IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, *et al.* Plaintiffs, vs. UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.* Defendants, and, PROJECT VOTE, INC., *et al.* Defendant-Intervenors.	)	CIVIL ACTION NO. 5:13-CV-4095-EFM-TJJ

DEFENDANT-INTERVENOR PROJECT VOTE, INC.'S
OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF

Plaintiffs' Motion for Relief (ECF No. 139) and their accompanying brief in support (ECF No. 140) ("Pls.' Br.") should be denied. Previously Defendant-Intervenor Project Vote, Inc. ("Project Vote") filed a Proposed Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief (ECF No. 89) ("PI Opp."). In that filing, Project Vote provided a summary of background facts and extensive legal analysis why Plaintiffs were not entitled to a preliminary injunction, much of which is relevant to the issues before the Court. Project Vote incorporates by reference the PI Opp., and the facts and arguments contained therein. In addition to the reasons cited in the PI Opp., the Plaintiffs' request for relief should be denied for the following reasons:

I. THE EAC DECISION IS ENTITLED TO SUBSTANTIAL JUDICIAL DEFERENCE

In rejecting Plaintiffs' requested revisions ("Plaintiffs' Requests" or "Requests") to the National Mail Voter Registration Form ("Federal Form"), the EAC determined that the Requests are not, as the National Voter Registration Act ("NVRA") requires, "necessary to enable the appropriate State election official to assess the eligibility of the applicant." EAC Memorandum of Decision (ECF No. 129-1) ("EAC Decision") at 28-41. The EAC also concluded that Plaintiffs' Requests are inconsistent with (i) Congress's intent in enacting the NVRA and (ii) the EAC's regulations implementing the NVRA. EAC Decision at 20-22. Under governing administrative law principles, these determinations are entitled to substantial judicial deference.

Under the Administrative Procedure Act ("APA"), the Court can only set aside the EAC decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard requires the Court to examine "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although judicial scrutiny is "to be searching and careful, the ultimate standard of

review is a narrow one." *Id.; see also Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793-94 (10th Cir. 2010). The review is "substantially deferential," *Copar Pumice Co.*, 603 F.3d at 794, and the agency's action is entitled to a presumption of validity, *Schweiker v. McClure*, 456 U.S. 188, 200 (1982). A court may not substitute its judgment for that of the agency, but must only determine "whether the agency has 'articulated a rational connection between the facts found and the choice made.'" *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994) (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)). The principles of judicial deference apply with equal force to decisions delegated by an agency to its subordinates. *See, e.g.*, *Salazar v. Reich*, 940 F. Supp. 96, 101 (S.D.N.Y. 1996) ("Although the present case concerns a subdelegation from the Attorney General to the BIA, the rationale for [APA] judicial deference remains the same.").

In addition, where an agency has interpreted a statute that it administers, that interpretation is entitled to substantial deference and must be accepted by a reviewing court so long as the interpretation is a reasonable one. *See, e.g.*, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . . .") (citations and internal quotation marks omitted); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013) ("[W]e have consistently held that *Chevron* applies to cases in which an agency adopts a construction of a . . . statute it administers."). As discussed below, the EAC's interpretation of the NVRA (including its purpose and congressional intent) was reasonable and entitled to substantial deference. *See* Section II, *infra*.

Finally, an agency's interpretation of its own regulations can be set aside only if "plainly erroneous" or inconsistent with the regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, the EAC determined that Plaintiffs' Requests are inconsistent with the EAC's regulations.[1] In particular, the EAC noted that, when the FEC promulgated the regulations that specify the substance of the Federal Form, it "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." EAC Decision at 21 (quoting 59 Fed. Reg. 32,311, 32,312 (June 23, 1994)).[2] The FEC specifically (i) addressed public comments regarding whether the Federal Form should require proof of citizenship (by adding language to the Federal Form emphasizing the citizenship requirement) and (ii) considered and rejected a proposal that proof of naturalization be provided along with the Federal Form. EAC Decision at 21-22 (quoting 59 Fed. Reg. at 32,318). Thus, the EAC found that granting

[1] Although the regulations were originally promulgated by the FEC, 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.*

[2] The entire rulemaking entailed an extensive nine-month process and three separate Federal Register publications. Specifically, the FEC began the rulemaking 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). The FEC also "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). The FEC received 108 comments in response and, after considering these comments, promulgated 11 C.F.R. Part 9428 governing the Federal Form. The FEC considered and rejected comments parallel to what Plaintiffs seek here—to have the Federal Form include additional information about naturalization status. *See id.* at 32,316.

