EMERGENCY RELIEF REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, *et al.* Appellees, vs. INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*, PROJECT VOTE, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*, VALLE DEL SOL, *et al*, Intervenor-Appellants.	)	CASE NOS. 14-3062, 14-3072
KRIS W. KOBACH, *et al.*, Appellees, vs. ALICE MILLER, *et al.*, Appellants.	)	

INTERVENOR-APPELLANTS' MOTION FOR (1) AN EMERGENCY STAY, (2) A STAY PENDING APPEAL AND, (3) IN THE ALTERNATIVE, FOR AN EXPEDITED HEARING AND DECISION

I. INTRODUCTION

In light of the impending federal mid-term elections and to preserve the rights of citizens in Arizona and Kansas ("the States") to register to vote, this Court should issue an emergency stay of the district court's March 19, 2014 Order ("Order"), and then grant a full stay pending appeal. Under the simplified system for voter registration for federal elections established by the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, prospective voters have been able since 1994 to register by completing the National Mail Voter Registration Form ("Federal Form")—a simple postcard—prescribed by the U.S. Election Assistance Commission ("EAC"). The Order compels the EAC to add an unprecedented requirement to the Federal Form that prospective voters submit additional documentary evidence establishing their eligibility to vote. In so doing, the district court disregarded critical and binding precedent (most notably the Supreme Court's decision last term in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) ("*ITCA*")), ignored the deferential standards for review of administrative action, and upset a *status quo* that has governed voter registration in federal elections for 20 years.

Following the Supreme Court's June 2013 decision in *ITCA*, the States asked the EAC to modify the Federal Form—which already requires an affirmation of U.S. citizenship—to add new state-specific instructions requiring applicants to

provide documentary proof of citizenship. The States currently are enforcing this proof requirement regarding their own registration forms and have used it to deny (or place in indefinite "suspension") thousands of registration applications, thus disenfranchising thousands of United States citizens. On January 17, 2014, after considering thousands of pages of submissions, the EAC issued a 46-page decision rejecting these requests and reaching the factual conclusion, on the record presented to the agency, that "additional proof of citizenship is not necessary . . . to enable the appropriate State election official to assess the eligibility of the applicant." Docket No. 129-1 at 45.[1] The EAC also found that the Federal Form includes ample safeguards against noncitizens registering to vote, that the States have numerous other methods to assure that noncitizens do not vote, and that the States failed to establish that the Federal Form precludes them from enforcing their voter qualifications. *Id.* at 35–41. However, upon the States' request for review, the district court did not acknowledge these findings and ordered the EAC to add the States' requested language "immediately." Order at 28.

All four balancing factors weigh heavily in favor of a stay. With regard to the merits, the district court's ruling runs contrary to the Supreme Court's decision last term in *ITCA*, and thus there is a strong likelihood that Intervenor-Appellants will succeed on appeal. *ITCA* dealt with essentially the same issue presented here:

[1] All citations to docket numbers are to the district court docket.

whether Arizona (a Plaintiff-Appellee here) may compel Federal Form applicants to comply with its state law documentary proof-of-citizenship provision. The Supreme Court ruled against Arizona, stating:

> [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. Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form. 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.' §1973gg(b)".

ITCA, 133 S. Ct. at 2256. Moreover, the Supreme Court held that the NVRA grants the EAC, not the States, the authority to determine the contents of the Form, and that the NVRA "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." *Id.* at 2260. Yet, in this case, the district court concluded that the EAC must defer to the States' request to include documentary proof-of-citizenship instructions on the Form. Furthermore, the district court violated the most basic tenets of administrative law by failing to defer to the EAC's legal interpretations or factual findings; indeed, it proceeded as if the EAC had never made any factual findings whatsoever.

