Nos. 14-3062 and 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

INTER TRIBAL COUNCIL OF ARIZONA, et al.

Intervenors Defendants-Appellants.

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

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GLOSSARY

APA: Administrative Procedure Act

EAC: Election Assistance Commission

FEC: Federal Election Commission

ITCA: *Ariz. v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013)

NVRA: National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*

STATEMENT PURSUANT TO TENTH CIRCUIT RULE 31.3

The United States Election Assistance Commission ("EAC") and its Executive Director Alice Miller filed their reply brief on July 17, 2014. The present brief, timely filed on July 28, 2014, is on behalf of all the Intervenors Defendants-Appellants: the League of Women Voters of the United States, the League of Women Voters of Arizona, and the League of Women Voters of Kansas; Project Vote, Inc.; Valle del Sol, Southwest Voter Registration Education Project, Common Cause, Chicanos Por La Causa, Inc., and Debra Lopez; and Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, League of United Latin American Citizens Arizona, and Steve Gallardo (collectively, the "Voter Registration Organizations"). Except as otherwise noted herein, Intervenors Defendants-Appellants join the reply brief submitted by the EAC on July 17, 2014, and write separately only to address a few select points.

SUMMARY OF THE ARGUMENT

Nothing better demonstrates the infirmities of the district court's decision below than the States' attempts to run away from it. Unable to defend the district court's rationale on its face, the States resort to mischaracterizing the Supreme Court's holding in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) ("*ITCA*"), and when that proves insufficient, to rewriting the opinion, so that they can claim they prevailed in *ITCA*. The States also offer a grab-bag of alternative grounds for affirmance. But no amount of smoke and mirrors can eliminate the States' burden under *ITCA* of demonstrating that they are precluded from enforcing their eligibility requirements without documentary proof of citizenship. The States cannot seize victory from the jaws of defeat through such disingenuous tactics.

ARGUMENT

I. THE EAC'S DECISION DOES NOT RAISE CONSTITUTIONAL DOUBTS

The States argue that if the EAC were to have authority over how the Federal Form obtains information verifying a registrant's citizenship, that would raise serious constitutional doubts. *See* Appellees' Br. at 14-15, 19, 24-25, 35-36. According to the States,

the EAC must blindly accept the States' dictates for how that information must be obtained. *Id.* This simply is not the case, as evidenced by the fact that, in order to support their position, the States mischaracterize the Supreme Court's opinion in *ITCA*, as well as the NVRA itself.

As an initial matter, there is no dispute between the States and the EAC about the voter qualification necessary for registration for federal elections—U.S. citizenship. Both *ITCA* and this case only concern the procedures by which individuals who use the Federal Form to register to vote verify that they satisfy the voter qualification of U.S. citizenship. This is a critical distinction because the States repeatedly conflate the citizenship qualification itself with the method of proving that qualification.[1] While the

[1] While the States argue that registration is itself a qualification to vote, this is an issue raised for the first time on appeal and thus carries no weight. *See United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012). Indeed, the Supreme Court itself addressed this in *ITCA*:

> In their reply brief, petitioners suggest for the first time that "registration is itself a qualification to vote." . . . We resolve this case on the theory on which it has hitherto been litigated: that *citizenship* (not registration) is the voter qualification Arizona seeks to enforce.

States may have the authority to set voter qualifications, Congress is fully empowered under the Constitution to establish the procedures by which individuals register to vote for federal elections, *see Smiley v. Holm*, 285 U.S. 355, 366 (1932), and *ITCA* makes clear that Congress has delegated to the EAC the power to determine the content of the procedural tool used for registration—the Federal Form.

