RE: Election Assistance Commission
Docket ID: EAC-2025-0236
Comment on Petition of America First Legal Foundation for Rulemaking Before the Election Assistance Commission
90 Fed. Reg. 40825 (Aug. 21, 2025)

I am a Professor of Law at LMU Loyola Law School, Los Angeles.[1] I teach constitutional law and the law of democracy — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish, and the structure of government designed to effectuate constitutional commands, including statutes pertaining to the electoral process. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the Constitution and the law of democracy is not merely theoretical. I have practiced in this arena as well, including work in the public and private sector with institutions and organizations attempting to foster meaningful representation of the American public. My work has included the publication of studies and reports; the provision of testimony and informal assistance to federal and state legislative and administrative bodies and officials with responsibility for apportionment, districting, and the electoral process; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under state and federal law. I have had the privilege to serve in both the U.S. Department of Justice and in the Domestic Policy Council of the White House, alongside both political appointees and career employees. In my work with the DOJ, I served as a Deputy Assistant Attorney General in the Civil Rights Division, supervising and supporting the work of career attorneys including attorneys with the responsibility to enforce both the National Voter Registration Act and the Help America Vote Act.

This letter responds to your call for comment on the petition proposal to amend 11 C.F.R. 9428.4 and the federal voter registration form to require applicants to provide one of several identified documentary forms of proof of citizenship.

I oppose the petition. I believe that action in line with the petition would end up creating far more problems than it would solve, effectively distorting the election process by disenfranchising far more eligible citizens than any impact in remedying extant electoral wrongdoing. And I believe that as a result, such action would be unconstitutional. But perhaps more important, I believe that even apart from the distorting and disenfranchising impact of such a proposal, action in line with the petition is not legally available to the Election Assistance Commission at this time. The decision on whether to require proof of citizenship in connection with the federal voter registration form is a decision on which Congress has already spoken, and any change to that default must come from Congress rather than a federal agency. The Election Assistance Commission may not purport to approve that which Congress has forbidden.

[1] My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

Statutory text and legislative history

The primary operative statute relevant to this petition is the National Voter Registration Act, which created the federal voter registration form in the first instance and assigned responsibility for the form to the Federal Election Commission — and, later, the Election Assistance Commission. 52 U.S.C. § 20508. The EAC, "in consultation with the chief election officers of the States," *id.* § 20508(a)(2), has the power and responsibility to develop and modify the federal form, but that power is not plenary. Rather, because the power is conferred by federal statute, derived from Congress's constitutional authority to regulate the manner in which federal elections are conducted, U.S. CONST. art. I, § 4, the power must be deployed in ways consistent with Congress's intent.

And Congress has already spoken directly to the issue of whether documentary proof of citizenship may be required in addition to the federal form. Its unequivocal answer was "no."

In 1993, along the way to the NVRA's passage, Congress debated exactly this issue. The Senate and House had each passed bills requiring states to, inter alia, accept and use a single convenient federal voter registration form, to make the application for registration simple and straightforward. H. Rep. No. 103-9, 103d Cong., Feb. 2, 1993, at 9; S. Rep. No. 103-6, 103d Cong., Feb. 25, 1993, at 12. Each bill required the form to "include a statement that specifies each eligibility requirement for voting, contain an attestation that the applicant meets each such requirement, including citizenship, and require the signature of the applicant, under penalty of perjury." H. Rep. No. 103-9, at 9 (1993); S. Rep. No. 103-6, at 12, 26 (1993). The House Committee report noted that the "Committee believes that these provisions are sufficient to deter fraudulent registrations." H. Rep. No. 103-9, at 10 (1993). The Senate Committee report was even more explicit:

> With regard to the registration of noncitizens, current law at 18 U.S.C. § 911 prohibits the knowing and false assertion of United States citizenship by an alien. Under the provisions of this bill, every application for voter registration must include a statement that sets forth all the requirements for eligibility, including citizenship, and requires that the applicant sign an attestation clause, under penalty of perjury, that the applicant meets those requirements. Together with the criminal penalties section of the bill, the Committee is confident that this Act provides sufficient safeguards to prevent noncitizens from registering to vote.

S. Rep. No. 103-6, at 11 (1993).

Despite the Senate Rules Committee's confidence, on March 16, 1993, Senator Alan Simpson of Wyoming introduced the following amendment to the Senate's version of the NVRA bill: "Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. S5098, Mar. 16, 1993. That amendment was adopted by the Senate on the same day, and included in the version of the bill that passed the full Senate. 139 Cong. Rec. S5099, Mar. 16, 1993; 139 Cong. Rec. S5233-5237, Mar. 17, 1993.

The bill that passed the House did not include Senator Simpson's rule of construction, and so Congress engaged a conference committee to resolve that and other differences. The committee specifically debated whether it would be consistent with, or contrary to, the overall design of the NVRA and its mandate for speedy and convenient registration to allow entities to require documentary evidence of citizenship in connection with the voter registration application.

The conference committee's answer was clear and emphatically unequivocal. It determined not only that attestations under penalty of perjury were sufficient to prevent fraud, but also that requiring documentary evidence of citizenship would undermine the intent of the bill. The committee's explanation read, in full:

> The conferees agree with the House bill and do not include this provision from the Senate amendment. *It is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well*. In addition, it creates confusion with regard to the relationship of this Act to the Voting Rights Act. Except for this provision, this Act has been carefully drafted to assure that it would not supersede, restrict or limit the application of the Voting Rights Act. These concerns lead the conferees to conclude that this section should be deleted.

H. Rep. No. 103-66, 103d Cong., Apr. 28, 1993, at 23-24 (conference report) (emphasis added).

That is, the Senate thought that it would be consistent with the bill to allow governments to ask for documentary evidence of citizenship alongside the voter registration form. The House did not. They debated. And the body arrived at the conclusion that such requests were "not necessary or consistent with the purposes of [the] Act," and that they could "seriously interfere with" the execution of registration by mail and the administration of other registration activity. *Id.* The House and Senate passed, and the President signed, a bill that emphatically and affirmatively rejected the very position of the petition on which the EAC now seeks comment.

This legislative history is perhaps as clear as legislative history can be as to Congress's intent on this particular issue. And it directly informs the legislative text providing that the EAC's voter registration form "may require *only* such . . . other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1) (emphasis added). In the committee reports from both House and Senate cited above, and the conference's rejecting of Senator Simpson's amendment, it is abundantly clear that Congress considered the form's attestation of citizenship and attendant criminal penalties to be sufficient to assess an applicant's citizenship, and that Congress affirmatively rejected the assertion that documentary proof of that citizenship could be "necessary" under the statute.

This understanding that Congress rejected formal documentation as specifically not "necessary" under the statute is bolstered by the immediately adjacent textual provision prohibiting the form from "includ[ing] any requirement for notarization or other formal authentication." 52 U.S.C. §

20508(b)(3). Congress aimed to reduce barriers in the voter registration process. Because attestations under penalty of perjury, combined with criminal penalties, were sufficient to deter wrongdoing, and because formal documents authenticating those attestations could prove to be barriers, Congress directly prohibited formal documentary authentication of the attestations on the form. It would strain the text beyond recognition to contend that documentary evidence of citizenship does not amount to formal authentication of an individual's attestation that they are, in fact, a citizen. Instead, the best reading of the statute is that Congress meant what it said: the form may not include a requirement for documentary proof of the same eligibility criteria to which an applicant swears on the form.

Congress can amend the NVRA if it wishes. Indeed, in at least one relevant respect, it has done so. The Help America Vote Act of 2002 adds a requirement for documentation of identity, in certain circumstances. When most individuals register by mail and seek to vote for federal office for the first time in a state, if that person's driver's license number or last four social security digits have not been confirmed via a match to other government systems, that person must show specified documentary proof of their identity before voting or when voting. 52 U.S.C. § 21083(b). That amendment clearly overrides the NVRA's prohibition of formal authentication for those using the federal voter registration form, with respect to covered voters' identity in those circumstances.

But the same amendment shows that when Congress wishes to create an exception to 52 U.S.C. § 20508(b)(1) or (b)(3) — when it finds additional information sufficiently "necessary" to permit or require documentary authentication — Congress has the capacity to do so. That power begins and ends with Congress. Until Congress sees fit to make a change, the EAC is not empowered to interpret the law in a way that Congress explicitly found to be inconsistent with the statutory design. *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 440-42 (9th Cir. 2012) (en banc) (Kozinski, C.J., concurring), *aff'd sub nom.* Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1 (2013).

Indeed, even if Congress had not directly precluded the possibility, it is likely that the EAC would not on its own be empowered to make the change that petitioners are urging. Over the last several years, the Supreme Court has made abundantly clear that Congress is the primary policymaking branch of federal government, with administrative agencies empowered to make only the determinations that Congress has authorized those agencies to make. And particularly if Congress is considering substantial policy questions of national importance, Congress is to be the sole body making those policy calls — not administrative agencies. West Virginia v. EPA, 597 U.S. 697, 723 (2022). This limitation, known as the "major questions doctrine," is particularly salient when Congress has considered but declined to pass legislation authorizing what an agency seeks to do on its own, bypassing the "earnest and profound debate across the country" that it is the legislative branch's lone prerogative to bring to a conclusion. *Id.* at 731.

Justices Gorsuch, Thomas, and Alito have been particularly firm about this separation of powers, with support from the Chief Justice, Justice Kavanaugh, and Justice Barrett, in decisions concerning vaccine mandates, climate change, and student loans, among others. NFIB v. OSHA, 595 U.S. 109 (2022); West Virginia v. EPA, 597 U.S. 697 (2022); Biden v. Nebraska, 600 U.S. 477 (2023). And right at the moment, Congress has been engaging in "earnest and profound debate," considering a requirement that registrants provide documentary proof of citizenship

when submitting a federal voter registration form. On April 10, 2025, after robust and vigorous discussion, the House of Representatives passed the SAVE Act with precisely such a requirement, expressly amending the NVRA. H.R. 22, 119th Cong; 171 Cong. Rec. H1569-81, Apr. 10, 2025. The Senate has not yet taken up the bill. This issue is hotly contested, and would change the requirements for registering to vote or for updating one's voter registration information for hundreds of millions of American citizens seeking to vote in federal elections across the country. There is little question that it amounts to a substantial policy question of national importance actively under consideration by Congress. And pursuant to Supreme Court precedent, that means the policy decision to require documentary proof of citizenship belongs with Congress, not with the EAC.

Policy background for the statutory determination

The fact that Congress has concluded that documentary proof of citizenship is unnecessary to supplement a registration's attestation is also entirely sensible as a matter of policy. For any noncitizen, intentionally registering to vote is perhaps the least perfect crime. This is a crime with a paper trail on each and every occasion, indelibly recording an noncitizen's false attestation of citizenship. It is a crime that will inevitably be discovered: standard background check information includes voter registration information, *see, e.g.,* LexisNexis, Accurint Individual Access Program, https://www.lexisnexis.com/en-us/privacy/for-consumers/request-personal-information.page, and for years, immigration personnel have been trained to inquire into voter registration activity for any change of status. False claims of citizenship for voting (among other purposes) render noncitizen voters deportable and ineligible to be admitted to the United States, 8 U.S.C. § 1182(a)(10)(D), in addition to subjecting those individuals to prosecution under several federal criminal laws. 18 U.S.C. §§ 611, 911, 1015(f); 52 U.S.C. § 20511(2).

That is, noncitizens who falsely declare that they are citizens in order to register and vote are creating a permanent record of their criminal activity, directly traceable to them (indeed, with a record of their present address), which will be discovered, which leads directly to severe and adverse immigration consequences, and for which there is ample incentive for prosecutors to bring charges. In contrast, for any noncitizen, the "reward" for such activity is just one incremental vote. That cost/benefit calculation makes it wildly irrational for noncitizens intentionally to register to vote. As Congress understood, the simple fact of attestation, in combination with the certainty of discovery and the likelihood of criminal penalties, amounts to profoundly ample deterrence of unlawful activity.

This ample deterrence also explains why accurate reports of noncitizen voting are so remarkably (but not surprisingly) rare. A recent investigation is typical: in September, Louisiana recently reported that it had scoured its voter rolls for noncitizen voters, and found — of 2.9 million registered voters — that 79 individuals may have voted in at least one election since the 1980s. Wesley Muller, *Louisiana election investigation finds 79 noncitizens have voted since 1980s*, Louisiana Illuminator, Sept. 4, 2025, https://lailluminator.com/2025/09/04/louisiana-election-investigation-finds-79-noncitizens-have-voted-since-1980s/. That conclusion represents only a preliminary finding. In other past investigations, further inquiry into preliminary conclusions has often revealed faulty underlying information, or inaccurate matching that mistakes two distinct individuals for the same person — it is quite likely that the final tally of intentional wrongdoing

across 4 decades of voting will be lower still. Justin Levitt, *The Truth About Voter Fraud* 18-20 (2007), https://www.brennancenter.org/media/179/download/Report_Truth-About-Voter-Fraud.pdf.

Against those 79 (potential) cases of ineligible Louisiana voters, congressional policymakers must weigh the disenfranchising impact of requiring documentary proof of citizenship along with a voter registration form. The EAC has specifically designed the federal voter registration form as a "postcard form"; the applicant completes information on one side of a page, folds the form in half, writes an address and affixes a stamp to the outside of the folded page, and mails off the form. Election Assistance Comm'n, *Register to Vote in Your State by Using this Postcard Form and Guide*, https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf. Requiring documentary proof of citizenship along with a voter registration form defeats the form's "postcard" design, and would likely require a separate envelope (and several additional steps). Moreover, the federal voter registration form is by statute designed for submission by mail, 52 U.S.C. § 20508(a)(2), and requiring documentary proof of citizenship for such mail submissions would require applicants to have access to a photocopier, increasing the burden of registration — or of address changes or other registration updates — for anyone whose access to a copier is not trivial.

