IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 14-3062, 14-3072

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

MOTION OF THE UNITED STATES ELECTION ASSISTANCE COMMISSION FOR EXPEDITED CONSIDERATION, STAY PENDING APPEAL, AND EMERGENCY MOTION FOR ADMINISTRATIVE STAY PENDING DISPOSITION OF THE MOTION FOR STAY

JOCELYN SAMUELS
Acting Assistant Attorney General

DIANA K. FLYNN
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20544-4403
(202) 307-0714

INTRODUCTION AND SUMMARY

The United States Election Assistance Commission and its Acting Executive Director, Alice Miller (collectively, the Commission), respectfully seek a stay pending appeal of an order of the United States District Court for the District Court of Kansas (Melgren, J.) that enjoins the Commission to make immediate changes to the Federal Form, a uniform national mail-in voter registration form. The Commission also seeks an emergency administrative stay of the order below until this Court disposes of the motion for a stay pending appeal. Finally, the Commission asks this Court to consider this important appeal on an expedited basis, preferably in a special session this summer. This relief will maintain the status quo until this Court can consider this appeal, which is likely to succeed.

This litigation is the latest installment of long-running efforts by a few States to require those registering to vote in federal elections by mail to prove their citizenship with documentation not required by the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, and its implementing regulations. Plaintiffs are two States (and their election officials) that have passed laws requiring documentary proof of citizenship in order to register to vote in federal as well as state elections. These laws conflict with the Federal Form, which was created by the NVRA in order to make registering to vote in federal elections by mail simpler. The Commission is tasked with ensuring that the Federal Form asks

for only information and documentation that state election officials need to enforce their voter eligibility requirements. The Commission's longstanding position is that documentary proof of citizenship is unnecessary to enforce the citizenship requirement that every State shares. Last year, the Supreme Court held that the NVRA preempts state laws just like those at issue here, because such laws purport to bar state officials from accepting mail-in voter registrations through the Federal Form without the inclusion of additional information that the Commission has chosen not to require for Federal Form registrations. See *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

Immediately following Arizona's loss in the Supreme Court, the States asked the Commission to modify the Federal Form to include state-specific instructions – applying only to Arizona and Kansas – requiring residents of those States alone to provide documentary proof of citizenship. The Commission rejected the States' requests, reaffirming its longstanding position that such a requirement is not necessary to enforce the citizenship eligibility requirement and will frustrate accomplishment of the NVRA's goal of streamlining registration procedures. See Exhibit A, Memorandum of Decision. The States brought this challenge to the Commission's action under the Administrative Procedure Act.

In an unprecedented decision, the district court ruled for the States, finding that the NVRA requires the Commission to rubber-stamp any request by any State

to add any requirement to the Federal Form. The district court found that the Commission has no authority to exercise any independent judgment regarding such state requests, but rather may act only in "ministerial" fashion at the States' behest. Exhibit B, District Court Op. 27 ("Dist. Ct. Op."). It instructed the Commission to modify the Federal Form in accordance with the States' request immediately. Late in the day on May 7, 2014, the district court denied timely-filed motions for a stay pending appeal. Exhibit C, Memorandum and Order ("Stay Order").

The district court's decision on the merits is likely to be reversed by this Court, for reasons that are laid out in summary fashion in this motion and will be described more fully in the merits brief that the Commission currently is scheduled to file by May 27. Moreover, serious confusion and disruption to the voter registration process will result if the Commission is required to modify the Federal Form immediately, and post the modified version on its Website, only to have the document revert back to its current form when this Court reverses the district court's judgment. This Court should protect the status quo and the public interest in having this important matter resolved quickly by (1) granting an administrative stay that maintains the status quo for a few days pending its fuller consideration of the Commission's motion for a stay; (2) staying the decision below pending appeal; and (3) expediting consideration of this appeal.

BACKGROUND

1. The NVRA "requires States to provide simplified systems for registering to vote in *federal elections*." *Young* v. *Fordice*, 520 U.S. 273, 275 (1997). Most relevant to this case, the NVRA provides that the federal government "shall develop a mail voter registration application form for elections for Federal office." 42 U.S.C. 1973gg-7(a)(2). It must do so "in consultation with the chief election officers of the States." *Ibid.* States, in turn, must "accept and use" this form, known as the Federal Form, in registering voters for federal elections by mail. 42 U.S.C. 1973gg-4(a)(1).