Plaintiffs' Requests would conflict with this rulemaking decision. The Court should not set aside such a conclusion that is not plainly erroneous and is entirely consistent with the regulations.[3]

II. THE EAC DECISION COMPORTS WITH THE NVRA'S TEXT AND PURPOSE

The EAC's Decision properly interprets the NVRA and assesses the administrative record according to those standards, and accordingly should be affirmed. In particular, the EAC correctly determined that Plaintiffs' Requests are not "necessary to enable the appropriate State election official to assess the eligibility of the applicant" as required by 42 U.S.C. § 1973gg-7(b)(1) and were contrary to the NVRA's text. EAC Decision at 28-43. The EAC further properly concluded that the Plaintiffs' Requests would undermine the NVRA's purpose of expanding voter registration by "hinder[ing] eligible citizens from registering to vote in federal elections" and "thwart[ing] organized voter registration programs." *Id.* at 41-43. Each of these determinations are well-supported by the NVRA and the administrative record. Indeed, given the evidence in the administrative record, the EAC reached the only defensible position it could.

1. The Record Confirms that Plaintiffs' Requests Are Not Necessary To Establish Voter Eligibility

Section 9(b)(1) of the NVRA instructs the EAC that the Federal 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). As the Supreme Court noted, this language acts "as both a ceiling and

[3] The Plaintiffs have challenged, on a number of grounds, the EAC's authority to reject their proposed state-specific instructions. As discussed below, the Plaintiffs' arguments have no merit. Section III.2, *infra*. In any event, the regulations that specified the substance of the Federal Form—with which the Plaintiffs' proposed instructions are inconsistent—are entitled to *Chevron* deference and serve as an independent basis for this Court to affirm the EAC's decision.

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).

The plain language of the NVRA thus precludes the EAC or the Federal Form from requiring any information beyond what is "necessary . . . to assess the eligibility of the applicant . . ." to vote in federal elections. 42 U.S.C. § 1973gg-7(b)(1). Moreover, the NVRA narrowly cabins the EAC's authority to deem information necessary with regard to assessing citizenship. In its decision, the EAC properly interpreted the "necessity" inquiry as requiring an assessment of whether using the Federal Form (1) the "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 (2) "the occurrence of such violations is rare." EAC Decision at 36. Under *Chevron*, this interpretation is entitled to deference.

The EAC Decision confirms that the EAC carefully considered evidence in support of Plaintiffs' Requests and determined that the Plaintiffs failed to meet either of these conditions. *Id.* at 28. That determination was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), but clearly consistent with the NVRA.

a. The Record Confirms that the Information in the Federal Form is Sufficient to Allow the States to Assess Eligibility to Vote

The EAC properly noted that the current Federal Form contains extensive information from which an applicant's eligibility can be assessed. EAC Decision at 28-31. This includes information that is expressly required by NVRA and the Help America Vote Act ("HAVA"), such as (i) the requirement the Federal Form must include "a statement that . . . specifies each eligibility requirement (including citizenship)," (ii) a checkbox for individuals to affirmatively indicate whether or not they are U.S. citizens, and (iii) 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). This also includes information that the EAC, through its rulemaking process, has required, 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.[4] 11 C.F.R. § 9428.4. The EAC conclusion that this information is all that is necessary to allow the Plaintiffs "to identify illegal registrations and address any violations" because "the States have a myriad of means available to enforce their citizenship requirements without requiring additional information from Federal Form applicants," EAC Decision at 36-37, is correct and is amply confirmed by the administrative record.

