COMMENT OF PROJECT VOTE, INC.
Docket No. EAC-2013-0004

I. STATEMENT OF ORGANIZATIONAL INTEREST

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

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

II. OVERVIEW OF COMMENTS

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

Any other outcome would be arbitrary and capricious and would violate the NVRA and the Administrative Procedure Act for the following reasons:

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

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

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

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

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

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

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

III. SUBSTANTIVE COMMENTS TO THE STATES' REQUESTS

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

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

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

The contents of the Federal Form are governed by duly enacted regulations adopted by the EAC's predecessor, the Federal Election Commission.[1] Specifically, the contents of the Federal Form are governed by 11 C.F.R. § 9428.4(b)(1)-(3), which specifies the precise information that the Federal Form can request from an applicant. With regard to citizenship, the regulations instruct that the Federal Form shall "list U.S. Citizenship as a universal eligibility requirement," "[c]ontain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements," and "[p]rovide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature." 11 C.F.R. § 9428.4(b)(1)-(3).[2]

Granting the modifications to the Federal Form requested by Arizona, Georgia, and Kansas would require making substantive changes to Section 9248.4. The States want the Federal Form to include different content than the Section 9248.4 specifies. They want to add to the state instructions a requirement that individuals submit documents or information constituting "satisfactory evidence of United States citizenship." But this change would require that the EAC modify the controlling regulation, 11 C.F.R. § 9428.4. Under the APA, such a modification, particularly one that reconsiders prior foundational decisions by the agency, requires notice to interested parties and an opportunity to comment.[3]

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

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

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

[3] Specifically, the APA requires "[g]eneral notice of proposed rule making *shall* be published in the Federal Register," including "the time, place, and nature of public rule making proceedings;" "reference to the legal authority under which the rule is proposed;" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b) (emphasis added). After the notice is published, "the agency *shall* give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .." *Id.* § 553(c) (emphasis added).

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

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

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

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

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

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

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

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

Moreover, the NVRA and APA require that comparable notice-and-comment process is to govern any substantive changes to the Federal Form. In particular, the NVRA's language states that the of the Federal Form is to be "developed" through "regulations." 42 U.S.C.

§ 1973gg-7(a)(1&2). The statute does not suggest that only the first version of the Federal Form need go through this process; rather, it suggests that anything that is done to "develop" the form must be done through "regulations," which as discussed above, means a formal notice-and-comment process. Adopting the changes proposed by Arizona, Georgia, and Kansas would involve further "development" of the form under the NVRA; conversely, leaving the Federal Form as is (*i.e.,* maintaining the status quo) is not a "development" that would require such process.

The APA similarly requires that substantive changes to properly promulgated rules may only be made through further notice-and-comment proceedings. *Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999) (issuance of substantive rule required notice-and-comment rulemaking); *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) ("the law seems clear that when an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public . . . the agency must adhere to the notice and comment requirements of § 553 of the APA."). Moreover, it is consistent with the EAC's historic practice, which has considered substantive changes to the Federal Form in the past (that were not expressly called for in new legislation) through formal notice-and-comment rulemaking.[4] For example, in 2010, the EAC issued a notice of proposed rulemaking to amend the NVRA regulations within the authority granted by the NVRA to reflect HAVA requirements and to make technical changes. 75 Fed. Reg. 47,729 (Aug. 10, 2010). Included in this notice was an invitation for "public comments" not only on the specific amendments outlined in the notice, but also "on additional changes to the NVRA regulations to improve voter registration through the content and format of the Federal form." *Id.* at 47,729.

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

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

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

[4] On one occasion—the passage of HAVA—Congress mandated specific changes to the Federal Form, spelling out with precision in the statutory language the required changes to the Federal Form. 42 U.S.C. § 15483.

exercised under section 1973gg-7(a)). As discussed above, these functions include "prescrib[ing] *such regulations* as are necessary to . . . develop a mail voter registration application. . . ." 42 U.S.C. § 1973gg-7(a)(1&2) (emphasis added). Accordingly, efforts to "develop" the Federal Form (which would include substantive changes to the Federal Form) can only be authorized through a vote of at least three EAC commissioners.

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

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

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

The current Federal Form is consistent with Section 9(b)(1) of the NVRA, which does not permit the Federal Form to require the evidence of U.S. citizenship that the States demand. Section 9(b)(1) instructs the EAC that the Form "may require ***only such identifying information*** (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), ***as is necessary*** to enable the appropriate State election official ***to assess the eligibility of the applicant*** and to administer voter registration and other parts of the election process" for federal office. 42 U.S.C. § 1973gg-7(b)(1) (emphases added).