A. The States' "Serious Constitutional Doubt" Argument Misconstrues and Mischaracterizes *ITCA*

In *ITCA*, the Supreme Court suggested that "serious constitutional doubts" could arise *only if* "a federal statute *precluded* a State from obtaining the information necessary to enforce its voter qualifications," in this case, that the registrant is a U.S. citizen. *ITCA*, 133 S. Ct. at 2258-59 (emphasis added). Thus, no constitutional doubts arise unless the States can show that they are *precluded* by the NVRA from obtaining the information necessary to enforce the voter qualification of U.S. citizenship—in other words, that the States are *unable* to obtain that information. *Id.* Mere disagreement between the EAC and the States over *how*

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133 S. Ct. at 2259 n.9 (emphasis in original).

that information is collected during registration is not enough to raise constitutional doubt or meet the States' burden in this case.

The States attempt to recast the issue by arguing that "*ITCA* specifically held that *it would raise serious constitutional doubts if the EAC were deemed to have the authority to reject Arizona's request*." Appellees' Br. at 19 (emphasis in original). But *ITCA* does not say this. Rather, as explained above, the only circumstance the Supreme Court noted could give rise to constitutional doubts is if the States could show that they would otherwise be unable to obtain information necessary to enforce their eligibility requirement. *ITCA*, 133 S. Ct. at 2258-59.

Moreover, *ITCA* itself demonstrates how the States' reading is untenable: "[Because 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 a suit under the Administrative Procedure Act, 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). Though the Court spoke in terms of the "accept and use" provision of the NVRA, the same principle applies here:

the very fact that there exists a means of challenging the agency's rejection negates the notion that the "agency's discretion [is] limited by its own discretionary determination," Appellees' Br. at 38, let alone that the rejection raises constitutional doubts.[2]

Similarly, the States misrepresent *ITCA* in arguing that the Supreme Court "strongly suggested that the EAC must make the requested changes if Arizona (and Kansas) were to renew their requests," and that the Court explicitly held that the "EAC is under a *nondiscretionary* duty to include state-specific instructions on the Federal Form." Appellees' Br. at 19, 37-38. In support, the States ostensibly quote directly from *ITCA*, but add language that

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[2] The EAC made specific factual findings that the States are not precluded from enforcing their eligibility requirement of U.S. citizenship absent documentary proof at registration. In particular, the EAC noted that the Federal Form currently requires applicants to confirm their citizenship under penalty of perjury, 42 U.S.C. § 15483(b)(4); 11 C.F.R. § 9428.4(b); Aplt. App. at 1101-04, and specifically informs applicants from Kansas and Arizona that they must be U.S. citizens to register. Aplt. App. at 1109, 1113. The EAC also noted that the States have numerous alternative means at their disposal to ensure that applicants are, in fact, citizens. *See* Intervenors-Appellants' Br. at 16-19, 63-64; Aplt. App. at 726-28, 1309-14. Simply stated, the EAC's determination of the information necessary for voter registration using the Federal Form does not limit the States' enforcement of their U.S. citizenship voter qualifications.

completely changes the meaning of what the Supreme Court said: "[I]t is surely permissible if not requisite for the Government to say that necessary information which may be required **[by the States]** will be required **[by the EAC]**." *Id.* (quoting *ITCA*, 133 S. Ct. at 2259) (emphasis added, bracketed and bolded language inserted by the States). But *ITCA* did *not* "strongly suggest" that the EAC "must make the requested changes," as the States assert. Rather, in its original and accurate form, *ITCA* repeatedly indicates that it is for the *EAC* to decide whether the information is necessary to assess eligibility. *See* Appellants-Intervenors' Opening Br. at 28-33. If the EAC determines that information is necessary, the EAC must then require that information on the Federal Form. *ITCA*, 133 S. Ct. at 2259.

B. The States Continue to Conflate Voter Qualifications with How Applicants Demonstrate They Meet Those Qualifications

The NVRA states that "the Election Assistance Commission . . . *in consultation with* the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(2) (emphasis added). Thus, while the states provide input, this statutory language clearly puts

control in the hands of the EAC to develop the Federal Form. *See ITCA*, 133 S. Ct. at 2251-52 (the NVRA grants the EAC "authority to prescribe the contents of [the] Federal Form," and "[e]ach state-specific instruction must be approved by the EAC before it is included on the Federal Form").