In particular, the evidence submitted by the Plaintiffs themselves confirm that (i) they have utilized the information in the Federal Form, in combination with information they have from state and federal databases, to corroborate that applicants meet all of the eligibility requirements, and (ii) they have effective methods to determine when noncitizens have sought to register. For example:

- Affidavits submitted by Kansas 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. EAC000611-12 ¶¶ 2-3; EAC000620 ¶ 5; *see* EAC Decision at 38 ("One available measure is suggested by Kansas's own evidence describing procedures to identify potential noncitizens on its voter rolls by comparing the list with a list of Kansas residents who hold temporary driver's licenses issued to noncitizens.")

- Affidavits submitted by Kansas 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 noncitizen. EAC000612 ¶ 4.

[4] Federal law also 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).

- An affidavit submitted by Arizona 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. EAC001740 ¶ 10; *see also* EAC Decision at 39 ("Another measure is suggested by Arizona's submission: using information provided to a jury commissioner.").

- 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. EAC000771.[5] *See* EAC Decision at 39 ("Several Arizona county election offices are already using this database to attempt to verify citizenship of voter registration applicants.")

All of these corroborative efforts are consistent with how other jurisdictions assess the eligibility of applicants. *See, e.g.*, EAC Decision at 29 ("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."). These efforts are also consistent with the *ITCA* Court's observation that the NVRA "does not preclude States from denying registration based on information in their possession establishing the registrant's ineligibility." 113 S. Ct. at 2257.

Accordingly, the record evidence before the EAC, including the experience of Plaintiffs themselves, confirms that the information contained in the current Federal Form is sufficient for Plaintiffs to assess the eligibility of applicants to vote. The sufficiency of the current Federal Form means that requiring additional information is not necessary, and accordingly, the EAC correctly determined that requiring additional information is not permitted under the NVRA.

[5] 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.

b. The Record Contains No Evidence that Noncitizen Voting is a Significant Problem

The EAC also noted that there was no record evidence that noncitizen voting was a significant problem. EAC Decision at 22-23. Rather, the administrative record confirms that the Plaintiffs submitted anecdotal evidence of isolated instances where noncitizens may have registered to vote. Notably, none of this evidence reflects that these individuals registered by utilizing the Federal Form; rather, each of these individuals appear to have registered through a state specific form or in person through a public agency.[6] Moreover, Plaintiffs' evidence failed to establish that these individuals were, in fact, noncitizens or otherwise ineligible to vote.[7] As the EAC put it, even accepting all of Plaintiffs' evidence of noncitizen registration, at best, Plaintiffs have only established that there are "a small number of registered noncitizens" that make up only an "exceedingly small" percentage of the "millions of voters" in Kansas and Arizona. EAC Decision at 34-35.

Plaintiffs argue that the EAC "ignored and discounted evidence" regarding their inability to identify the number of noncitizen registrants and that the "number of noncitizens who have registered to vote is likely to be much higher." Pls.' Br. at 17-18. In particular, Plaintiffs assert that they have "very few tools to identify noncitizens after they register." But this assertion is belied by the experience of other jurisdictions, the administrative record (*see supra* page 7-8 discussing the tools Plaintiffs have used to detect potential noncitizen voters), as well as the plain language of SB 200 and HB 2067, both of which provide that all individuals who were

[6] *See, e.g.*, EAC000627-28 (Finney County declaration citing use of Kansas registration form); EAC000625-26 (Lehman Declaration citing voter who registered through Kansas DMV website).

[7] *See, e.g.*, EAC000611-12; EAC619-20 (Bryant Declarations reflect that twelve of thirteen suspected noncitizens were citizens); EAC001739-40 (Osborne Declaration reflecting that only ten of thirty-six suspected noncitizens were referred for prosecution and none were convicted).

previously registered to vote were "deemed to have provided satisfactory evidence of citizenship." Ariz. Rev. Stat. § 16-166(G); Kan. Stat. Ann. § 25-2309(n).

Based on the foregoing, the EAC correctly concluded that "the small number of registered non-citizens 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." EAC Decision at 35. The Plaintiffs simply did not present evidence that noncitizen voting is a significant problem. Nothing the Plaintiffs 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.

