits

of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. Optional. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Arkansas you must:

- be a citizen of the United States
- live in Arkansas at the address in Box 2 on the application
- be at least 18 years old before the next election
- not be a convicted felon (or have completely discharged your sentence or been pardoned)
- not claim the right to vote in any other jurisdiction
- not previously be adjudged mentally incompetent by a court of competent jurisdiction

Mailing address:

Secretary of State
Voter Services
P.O. Box 8111
Little Rock, AR 72203-8111

California

Updated: 03-01-2006

Registration Deadline — 15 days before the election.

6. ID Number. When you register to vote, you must provide your California driver's license or California identification card number, if you have one. If you do not have a driver's license or

ID card, you must provide the last four digits of your Social Security Number (SSN). If you do not include this information, you will be required to provide identification when you vote.

7. Choice of Party. Please enter the name of the political party with which you wish to register. If you do not wish to register with any party, enter "Decline to State" in the space provided.

California law allows voters who "decline to state" an affiliation with a qualified political party or who affiliate with a nonqualified political party to vote in the primary election of any qualified political party that files a notice with the Secretary of State allowing them to do so. You can call 1-800-345-VOTE or visit www.sos.ca.gov to learn which political parties are allowing nonaffiliated voters to participate in their primary election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in California you must:

- be a citizen of the United States
 - be a resident of California
 - be at least 18 years of age at the time of the next election
 - not be imprisoned or on parole for the conviction of a felony
 - not currently be judged mentally incompetent by a court of law
- Signature is required. If you meet the requirements listed above, please sign and date the registration card in the space provided.

Mailing address:

Secretary of State
Elections Division
1500 11th Street
Sacramento, CA 95814

State Instructions

Colorado

Updated: 03-28-2008

Registration Deadline — 29 days before the election. If the application is received in the mails without a postmark, it must be received within 5 days of the close of registration.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or identification number. If you do not have a driver's license or state issued identification, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Colorado you must:

- be a citizen of the United States
- be a resident of Colorado 30 days prior to the election
- be 18 years old on or before election day
- not be confined as a prisoner or serving any part of a sentence under mandate

Mailing address:

Colorado Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

Connecticut

Updated: 03-01-2006

Registration Deadline — 14 days before the election.

6. ID Number. Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.

7. Choice of Party. This is optional, but you must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Connecticut you must:

- be a citizen of the United States
- be a resident of Connecticut and of the town in which you wish to vote
- be 17 years old. You can vote when you turn 18
- have completed confinement and parole if previously convicted of a felony, and have had your voting rights restored by Registrars of Voters.
- not currently be declared mentally incompetent to vote by a court of law

Mailing address:

Secretary of State
Elections Division
30 Trinity Street
Hartford, CT 06106

Delaware

Updated: 02-07-2012

Registration Deadline — The 4th Saturday before a primary or general election, and 10 days before a special election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Delaware you must:

- be a citizen of the United States
- be a permanent resident of Delaware
- be at least 18 years old on the date of the next general election
- felons are eligible to vote if certain requirements are met: fines and sentence completed at least five years prior to application date; felony convictions can not be disqualifying felonies, which are murder, sexual offenses, or crimes against public administration involving bribery or improper influence or abuse of office.
- not be mentally incompetent

Mailing address:

State of Delaware
Office of the State Election
Commissioner
905 S. Governors Ave., Suite 170
Dover, DE 19904

State Instructions

District of Columbia

Updated: 10-29-2003

Registration Deadline — 30 days before the election.

6. ID Number. Federal law now requires that all voter registration applications must include either the applicant's driver's license number or the last four digits of the applicant's social security number in order to be processed.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in the District of Columbia you must:

- be a citizen of the United States
- be a District of Columbia resident at least 30 days preceding the next election
- be at least 18 years old on or preceding the next election
- not be in jail for a felony conviction
- not have been judged "mentally incompetent" by a court of law
- not claim the right to vote anywhere outside D.C.

Mailing address:

District of Columbia Board of
Elections & Ethics
441 4th Street, NW, Suite 250
Washington, DC 20001-2745

Florida

Updated: 11-30-2011

Registration Deadline — 29 days before the election.

6. ID Number. If you have one, you must provide your Florida

driver's license number or Florida identification card number. If you do not have a Florida driver's license or identification card, you must provide the last four digits of your social security number. If you have not been issued any of these numbers, you must write the word "NONE."

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. You are requested, but not required, to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Florida you must:

- be a citizen of the United States
- be a legal resident of both the State of Florida and of the county in which you seek to be registered
- be 18 years old (you may pre-register if you are at least 16)
- not be adjudicated mentally incapacitated with respect to voting in Florida or any other State, or if you have, you must first have your voting rights restored.
- not be a convicted felon, or if you are, you must first have your civil rights restored if they were taken away.
- swear or affirm the following: "I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, that I am qualified to register as an elector under the Constitution and laws of the State of Florida, and that all information in this application is true."

Mailing address:

State of Florida
Department of State
Division of Elections
The R.A. Gray Building
500 South Bronough St, Rm 316
Tallahassee, Florida 32399-0250

Georgia

Updated: 03-28-2008

Registration Deadline — The fifth Monday before any general primary, general election, or presidential preference primary, or regularly scheduled special election pursuant to the Georgia Election Code. In the event that a special election is scheduled on a date other than those dates prescribed by the Georgia Election Code, registration would close on the 5th day after the call.

6. ID Number. Federal law requires you to provide your full GA Drivers License number or GA State issued ID number. If you do not have a GA Drivers License or GA ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a GA Drivers License or Social Security number, a unique identifier will be provided for you.

7. Choice of Party. You do not have to register with a party to take part in that party's primary, caucus or convention.

8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Georgia you must:

- be a citizen of the United States
- be a legal resident of Georgia and of the county in which you want to vote

State Instructions

- be 18 years old within six months after the day of registration, and be 18 years old to vote
- not be serving a sentence for having been convicted of a felony
- not have been judicially determined to be mentally incompetent, unless the disability has been removed

Mailing address:

Elections Division
Office of the Secretary of State
1104 West Tower
2 Martin Luther King, Jr. Dr. SE
Atlanta, GA 30334-1505

Hawaii

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application (Hawaii Revised Statutes, Section 11-15).

7. Choice of Party. A “choice of party” is not required for voter registration.

8. Race or Ethnic Group. Race or ethnic group information is not required for voter registration.

9. Signature. To register in Hawaii you must:

- be a citizen of the United States
- be a resident of the State of Hawaii
- be at least 16 years old (you must be 18 years old by election day in order to vote)

- not be incarcerated for a felony conviction
- not be adjudicated by a court as “non compos mentis”

Mailing address:

Office of Elections
State of Hawaii
802 Lehua Avenue
Pearl City, HI 96782

Idaho

Updated: 03-01-2006

Registration Deadline — 25 days before the election.

6. ID Number. Enter your driver's license number. If you have no driver's license, enter the last 4 digits of your social security number.

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Idaho you must:

- be a citizen of the United States
- have resided in Idaho and in the county for 30 days prior to the day of election
- be at least 18 years old
- not have been convicted of a felony, and without having been restored to the rights of citizenship, or confined in prison on conviction of a criminal offense

Mailing address:

Secretary of State
P.O. Box 83720
State Capitol Bldg.
Boise, ID 83720-0080

Illinois

Updated: 08-14-2012

Registration Deadline — 28 days prior to each election.

6. ID Number. Your driver's license number is required to register to vote. If you do not have a driver's license, at least the last four digits of your social security number are required. If you have neither, please write “NONE” on the form. A unique identifier will be assigned to you by the State.

7. Choice of Party. Party registration or preference is not required for voter registration. However, when you apply for a primary ballot, you must indicate your party preference for that election.

8. Race or Ethnic Group. Leave blank.

9. Signature. A signature is required. If signature is missing from registration form, you will be notified your registration is incomplete.