The factors relating to irreparable harm and the public interest likewise strongly favor a stay:

- Both prospective registrants and community groups that conduct registration drives (including Intervenor–Appellants) will suffer irreparable harm unless

a stay is granted, because prospective registrants will be disenfranchised by the documentary proof of citizenship requirements and unable to vote in the upcoming federal elections.[2] Already, the States have denied or indefinitely "suspended" thousands of registration applications submitted using the States' own registration forms because citizenship proof was not submitted.

- The States, conversely, will not be harmed by the issuance of a stay because—as the EAC found—they have alternative methods of enforcing their citizenship qualifications. Docket No. 129-1 at 35-41.

- Granting a stay is in the public interest because it will avoid the confusion inherent in promulgating multiple versions of the Federal Form, preserve the integrity of the 2014 elections, and prevent citizens from being improperly barred from voting. Moreover, requiring that the Federal Form include each State's documentary proof requirements would lead to the Federal Form "ceas[ing] to perform any meaningful function," *ITCA*, 133 S. Ct. at 2256, a result that is plainly contrary to the public interest.

The district court's order overturns the reasoned judgment of a federal agency and risks confusion and disenfranchisement on the eve of federal elections. A stay is essential to preserve the status quo until this Court can fully evaluate the arguments and resolve the issue. In the alternative, briefing and oral argument should be expedited to allow for a decision on the merits at the earliest possible date prior to the close of registration for the November federal elections.

II. JURISDICTION, RIPENESS, AND FRAP 8 CONSIDERATIONS

The district court had jurisdiction under 28 U.S.C. § 1331 as this case arises under the Constitution's Elections Clause, the NVRA, and the APA, 5 U.S.C. §

[2] The registration deadlines for federal elections this year are as follows: (1) Arizona, July 28 (primary) and October 6 (general); and (2) Kansas, July 15 (primary) and October 14 (general). The Kansas primary is on August 5, and Arizona is on August 26.

550 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291 since it is an appeal of a final decision by the U.S. District Court for the District of Kansas. The district court denied a stay on May 7, 2014 stating *inter alia*:

> [T]he Court does not dispute that some harm to . . . voter registration drives could occur . . . [but] any such harm would prove to be temporary and reversible. . . [and] does not outweigh the potential harm to the states . . . Public interest is best expressed through laws enacted by the public's elected representatives. [Arizona and Kansas] have decided that the public interest of their residents is in preventing voter fraud and protecting public confidence in the integrity of their elections . . . [T]he inability to register voters is only theoretical . . . . [T]he Court is not convinced that the EAC and the intervenors have demonstrated a strong likelihood of success on appeal.

Docket No. 195, at 5-8.

III. LEGAL STANDARD

The purpose of a stay is to preserve the status quo pending an appeal. *See McClendon v. City of Albuquerque*, 79 F.3d at 1014, 1020 (10th Cir. 1996). When considering a stay pending appeal, the Court must balance the following factors: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest." *Nken v. Holder*, 556 U.S. 418, 434 (2009); 10th Cir. R. 8.1. Generally, the moving party must demonstrate a "substantial likelihood of success on the merits." *FTC v. Mainstream Mktg. Servs.*, 345 F.3d 850, 853 (10th Cir. 2003). However, "where the moving party has established that the three 'harm' factors tip decidedly in its

favor, the 'probability of success' requirement is somewhat relaxed" and "is demonstrated when the [moving party] has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* at 852.

IV. ARGUMENT

A. INTERVENOR-APPELLANTS ARE LIKELY TO SUCCEED ON APPEAL

Intervenor-Appellants are likely to succeed on appeal for at least two independent reasons. First, the district court fundamentally misconstrued the Supreme Court's decision in *ITCA* and misinterpreted the NVRA. Second, the district court failed to give any deference to the EAC's factual findings or appropriate deference to its interpretations of the NVRA.