2. The Record Confirms that Granting Plaintiffs' Requests Would Contravene the Purpose of the NVRA and Would Impermissibly Create a Substantial Burden on Eligible Applicants and Burden Voter Registration Efforts

The EAC also properly concluded, based on the administrative record, that Plaintiffs' Requests would produce significant, negative collateral effects that are contrary to the NVRA's express purpose. *See* EAC Decision 41-43. Congress enacted the NVRA in part "to establish procedures that will *increase the number of eligible citizens who register to vote* in elections for Federal office." 42 U.S.C. § 1973gg(b)(1) (emphasis added). In effect, the NVRA was designed "to provide simplified systems for registering to vote in federal elections." *Young v. Fordice*, 520 U.S. 273, 275 (1997). To accomplish these objectives, the NVRA contains provisions to (i) provide a simple procedure for registration in federal elections, (ii) provide a uniform procedure that can be used in any state, and (iii) allow effective voter registration drives.

Congress enacted the NVRA because it concluded that "discriminatory and unfair registration laws and procedures" have: (i) "a direct and damaging effect on voter participation in elections for Federal office" and (ii) "disproportionately harm voter participation by various

groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3). The administrative record confirms that granting Plaintiffs' Requests would undermine the NVRA's purpose and amount to the very sort of "discriminatory and unfair registration laws and procedures" that Congress sought to eliminate through enactment of the NVRA.

a. The Record Confirms Changing the Federal Form Would Reduce the Number of Eligible Voters Who Register to Vote

The administrative record contains ample evidence that granting Plaintiffs' Requests 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 place obstacles between eligible voters and the voting booth that serve to decrease the number of eligible voters able to register. As the EAC found, "granting the States' requests would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA." EAC Decision at 42.

The record contained ample evidence that following Proposition 200 in Arizona in 2006, there was widespread disenfranchisement of thousands of otherwise eligible voters who lacked the documentation necessary to register to vote. For example:

- 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 requirements; EAC001663 (Order; Findings of Fact and Conclusions of Law at 13, *Gonzalez v. Arizona*, No. 2:06-cv-1268-ROS (D. Ariz. Aug. 20, 2008), ECF No 1041.); *see also* EAC000904.

- Arizona did not submit any evidence to the EAC (and has never produced such evidence) that any of these individuals who were barred by Proposition 200 from registering to vote were noncitizens, as opposed to individuals who were unable to furnish the requisite documents or were otherwise unreasonably burdened by Proposition 200's documentation requirements.

- 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. EAC001822-23.

Although HB 2067 has been in effect for less than one year, Kansas's experience has been similar. *See* EAC000895 (noting that approximately 19,348 applicants in Kansas since passage of the law have had their applications held "in suspense" pending documentary proof of citizenship). While Kansas did not submit evidence regarding its application experience to the EAC, in its Motion for Relief, Kansas notes that nearly 29% (20,964 of 72,999) of the individuals that have attempted to register to vote since January 1, 2013 are still not registered because of the documentation requirement. Pls.' Brief at 18. This statistic is astonishing, and ought to be an embarrassment to the Kansas Secretary of State. For purposes of this proceeding, it demonstrates precisely the type of impermissible burden on voter registration that the NVRA prohibits.

The administrative record also contains evidence that the documentation requirements of Proposition 200 and HB 2067 disproportionately burden certain voting groups, including minorities, the poor, the elderly, and the young. EAC001468-70; EAC001620; EAC001824. These particularly groups already have registration rates significantly lower than the national average. EAC000901; EAC000905-07 (noting that registration rates for Black and Hispanic citizens in Kansas and Arizona are significantly lower than the state averages). In other words, these requirements "disproportionately harm voter participation by various groups, including racial minorities" contrary to the NVRA. 42 U.S.C. § 1973gg(a)(3).

b. The Record Confirms Changing The Federal Form Would Significantly Burden Voter Registration Efforts

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). The administrative record contains ample evidence that imposing a requirement that documentary proof of citizenship contravene this purpose of the NVRA by impeding voter registration through drives. As the EAC noted, "granting the States' requests could discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form." EAC Decision at 43.