To register in Illinois you must:

- be a citizen of the United States
- be a resident of Illinois and of your election precinct at least 30 days before the next election
- be at least 18 years old on or before the next election
- not be in jail for a felony conviction
- not claim the right to vote anywhere else

Mailing address:

State Board of Elections
2329 S. MacArthur Boulevard
Springfield, IL 62704

State Instructions

Indiana

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your state voter ID number is your ten digit Indiana issued driver's license number. If you do not possess an Indiana driver's license then provide the last four digits of your social security number. Please indicate which number was provided. (Indiana Code 3-7-13-13)

7. Choice of Party. Leave blank.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Indiana you must:

- be a citizen of the United States
- have resided in the precinct at least 30 days before the next election
- be at least 18 years of age on the day of the next general election
- not currently be in jail for a criminal conviction

Mailing address:

Election Division
Office of the Secretary of State
302 West Washington Street,
Room E-204
Indianapolis, IN 46204-2743

Iowa

Updated: 03-28-2008

Registration Deadline — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others.* Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.

*If you fail to meet the voter registration deadlines above you can register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website: www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf.

6. ID Number. Your ID number is your Iowa driver's license number (or Iowa non-driver identification number) if you have one, if not then the last four digits of your social security number. The ID number you provide will be verified with the Iowa Department of Transportation or the Social Security Administration.

7. Choice of Party. You may, but do not have to, register with a party in advance if you want to take part in that party's primary election. You may change or declare a party affiliation at the polls on primary election day.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Iowa you must:

- be a citizen of the United States
- be a resident of Iowa
- be at least 17-1/2 years old (you must be 18 to vote)
- not have been convicted of a felony (or have had your rights restored)
- not currently be judged by a court to be "incompetent to vote"
- not claim the right to vote in more than one place
- give up your right to vote in any other place

Mailing address:

Elections Division
Office of the Secretary of State
Lucas Building-1st Floor
321 E. 12th Street
Des Moines, IA 50319

Kansas

Updated: 03-01-2006

Registration Deadline — Postmarked or delivered 15 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nondriver's identification card number. If you do not have a driver's license or nondriver's identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a nondriver's identification card or social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. The number you provide will be used for administrative purposes only and will not be disclosed to the public. (KSA 25-2309).

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Kansas you must:

- be a citizen of the United States
- be a resident of Kansas
- be 18 by the next election
- have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote
- not claim the right to vote in any other location or under any other name
- not be excluded from voting for mental incompetence by a court of competent jurisdiction

State Instructions

Mailing address:

Secretary of State
1st Floor, Memorial Hall
120 SW 10th Ave.
Topeka, KS 66612-1594

Kentucky

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your full social security number is required. It is used for administrative purposes only and is not released to the public (KRS 116.155). No person shall be denied the right to register because of failure to include social security number.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Kentucky you must:

- be a citizen of the United States
- be a resident of Kentucky
- be a resident of the county for at least 28 days prior to the election date
- be 18 years of age on or before the next general election
- not be a convicted felon or if you have been convicted of a felony, your civil rights must have been restored by executive pardon
- not have been judged "mentally incompetent" in a court of law
- not claim the right to vote anywhere outside Kentucky

Mailing address:

State Board of Elections
140 Walnut Street
Frankfort, KY 40601-3240

Louisiana

Updated: 08-14-2012

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Louisiana driver's license number or Louisiana special identification card number, if issued. If not issued, you must provide at least the last four digits of your social security number, if issued. The full social security number may be provided on a voluntary basis. If the applicant has neither a Louisiana driver's license, a Louisiana special identification card, or a social security number, the applicant shall attach one of the following items to his application: (a) a copy of a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of applicant. Neither the registrar nor the Department of State shall disclose the social security number of a registered voter or circulate the social security numbers of registered voters on commercial lists (R.S. 18:104 and 154; 42 U.S.C. § 405).

7. Choice of Party. If you do not list a party affiliation, you cannot vote in the Presidential Preference Primary and party committee elections. Political party affiliation is not required for any other election.

8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Louisiana you must:

- be a citizen of the United States
- be a resident of Louisiana (Residence address must be address where you claim homestead exemption, if any, except for a resident in a nursing home or veteran's home who may select to use the address of the nursing home or veterans' home or the home where he has a homestead exemption. A college student may elect to use his home address or his address while away at school.)
- be at least 17 years old, and be 18 years old prior to the next election to vote
- not currently be under an order of imprisonment for conviction of a felony
- not currently be under a judgment of interdiction for mental incompetence

Mailing address:

Secretary of State
Attention: Voter Registration
P.O. Box 94125
Baton Rouge, LA 70804-9125

Maine

Updated: 08-14-2012

Registration Deadline — Delivered 21 business days before the election (or a voter may register *in-person* up to and including election day).

6. ID Number. You must list your valid Maine driver's license number. If you don't have a valid Maine driver's license, then you must provide the last four digits of your Social Security Number. Voters who don't have either of these forms of ID must write "NONE" in this space.

State Instructions

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless otherwise permitted by a political party).

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Maine you must:

- be a citizen of the United States
- be a resident of Maine and the municipality in which you want to vote
- be at least 17 years old (you must be 18 years old to vote)

Mailing address:

Elections Division
Bureau of Corporations,
Elections and Commissions
101 State House Station
Augusta, ME 04333-0101

Maryland

Updated: 06-26-2008

Registration Deadline — 9:00 p.m. 21 days before the election.

6. ID Number. If you have a current, valid Maryland driver's license or a Motor Vehicle Administration identification card, you must enter the driver's license or identification number. If you do not have a current, valid Maryland driver's license or Motor Vehicle Administration identification card, you must enter at least the last 4 digits of your social security number. However, please note, the disclosure of your full Social Security number is voluntary. The statutory authority allowing election officials to request your full Social Security number is Election Law Article, Section 3-202, Annotated Code of Maryland. The number will

be used only for registration and other administrative purposes. It will be kept confidential.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Maryland you must:

- be a U.S. citizen
- be a Maryland resident
- be at least 18 years old by the next general election
- not be under guardianship for mental disability
- not have been convicted of buying or selling votes
- not have been convicted of a felony, or if you have, you have completed serving a court ordered sentence of imprisonment, including any term of parole or probation for the conviction.

Mailing address:

State Board of Elections
P.O. Box 6486
Annapolis, MD 21401-0486

Massachusetts

Updated: 03-01-2006

Registration Deadline — 20 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a current and valid Massachusetts' driver's license then you must provide the last four (4) digits of your social security number. If you have neither, you must write "NONE" in the box and a unique identifying number will be assigned to you.

7. Choice of Party. If you do not designate a party of political designation in this box, you will be registered as unenrolled. Unenrolled voters may participate in party primaries. However, an unenrolled voter must enroll in a party on the day of the Presidential Preference Primary in order to participate in that primary.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Massachusetts you must:

- be a citizen of the United States
- be a resident of Massachusetts
- be 18 years old on or before the next election
- not have been convicted of corrupt practices in respect to elections
- not be under guardianship with respect to voting
- not be currently incarcerated for a felony conviction

Mailing address:

Secretary of the Commonwealth
Elections Division, Room 1705
One Ashburton Place
Boston, MA 02108

Michigan

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or state issued personal identification card number. If you do not have a driver's license or state issued personal identification card, you must include the last four digits of your social security number. If you

State Instructions

do not have a driver's license or a state issued personal identification card or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. A "choice of party" is not required for voter registration.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Michigan you must:

- be a citizen of the United States
- be 18 years old by the next election
- be a resident of Michigan and at least a 30 day resident of your city or township by election day
- not be confined in a jail after being convicted and sentenced

Notice: Michigan law requires that the same address be used for voter registration and driver license purposes. Therefore, if the residence address you provide on this form differs from the address shown on a driver license or personal identification card issued by the State of Michigan, the Secretary of State will automatically change your driver license or personal identification card address to match the residence address entered on this form. If an address change is made, the Secretary of State will mail you an address update sticker for your driver license or personal identification card.

Caution: If you register by mail, you must vote in person at your assigned precinct the first time you vote, unless you are:

- disabled as defined by state law;
- 60 years of age or older; or
- temporarily residing overseas.

Mailing address:

Michigan Department of State
Bureau of Elections
P.O. Box 20126
Lansing, MI 48901-0726

Minnesota

Updated: 12-31-2008

Registration Deadline —

Delivered by 5:00 p.m. 21 days before the election (there is also election day registration at polling places).

6. ID Number. You are required to provide your Minnesota driver's license or state ID number to register to Vote. If you do not have a Minnesota driver's license or state ID then you will have to provide the last four digits of your social security number. If you have neither, please write "none" on the form.

