Nos. 14-3062, 14-3072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, *et al.*,

Plaintiffs-Appellees

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,

Defendants-Appellants

and

PROJECT VOTE, INC., *et al.*,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, No. 5:13-cv-4095
THE HONORABLE ERIC F. MELGREN

REPLY BRIEF FOR THE UNITED STATES ELECTION ASSISTANCE COMMISSION

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INTRODUCTION

In *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (*ITCA*), the Supreme Court construed the National Voter Registration Act (NVRA) to give the Election Assistance Commission (EAC or Commission) the authority to

create and modify the Federal Form in consultation with state election officials, rather than empowering the States to direct the EAC regarding the contents of the form. In opposition to that ruling, the States of Arizona and Kansas argue that the NVRA cannot be read to permit the EAC "to second guess" their proof-of-citizenship requirements because doing so would permit a federal agency to displace the States' "exclusive power to establish and enforce the qualifications for voting." States' Br. 12; see also States' Br. 18, 23, 36. Because, in their view, allowing the Commission to determine for itself whether the States' requested citizenship documentation requirements are "necessary" would infringe the States' alleged exclusive constitutional power to establish and enforce voter qualifications, they argue that the canon of constitutional avoidance must preclude construing the NVRA to give the EAC that authority. The States also argue in the alternative that, if construed to give the Commission that authority, the statute would be unconstitutional as applied. States' Br. 13, 45-46.

The States are wrong, however, in claiming "exclusive" authority to "enforce" (in addition to "establishing") voter qualifications. Not only *ITCA* itself, but more than a century of Supreme Court precedents, establish that, under the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, Congress not only enjoys *concurrent* authority with the States to regulate voting procedures such as registration but has plenary authority to supplement or preempt state law as it sees

fit. Indeed, if the States had *exclusive* authority to enforce their eligibility requirements, they would have won the case in *ITCA*.

Because the States' assertion that they have exclusive constitutional power to enforce voter eligibility requirements is unfounded, their entire argument regarding constitutional doubt and the Commission's alleged "nondiscretionary" duty to include the States' requested proof-of-citizenship instructions collapses. And with respect to the merits of the EAC's decision, the States offer no persuasive reason to reject the Commission's careful and thorough decision as arbitrary and capricious under Administrative Procedure Act (APA) standards.

Finally, both the States and the Valle del Sol Intervenors group (Valle del Sol) argue, for different reasons, that the Commission had no authority to issue its decision without a quorum. Neither argument has merit. Pursuant to a valid delegation of authority by the Commission, acting with a quorum, the acting Executive Director had authority to act on (and reject) the States' modification requests.

ARGUMENT

I

THE COMMISSION HAS AUTHORITY TO DETERMINE ITSELF WHETHER ADDING THE STATES' PROOF-OF-CITIZENSHIP REQUIREMENTS TO THE FEDERAL FORM IS "NECESSARY"

A. The States Do Not Have Exclusive Authority To Enforce Voter Eligibility Requirements

1. No one disputes that Arizona and Kansas are entitled both to define voter qualifications for federal elections and to adopt registration requirements to protect the integrity and reliability of the electoral process. States' Br. 2, 17-19. The question presented here is whether the States' registration requirements trump a decision by an expert federal agency, acting pursuant to an express congressional delegation of authority, that these registration requirements are not "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. 1973gg-7(b)(1). The Supreme Court already resolved the questions of the Commission's authority and the Federal Form's primacy in *ITCA*. The Court concluded in no uncertain terms that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) (*ITCA*); see also *id.* at 2255 (describing EAC's authority).

Nonetheless, the States repeatedly assert that the Commission has a "nondiscretionary duty" to execute their requests to add citizenship documentation requirements to the Federal Form's state-specific instructions because the States have exclusive authority both to establish *and enforce* voter qualifications. See, *e.g.*, States' Br. 12-14, 18, 23, 36. Moreover, they claim that the Supreme Court in *ITCA* recognized the States' exclusive power. States' Br. 18, 23. These claims are baseless. The Court in *ITCA* never held that, short of *precluding* a State from obtaining necessary information, Congress lacks authority under the Elections Clause to adopt registration requirements and otherwise enforce state voter qualifications and prevent voter fraud with respect to federal elections.

The States' argument proves too much. If the States had exclusive authority to enforce voting qualifications, Congress would have been powerless to authorize the EAC to prescribe a Federal Form in the first place.[1] Indeed, if the States' power to enforce voter qualifications such as citizenship were exclusive, then Arizona would have won *ITCA*, for there would have been no basis for the Court's finding of preemption.