The administrative record confirms that many citizens who are otherwise perfectly qualified potential registrants do not possess the specified documentation set forth in Proposition 200 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. EAC000904-05; EAC001825. Most Americans do not have a passport, EAC000903 (only 39% of all U.S. citizens, not just those of voting age, have a passport), and even if they do, they do not carry it with them while running errands within the United States, EAC001825. Most U.S. citizens also do not carry around their birth certificate or naturalization papers with them. EAC001825.

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. EAC000904 (noting that some groups have found it so difficult to conduct voter registration drives that they have ceased completely); EAC001826. 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. EAC001826. In sum, the realities of voter registration drives make conducting a community registration drive consistent with the documentation requirements of Proposition 200 and HB 2067 financially and logistically impractical. EAC000714-19 (Declaration of Robyn Prud'Homme-Bauer, President of the League of Women Voters of Arizona, documenting issues encountered in registration drives since enactment of Proposition 200); EAC000737-42 (Declaration of Delores Furtado, President of the League of Women Voters of Kansas, documenting issues encountered in registration drives since enactment of HB 2067); EAC000772; EAC001466-67.

Reduced voter registration through drives is a known consequence of such impracticalities. EAC001620. 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. EAC000904; EAC001826. 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. EAC0001469-70; EAC001826. 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. EAC000906.

III. THE PLAINTIFFS' ASSERTIONS OF LEGAL ERROR ARE INCORRECT

The Plaintiffs essentially assert three legal errors by the EAC. None of these arguments has any merit.

1. **There is No Support for Plaintiffs' Assertion** That the EAC Has a Non-Discretionary Duty to Accept Their Changes

In their motion, Plaintiffs rehash their argument that the EAC has a non-discretionary duty to include in the Federal Form whatever information Plaintiffs demand. *See* Pls.' Br. at 1-2. This assertion, however, has no support in the Constitution, the NVRA, or the Supreme Court's *ITCA* decision, and is incorrect as a matter of law.

The Elections Clause grants Congress the ultimate authority to regulate the "times, places, and manner of holding elections" for Federal office, U.S. Const. art. I, § 4, cl. 1, including "the power to alter [State] regulations [in this area] or supplant them altogether," *ITCA*, 133 S. Ct. at 2253. "The Clause's substantive scope is broad" and "'embrace[s] authority to provide a complete code for congressional elections,' including . . . regulations relating to 'registration.'" *ITCA*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Consequently, the Constitution itself does not require the Federal Government to acquiesce to Plaintiffs' unilateral determination of how to register voters for Federal elections. If anything, the balance struck by the Elections Clause provides the direct opposite—Congress has the authority to "alter" or "supplant" Plaintiffs' registration regulations. *ITCA*, 133 S. Ct. at 2253. For this reason, courts have repeatedly held that Congress properly exercised its Election Clause authority when it enacted the NVRA. *E.g.*, *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995); *Ass'n of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995).

Plaintiffs do not—and cannot—identify any provision of the NVRA that explicitly provides that the EAC has a "non-discretionary duty" to accept Plaintiffs' proposed revisions to the Federal Form. Instead, to support their argument, Plaintiffs attempt to cobble together such a requirement from a strained interpretation of disparate provisions of the NVRA and relying on

selectively chosen, non-representative excerpts of the NVRA's legislative history. Upon review, neither support Plaintiffs' inference.

Plaintiffs posit that the EAC has a "non-discretionary duty" to revise the Federal Form because: (1) the NVRA does not grant the EAC the ability to regulate the content of certain state created voter registration forms; and (2) the NVRA's language governing the content of these forms is "nearly identical" to the language governing the Federal Form. Pls.' Br. at 2-3. But this comparison is unavailing. While Plaintiffs are correct that the NVRA and state law may provide numerous alternative methods for voter registration, "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *ITCA*, 133 S. Ct. at 2255. Accordingly, whether the EAC can regulate the content of these state forms—and to what extent States are restricted in their policy discretion by the NVRA in those contexts—is irrelevant to whether the EAC has a "non-discretionary duty" to accept Plaintiffs' requested revisions to the Federal Form.