The States argue that adhering to the statutory language—and thus recognizing that the EAC, not the states, determines what should be required on the Federal Form—raises constitutional doubts. Appellees' Br. at 20-21. Their argument is premised on a fundamental misunderstanding: that the states' authority to set voter qualifications includes the exclusive authority to determine *how* applicants can show that they meet those voter qualifications, including with respect to the Federal Form. But *ITCA* makes clear that Congress has plenary preemptive power over the "how" when it comes to registration requirements for federal elections. *See ITCA*, 133 S. Ct. at 2257 ("[T]he Elections Clause empowers Congress to

regulate *how* federal elections are held, but not *who* may vote in them.").[3]

The States' position contradicts *Smiley v. Holm*, 285 U.S. 355, *ITCA*, and other Supreme Court decisions recognizing that Congress has broad preemptive authority over federal elections, including over registration. In *Smiley*, for example, the Supreme Court

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[3] The States' argument misunderstands the balance struck by the Elections Clause; the Framers intended that the *federal* election power exist to protect electors from *state* actions that make voting more difficult. *See* Letter from Timothy Pickering, Delegate, Pennsylvania Ratifying Convention to Charles Tillinghast, Dec. 24, 1787, quoted in John P. Kaminski, et al., eds., The Documentary History of the Ratification of the Constitution Digital Edition (2009), *available at* http://rotunda.upress.virginia.edu/founders/RNCN-03-14-02-0052-0004 (discussing how states could "regulate . . . elections in such manner as would be highly inconvenient to the people," in which case congressional election power would be welcomed); Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections, post-31 October (notes for speech for Massachusetts ratifying convention), quoted in John P. Kaminski, et al., eds., The Documentary History of the Ratification of the Constitution Digital Edition (2009), *available at* http://rotunda.upress.virginia.edu/founders/RNCN-02-04-02-0003-0023 (expressing a need for federal election power in the event that states "fix on improper places, inconvenient Times, & a manner of Electing wholly disagreeable to the people"). *See also* Brief Amici Curiae of Constitutional Law Professors in Support of Respondents, *ITCA*, 133 S. Ct. 2247, 2013 WL 267029 (discussing the intent behind drafting the Elections Clause).

emphasized the breadth of Congress' authority under the Elections Clause, stating:

> It cannot be doubted that these comprehensive words ["Times, Places and Manner"] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to 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; *in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved*.

Smiley, 285 U.S. at 366 (emphasis added). Consistent with *Smiley*, which the *ITCA* majority relied upon for this very proposition, the NVRA lays out certain procedures for registering to vote in federal elections, including providing for the creation of the Federal Form as a safeguard to protect and enforce the right to vote, since Congress found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3).

In *ITCA*, the Supreme Court again recognized that "the States' role in regulating congressional elections . . . has always existed subject to the express qualification that it 'terminates according to federal law.'" *ITCA*, 133 S. Ct. at 2257.[4] The NVRA is a federal law regulating federal elections, an area where the Supreme Court has repeatedly recognized that Congress "has a general supervisory power over the whole subject." *Smiley*, 285 U.S. at 366-67 (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)). The statute lays out a comprehensive scheme for increasing the number of eligible citizens

[4] The States cite *Shelby County v. Holder*, 133 S. Ct. 2612, 570 U.S. __ (2013), to support their argument that states have the exclusive power to regulate elections. *See* Appellees' Br. at 18-19. However, *ITCA* and *Shelby* address different constitutional delegations of authority to Congress: *ITCA* examines the Elections Clause, whereas *Shelby* involves the Fourteenth and Fifteenth Amendments. Moreover, the decision in *Shelby* was issued on June 25, 2013, and the decision in *ITCA* merely eight days earlier, on June 17, 2013. The Supreme Court clearly had no intention of silently reversing the decision it had issued just over a week earlier. *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). Indeed, *Shelby* refers to *ITCA*, citing the portions of the *ITCA* opinion that recognize Congress's broad power over federal elections and that require the states to demonstrate that they would be "precluded" from enforcing their voter qualification requirements in order to be in violation of the provisions of the NVRA at issue here. *See Shelby*, 133 S. Ct. at 2623 & 2636 n.2.