7. Choice of Party. Leave blank.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Minnesota you must:

- be a citizen of the United States
- be a resident of Minnesota for 20 days before the next election
- maintain residence at the address given on the registration form
- be at least 18 years old on election day
- if previously convicted of a felony, your felony sentence has expired or been completed, or you have been discharged from the sentence
- not be under a court-ordered guardianship in which the right to vote has been revoked
- not be found by a court to be legally incompetent to vote.

Mailing address:

Secretary of State
60 Empire Drive, Suite 100
St. Paul, MN 55103-1855

Mississippi

Updated: 05-07-2010

Registration Deadline — 30 days before the election.

6. ID Number. You are required to provide your current and valid driver's license number or, if you don't have one, the last four digits of your social security number.

7. Choice of Party. Mississippi does not have party registration. Therefore, you do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Mississippi you must:

- be a citizen of the United States
- have lived in Mississippi and in your county (and city, if applicable) 30 days before the election in which you want to vote
- be 18 years old by the time of the general election in which you want to vote
- have not been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, armed robbery, extortion, felony bad check, felony shoplifting, larceny, receiving stolen property, robbery, timber larceny, unlawful taking of a motor vehicle, statutory rape, carjacking, or bigamy, or have had your rights restored as required by law
- not have been declared mentally incompetent by a court

State Instructions

Note: State law changed by federal court order in 1998 and by state legislation in 2000. We now accept the form as registration for voting for all state and federal offices.

Mailing address:

Secretary of State
P.O. Box 136
Jackson, MS 39205-0136

Local county addresses:

You also may return completed applications to the county circuit clerk/registrar where you reside. A complete list of county circuit clerk/registrars is available on Mississippi's website at www.sos.ms.gov.

Missouri

Updated: 09-12-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number. Your completed voter registration form must also include the last four digits of your social security number. (Section 115.155, RSMo). If you do not have a driver's license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. Any electronic media, printouts or mailing labels provided under this section shall not include telephone numbers and social security numbers of voters. (Section 115.157, RSMo).

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To vote in Missouri you must:

- be a citizen of the United States
- be a resident of Missouri
- be at least 17-1/2 years of age (you must be 18 to vote)
- not be on probation or parole after conviction of a felony, until finally discharged from such probation or parole
- not be convicted of a felony or misdemeanor connected with the right of suffrage
- not be adjudged incapacitated by any court of law
- not be confined under a sentence of imprisonment

Mailing address:

Secretary of State
P.O. Box 1767
Jefferson City, MO 65102-1767

Montana

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Montana driver's license number. If you do not have a Montana driver's license number then you must list the LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER. If you have neither a driver's license, nor a social security number, please write "NONE" on the form. The state of Montana will assign to you a unique identifying number.

7. Choice of Party. Montana does not require party registration to participate in any election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Montana you must:

- be a citizen of the United States
- be at least 18 years old on or before the election
- be a resident of Montana and of the county in which you want to vote for at least 30 days before the next election
- not be in a penal institution for a felony conviction
- not currently be determined by a court to be of unsound mind
- meet these qualifications by the next election day if you do not currently meet them

Mailing address:

Secretary of State's Office
P.O. Box 202801
State Capitol
Helena, MT 59620-2801

Nebraska

Updated: 03-01-2006

Registration Deadline — The third Friday before the election (or delivered by 6 p.m. on the second Friday before the election).

6. ID Number. You must provide your Nebraska driver's license number. If you do not have a Nebraska driver's license number then you must list the last four digits of your social security number.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Nebraska you must:

- be a citizen of the United States
- be a resident of Nebraska

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- be at least 18 years of age or will be 18 years of age on or before the first Tuesday after the first Monday of November
- not have been convicted of a felony, or if convicted, have had your civil rights restored
- not have been officially found to be mentally incompetent

Mailing address:

Nebraska Secretary of State
Suite 2300, State Capitol Bldg.
Lincoln, NE 68509-4608

Nevada

Updated: 05-07-2010

Registration Deadline — The deadline for mail-in registration is the fifth Saturday before any primary or general election. In person registration remains available until 9:00 p.m. on the third Tuesday preceding any primary or general election. You may register to vote in person only by appearing at the office of the County Clerk/Registrar of Voters.

6. ID Number. You must supply a Nevada's Driver's License Number or Nevada ID Card Number if you have been issued one. If you do not have a Driver's License Number or Nevada ID Card Number, you must supply the last four digits of your Social Security Number. If you do not have a Social Security Number, please contact your County Clerk/Registrar of Voters to be assigned a unique identifier.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention. If you register with a minor political party, or as a Nonpartisan you will receive

a Nonpartisan Ballot for the Primary Election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Nevada you must:

- be a citizen of the United States
- have attained the age of 18 years on the date of the next election
- have continuously resided in the State of Nevada, in your county, at least 30 days and in your precinct at least 10 days before the next election
- have your civil rights restored if you were convicted of a felony
- not be determined by a court of law to be mentally incompetent
- claim no other place as your legal residence

Mailing address:

Secretary of State
Elections Division
101 North Carson Street
Suite 3
Carson City, NV 89701-4786

Applications may be returned to the Secretary of State's office at the address above, but to avoid possible delays, you are advised to return your completed voter registration applications directly to your local county election official.

Local county addresses:

To meet registration deadlines, especially during the two weeks before the close of the mail-in registration deadline, return completed applications to your respective County Clerk/Registrar of Voters. A complete list of County Clerk/Registrar of Voters and registration deadlines is available on Nevada's website: www.nvsos.gov.

New Hampshire

Updated: 03-01-2006

Registration Deadline — New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form, which must be received by your city or town clerk by 10 days before the election.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form. You need to fill in only Box 1 and Box 2 or 3.

The application should be mailed to your town or city clerk at your zip code. These addresses are listed on the Secretary of State web site at www.state.nh.us/sos/clerks.htm

It should be mailed in plenty of time for your town or city clerk to mail you their own form and for you to return that form to them by 10 days before the election.

New Jersey

Updated: 03-28-2008

Registration Deadline — 21 days before the election.

6. ID Number. The last four digits of your Social Security number OR your New Jersey Driver's License number is required for voter registration. If you do not possess either of these identifications, please write "NONE" on the form. The State will assign a number that will serve to identify you for voter registration purposes.

State Instructions

7. Choice of Party. New Jersey's voter registration form does not provide a check-off for political party affiliation. A newly registered voter or voter who has never voted in a political party primary election can declare party affiliation at the polling place on the day of a primary election. In New Jersey, a primary election is only held for the Democratic and Republican parties. A voter may also file a political party declaration form to become a member of a political party. If a declared voter wished to change party affiliation he or she must file a declaration form 50 days before the primary election, in order to vote.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New Jersey you must:

- be a citizen of the United States
- be at least 18 years of age by the time of the next election
- be a resident of this State and county at your address at least 30 days before the next election
- not be serving a sentence or on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States

Mailing address:

New Jersey Department of Law
and Public Safety
Division of Elections
PO BOX 304
Trenton, NJ 08625-0304

New Mexico

Updated: 03-01-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your full social security number is required. This registration card containing your social security number will become part of the permanent voter registration records of your locality, which are open to inspection by the public in the office of the county clerk. However, your social security number and date of birth will remain confidential and will not be disclosed to the public. Computerized listings of limited voter registration information (without social security number or birth date) are available to the general public, and are furnished upon request to incumbent election officeholders, candidates, political parties, courts and non-profit organizations promoting voter participation and registration, for political purposes only (§1-5-19B, NMSA 1978).

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New Mexico you must:

- be a citizen of the United States
- be a resident of the State of New Mexico
- be 18 years of age at the time of the next election
- not have been denied the right to vote by a court of law by reason of mental incapacity and, if I have been convicted of a felony, I have completed all conditions of probation or parole, served the entirety of a sentence or have been granted a pardon by the Governor.

Mailing address:

Bureau of Elections
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

New York

Updated: 03-01-2006

Registration Deadline — 25 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will be assigned to you by your State.