More fundamentally, Plaintiffs' argument ignores the NVRA's plain language that explicitly grants the EAC the authority to "develop" a single, uniform Federal Form and to "prescribe such regulations as are necessary" to do so. 42 U.S.C. § 1973gg-7(a)(1) & (2); *ITCA*, 133 S. Ct. at 2251 (The EAC "is invested with rulemaking authority to prescribe the contents of [the] Federal Form"). In light of this plain language, Plaintiffs' argument that the EAC lacks the authority to prescribe the contents of the Federal Form by drawing comparisons to other sections of the NVRA must be rejected by this Court. *E.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial

inquiry is complete.") (citations and internal quotation marks omitted). Further, on a practical level, were the states' discretion unfettered, endless onerous requirements could be added to the Federal Form that would make the NVRA's plain language establishing it superfluous, and would fundamentally frustrate the NVRA's purpose to provide a uniform national voter registration application for federal elections and to streamline voter registration. *See* 42 U.S.C. § 1973gg.

Second, Plaintiffs contend that the NVRA allows the EAC to bar from the Federal Form only those state requirements relating to "notarization or other formal authentication." Pls.' Br. at 4 (quoting 42 U.S.C. § 1973gg-4(a)(2)). This argument is without merit. Aside from Plaintiffs' misapplication of the canon *expressio unius est exclusio alterius*,[8] such an interpretation of the NVRA would render superfluous and unnecessary Congress's admonishment that the Federal Form "may require only such identifying information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant . . . ." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Plaintiffs' construction of the NVRA ignores basic principles of statutory construction. *See, e.g.*., *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

Finally, Plaintiffs misleadingly invoke selective portions of the NVRA's legislative history from the early portion of the congressional debate in an attempt to support their claim.

[8] Contrary to Plaintiffs' application, "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (internal quotation marks omitted). There is no indication in the NVRA's text or legislative history that Congress sought to include in 42 U.S.C. § 1973gg-4(a)(2) every impermissible item that might be included in the Federal Form.

Pls.' Br. at 5. Subsequent legislative history reveals that Congress ultimately rejected attempts (such as Plaintiffs' Requests) to require documentary evidence of citizenship in the Federal Form as being "not necessary or consistent with the purposes of the Act." H.R. Rep. 103-66, at 23-24 (1993) (Conf. Rep.).[9] This has been noted before. *See Gonzalez v. Arizona*, 677 F.3d 383, 442 (9th Cir. 2012) (*en banc*) (J. Kozinski concurring) ("[B]oth chambers affirmatively rejected efforts to authorize precisely what Arizona is seeking to do.").[10] Congress's conclusion in this regard only further supports the EAC's conclusion to deny Plaintiffs' Requests as not "necessary" under the NVRA. *See, e.g.*, *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.").[11]

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[9] The two sources Plaintiffs cite occurred prior to the Conference Committee report cited in the EAC Decision. Specifically, the House Report occurred on February 2, 1993, *see* H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993) *reprinted at* 1993 U.S.C.C.A.N 105, 112, and Senator Ford's speech occurred on March 16, 1993, *see* 139 Cong. Rec. 5099. Over one month later, on April 28, 1993, the Conference Committee rejected the Simpson Amendment, *see infra* n. 10, finding that documented proof of citizenship "is not *necessary* or consistent with the purposes of this Act," H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (emphasis added).

[10] Congress considered and rejected the following amendment to the NVRA: "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). 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.). 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).

[11] Plaintiffs also appear to contend that 11 C.F.R. § 9428.3 imposes a non-discretionary duty on the EAC to adopt Plaintiffs' Requests. Pls.' Brief at 8. This argument, however, fails to appreciate that Section 9428.3 pertains to the contents of the state-specific instructions to the federal form, which are used to guide applicants through filling out the Federal Form, and are not a mechanism for states to revisit the EAC's determinations on the content of the Federal Form. *See, e.g.*, 59 Fed. Reg. 32,311, 32,316 (June 23, 1994) (providing that the instructions would guide applicants in filling out the "race/ethnicity" section of the Federal Form).