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[1] As discussed in our opening brief, the NVRA and the Help America Vote Act (HAVA) require that the Federal Form facilitate the assessment of an applicant's voting eligibility, including citizenship, in several respects. EAC Br. 4-5.

2. Not only is the States' assertion of exclusive authority to enforce their voter qualifications at odds with *ITCA*'s result, but it cannot be squared with *ITCA*'s reasoning, precedent, or the myriad instances in which Congress has exercised plenary authority to regulate voter registration procedures and protect the integrity of federal elections.

As discussed in our opening brief (at 29-33), the States' misguided constitutional argument depends on conflating substantive eligibility requirements for voting in federal elections—which the States have authority to set—and the registration procedures by which they enforce those requirements, which Congress may modify or preempt. As the Court recognized in *ITCA*: "In practice, the [Elections] Clause functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.'" 133 S. Ct. at 2253 (quoting *Foster* v. *Love*, 522 U.S. 67, 69 (1997)). The Clause "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections," *ibid.*, and thus "to regulate *how* federal elections are held," *id.* at 2257. The Court's longstanding, "commonsense view" is that the "manner" of holding federal elections "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and

making and publication of election returns.'" *Cook* v. *Gralike*, 531 U.S. 510, 523-524 (2001) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)); accord *Ex parte Siebold*, 100 U.S. 371, 382-399 (1880); *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (citing *United States* v. *Manning*, 215 F. Supp. 272, 284 (W.D. La. 1963) (Wisdom, J., for three-judge court)); EAC Br. 29-30. Because the States' laws requiring documentary proof of citizenship address the *manner* in which voter registration is conducted, they are subject to preemption by Congress. See *ITCA*, 133 S. Ct. at 2253-2254; accord *Foster*, 522 U.S. at 69.[2]

Finally, Congress has enacted many laws to enforce the universal voter qualification of citizenship—legislation that may not have been within congressional power had the States' authority to enforce voter qualifications been exclusive. See, *e.g.*, 18 U.S.C. 611 (voting by aliens); 18 U.S.C. 911 (misrepresentation of citizenship); 18 U.S.C. 1015(f) (false claim of citizenship in

[2] The States argue for the first time in their brief in this Court that "being registered is itself a qualification for being an elector." States' Br. 47. But as in *ITCA*, this Court should "resolve this case on the theory on which it has hitherto been litigated: that *citizenship* (not registration) is the voter qualification [the State] seeks to enforce." 133 S. Ct. at 2259 n.9. In any event, as discussed in text, and in EAC Br. 29-33, the Supreme Court has long recognized that Congress has plenary authority under the Elections Clause to regulate voter registration procedures in federal elections. The States cannot evade that precedent by recasting the relevant voter qualification as "registration" instead of (or in addition to) "citizenship."

connection with voter registration or voting); see also Aplt. App. at 1310 n.19 (citing additional federal statutes).

B. Construing The NVRA To Grant The Commission The Power To Make Its Own Determination Of "Necessity" Raises No Constitutional Concerns

The States insist that construing the NVRA to grant the Commission the power to make its own assessment whether the States' requested modifications to the Federal Form are "necessary" would raise serious constitutional doubts, would constitute an unconstitutional preclearance system, and would be unconstitutional as applied. States' Br. 12-24, 45-49.

1. The States continue to misread the critical passage in *ITCA*. States' Br. 14-21. To be sure, the Court recognized that "the power to establish voting requirements is of little value without the power to enforce those requirements," and thus "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258-2259. But the Court explicitly found that NVRA does no such thing. The Court agreed with the government that the "necessity" requirement of Section 1973gg-7(b)(1) sets "a floor with respect to the contents of the Federal Form," as well as a "ceiling." *Id.* at 2259; see also EAC Br. 30 & n.6.

That recognition removed any vestiges of constitutional doubt and satisfied the Court that the NVRA's "necessity" standard suffices for constitutional

purposes. Since "a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility," and "may challenge the EAC's rejection of that request" in an APA suit, "*no constitutional doubt* is raised by giving the 'accept and use' provision of the NVRA its fairest reading." *ITCA*, 133 S. Ct. at 2259 (emphasis added).[3]

2. Invoking the Supreme Court's decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), the States argue that the EAC's interpretation of its authority under the NVRA raises serious constitutional doubts because allowing the Commission to determine what information is "necessary" constitutes an unconstitutional preclearance system. States' Br. 21-24, 46-47. Not so. The Voting Rights Act preclearance regime, which was based on Congress's authority to enforce the post-Civil War amendments, "sharply departs" from the "basic principles" that States have "the power to regulate elections," *Shelby County*, 133 S. Ct. at 2623-2624 (citation omitted), "suspend[ing] '*all* changes to state election law—however innocuous—until they have been precleared by federal authorities