7. Choice of Party. You must enroll with a party if you want to vote in that party's primary election or caucus.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New York you must:

- be a citizen of the United States
- be a resident of the county, or of the City of New York, at least 30 days before an election
- be 18 years old by December 31 of the year in which you file this form (*Note:* You must be 18 years old by the date of the general, primary, or other election in which you want to vote)
- not be in jail or on parole for a felony conviction
- not currently be judged incompetent by order of a court of competent judicial authority
- not claim the right to vote elsewhere

Mailing address:

NYS Board of Elections
40 Steuben Street
Albany, NY 12207-2108

State Instructions

North Carolina

Updated: 03-01-2006

Registration Deadline —

Postmarked 25 days before the election or received in the elections office or designated voter registration agency site by 5:00 p.m. 25 days before the election.

6. ID Number. Provide your North Carolina driver's license number, or North Carolina Department of Motor Vehicles ID number. If you do not have a driver's license, then list the last four digits of your social security number.

7. Choice of Party. You must register with a party to vote in that party's primary unless that party allows unaffiliated voters to vote in its primary. If you indicate a political party that is not a qualified party, or indicate no party, you will be listed as "Unaffiliated".

8. Race or Ethnic Group. You are required to fill in this box. However, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in North Carolina you must:

- be a citizen of the United States
- be a resident of North Carolina and the county in which you live for at least 30 days prior to the election
- be 18 years of age by the day of the next general election
- have your rights of citizenship restored if you have been convicted of a felony
- not be registered or vote in any other county or state

Mailing address:

State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

North Dakota

Updated: 03-01-2006

North Dakota does not have voter registration.

Ohio

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your social security number is requested. Providing this number is voluntary. This information allows the Board of Elections to verify your registration if necessary (O.R.C. 3503.14). [Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you don't have either number you will have to write "NONE" on the form and the State will assign you a number.]

7. Choice of Party. You do not register with a party if you want to take part in that party's primary election. Party affiliation is established by voting at a primary election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Ohio you must:

- be a citizen of the United States
- be a resident of Ohio
- be 18 years old on or before election day. If you will be 18 on or before the day of the general election, you may vote in the primary election for candidates only.
- not be convicted of a felony and currently incarcerated
- not be found incompetent by a court for purposes of voting

Mailing address:

Secretary of State of Ohio
Elections Division
180 E. Broad Street — 15th Floor
Columbus, OH 43215

Oklahoma

Updated: 10-29-2003

Registration Deadline — 25 days before the election.

6. ID Number. The last four digits of your social security number are required. (Oklahoma Title 26, Section 4-112) In addition, your Oklahoma driver's license number is requested.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Oklahoma you must:

- be a citizen of the United States and a resident of the State of Oklahoma
- be 18 years old on or before the date of the next election
- have not been convicted of a felony, for which a period of time equal to the original sentence has not expired, or for which you have not been pardoned
- not now be under judgment as an incapacitated person, or a partially incapacitated person prohibited from registering to vote

Mailing address:

Oklahoma State Election Board
Box 528800
Oklahoma City, OK 73152-8800

State Instructions

Oregon

Updated: 03-01-2006

Registration Deadline — 21 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, you will need to write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Oregon you must:

- be a citizen of the United States
- be a resident of Oregon
- be at least 18 years old by election day

Mailing address:

Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722

Pennsylvania

Updated: 03-01-2006

Registration Deadline — 30 days before an election or primary.

6. ID Number. You must supply a Driver's License Number, if you have one. If you do not have a Driver's License Number, you must supply the last four digits of your

social Security Number. If you do not have a Social Security Number, please write "NONE" in the box.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election.

8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Pennsylvania you must:

- be a citizen of the United States at least one month before the next election
- be a resident of Pennsylvania and your election district at least 30 days before the election
- be at least 18 years of age on the day of the next election

Mailing address:

Office of the Secretary of
the Commonwealth
210 North Office Bldg.
Harrisburg, PA 17120-0029

Rhode Island

Updated: 03-28-2008

Registration Deadline — 30 days before the election.

6. ID Number. The applicant shall be required to provide his/her Rhode Island driver's license number if the applicant has been issued a current and valid Rhode Island driver's license. In the case of an applicant who has not been issued a current and valid driver's license he/she must provide the last four (4) digits of his/her social security number. An applicant, who has neither, will be assigned a unique identifying number by the State of Rhode Island.

7. Choice of Party. In Rhode Island, a person must register with a party if he/she wishes to take part in that party's primary election. A person who fails to register with a party at the time of registration may, if he/she chooses, register with a party on the day of that party's primary and take part in that party's primary election. If a person does not register with a party, he/she can still vote in general elections and non-partisan primary elections.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Rhode Island you must:

- be a citizen of the United States
- be a resident of Rhode Island for 30 days preceding the next election
- be 18 years old by election day
- not be currently incarcerated in a correctional facility due to a felony conviction
- not have been lawfully judged to be mentally incompetent

Mailing address:

Rhode Island State Board of
Elections
50 Branch Ave.
Providence, RI 02904-2790

South Carolina

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is required by the South Carolina Code of Laws and is used for internal purposes only. Social security number does not appear on any report produced by the State Election Commission nor is it released to any unauthorized

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individual. (South Carolina Title 7-5-170)

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. You are required to fill in this box. Your application may be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in South Carolina you must:

- be a citizen of the United States
- be at least 18 years old on or before the next election
- be a resident of South Carolina, your county and precinct
- not be confined in any public prison resulting from a conviction of a crime
- never have been convicted of a felony or offense against the election laws, or if previously convicted, have served your entire sentence, including probation or parole, or have received a pardon for the conviction
- not be under a court order declaring you mentally incompetent
- claim the address on the application as your only legal place of residence and claim no other place as your legal residence

Mailing address:

State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

South Dakota

Updated: 03-01-2006

Registration Deadline — Received 15 days before the election.

6. ID Number. Your driver's license number is requested. If you do not have a valid driver's license, you must provide the last four digits of your social security number.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in South Dakota you must:

- be a citizen of the United States
- reside in South Dakota
- be 18 years old by the next election
- not be currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penitentiary system
- not have been adjudged mentally incompetent by a court

Mailing address:

Elections, Secretary of State
500 E. Capitol
Pierre, SD 57501-5070

Tennessee

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. Social security number, if any, is required for purposes of identification and to avoid duplicate registration (TCA 2.2.116).

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Optional.

9. Signature. To register in Tennessee you must:

- be a citizen of the United States
- be a resident of Tennessee
- be at least 18 years old on or before the next election
- not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)
- not be adjudicated incompetent by a court of competent jurisdiction (or have been restored to legal capacity)

Mailing address:

Coordinator of Elections
Tennessee Tower, Ninth Floor
312 Eighth Avenue, North
Nashville, TN 37243

Texas

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Texas you must:

- be a citizen of the United States

State Instructions

- be a resident of the county in which the application for registration is made
- be at least 17 years and 10 months old (you must be 18 to vote)
- not be finally convicted of a felony, or if a convicted felon, you must have fully discharged your punishment, including any incarceration, parole, supervision, period of probation or be pardoned.
- have not been declared mentally incompetent by final judgment of a court of law

Mailing address:

Office of the Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

Utah

Updated: 03-28-2008

Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk's office.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. Declaring a party is not required in order to register to vote. However, Utah's

election law allows each political party to choose whom it will allow to vote in its primary election. If you do not affiliate with a party, you may be restricted from voting in the primary.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Utah you must:

- be a citizen of the United States
- have resided in Utah for 30 days immediately before the next election
- be at least 18 years old on or before the next election
- not be a convicted felon currently incarcerated for commission of a felony
- not be convicted of treason or crime against the elective franchise, unless restored to civil rights
- not be found to be mentally incompetent by a court of law

Mailing address:

Office of the Lieutenant Governor
P.O. Box 142325
Salt Lake City, UT 84114

Vermont

Updated: 07-29-2008

Registration Deadline — Delivered to the town clerk before 5:00 PM on the Wednesday before the election.

6. ID Number. You must provide your Vermont Driver's license number, or if none, the last 4 digits of your Social Security number. If you do not have a Vermont Driver's license or a Social Security number, please write "NONE" on the form. The Secretary of State's office will assign you a unique identifying number.

7. Choice of Party. Vermont does not require party registration to participate in any election.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Vermont you must:

- be a citizen of the United States
- be a resident of Vermont
- be 18 years of age on or before election day
- have taken the following Oath: You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person [Voter's Oath, Vermont Constitution, Chapter II, Section 42]

By signing in Box 9, you are attesting that you have sworn or affirmed the Vermont voter's oath as printed above.