2. The EAC Had Authority to Deny Plaintiffs' Requests

With regard to the Plaintiffs' assertion that the EAC decision is invalid because it was made by the Executive Director rather than Commissioners, Pls.' Br. 9-12, the EAC clearly had authority to leave in place the regulations governing the Federal Form (which have been in place since 1994) and maintain the status quo.

The NVRA requires the EAC to "develop" the Federal Form through regulations. 42 U.S.C. § 1973gg-7(a)(1) & (2). Accordingly, shortly after the NVRA's passage in 1993, the EAC's predecessor embarked on a nine-month notice-and-comment rulemaking process that resulted in the promulgation of 11 C.F.R. Part 9428 that governs the Federal Form to this day. *See supra* n. 2. Plaintiffs' Requests would require the EAC to revise 11 C.F.R. Part 9428, including the information applicants must provide to fill out the Federal Form. 11 C.F.R. § 9428.4 (listing in detail the information applicants must provide in the Federal Form, as well as the attestation that applicants meet voter eligibility requirements, but omitting any requirement of providing documentary evidence of citizenship). Of course, the APA not only requires the initial rulemaking to be subject to notice and comment, but also subsequent revisions to enacted regulations. 5 U.S.C. § 551(5) (defining "rule making," which is subject to notice and comment requirements of 5 U.S.C. § 553, to include the "agency process for formulating, *amending*, or repealing a rule") (emphasis added).

The EAC's decision, however, to deny Plaintiffs' Requests maintains the status quo and does not require the EAC to revise the Federal Form or its regulations. Nor does it trigger the three-commissioner approval provision. The approval of the commissioners is only required for "*action*," not for leaving intact existing regulations or policy. 42 U.S.C. § 15328 ("Any 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."). Therefore, Plaintiffs are incorrect that the EAC's

decision to maintain the status quo violated 42 U.S.C. § 15328. In addition, the EAC notes that there has been a delegation of authority that also supports its authority to deny Plaintiffs' Requests. EAC Decision at 15-17.

3. The EAC Properly Applied the NVRA's Legal Standard in Assessing the Plaintiffs' Requests

Plaintiffs contend that the EAC failed to articulate what "legal standard" it applied when denying Plaintiffs' requests. Pls.' Br. at 12. The EAC properly applied the standard provided in the NVRA to assess a proposed change to the Federal Form—the Federal 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) (emphasis added). Indeed, the EAC repeatedly noted in its Decision that it was applying this standard to evaluate the Plaintiffs' Requests.[12]

The Plaintiffs further complain that the EAC improperly engaged in "fact-finding." The cited passages of the EAC Decision, however, reflect nothing but reasoned decision-making, entirely consistent with what is required under the APA. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1034 (10th Cir. 2002) (the agency's decision "need not include detailed findings of fact but must inform the court and the petitioner of the grounds of decision and the essential facts upon which the administrative decision was based") (citation and

[12] *See, e.g.*, EAC Decision at 23 ("It is clear from [*ITCA*] 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"); EAC Decision at 28 ("[T]o ensure that the Federal Form continues to comply with the constitutional standard set out in [*ITCA*] 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.").

internal quotation marks omitted). Under the APA, the agency must "examine the relevant data and articulate a satisfactory explanation for its action." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("[A] court is not to substitute its judgment for that of the agency"). The EAC met this standard by supporting its decision that Plaintiffs' Requests were not "necessary" with nearly 20 pages evaluating the submitted comments, and articulating in detail the bases for its decision. EAC Decision at 28-46. Notably, the Plaintiffs do not argue (nor could they) that any particular point (or subpoint) of the EAC Decision was unsupported by the record.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' request for relief should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2014, I electronically filed the foregoing DEFENDANT-INTERVENOR PROJECT VOTE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF with the clerk of the court by using the CM/ECF system, which will automatically send a notice of electronic filing and a copy of the filing to all counsel of record.

s/ Erin Thompson
Erin Thompson