who register to vote in federal elections, thus making it clear that Congress relied upon its "general supervisory power" when it enacted the NVRA. Tellingly, the States ignore the language in *ITCA* that the presumption against preemption does not apply with regard to the Elections Clause. *See ITCA*, 133 S. Ct. at 2250 ("Arizona's appeal to the presumption against pre-emption . . . is inapposite. The power the Elections Clause confers is none other than the power to pre-empt."). This language is significant because it demonstrates the expansive authority conferred to Congress by the Elections Clause, especially as it relates to the states' ability to legislate with regard to federal elections.

C. The States' Interpretation Undermines the NVRA

The States' assertion that they possess exclusive authority to determine the procedures for verifying an applicant's citizenship, even for federal elections, undermines the very enactment of the NVRA, and specifically Congress' decision to provide for the creation of a uniform federal voter registration form. Congress' first purpose in enacting the NVRA was "(1) 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), since, as

noted above, Congress had determined that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation . . . ." *Id.* § 1973gg(a)(3).

As the Supreme Court recognized in *ITCA*, the NVRA created a multi-faceted system that differentiated the Federal Form from the mail-in registration forms that states are permitted to develop for federal elections, and from the other means of registration required by other sections of the NVRA. Indeed, the Supreme Court recognized the Federal Form's unique role, noting, "These state-developed forms may require information the Federal Form does not . . . . This permission works in tandem with the requirement that States 'accept and use' the Federal Form." 133 S. Ct. at 2255.

The States note that another purpose of the NVRA is "to protect the integrity of the electoral process." *Id.* § 1973gg(b)(3); Appellees' Br. at 31. However, the NVRA struck a balance between and among these purposes by imposing certain requirements on the Federal Form (including the checkbox and affirmation provisions) while also facilitating registration of all eligible applicants by providing that the EAC will develop the Federal Form with the information "necessary to enable the appropriate State election

official to assess the eligibility of the applicant." *Id.* § 1973gg-7(b)(1). While the States construe "protect[ing] the integrity of the electoral process" to mean keeping ineligible people off the voter rolls, they ignore the flipside: ensuring that eligible people can register to vote.

The States point to the statutory language in § 1973gg-3(c)(2)(B) (directing states to provide registration via State drivers' license forms) and § 1973gg-4(a)(2) (allowing states to create their own voter registration forms) in an effort to demonstrate Congressional intent for states to control the Federal Form, since the states have substantial authority over these other voter registration forms. Appellees' Br. 29-30. But the Federal Form is meant to act as a "backstop," *ITCA*, 133 S. Ct. at 2255, and is not intended to be identical to the individual voter registration forms adopted by any particular state. Accordingly, the EAC is responsible for developing and maintaining the Federal Form in order to ensure that there is at least one voter registration form free from "procedural hurdles" imposed by states. *Id.* Thus, the EAC, not the states, determines what is "necessary" to include in the Federal Form.

Under the States' reading, any state could shoehorn all manner of requirements into the Federal Form so long as the state recited its belief that its provision is necessary to assess voter qualifications. If the district court's ruling is not reversed, the EAC could be forced to modify the Federal Form to include any such provision requested by a state. Indeed, the EAC could be forced to include on the Federal Form every requirement that states have for their individual state voter registration forms—thus defeating the entire purpose of the Federal Form, and contravening both *ITCA* and the NVRA. *Cf. ITCA*, 133 S. Ct. at 2256 (noting that if this were required, "the Federal Form [would] ceas[e] to perform any meaningful function.").