Mailing address:

Office of the Secretary of State
Director of Elections
26 Terrace Street
Montpelier, VT 05609-1101

Virginia

Updated: 11-30-2011

Registration Deadline — Delivered 22 days before the election.

6. ID Number. Your full social security number is required. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.

State Instructions

Article II, §2, Constitution of Virginia (1971).

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Virginia you must:

- be a citizen of the United States
- be a resident of Virginia and of the precinct in which you want to vote
- be 18 years old by the next May or November general election
- not have been convicted of a felony, or have had your civil rights restored
- not currently be declared mentally incompetent by a court of law

Mailing address:

Virginia State Board of Elections
1100 Bank Street, 1st floor
Richmond, VA 23219

Washington

Updated: 10-29-2003

Registration Deadline — 30 days before the election (or delivered in-person to the local voter registration office 15 days before the election).

6. ID Number. You must provide your driver's license number. If you do not have a Washington driver's license, you must provide the last four digits of your Social Security Number. Failure to provide this information may prevent your registration from being processed.

7. Choice of Party. You are not required to designate your party affiliation to register in Washington.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in Washington you must:

- be a citizen of the United States
- be a legal resident of Washington State, your county and precinct for 30 days immediately preceding the election in which you want to vote
- be at least 18 years old by election day
- not be convicted of infamous crime, unless restored to civil rights

Mailing address:

Secretary of State
Voter Registration by Mail
P.O. Box 40230
Olympia, WA 98504-0230

West Virginia

Updated: 09-12-2006

Registration Deadline — 21 days before the election.

6. ID Number. Enter your driver's license number. If you do not have a driver's license number, enter the last four numbers of your social security number. If you do not have a driver's license number or a social security number, an identification number will be assigned to you.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless you request the ballot of a party which allows independents to vote)

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in West Virginia you must:

- be a citizen of the United States

• live in West Virginia at the above address

• be 18 years old, or to vote in the primary be 17 years old and turning 18 before the general election

- not be under conviction, probation, or parole for a felony, treason or election bribery
- not have been judged "mentally incompetent" in a court of competent jurisdiction

Mailing address:

Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

Wisconsin

Updated: 09-12-2006

Registration Deadline — Twenty (20) days before the election (or completed in the local voter registration office up to 5:00 pm. 1 day before the election, or completed at the polling place on election day).

6. ID Number. Provide your driver's license number, if you have no current and valid driver's license, the last 4 digits of your social security number or DOT-issued ID card number.

7. Choice of Party. Not required.

8. Race or Ethnic Group. Not required.

9. Signature. To register in Wisconsin you must:

- be a citizen of the United States
- be a resident of Wisconsin for at least 10 days
- be 18 years old
- not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored

- not have been found by a court to be incapable of understanding the objective of the electoral process
- not make or benefit from a bet or wage depending on the result of an election
- not have voted at any other location, if registering on election day

Mailing address:

State Elections Board
17 West Main Street, Suite 310
P.O. Box 2973
Madison, WI 53701-2973

Wyoming

Updated: 03-01-2006

Wyoming by law, cannot accept this form unless State law is changed.

EXHIBIT K

Johnson County Election Office
2101 East Kansas City Road
Olathe, KS 66061
Phone: 913-782-3441 Fax: 913-791-1753
Website www.jocoelection.org

Thank you for your recent application to register to vote. Beginning January 1, 2013 any person registering to vote in Kansas for the first time is required to provide proof of U.S. citizenship. Therefore, your application to register has been suspended until proof is provided. Enclosed is a list of valid citizenship documents. A copy of the document may be mailed, faxed or emailed to registration@jocoelection.org.

If the name or sex on the citizenship document is not consistent with the information provided on the voter registration application, you may complete and sign the enclosed Form CDU or a copy of another government document, such as a driver's license, confirming the name also needs to be submitted. This second document does not have to be one of the documents on the enclosed list.

If you have questions, please contact the Election Office at 913-782-3441. The citizenship document must be submitted to the Election Office by the day before the next election.

Office of the Kansas Secretary of State
Affidavit of Evidence of U.S. Citizenship

DOWNLOAD THIS FORM AT WWW.SOS.KS.GOV



1. Introduction

If an application for voter registration is denied due to an inconsistency in the name or sex indicated on the citizenship document provided, the applicant may sign the following affidavit and submit it to the county election officer or the Secretary of State. The election officer will assess the applicant's eligibility using this affidavit and the U.S. citizenship document submitted.

2. Statement

Describe the inconsistency in name or sex indicated on the citizenship document submitted, including the reason(s) for the inconsistency:

3. Address

Residential Address

City

State

Zip Code

4. Voter Signature

Note: False statement on this affirmation is a severity level 9, nonperson felony.

I do solemnly swear under penalty of perjury that, despite the inconsistency in name or sex indicated on the document I have submitted as proof of United States citizenship, I am the individual reflected in the document.

Required

Signature of Applicant

Name of Applicant (please print)

Date (MM/DD/YY)

Phone Number

Office of the Kansas Secretary of State

NOTICE

Proof of U.S. Citizenship Required for Voter Registration

Any person registering to vote in Kansas for the first time is required to provide evidence of U.S. citizenship. If you do not provide a citizenship document when you complete your voter registration application, you must submit it to the county election office. You may submit it by mail, hand delivery, fax or email.

Valid Citizenship Documents

Here is a list of U.S. citizenship documents that are acceptable for voter registration:

- Birth certificate that verifies U.S. citizenship
- U.S. passport (may be expired)
- U.S. naturalization document or the number of the certificate of naturalization
- Bureau of Indian Affairs card number, tribal treaty number or tribal enrollment number
- U.S. hospital record of birth indicating place of birth in the U.S.
- U.S. military record of service showing applicant's place of birth in the U.S.
- Final adoption decree showing the applicant's name and U.S. birthplace
- U.S. citizenship document issued pursuant to the Immigration and Nationality Act of 1952
- Consular report of birth abroad of a U.S. citizen
- Certificate of citizenship issued by the U.S. Bureau of Citizenship and Immigration Services
- Certification of report of birth issued by the U.S. Department of State

You may find more information and a complete list of documents at www.getvoterid.com. Or you may contact your county election office (see back) or call the Secretary of State's office at 1-800-262-8683.

EXHIBIT L

Johnson County Election Office
2101 East Kansas City Road
Olathe, KS 66061
Phone: 913-782-3441 Fax: 913-791-1753
Website: www.jocoelection.org

Thank you for your recent application to register to vote. Beginning January 1, 2013 any person registering to vote in Kansas for the first time is required to provide proof of U.S. citizenship. The law also requires persons to submit citizenship documentation if their registration had been cancelled and they are now re-registering in Kansas.

Your application to register is pending until this documentation is received. The citizenship documentation must be received at the Election Office by the day before the next election in order for you to be eligible to vote in that election.

Enclosed is a list of valid citizenship documents. A copy of your documentation may be mailed, faxed, emailed to registration@jocoelection.org or you can take a cell-phone photo of the document and text the photo to (913) 953-9539.

If the name or gender on the citizenship document is not consistent with the information provided on the voter registration application, you may complete and sign the enclosed Form CDU or provide a copy of another government document, such as a driver's license, confirming the name also needs to be submitted. This second document does not have to be one of the documents on the enclosed list.

If you have questions, please contact the Election Office at 913-782-3441.

Valid Citizenship Documents

Here is a list of documents that are acceptable as evidence of United States citizenship for voter registration purposes:

- Birth certificate that verifies United States citizenship
- United States passport or pertinent pages of the applicant's valid or expired United States passport identifying the applicant and the applicant's passport number
- United States naturalization documents
- Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952
- Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number
- Consular report of birth abroad of a citizen of the United States
- Certificate of citizenship issued by the United States Bureau of Citizenship and Immigration Services
- Certification of report of birth issued by the United States Department of State
- American Indian card, with KIC classification, issued by the United States Department of Homeland Security (Note: This document applies only to a small Texas band of the Kickapoo tribe with slightly more than 50 members.)
- Final adoption decree showing the applicant's name and United States birthplace
- United States military record of service showing applicant's place of birth in the United States
- Extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States
- Only if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship, then a driver's license or nondriver's identification card issued by the Kansas Division of Vehicles or the equivalent governmental agency of another state within the United States

EXHIBIT M

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT**

AARON BELENKY,)
 SCOTT JONES, and)
 EQUALITY KANSAS,)
)
 Plaintiffs,)
 vs.)
)
 KRIS KOBACH, KANSAS)
 SECRETARY OF STATE, and)
 BRAD BRYANT, KANSAS)
 ELECTIONS DIRECTOR, in their)
 official capacities,)
)
 Defendants.)

