



October 20, 2025

U.S. Election Assistance Commission
633 3rd Street NW, Suite 200
Washington, DC 20001

*Submitted Via Federal Rulemaking Portal at www.regulations.gov
[Docket ID EAC–2025-0236]*

Re: Comments in Response to America First Legal’s Petition for
Rulemaking

INTRODUCTION

On behalf of the American Civil Liberties Union, the American Civil Liberties Union of the District of Columbia, the Brennan Center for Justice, the Legal Defense Fund, LatinoJustice PRLDEF, and Asian Americans Advancing Justice-AAJC, we submit these comments to request that the Election Assistance Commission (“EAC” or “Commission”) deny American First Legal’s (“AFL”) petition for rulemaking. We oppose the petition’s request that the Commission consider amending 11 C.F.R. § 9428.4 and the federal voter registration form (“Federal Form”) to require a passport or one of a few other limited U.S. citizenship documents to register to vote in federal elections.

We are nonprofit, nonpartisan legal organizations whose shared mission is to build an accessible, inclusive, and equitable democracy free from racial discrimination. This mission is consistent with one of the core purposes and promises of the National Voter Registration Act (“NVRA”) of 1993. Congress authorized the NVRA to, among other goals, “increase the number of eligible citizens who register to vote in elections for Federal office,” and eliminate “discriminatory and unfair registration laws and procedures [that] 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,” 52 U.S.C. § 20501(a)(3), (b)(1).

We collectively represent nonpartisan organizational Plaintiffs in *League of United Latin American Citizens v. Executive Office of the President* (“*LULAC*”), No. 1:25-cv-946 (D.D.C. 2025)—a lawsuit challenging the President’s Executive Order 14,248 that purports to mandate that the EAC require a passport or one of a limited set of citizenship documents to register to vote with the Federal Form. On April 24, 2025, the court preliminarily enjoined the EAC “from taking any action to implement or give effect to [that portion] of Executive Order 14,248, including taking any action based on the Executive Order to modify the content of the [Federal Form] to require documentary proof of United States citizenship.” *See LULAC*, 780 F. Supp. 3d 135, 225 (D.D.C. 2025).

The injunction forbids this Commission from relying on the President’s instructions as a basis to grant this petition. *Id.* This comment provides additional reasons why the Commission should deny the petition and specifically responds to certain arguments advanced by AFL.

DISCUSSION

I. The EAC Has Broad Discretion to Deny a Request to Begin the Rulemaking Process.

At the outset, we note the precise nature of AFL’s petition. Crucially, AFL is *not* asking the EAC to take immediate action to amend the Federal Form. Instead, it is asking the EAC to start a multi-step rulemaking process under 5 U.S.C. § 553(e) to consider whether to make a potential change.

As we understand it, the process first requires the EAC to vote on whether to start the rulemaking process. That is the immediate decision the Commission must make. If a majority of Commissioners agree to do so, the Commissioners would then need to consult with the chief election officers of the States and draft a proposed rule. *See* 52 U.S.C. § 20508(a)(1) (requiring the EAC to “consult[]” with chief election officers to “prescribe such regulations as are necessary to . . . develop the [Federal Form]”).

Next, the EAC must publish a Notice of Proposed Rulemaking in the Federal Register and provide the public with an opportunity to comment on the proposed rule itself. *See* 5 U.S.C. § 553(c). Following the comment period, the EAC would have to again consult with the chief election officers of the States to “develop” the revised Federal Form. *See* 52 U.S.C. § 20508(a)(2) (requiring the EAC to “consult[] with chief election officers to “develop the [Federal Form]”). A majority of the Commissioners would then have to approve the final revised Federal Form. *See* 52 U.S.C. § 20928. If a revised Federal Form were approved, the EAC would have to submit it as an information collection activity to the Director of the Office of Management and Budget for approval. *See, e.g.,* Agency Information Collection Activities: National

Mail Voter Registration Form, 90 F.R. 11,159 (Mar. 4, 2025)¹; 44 U.S.C. § 3501 et seq.