[3] The Court suggested only one circumstance in which Arizona could potentially bring a constitutional claim—if the EAC, for lack of a quorum, is "incapable" of acting on the State's request to modify the Federal Form. Only then might Arizona "be in a position to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form." *ITCA*, 133 S. Ct. at 2260 n.10. As discussed in Part III, *infra*, the Commission had the requisite authority to act on the States' requests.

in Washington, D.C.'" *Id.* at 2624 (citation omitted). Here, by contrast, Congress has delegated a narrow authority to the EAC to "develop a mail voter registration application form" for federal elections. 42 U.S.C. 1973gg-7(a)(2).

The States argue, and the EAC agrees, that no "constitutionally enumerated power supports granting the EAC discretion to *preclude* the States from enforcing their voter qualifications laws." States' Br. 23 (emphasis added). But here the Commission made a factual determination that the States were *not* so precluded: "[T]he evidence reflects the States' ability to identify potential non-citizens and thereby enforce their voter qualifications relating to citizenship, even in the absence of the additional instructions they requested on the Federal Form." Aplt. App. at 1306. That determination is entitled to deference. *W. Watersheds Project* v. *Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013); see also Part II, *infra*.

As the Court in *Shelby County* recognized, "the Federal Government retains significant control over federal elections." 133 S. Ct. at 2623. More specifically, Congress has constitutional power under the Elections Clause to adopt procedural requirements governing the manner in which voters prove their eligibility to vote, even if it means displacing some aspects of the States' own regulatory scheme. EAC Br. 31-32. Nor is there any constitutional obstacle, as the States suggest (Br. 37 n.7), to Congress delegating the function of making discretionary judgments in

implementing Congress's registration scheme, whether the source of Congress's constitutional authority is the Fifteenth Amendment or the Elections Clause. The Supreme Court has upheld congressional delegations to subordinates that involved a far greater displacement of state registration regimes by federal officers' decisions. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *United States* v. *Gradwell*, 243 U.S. 476, 483 (1917); *Ex parte Siebold*, 100 U.S. at 379-380.

In sum, the district court had no cause to rely on the constitutional avoidance canon, and the States' alternative as-applied constitutional challenge to the NVRA is equally meritless. Congress's vesting of authority in the EAC to prescribe the contents of the Federal Form, including the power to make its own assessment of whether information requested by the States is "necessary," is securely rooted in precedent and historical practice.

C. The NVRA Gives The EAC Authority To Determine For Itself Whether Adding The States' Proof-Of-Citizenship Requirements To The Federal Form Is Necessary

1. Once the States' constitutional doubt arguments are laid to rest, the remainder of their statutory argument founders. The NVRA directs the Commission to "develop" the Federal Form "in consultation with the chief election officers of the States," not as directed by the States. 42 U.S.C. 1973gg-7(a)(2); see also 42 U.S.C. 1973gg-4(a)(1) ("Each State shall accept and use the mail voter

registration application form prescribed by the * * * Commission"). As the Court recognized in *ITCA*: "Each state-specific instruction *must be approved by the EAC* before it is included on the Federal Form." 133 S. Ct. at 2252 (emphasis added); *id.* at 2255 (describing EAC's authority); accord *Gonzalez* v. *Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) ("While states may suggest changes to the Federal Form, the EAC has the ultimate authority to adopt or reject those suggestions."); see also EAC Br. 17-27.

The NVRA requires States "to provide simplified systems for registering to vote in federal elections." *Young* v. *Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted). Indeed, Congress intended the NVRA to address precisely the sort of practice at issue here—state registration requirements that needlessly discourage or impede voter registration for federal elections. See 42 U.S.C. 1973gg(a)(3); EAC Br. 24-25. To increase the number of eligible citizens registered to vote in federal elections, to streamline the process, and to promote sufficient uniformity to facilitate registration drives across state lines, Congress provided that only information "necessary" to the enforcement of substantive eligibility requirements could be required on the Federal Form. It charged an expert agency (first the Federal Election Commission (FEC) and later, the EAC) with implementing that standard. It makes no sense that Congress would then require this expert agency to

rubber-stamp every requested modification to the Federal Form that a state official demands. EAC Br. 24-25; compare States' Br. 29.