Case No. 13C1331

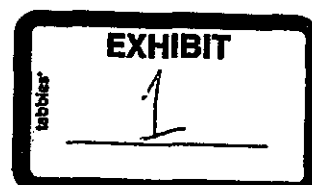
Division 7

AFFIDAVIT OF BRAD BRYANT

I, Brad Bryant, Deputy Secretary of State for the Kansas Secretary of State's Office, having been duly sworn, do hereby depose and state as follows to the best of my knowledge and belief:

1. I am a Deputy Assistant Secretary of State for the Kansas Secretary of State's Office, and my primary job responsibilities are related to Kansas elections. I have held this position since February 1993. Pursuant to my duties, I supervise and direct the planning of elections for our office and provide training on elections issues to county clerks and elections officials.

2. I have been involved in the implementation of the Kansas Secure and Fair Elections Act (SAFE Act) since its passage. One component of the SAFE Act is the requirement that persons registering to vote in Kansas after January 1, 2013 submit evidence of United States citizenship before they may be considered registered to vote in Kansas elections. During



implementation of this provision of the SAFE Act, we developed various methods for individuals to comply.

3. A person applying to register to vote in Kansas may fulfill the requirement to provide evidence of United States citizenship by submitting a copy of his or her citizenship document to an agency defined as a voter registration agency by federal or state law or to a person conducting a private voter registration drive.

4. The person may provide a copy of the document to the secretary of state or to a county election officer.

5. An administrative regulation, K.A.R. 7-23-14 (b), allows the person to submit a copy of the document by mail or personal delivery to the county election office before the close of business the day before an election.

6. The regulation also allows the person to submit a copy of the document by electronic means until midnight the day before the election. "Electronic means" include facsimile, electronic mail, or any other electronic means approved by the secretary of state. The secretary of state has authorized the use of text messaging to submit documents.

7. The secretary of state's office routinely provides guidance to county election officers and personnel working in their offices. Such guidance may be given in response to telephone calls, electronic mail, questions posed at training meetings, or in printed materials developed for this purpose.

8. Often the guidance is provided to assist county election officers in implementing new federal or state laws or administrative regulations, or in interpreting court cases or attorney general opinions. In many cases the guidance is based on the secretary of state's statewide perspective, being familiar with longstanding administrative practice or the way questions have

historically been answered in various jurisdictions across the state. Such guidance is not considered to be binding, and county election officers are free to, and are encouraged to, consult their respective county attorneys or county counselors for advice. If the county attorney or counselor's advice differs from the guidance provided by the secretary of state, longstanding policy in the secretary of state's office is to defer to the county counselor.

9. As long as I have worked for the Kansas Secretary of State's Office, our office has never processed voter registration applications. The county election officers administer the voter registration process in their respective counties. Whenever our office receives a voter registration application we simply forward the application to the appropriate county election officer.

10. On July 7, 2014, Julie Earnest, duly authorized custodian of business records maintained at the Kansas Department of Revenue, submitted an affidavit to our office with driver's license records for Aaron Belenky showing that Mr. Belenky provided a passport when he applied for a Kansas driver's license.

11. On July 7, 2014, I sent the Earnest affidavit and accompanying documents related to Mr. Belenky to the Johnson County Elections Office to be evaluated for sufficient proof of citizenship for Mr. Belenky.

12. On July 7, 2014, the Johnson County Elections Office determined that Mr. Belenky had provided sufficient proof of citizenship and changed Mr. Belenky's registration status from incomplete to active.

13. Three printouts from Kansas's voter registration database containing information related to Mr. Belenky are attached to this Affidavit. The printout labeled as Defense Exhibit 1a displays the Precinct Tab of the database; the printout labeled as Defense Exhibit 1b displays the

Activity Tab of the database; and the printout labeled as Defense Exhibit 1c displays the Notes Tab of the database.

14. The change of Mr. Belenky's registration status to active is evidenced on all three printouts by an "A" in the Status Field under the Federal Data header.

15. The printout with the Notes Tab displayed indicates that a letter related to citizenship was sent to Mr. Belenky on August 6, 2013.

16. As of July 7, 2014, Mr. Belenky is registered to vote for all elections held in Kansas, including federal, state, and local elections.

17. On July 7, 2014, Julie Earnest, duly authorized custodian of business records maintained at the Kansas Department of Revenue, submitted an affidavit to our office with driver's license records for Scott Jones showing that Mr. Jones provided a passport when he applied for a Kansas driver's license.

18. On July 7, 2014, I sent the Earnest affidavit and accompanying documents related to Mr. Jones to the Douglas County Clerk to be evaluated for sufficient proof of citizenship for Mr. Jones.

19. On July 8, 2014, the Douglas County Clerk determined that Mr. Jones had provided sufficient proof of citizenship and changed Mr. Jones's registration status from incomplete to active.

20. Three printouts from Kansas's voter registration database containing information related to Mr. Jones are attached to this Affidavit. The printout labeled as Defense Exhibit 2a displays the Precinct Tab of the database; the printout labeled as Defense Exhibit 2b displays the Activity Tab of the database; and the printout labeled as Defense Exhibit 2c displays the Notes Tab of the database.

21. The change of Mr. Jones's registration status to active is evidenced on all three printouts by an "A" in the Status Field under the Federal Data header.

22. The printout with the Activity Tab displayed indicates that a notice related to incomplete registration was sent to Mr. Jones on July 23, 2013.

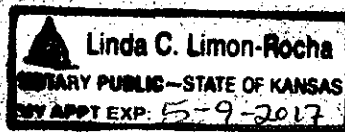
23. As of July 8, 2014, Mr. Jones is registered to vote for all elections held in Kansas, including federal, state, and local elections.

24. Individuals may apply to register to vote at the same time they apply for or renew a Kansas driver's license. Driver's license examiners are required to ask each person obtaining a driver's license if they would like to register to vote. The examiner then collects the information necessary to complete a voter registration application, and this information is electronically sent to the appropriate county election officer. If the person provides a proof-of-citizenship document to the driver's license examiner, a certification stating that a proof-of-citizenship document has been provided is also sent to the appropriate county election officer.

Brad Bryant

Brad Bryant, Deputy Assistant Secretary of State
KANSAS SECRETARY OF STATE'S OFFICE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

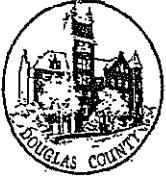


SUBSCRIBED, ACKNOWLEDGED, AND SWORN TO before me, the undersigned Notary Public, by Brad Bryant in his capacity as Deputy Assistant Secretary of State, Kansas Secretary of State's Office, on this the 9 day of July, 2014.

Linda C. Limon-Rocha
Notary Public

My Appointment Expires: May 9, 2017

EXHIBIT N



JAMIE SHEW
DOUGLAS COUNTY CLERK
 1100 Massachusetts
 Lawrence, KS 66044

Marni Penrod-Chief Deputy Clerk
Benjamin Lampe-Deputy Clerk Elections

Dear Douglas County voter,

You have submitted an application for voter registration to our office; however, you have not submitted any proof of citizenship that, as of January 1, 2013 is required for new or re-registering applicants in the state of Kansas. According to K.S.A. 25-2309, applicants are required to submit any of the following documents (NOTE: The Kansas driver's license does not currently qualify):

- Birth certificate that verifies U.S. citizenship
- U.S. passport or pertinent pages of the applicant's U.S. valid or expired passport identifying the applicant and the applicant's passport number
- U.S. naturalization documents or the number of the certificate of naturalization. (If only the number of the certificate of naturalization is provided, the applicant shall not be included on the registration rolls until the number of the certificate of naturalization is verified with the U.S. Bureau of Citizenship and Immigration Services by the county election officer or the Secretary of State, pursuant to 8 U.S.C. § 1373(c))
- Other documents or methods of proof of U.S. citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952
- Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number
- Consular report of birth abroad of a citizen of the U.S.
- Certificate of citizenship issued by the U.S. Bureau of Citizenship and Immigration Services
- Certification of report of birth issued by the U.S. Department of State
- American Indian card, with KIC classification, issued by the U.S. Department of Homeland Security (Note: This document applies only to a small Texas band of the Kickapoo tribe with slightly more than 50 members.)
- Final adoption decree showing the applicant's name and U.S. birthplace
- U.S. military record of service showing applicant's place of birth in the U.S.
- Driver's license or nondriver's identification card issued by the Division of Vehicles (or the equivalent governmental agency of another state within the U.S. if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of U.S. citizenship). **NOTE: The Kansas Driver's/Non-driver's license does not currently qualify.**
- Extract from a U.S. hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the U.S.