As originally enacted in 1993, the NVRA required the Federal Election Commission to prescribe the Federal Form. The Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, transferred this function to the Election Assistance Commission. See 42 U.S.C. 15532. The Federal Form governs registrations by mail only for federal elections, not state elections.

The NVRA limits the information that the Federal Form may require of applicants. The form "may require only such identifying information (including the signature of the applicant) and other information * * * as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. 1973gg-7(b)(1). In order to assist in that assessment, the form includes (1) "a

statement that * * * specifies each eligibility requirement (including citizenship)"; (2) "an attestation that the applicant meets each such requirement"; and (3) "the signature of the applicant, under penalty of perjury." 42 U.S.C. 1973gg-7(b)(2). The form must include two specific questions: "Are you a citizen of the United States of America?" and "Will you be 18 years of age on or before election day?" 42 U.S.C. 15483(b)(4)(A).

Congress considered, but did not include, language allowing States to require "presentation of documentation relating to the citizenship of an applicant for voter registration." See H.R. Rep. No. 66, 103d Cong., 1st Sess. 23 (1993). The conference committee determined that this provision was "not necessary or consistent with the purposes of the Act" and could lead to state requirements that "seriously interfere with[] the mail registration program." *Ibid.*

The Federal Election Commission developed, and the Election Assistance Commission maintains, a Federal Form that meets the NVRA's requirements. See 11 C.F.R. 9428.3-9428.6. This form specifies "universal eligibility requirements," including U.S. citizenship. 11 C.F.R. 9428.4(b)(1). It also requires "an attestation * * * that the applicant * * * meets each of his or her state's specific eligibility requirements." 11 C.F.R. 9428.4(b)(2). An applicant must sign this attestation, under penalty of perjury; the form describes "the penalties provided by law for submitting a false voter registration application." 11 C.F.R. 9428.4(b)(3)-(4).

The Federal Election Commission rejected certain other elements as not "necessary." See Federal Election Commission, *Final Rules: National Voter Registration Act of 1993*, 59 Fed. Reg. 32,311, 32,316 (June 23, 1994). Among the rejected items were (1) information regarding whether the applicant was a naturalized citizen and (2) the applicant's place of birth. *Ibid.*

2. Arizona, Kansas, and a few other States nonetheless subsequently enacted statutes that purport to require documentary proof of citizenship in order to register to vote in both federal and state elections. In 2005, Arizona asked the Commission to add its proposed citizenship documentation requirement to the state-specific instructions for Arizona on the Federal Form; the Commission denied its request. Arizona expressed its intent to implement its law anyway. After several years of litigation, the case reached the Supreme Court, which held that the States' obligation to "accept and use" the Federal Form, 42 U.S.C. 1973gg-4(a)(1), preempted Arizona's law requiring the State to reject applications that complied with the form's instructions. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) ("*Inter Tribal Council*"). The Court observed that, while the State could not ignore the EAC's determination, it could renew its request to the agency and challenge a second denial in court under the Administrative Procedure Act. *Id.* at 2260. In such an APA action, the State could

attempt to establish "that a mere oath will not suffice to effectuate its citizenship requirement." *Ibid.*

3. Arizona and Kansas again asked the Commission to revise the Federal Form to conform to their state laws. The Commission initially deferred ruling on their request because it currently lacks a quorum of Commissioners. Arizona and Kansas then filed this suit against the Commission and its Acting Executive Director. Four groups of individuals and organizations intervened as defendants. The district court directed the Commission to issue a final order. After a notice and comment period, the Commission denied the States' request. See Exhibit A, Memorandum of Decision.

