


# EXHIBIT 5

**Karen Osborne - RISCX**

**From:** Kanefield, Joe (jkanefield@azsos.gov)  
**Sent:** Tuesday, March 07, 2006 7:00 PM  
**To:** Ana Wayman-Trujillo; Berta Manuz (E-mail); Candace Owens; Christine Rhodes; F. Ann Rodriguez (E-mail); Helen Purcell - RISCX; Joan McCall (E-mail); Laura Dean-Lytle (E-mail); Laurie Justman (E-mail); LeNora Y. Johnson (E-mail); Linda Haught Ortega (E-mail); Shelly Baker (E-mail); Susan Hightower Marler (E-mail); Suzie Sainz (E-mail); Wendy John (E-mail)  
**Cc:** Brewer, Jan; Tyne, Kevin; Waite, Kris; Stender, Craig; Allen McVey (E-mail); Chris J Roads (E-mail); Chris Roll (E-mail); Claudia Lopez; Gene Zawacky (E-mail); Holly Hawn (E-mail); Jerry Jaramillo; Karen Osborne - RISCX; Kim Stewart (E-mail); Kristi Jones; Martin Brannan (E-mail); Nancy Duke (E-mail); Patty Hansen (E-mail); Ruth Robinson; Suzanne Cuthbertson (E-mail); Sylvia Gruhn  
**Subject:** Letter from EAC re: Federal Mail Voter Registration Form  
**Attachments:** EACletter.pdf

  
 EACletter.pdf  
 (273 KB)

**TO:** County Recorders

**FROM:** Joseph Kanefield  
 State Election Director

**DATE:** March 8, 2006

**SUBJECT:** Letter from Election Assistance Commission re: National Voter Registration Form

Yesterday Secretary Brewer received the attached letter from the executive director of the U.S. Election Assistance Commission. The letter deals with the Federal Mail Voter Registration Form (Federal Form) and concludes that Arizona may not apply the proof of citizenship requirement set forth in Proposition 200 to the Federal Form. The EAC makes clear that its opinion does not affect the state registration form and applies only to federal elections. We question whether the letter is legally correct and have sought advice from our counsel at the Arizona Attorney General's Office. Please note that this EAC opinion does not affect any voter registrations for the upcoming elections next week. We will keep you informed as we learn more about this issue.

Joseph Kanefield  
 State Election Director  
 Arizona Secretary of State's Office  
 1700 West Washington, 7th Floor  
 Phoenix, Arizona 85007  
 (602) 542-6167 (direct)  
 (602) 542-6172 (fax)  
 jkanefield@azsos.gov  
 <<EACletter.pdf>>

*Item 1*

MAR-06-2006 11:52 FROM: EAC

2025663128

TO: 602 542 1575

P. 2

**U.S. ELECTION ASSISTANCE COMMISSION**1225 NEW YORK AVENUE, N.W., SUITE 1100  
WASHINGTON, D.C. 20005

March 6, 2006

Jan Brewer  
Arizona Secretary of State  
1700 West Washington Street, 7th Floor  
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.*, (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

**Arizona's Policy.** On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form would have their form rejected, resulting in the loss of voting rights.

**Federal Authority To Regulate Elections.** It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and

MAR-06-2006 11:52 FROM: EAC

2025663120

TO: 602 542 1575

P. 3

Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413-1414 (9<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (citing, Smiley v. Holm, 285 U.S. 355, 366 (1932)); Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 793-794 (7<sup>th</sup> Cir. 1995) (citing Smiley, 285 U.S. at 366, Ex parte Siebold, 100 U.S. 371 (1879) and United States v. Original Knights of the Ku Klux Klan, 250 F.Supp 330, 351-355 (E.D.La 1965)); Association of Community Organizations for Reform Now v. Miller, 129 F.3d 833, 836 (6<sup>th</sup> Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections... or to 'alter' the laws initially promulgated by the states. Thus... article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." Miller, 129 F.3d at 836.

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (Edgar at 794), this does not limit the Federal authority to set voter registration procedures for such elections. Voting Rights Coalition, at 1413. This is true even where States have declared voter registration to be a voting qualification (Wilson, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (Edgar at 794-795).