You can submit a photocopy of any of these documents to the Douglas County Clerk's Office to complete your voter registration application. You could also bring the originals to our office, and we can photocopy them for you. You can also email or fax a copy to elections@douglas-county.com. Citizenship documents must be received by the end of the day before any Douglas County election in order for your registration to be complete, and for you to become eligible to vote in subsequent Kansas elections normally.

If you have any questions or concerns, please contact our office.

Phone: 785-832-5267 www.douglascountyelections.com Fax: 785-832-5192

EXHIBIT O

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

AARON BELENKY,)
 SCOTT JONES, and)
 EQUALITY KANSAS,)
)
 Plaintiffs,)
)
 vs.)
)
 KRIS KOBACH, KANSAS)
 SECRETARY OF STATE, and)
 BRAD BRYANT, KANSAS)
 ELECTIONS DIRECTOR, in their)
 official capacities,)
)
 Defendants.)
 _____)

Case No. 5:13-CV-04150

ANSWER

COME NOW the Defendants¹, Kris W. Kobach, Secretary of State of Kansas (hereinafter “the Secretary”), and Brad Bryant, Kansas Elections Director (hereinafter “Bryant”), by and through the undersigned counsel, and for their answer to the Plaintiffs’ Petition, filed herein on November 21, 2013, in the District Court of Shawnee County, Kansas, state and allege as follows:

1. The Defendants respond to the multiple claims in Paragraph 1 of the Petition in the following manner:

- a. The Defendants are without sufficient information to admit or deny the allegations that Plaintiff Aaron Belenky (hereinafter “Belenky”) is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and

¹ The case caption on the Petition refers to Mr. Belenky, Mr. Jones, and Equality Kansas as “Plaintiffs,” and refers to Secretary of State Kobach and Elections Director Bryant as “Defendants.” Throughout their Petition the Plaintiffs refer to themselves as “Petitioners” and to the Defendants as “Respondents.” In this Answer, the Defendants adopt the designation of the parties as articulated in the case caption, and therefore refer to themselves as “Defendants” and to the Plaintiffs as “Plaintiffs.”

- federal elections in Kansas, and the same are therefore denied.
- b. The Defendants admit the allegation that on or about August 2, 2013, Belenky applied to register to vote in Kansas by filling out a National Mail Voter Registration Form (hereinafter “the Federal Form”) and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote.
 - c. The Defendants deny the allegation that as a Federal Form applicant, Belenky is currently subject to a dual registration system implemented by the Defendants.
 - d. The Defendants deny the allegation that as a result of the Defendants’ implementation of a dual voter registration system, on or about August 8, 2013, Belenky received notice that his voter registration was in “suspense.”
 - e. The Defendants are without sufficient information to admit or deny the allegations that on or about September 27, 2013, Belenky called the Johnson County Elections Office to inquire about the status of his registration, and that an elections official informed him that he is not registered to vote in Kansas local or state elections, and the same are therefore denied.
 - f. The Defendants admit the allegation that Belenky was unable to vote in the October 8, 2013, City of Overland Park election because he was deemed not registered despite his submission of the Federal Form.
 - g. The Defendants deny the allegation that Belenky will be prohibited from voting in future elections.
2. The Defendants respond to the multiple claims in Paragraph 2 of the Petition in the

following manner:

- a. The Defendants are without sufficient information to admit or deny the allegations that Plaintiff Scott Jones (hereinafter “Jones”) is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas, and the same are therefore denied.
- b. The Defendants admit the allegation that in late July 2013, Jones applied to register to vote in Kansas by filling out a Federal Form and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote.
- c. The Defendants admit the allegation that Jones submitted the Federal Form in person at the Douglas County clerk’s office
- d. The Defendants deny the allegation that as a Federal Form applicant, Jones is currently subject to a dual registration system implemented by the Defendants.
- e. The Defendants are without sufficient information to admit or deny the allegation that in early August 2013, Jones received notice from a Douglas County clerk’s officer that his registration was in “suspense,” and therefore deny the same.
- f. The Defendants are without sufficient information to admit or deny the allegation that on or about September 26, 2013, Jones went to the Secretary of State’s registrant search website to check his registration status, and the same is therefore denied.
- g. The Defendants admit the allegation that on or about September 26, 2013, the Secretary of State’s website listed Jones as registered to vote.

However, on or about September 26, 2013, Jones was only listed on the Secretary of State's website as registered to vote due to a clerical error. Because Jones failed to provide proof of citizenship, he should not have been listed as registered to vote.

- h. The Defendants are without sufficient information to admit or deny the allegations that on or about September 27, 2013, Jones called the Douglas County clerk's office and an elections official there informed him that he was registered to vote in federal elections and not registered to vote in state or local elections, and the same are therefore denied.
- i. The Defendants deny the allegation that Jones will be prohibited from voting in future state or local elections.

3. The Defendants deny the allegations in Paragraph 3 of the Petition that a dual registration system prevents Plaintiff Equality Kansas (hereinafter "Equality Kansas") from effectively registering voters in state and local elections and creates confusion among Federal Form registrants who are later denied substantial portions of their voting rights. The Defendants are without sufficient information to admit or deny all other allegations contained in Paragraph 3 of the Petition, and the same are therefore denied.

- 4. The Defendants admit the allegations contained in Paragraph 4 of the Petition.
- 5. The Defendants admit the allegations contained in Paragraph 5 of the Petition.
- 6. The Defendants admit the allegations contained in Paragraph 6 of the Petition.
- 7. The Defendants admit the allegations contained in Paragraph 7 of the Petition.
- 8. Paragraph 8 of the Petition asserts a conclusion of law to which no response is required. To the extent a response is deemed required, the allegation contained in Paragraph 8 is

denied.

9. Paragraph 9 of the Petition asserts a conclusion of law to which no response is required. To the extent a response is deemed required, the allegation contained in Paragraph 9 is denied.

10. Paragraph 10 of the Petition asserts a conclusion of law to which no response is required. To the extent a response is deemed required, the allegation contained in Paragraph 10 is denied.

11. Paragraph 11 of the Petition asserts a conclusion of law to which no response is required. To the extent a response is deemed required, the allegation contained in Paragraph 11 is denied.

12. The Defendants admit the allegations in Paragraph 12 of the Petition that on May 20, 1993, the U.S. Congress passed the National Voter Registration Act (hereinafter “the NVRA”), and that the NVRA became effective on January 1, 1995. All other allegations contained in Paragraph 12 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

13. The Defendants admit the allegation in Paragraph 13 of Petition that K.S.A. 25-2355 was adopted in 1996. All other allegations contained in Paragraph 13 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

14. The allegations contained in Paragraph 14 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

15. The Defendants admit the allegation contained in Paragraph 15 of the Petition that

the Secretary of State's Office promulgated K.A.R. 7-37-1, K.A.R. 7-38-1, and K.A.R. 7-23-2. All other allegations contained in Paragraph 15 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

16. The allegations contained in Paragraph 16 of the Petition assert opinions of the Plaintiffs and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

17. The Defendants admit the allegations contained in Paragraph 17 of the Petition.

18. The allegations contained in Paragraph 18 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

19. The Defendants admit the allegation in Paragraph 19 of the Petition that the Secretary of State premised his support for requiring documentary proof of citizenship on protecting against fraudulent registration by non-citizens. The Defendants are without information sufficient to admit or deny all other allegations in Paragraph 19 of the Petition, and the same are therefore denied.

