

**BEFORE THE
U.S. ELECTION ASSISTANCE COMMISSION
SILVER SPRING, MD 20910**

In the matter of:)
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Notice and Request for Public Comment) Docket No. EAC-2013-0004
on State Requests to Include Additional)
Proof-of-Citizenship Instructions on the)
National Mail Voter Registration Form)
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_____)

COMMENTS OF JUDICIAL WATCH, INC.

Judicial Watch¹ files these comments in support of Arizona, Kansas, and Georgia’s requests that the U.S. Election Assistance Commission (“EAC”) amend the National Mail Voter Registration Form (“Federal Form”) to allow states to require proof of United States citizenship at the time a citizen registers to vote. A failure to allow states to require such information would undermine Americans’ confidence that their elections are being conducted fairly and honestly, and would thwart states’ ability to comply with the election integrity obligations imposed by federal law.

Background on the NVRA

The National Voter Registration Act (“NVRA”) reflects a compromise designed both to increase lawful voter registration and to increase the integrity of elections by ensuring voter rolls are accurate and contain only eligible voters. The NVRA was enacted “to establish procedures that will increase the number of eligible citizens who register to vote,” as well as to “protect the

¹ Judicial Watch is one of the nation’s leading election integrity advocacy organizations, and since 2012 has initiated or involved itself in election law litigation in Ohio, Indiana, Florida, North Carolina, Virginia, Tennessee, and Maryland.

integrity of the electoral process” and “ensure that accurate and current voter registration rolls are maintained.” 42 U.S.C. § 1973gg(b)(1), (3)-(4).

To accomplish these goals, Section 6 of the NVRA, 42 U.S.C. § 1973gg-4, was passed to expand opportunities to register to vote by requiring states to allow citizens to register by mail, along with Section 7 of the NVRA, 42 U.S.C. § 1973gg-5, which requires states to allow citizens to register to vote at public assistance agencies. As a counterpart to these provisions, Section 8 of the NVRA, 42 U.S.C. § 1973gg-6, was designed to increase the integrity of elections by requiring states to maintain accurate voter rolls by ensuring the rolls contain only the names of eligible voters. Section 8 therefore functions as a counterpart to Sections 6 and 7. The provisions represent a carefully crafted compromise by the U.S. Congress to increase both voter registration *and* the integrity of voter lists. As the Senate Report explains:

An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis. The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud.²

Congress intended for states to comply fully with all provisions of the NVRA.

Failure to Amend the Federal Form Will Undermine Voter Confidence

If states cannot ensure that only eligible citizens are registered to vote in federal elections, citizen confidence that elections are being conducted lawfully will be undermined. The purpose of NVRA Section 8, in addition to preventing voter fraud and election fraud, is to protect citizens’ *confidence* that elections are being conducted fairly and honestly. As the U.S. Supreme Court has stated, ensuring that elections are legitimate with verifiable results has an

² S. Rep. 103-6 at 17-18, 103rd Cong., 1st Sess., reprinted in *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples*, Appendix C, Senate Committee Report on the Act, p. C-10, Federal Election Commission, January 1, 1994, available at http://www.eac.gov/national_voter_registration_act/related_documents.aspx.

independent value. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the ‘electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.’”); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. . . Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”).

There are good reasons to believe that the public needs to be reassured on this point. In poll after poll, for some time now, large segments of the American populace have expressed their dismay with various aspects of our electoral system. A Rasmussen poll from August of 2013 reported that only 39% of Americans believe elections are fair.³ In 2012, a Monmouth University poll reported that more than two-thirds of registered voters thought voter fraud was a problem.⁴ In 2008, when a Gallup poll asked respondents around the world whether they had “confidence in the honesty of elections,” 53% of Americans said that they did not.⁵

These polls reveal a startling lack of faith in our electoral system. With respect to the issue of whether non-citizens are able to cast ballots, there is, moreover, support for the public’s concern. To cite only two recent examples, Ohio Secretary State Jon Husted was able to confirm

³ Rasmussen Reports, *New Low: 39% Think U.S. Elections Are Fair*, August 16, 2013, Rasmussen Reports, available at http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair.

⁴ Politico, *Poll: 36% say voter fraud major issue*, Kevin Robillard, October 26, 2012, available at <http://www.politico.com/news/stories/1012/82936.html>.

⁵ Gallup, *Worldwide, Views Diverge About Honesty of Elections*, Magali Rheault and Brett Pelham, November 3, 2008, available at <http://www.gallup.com/poll/111691/worldwide-views-diverge-about-honesty-elections.aspx>.

that at least 17 non-citizens voted in Ohio in the 2012 presidential election,⁶ and a 2012 Philadelphia City Commissioner report on voter fraud confirmed that 19 non-citizens were registered in the city, with at least 7 voting.⁷ These discoveries will naturally lead the public to wonder how much broader this law-breaking is. But in any event, as the Carter-Baker Report observed, even a small amount of fraud can have a pernicious effect on the electoral system:

While the Commission is divided on the magnitude of voter fraud – with some believing the problem is widespread and others believing that it is minor – there is no doubt that it occurs. *The problem, however, is not the magnitude of the fraud.* In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system.⁸

To prevent these harms to the electoral system and the public’s confidence in it, the EAC should grant the states’ requests. This step is necessary not only to safeguard close elections from non-citizen voter fraud, but to prevent these documented cases of illegal voting from causing lawful voters to turn away from future participation in American democracy.