**National Voter Registration Act.** Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. Voting Rights Coalition, 60 F.3d F.3d 1411; Edgar, 56 F.3d 791; Miller, 129 F.3d 833. The NVRA mandates that States "shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.<sup>1</sup> The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

**Discussion.** While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the

<sup>1</sup> The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

MAR-25-2006 11:52 FROM: EAC

2025663128

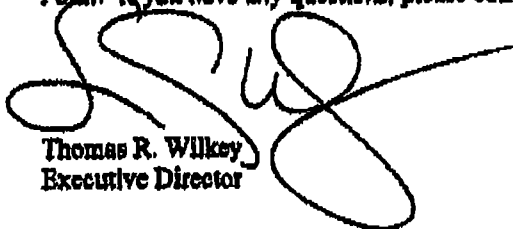
TO: 602 542 1575

P. 4

Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.<sup>2</sup> These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C. §15483(b)(4)). This Federal scheme has regulated the area and preempts state action. 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 purpose of [the NVRA]."<sup>3</sup> The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

**Conclusion.** While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.



Thomas R. Wilkey  
Executive Director

<sup>2</sup> These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

<sup>3</sup> *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

**Karen Osborne - RISCX**

**From:** Kanefield, Joe [jkanefield@azsos.gov]  
**Sent:** Monday, March 13, 2006 5:35 PM  
**To:** Ana Wayman-Trujillo; Berta Manuz (E-mail); Candace Owens; Christine Rhodes; F. Ann Rodriguez (E-mail); Helen Purcell - RISCX; Joan McCall (E-mail); Laura Dean-Lytle (E-mail); Laurie Justman (E-mail); LeNora Y. Johnson (E-mail); Linda Haught Ortega (E-mail); Shelly Baker (E-mail); Susan Hightower Marler (E-mail); Suzie Sainz (E-mail); Wendy John (E-mail)  
**Cc:** Brewer, Jan; Tyne, Kevin; Waite, Kris; Stender, Craig; Maaske, Bill; Fontes, Mary; Allen McVey (E-mail); Chris J Roads (E-mail); Chris Roll (E-mail); Claudia Lopez; Gene Zawacky (E-mail); Holly Hawn (E-mail); Jerry Jaramillo; Karen Osborne - RISCX; Kim Stewart (E-mail); Kristi Jones; Martin Brannan (E-mail); Nancy Duke (E-mail); Patty Hansen (E-mail); Ruth Robinson; Suzanne Cuthbertson (E-mail); Sylvia Gruhn  
**Subject:** Letter from Election Assistance Commission re: National Voter Registration Form  
**Attachments:** Letter from SOS to EAC 3-9-06 (Federal VR Form).pdf; Letter from SOS to EAC 3-13-06 (Federal VR Form).pdf



Letter from Letter from  
 S to EAC 3-9-06 to EAC 3-13-0

TO: County Recorders

FROM: Joseph Kanefield  
 State Election Director

DATE: March 13, 2006

SUBJECT: Letter from Election Assistance Commission re: National Voter Registration Form

Last week I sent you a copy of the letter Secretary Brewer received from the executive director of the U.S. Election Assistance Commission (EAC) on March 6, 2006. Attached are two letters sent by Secretary Brewer to the EAC Chairman, Paul DeGregorio, in response to this letter. The second letter sent this afternoon states Secretary Brewer's position that the proof of citizenship requirement set forth in A.R.S. § 16-166(F) must continue to be enforced for all newly registered voters and voters moving from one county to another. Secretary Brewer made this decision after consulting with the Arizona Attorney General's Office. We will continue to keep you informed about this matter.