1. The District Court Misconstrued *ITCA*

The district court's March 19, 2014 decision cannot be reconciled with the Supreme Court's decision in *ITCA*. In particular, the Supreme Court held that the NVRA preempts States "from requiring a Federal Form applicant to submit information beyond that required by the form itself." *ITCA*, 133 S. Ct. at 2260. More specifically, because the Federal Form prescribed by the EAC did not include Arizona's proof-of-citizenship provision, the Court ruled that Arizona was preempted from requiring Federal Form applicants to submit any such additional proof of citizenship. The Court observed that Arizona had the option to try to

demonstrate to the EAC (again) that the agency should amend the Federal Form to include a citizenship documentation requirement. However, the Court emphasized that: (1) the Form can only contain "'information . . . *necessary* to enable . . . State election official[s] to assess the eligibility'" of an applicant, citing 42 U.S.C. § 1973gg-7(b)(1); (2) the EAC could reject Arizona's request; and (3) on judicial review it was Arizona's burden, under the APA, "to *establish* 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 Arizona's concrete evidence requirement on the Federal Form." *Id.* at 2259–60 (emphasis added).

The district court, however, turned the Supreme Court's ruling on its head, erroneously concluding that: (1) the requested state-specific instructions are "necessary" because the "the states' determination that a mere oath is not sufficient is all the states are required to establish," Order at 27; (2) "Congress has not preempted state laws requiring proof of citizenship through the [NVRA]," *id.* at 1; and (3) the EAC's statutory interpretations were not entitled to "any deference." *Id.* at 7, 16. The court's misreading of *ITCA* is evident in three critical respects.

First, the Supreme Court repeatedly recognized that the NVRA gives the EAC—*not* the States—the authority and discretion to determine the contents of the Federal Form, including whether or not the Form includes a proof-of-citizenship requirement. Accordingly, the district court's ruling that States have plenary

power to compel changes to the Federal Form is incorrect. *Compare* Order at 24, 27 (stating that "the Arizona and Kansas legislatures have decided that a mere oath is not sufficient to effectuate their citizenship requirements" and "the EAC must list those requirements" that states request), *with ITCA*, 133 S. Ct. at 2251–52, 2259 (stating that the EAC "is invested with rulemaking authority to prescribe the contents of that Federal Form" and referring to the EAC's "validly conferred discretionary executive authority"). Through the NVRA, Congress delegated to the EAC the power to determine what is necessary, including with respect to citizenship verification; indeed, the first step in the Supreme Court's "road map"—that Arizona needed to renew its request before the EAC, *ITCA*, 133 S. Ct. at 2260—would have otherwise been a pointless exercise. Accordingly, the district court's conclusion that the EAC has a "nondiscretionary duty to include the state's concrete evidence requirement" was wrong. *See* Order at 27.

Second, the district court's invocation of the rule of constitutional avoidance was improper because *ITCA* fully resolved the constitutional concern that the district court perceived. *Compare* Order at 7 (questioning whether "Congress ha[s] the constitutional authority to preempt state voter registration requirements"), *with ITCA*, 133 S. Ct. at 2253, 2259 (stating that the Constitution's Elections Clause grants Congress the authority to create "'regulations relating to registration,' an authority that necessarily encompasses 'the power to alter [state law] registration

laws or supplant them all together,'" and that "no constitutional doubt is raised" by Congress's grant of authority to the EAC to determine the contents of the Federal Form, subject to APA review).

Third, the district court erred in concluding that the NVRA must yield to state-law proof-of-citizenship provisions. *See* Order at 27. The contents of the Federal Form, which includes provisions requiring applicants to establish their citizenship, are a matter of *federal law*, prescribed by the EAC under the NVRA, which, in turn, was enacted by Congress pursuant to its "broad" Elections Clause authority "'to provide a complete code for congressional elections,' including . . . regulations relating to 'registration.'" *ITCA*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). In the NVRA, Congress set out the Federal Form's contents and "empower[ed] the EAC to create the Federal Form … [and] prescribe its contents." *ITCA*, 133 S. Ct. at 2255. By ruling that Arizona and Kansas can graft their individual requirements onto the Federal Form, the district court frustrated the intent of the NVRA and contravened the Supreme Court's holding—instead of a framework where States cannot modify the Federal Form absent a showing of necessity, the court below created a framework where States have the ability to control the content, provided a State merely asserts that the

content is related to the State's qualifications for voting. This is fundamentally incorrect under the NVRA and *ITCA*.[3]

2. The District Court Failed to Defer to the EAC

As authorized by the NVRA, the EAC considered the requested changes to the Federal Form, evaluated the administrative record, made factual findings based on that record, and concluded that the proposed changes were not "necessary" within the meaning of the NVRA. Rather than evaluate those findings under the deferential standards mandated by the APA, 5 U.S.C. § 706, the district court ignored the EAC's factual findings and overrode the agency's legal conclusions. This was reversible error for two distinct reasons.

First, under the APA, an agency's factual findings are entitled to substantial deference by a reviewing court. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) ("The standard of review is a highly deferential one . . . and requires affirmance if

[3] *See ITCA*, 133 S. Ct. at 2255-57 ("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 . . . [and] the Election Clause requires that Arizona's rule give way."). The court also failed to consider that, in both the NVRA and HAVA, Congress expressly specified the information about citizenship that must be included in the Federal Form. In addition to the necessity provision discussed *supra* at 6-7, the NVRA provides the Form "shall include a statement that (a) specifies each eligibility requirement (including citizenship); (b) contains an attestation that the applicant meet each such requirement; and (c) requires the signature of the applicant under penalty of perjury . . ." 42 U.S.C. § 1973gg-7(b)(2); *see also* 42 U.S.C. § 15483(b)(4)(A)(i) (HAVA citizenship verification requirements). State law documentary proof-of-citizenship requirements that conflict with these provisions obstruct fulfillment of the NVRA's objective of "guarantee[ing] that a simple means of registering to vote in federal elections will be available." *ITCA*, 133 S. Ct. at 2255.

a rational basis exists for the agency's decision"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) ("Although inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one . . . . The court is not empowered to substitute its judgment for that of the agency.").

Here, the EAC made specific factual findings that:

- The State's requested relief "would require applicants to submit more information than is necessary to enable election officials to assess eligibility," EAC Decision, Docket No. 129-1 at 28–41;
- "The Federal Form already provides safeguards to prevent noncitizens from registering to vote," *id.* at 28–29;
- "The evidence in the record is insufficient to support the States' contention that a sworn statement is 'virtually meaningless' and not an effective means of preventing voter registration fraud," *id.* at 31;
- "The evidence [submitted by the States] fails to establish that the registration of noncitizens is a significant problem in either state, sufficient to show that the States are, by virtue of the Federal Form, currently precluded from assessing the eligibility of Federal Form applicants," *id.* at 33;
- "States have a myriad of means available to enforce their citizenship requirements without requiring additional information," *id.* at 36-40;
- " States are not 'precluded . . . from obtaining the information necessary to enforce their voter qualifications,' and that the required oaths and attestations contained on the Federal Form are sufficient to enable the States to effectuate their citizenship requirements," *id.* at 40; and
- Changing the Federal Form "would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA," and "could discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form," *id.* at 42–43.

Rather than deferring to these findings, the district court ignored them.

Second, the district court failed to give appropriate deference to the EAC's interpretation of the NVRA and of its own regulations, in direct contravention of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the court held that "the EAC decision is not entitled to *Chevron* deference in this case" because "the canon of constitutional avoidance trumps *Chevron* deference." Order at 14-15. This is incorrect, and (as discussed above) disregards the ruling in *ITCA* dismissing the very constitutional concern that the district court invoked in applying the constitutional avoidance doctrine. There was thus no barrier to application of the principles of administrative law set forth in *Chevron*. *See Chevron*, 467 U.S. at 844 (a court's preference for a different reading does not justify "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013) ("*Chevron* applies to cases in which an agency adopts a construction of a . . . statute it administers.").

B. THE THREE "HARM" FACTORS TIP DECIDEDLY IN INTERVENOR–APPELLANTS' FAVOR

1. Intervenor-Appellants Would Suffer Irreparable Harm Should a Stay Not Issue

Immediate enforcement of the Order will destroy the long-standing status quo and interfere with Intervenor-Appellants' mission to help marginalized

communities in the voter registration process, and will thereby cause irreparable harm. In addition to funding and managing registration drives, several of the Intervenor-Appellants provide training and technical assistance to groups conducting drives, while others are membership organizations that represent prospective voters.

Changing the Federal Form's requirements during the pendency of the appeal will be particularly damaging because registration is now ongoing for federal elections that will take place mere months from now in both Arizona and Kansas. Enforcement of the Order will deprive Intervenor-Appellants and other voter registration organizations of the ability to help register eligible citizens, including those who lack the States' prescribed documents. The revisions to the Federal Form mandated by the Order will make it difficult or impossible for Intervenor-Appellants to conduct registration drives, and, even when drives are possible, they will have to expend significantly more effort on less effective ways of helping citizens register. As the EAC found, changing the Federal Form "could discourage the conduct of organized voter registration programs, undermining one of the statutory purposes of the Federal Form." EAC Mem. of Decision, Docket No. 129-1, at 42–43. These burdens will fall heavily on members of communities

that are already underrepresented at the polls—such as minorities and the poor—the very communities Intervenor-Appellants target with their registration drives.[4]

The district court dismissed these concerns as "temporary and reversible." Docket No. 195 at 4. In fact, Arizona's and Kansas' laws have already impeded several of the Intervenor-Appellants in ways that cannot be undone:

- Intervenor-Appellant Project Vote is working with organizations in Arizona to provide training in assisting applicants to register to vote. Questions regarding implementation of the Order and the uncertainty of its future are already complicating training efforts and could lead to a considerable waste of efforts and resources. *See* EAC001809, 1825-26, Docket No. 132-17.

- Intervenor-Appellant League of Women Voters' activities in both Kansas and Arizona have been constrained by the States' documentary requirements, and the organization has helped fewer voters register because of the state form's requirements. EAC000714, 737-38, Docket No. 132-5.

- Under the States' laws, registration organizations are often unable to help people complete voter registrations because it is not logistically feasible for its volunteers to copy and handle the necessary documentation, even for citizens who have it. *See* EAC Decision, Docket No. 129-1 at 42–43.

- In response to the States' laws, the League of Women Voters has stopped conducting voter registration drives in certain counties in Kansas. EAC000739, Docket No. 132-5.

[4] *See* EAC001395, Docket No. 132-12 (Expert Report of Dr. Lanier showing that Arizona's initial implementation of its documentary proof requirement disproportionately resulted in rejecting Latino applicants and applicants, who came from areas of Arizona where the population was poorer and less educated); EAC001176–78, Docket No. 132-9 (Declaration of Lydia Camarillo noting that the documentary proof requirement will have a disparate impact on low-income and Latino registrants); EAC001185, Docket No. 132-9 (Declaration of Irene Caudillo noting that the documentary proof requirement will create a substantial barrier for low-income, working class Latinos).

A cancelled voter registration drive is not a harm which can be "undone"; it is an irreparable harm. When an opportunity to interact with and register a voter is lost, that chance is lost forever.[5] Some voters would not register at all but for the opportunity to do so at drives. Both Kansas and Arizona have registration deadlines for federal primaries in the next few weeks, and efforts to conduct registration activities are already in process.