Crucially, the EAC is owed “extraordinary deference . . . when it declines to undertake a rulemaking.” *Nat’l Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)); see also *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (an agency has “broad discretion” to grant or deny a petition for rulemaking). Moreover, an agency does not have any obligation to engage in rulemaking to address a problem that rarely occurs. See *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 748–49 (D.C. Cir. 2017). As explained below, the evidence clearly and consistently shows that voting by noncitizens rarely occurs. It certainly is not a widespread problem that justifies the harms of requiring a passport or another citizenship document to vote in federal elections.

If the EAC denies AFL’s rulemaking petition, judicial review would be “‘extremely limited’ and ‘highly deferential.’” *Massachusetts*, 549 U.S. at 527–28 (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am.*, 883 F.2d at 96). “[A]n agency’s refusal to institute rulemaking proceedings is at the high end of the range of levels of deference [courts] give to agency action under [the] ‘arbitrary and capricious’ [standard of] review.” *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987)).

II. The EAC Should Exercise Its Discretion to Deny the Petition.

There are at least four independent reasons that the EAC should deny AFL’s petition. These reasons are outlined at length in other comments submitted to the EAC. We summarize them here and strongly urge the Commission to earnestly consider them and deny the AFL’s petition.

A. The EAC Has Previously Rejected Similar Requests and Has No Reason to Revisit that Determination.

First, the EAC (and the Federal Election Commission (“FEC”) before it²) has a long record of rejecting the addition of a documentary proof-of-citizenship requirement for the Federal Form. That consistent position is based on clear NVRA statutory language that the Federal Form “may only contain such identifying information . . . as is necessary to enable the appropriate State official to assess the eligibility of the applicant.” 52 U.S.C. § 20508(b)(1). And this position has been upheld by federal courts. See, e.g., *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183 (10th Cir. 2014) (upholding decision of EAC denying request to add documentary

¹ The EAC’s Executive Director has confirmed that the Commission must follow these steps before changing the Federal Form. See Decl. of Brianna Schletz ¶¶ 3–7, *LULAC*, 780 F. Supp. 3d 135 (No. 1:25-cv-0946), Dkt. No. 84-1.

² Congress originally delegated to the FEC, another independent, bipartisan agency, the authority over the contents of the Federal Form but it was transferred to the EAC in 2009. See, e.g., 74 Fed. Reg. 37519-01 (July 29, 2009) (reorganization of National Voter Registration); 52 U.S.C. § 20508(b).

proof of citizenship to Federal Form); *see also League of Women Voters v. Newby*, 838 F.3d 1, 12–14 (D.C. Cir. 2016) (issuing preliminary injunction halting documentary proof-of-citizenship requirements and finding little evidence of noncitizen voting and significant evidence that applying documentary proof-of-citizenship requirements would lead to citizen disenfranchisement). Starting with the FEC, a clear throughline of informed, expert reasoning shows that citizenship documents are not necessary to assess voter eligibility. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32311 (June 23, 1994) (FEC concluding that documentary proof of citizenship is not necessary to assess voter eligibility); Reorganization of Nat'l Voter Registration Act Reg., 74 Fed. Reg. 37519-01 (July 29, 2009) (same regarding EAC); *see also* also Mem. of Decision Concerning State Requests to Include Additional Proof of Citizenship Instructions on the Nat'l Mail Voter Registration Form, No. EAC-2013-0004 (U.S. Election Assistance Comm'n Jan. 17, 2014) (rejecting documentary proof-of-citizenship requirement in part on the ground that the agencies had previously rejected it).

At the time that the FEC promulgated the rule in 1994, 11 C.F.R. § 9428.4, the FEC considered and rejected requests much like what AFL urges—to have the Federal Form require additional citizenship information. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32311, 32316 (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 32316. Interpreting and implementing the NVRA, 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 [NVRA] 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 [Federal Form]. For these reasons, the final rules do not include this additional requirement.

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

Then, in 2006, the EAC rejected Arizona's requests for a State-specific amendment to accommodate Arizona's documentary proof-of-citizenship procedure.³

³ *See* Correspondence of Thomas R. Wilkey, Executive Director, Election Assistance Commission, to Jan Brewer, Arizona Secretary of State, March 6, 2006 (“Wilkey Correspondence”), *available at* EAC Administration Record, *Kobach v. EAC*, C.A. No. 5: 13-CV-4095, (Nov. 25, 2013), Doc. 79.