Joseph Kanefield  
 State Election Director  
 Arizona Secretary of State's Office  
 1700 West Washington, 7th Floor  
 Phoenix, Arizona 85007  
 (602) 542-6167 (direct)  
 (602) 542-6172 (fax)  
 jkanefield@azsos.gov

<<Letter from SOS to EAC 3-9-06 (Federal VR Form).pdf>> <<Letter from SOS to EAC 3-13-06 (Federal VR Form).pdf>>

*Item 2*



**JAN BREWER  
SECRETARY OF STATE  
STATE OF ARIZONA**

March 9, 2006

**Paul S. DeGregorio, Chairman  
United States Election Assistance Commission  
1225 New York Avenue N.W.  
Washington, DC 20005**

Dear Chairman DeGregorio:

I was extremely disappointed to receive a letter from the Election Assistance Commission's executive director, Thomas Wilkey, on Monday, March 6, 2006, that expresses his opinion that our State's proof of citizenship requirement when registering to vote is preempted by federal law with regard to the Federal Mail Voter Registration Form (Federal Form).

On November 2, 2004, over one million Arizona citizens passed into law Proposition 200, which requires all applications for voter registration in Arizona to be accompanied by satisfactory evidence of United States citizenship. Mr. Wilkey's letter provides questionable legal support for its conclusion that a state may not condition acceptance of the Federal Form upon receipt of proof of citizenship and I have asked the Arizona Attorney General to advise me on this matter.

What upsets me most is the manner in which the EAC has handled this issue. My staff proposed changes to the Arizona Instructions to the Federal Form in December of 2005, to reflect our new proof of citizenship requirement. At no point over the past three months was my office ever told that the EAC was questioning whether federal law preempted Arizona's proof of citizenship requirement for registrants using the Federal Form. Moreover, I am told the Commission spent a lot of time researching this question, but never had the courtesy to ask the State of Arizona for its input. Although Mr. Wilkey and the other Commissioners attended the NASS/NASED meeting in early February along with my State Election Director Joseph Kanefield, no one reached out to him to inform me about this issue.

In addition, to make matters worse, my office began getting press inquiries shortly after receiving the letter. It is my understanding that one of the Commissioners distributed this letter before I even had a chance to review it with my staff. I find this very upsetting coming from a federal agency that I believe should be working with the States to implement the National Voter Registration Act and not against them.

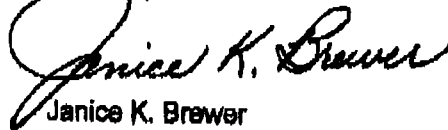
State Capital: 1700 West Washington Street, 7th Floor  
Phoenix, Arizona 85007-2888  
Telephone (602) 542-4285 Fax (602) 542-1575

Paul S. DeGregorio, Chairman  
March 9, 2006  
Page 2 of 2

Perhaps most importantly, this matter never appeared as an agenda item at any of the EAC's past public meetings and no formal vote was ever taken by the EAC to support Mr. Wilkey's opinion. I cannot help but feel that in your staff's haste to opine on this issue, the matter was not appropriately vetted by the Commission.

I therefore respectfully request that the Commission provide me an opportunity to respond to the legal points raised by Mr. Wilkey before taking a position on this issue, and then properly notice this matter for a future meeting at which time my input can be taken into consideration before a final vote is taken by the EAC. Thank you for considering my request.

Sincerely,



Janice K. Brewer  
Arizona Secretary of State

cc: The Honorable John McCain  
The Honorable John Kyl  
The Honorable Rick Renzi  
The Honorable Trent Franke  
The Honorable John Shadegg  
The Honorable Ed Pastor  
The Honorable J.D. Hayworth  
The Honorable Jeff Flake  
The Honorable Raul Grijalva  
The Honorable Jim Kolbe  
The Honorable Terry Goddard  
The Honorable Sam Reed, President,  
National Association of Secretaries of State  
Linda Lamone, President,  
National Association of State Elections Directors



**JAN BREWER  
SECRETARY OF STATE  
STATE OF ARIZONA**

March 13, 2006

**Paul S. DeGregorio, Chairman  
United States Election Assistance Commission  
1225 New York Avenue, N.W.  
Washington, DC 20005**

**Dear Chairman DeGregorio,**

As the Secretary of State and Chief Election Officer for the State of Arizona, I have significant concerns about the March 6, 2006, letter from your executive director asserting that Arizona may not implement its proof of citizenship law with respect to voters who register using a Federal Mail Voter Registration Form (Federal Form). In my mind, such a policy is completely inconsistent, unlawful, and without merit.

