Fair Elections Center

COMMENT OF FAIR ELECTIONS CENTER
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I. SUMMARY OF COMMENTS

Fair Elections Center[1] submits this comment to express our conviction that the EAC should not—and cannot—make the changes to the national mail voter registration form ("the Federal Form") urged by the President's Executive Order entitled, "Preserving and Protecting the Integrity of American Elections" (March 25, 2025) ("the EO").[2] Such changes would be procedurally and substantively improper. Any other outcome would be arbitrary and capricious and would violate the NVRA and the Administrative Procedure Act.

The EAC should not change the Federal Form in accordance with the terms of the EO because amending the regulations to permit the requested changes to the Federal Form would require substantive changes to duly enacted regulations. Such changes require a complete notice-and-comment rulemaking process and a vote of three EAC commissioners as provided by the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002. Notably, in promulgating the regulations to adopt the Federal Form, the Federal Election Commission ("FEC") concluded that similar documentary requirements to establish naturalization were not necessary to assess the eligibility of applicants.

II. DISCUSSION

A. The EAC Can Only Implement The Requests Urged By The EO Through Formal Notice-And-Comment Rulemaking Approved By Three Commissioners.

To effectuate the changes urged by the EO would require formal notice-and-comment rulemaking and consultation with the chief election officers of the states. Under its enabling statute, the EAC cannot implement the EO to change the Federal Form without these procedures. Cutting any of these corners would violate the Administrative Procedure Act ("APA"), to the detriment of other interested parties who are entitled to be heard regarding such regulatory changes. Proceeding in such a manner would also violate the NVRA, to the detriment of the states subject to the NVRA who are all entitled to be consulted.

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[1] Fair Elections Center is a nonpartisan, nonprofit 501(c)(3) organization dedicated to removing barriers to voter registration and voting through advocacy and impact litigation.

[2] *Preserving and Protecting the Integrity of American Elections*, *Presidential Actions*, The White House (Mar. 25, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/preserving-and-protecting-the-integrity-of-american-elections/.

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1. Under The NVRA, Substantive Changes To The Federal Form Such As Those Urged By The EO Can Only Be Made Through Formal Notice-And-Comment Rulemaking After Consultation With The Chief Election Officers Of The States.

The contents of the Federal Form are governed by duly enacted regulations adopted by the EAC's predecessor, the Federal Election Commission.[3] Specifically, the contents of the Federal Form are governed by 11 C.F.R. § 9428.4(a)–(b), which specifies the precise information that the Federal Form can request from an applicant. With regard to citizenship, the regulations instruct that the Federal Form shall "list U.S. Citizenship as a universal eligibility requirement," "[c]ontain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements," and "[p]rovide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature." 11 C.F.R. § 9428.4(b)(1)–(3).[4]

Granting the modifications to the Federal Form urged by the EO would require making substantive changes to Section 9428.4. The EO expresses a preference for the Federal Form to include different content than Section 9428.4 specifies. Specifically, the EO seeks to add to the state instructions a requirement that individuals submit "documentary proof of United States citizenship."[5] This change would require that the EAC modify the controlling regulation, 11 C.F.R. § 9428.4. Under the APA, such a modification, particularly one that reconsiders prior foundational decisions by the agency, requires notice to interested parties and an opportunity to comment.[6]

Section 9428.4 was promulgated in 1994, following a formal notice-and-comment rulemaking proceeding conducted by the Federal Election Commission. *National Voter Registration Act of 1993*, 59 Fed. Reg. 32311 (June 23, 1994). The process for adopting these regulations involved extensive public notification and opportunity to comment. Specifically:

- the FEC began a formal notice-and-comment rulemaking process by first publishing an advance notice of proposed rulemaking to "gain general guidance from the regulated community and other interested persons on how best to"

[3] The FEC and EAC entered into a joint rulemaking to transfer the NVRA regulations from the FEC to EAC on July 29, 2009. *Reorganization of National Voter Registration Act Regulations*, 74 Fed. Reg. 37519 (July 29, 2009). The transfer became effective on August 28, 2009. *Id.*

[4] These requirements precisely track the statutory language of the NVRA.

[5] EO, *supra* note 2, § 2(a)(i)(A)–(B).