The Commission found that it could approve the States' request only after itself determining, "based on the evidence in the record," that the proposed documentation of citizenship requirements are "necessary" for state officials to enforce their citizenship requirement. Memorandum of Decision at 27. It noted that the existing form "already provides safeguards to prevent noncitizens from registering to vote," *id.* at 28, by stating that only citizens may vote and that the attestation of citizenship is under penalty of perjury. The Commission found it unlikely that the typical non-citizen would risk a fraud conviction and likely deportation to fraudulently register, considering that "the benefit to a non-citizen of fraudulently registering to vote is distinctly less tangible" that these risks. *Id.* at

30. It further found scant evidence that non-citizens nonetheless fraudulently register to vote in meaningful numbers. Even granting the States the benefit of the doubt with respect to disputed evidence, the Commission concluded that, at most, the States had pointed to 196 non-citizens registered to vote in Arizona and 21 who had registered or attempted to register in Kansas, an "exceedingly small" percentage of the registered voters in both States, *id.* at 33-34. Moreover, there was no evidence that any deficiency in the Federal Form was responsible; for example, 3 of the 21 registrations Kansas pointed to took place through applications for driver's licenses, when applicants must submit the same additional proof of citizenship that the States seek to add to the Federal Form. *Id.* at 35

Meanwhile, the Commission found that the States' proposal would deter a considerably greater number of eligible voters from registering. See Memorandum of Decision at 41. The Commission also found evidence that requiring additional documentation significantly impaired the effectiveness of organized voter registration programs, "undermining one of the statutory purposes of the Federal Form." *Id.* at 42-43 (citing 42 U.S.C. 1973gg-4(b)).

4. The district court, while doubting the Commission's authority to issue the decision without sitting Commissioners, declined to rule on the question. See Dist. Ct. Op. 7. It also declined to rule on the States' argument that Congress lacked the power to preempt state laws requiring proof of citizenship, *id.* at 12. However, it

found the question close enough to construe the NVRA and its implementing regulations so as to avoid the question, *id.* at 12-14, in the process denying the agency any deference to which its interpretation of the statute and its own regulations might otherwise be entitled, *id.* at 14-16. The district court then overturned the Commission's action, finding that the NVRA and its regulations do not empower the Commission to determine independently whether a State needs to require documentation of citizenship to enforce its eligibility requirement.

Acknowledging that "the federal form 'may require only such' information 'as is necessary to enable the appropriate State election official to assess the eligibility of the applicant,'" the court concluded that it was sufficient that the *state legislatures* had deemed proof of citizenship "necessary to enable Arizona and Kansas election officials to assess the eligibility of applicants under their states' laws." Dist. Ct. Op. 25 (quoting 42 U.S.C. 1973gg-7(b)(1)). The Commission, by contrast, was given only the "nondiscretionary duty[] to perform the ministerial function of updating the instructions to reflect each state's laws." *Id.* at 27.

5. The Commission and the intervenors both appealed to this Court. Their briefs as appellants currently are due May 27. The Commission and the intervenors also sought a stay, which the district court denied. The district court conceded that its decision would cause "some harm to the EAC and voter registration drives" but concluded that "any such harm would prove to be

temporary and reversible if this Court's order is overturned on appeal." Stay Order, Ex. C, at 5. It found irrelevant evidence that proof of citizenship requirements deter a substantial number of eligible people from registering to vote, reasoning that such evidence does not prove that those people are "unable to provide such proof," only that they "have not," and so they are not "denied the right to vote as a result of the states' laws." *Id.* at 7. By contrast, the district court found, a stay would harm the States and the public interest because the "[p]ublic interest is best expressed through laws enacted by the public's elected representatives." *Ibid.*

ARGUMENT

In considering a stay motion, this Court balances: (1) the likelihood of success on the merits; (2) the risk of irreparable harm in the absence of a stay; (3) the risk of substantial injury if the stay is granted; and (4) the risk of harm to the public interest. See, *e.g.*, *O Centro Espirita Beneficiente Uniao De Vegetal* v. *Ashcroft*, 314 F.3d 463, 465-466 (10th Cir. 2002). Here, the Commission has a strong likelihood of success on the merits. Moreover, a stay would preserve the status quo and prevent serious confusion regarding voter registration procedures in Kansas and Arizona.

