

**ADVANCEMENT PROJECT IS PROFOUNDLY CONCERNED ABOUT A UNILATERAL DECISION BY THE EXECUTIVE DIRECTOR OF THE U.S. ELECTION ASSISTANCE COMMISSION TO ADD DOCUMENTARY PROOF OF CITIZENSHIP REQUIREMENTS ON THE FEDERAL VOTER REGISTRATION FORM INSTRUCTIONS FOR ALABAMA, GEORGIA & KANSAS**

(February 9, 2016) The Executive Director of the U.S. Election Assistance Commission (EAC) is authorized to “[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies.”<sup>1</sup> Executive Director Brian Newby’s recent action, however, is not in compliance with the National Voter Registration Act (NVRA) and contravenes the EAC’s own internal policies.



Pursuant to the NVRA, the Federal Form cannot include documentary proof of citizenship. In *Kobach v. United States Election Assistance Comm’n*, 772 F.3d 1183 (10<sup>th</sup> Cir. 2014), the Tenth Circuit held that the EAC’s rejection of Arizona’s and Kansas’s request to amend the Federal Form to require documentary proof of citizenship was valid. The court stated, “We are compelled by [the Supreme Court’s ruling in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013)] to conclude that the NVRA preempts [states’] laws...” regarding proof of citizenship, and the legislative history of the NVRA reveals Congress ultimately rejected the idea of such proof because it found that, “attestation under penalty of perjury and criminal penalties are sufficient safeguards to prevent noncitizens from registering to vote.”<sup>2</sup> The court also noted that permitting such state alterations threatened to eviscerate the Federal Form’s purpose of increasing voter registration.<sup>3</sup> In addition, it established that the EAC’s “Executive Director is properly vested...with responsibility to make decisions (even if only of a provisional and ministerial sort) regarding the contents of the Federal Form.”<sup>4</sup> The court upheld the Executive Director’s decision partly because it was “consistent with and relies in substantial part upon the EAC’s established policies.”<sup>5</sup> This was not the case, however, with Executive Director Newby’s recent action.

The EAC has internally established that it has a “specific duty to ‘[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies.’ EAC000072.”<sup>6</sup> On February 2, 2016, EAC Vice-Chair Thomas Hicks stated that Executive Director Newby exceeded the scope of his authority in that his recent decision, “constitutes a change of policy, which can only be made following official adoption by at least three Commissioners.”<sup>7</sup> Because Newby acted unilaterally, he violated EAC protocol. He also stated, “The Commission has addressed this matter several times over the last decade and voted to decline requests to add conflicting language to the federal voter registration form.”<sup>8</sup> Thus, Vice-Chair Hicks requested that the EAC’s letters sent to Kansas, Georgia, and Alabama at Newby’s behest be withdrawn.<sup>9</sup>

Moreover, requiring voters to provide documentary proof of citizenship has a disparate impact on several marginalized communities, especially people of color. The following includes some examples:

**Naturalized citizens.** Some may be wondering, “Do I have to bring my naturalization papers, which cost \$345 if I need a new copy?”<sup>10</sup> More than five percent of Americans are naturalized citizens. About two of every five persons living in the U.S. who were born elsewhere are naturalized citizens. These laws would also have a disproportionate impact on communities of color: Less than half (45.5%) of naturalized citizens are white. About 32% are Latino, another 32% are Asian, and 9.8% are Black.<sup>11</sup>

Ms. Melande Antoine and Ms. Karen Arcia are naturalized citizens who were targeted for removal from the voting rolls by the State of Florida’s 2012 “purge list.”<sup>12</sup> Over 85% of targeted voters were people of color, and like Ms. Antoine and Ms. Arcia, many were Caribbean and Latin American naturalized citizens. Both received threatening letters from their local boards of elections requiring them to bring in documentary proof of citizenship within 30 days, or they would be removed from the rolls and could be charged with a felony. This was only stopped by litigation, advocacy and communications strategies to convince local election officials that the data being used was inaccurate, obsolete, and an insufficient basis for challenging voters.

In *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (D. Ohio 2006), the court struck down Ohio’s law that allowed election workers to demand documentary proof of citizenship – namely naturalization certificates – as unconstitutional for violating the Equal Protection clause of the Fourteenth Amendment. The court held that the law gave election judges “unbridled discretion” to request naturalization documents from anyone they deemed to not be American-born citizens, and it “imposes an undue burden on the fundamental right to vote.”<sup>13</sup>

**African-Americans.** Other voters of color may be wondering, do I have to bring my birth certificate? African-Americans are less likely than whites to have birth certificates, and the cost of getting a copy ranges from \$75-175, or more if legal fees are involved.<sup>14</sup> Missouri’s proposed proof of citizenship law would have blocked 78-year-old Ms. Millie Lewis<sup>15</sup> from voting. Ms. Lewis was born in Mississippi and, like many African Americans born in the Jim Crow South, has voted in every Presidential election she can remember -- but she does not have a birth certificate.

**Millennials and low-income voters.** Citizens who don't drive, many of whom are young and/or poor, may be wondering what documents they can show to prove that they are who they say they are. Millennials, and particularly young people of color, are less likely to have the type of IDs that require proof of citizenship.<sup>16</sup> More than 44% of eligible Latino voters in 2016 are Millennials, compared to only 27% of eligible Caucasian voters.<sup>17</sup>

In sum, Advancement Project believes that if Executive Director Newby's decision is implemented, not only would it counter the NVRA and the EAC's internal policies, it would only make the already existing burdens related to extra paperwork worse for thousands of voters and deter them even more from registering.

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<sup>1</sup> U.S. Equal Assistance Comm'n, Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form (Jan. 17, 2014) at 19, <http://www.brennancenter.org/sites/default/files/legal-work/129-1%20Memorandum%20of%20Decision.pdf>.

<sup>2</sup> *Kobach*, 772 F.3d at 1194-95 (10<sup>th</sup> Cir. 2014)

<sup>3</sup> *Id.* at 1195.

<sup>4</sup> *Id.* at 1192.

<sup>5</sup> *Id.* at 1193.

<sup>6</sup> U.S. Equal Assistance Comm'n, Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form (Jan. 17, 2014)[emphasis added], *supra*. note 1, at 19.

<sup>7</sup> U.S. Equal Assistance Comm'n, Statement by Vice-Chair Thomas Hicks (Feb. 2, 2016), [http://www.eac.gov/assets/1/Documents/Statement%20by%20Commissioner%20Hicks%20NVRA%20Form%20\(2-2-16\).pdf](http://www.eac.gov/assets/1/Documents/Statement%20by%20Commissioner%20Hicks%20NVRA%20Form%20(2-2-16).pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> U.S. Citizenship and Immigration Services, N-565, Application for Replacement Naturalization/Citizenship Document (viewed on Feb. 8, 2016), <https://www.uscis.gov/n-565>.

<sup>11</sup> U.S. Census Bureau, Selected Characteristics of the Native and Foreign-Born Populations, 2010-2014 American Community Survey 5-Year Estimates (viewed on Feb. 8, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0501&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table).

<sup>12</sup> Amended Complaint, *Arcia v. Detzner*, 908 F. Supp. 2d 1276 (S.D. Fla. filed Aug. 22, 2012), available at [http://b3cdn.net/advancement/8ebcd7e3f88f63b8f4\\_rbm6vi0w9.pdf](http://b3cdn.net/advancement/8ebcd7e3f88f63b8f4_rbm6vi0w9.pdf).

<sup>13</sup> *Boustani*, 460 F. Supp. 2d at 825, 827 (D. Ohio 2006).

<sup>14</sup> Richard Sobel, *The High Cost of 'Free' Photo Voter Identification Cards*, Harvard Law School Charles Hamilton Houston Institute for Race & Justice (June 2014), available at <http://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf>.

<sup>15</sup> Start Naifeh, 'How Do Proof-of-Citizenship Laws Block Legitimate Voters?', Demos (Aug. 25, 2014), <http://www.demos.org/publication/how-do-proof-citizenship-laws-block-legitimate-voters>.

<sup>16</sup> Advancement Project, *The Time Tax: America's Newest Form of Voter Suppression for Millennials, and How it Must be Eliminated to Make Voting Accessible for the Next Generation* (Nov. 18, 2013), available at [http://b3cdn.net/advancement/ba719924e82b44bb92\\_14m6bgjh0.pdf](http://b3cdn.net/advancement/ba719924e82b44bb92_14m6bgjh0.pdf)

<sup>17</sup> Jens Manuel Krogstad, Mark Hugo Lopez, Gustavo Lopez, Jeffrey S. Passel and Eileen Patten, 'Millennials Make Up Almost Half of Latino Eligible Voters in 2016', Pew Research Center (Jan. 19, 2016), <http://www.pewhispanic.org/2016/01/19/millennials-make-up-almost-half-of-latino-eligible-voters-in-2016/>.