[6] Specifically, the APA requires "[g]eneral notice of proposed rule making *shall* be published in the Federal Register," including "the time, place, and nature of public rule making proceedings;" "reference to the legal authority under which the rule is proposed;" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(1)–(3) (emphasis added). After the notice is published, "the agency *shall* give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." *Id.* § 553(c) (emphasis added).

implement the NVRA, *see National Voter Registration Act*, 58 Fed. Reg. 51132, 51132 (Sept. 30, 1993);

- the FEC "received 65 comments from 63 commenters in response to the" advance notice, 59 Fed. Reg. 32311, 32311 (June 23, 1994);

- at the same time the advance notice was pending, the FEC "conducted several surveys of state election officials to ascertain whether or not they plan to develop and use their own state mail and agency registration forms (or use the national form), and to clarify certain state voter registration requirements and procedures," *id.*;

- after the initial advance notice-and-comment process, the FEC published a notice of proposed rulemaking to further "seek comments from the regulated community and other interested parties on the specific items of information that it proposes to include on the mail registration form, and on the specific items of information that it proposes be required from the states to carry out the Act's reporting requirements," 59 Fed. Reg. 11211, 11211 (Mar. 10, 1994);

- "108 comments were received in response to [that] notice," 59 Fed. Reg. 32311, 32311 (June 23, 1994).

Only after the notice-and-comment period ended did the FEC promulgate Section 9428. *See id.*

This process—formal notice-and-comment rulemaking and consultation with chief election officials of states—is required by the NVRA. In particular, the NVRA requires that the Commission "in consultation with the chief election officers of the States, shall prescribe *such regulations* as are necessary to . . . develop a mail voter registration application. . . ." 52 U.S.C. § 20508(a)(1)–(2) (emphasis added). Moreover, by specifying that the contents of the Federal Form are to be "developed" through "regulations," the statute invokes the language of the Administrative Procedure Act for notice-and-comment rulemaking. *See, e.g.*, *Joseph v. U.S. Civ. Serv. Comm'n*, 554 F.2d 1140, 1153–54 (D.C. Cir. 1977) (exercise by executive agency of congressional delegation of authority to promulgate "regulations" must be done through notice-and-comment rulemaking). *See also Arizona v. The Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 4 (2013) (hereinafter "*ITCA*") ("The Election Assistance Commission is invested with rulemaking authority to prescribe the contents of [the] Federal Form.").

Moreover, the NVRA and APA require that comparable notice-and-comment process is to govern any substantive changes to the Federal Form. In particular, the NVRA's language states that the of the Federal Form is to be "developed" through "regulations." 52 U.S.C. § 20508(a)(1)–(2). The statute does not suggest that only the first version of the Federal Form need go through this process; rather, it suggests that anything that is done to "develop" the form must be done through "regulations," which as discussed above, means a formal notice-and-

comment process. Adopting the changes urged by the EO would involve further "development" of the form under the NVRA.[7]

The APA similarly requires that substantive changes to properly promulgated rules may only be made through further notice-and-comment proceedings. *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 174 F.3d 206, 211–13 (D.C. Cir. 1999) (issuance of substantive rule required notice-and-comment rulemaking); *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) ("the law seems clear that when an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public . . . the agency must adhere to the notice and comment requirements of § 553 of the APA."). Moreover, it is consistent with the EAC's historic practice, which has considered substantive changes to the Federal Form in the past (that were not expressly called for in new legislation) through formal notice-and-comment rulemaking.[8] For example, in 2010, the EAC issued a notice of proposed rulemaking to amend the NVRA regulations within the authority granted by the NVRA to reflect HAVA requirements and to make technical changes. *National Voter Registration Act*, 75 Fed. Reg. 47729 (Aug. 9, 2010). Included in this notice was an invitation for "public comments" not only on the specific amendments outlined in the notice, but also "on additional changes to the NVRA regulations to improve voter registration through the content and format of the Federal form." *Id.* at 47729.

The EAC's past approach of considering changes to the Federal Form through formal notice-and-comment rulemaking was well-advised under the law. Failure to comply with the required APA procedures invalidates an agency's action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) ("[R]egulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act.") (internal quotation marks omitted). *See also Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009) ("Under the APA, legislative rules can be issued only following notice and comment procedures.").

2. Under The Help America Vote Act, Any Substantive Change To The Federal Form Must Be Approved By A Vote Of Three Commissioners.

The Help America Vote Act of 2002 specified that "[a]ny action which the [EAC] is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members." 52 U.S.C. § 20928. HAVA specifically authorizes the EAC to carry out the functions necessary to develop the Federal Form under Section 9 of the NVRA. *See* 52 U.S.C. § 21132 (transferring to the EAC "all functions which the Federal Election Commission exercised under section 20508(a) . . . ."). As discussed above, these functions include "prescrib[ing] *such regulations* as are necessary to . . . develop a mail voter registration application . . . ." 52 U.S.C. § 20508(a)(1)–(2) (emphasis added). Accordingly, efforts to

[7] Conversely, leaving the Federal Form as is (*i.e.,* maintaining the status quo) is not a "development" that would require such process.