The executive director's opinion is incorrect and unlawfully prevents the State of Arizona from implementing an important voting security measure with respect to those voters using the Federal Form. Arizona's proof of citizenship requirement was passed by over one million voters in 2004, and was pre-cleared by the U.S. Department of Justice (DOJ) on January 24, 2005. In addition, DOJ separately pre-cleared our Arizona Voter Registration Form on May 6, 2005, which includes the proof of citizenship instructions now required of all citizens registering to vote in Arizona. The DOJ has civil enforcement power over the National Voter Registration Act, and has expressed no concern about Arizona's proof of citizenship requirement when registering to vote.

As I stated in my March 9, 2006, letter, I believe your letter provides questionable legal support for its conclusion. After consulting with the Arizona Attorney General, I will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-168(F).

State Capitol: 1700 West Washington Street, 7th Floor  
Phoenix, Arizona 85007-2888  
Telephone (602) 542-4285 Fax (602) 542-1575

Paul S. DeGregorio, Chairman  
March 13, 2008  
Page 2 of 2

As I requested of you in December, I urge you to instruct voters using the Federal Form to register in Arizona that they provide sufficient proof of citizenship. To do otherwise would be incredibly irresponsible and may unnecessarily disenfranchise voters using the Federal Form to register.

Sincerely,



Janice K. Brewer  
Arizona Secretary of State

JKB:kt

**Karen Osborne - RISCX**

**From:** Kanefield, Joe [jkanefield@azsos.gov]  
**Sent:** Thursday, April 20, 2006 11:08 AM  
**To:** Ana Wayman-Trujillo; Berta Manuz (E-mail); Candace Owens; Christine Rhodes; F. Ann Rodriguez (E-mail); Helen Purcell - RISCX; Joan McCall (E-mail); Laura Dean-Lytle (E-mail); Laurie Justman (E-mail); LeNora Y. Johnson (E-mail); Linda Haught Ortega (E-mail); Shelly Baker (E-mail); Susan Hightower Marler (E-mail); Suzie Sainz (E-mail); Wendy John (E-mail)  
**Cc:** Tyne, Kevin; Waite, Kris; Stender, Craig; Allen McVey (E-mail); Chris J Roads (E-mail); Chris Roll (E-mail); Claudia Lopez; Gene Zawacky (E-mail); Holly Hawn (E-mail); Jerry Jaramillo; Karen Osborne - RISCX; Kim Stewart (E-mail); Kristi Jones; Martin Brannan (E-mail); Nancy Duke (E-mail); Patty Hansen (E-mail); Ruth Robinson; Suzanne Cuthbertson (E-mail); Sylvia Gruhn  
**Subject:** Letter from Election Assistance Commission re: National Voter Registration Form  
**Attachments:** Letter from SOS to DOJ 04-17-2006 (Federal (National Voter Registration Form ID Requirement)).pdf



Letter from  
 S to DOJ 04-17-  
**TO:** County Recorders

**FROM:** Joseph Kanefield  
 State Election Director

**DATE:** April 20, 2006

**SUBJECT:** Letter from Election Assistance Commission re: National Voter Registration Form

I have previously reported to you about a letter Secretary Brewer received from the executive director of the U.S. Election Assistance Commission (EAC) on March 6, 2006, regarding the National Voter Registration Form and Secretary Brewer's response to those letters.

After receiving Secretary Brewer's response to the March 6, 2006 letter, the EAC referred the matter to the Department of Justice (DOJ). Attached is Secretary Brewer's response to that letter. Also, on March 27, 2006, and April 17, 2006, two separate groups sent Secretary Brewer a notice of intent to file suit under the National Voter Registration Act based on the opinion set forth in the March 6, 2006 letter from the EAC. Under the NVRA, a private party may bring suit 90 days after filing its notice. Although this letter of intent was sent to Secretary Brewer, it is very likely that the county recorders will be named in these suits when they are filed.

We will continue to keep you informed about this matter.  
 <<Letter from SOS to DOJ 04-17-2006 (Federal (National Voter Registration Form ID Requirement)).pdf>>

Joseph Kanefield  
 State Election Director  
 Arizona Secretary of State's Office  
 1700 West Washington, 7th Floor  
 Phoenix, Arizona 85007  
 (602) 542-6167 (direct)  
 (602) 542-5172 (fax)  
 jkanefield@azsos.gov

*Item 3*



**JAN BREWER  
SECRETARY OF STATE  
STATE OF ARIZONA**

April 17, 2006

John K. Tanner  
U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, N.W.  
Voting Section, 1800G  
Washington, D.C. 20530

Dear Mr. Tanner:

The U.S. Election Assistance Commission (EAC) recently wrote to you regarding the Arizona requirements for voter registration and the National Voter Registration Act (NVRA). Because the EAC misrepresents my position in this matter, it is necessary for me to address you directly to establish that Arizona is in full compliance with the NVRA. I urge you to advise the EAC to instruct Arizona voters using the Federal Mail Voter Registration Form (Federal Form) regarding the Arizona registration requirements.

On March 6, 2006, I received a letter from the EAC concluding that the NVRA preempts States from requiring proof of citizenship for registrants using the Federal Form. The EAC overstepped its authority and erroneously interpreted federal law<sup>1</sup>. Moreover, the EAC is unnecessarily disenfranchising voters using the Federal Form by refusing to properly instruct them regarding Arizona's citizenship requirement under A.R.S. § 16-166(F)<sup>2</sup>.

The EAC wrongfully asserts that Arizona is refusing to accept the Federal Form. Arizona uses and accepts the Federal Form and has done so since the NVRA's inception. The case law cited by the EAC in its March 6, 2006 letter affirms the

<sup>1</sup> The EAC has no authority to determine whether a state law complies with the NVRA. Section 209 of HAVA provides that the EAC "shall not have any authority to issue any rule, promulgate and regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a))." 42 U.S.C. § 15329. That section of the NVRA permits the EAC to "develop a mail voter registration application form for elections for Federal offices..." and do so "in consultation with the chief election officers of the States." 42 USC 1973gg-7(a)(2) (emphasis added). This provision does not provide the EAC authority to refuse to instruct voters about State registration requirements.

<sup>2</sup> Over one million Arizona voters passed this measure in 2004 through Proposition 200 to assure the accuracy of Arizona's voter registrations and to prevent voter fraud. The Department of Justice precleared Proposition 200 on January 24, 2005, and precleared the revised Arizona voter registration form incorporating the proof of citizenship requirement into its instructions on May 6, 2005.

State Capitol: 1700 West Washington Street, 7th Floor  
Phoenix, Arizona 85007-2888  
Telephone (602) 542-4285 Fax (602) 542-1575

Mr. John K. Tanner  
April 17, 2006  
Page 2

authority of Congress to legislate in the area of elections for federal office. The EAC did not cite any cases for its conclusion that "[n]o state may condition acceptance of the Federal Form upon receipt of additional proof."

In *Association of Community Organizations for Reform Now v. Miller*, 912 F. Supp. 976, 987 (W.D. Mich. 1995), *aff'd* 129 F.3d 833 (6th Cir. 1997), the court concluded that "under the NVRA the states are still left the task of determining that an applicant is eligible, and that the registration form as submitted complies with state law." The court rejected the notion that an applicant must be registered upon providing information—accurate or not—on a Federal Form.

A House Committee Report on the NVRA also stated that local officials may continue to confirm an applicant's eligibility, including as to citizenship:

Only the election officials designated and authorized under State law are charged with the responsibility to enroll eligible voters on the list of voters. [NVRA] should not be interpreted in any way to supplant that authority. The Committee is particularly interested in ensuring that election officials continue to make determinations as to applicant's eligibility, such as citizenship, as are made under current law and practice.

*National Voter Registration Act of 1993: Report 103-9 from the Comm. on House Administration, 103d Congress, 1st Sess., at 8 (emphasis added).*

The Federal Election Commission (FEC), in explaining the NVRA, also concluded that an application received by the local voter registration official may be subject to verification procedures that exist under State law. See "Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples," Federal Election Commission, January 1, 1994, at 1-6. The FEC stated, "although completing a voter registration application may be *simultaneous* with other transactions, such application does not constitute *automatic* registration." *Id.* (Emphasis in original).

The EAC's position also runs counter to the intent of Congress under HAVA, which requires verification of voter registration information. Section 303, for instance, requires States to implement "provisions to ensure that voter registration records in the State are accurate" and to have a "system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 42 U.S.C. § 15483(a)(2)(B)(4). Section 303 also requires first time registrants by mail to provide proof of identity with their registrations. 42 U.S.C. § 15483(b). In addition, HAVA requires States to verify driver license and social security information provided by registrants to ensure their eligibility to vote under State law. See 42 U.S.C. § 15483(a)(2)(B)(5).

<sup>3</sup> The FEC's administrative responsibilities under the NVRA were transferred to the EAC in Section 802 of HAVA.

Mr. John K. Tanner  
April 17, 2006  
Page 3

The EAC erroneously argues that NVRA and HAVA create a Federal scheme that regulates the manner in which voters prove citizenship to simply checking a box on the form. This assertion is contrary to the clear language in Sections 304 and 305 of HAVA, which leaves it up to the States' discretion to determine the methods of complying with the requirements of HAVA and specifically provides that "nothing in [HAVA] shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under [HAVA] so long as such State requirements are not inconsistent with the Federal requirements under [HAVA]...."<sup>4</sup> Moreover, the EAC's Interpretation, if correct, would require the States to accept all information on the Federal Form as true on its face without any mechanism for verification.

The EAC never consulted me about its intent to omit instructions in the Federal Form on Arizona's new law. To the contrary, the EAC sent my office proposed Arizona instructions on April 7, 2005, which included instructions on how to prove citizenship under A.R.S. § 16-166(F), and then reversed itself in its March 6, 2006 letter<sup>5</sup>.

I urge you to advise the EAC to follow the lead of the Federal Voting Assistance Program, which incorporated the proof of citizenship requirement into the Arizona instructions for the Federal Post Card Application used by military and overseas citizens to register to vote. See 2006-07 Voting Assistance Guide, published by the Department of Defense Federal Voting Assistance Program, at p. 53. The EAC advises military and overseas voters on page one of its instructions to the Federal Form not to use that form to register to vote, but instead to use the Federal Post Card Application. See [www.eac.gov/docs/NVRA%20FINAL%20UPDATE%2003-13-06.pdf](http://www.eac.gov/docs/NVRA%20FINAL%20UPDATE%2003-13-06.pdf).

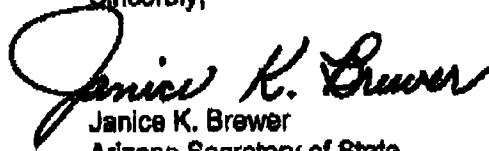
I appreciate the opportunity to clarify and respond to the EAC's claims. If you have any questions, please contact my State Election Director, Joseph Kanefield, at (602) 642-6167, or Peter Silverman, Assistant Attorney General, at (602) 642-8305.

<sup>4</sup> Sections 304 and 305 of HAVA recognize the long-established compelling state interests in preventing voter fraud and protecting the integrity of the electoral process. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983) (state has a compelling interest in preserving the integrity and reliability of its election process); *Burson v. Freeman*, 504 U.S. 191, 199-200 (1992) (state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process); *Rondebush v. Harke*, 450 U.S. 15, 24 (1972) (states may "provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.")

<sup>5</sup> This is typical of the erratic behavior displayed by the EAC over the past several months. The EAC released its March 6, 2006 letter to the press before I received it.

Mr. John K. Tanner  
April 17, 2006  
Page 4

Sincerely,

  
Janice K. Brewer  
Arizona Secretary of State

JKB/jk

cc: The Honorable John McCain  
The Honorable John Kyl  
The Honorable Rick Renzi  
The Honorable Trent Franks  
The Honorable John Shadegg  
The Honorable Ed Pastor  
The Honorable J.D. Hayworth  
The Honorable Jeff Flake  
The Honorable Raul Grijalva  
The Honorable Jim Kolbe  
The Honorable Terry Goddard  
The Honorable Sam Reed, President,  
National Association of Secretaries of State  
Linda Lamone, President,  
National Association of State Elections Directors  
Peter Silverman, Assistant Attorney General