In *ITCA*, the Court confirmed this point: "[T]he Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." 133 S. Ct. at 2255. The Court was not "concerned with States requiring information beyond that listed in state-specific instructions" (States' Br. 40), but with Arizona's reading of the statute as "permit[ting] a State to demand of Federal Form applicants every additional piece of information the States requires on its state-specific form." 133 S. Ct. at 2256. Under that reading, the States could demand documentation such as a photograph, fingerprints, or DNA samples to establish identity; a utility bill or property title deed to prove residence; a background check to demonstrate the lack of criminal convictions, and more. Intervenors' Joint Br. 33; Pelosi Amicus Br. 7. "If that is so, the Federal Form ceases to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *ITCA*, 133 S. Ct. at 2256 (quoting 42 U.S.C. 1973gg(b)).[4]

[4] Because the EAC performs a gate-keeping function regarding the Federal Form's contents that it does not perform regarding other voter registration forms required or permitted by the NVRA, the States' attempted analogy to the NVRA provision requiring States to include a voter registration application form as part of (continued…)

The States claim that the Court resolved its "serious constitutional doubts" by holding that "the EAC is under a *nondiscretionary duty*" to include a State's requested instructions on the Federal Form. States' Br. 37; see also States' Br. 26. But the Commission's "nondiscretionary duty" comes into play only *after* a State has "establish[ed] in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is *therefore* under a nondiscretionary duty to include [the State's] concrete evidence requirement on the Federal Form." *ITCA*, 133 S. Ct. at 2260 (emphasis added); see also *id.* at 2259 (referring to EAC's "validly conferred discretionary executive authority"). The Court's suggestion that Arizona could assert that it would be "arbitrary" for the EAC to refuse to include its proposed instructions when it had accepted allegedly similar instructions from Louisiana,[5] confirms that the Court expected that Arizona would have to *persuade* the EAC (or a reviewing court) to grant its request for modification rather than that approval would be automatic. If the EAC must modify the Federal Form whenever a requesting State contends that such a change is necessary to implement a state statute, it would have made no sense for the

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(…continued)
their driver's license applications is inapposite. See States' Br. 29-30 (citing 42 U.S.C. 1973gg-3(c)(2)(B)). The States—not the EAC—are charged with administering the "motor voter" program. 42 U.S.C. 1973gg-3(c); see also EAC Br. 20.

[5] The States have not made such an argument here.

Court to propose that Arizona "request" the EAC to modify the Federal Form, and then challenge the EAC's "rejection" of that request in an APA suit. Instead, the Court would have ruled outright that the Commission had no choice but to execute the change, thereby resolving the preemption issue by eliminating any conflict between the Federal Form and Arizona's requirements.

2. Finally, neither the structure of the Federal Form nor the EAC's regulations obliges the Commission to rubber-stamp a State's requested modification of the Federal Form whenever the State avows that such a modification is necessary to comport with state law. Pointing to state-specific instructions requiring that the registrant provide additional identifying information on the Federal Form, the States argue that "the structure of the Federal Form is itself evidence that the NVRA's streamlining goal is subservient to the constitutional authority of each State to establish and enforce its own voter qualifications." States' Br. 32-33. Again, not so. Requirements to verify registrant identity are mandated by the Help America Vote Act (HAVA). 42 U.S.C. 15483(a)(5). And before HAVA's enactment, the FEC's regulations authorized States to require that applicants provide voter identification numbers on the Federal Form, 59 Fed. Reg. 32,324 (June 23, 1994) (11 C.F.R. 8.4(a)(6)), because the FEC was persuaded that state and local election officials had "made compelling arguments in support of the need for full voter identification numbers,"

59 Fed. Reg. at 32,313—not because the agency viewed its discretion as subservient to the States' constitutional authority.

Nor do the EAC's regulations support the States' argument regarding the Commission's purported lack of discretion to assess the necessity of their requested changes. The States cite 11 C.F.R. 9428.3(b), which provides that "[t]he state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements." States' Br. 34, 49. They contend that this regulation requires the EAC to include state-specific instructions that reflect the States' respective voter qualification and registration laws. States' Br. 34, 50-51. And so it does, subject to the Commission's determination regarding the appropriate contents of the form, in accordance with the NVRA.

The Commission is not free to disregard the NVRA's direction that the Federal Form may require only "necessary" information, 42 U.S.C. 1973gg-7(b)(1), any more than it is free to include a state-law requirement for notarization or other formal authentication, 42 U.S.C. 1973gg-7(b)(3). As the EAC explained: "EAC staff (and before it, FEC staff) has always had the responsibility and discretion to develop and, where necessary, revise and modify the text of the Federal Form's instructions in a manner that comports with the requirements of

federal law and the EAC's regulations and policies." Aplt. App. at 1293; see also Aplt. App. at 1318; accord *ITCA*, 133 S. Ct. at 2252 ("Each state-specific instruction must be approved by the EAC before it is included on the Federal Form.").