The EAC also found that granting the States' requests to change the Federal Form "would likely hinder eligible citizens from registering to vote in federal elections, undermining a core purpose of the NVRA." EAC Mem. of Decision, Docket No. 129-1 at 42–43. The district court dismissed these concerns as "theoretical," Docket No. 195 at 4, but the EAC's conclusion is amply supported by the States' experience in implementing their documentation requirements. Tens of thousands of U.S. citizens have already been disenfranchised by the States, who have rejected their applications or placed their applications in "suspense" (meaning that the individuals are not entitled to vote until they present citizenship

[5] *See, e.g.*, Michael C. Herron & Daniel A. Smith, *House Bill 1355 and Voter Registration in Florida*, Presentation for the 2012 Annual Meeting of the Am. Pol. Sci. Ass'n 20 (Sept. 20, 2012), *available at* http://www.dartmouth.edu/~herron/FloridaVoterRegistrationHB1355.pdf (finding voter registrations dropped 14% in Florida when drives shut down).

documents).[6] Many of these individuals lack access to the required documentation at the time they register to vote (such as during community voter drives), are unwilling to photocopy and mail copies of their sensitive personal documents, or lack the resources to submit such proof. Accordingly, if the Order is put into effect immediately, potentially thousands of additional eligible voters will be unable to register to vote for the upcoming elections.

The district court said it was unconvinced that these tens of thousands of citizens are "unable" to produce documentation (Docket No. 195 at 7), but their continued unregistered status, with the registration deadline approaching, strongly indicates that these citizens will not be able to comply with the new requirements.[7] Without the Federal Form, these citizens will be unable to exercise their right to vote in the upcoming federal elections.

Nor is this harm "reversible." If a stay is not granted and the Order is then overturned on appeal, U.S. citizens will have illegally been prevented from voting

[6] For example, when Arizona implemented its documentary proof-of-citizenship requirement in 2005, more than 31,000 voter registration applications were rejected for failure to include the required documentation, and community-based voter registration in Arizona's largest county plummeted by 44%. *See* Br. for Gonzalez Resps., *ITCA*, 133 S. Ct. 2247 (No. 12-71), 2013 WL 179943 at *18; EAC000904, Docket No. 132-7; EAC001826, Docket No. 132-17. Similarly, Kansas's requirement initially resulted in over 20,000 applicants being placed on a "suspense" list, meaning they cannot vote until they present citizenship documentation. *See* Docket No. 140-2 (Decl. of Brad Bryant); EAC Mem. of Decision, Docket No. 129-1 at 42.

[7] In the district court, Kansas conceded that of the over 20,000 registrants placed on its suspense list by January 2014, the State had not been able to subsequently verify the citizenship of about 12,500 applicants. Docket No. 140-2.

and the restoration of their rights will be contingent on the States' ability to locate and reinstate them to the voter rolls. The States do not have such an ability.

2. The States Will Not Be Harmed By a Stay

While the risk of harm to Intervenor–Appellants and the public is substantial, the States would not be harmed by a stay of the Order pending appeal. In the district court, the States argued that if the Federal Form is not modified they "will be forced to register unqualified voters" (*i.e.*, noncitizens) who use the Form. Docket No. 17 at 27. That is incorrect. As described above, the EAC found that the state proof-of-citizenship provisions are *not* necessary to ensure that noncitizens do not register using the Federal Form. Indeed, the States failed to submit any evidence to the EAC that noncitizens had registered using the Federal Form, and conceded at oral argument before the district court that they have *no evidence whatsoever* that even a single noncitizen has used the Federal Form to register to vote in Arizona or Kansas. *See* Feb. 11, 2014 Hr'g Tr. at 165–66.

But even assuming that a handful of noncitizens have registered to vote in Arizona and Kansas over the past several years, that alleged harm is insignificant—by orders of magnitude—compared to the disenfranchisement of countless U.S. citizens who will not be able to vote due to the States' documentary proof requirements. The EAC found that, even taking the States' claims as true,

noncitizen applicants constituted less than one-hundredth of one percent of all voter registrations. EAC Mem. of Decision, Docket No. 129-1 at 33–34.