[8] On one occasion—the passage of the Help America Vote Act of 2002 ("HAVA")—Congress mandated specific changes to the Federal Form, spelling them out with precision in the statutory language. 52 U.S.C. § 21083(b)(4).

"develop" the Federal Form (which would include substantive changes to the Federal Form) can only be authorized through a vote of at least three EAC commissioners.[9]

3. The Agency Has Previously Concluded That Documentation Of Naturalization Is Not Necessary To Establish Eligibility To Vote And To Reverse That Decision Would Be Arbitrary And Capricious.

At the time Section 9428 was promulgated, the FEC considered and rejected requests parallel to what the EO urges—to have the Federal Form include additional citizenship information. *See* 59 Fed. Reg. 32311, 32,316 (June 23, 1994). In particular, during the notice-and-comment period on the Proposed Rule specifying the substance of the Federal Form, the FEC addressed public comments on whether to require proof of naturalization. *Id.* at 32,316. Interpreting and implementing the NVRA, as Congress empowered it to do, the FEC concluded that such information was not necessary to establish eligibility to vote. In particular, the FEC concluded:

> While U.S. citizenship is a prerequisite for voting in every state, the basis of citizenship, whether it be by birth or by naturalization, is irrelevant to voter eligibility. The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words "For U.S. Citizens []" will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include this additional requirement.

Id. The FEC thus considered and rejected requests similar to the EO's requested changes, concluding additional information about naturalization status (beyond the information about citizenship status already sought by the form) was unnecessary to assess eligibility to vote.

In light of the prior consideration of this issue, reversing course to have the Federal Form include a requirement to provide documentary proof of citizenship would be arbitrary and capricious. *See, e.g.*, *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

B. Various Policy Considerations Must Be Considered In A Full And Complete Notice-And-Comment Rulemaking Process In Order To Change The Substance Of The Federal Form.

1. The EAC Would Be Required To Consider The Relevant Legal Standard For Requiring Information To Be Provided On Or With The Federal Form.

[9] Conversely, leaving the current regulations in place (*i.e.,* maintaining the current Federal Form) would not constitute an effort to "develop" the Federal Form, and would not trigger the three-commissioner approval provision.

Section 9(b)(1) instructs the EAC that the Form "may require ***only such identifying information*** (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), ***as is necessary*** to enable the appropriate State election official ***to assess the eligibility of the applicant*** and to administer voter registration and other parts of the election process" for federal office. 52 U.S.C. § 20508(b)(1) (emphases added). The plain language of the NVRA thus precludes the Federal Form from requiring any information beyond what is "necessary . . . to assess the eligibility of the applicant . . ." to vote in federal elections. As the Supreme Court noted, this language acts "as both a ceiling and a floor with respect to the contents of the Federal Form," meaning the EAC "shall require information that's necessary, but may *only* require that information." *ITCA*, 570 U.S. at 18 (emphasis added).

The determination of what is "necessary" may entail the following components of a rulemaking proceeding:

- Consider whether states are effectively using the information in the current Federal Form and in their own possession to assess eligibility. The record would show whether the information required by federal law and provided on the Federal Form continues to be sufficient to assess eligibility.

- Consider litigation outcomes pertaining to state documentary proof of citizenship laws, such as the finding that Kansas's documentary proof law unconstitutionally burdened the right to vote. *Fish v. Schwab*, 957 F.3d 1105, 1136 (10th Cir. 2020), *cert. denied*, 141 S.Ct. 965 (2020).

- Consider alternative means of enforcement, in particular, the alternate safeguards in federal law. For example, the Federal Form itself warns that individuals who provide false information and are not U.S. Citizens may be "fined, imprisoned . . . or deported from or refused entry to the United States." And there are numerous criminal penalties for non-citizens to register to vote, each of which serves as a strong deterrent against fraud. *See* 18 U.S.C. § 1015(f) (fine and/or imprisonment for up to 5 years); 52 U.S.C. § 21144(b) (fine and/or imprisonment); *see also* 52 U.S.C. § 20511(2)(A) (similar penalties for knowingly procuring or submitting voter registration applications that are materially false, fictitious, or fraudulent); 8 U.S.C. § 1227(a)(6) (deportation for alien who votes); 8 U.S.C. § 1182(a)(10)(D) (inadmissibility for alien who votes); 18 U.S.C. § 611 (fine and/or imprisonment for up to 1 year).

Moreover, the NVRA narrowly cabins the EAC's authority to deem information "necessary" with regard to assessing citizenship. The NVRA and HAVA together specifically catalog the information necessary to that end: the Federal Form must include "a statement that . . . specifies each eligibility requirement (including citizenship)," a checkbox for individuals to affirmatively indicate whether or not they are U.S. citizens, and a specific attestation signed by the applicant under penalty of perjury that the person is a U.S. citizen. 52 U.S.C. §§ 20508(b)(2), 21083(b)(4)(A)(i). To change the requirements of the form, a rulemaking proceeding must consider these statutory bounds.

2. The EAC Must Assess Whether Implementing The EO's Terms Would Have Negative Consequences That Are Contrary To The Purpose Of The NVRA.

The EAC would also be required to assess whether implementing the EO would have significant, negative collateral effects that are contrary to the NVRA's purpose. Congress enacted the NVRA in part in order "to establish procedures that will *increase the number of eligible citizens who register to vote* in elections for Federal office." 52 U.S.C. § 20501(b)(1) (emphasis added). Congress did so because it concluded that "discriminatory and unfair registration laws and procedures" can have: (1) "a direct and damaging effect on voter participation in elections for Federal office" and (2) "disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). Therefore, to implement the EO as written, the effects of adding a documentary proof of citizenship requirement would have to be assessed to determine whether those effects are consistent with the NVRA. Such investigation may include:

- The number and demographics of voting-eligible citizens who have access to documentary proof of citizenship documents;
- The ability of persons without documentary proof to obtain such documents;
- The impact of a documentary proof requirement on individual citizens well as on impacted organizations;
- The consequences for election administration of such requirements; and
- Whether the impacts of the change are consistent with the purpose of the NVRA.

C. Additional Statutory Preclusion Arguments Must Be Addressed In Rulemaking.

1. The EAC Would Be Required To Examine Congress's Conclusion That Documentary Proof Of Citizenship Was Not "Necessary" To Establish Eligibility.

During the deliberations over the NVRA, Congress considered and expressly rejected permitting particular states to require the Federal Form to include documentary proof of citizenship, concluding such information was "not necessary" to establish eligibility to vote. In particular, during floor debate, Congress considered adding to the statute the statement: "Nothing in this act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993) ("Simpson Amendment"). Although the Senate initially accepted the Simpson Amendment, the Congressional Conference Committee voted to remove it from the NVRA, finding it was "not necessary or consistent with the purposes of the Act." H.R Rep. 103-66, at 23–24 (1993) (Conf. Rep.), *as reprinted in* 1993 U.S.C.C.A.N. 140, 148–49.[10]

[10] During subsequent floor debate on the NVRA, the House of Representatives considered and rejected a motion to reinsert the Simpson Amendment into the NVRA, and both chambers adopted the Conference Committee version of the legislation without the Simpson Amendment. 139 Cong. Rec. 9231-32 (1993) & *id.* at 9640-41 (1993).

In other words, as Chief Judge Kozinski noted in the Ninth Circuit's *ITCA* decision, "both chambers affirmatively rejected efforts to authorize precisely" what the EO seeks. *See Gonzalez v. Arizona*, 677 F.3d 383, 442 (9th Cir. 2012) (*en banc*) (J. Kozinski concurring).

Congress's conclusion that documentary evidence of citizenship was "not necessary" compels the conclusion that implementing the EO's terms (to modify the form to require documentary proof of citizenship) are not necessary, as that term is used in the NVRA, to assess an applicant's eligibility to vote. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation omitted); *Hamdan v. Rumsfeld*, 548 U.S. 557, 579–80 (2006) ("Congress' rejection of the very language that would have achieved the results the Government urges here weighs heavily against the Government's interpretation.").

In light of Congress' conclusion that documentation of citizenship was "not necessary" for states to determine an applicant's eligibility, any action by the EAC to require documentary proof of citizenship would be arbitrary and capricious. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024) ("when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.").[11]

2. The EAC Would Be Required To Examine The Changes Sought By The EO In Light Of The NVRA's Ban On Formal Authentication Requirements.

Section 9(b)(3) of the NVRA prohibits the EAC from including on the Federal Form "any requirement for notarization or other formal authentication." 52 U.S.C. § 20508(b)(3). Consistent with the legislative purpose of the NVRA, Section 9(b)(3) specifically prevents the EAC or particular states from requiring applicants to complete additional steps to "authenticate" their eligibility because of the risk that such requirements would burden, inconvenience, or make completion of the form more difficult.

It appears that the EO would have the EAC impermissibly impose a requirement tantamount to "formal authentication" of eligibility to vote, in which the applicant must go through an additional step after completely filling out the Federal Form.

III. CONCLUSION

For the foregoing reasons, the EAC should not and cannot adopt the changes to the Federal Form urged by the President's March 25, 2025 Executive Order.

[11] Congress knows how to revise the statutory requirements for the Federal Form, and supplemented the requirements at the time HAVA was adopted to add the checkbox requirement. *See* 52 U.S.C. § 21083(b)(4).