Wilkey found that the Arizona proposal would require applicants to furnish information beyond the information necessary to establish eligibility, and thus was not consistent with the NVRA.⁴ Wilkey further observed that “Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as ‘not necessary or consistent with the purposes of [the NVRA].’”⁵

The EAC again rejected a similar request in 2014 when Arizona, Georgia, and Kansas asked it to modify the Federal Form to instruct that applicants in those States provide documentary proof of citizenship.⁶

In the 2014 agency decision, the EAC explained that both:

the FEC and the EAC . . . specifically considered and determined, in their discretion, that the oath signed under penalty of perjury, the words ‘For U.S. Citizens Only’ and later the relevant [Help America Vote Act] citizenship provisions, *see* 42 U.S.C. § 15483(b)(4)(A) (adding to the Federal Form two specific questions and check boxes indicating the applicant’s U.S. citizenship), were all that was necessary to enable state officials to establish the bona fides of a voter registration applicant’s citizenship.⁷

The EAC rejected these States’ efforts to add documentary proof of citizenship to the Federal Form because it “would require applicants to submit more information than is necessary to . . . assess eligibility,” while a sworn attestation of citizenship status “provides the necessary means for assessing applicants’ eligibility.”⁸ And in 2015, when a new EAC Executive Director tried to unilaterally approve the three States’ requests to require documentary proof of citizenship with the Federal Form, the D.C. Circuit preliminarily enjoined that decision, *Newby*, 838 F.3d at 15, and a district court later awarded judgment to plaintiffs because the EAC did not find that the requirement was “necessary” to assess eligibility, as Congress required under the NVRA, *League of Women Voters of U.S. v. Harrington*, 560 F. Supp. 3d 177, 188–89 (D.D.C. 2021).

Because the EAC has already considered—and rejected—the proposition that documentary proof of citizenship is necessary to assess voter eligibility, it does not have to revisit the issue unless there has been “a fundamental change in the factual premises previously considered by the agency.” *Flyers Rts.*, 864 F.3d at 743 (quoting *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014)).

⁴ *Id.* at 2–3.

⁵ *Id.* (citing H. R. Rep. No. 103-66 (1993) (Conf. Rep.)).

⁶ Memorandum of Decision Concerning State Requests to Include Additional Proof of Citizenship Instructions on the National Mail Voter Registration Form, Docket No. EAC-2013-0004, U.S. Election Assistance Comm’n (January 17, 2014), *available at* EAC NVRA Related Documents (March 11, 2022), <https://perma.cc/MBL2-ENQ5>.

⁷ *Id.* at 22.

⁸ *Id.* at 28–30.

Nothing has changed to warrant a new rulemaking process. Noncitizen voting was—and remains—a rare occurrence. Comprehensive studies and nationwide surveys have continuously and consistently confirmed this.⁹

Likewise, State investigations of their own voter rolls show that instances of noncitizens voting are exceedingly rare. Just this year, for example, after reviewing State voter rolls going back to the 1980s, Louisiana’s Secretary of State Nancy Landry announced this month that “non-citizens illegally registering or voting is not a systemic problem in Louisiana.”¹⁰ Louisiana officials ran the State’s voter files through the SAVE program, a federal database that verifies an individual’s immigration status for purposes of their applications for government benefits. In voting records dating back to the 1980s, Secretary Landry’s office identified up to 390 registered voters who could be noncitizens. Of those, 79 voted at least once during that more than 40-year period. Secretary Landry acknowledged that the actual number could be even lower, as some of the potential noncitizen voter registrations flagged by the SAVE program could be the result of outdated or inaccurate data. To put that number in perspective, the Brennan Center estimates that at least 74 million votes have been cast in Louisiana since the 1980s — and that estimate is a significant undercount due to data limitations. In other words, out of tens of millions of ballots cast in Louisiana over more than 40 years, only a tiny fraction—less than one thousandth of one percent—of them were possibly cast by noncitizens, and even those cases are unconfirmed.