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

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

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

2. The EAC Should Conclude that the Changes Sought By Arizona, Georgia, and Kansas are Not Necessary to Assess the Eligibility of an Applicant

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

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

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

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

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

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

During the deliberations over the NVRA, Congress considered and expressly rejected permitting particular states to require the Federal Form to include documentary proof of citizenship, concluding such information was "not necessary" to establish eligibility to vote. In particular, during floor debate, Congress considered adding to the statute the statement: "Nothing in this act shall be construed to preclude a state from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec.

5098 (Mar. 16, 1993) ("Simpson Amendment"). Although the Senate initially accepted the Simpson Amendment, the Congressional Conference Committee voted to remove it from the NVRA, finding it was "not necessary or consistent with the purposes of the Act." H.R Rep. 103-66, at 23-24 (1993) (Conf. Rep.).[5]

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

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

In light of Congress' conclusion that documentation of citizenship was "not necessary" for states to determine an applicant's eligibility, any action by the EAC to permit states to require documentary evidence of citizenship would be arbitrary and capricious. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 445 n.29 ("'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'") (quoting *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).[6]

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

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

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

[6] Congress knows how to revise the statutory requirements for the Federal Form, and supplemented the requirements at the time HAVA was adopted to add the checkbox requirement. *See* 42 U.S.C. § 15483. That Congress updated the statutory requirements concerning citizenship but did not add a requirement to submit documentary proof further confirms that Congress rejected the specific changes to the Federal Form that the States seek here.

With an individual's name, home address, date of birth, and driver's license (or other identifying) number, states can cross-check citizenship status against all manner of public and government records. States have, in fact, been using information from other records to assess whether applicants are citizens for nearly 20 years. As the Supreme Court noted in the *ITCA* decision, "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from denying registration based on information in their possession establishing the registrant's ineligibility." *ITCA*, 113 S. Ct. at 2250.

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

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

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

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

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

- Affidavits submitted in the *Kobach* litigation reflect that the Kansas Secretary of State has been able to determine that potential applicants may not be citizens by cross-referencing applicants against Kansas Department of Revenue and Department of Motor Vehicle Records. Bryant Decl. ¶¶ 2-3, *Kobach*, No. 5:13-cv-4095 (D. Kan. Oct. 23, 2013). *See also* Bryant Supp. Decl ¶¶ 3-5, *Kobach*, No. 5:13-cv-4095 (D. Kan. Dec. 24, 2013).

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

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

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

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

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

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

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

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

[8] Indeed, as discussed below, evidence indicates that making the changes to the Federal Form that have been requested by Arizona, Georgia, and Kansas would dramatically decrease the number of eligible citizens who could register to vote, which is directly contrary to the purpose of the NVRA.

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

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

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

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

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

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

> Oct. 23, 2013). And based on the information submitted and cross-referencing that information against county databases, the Director of Elections was able to detect that these individuals may not have been eligible to vote.[9]

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

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

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

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

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

[9] Further, although Arizona and Kansas have demonstrated they are able to identify a small number of potential non-citizens for follow-up on an individual case-by-case basis, and prosecution as appropriate, almost all of the examples given to support Arizona and Kansas' position do not even offer information that the individuals in question were in fact non-citizens at the time of registration or voting. This omission further demonstrates that Arizona and Kansas have not shown there is a problem with non-citizen voting which would make documentary proof of citizenship necessary for all voter registration applicants using the Federal Form.

EAC or particular states from requiring applicants to complete additional steps to "authenticate" their eligibility because of the risk that such requirements would burden, inconvenience, or make completion of the Form more difficult.

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

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

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

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

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

[10] 42 U.S.C. § 1973gg(b)(1) (emphasis added).

[11] 42 U.S.C. § 1973gg(a)(3).

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

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

- As of August 2006, Maricopa County rejected 16% (4,903 of 28,467) of voter registration applications it received that year, acknowledging that most of the rejected applicants likely were citizens who did not provide the documentation required by Proposition 200.[14]

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

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

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

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[12] Order; Findings of Fact and Conclusions of Law at p. 13, *Gonzalez v. Arizona*, No. 2:06-cv-1268-ROS (D. Ariz. Aug. 20, 2008), ECF No 1041.

[13] *Id.*

[14] 1,100 Pima Voter Applicants Rejected Down, Tucson Citizen (Aug. 17, 2006), *available at* http://tucsoncitizen.com/morgue2/2006/08/17/171969-1-100-pima-voter-applicants-rejected-down/.

[15] ITCA Plaintiffs' Response to Defendants' Separate Statement of Facts and Supplemental Statement of Facts at p. 9, *Gonzalez v. Arizona*, No. 2:06-cv-1268-ROS (D. Ariz. July 12, 2007), ECF No 296.

[16] EAC, The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2003-2004, A Report to the 109th Congress 25 (June 30, 2005), *available at http://www.eac.gov/assets/1/Page/NVRA%20Reports%20and%20Data%20Sets%202003%20-%202004.pdf, http://www.eac.gov/assets/1/AssetManager/NVRA%202003-*

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

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

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

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

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2004%20Report%20Tables%201-4.pdf; EAC, The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2007-2008, A Report to the 111th Congress 42, 50 (June 30, 2009), *available at http://www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202007-2008.pdf*; EAC, The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012, A Report to the 113th Congress 46, 54 (June 30, 2013), *available at http://www.eac.gov/assets/1/Documents/EAC_NVRA%20Report_lowres.pdf*.

[17] ITCA Plaintiffs' Response to Defendants' Separate Statement of Facts and Supplemental Statement of Facts at p. 5, *Gonzalez v. Arizona*, No. 2:06-cv-1268-ROS (D. Ariz. July 12, 2007), ECF No 296.

[18] John Hanna, Kansas Law Top Reason Voters on Hold (Sept. 19, 2013), http://hutchnews.com/Localregional/BC-KS--Voters-Citizenship-1st-Ld-Writethru-20130919-19-28-59.

[19] *See* Kansas On-Hold Voter Registrations Rising Again (Nov. 21, 2013), http://www.hutchnews.com/latestregionalnews/Kansas-on-hold-voter-registrations-rising-again.

[20] *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1311 (N.D. Ga. 2006).

[21] 42 U.S.C. § 1973gg(a)(3).

[22] Greenstein et al., *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* 1 (2006) ("Greenstein") (finding that 5.7% of citizens do not have a passport or birth

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Population Segment	Percent of Segment Surveyed Who Lack a Passport or Birth Certificate	Estimated Number of U.S. Citizens Who Lack a Passport or Birth Certificate
65 or Older	7.4%	2.3 million
Earn Less than $25,000 per Year	8.1%	3 million
African Americans	8.9%	2 million
Residents of Rural Areas	9.1%	4.5 million

Another survey found that "[a]s many as 11 percent of United States citizens – more than 21 million individuals – do not have government-issued photo identification," "such as a driver's license or military ID" that include the citizen's current address and legal name.[24] Once again, such citizens were disproportionately found in certain segments of society:[25]

Population Segment	Percent of Segment Surveyed Who Lack a Government-Issued Photo ID With Current Address and Legal Name	Estimated Number of U.S. Citizens Who Lack a Government-Issued Photo ID With Current Address and Legal Name
65 or Older	18%	6 million
Earn Less than $35,000 per Year	15%	Not provided
African Americans	25%	5.5 million
Age 18 - 24	18%	4.5 million

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

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

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certificate available), *available at* http://www.cbpp.org/files/9-22-06id.pdf; *see also* Brennan Center for Justice, *Citizens Without Proof* 2 (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (finding that 7% of those surveyed "do not have ready access to U.S. passports, naturalization papers, or birth certificates.")

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

[24] Center for Justice, *Citizens Without Proof* 2 (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf

[25] *Id.*

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

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

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

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

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

[27] Declaration of Michael Slater ¶ 19, *Voting for America v. Andrade*, 3:12-cv-00044 (S.D. Tex. May 10, 2012) ECF No. 33-1.

[28] For instance, in the United States in 2010, 101,797,872 passports were in circulation and the number of eligible voters was 210,800,000. U.S. Department of State, Passport Statistics, http://travel.state.gov/passport/ppi/stats/stats_890.html; U.S. Census, Table 1 Reported Voting and Registration, by Sex and Single Years of Age: November 2010 (Oct. 2011), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html. Therefore, assuming every passport in circulation in 2010 was provided to a citizen of voting age, the number of passports in circulation would only account for 48% of the voting eligible population. In reality, however, the percentage of the voting eligible population with a passport is likely well below 48% because passports are also issued to minors who cannot vote.

Moreover, even if a potential registrant possessed the listed documentation at the registration drive location, it would be logistically and financially impractical for Project Vote and other third-party voter registration organizations to photocopy the documents at the drive site. At some registration locations (e.g., public transit facilities, such as bus stops), it is not even feasible to have a dependable source of electricity, much less operate a photocopier. In sum, the realities of voter registration drives make conducting a community registration drive consistent with the documentation requirements of Proposition 200, SB 86, and HB 2067 financially and logistically impractical.

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

IV. CONCLUSION

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

[29] Maricopa County Recorder's Information Center, All Voter Registrations By Source Month (1999-2007).

[30] U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2007–2008* 38-41 (Table 2a) (June 30, 2009); U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009–2010* 43-46 (Table 2b) (June 30, 2011); U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011–2012* 40-45 (Table 2a) (June 30, 2013).

[31] *See* Declaration of Michael Slater ¶ 11, *Voting for America v. Andrade*, 3:12-cv-00044 (S.D. Tex. May 10, 2012) ECF No. 33-1.