⁶ Fox News, *Non-citizens caught voting in 2012 presidential election in key swing state*, Eric Shawn, December 18, 2013, available at <http://www.foxnews.com/politics/2013/12/18/non-citizens-caught-voting-in-2012-presidential-election-in-key-swing-state/>.

⁷ Report of City Commissioner Al Schmidt, “Voting Irregularities in Philadelphia County, 2012 Primary Election,” July 2012, p. 18 (“In 2012 alone, the Philadelphia Voter Registration office has already cancelled the registrations of 19, illegally-registered voters in Philadelphia County who are not U.S. Citizens. Of the 19 illegally-registered voters, 7 have voted in at least one election over the past 10 years, as recently as the 2012 Primary.”).

⁸ See Report of The Commission on Federal Election Reform, Jimmy Carter and James A. Baker, III (Co-Chairs), “Building Confidence in U.S. Elections,” American University’s Center for Democracy and Election Management, p. 18 (September 2005) (italics added), available at http://www1.american.edu/ia/cfer/report/full_report.pdf.

Failure to Amend the Federal Form Will Thwart State NVRA Compliance

If the EAC refuses the requests of Arizona, Kansas, and Georgia, these and other states will be frustrated in their efforts to comply with Section 8 of the NVRA. Many states have already been struggling to do so. Indeed, the routine failure of certain states to comply with their voter list accuracy obligations – and the resulting poor condition of many state voter rolls – is quickly becoming a national, nonpartisan issue. For example, the Pew Research Center on the States released an astonishing report in 2012 noting that “[a]pproximately 2.75 million people have active registrations in more than one state.”⁹ That same report observed that “24 million – one of every eight – active voter registrations in the United States are no longer valid or are significantly inaccurate,” and that “[m]ore than 1.8 million deceased individuals are listed as active voters.” *Id.*¹⁰ Non-citizen voter registration fraud is a contributor to this problem.

Under Section 8 of the NVRA, states are under a federal obligation to ensure non-citizens neither register nor vote. In 2012, a federal district court found that Section 8’s broad language mandating accurate voter rolls *requires* states to ensure non-citizens are not registered to vote in federal elections:

Both sides agree that a state can remove an improperly registered noncitizen. . . For noncitizens, the state’s duty is to maintain an accurate voting list. *See, e.g.*, 42 U.S.C. § 1973gg-6(b). A state can and should do that on the front end, blocking a noncitizen from registering in the first place. And if a state finds it has

⁹ “Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade,” PEW RESEARCH CENTER ON THE STATES, Feb. 14, 2012, at 1, available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Pew_Upgrading_Voter_Registration.pdf.

¹⁰ *See also* Jonathan Brater, “Presidential Voting Commission Can Modernize Elections: Testimony to the Presidential Commission on Election Administration,” THE BRENNAN CENTER, Sept. 4, 2013 (“A system in which 1 in 8 records has serious errors raises the prospect of fraud and manipulation.”), available at <http://www.brennancenter.org/analysis/testimony-presidential-voting-commission-can-modernize-elections>.

made an error – or a number of errors – and wishes to correct the problem, it should do so well in advance [of a federal election].

United States v. Florida, 870 F. Supp. 2d 1346, 1351 (N.D. Fla. 2012). It is this obligation that Arizona, Kansas, and Georgia now seek to comply with.

States' federal obligation to keep non-citizens off the voter rolls is one of the key purposes of the NVRA. The EAC would be thwarting states' compliance with this federal law if it refuses the requests of Arizona, Kansas, and Georgia, potentially exposing those states to liability and litigation. *See Judicial Watch v. King*, 2012 U.S. Dist. Lexis 174360 (S.D. Ind., Dec. 10, 2012).

Conclusion

For all the foregoing reasons, Judicial Watch respectfully asks that the EAC¹¹ grant the requests of Arizona, Kansas, and Georgia and allow states to require proof of citizenship when a new voter registers to vote.

Dated: January 3, 2014

Respectfully submitted,

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¹¹ Judicial Watch notes that only a quorum of EAC Commissioners can refuse the states' requests. An Acting Director lacks authority to take official regulatory action for the Commission. *See* 42 U.S.C. § 15328 (action by the EAC can be authorized "only with the approval of at least three of its members."). Because there is no quorum of Commissioners, the EAC cannot reject the states' request.

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The **Election Assistance Commission (EAC)** Notice: [National Mail Voter Registration Form: State Requests to Include Additional Proof-of-Citizenship Instructions](#)

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