In 2022, the Georgia Secretary of State’s office conducted a citizenship review of the state’s voter rolls and found that it could not verify the citizenship of 1,634

⁹ See, e.g., Lori Minnite, *The Politics of Voter Fraud* (2007), <https://perma.cc/HV86-PS44> (analyzing the first three years of a Justice Department initiative to uncover voter fraud ending in 2005, and finding only 14 convictions of noncitizens for voting); Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice (2007), <https://perma.cc/4DDC-54CC> (nationwide survey of a decade of news accounts and other complaints of noncitizen voting showed that allegations of noncitizen voting that prove unfounded are far more common than allegations that turn out to be true. Some of the exaggerated or baseless allegations highlighted in that study include: A 2005 investigation into 1,668 Washington residents with “foreign-sounding names” which turned up no noncitizens, and finding that even if one accepts all of the *allegations* of noncitizen voting as true, noncitizen voters would have accounted for between .0002 percent and .017 percent of the votes in the relevant jurisdiction); Michael Wines, *All This Talk of Voter Fraud? Across U.S., Officials Found Next to None*, N.Y. Times (Dec. 18, 2016), https://www.nytimes.com/2016/12/18/us/voter-fraud.html?_r=0 (surveying election and law enforcement officials in 49 states and the District of Columbia and identifying two *possible* instances of noncitizens voting out of 137.7 million voters nationwide); Phillip Bump, *There have been just four documented cases of voter fraud in the 2016 election*, Wash. Post (Dec. 1, 2016), <https://perma.cc/6H7W-YP9M> (compiling reports from the news-aggregation system Nexis to identify demonstrated cases of voter fraud and finding four demonstrated cases of any type of voter fraud, and no instances of noncitizens voting).

¹⁰ Nancy Landry, Facebook (Sep. 4, 2025), <https://perma.cc/DPQ2-Y2YM>.

voter registration *applicants* but that the state’s registration procedures to determine eligibility—which notably did *not* require citizenship documents—screened the applicants so that none were added to the voter rolls and none had actually voted.¹¹ An additional audit was conducted by the Georgia Secretary of State’s Office in 2024, and the results showed that only 20 noncitizens registered to vote out of 2.8 million.¹² Like the other results, this is only a tiny fraction of all voters.

In 2020, after an investigation into alleged noncitizen voting, Ohio’s Secretary of State referred 104 cases of alleged noncitizen voter registration and 13 cases of alleged noncitizen voting for prosecution.¹³ Assuming that 13 ballots were cast by noncitizen voters, those ballots would have amounted to .00016 percent of the ballots cast during the primary and general elections that year.¹⁴ In contextualizing the finding, Ohio’s Secretary of State conceded that “voter fraud is exceedingly rare.”¹⁵

In other words, existing data and longstanding research unequivocally show that our current system of federal and state laws is working.

AFL’s cherry-picked examples of noncitizen registration, attempts to vote or voting, Pet. at ¶ 8, are misleading. Taking each in turn:

In North Carolina, AFL notes that 11 registrants faced successful eligibility challenges on the basis of their citizenship in 2014. That’s out of more than 1.7 million ballots cast across the state, amounting to less than .001 percent of ballots cast. And, those 11 people were *not* permitted to vote. In other words, North Carolina’s audit process and state laws were sufficient to ensure that none of these ineligible individuals cast ballots.

In Texas in 2019, a federal court blocked the acting Secretary of State from purging nearly 100,000 registrants because tens of thousands of them were, in fact, naturalized citizens. The court called the state’s ill-conceived efforts “a solution looking for a problem . . . [that] exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us.” *Tex. League of United Latin Am. Citizens v. Whitley*, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at *1 (W.D. Tex. Feb. 27, 2019). Texas promptly settled the case.

¹¹ Press Release, Georgia Secretary of State, *Citizenship Audit Finds 1,634 Noncitizens Attempted to Register to Vote*, (Mar. 28, 2022) <https://perma.cc/HLP3-PGH7>.

¹² Stanley Dunlap, *Georgia GOP secretary of state reports audit found 20 noncitizens registered to vote out of 8.2M*, Georgia Recorder, Oct. 23, 2024, <https://perma.cc/9R9H-ETM8>.

¹³ Tyler Buchanan, *LaRose: 104 illegally registered to vote in Ohio, 13 voted in 2020*, Ohio Capital J. (Jul. 31, 2021), <https://ohiocapitaljournal.com/2021/07/13/larose-104-illegally-registered-to-vote-in-ohio-13-voted-in-2020/>.

¹⁴ *Id.*

¹⁵ Jessie Balmert, *13 possible cases of non-citizens voting underscore rarity of Ohio voter fraud*, Cincinnati Enquirer (Jul. 12, 2021), <https://www.cincinnati.com/story/news/politics/elections/2021/07/12/non-citizens-voting-ohio-extremely-rare-elections-chief-says/7935710002/>.