II. THE EAC REGULATIONS DO NOT DELEGATE TO THE STATES THE AUTHORITY TO DETERMINE WHAT INFORMATION IS "NECESSARY"

Two EAC regulations address the contents of the Federal Form: 11 C.F.R. § 9428.3 (entitled "General information") describes the Federal Form's overall contours, and 11 C.F.R. § 9428.4 (entitled "Contents") provides a line-item list of the information that voter registration applicants must provide on the Federal Form, including state-specific instructions. Both the States and the

district court focus solely on 11 C.F.R. § 9428.3(b), which specifies in relevant part that "[t]he state-specific instructions shall contain . . . information regarding [each] state's specific voter eligibility and registration requirements." The States suggest that this regulation delegated to the states the EAC's authority under the NVRA to determine what information is "necessary" for inclusion in the Federal Form. *See* Appellees' Br. at 33-35, 49-51; Aplt. App. at 1444-45. But 11 C.F.R. § 9428.3 simply provides, as its title implies, an introductory, non-specific overview of the Federal Form. By contrast, the next section of the regulations enumerates the Form's specific contents.

Moreover, the regulation cannot be read in a vacuum, but must be read in the context of the statute pursuant to which it was promulgated. *See, e.g.*, *Emery Min. Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) ("[W]e must construe [the regulation] in light of the statute it implements, keeping in mind that 'where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred.'") (quoting *United Telecomm., Inc. v. Comm'r*, 589 F.2d 1383, 1390 (10th Cir. 1978)). The regulation cannot alter what the

NVRA expressly commands: that the EAC determines what information is "necessary" to be submitted in conjunction with the Federal Form. *See* 42 U.S.C. § 1973gg-7(b)(1). *See Koch Indus., Inc. v. United States*, 603 F.3d 816, 821 (10th Cir. 2010) ("implementing regulations 'must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute [they] implement[].'") (quoting *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996)); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 454 (10th Cir. 1990).

In addition, the States' and district court's reading of the regulations is contrary to the regulatory history. When the FEC first promulgated the regulations for the Federal Form in 1994, it rejected two registration requirements in use by some states that, allegedly, were needed by the states to determine voter eligibility (the registration applicant's place of birth, and the date on which the applicant's voting rights were restored for those applicants previously convicted of a disenfranchising crime). Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32311, 32316-17 (June 23, 1994). The regulations have thus never been construed to obligate the FEC or EAC to rubberstamp all state registration requirements.

For over twenty years, the FEC and EAC have reasonably interpreted the regulations to prohibit documentary proof of citizenship requirements, a reading consistent with the language of the regulations and the statute. *See* Intervenors-Appellants' Br. at 54-56. Given that "an agency's interpretation of its own regulations [is afforded] 'substantial deference', except in those instances where such interpretation is 'unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning,"' *Utah Envtl. Cong. v. Bosworth,* 443 F.3d 732, 746 (10th Cir. 2006), the EAC's interpretation is clearly entitled to deference. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1329, 1337 (2013); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 454 (10th Cir. 1990).

III. THE STATES' REMAINING ARGUMENTS ARE EQUALLY UNAVAILING

Perhaps recognizing that the district court's decision does not stand on its own merits, the States raise a host of alternative arguments. Appellees' Br. at 45-60. None are compelling. The Intervenors-Appellants fully join the EAC's brief in addressing these

alternative grounds, and write separately only to raise two additional points.[5]

First, the States argue that recognizing the EAC's authority to reject the States' requests to include a documentary proof of citizenship requirement on the Federal Form would constitute "an unconstitutional preclearance system." Appellees' Br. 21-24. The States both mischaracterize the concept of preclearance and misstate the ruling in *Shelby County v. Holder*, 133 S. Ct. 2612, 570 U.S. __ (2013).

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[5] Three of the Voter Registration Organizations agree that the EAC's Executive Director possessed the requisite authority to act on behalf of the EAC to deny the States' requests.

The *ITCA Group* believes that the EAC Executive Director had full authority to grant or deny the States' requests consistent with the EAC's rationale as set forth in the EAC's reply brief.