Additionally, Arizona and Kansas grandfathered-in millions of individuals from their proof-of-citizenship requirements. As a result, these millions of individuals continue to be eligible to vote in Arizona and Kansas elections—a fact that belies the States' argument that additional proof is necessary to protect electoral integrity. Ariz. Rev. Stat. § 16-166(F); Kan. Stat. Ann. § 25-2309(n).

And even if this Court were to accept the States' argument that additional steps must be taken to prevent noncitizens from registering and voting, the States have demonstrated that they can verify citizenship status following registration by cross-checking voter registration records against other state and federal records. A stay would do nothing to prevent the States from continuing to use independent information in their possession, information that may indicate that a particular applicant is in fact not a citizen, to confirm the eligibility of that applicant. This is what the 42 other States subject to the NVRA do, and it is what Arizona and Kansas did as well prior to the enactment of their proof-of-citizenship laws. The States currently employ a number of procedures to serve the public interest in ensuring fair and honest elections.[8] At the same time, Congress itself considered

[8] *See* EAC001033–1103, Docket No. 132-8 (January 11, 2008 deposition of Craig Stender for *Gonzalez v. Arizona,* Case No. cv-06-1268 (D. Ariz, filed May 9, 2006),

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and balanced the need to ensure election integrity when it enacted the NVRA and required the States to accept and use the Federal Form. 42 U.S.C. § 1973gg(b)(3). A stay will ensure that an unnecessary citizenship verification method that excludes citizens from the voter rolls, which itself violates the integrity of federal elections, will play no role in registration using the Federal Form.

In sum, the States cannot credibly claim that the integrity of their elections will be put at risk by following the system that has worked well for 20 years, and against which they have provided *absolutely no evidence* of fraud through use of the Federal Form.

3. Denying a Stay Would Harm the Public Interest

In considering whether to issue a stay, the Court must consider "any risk of harm to the public interest." *Mainstream Mktg. Servs.*, 345 F.3d at 852. Denying a stay pending appeal would frustrate a central purpose of the NVRA, harm U.S. citizens residing in Kansas and Arizona who lack the documentation the States demand, and would harm the election process more generally.

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stating that the Arizona Secretary of State has created a system called VRAZ to compare the information on voter registration forms to other databases); EAC001222–1224 ¶¶ 8,10, Docket No. 132-10 (Declaration of Karen Osborne describing use of jury questionnaires to identify individuals that were registered to vote, but were not citizens); EAC001437–1445 at 109:11–23, Docket No. 132-12 (Reporter's Transcript of Proceedings held December 13, 2013 in *Kobach v. EAC*, No. 5:13-cv-4095 (D. Kan. filed Aug. 21, 2013) containing Plaintiffs' counsel's representation of Kansas' ability to unilaterally obtain information establishing citizenship); EAC000920 ¶¶ 2, 3, Docket No. 132-7 (Declaration of Brad Bryant describing use by Kansas of temporary driver's licenses records to identify noncitizens who may have registered to vote).

In enacting the NVRA, Congress explicitly sought "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). Immediate enforcement of the Order would alter a status quo that has governed voter registration in federal elections for 20 years and frustrate the public's compelling interest in a simple, straightforward voter registration process just months before federal primary and general elections. As the Supreme Court warned, giving States carte blanche to add all of their state-specific requirements to the Federal Form would result in "the Federal Form ceas[ing] to perform any meaningful function," and becoming "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)).

In its order denying the stay, the district court cited the interest in deferring to "laws enacted by the public's representatives." Docket No. 195 at 7. But the court only cited to the States' laws, and failed to consider the NVRA —also duly enacted by public representatives — which preempts any conflicting state laws.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenor–Appellants' motion for an emergency stay of the district court's March 19, 2014 Order and a stay pending appeal. The States have been informed of this motion, were asked their position, and have not responded.

Dated: May 8, 2014

Respectfully submitted,

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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.

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