With respect to purported noncitizens removed from Alabama’s voter rolls in 2024, Alabama’s Secretary of State acknowledged that this list maintenance effort improperly removed thousands of U.S. citizens who were legally registered to vote. *See* Prelim. Inj. Hr’g Tr. at 13–16, *Ala. Coal. For Immigrant Just. v. Allen*, No. 2:24-cv-01254-AMM, (N.D. Ala. Oct. 18, 2024), Dkt. No. 91. He directed county registrars to reactivate most of the voters who were incorrectly identified as noncitizens and inactivated as part of the list maintenance program. *Id.* at 13–16.

Likewise, Virginia’s and Ohio’s 2024 purges of supposed noncitizens also improperly removed eligible citizen voters.¹⁶ Not only does AFL fail to mention these errors, but their data is also woefully without context. For example, the supposed number of noncitizens on Ohio’s rolls amounted to less than one tenth of one percent of Ohio voters. An even smaller number of supposed noncitizens allegedly cast ballots, and it is not clear what the timespan is for such few occurrences because Ohio’s Secretary of State has failed to specify when any of these alleged noncitizens voted.

AFL’s use of Heritage Foundation data is similarly devoid of context. Even accepting for the sake of argument the conclusion that the Heritage Foundation identified “1,499 proven instances of voter fraud,” Pet. at ¶ 8, (itself a misleading characterization), those cases span 40 years, from 1982 through 2025. Of those cases, the database includes just 96 instances involving supposed noncitizens registering, voting, or attempting to vote—out of billions of votes cast nationally across more than four decades. Only two such cases occurred within the last decade (both in 2016).

AFL also cites a long-debunked study regarding the percentage of noncitizens who are allegedly registered to vote. *See* ¶ 26. In a November 2020 blog post, James Agresti restated widely discredited 2014 research by Jesse Richman, a professor at Old Dominion University.¹⁷ The year after Richman’s study was published, an article in the same journal thoroughly debunked his conclusions.¹⁸ One of the authors of the study condemning Richman’s work said of the refuted study: “As a member of the team that produces the datasets upon which that study was based . . . I can say unequivocally that this research is not only wrong, it is irresponsible social science

¹⁶ Jude Joffe-Block, *U.S. citizens are among the voters removed in Virginia’s controversial purge*, NPR, (Oct. 30, 2024), <https://perma.cc/X6BL-FC7B>; Nick Evans, *Citizens caught in Ohio noncitizen voting audit say latest letter offers incomplete information*, Ohio Capitol J. (Sep. 4, 2024), <https://perma.cc/M8PQ-WLCJ>.

¹⁷ James D. Agresti, *Quantifying Illegal Votes Cast by Non-Citizens in the Battleground States of the 2020 Presidential Election*, Just Facts (Nov. 8, 2020), <https://perma.cc/8J8D-TYYJ>; *see* Jesse T. Richman, et al., *Do non-citizens vote in U.S. elections?*, 36 Electoral Stud. 149 (Dec. 2014),

<https://www.sciencedirect.com/science/article/abs/pii/S0261379414000973>.

¹⁸ Stephen Ansolabehere, et al., *The perils of cherry picking low frequency events in large sample surveys*, 40 Electoral Stud. 409 (Dec. 2015), <https://www.sciencedirect.com/science/article/abs/pii/S0261379415001420?via%3Dihub>.

and should never have been published in the first place.”¹⁹ The Cato Institute described Agresti’s analysis as an example of “survey misuse, misdesign, and misinterpretation.”²⁰ And a federal court gave “no weight” to Richman’s estimates about the number of noncitizens who “registered or attempted to register to vote.” *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1088 (D. Kan. 2018), *aff’d sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). In 2017, more than 200 political scientists and statisticians signed a public letter stating that “the scholarly political science community has generally rejected the findings in the Richman study.”²¹

B. The NVRA’s legislative history makes clear Congress’s intent; Congress, not the EAC, should decide whether to amend the NVRA to require citizenship documents with the Federal Form.