20. The allegations contained in Paragraph 20 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

21. The allegations contained in Paragraph 21 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

22. The allegations contained in Paragraph 22 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations

are denied.

23. The allegations contained in Paragraph 23 of the Petition assert conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

24. The Defendants admit the following allegations contained in Paragraph 24 of the Petition:

- a. On November 24, 2011, the Secretary of State issued a notice of hearing on proposed administrative regulations.
- b. On January 3, 2012, the Secretary of State presented the proposed rules and regulations noticed for hearing to the Joint Committee on Administrative Rules and Regulations.
- c. A hearing was held on January 24, 2012. The Secretary of State issued public hearing responses to concerns raised at that hearing.
- d. On February 24, 2012 the Secretary of State promulgated K.A.R. 7-23-4, K.A.R. 7-23-14, K.A.R. 7-36-7, K.A.R. 7-36-8, K.A.R. 7-46-1, K.A.R. 7-46-2, and K.A.R. 7-46-3.

The Defendants deny all other allegations contained in Paragraph 24 of the Petition.

25. The Defendants admit the allegations contained in Paragraph 25 of the Petition.

26. The Defendants admit the allegations contained in Paragraph 26 of the Petition to the extent that after January 1, 2013, new voter registration applicants who do not submit satisfactory evidence of U.S. citizenship with their voter registration application are not considered fully registered pursuant to Kansas law. However, the Defendants treat such applicants as “incomplete” and not “in suspense” as alleged in Paragraph 26 of the Petition. The

Defendants admit the allegation in Paragraph 26 of the Petition that applicants with an incomplete status due to failure to provide proof of U.S. citizenship will not be allowed to vote in local and state elections. The Defendants deny the allegation in Paragraph 26 of the Petition that applicants with an incomplete status due to failure to provide proof of U.S. citizenship will not be allowed to vote in elections for federal office. Whether such applicants will be allowed to vote for federal office depends, in part, on the outcome of another case currently being litigated by the Defendants, *Kris W. Kobach, et al. v. The United States Election Assistance Commission, et al.*, No. 5:13-cv-04095 (hereinafter “the EAC Case”). The Defendants deny the allegation in Paragraph 26 of the Petition that there are currently nearly 18,000 voter registration applicants whose applications are incomplete, and that such incomplete registrants represent approximately one third of all individuals who have applied to register to vote in Kansas since January 1, 2013. However, the Defendants admit that as of 11:14 a.m. on December 26, 2013, there were 19,216 voter registration applications designated as incomplete due to failure to provide proof of citizenship. Moreover, the Defendants admit that from January 1, 2013, to December 26, 2013 at 1:09 p.m., more than 68,300 voter registration applications have been submitted in the state of Kansas. All other allegations in Paragraph 26 of the Petition are hereby denied.

27. The Defendants admit the allegations contained in Paragraph 27 of the Petition to the extent that the State Rules and Regulations Board did not approve the proposed administrative rule described in Paragraph 27 of the Petition. All other allegations in Paragraph 27 of the Petition are denied.

28. The allegations contained in Paragraph 28 of the Petition assert opinions of the Plaintiffs, legal arguments, and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

29. The allegations contained in Paragraph 29 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

30. The allegations contained in Paragraph 30 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

31. The allegations contained in Paragraph 31 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

32. The allegation in Paragraph 32 of the Petition that asserts a unitary registration system is contemplated by Kansas election law is a conclusion of law to which no response is required. To the extent a response is deemed required, such allegation is denied. The Defendants admit the allegation that Bryant composed and distributed, on July 30, 2013, to Kansas county election officers the email attached to the Petition and designated as Exhibit A. All other allegations concerning the contents of Exhibit A are denied; the referenced document speaks for itself. The Defendants deny that the contents of the email designated as Exhibit A is binding on county elections officers. All other allegations contained in Paragraph 32 of the complaint are hereby denied.

33. Paragraph 33 of the Petition contains the Plaintiffs' characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

34. The Defendants deny the allegations contained in Paragraph 34 of the Petition.

35. The allegations contained in Paragraph 35 of the Petition assert legal arguments

and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

36. The allegations contained in Paragraph 36 of the Petition are denied. Individuals who apply for a ballot using the FSPCA are not considered registered voters in Kansas.

37. The allegations contained in Paragraph 37 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

38. Paragraph 38 of the Petition contains the Plaintiffs' characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

39. The Defendants deny the allegations contained in Paragraph 39 of the Petition. The Defendants filed suit in the EAC Case for the purpose of preventing the necessity of implementing a bifurcated voter registration system.

40. Paragraph 40 of the Petition contains the Plaintiffs' characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

41. The allegations contained in Paragraph 41 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

42. The allegations contained in Paragraph 42 of the Petition assert opinions of the Plaintiffs, legal arguments, and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

43. Paragraph 43 of the Petition contains the Plaintiffs' characterization of their action,

legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

44. Paragraph 44 of the Petition relies on and refers to a document that is attached to the Petition and designated as Exhibit B. Exhibit B was not created by the Defendants and lacks information by which the Defendants may ascertain its authenticity. As a result, the Defendants are without sufficient information to admit or deny the allegations contained in Paragraph 44 of the Petition, and the same are therefore denied.

45. The allegations in Paragraph 45 of the Petition are based on statements contained in a legal brief submitted by the Defendants in the EAC Case. Such statements are taken out of context and have been altered by the Plaintiffs. Therefore, the Defendants deny the allegations contained in Paragraph 45 of the Petition.

46. The allegations contained in Paragraph 46 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

47. The allegations contained in Paragraph 47 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

48. The allegations contained in Paragraph 48 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

49. The allegations contained in Paragraph 49 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

50. The Defendants deny the allegation contained in Paragraph 50 that a dual registration system “has been implemented.” The other allegations contained in Paragraph 50 of the Petition assert legal arguments and conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

51. Paragraph 51 of the Petition is an introductory statement that requires no response. To the extent a response is deemed required, such allegations are denied.

52. Paragraph 52 of the Petition contains the Plaintiffs’ characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

53. Paragraph 53 of the Petition contains the Plaintiffs’ characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

54. Paragraph 54 of the Petition contains the Plaintiffs’ characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

55. Paragraph 55 of the Petition contains the Plaintiffs’ characterization of their action, legal arguments, or conclusions of law to which no response is required. To the extent a response is deemed required, such allegations are denied.

56. Paragraph 56 of the Petition sets forth the Plaintiffs’ request for relief to which no response is required. To the extent a response is deemed required, such allegations are denied.

57. Paragraph 57 of the Petition sets forth a request for a scheduling conference to which no response is required. To the extent a response is deemed required, such allegations are denied.

58. Any allegation of fact or conclusion of law not expressly admitted herein is hereby denied.

AFFIRMATIVE DEFENSES

1. Some or all claims raised by the Plaintiffs are barred for failure to exhaust administrative remedies.

2. Some or all claims raised by the Plaintiffs may be barred for failure to initiate proceedings under the Kansas Judicial Review Act.

3. Some or all claims raised by the Plaintiffs regarding elections that have already occurred are moot and are therefore barred.

4. Some or all claims raised by the Plaintiffs regarding the application of a dual voter registration system to future elections are not ripe at this point and are therefore barred.

5. Some or all claims raised by the Plaintiffs may be barred by laches.

6. One or more of the Plaintiffs lack standing to assert some or all of the claims raised in the Petition.

7. The Plaintiffs fail to state one or more claims upon which relief may be granted.

8. The Defendant's reserve the right to amend this Answer to assert additional claims or defenses as may be allowed by law or which are discovered hereinafter through the course of this action.

WHEREFORE, the Defendants pray that the Plaintiffs take naught by their Petition, and that judgment be entered in favor of the Defendants and against the Plaintiffs, that the Defendants be awarded their costs in this action and any and all attorneys' fees as are allowed under the law, and for such other and further relief as this Court may deem just and equitable.

Respectfully submitted this 27th day
of December, 2013.

s/ Thomas E. Knutzen

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 27th day of December, 2013, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s Thomas E. Knutzen

Thomas E. Knutzen, #24471

Attorney for Defendants