And the above assumes that the applicant has documentation of their citizenship readily available in the first place. American citizens do not emerge from the womb clutching documentation of their citizenship, nor do they carry such documentation attached to them throughout their lives. There are ample numbers of citizens who do not have readily available documentary proof of that citizenship. And reliable estimates indicate that the damage to eligible voters caused by a documentation requirement would be many, many times larger than 79 votes.

Because documentary proof of citizenship is dependent on a variety of different local, state, and federal government systems, without a central mandate or national registry, the best way to estimate which Americans possess documentary proof of citizenship is through survey data. *Cf.* Justin Levitt, *Election Deform*, 11 ELECTION L.J. 97, 105-07 (2012) (explaining why survey data is, similarly, the most reliable method of determining how many Americans have identification). And recent surveys suggest that 9% of eligible citizen voters do not have, or have ready access to, documentary proof of their citizenship. *See, e.g.*, Jillian Andres Rothschild et al., *Who Lacks Documentary Proof of Citizenship?*, U. Md. Ctr. for Democracy and Civic Engagement (Mar. 2025), https://cdce.umd.edu/sites/cdce.umd.edu/files/Who%20Lacks%20Documentary%20Proof%20of%20Citizenship%20March%202025.pdf. Applied to Louisiana's 2.9 million registered voters, that would amount to an unnecessary barrier for approximately 261,000 citizens — creating a problem more than 3000 times as large as the "problem" the documentation requirement purports to address. The same study found that approximately 2% of voting-age American citizens, and approximately 1% of citizens already registered to vote, have no access to documentary proof of citizenship at all. Applied to Louisiana's 2.9 million registered voters, even this profoundly conservative estimate of hardship amounts to an unnecessary barrier for approximately 29,000 citizens — creating a problem more than 360 times as large as the "problem" the documentation requirement purports to address.

Further, it can be quite difficult for those eligible citizens without proof of their citizenship to acquire such documentation. There is no guarantee that each individual born in the country was

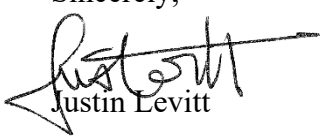
given a birth certificate — particularly for citizens born outside of hospitals. While local government systems are improving their record management systems, the capacity of local governments to maintain or provide birth certificate information varies tremendously throughout the country — there is no guarantee that an individual who does not currently possess a birth certificate will be able to retrieve it from the local government where they were born. Bureaucratic catch-22s like the inability to retrieve a copy of a birth certificate without identification that itself requires a birth certificate are hardly unknown. And even where retrieval is possible, securing a local government record like a birth certificate takes time and costs money.

Indeed, the petition presently before the EAC itself provides evidence refuting the cost-benefit calculus of requiring documentary proof of citizenship. The petition cites Arizona's experience: as it suggests, Arizona maintains separate state and federal voter rolls, creating a dual system in which individuals who have not been able to provide documentary proof of their citizenship may vote only in federal elections. The petition claims that as of January 2, 2025, more than 40,000 people in Arizona were registered to vote only in federal elections, having failed to provide the documentary proof of citizenship that the state deems necessary. America First Legal Petition for Rulemaking at 7 (July 16, 2026), https://www.eac.gov/sites/default/files/2025-08/America_First_Legal_EAC_DPOC_Rule_Petition.pdf. America First Legal suggests a hypothetical, without any evidence whatsoever, in which one-quarter of these individuals were in fact noncitizens — and in so doing, admits that its favored solution would <u>still</u> be three times more costly than the problem.

But the available evidence presents the issue in even starker relief. Each of these 40,000 individuals swore to their citizenship under penalty of perjury, facing discovery and punishment under circumstances that would be rational only if each of them were, in fact, a citizen. America First Legal provides no evidence that <u>any single individual</u> of that 40,000 is a noncitizen. But every single one of those 40,000 has been prevented from voting in state elections because of the documentation requirement. The petition asks the EAC to replicate that administrative barrier nationwide.

That is, even the evidence proffered in the petition does not support the petition's requested relief. Indeed, it supports the notion that Congress amply considered, and sensibly rejected, a documentary requirement for proof of citizenship. But the EAC's determination is simpler still, for the policy choice is not properly before the Commission at all. Congress has made a decision, reflected in both the statutory text and its unmistakably clear legislative history. And only Congress has the power to change that decision. For these reasons and others found in other comments, the EAC should reject the petition as both unwarranted on the merits and beyond the scope of the power properly delegated to the Commission absent further statutory change.

Sincerely,



Justin Levitt