The legislative history of the NVRA reflects that Congress did not believe that documentary proof of citizenship was “necessary” and did not intend to burden voters with additional requirements to register to vote beyond filling out one form.²² During Congressional debates about the passage of the NVRA, the Senate considered but rejected concerns that citizenship documentation was needed to prevent noncitizen voting, explaining that the NVRA “provides sufficient safeguards to prevent noncitizens from registering to vote.” S. Rep. No. 103-6, at 11 (Feb. 25, 1993). Congress reached this conclusion because the NVRA requires that “every application for voter registration must include a statement [setting forth the citizenship requirement] and requires that the applicant sign an attestation clause, under penalty of perjury.” *Id.*; *see also* H. Rep. 103-9, at 10 (“The Committee believes that these provisions [to set forth citizenship requirements and require an attestation under penalty of perjury] are sufficient to deter fraudulent registrations.”). This provision, along with the criminal penalties for knowing and false assertion of United States citizenship, were deemed sufficient by Congress. S. Rep. No. 103-6, at 11.

Moreover, when the NVRA reached conference, Congress specifically rejected a proposed amendment that would have allowed states to require documentary proof of citizenship. H.R. Conf. Rep. No. 103-66, at 12-23 (April 28, 1993). As Chief Judge Kozinski noted in the Ninth Circuit’s *ITCA* decision, “both chambers affirmatively rejected efforts to authorize precisely” the exact same type of proposal that the AFL now seeks through its petition. *See Gonzalez v. Arizona*, 677 F.3d 383, 442 (9th Cir. 2012) (*en banc*) (Kozinski, C.J., concurring). Congress not only found that the

¹⁹ Brian Schaffner, *Trump’s Claims About Illegal Votes Are Nonsense. I Debunked the Study He Cites as ‘Evidence.’*, Politico Mag. (Nov. 29, 2016), <https://perma.cc/6ZZX-SM6H>.

²⁰ Alex Nowrasteh, *Noncitizens Don’t Illegally Vote in Detectable Numbers*, Cato Inst. (Nov. 25, 2020), <https://perma.cc/9GM7-95XT>.

²¹ Ex. H, Open Letter to Richman at 2, *Fish v. Kobach*, 309 F. Supp. 3d 1048, No. 16-cv-02105-JAR-JPO (D. Kan. 2017), Dkt. No. 390-9, <https://perma.cc/NQT9-DY74>.

²² Courts have noted this legislative history when addressing attempts to add documentary proof-of-citizenship requirements to NVRA voter registrations processes. *See Fish v. Kobach*, 189 F. Supp. 3d 1107, 1114-15 (D. Kansas, 2016); *Kobach*, 772 F.3d at 1195 n.7.

amendment was “not necessary or consistent with the purposes of this Act,” H.R. Conf. Rep. No. 103-66, at 12-23, but also that it would “effectively eliminate, or seriously interfere with, the mail registration program of the Act [and] could also adversely affect the administration of the other registration programs,” *id.* at 23.

The rejected amendment was even less burdensome than AFL’s proposal here. AFL seeks to require that Americans provide one of a very limited list of citizenship documents to use the Federal Form in *every* state. But the proposed amendment rejected by Congress as too burdensome would have only *allowed* states to choose if they wanted to impose a show-your-papers requirement. H.R. Conf. Rep. No. 103-66, at 12–23. Congress concluded that even the *potential* that some states could impose additional documentation requirements outside the bounds of the Federal Form itself would be so burdensome that it would seriously interfere with one of the key purposes of the NVRA “to establish procedures that will increase the number of eligible citizens who register to vote for Federal office.” 52 U.S.C. § 20501(b)(1). The Conference Report found that the amendment was “not necessary or consistent with the purpose of this Act.” H.R. Conf. Rep. No. 103-66, at 12-23.

AFL’s proposed change would directly conflict with Congress’s original intent in enacting the NVRA. Such a substantial change from the intent and goals of the NVRA should be made by Congress, particularly as to a policy that Congress specifically considered and rejected. Currently, the SAVE Act is pending in Congress and would make changes to the NVRA similar to the proposal that AFL is asking the EAC to consider evaluating.²³ The undersigned, however, agree with Congress’s initial determination that imposing additional documentation requirements outside the bounds of the Federal Form would make voter registration unnecessarily burdensome.

C. The NVRA Does Not Authorize the EAC to require a passport or other citizenship document with the Federal Form.

The NVRA does not authorize the EAC to require a passport or other citizenship document for registration with the Federal Form. The NVRA permits the EAC to require “only such *identifying information* . . . as is *necessary*” to establish voter eligibility. 52 U.S.C. § 20508(b)(1) (emphasis added). In *Mi Familia Vota v. Fontes*, 129 F.4th 691, 719 (9th Cir. 2025),²⁴ the Ninth Circuit found that the ordinary meaning of “necessary” is “essential.” *Id.* (citing *Williams v. Taylor*, 529 U.S. 420, 431 (2000)), *Necessary*, Black’s Law Dictionary (12th ed. 2024); *Necessary*, Oxford English Dictionary, (2d ed. 1989). Given this meaning of the plain language of the NVRA, the court held that documentary proof of citizenship is “not legitimately

²³ Safeguard American Voter Eligibility Act, H.R. 22, 119th Cong. (2025), <https://www.congress.gov/bill/119th-congress/house-bill/22/text>.

²⁴ In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Supreme Court did not reach the question of the meaning of the term “necessary” as used in Section 9 of the NVRA.. 570 U.S. 1 (2013). Thus, *Mi Familia Vota* is the only case to rule on the meaning of “necessary” in Section 9.

necessary for registration” and as such the NVRA prohibits requiring such documentation as part of registration for federal elections. *Id.* The court noted that such documentation is not necessary because the registration form requires proof of citizenship through a sworn attestation. *Id.*

The NVRA also forbids the EAC from requiring “notarization or other formal authentication” on the Federal Form. 52 U.S.C. § 20508(b)(3). A documentary proof-of-citizenship requirement is a form of “formal authentication.” Consistent with the legislative purpose of the NVRA, Section 9(b)(3) specifically prevents the EAC from requiring applicants to complete additional steps to “authenticate” their eligibility because the burden and inconvenience of such a requirement will make registration through the Federal Form unduly difficult. The request from AFL would require the EAC to 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, in violation of the NVRA.

Even if the NVRA permitted the EAC to impose these new burdens on voter registration, the minimal justifications for doing so are far outweighed by the danger of preventing eligible persons from voting. Although AFL points to Real IDs required for air travel as widely available, Pet. at ¶ 29, most Real IDs, in fact, would *not* allow for successful registration. AFL’s list of acceptable documents only includes what is commonly referred to as “enhanced Real ID.” Pet. at ¶ 43. Only five states offer these enhanced Real IDs,²⁵ and thus Americans in 45 states have no access to them.²⁶ Most Real IDs do not provide any information about citizenship—their purpose is to verify identity.

The history of Real ID implementation demonstrates the challenges in imposing a cumbersome proof-of-citizenship requirement. The Real ID Act was passed in 2005 and initially imposed a deadline requiring that all individuals present a passport or a Real ID to fly by 2008. See 49 U.S.C. § 30301 (Real ID Act of 2005). But that deadline was postponed many times because compliance has been so challenging. The last postponement was from 2022 to 2025,²⁷ but even now given that compliance is still a challenge, Homeland Security TSA Agents still allow people to

²⁵ See U.S. Dep’t of Homeland Sec., *Enhanced Drivers Licenses: What Are They?* (Apr. 27, 2023), available at <https://perma.cc/AJ9Z-Y73N>. *Citation corrected after submission.

²⁶ See *id.*

²⁷ U.S. Dep’t of Homeland Security, *DHS Announces Extension of REAL ID Full Enforcement Deadline* (Dec. 5, 2022), <https://www.dhs.gov/archive/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline>; see also Kris Van Cleave, Kathryn Krupnik & Kelsie Hoffman, *Millions of Americans Still Don’t Have a Real ID. Here’s What to Know as the Deadline Nears*, CBS NEWS (Apr. 2, 2025), <https://perma.cc/S8HA-RC8A>; Holly Edgell, *Got Your Real ID? Millions of Midwesterners Still Don’t Have the New, More Secure Cards*, IPM Newsroom (Apr. 30, 2025), <https://perma.cc/C8V2-UWLZ>. *Citation corrected after submission.

fly if they do not present REAL ID.²⁸ A similar outcome here would have far greater consequences: voting, unlike flying, is a fundamental right. *See, e.g.*, 52 U.S.C. § 20501(a)(1) (“the right of citizens of the United States to vote is a fundamental right.”).

AFL’s assertion that the percentage of persons without access to the necessary documents is “vanishingly small” is also inaccurate. Pet. at ¶ 29. The only qualifying document per AFL’s proposal that all Americans may have the ability to obtain is a passport. But many American citizens do not have a valid passport.²⁹ For example, roughly 65 percent of Black Americans lack a valid passport.³⁰ And the distribution of who has passports is very uneven across the different states.³¹ Several additional comments being submitted by other organizations and individuals provide more details showing the number of U.S. citizens who would not be able to access citizenship documents required to register to vote under AFL’s proposal. The many U.S. citizens who lack qualifying documentary proof of citizenship under the AFL proposal would decrease voter registration by eligible persons, in direct conflict with one of the main purposes of the NVRA to “increase the number of eligible citizens who register to vote in elections for Federal office.” 52 U.S.C. § 20501(b)(1).

D. The EAC’s Limited Resources are Better Deployed Elsewhere.

The EAC’s limited resources are better deployed addressing more pressing issues that carry out the key purposes of the NVRA, such as increasing rather than limiting access to voter registration.³²

As explained above, noncitizen voting is virtually nonexistent. The EAC has no obligation to address such a rarely occurring problem. *See Flyers Rts.*, 864 F.3d at 749 (affirming the FAA’s decision not to undertake a rulemaking process to address the risk of a medical problem that passengers could suffer on planes because it “cited evidence showing that it rarely occurs”).

Rather than engage in complex rulemaking to address an illusory problem, the EAC should instead focus on its core statutory responsibilities: improving election

²⁸ Mary Cunningham, *Real IDs Are Required to Travel Domestically Starting Today. Here's What to Know*, CBS News (May 7, 2025), <https://perma.cc/PE6K-4J4L>; Rebecca Santana, *Homeland Security chief says travelers with no REAL ID can fly for now, but likely with extra steps*, PBS News (May 6, 2025), <https://www.pbs.org/newshour/nation/homeland-security-chief-says-travelers-with-no-real-id-can-fly-for-now-but-with-likely-extra-steps>.

²⁹ *See, e.g.*, U.S. Dep’t of State, Bur. Of Consular Affairs, *Reports and Statistics*, <https://perma.cc/8A9R-59KY> (last visited Apr. 1, 2025) (169,915,821 valid passports in circulation in Fiscal Year 2024).

³⁰ YouGov, *Adults under 30 are more likely than older Americans to have a current U.S. passport*, (Aug. 31, 2023), <https://perma.cc/5845-LNRK>; *see also id.*

³¹ USAFacts, *How many US passports are in circulation?* (Mar. 4, 2024) <https://perma.cc/JYQ9-7UUI>.

³² *See, e.g.* 52 U.S.C. § 20501(a)(3).

administration, ensuring the security and accessibility of voting systems, and serving as a nonpartisan clearinghouse for best practices and data. 52 U.S.C. § 20922.

Such “regulatory-effort and resource-allocation judgments . . . fall squarely within the agency’s province.” *Flyers Rts.*, 864 F.3d at 749. If the EAC “identif[ies] its other priorities and explain[s] why it believe[s] they were more pressing than” revisiting this settled issue, courts are unlikely to disturb that judgment. *See Coinbase, Inc. v. SEC*, 126 F.4th 175, 201 (3d Cir. 2025).

CONCLUSION

For these reasons, we urge the EAC to deny AFL’s petition.

Respectfully submitted,

Sophia Lin Lakin
Ethan Herenstein
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor,
New York, NY 10004

Sarah Brannon
American Civil Liberties Union Foundation
915 15th Street NW
Washington, D.C. 20005

Eliza Sweren-Becker
Wendy Weiser
Brennan Center for Justice at NYU School
of Law
120 Broadway, Suite 1750
New York, NY 10271

Miranda Galindo
Delmarie Alicea
Latino Justice PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115

Leah C. Aden
John S. Cusick
NAACP Legal Defense and Educational
Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

Niyati Shah
Asian Americans Advancing Justice-AAJC
1620 L Street NW, Suite 1050
Washington, D.C. 20036

Michael Perloff
American Civil Liberties Union Foundation
of the District of Columbia
529 14th Street NW, Suite 722
Washington, D.C. 20045