I

THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS

1. The district court contorted the NVRA's plain text and ignored its purposes in concluding that the Commission must rubberstamp any State's assertion of the necessity of requiring additional documentation on the Federal Form. The Federal Form "may require only such * * * information * * * as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. 1973gg-7(b)(1). It is the Commission's responsibility, not a State's, to determine whether the information in question is "necessary" for a state official to assess an applicant's eligibility or otherwise administer the election process. Once again, this authority is only for mail registrations for federal elections; with respect to state and local elections, a State has greater latitude to impose additional requirements for mail registrations.

a. The NVRA directs *the Commission* to create the Federal Form "in consultation with the chief election officers of the States." 42 U.S.C. § 1973gg-7(a). Thus, the Commission, while charged with "consult[ing]" with the States, takes the primary role in drafting the form and retains ultimate authority regarding the content of the form. Other provisions of the NVRA are to the same effect. See, *e.g.*, 42 U.S.C. 1973gg-4(a)(1) ("Each State shall accept and use the mail

voter registration application form *prescribed by the * * * Commission*") (emphasis added). Accordingly, in *Inter Tribal Council*, the Supreme Court stated, in no uncertain terms: "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). Similarly, the Ninth Circuit in the same case found that, "[w]hile states may suggest changes to the Federal Form, the EAC has the ultimate authority to adopt or reject those suggestions." *Gonzalez* v. *Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc).

The district court misread the NVRA's implementing regulations, which require a state election official to "notify the Commission, in writing, within 30 days of any change to the state's *voter eligibility requirements* or other information reported under this section." 11 C.F.R. 9428.6(c) (emphasis added). The district court construed this regulation to provide that a State has full control over "registration requirements" and need only "notify" the Commission of any changes, not request approval. See Dist. Ct. Op. 23-24. But the regulation's text maintains the distinction between substantive eligibility requirements for voting – over which States retain control – and procedural requirements to prove such eligibility, which the Commission must approve.[1] And while the text is clear, the

[1] For example, if a State decides to make felons ineligible to vote, it must notify the Commission of this change, and the Commission will add this eligibility

(continued…)

Commission's reasonable reading of its own regulation is entitled to deference. See *Utah Envtl. Cong.* v. *Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007).

Nor is the district court's cramped reading of the Commission's authority consistent with the NVRA's purposes. The NVRA is meant to combat registration requirements that unnecessarily discourage voter registration for federal elections, particularly by certain groups, 42 U.S.C. 1973gg(a)(3); "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); and to promote sufficient uniformity in registration proceedings to permit interstate registration drives. See H.R. Rep. No. 9, 103d Cong., 1st Sess. 10 (1993). To further these ends, Congress provided that only information "necessary" to the enforcement of eligibility requirements could be required on the Federal Form, and it charged an expert agency – first the Federal Election Commission and now the Election Assistance Commission – with implementing that standard. See 42 U.S.C. 1973gg(b)(2).

These purposes would be frustrated if the Commission had to automatically approve every state request for additional information from those registering to vote by mail. As *Inter Tribal Council* noted, if a State could ask applicants for

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(…continued)
requirement to the state-specific voter attestation. If the State, however, also wishes to require voters to prove they have no felony convictions, it would have to seek Commission approval and make a showing that such proof requirements are necessary.

information not listed on the Federal Form, "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.'" 133 S. Ct. at 2256 (quoting 42 U.S.C. 1973gg(b)) (brackets in original). Similar reasoning applies here.

b. Because the district court's construction is not a reasonable reading of the NVRA, it would be unavailable even if the alternative raised serious constitutional questions. "[T]he canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress.'" *Miller* v. *French*, 530 U.S. 527, 541 (2000) (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). In any event, contrary to the district court's conclusion, properly construing the NVRA as vesting authority in the Commission to make this determination would raise no significant constitutional questions.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 4, cl. 1. Thus, the Elections Clause, while leaving to the States the function of determining substantive eligibility requirements for voting, *Inter Tribal Council*, 133 S. Ct. at 2258, "empowers Congress to pre-empt state

regulations governing the 'Times, Places and Manner' of holding congressional elections," *id.* at 2253. It thereby "gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Foster* v. *Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)). This authority covers regulation of procedures for voter registration. See *Inter Tribal Council*, 133 S. Ct. at 2253; *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001).

To be sure, *Inter Tribal Council* stated that "the power to establish voting requirements is of little value without the power to enforce those requirements," 133 S. Ct. at 2258, and so it "would raise serious constitutional doubts if a federal statute precluded a State from obtaining information necessary to enforce its voter qualifications." *Id.* at 2258-2259. But it also found that no such concerns are raised so long as "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." *Id.* at 2259. In such a suit, a State "would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement." *Id.* at 2260. Thus, *Inter Tribal Council* envisioned that the State would have to prove – not just assert – the necessity of its documentation

requirements, and it found that "no constitutional doubt is raised." *Id.* at 2259. The process the Commission followed here was precisely that envisioned by *Inter Tribal Council* as sufficient to avoid constitutional concerns.