The *League of Women Voters Group* and *Project Vote* believe that the Executive Director was permitted to reject those requests, as doing so was consistent with the Executive Director's obligation to maintain the Federal Form and the EAC's longstanding rules and practices, including the EAC's 2005 and 2006 decisions denying Arizona's requests to modify the Federal Form. The League and Project Vote further believe that the EAC lacked authority to grant the States' requests because requiring documentary proof is contrary to the NVRA.

The *Valle del Sol Group* maintains that the EAC lacked authority to grant or deny the States' requests for the reasons set forth in their separate brief dated May 27, 2014.

Section 5 of the Voting Rights Act of 1965 requires that certain jurisdictions receive federal approval before implementing changes to election laws, known as "preclearance." *See* 42 U.S.C. § 1973c. Preclearance thus requires that the federal government approve a state's election law *before* the law can be implemented in the state. *Shelby*, 133 S. Ct. at 2624. Here, by contrast, the States' laws are *fully implemented* in both Kansas and Arizona, and those laws remain in effect today. Appellees' Br. at 7-9; *see* Ariz. Rev. Stat. Ann. §16-166(F); Kan. Stat. Ann. § 25-2309(1). The comparison to a preclearance system is thus inapposite for the simple reason that there is nothing to preclear. Whether the States can use—which they do—their own voter registration forms that require applicants to provide documentary proof of citizenship is not at issue in this case. The only issue is whether the States can impose such a requirement upon the Federal Form.

More fundamentally, the States incorrectly characterize the *Shelby* decision as overturning the concept of preclearance. It did not. *Shelby* instead addressed the geographic formula in Section 4 of the Voting Rights Act, 42 U.S.C. § 1973b, by which jurisdictions

were identified for preclearance under Section 5. *Shelby*, 133 S. Ct. at 2630. The States' analogy thus falls flat.

Second, the EAC's decision was fully supported by the administrative record and constitutes a thorough analysis resulting in a reasonable conclusion. In its 46-page decision, the EAC, following the standard prescribed in *ITCA* that the States had to show preclusion of their ability to enforce their voter qualifications, carefully considered all of the evidence presented before it and came to the reasoned conclusion that the States failed to demonstrate that it is necessary to include their documentary proof of citizenship requirements on the Federal Form. *See* Intervenors-Appellants' Br. at 56-66; EAC Reply Br. 17-24. Such a decision can hardly be considered arbitrary and capricious or an abuse of discretion. *See City of Colo. Springs v. Solis*, 589 F.3d 1121, 1131 (10th Cir. 2009). Furthermore, the EAC identified the essential facts considered and provided the grounds for its decision—namely, that the States failed to demonstrate that the information they requested is "necessary" to include on the Federal Form. *See id.* at 1134 ("'[T]he agency's statement of reasons 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.'") (quoting *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002)).[6]

Simply put, none of the arguments that the States offer support their claim that the EAC's decision was incorrect or improper.

CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's order granting in part Plaintiffs' Motion for Judgment and affirm the EAC's decision denying the States' request for alterations to the Federal Form.

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[6] The States' argument that the EAC's decision should be reversed because it does not identify a standard of proof contravenes the APA. *See, e.g.*, *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) ("[C]ourts are not free to impose upon agencies specific procedural requirements that have no basis in the APA. . . . The determination in this case . . . was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA."). The States cite *Mori v. Dep't of Navy*, 731 F. Supp. 2d 43 (D.D.C. 2009) in support of their position, but the standard of proof discussion in *Mori* applies only to a specific statutory scheme governing the Secretary of the Navy's decision to convene a Special Selection Board ("SSB"), and is therefore inapplicable. *See id.* at 45. The States' argument is thus without merit.

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s/ Michael C. Keats

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 4,362 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: July 28, 2014

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Microsoft Forefront Endpoint Protection software and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

Dated: July 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to all counsel of record.

In addition, I certify that on July 30, 2014, I will serve paper copies of the same by overnight mail to the Court and one paper copy to each of the following counsel of record:

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