At the outset of its rulemaking process, the FEC cautioned that "decisions may have to be made that information considered necessary by certain states not be included on the national form," 58 Fed. Reg. 51,132 (Sept. 30, 1993), and the agency made such decisions in promulgating the final rules, see 59 Fed. Reg. at 32,312 ("[T]he Commission 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."). Even if the regulatory language is ambiguous, the Commission's interpretation of its own regulations is both reasonable and entitled to deference. *Aviva Life & Annuity Co.* v. *Federal Deposit Ins. Corp.*, 654 F.3d 1129, 1132 (10th Cir. 2011).

II

THE COMMISSION DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DETERMINING THAT THE STATES FAILED TO DEMONSTRATE THE NECESSITY OF REQUIRING PROOF OF CITIZENSHIP

The EAC issued a careful, comprehensive 46-page decision considering the extensive record developed in response to its request for public comment on the States' requests. Aplt. App. at 1274-1319; 78 Fed. Reg. 77,666 (Dec. 24, 2013).

The Commission found (1) that the Federal Form already provides adequate safeguards to prevent noncitizens from registering to vote; (2) that the evidence fails to establish that the registration of noncitizens is a significant problem in either Arizona or Kansas; and (3) that the States have been able to enforce their citizenship eligibility requirements without the additional requested instructions. Aplt. App. at 1301, 1306; see Aplt. App. at 1301-1314. Thus, the Commission concluded that the States failed to "demonstrate[] that requiring additional proof of citizenship is necessary for the States to enforce their citizenship requirements" (Aplt. App. at 1301), and that, accordingly, "the States are not 'precluded . . . from obtaining the information necessary to enforce their voter qualifications'" (Aplt. App. at 1313).

A presumption of validity attaches to the EAC's decision, and the burden of proof rests on the States in challenging it. *W. Watersheds Project* v. *Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013). This Court may set aside the Commission's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ibid.* (quoting 5 U.S.C. 706(2)(A)). Review under this standard is "highly deferential," *Aviva Life & Annuity Co.* v. *Federal Deposit Ins. Corp.*, 654 F.3d 1129, 1131 (10th Cir. 2011) (citation omitted), and is limited to determining whether the decision was "based on a consideration of the relevant factors" and whether there has been "a clear error of

judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). The Commission did not conduct a formal adjudicatory proceeding and was not required to articulate a "standard of proof." See States' Br. 53-54. All that is necessary is that "the grounds upon which the agency acted * * * be clearly disclosed in, and sustained by, the record." *Olenhouse*, 42 F.3d at 1575 (citation omitted); see also *Mountain Side Mobile Estates P'ship* v. *Secretary of Hous. & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995). The Commission's denial of the States' requests easily meets these standards.[6]

[6] Both the States and their amici incorrectly argue that review of the EAC's decision is, in whole or part, subject to de novo, rather than deferential, review. The States argue that constitutional questions that arise during APA review are reviewed de novo. States' Br. 25 & n.2, 44. Whether or not that is true, it is irrelevant. The Commission's rejection of the States' requests was based on its construction of the NVRA and its thorough review of the administrative record. Nor are the EAC's factual findings reviewable de novo under 5 U.S.C. 706(2)(F), which provides for setting aside agency action "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Eagle Forum Amicus Br. 14-15. This provision applies only when agency action is "adjudicatory in nature and the agency factfinding procedures are inadequate" or when "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Volpe*, 401 U.S. at 415. Section 706(2)(F) is inapplicable to an informal agency action such as the Commission's denial of the States' requests. See, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 140-142 (1973); *National Wildlife Fed'n* v. *Burford*, 871 F.2d 849, 855 (9th Cir. 1989); *Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832, 840-842 (D.C. Cir. 1976).

The States argue that the Commission's decision was arbitrary and capricious because it allegedly discounted the States' evidence while adopting conclusory statements by the Intervenors. Their claim is belied by the administrative record and the EAC's discussion of it. The Commission thoroughly reviewed all submissions responding to its Notice and Request for Public Comment. See Aplt. App. at 1278-1283. In particular, the Commission closely examined those portions of the States' submissions that purported to demonstrate that a small number of noncitizens—amounting to an "exceedingly small" percentage of the registered voters in either State (Aplt. App. at 1307)—have in past years registered to vote or voted in Arizona or Kansas. The Commission provided a detailed analysis of that evidence (Aplt. App. at 1304-1309); it explained that the evidence failed to demonstrate that registration of noncitizens is a significant problem in either State or that the States are unable to enforce their citizenship eligibility requirements because of an inability to identify potential noncitizens (Aplt. App. at 1306). Indeed, as the attorney for the States conceded, Kansas has not "attempted to distinguish among the 20 aliens" and Arizona has not "attempted to distinguish among the 196 aliens" whose ostensibly improper registrations they identified, "whether they used the Federal Form or the state form." Aplt. App. at 1636-1637; see also EAC Br. 37 n.9 (detailing the

Commission's explanation for why even these registrations might reflect eligible voters).

The Commission also noted that the States' laws excepted from their proof-of-citizenship requirements all individuals who were registered at the time the laws took effect. Aplt. App. at 1308. As the Commission observed, however, "the States have not provided any evidence suggesting that voters attempting to register before the laws took effect were any more or less likely to be noncitizens than those attempting to register after the laws took effect." Aplt. App. at 1308. Thus, the States' exemptions suggested "that the information required by the Federal Form has historically been considered sufficient to assess voter eligibility, even in the recent past." Aplt. App. at 1308-1309 (citing EAC 001817 (Aplt. App. at 1256)). In short, the Commission found no basis in the record to depart from its long-standing practice. See also EAC Br. 35-39.

The States complain, in particular, that the Commission ignored the factual findings and legal conclusions underlying Judge Silver's 2008 denial of the *Gonzalez* plaintiffs' motion for a permanent injunction. States' Br. 55-56. That case involved a very different question—*i.e.*, whether Arizona's proof-of-citizenship requirements imposed an unconstitutional burden on the right to vote (Aplee. Supp. App. at 468-474)—and not whether the State would, in the absence of that requirement, be unable to ensure that only citizens voted. Moreover, the

facts the States highlight here are inapposite. They emphasize that at least 208 citizens in two Arizona counties falsely declared non-citizenship to evade jury service despite the prospect of conviction for perjury. States' Br. 55 (citing Aplee. Supp. App. at 455). That 208 individuals falsely declared their *non*-citizenship to avoid jury duty is not evidence that non-citizens have falsely averred on the Federal Form that they *are* citizens; nor did the district court conclude, as the States imply (States' Br. 56), that "the Federal Form's sworn statement is insufficient." In any event, the EAC did consider the district court's decision in *Gonzalez*. Aplt. App. at 1278-1279, 1314.

With respect to Kansas, the EAC recognized that the State had submitted declarations and supporting documents and fully considered the declarations submitted by Kansas official Brad Bryant (Aplt. App. at 664-677). Aplt. App. at 1279-1280, 1304-1306. The Commission explicitly acknowledged that the States had submitted evidence that they believed "demonstrates that requiring additional proof of citizenship is necessary for them to enforce their citizenship requirements" (Aplt. App. at 1306), and proceeded to explain in detail why the Commission reached a contrary conclusion based on all the evidence in the record (Aplt. App. at 1306-1314). In particular, the Commission discussed how and why it disagreed with the States that they have very few tools to identify noncitizens after they are registered to vote. Aplt. App. at 1309-1314; see States' Br. 57 (citing Bryant

Declaration (Aplt. App. at 673)). Evidence in the record showed that the States have a number of effective alternative means to identify potential noncitizens and have used them. Aplt. App. at 1309-1314. The States insist that the Commission was required to credit Bryant's assertion that the number of noncitizens who have registered to vote is likely to be "much higher" than the handful he reported (States' Br. 57), but as we previously noted, the Commission was not required to draw a "tip-of-the-iceberg" inference based on such speculation (EAC Br. 39).

Finally, in concluding that granting the States' requests would likely hinder eligible citizens from registering to vote in federal elections, thereby undermining a core purpose of the NVRA (Aplt. App. at 1315), the Commission did not "readily adopt[] conclusory statements submitted by the Intervenors" (States' Br. 58). Rather, the Commission based its conclusions on uncontested evidence submitted by a number of commenters, including the League of Women Voters and Project Vote, describing the burdens proof-of-citizenship requirements impose on voter registration efforts. See, *e.g.*, Aplt. App. at 749-751, 1260-1265; Aplt. Supp. App. at 1708-1725. In any case, regardless of the potential impact of the States' requested instructions on voter registration for federal elections (Aplt. App. at 1314-1316), the central statutory question for the EAC was whether the requested instructions were "necessary" for the States to enforce their citizenship voter

qualifications. After a thorough discussion and consideration of the record, the EAC determined that they were not.

III

THE COMMISSION HAD AUTHORITY TO ACT ON THE STATES' REQUESTED CHANGES TO THE FEDERAL FORM

Both the States and the Valle del Sol Intervenor group contend, for different reasons, that the Commission had no authority to act on the States' requests without a quorum of Commissioners. The States argue in conclusory fashion that, because the Commission was under a "nondiscretionary duty" to include their requested instructions, the Commission had the authority to grant, but not deny, their requests without a quorum. States' Br. 59. Valle del Sol, by contrast, contends that the Commission lacked authority to act on the States' requests altogether. Valle del Sol Intervenor Br. 5, 7-11. Both arguments are meritless.[7]

[7] As specifically noted by the EAC, the States did not make their argument regarding the Commission's authority to the Commission. Aplt. App. at 1287-1288. Valle del Sol, while it made the lack-of-a-quorum argument to the Commission (Aplt. App. at 1057-1062), failed to make that argument to the district court. Instead, in a footnote in its memorandum in opposition to the plaintiffs' motion for relief, Valle del Sol noted that it had argued to the EAC that the Commission had no authority to act without a quorum but explained that "[w]ithout waiving that position, in this brief Valle del Sol Intervenors address only the respective actions this Court is empowered to take to the extent it holds that the [Executive Director] did or did not have authority to act on behalf of the agency without a quorum." Aplt. App. at 1376 n.2.

1. The States' argument that the Commission retained authority to *grant* their request for state-specific instructions but not to *reject* it is meritless. The Commission's authorizing legislation—"Any action which the Commission 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—cannot support such a one-way ratchet argument.

The States make no attempt to defend their reading as a matter of statutory construction (or, for that matter, sound policy). Instead, they assert, without explanation, that granting their request would have been a "nondiscretionary and ministerial" task not requiring Commissioner approval, whereas denying their request would have involved "quasi-judicial analysis and policy making" that does require such approval. States' Br. 59.

As we explained in Part I.C., *supra*, however, the EAC was not under any "nondiscretionary duty" to approve the States' requested instructions. Therefore, if the Commission lacked authority to act, the States are not entitled to the relief they seek. Indeed, the States have it precisely backward. Even assuming that the Commission's authority to act on the States' requests is diminished by the lack of a quorum—a premise that, as we explain below, is incorrect—that would mean the Commission must leave in place, and not depart from, its longstanding policy of

declining to require proof of citizenship on the Federal Form. See EAC Br. 35-36 (describing EAC's development of that policy after two-decades-long debate).

2. Valle del Sol's broader attack on the Commission's authority to act altogether fares no better. The three-member requirement is best read to require three Commissioner votes for those actions that require a vote by the Commissioners in the first place, and to have no application to those actions that do not require a Commissioner vote. The provision's title confirms this: "Requiring majority approval for actions." 42 U.S.C. 15328. Nothing about the three-member requirement suggests that it is meant to impose an unusual quorum requirement for day-to-day activities. Indeed, as the Commission pointed out (Aplt. App. at 1288), the statute provides the EAC with an Executive Director and staff. 42 U.S.C. 15324. It makes little sense for Congress to forbid the EAC's staff from taking action without Commissioners if that action would not require a Commissioner vote. See *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122 (1947) ("We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction.").

The question, then, is whether the agency action at issue—considering the States' requests for state-specific additions to the Federal Form—is one that required a vote by the Commissioners. The statute provides no guidance on that

question. The Commission itself, however, provided such guidance in a 2008 policy document endorsed unanimously by the three Commissioners then serving, entitled "The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission." Aplt. App. at 358-366, 1288. This document reserves for the Commissioners the responsibility for developing high-level policy. Aplt. App. at 359. By contrast, it delegates to the Executive Director the responsibilities, among other things, to: "[m]anage the daily operations of EAC consistent with Federal statutes, regulations and EAC policies"; "[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners"; and "[a]nswer questions from stakeholders regarding the application of NVRA or HAVA consistent with EAC's published Guidance, regulations, advisories and policy." Aplt. App. at 364-365. In particular, it charges the Executive Director—not the Commissioners—with "[m]aintain[ing] the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." Aplt. App. at 365.

As the Commission determined, its decision here falls well within the boundaries of that delegation, as the Executive Director's duty to "[m]aintain the Federal Voter Registration Form" includes "making such changes to the general and state-specific instructions as is necessary to ensure that they accurately reflect

the requirements for registering to vote in federal elections." Aplt. App. at 1292. It notes that, under both the FEC and EAC's administrations, staff have always been delegated "the responsibility and discretion to develop and, where necessary, revise and modify the text of the Federal Form's instructions in a manner that comports with the requirements of federal law and the EAC's regulations and policies." Aplt. App. at 1293. For example, the Commission's rejection of Arizona's 2005 request to add citizenship documentation requirements was initially handled at the staff level and announced by the Executive Director (Aplt. App. at 296-298), with a majority vote of the Commissioners required to override (rather than affirm) the staff's determination and grant Arizona's request (Aplt. App. at 304). The Commission's reading of its own agency guidelines is entitled to deference, see *Oklahoma* v. *Environmental Prot. Agency*, 723 F.3d 1201, 1211 (10th Cir. 2013), and it is a reasonable one. Moreover, as Valle del Sol conceded below (Aplt. App. at 1376 n.2), the EAC's assessment that it had authority to act under the statute (see Aplt. App. at 1287-1293) is entitled to *Chevron* deference, see *City of Arlington* v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863, 1868 (2013), and that determination was correct.[8]

[8] Not to the contrary is a 2011 internal memorandum by then-Executive Director Thomas Wilkey, which set out procedures for processing state requests to modify the state-specific instructions on the Federal Form in the absence of a quorum of Commissioners. Aplt. App. at 343-344. That memorandum provided

(continued…)

The Commissioners' delegation of authority to the Executive Director was permissible. "When a statute delegates authority to a federal office or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible." *U.S. Telecom Ass'n* v. *Federal Commc'ns Comm'n*, 359 F.3d 554, 565 (D.C. Cir. 2004) (collecting cases); accord *Frankl* v. *HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011), cert. denied, 132 S. Ct. 1821 (2012). Nothing here overcomes that presumption. Congress expressly created the agency positions of Executive Director and General Counsel, as well as the Commissioners, see 42 U.S.C. 15324, and thus necessarily contemplated that some tasks would be delegated to them. Aplt. App. at 1288-1289. The statute does not spell out which tasks may or may not be delegated—or, for that matter, which tasks require a Commissioner vote—leaving that gap for the Commissioners to fill.

Valle del Sol argues that the Supreme Court's decision in *New Process Steel, L.P.* v. *National Labor Relations Board*, 560 U.S. 674 (2010), holds that a federal

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(…continued)
that "[r]equests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum [of EAC commissioners]." Aplt. App. at 344. Although the Acting Executive Director initially declined to act on the States' requests in this case, her deferment of action while lacking a quorum was discretionary and prudential, and, as she later explained, did not reflect the view that the Executive Director lacked authority to act on the requests under the 2008 delegation. See Aplt. App. at 1290 n.7 (2011 memorandum "did not and could not have limited the scope of the commissioners' original delegation to the Executive Director").

commission subject to a statutory quorum requirement cannot legally act without a quorum (Valle del Sol Intervenor Br. 9, 10), but it misreads that decision. In *New Process Steel*, the Court held that a specific quorum statute required that the National Labor Relations Board's delegated power be vested continuously in a group of three members and thus prohibited the delegation of the Board's power to fewer than three members to transact the Board's business. 560 U.S. at 679-688. The Court recognized, however, that the failure to meet the quorum requirement does not "necessarily establish that an entity's power is suspended so that it can be exercised by no delegee." *Id.* at 684 n.4. It specifically stated that its conclusion regarding the required membership of the Board's delegee group "does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." *Ibid.*

Thus, *New Process Steel* supports, rather than denigrates, the continued validity of the Commission's 2008 delegation of Federal Form maintenance and administration authority to EAC staff. And, contrary to Valle del Sol's contention (Br. 10), the Commissioners' delegation of authority remains valid notwithstanding its subsequent loss of a quorum. See *Kreisberg* v. *HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013) (delegation of authority by National Labor Relations Board to its general counsel remains valid after Board lost quorum); accord *Frankl*, 650 F.3d at 1354; *Osthus* v. *Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011);

Overstreet v. *El Paso Disposal, L.P.*, 625 F.3d 844, 852-854 (5th Cir. 2010); see also *Overstreet* v. *SFTC, LLC*, 943 F. Supp. 2d 1296, 1302-1303 (D.N.M. 2013). But see *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *National Labor Relations Bd.*, 564 F.3d 469, 473 (D.C. Cir. 2009).

CONCLUSION

This Court should reverse the district court's judgment and remand with instructions to dismiss this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 6,989 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing REPLY BRIEF FOR THE UNITED STATES ELECTION ASSISTANCE COMMISSION, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES ELECTION ASSISTANCE COMMISSION with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on July 18, 2014, I will serve seven paper copies of the same by Federal Express to the Court and one paper copy to the following counsel of record via Federal Express:

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