II

THE OTHER STAY FACTORS COUNSEL IN FAVOR OF STAYING THE DISTRICT COURT'S ORDER TO PRESERVE THE STATUS QUO

For the above reasons, this appeal is likely to succeed, and the other stay factors counsel in favor of a stay. The purpose of a stay is "to preserve the status quo pending appellate determination." *McClendon* v. *City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). The status quo is that the States have used the existing Federal Form for two decades, and they have made no showing that they have suffered or will suffer any significant irreparable harm as a result.[2] By contrast, permitting the States to require additional documentation during this appeal will cause significant damage to voter registration even if this Court ultimately reverses. Staying the district court's order will simply preserve the status quo pending appellate resolution. Cf. *Prairie Band of Potawatomi Indians* v. *Pierce*, 253 F.3d 1234, 1239 (10th Cir. 2001) (noting that court had stayed decision below because "[i]t is appropriate to preserve the status quo as it existed

[2] Indeed, both States' registration laws specifically exempt all previously registered voters from the additional proof-of-citizenship requirements imposed by the laws at issue in this appeal. See Memorandum of Decision at 35-36.

prior to the district court's entry of the injunction pending determination of the issues on appeal") (citation omitted).

If not stayed during this appeal, the decision will cause considerable uncertainty for voters in Arizona and Kansas in the run-up to the primaries in those States in August and the general election in November; both elections include federal offices. The decision is likely to discourage some voters from registering for federal elections, particularly those who do not have ready access to a copy of their birth certificate or other qualifying documentation, and it will work a particular hardship on voter registration drives. The harm to voter registration this election cycle cannot be remedied even if this Court reverses.

The district court missed the point in finding that the States' requirements can only cause harm if citizens are literally denied the right to vote because they are unable to produce documentation of citizenship. The animating principle of the NVRA as a whole, and the Federal Form in particular, is that registering to vote should be simplified. As the Commission found in its ruling – and as the district court has not disputed – the laws at issue here put unnecessary obstacles in the way of registration, frustrating the accomplishment of the NVRA's purposes regardless of whether the laws make it literally impossible for citizens to register.

Moreover, the district court's decision, if not stayed, will harm the Commission and the public more broadly during the pendency of this appeal by

impeding the Commission's ability to carry out its statutory mandate of regulating the registration process for federal elections. When the decision below eventually is overturned, and the status quo Federal Form reinstated, the interim confusion will cause irreparable harm. Voters and organizations that help register voters download the Federal Form every day from the Commission's website. In the likely event that this Court reverses, and the Federal Form reverts to its current form, it will be exceedingly difficult to prevent incorrect versions of the Federal Form – downloaded during the pendency of this appeal – from being used, and relied upon, in this election cycle.

By contrast, staying the decision works no irreparable harm on the States. Such a stay will simply maintain the status quo under which they have carried out their elections for two decades. The States' submissions to the Commission indicate that non-citizens have registered to vote in minuscule numbers, at the most, and that any improper registrations can be ferreted out by other means. And while the district court pointed to the public interest in permitting the enforcement of duly enacted laws, see Stay Order 7, such concerns cut both ways, as the NVRA also is a law duly enacted by elected representatives. There is no reason for the public interest to favor immediate implementation of the State laws over proper enforcement of the NVRA.

In any event, regardless of whether this Court stays the order below, it is clear that the public interest favors speedy resolution of this dispute. Accordingly, the Commission asks for expedited consideration of this appeal such that, if possible, this case can be argued over the summer and resolved by this fall. While the Commission is not required to file its merits brief until May 27, it expects to file as soon as May 21, and would not object if this Court set an expedited briefing schedule accordingly.

WHEREFORE, the United States Election Assistance Commission respectfully requests that this Court (1) issue an administrative stay of the decision below until it decides the Commission's motion for a stay pending appeal; (2) stay the decision below pending appeal; and (3) set this appeal for expedited consideration.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Sasha Samberg-Champion
DIANA K. FLYNN
SASHA SAMBERG-CHAMPION
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-0714

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2014, I electronically filed the foregoing 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 parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney