Testimony of Justin Levitt
Spotlight Forum
"Protecting the Future of American Democracy: Fighting a Surge in Voter Suppression"
July 30, 2025

Ranking Member Padilla, Ranking Member Durbin, esteemed Senators, thank you for the opportunity to be with you today, and alongside such distinguished company.

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. From the first words of the Preamble to the final words of the 27th Amendment, our foundational 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.

Though I work as a professor, 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 both represented and sued members of both major political parties and neither, and those whose partisan affiliations I do not know. And 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 both roles, my own work was — by disposition and by statutory command — emphatically nonpartisan.

I'm as honored to be here for this forum as I am disturbed by the reason for it. This Administration has been in office for just six months, and it has already inflicted profound damage on the institutions of our democracy that I both study and cherish — damage that will be extremely difficult to repair. I am also quite concerned about damage still to come. As a constitutional law scholar, I have faith that "we, the people" will prevail in keeping the republic, and continuing the work toward the more perfect union entrusted to us. But I am troubled that we will have to do that work despite, not alongside, our current federal government.

The Trump Administration is acting unlawfully — unconstitutionally — in ways that attack and undermine public trust in institutions. Those include not only the executive branch itself, but the judiciary, scientific centers, law enforcement, the military, academia, journalism. And of note for today, those also include the electoral institutions that have earned our trust.

[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.

Regrettably, Donald Trump is not new to efforts to undermine our electoral institutions. Years ago, in his first forays into political competition, he manufactured claims rebutted by all available evidence — the shorter word is "lied" — about the integrity of our elections.[2] He has continued that barrage of lying about the process, through elections that he legitimately won and elections he legitimately lost.[3] Candidly, it is hard to assess how much impact the lies themselves are having at this point — in part because I'm sincerely not sure how many Americans really believe that President Trump is trustworthy anymore.

But beyond the lies themselves, I am very concerned about the abuse of official power in the service of those lies. In selecting federal officials, President Trump has demanded fealty over competence. And institutions like the Department of Justice that you have funded to represent the American people in upholding the law now seem inclined instead to represent him while breaking it.

There have been a number of disturbing developments, in the last six months alone, with respect to Administration pressure on our electoral institutions.

- The Administration has promulgated an executive order on elections; that order is mostly illegal.[4] To be sure, some components of Executive Order 14248 are within the President's power.[5] But the vast majority of the order — purporting to upend the voter registration process, purporting to upend voting systems, purporting to upend ballot deadlines, purporting to upend the shamefully little federal funding there is — violates federal law.[6] Two courts have already enjoined implementation of significant portions of

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[2] *See, e.g.*, Maggie Haberman & Matt Flegenheimer, *Donald Trump Says Ted Cruz Stole Victory in Iowa Caucuses*, N.Y. TIMES, Feb. 3, 2016.

[3] *See, e.g.*, *Fact-Checking Trump's Repeated Unsubstantiated Claim of Widespread Voter Fraud*, ABC NEWS, May 11, 2017, https://abcnews.go.com/Politics/fact-checking-trumps-repeated-unsubstantiated-claim-widespread-voter/story?id=45021067; Mert Can Bayar et al., *The Anatomy of a Resurging Rumor Stemming from Peer-Reviewed Research that Non-Citizens Vote in U.S. Elections*, Center for an Informed Public, U. Wash., June 20, 2024, https://www.cip.uw.edu/2024/06/20/rumor-non-citizens-voting-us-elections/; David Cottrell et al., *An Exploration of Donald Trump's Allegations of Massive Voter Fraud in the 2016 General Election*, 51 ELECTORAL STUD. 123 (2018); Andrew C. Eggers et al, *No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election*, 118 PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES e2103619118, Nov. 2, 2021, https://www.pnas.org/doi/10.1073/pnas.2103619118; SEN. JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION (2022), https://lostnotstolen.org/; Justin Grimmer & Abhinav Ramaswamy, *An Evaluation of Fraud Claims from the 2020 Trump Election Contests*, Jan. 16, 2024, https://www.dropbox.com/scl/fi/qfvavvua3g6dksnzl9ils/TrumpClaims.pdf; Jeremy Herb, *How Donald Trump is Laying the Groundwork to Dispute the Election Results – Again*, CNN, Nov. 4, 2024, https://www.cnn.com/2024/11/03/politics/donald-trump-disputing-election-results.

[4] Exec. Order 14248, *Preserving and Protecting the Integrity of American Elections*, 90 Fed. Reg. 14,005 (Mar. 25, 2025).

[5] For example, the President may declare hortatory policy preferences (even when those preferences are not supported by federal law), *id.* § 1; set broad law enforcement priorities, *id.* §§ 2(e), 3(b)-(c); and command reports from executive agencies (at least, those that are not independent), on topics within their purview, *id.* § 6(b).

[6] *See, e.g.*, *id.* at §§ 2(a), 2(b)(iii), 2(d), 3(a), 3(d) (voter registration); §§ 4(b), 6(a) (voting systems); §§ 7(a) (ballot deadlines); §§ 4(a), 4(c), 4(d), 5(b), 7(b) (funding). Further analysis of the legality of discrete sections of the Executive Order is available in the attached Appendix.

the Executive Order.[7] Other portions will likely be enjoined if federal agencies take concrete action to effectuate the Order's commands without far more attention to federal legal restrictions than has thus far been publicly disclosed.[8]

- A brazenly politicized Department of Justice has sent a series of election-related letters that also apparently attempt to effectuate illegal acts. Several of these letters demand access to voter data the Department may not at this point lawfully collect.[9] The letters are decidedly substandard work product for the DOJ, with sloppy mistakes and shoddy analysis.[10] The letters seek data that will not meaningfully aid the enforcement of the laws that the letters cite, raising questions about pretext.[11] Citing public access provisions of the National Voter Registration Act, the letters seek sensitive personal data like Social Security digits that federal courts have already determined states may lawfully withhold from public view.[12] But more disturbing still is the fact that I believe the letters also

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[7] LULAC v. Executive Office of the President, Case No. 1:25-cv-00946, __ F.Supp.3d __, 2025 WL 1187730 (D.D.C. Apr. 24, 2025) (enjoining implementation of § 2(a) and 2(d)); California v. Trump, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949 (D. Mass. June 13, 2025) (enjoining implementation of §§ 2(a), 2(d), and 3(d), and much implementation of § 7(a) and 7(b).

[8] *See, e.g.*, *LULAC*, 2025 WL 1187730, at *45-46, 51-52.

[9] I am aware of at least eight states (Alaska, Colorado, Michigan, Minnesota, Nevada, New Hampshire, New York, and Wisconsin) in which the Civil Rights Division of the Department of Justice has asked for the states' full voter file. Other states (e.g., Florida, Maryland, Oklahoma) have reportedly been asked for the states' full voter files as well. *See* Bryan P. Sears, *Justice Department, Conservative Law Firm Set Sights on Maryland Voter Registrations*, MARYLAND MATTERS, July 23, 2025, https://marylandmatters.org/2025/07/23/justice-department-conservative-law-firm-set-sights-on-maryland-voter-registrations/; Patrick Marley & Yvonne Wingett Sanchez, *DOJ Hits States with Broad Requests for Voter Rolls, Election Data*, WASH. POST, July 16, 2025, https://www.washingtonpost.com/politics/2025/07/16/trump-voter-fraud-elections/.

[10] Within this Administration, there is a notable difference in the quality of care and legal analysis in letters sent outside of the judicial process and signed by Civil Rights Division or Voting Section leadership, and the judicial filings of DOJ career lawyers in election cases on behalf of the United States. I do not agree with every argument put forth by the Department, either now or in the past, but the quality of lawyering by career attorneys — at least in the Department's election-related cases — generally remains high. *See, e.g.*, Statement of Interest of the United States, Kentuckians for the Commonwealth v. Adams, Case No. 3:24-cv-00387 (W.D. Ky. Mar. 27, 2025); Statement of Interest of the United States, Judicial Watch, Inc. v. Read, Case No. 6:24-cv-01783 (D. Ore. June 6, 2025); Statement of Interest of the United States, Equality State Policy Center v. Gray, Case No. 1:25-cv-00117 (D. Wyo, July 1, 2025); Statement of Interest of the United States, Judicial Watch, Inc. v. Ill. State Bd. of Elections, Case No. 1:24-cv-01867 (N.D. Ill. July 8, 2025). Of the Division's election-related court filings thus far, the Department's complaint in *United States v. Page*, No. 8:25-cv-01370 (C.D. Cal. June 25, 2025) — signed not by a career attorney but by the Division's Deputy Assistant Attorney General — stands out as a notable anomaly. *See, e.g.*, Justin Levitt, *The OC Case Gets Weirder*, Election Law Blog, June 27, 2025, 6:33pm, https://electionlawblog.org/?p=150639; Justin Levitt, *"Justice Department sues Orange County Registrar for Access to Noncitizen Voting Records"*, Election Law Blog, June 25, 2025, 10:08pm, https://electionlawblog.org/?p=150601.

[11] The letters claim an interest in the data in enforcing the National Voter Registration Act and the Help America Vote Act, but in addressing registrants who may have become ineligible, both of those statutes require of state and local governments only general programs of list maintenance, for which detailed information on individual data records is at best marginally relevant. *See, e.g.*, 52 U.S.C. §§ 20507(a)(4), 21083(a)(4)(A); *see also* Justin Levitt, *The Recent Rash of DOJ Voter File "Requests"*, Election Law Blog, July 18, 2025, 7:44am, https://electionlawblog.org/?p=151010.

[12] *See* 52 U.S.C. § 20507(i); Public Interest Legal Foundation, Inc. v. Bellows, 92 F.4th 36, 56 (1st Cir. 2024) (collecting cases).

affirmatively seek to violate federal law, collecting information on Americans' First Amendment activity without the advance public conversation that the Privacy Act requires.[13]

- DOJ recently sent an additional letter to Texas, unjustifiably sticking its nose back into a redistricting fight that the Department voluntarily abandoned three months earlier, making questionable claims without any factual support and threatening a lawsuit it has no power to bring.[14] The letter alleges that several congressional districts are unconstitutionally based on race, and threatens (further) litigation. But the letter is written as if its authors either do not understand or are incapable of explaining foundational judicial decisions and their relation to each other, and offers no underlying facts to support even the most charitable interpretation of its claim.[15] Furthermore, the letter purports to be a "formal notice" of illegality, but demands a same-day response to its unsupported claims — which is at odds with any serious legal discussion — and

[13] 5 U.S.C. § 552a; *see also* Levitt, *supra* note 11, https://electionlawblog.org/?p=151010. The Privacy Act requires, for every anticipated new collection of information on individuals by the federal government and for every anticipated significant new use of existing information, a notice in the Federal Register with opportunity for public comment, 5 U.S.C. § 552a(e)(4), (11), and notice to the Senate Committee on Homeland Security & Government Affairs and the House Committee on Oversight and Government Reform, *id.* at § 552a(r). Those transparency provisions are subject to criminal penalties. *See id.* at § 552a(i)(2). The Privacy Act includes additional sensitivity for records "describing how any individual exercises rights guaranteed by the First Amendment" (like voting), § 552a(e)(7), and for operations designed to match data from different systems in a manner that might impact individuals' benefits, § 552a(o), with liability for improper participation in the latter extending to state and local entities sharing data as well, § 552a(a)(11), (q). There is no indication that the Civil Rights Division, which sent these letters, has promulgated the sort of notices required under the Privacy Act. *See* U.S. Dep't of Justice, Office of Privacy and Civil Liberties, DOJ Systems of Records, https://www.justice.gov/opcl/doj-systems-records#CRT (last accessed July 28, 2025).

[14] *See* Letter from Asst. Att'y Gen. Harmeet K. Dhillon & Dep. Asst. Att'y Gen. Michael E. Gates, Civil Rights Div., to Gov. Gregory Abbott & Att'y Gen. Ken Paxton, July 7, 2025, https://electionlawblog.org/wp-content/uploads/7-7-2025-DOJ-Letter-re-Unconstitutional-Race-Based-Congressional-Distric.pdf; *see also* Order Dismissing the United States' Claims and Denying Motions as Moot, *LULAC v. Abbott*, No. 3:21-cv-00259 (W.D. Tex. Mar. 6, 2025).

[15] Among other problems, the letter appears to conflate four entirely distinct concepts: 1) the existence of a district containing voters belonging to more than one significant minority group (which is not a fact that indicates any legal impropriety); 2) the notion that effects-based vote dilution claims under § 2 of the Voting Rights Act are available to minority communities only when they can constitute more than half of a district-sized population; 3) the Fifth Circuit's determination that multiple minority groups may not join together to raise vote dilution claims under § 2 if no one group constitutes more than half of a district-sized population; and 4) the notion that districts drawn such that race predominates over other redistricting criteria are constitutionally permissible only if those districts are narrowly tailored to a compelling state interest. The letter asserts that several districts are unconstitutional (the fourth concept) but presents as supporting logic only the first three concepts, which do not answer the question. And the letter offers no facts whatsoever to support the allegation of unconstitutionality under the relevant judicial doctrine. Compare the negligible legal analysis and factual backup of this letter to, for example, the analysis and factual development in a DOJ voting-related letter to Los Angeles sent in 2023, Letter from U.S. Att'y E. Martin Estrada to Deputy County Counsel Eva W. Chu, Office of the Los Angeles County Counsel, May 16, 2023, https://www.justice.gov/crt/media/1338841/dl, or to the letter of findings from a Civil Rights Division investigation undertaken during the first Trump Administration, Letter from Principal Deputy Chief Christine Stoneman, Civil Rights Div., to General Counsel C. Erica White, Office of the Florida State Courts Administrator, Feb. 19, 2021, https://www.justice.gov/crt/media/1125836/dl.

threatens litigation the Department appears to have no authority to pursue.[16] Because the letter is so unconvincing on the merits, I am left to wonder whether the purpose was really thin pretext for a transparently partisan Texan redrawing of the lines, at the White House's behest.[17] And if that's the case, then that letter violates federal law as well.[18]

- At the same time, the Administration has decimated the Department's capacity, forcing out the nonpartisan career staff who enforce the laws that you and your predecessors have passed.[19] It may well be that the poor legal quality and attention to detail of the letters above, and others in the electoral realm,[20] reflect a degradation of the Department's ability to enforce federal election laws that will linger for years to come.

I hope that we will have the opportunity to further discuss these developments today. These actions all have some common threads. They stand to hurt legitimate voters — of both parties and neither — including, among other groups, members of the military deployed to combat zones. They make a mockery of federal law. And they unjustifiably impugn the election process itself.

That would be plenty bad enough. But allies have foreshadowed more disturbing activity to come. Despite foreswearing any relationship with Project 2025, the Administration has been following the Project 2025 template disturbingly closely.[21] And in the elections sphere, Project

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[16] The letter was dated July 7, 2025, and demanded a response on July 7, 2025. The Department of Justice has no authority to bring a standalone complaint for the 14th Amendment violations asserted in the letter. Under other circumstances, the DOJ could seek to intervene in the pre-existing *LULAC v. Abbott* case to bring its newfound constitutional claims under 42 U.S.C. § 2000h-2, but that provision allows only "timely" intervention. In addition to the fact that the DOJ had asked for (and was granted) dismissal from an existing case challenging Texas's congressional districts several months earlier, DOJ's sudden and unsupported interest in new constitutional claims would not have been "timely" when the letter was written, months after parties had requested and received permission to amend their complaints and several weeks after a court had concluded a three-week trial with respect to those congressional districts.

[17] Texas added congressional redistricting to its special legislative session just two days after DOJ sent its letter, explicitly citing the DOJ's purported concerns. *See, e.g.*, Gov. Greg Abbott, Proclamation, July 9, 2025, https://gov.texas.gov/uploads/files/press/PROC_first_called_session_89th_legislature_IMAGE_07-09-25.pdf (calling a special session to consider, inter alia, "[l]egislation that provides a revised congressional redistricting plan in light of constitutional concerns raised by the U.S. Department of Justice."), Hansi Lo Wang, *GOP Gambit to Redraw Texas' Congressional Map Shows Redistricting is an Ongoing Fight*, NPR, July 25, 2025, https://www.npr.org/2025/07/21/nx-s1-5468648/texas-congressional-redistricting-special-session.

[18] *See, e.g.*, 5 U.S.C. §§ 7323(a)(1), 7324(a).

[19] *See, e.g.*, Matt Cohen, *DOJ Voting Section Has Just Three Lawyers Left, Watchdog Estimates*, DEMOCRACY DOCKET, May 12, 2025, https://www.democracydocket.com/news-alerts/doj-voting-section-has-just-three-lawyers-left-watchdog-estimates/.

[20] *See, e.g.*, Email from Scott Laragy & Paul Hayden, U.S. Dep't of Justice, to Sarah Godlewski, Wis. Sec'y of State, July 10, 2025, 8:12:57am; Letter from Maureen Riordan, Civil Rights Div., to Robert Page, Orange Cnty. Registrar of Voters (undated, but sent on or about June 2, 2025, according to Complaint ¶ 19, United States v. Page, No. 8:25-cv-01370 (C.D. Cal. June 25, 2025)).

[21] Elena Shao et al., *How Trump's Directives Echo Project 2025*, N.Y. TIMES, Feb. 14, 2025, https://www.nytimes.com/interactive/2025/02/14/us/politics/project-2025-trump-actions.html; Melissa Quinn, *How Trump's Policies and Project 2025 Proposals Match Up After First 100 Days*, CBS NEWS, Apr. 29, 2025,

2025 proposes, in plain view, a monstrous abuse of DOJ authority, pursuing baseless prosecutions of elections officials for enfranchising eligible voters.[22] Of all of the available examples of cases to highlight where DOJ enforcement should be directed in the electoral sphere, the Project 2025 authors asserted as their paradigm case the desire to send a state official to prison — under the Ku Klux Klan Act of 1870 — for a state official's accurate reading of state law to permit an eligible voter to cast a provisional ballot that could be counted once the voter was confirmed as eligible with no other valid ballot cast in the election.[23] To describe the example is to recognize it as unhinged.

Reality TV producers understand that the way to keep viewers engaged is to perpetually dial up the outrage. International observers understand that the way would-be autocrats extend power is to ratchet up pressure, often in weakness and sometimes in desperation. And most people understand that bullies bully until someone hits back. So I expect that more bad behavior is coming.

But people who prize democracy are not powerless here. Federal trial and appellate courts — with judges appointed by Democrats and judges appointed by Republicans, including judges appointed by Donald Trump — have been largely acting like judges. I don't agree with every ruling, but most judges have been finding facts and assessing claims — and pushing back where the Administration has broken the law. Elections officials are largely standing firm — not in every state, but in most of them — looking to state and federal law and doing their jobs, trying to run fair elections for their voters without buying into the Administration's extralegal nonsense.[24]

And the voters are watching, waiting for their next chances to weigh in. Even as the Administration continues to sow distrust in the American electoral process, we've seen that the American people are losing trust in the Administration. What's more, the federal executive does not and cannot control American elections; states and local governments do, within a framework you set and which the courts enforce.[25] Most Americans believe that their own local elections will be fair[26] — even if it sometimes takes a while to get there — and that is because many

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https://www.cbsnews.com/news/trump-project-2025-first-100-days/; Project 2025 Tracker, https://www.project2025.observer/.

[22] Gene Hamilton, *Department of Justice*, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE, PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT 562-64 (2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf.

[23] *Id.*; Justin Levitt, *Pam Bondi, the 2020 election, Project 2025, and the Ku Klux Klan Act*, ELECTION LAW BLOG, Jan. 15, 2025, 12:19am, https://electionlawblog.org/?p=148183.

[24] *See, e.g.*, Morgan Reddekopp, *Minnesota Secretary of State's Office Says It Will Not Share Voter Registration List with the DOJ*, KSTP, July 25, 2025, https://kstp.com/kstp-news/top-news/minnesota-secretary-of-states-office-says-it-will-not-share-voter-registration-list-with-the-doj/.

[25] U.S. CONST. art. I, § 4, cl. 1.

[26] PEW RESEARCH CENTER, HARRIS, TRUMP VOTERS DIFFER OVER ELECTION SECURITY, VOTE COUNTS AND HACKING CONCERNS 10, 12 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/10/PP_2024.10.24_election-security_report.pdf (reporting that "92% of registered voters say that elections *in their own community* will be run and administered at least somewhat well, including 50% who say they will be run very well," with similar findings persistent across midterm and presidential general elections since at least 2018).

institutions are still working to make sure their own local elections are fair. Voters will have the opportunity to do their part, and they will need to take that opportunity. I thank you for your continuing efforts to help ensure that eligible voters are able to cast meaningful ballots to elect a government of, by, and for the people.

Justin Levitt
Appendix: Analysis of Executive Order 14248

On March 25, 2025, President Trump issued Executive Order 14248, *Preserving and Protecting the Integrity of American Elections*, 90 Fed. Reg. 14005 (Mar. 25, 2025). Several aspects of the executive order appear lawful. But the elements of the Executive Order that have received the most publicity — and which may concern citizens and purport to disrupt the local operations of election administrators to the greatest extent — exceed the authority of the Presidential office. In other words, state and local officials have no obligation to change their operations in response to the Executive Order. Indeed, many of those officials operate under state and federal laws that preclude following the Executive Order's suggestions and purported mandates.

Background

Presidential Executive Orders are orders given to federal executive agencies. They are binding only on those federal executive actors, and they are legally meaningful only to the extent that they direct the exercise of discretion within the authority that federal law properly affords to federal executive actors. Executive Orders cannot change the federal constitution or federal statutes, and they cannot supersede state law. While the logic of their policy proposals may or may not prove persuasive outside of the federal sphere, Executive Orders have no legal power to command or direct state or local governments or private entities.

Those limits on Executive Orders generally are particularly salient in the arena of election administration. In a few policy arenas, the Constitution grants the President significant discretion to direct federal action as he sees fit. In many other arenas, Congress has used its statutory authority to do the same. Neither is true for the administration of federal elections. The Constitution expressly assigns electoral policy to the states in the first instance. To the extent that a federal body regulates federal elections, or safeguards constitutional rights in state elections, the Constitution expressly assigns that responsibility to Congress. U.S. Const., art. I, § 4; U.S. Const. amd. XIV, XV, XIX, XXIV, XXVI.

Congress has exercised this power in several statutes, usually regulating the election process directly (and without a role for federal direction or discretion beyond enforcement of that law). And Congress has authorized federal agencies to assist state, local, Tribal, and territorial election officials in some discrete ways. *See, e.g.*, 52 U.S.C. § 20506(b) (directing agencies of the federal government "to the greatest extent practicable, [to] cooperate with the States" in voluntary state designations of voter registration agencies). But few of those authorities are implicated by Executive Order 14248.

Section 1 of the Order

Section 1 of Executive Order 14248 offers narrative background on the purpose and policy behind the President's directive. These amount to the President's policy preferences.

Some but not all of these preferences are supported by federal law. And not every assertion of federal statutory support is unambiguously correct. For example, the assertion that federal

statutes prohibit the counting of ballots cast by Election Day when they arrive after Election Day is legally correct in Texas, Louisiana, and Mississippi, but hotly contested in other states, with pending litigation at the moment. (See below.) As another example, the Executive Order asserts that DHS is "required to share database information with States upon request," but federal law does not appear to permit the distribution of immigration databases as such to the states; instead, the relevant federal statute requires DHS response to state or local government inquiries about the immigration status of an "individual." 8 U.S.C. § 1373(c).

Even where the policies in Section 1 are not supported by federal statute, where federal statutes do not preclude the President's preferred policies, it is entirely lawful for him to have preferences, and to promote them. Those preferences may not lawfully override either federal or state legal requirements. State officials have no obligation to share those preferences. And where existing law allows local discretion to direct policy, that discretion allows local officials similarly to adopt, reject, modify, or ignore the President's preferences as they wish. Section 1 of the Executive Order may be informative, but it is no more legally binding than an op-ed.

Section 2 of the Order – Changing the Federal Form

Section 2 of Executive Order 14248 contains several directives to federal officials. First, it purports to instruct the federal Election Assistance Commission to modify the federal voter registration form, to require registrants to provide certain specified documents to prove citizenship when submitting that federal form, and to require state and local officials to record on the form the document used by the registrant. There are at least three reasons why this instruction is not legally valid; indeed, it has already been enjoined by two federal courts, in orders that the administration has indicated it will not appeal. *See, e.g.*, *LULAC v. Executive Office of the President*, Case No. 1:25-cv-00946, __ F.Supp.3d __, 2025 WL 1187730 (D.D.C. Apr. 24, 2025); *California v. Trump*, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949 (D. Mass. June 13, 2025).

The first reason that the instruction to the Election Assistance Commission is invalid is that the President has no power to instruct the EAC. Congress created the EAC in the Help America Vote Act of 2002, and in the very first pertinent sentence of the law, Congress declared that the new Commission would be "established as an independent agency." 52 U.S.C. § 20921. Congress established the Commission to make decisions on its own, independent from the President. The notion that the EAC would be independent is backed up by its structure: it has four Commissioners, no two of whom can be members of the same party, and three of whom are necessary under the statute for any action whatsoever. 52 U.S.C. §§ 20923(b)(2)-(3), 20928. The Commission was meant to act only with bipartisan consensus, independent from the President. Like any member of the public, the President may make recommendations to the EAC, but the EAC is not obligated to listen.

Moreover, even if the EAC wanted, it could likely not take the particular action the President suggests. Over the last several years, in something known as the "major questions doctrine," the Supreme Court has made abundantly clear that Congress is our primary policymaking branch, with administrative agencies making only the determinations that Congress has authorized as a secondary matter. If there are big policy questions of national importance that Congress is

considering, Congress has to be the body making those policy calls, not administrative agencies. Justices Gorsuch, Thomas, and Alito have been particularly firm about this, with support from the Chief Justice, Justice Kavanaugh, and Justice Barrett, in decisions concerning vaccine mandates, climate change, and student loans, among others. *See 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). At the moment, Congress is considering a requirement that registrants provide documentary proof of citizenship when submitting a federal voter registration form. H.R. 22, 119th Cong. This issue is both hotly contested and a big deal. And pursuant to Supreme Court precedent, that means the policy decision belongs with the Supreme Court, not the EAC.

There is another reason why the President's suggestion is beyond the EAC's power. Existing federal law — specifically, the National Voter Registration Act of 1993 (NVRA) — prohibits requiring additional documentation along with the federal voter registration form. In 1993, Congress debated exactly this issue. The Senate passed a version of the bill with the following provision: "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." That is, the Senate wanted governments to be able to ask for documentary evidence of citizenship if they wished. The House did not. Congress set up a conference committee, which expressly found that asking for documentation:

> 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.

H. Rept. 103-66, 103d Cong., Apr. 28, 1993, at 23-24 (conference report). That is, the committee expressly rejected any permission to request additional documentation, as inconsistent with the Act. Both Houses of Congress passed the version of the bill rejecting the Senate Amendment. Congress can amend the law if it wishes. But until it does, no other entity is empowered to interpret the law in a way that Congress explicitly found to be inconsistent with the whole purpose of the statute. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 440-42 (9th Cir. 2017) (en banc) (Kozinski, C.J., concurring).

On April 24, the federal court in the District of Columbia mentioned each of these reasons in enjoining the EAC from "taking any action to implement or give effect to Section 2(a) of Executive Order 14,248." *LULAC v. Executive Office of the President*, Case No. 1:25-cv-00946, __ F.Supp.3d __, 2025 WL 1187730, *26-44 (D.D.C. Apr. 24, 2025). The federal government has indicated that it does not intend to appeal this order. Joint Scheduling Proposal at 4, *LULAC v. Executive Office of the President*, Case No. 1:25-cv-00946 (D.D.C. May 5, 2025) (Doc. No. 119). Another federal court has followed the same course, with the same logic. *California v. Trump,* Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949, *7-9 (D. Mass. June 13, 2025).

Section 2 of the Order – Database Access

Section 2 of Executive Order 14248 also requires several federal agencies to provide or gain access to various government data systems that might impact voter registration.

Section 2(b)(i) directs the Department of Homeland Security to ensure that state and local officials have access to "appropriate systems for verifying the citizenship or immigration status of individuals registering to vote or who are already registered." There has been significant litigation over state access to DHS systems purporting to catalog immigration status. DHS has consistently said that there is only one system that is "appropriate" for verifying the immigration status of an individual: the SAVE system, which allows users to look up an immigrant in a DHS registry to double-check their current immigration status. *See, e.g.*, Complaint exh. 3, *Florida v. DHS*, No. 3:24-cv-00509 (N.D. Fla. Oct. 16, 2024). The system is keyed to a unique immigration identifier assigned to each individual in the immigration system. *See, e.g.,* Complaint 8-9 & exh. 1, *id*. Without such a number, the system cannot reliably determine whether an individual "John Smith" or "Juan Garcia" is the same person in DHS's data. Other identifiers, like date of birth or address, may seem like they narrow the pool, but in any records system with millions of people, they are guaranteed to yield mistakes.

Section 2(b)(i) of the Executive Order may well be lawful to the extent it requires DHS to make the SAVE system available for one-off searches by local officials with voting-related records that include those unique immigration identifiers — for example, to see if an individual once in the immigration system has been naturalized before applying to register to vote. Such use of the system is subject to at least some safeguards for the accuracy and reliability of the matches it returns (even if concerns about the timeliness of the information in the system persists), and such use appears to have been properly noticed under the Privacy Act of 1974, 5 U.S.C. § 552a. *See, e.g.*, Dep't of Homeland Security, Privacy Act of 1974; System of Records, 85 FED. REG. 31,798 (May 27, 2020). But it likely does not permit DHS to offer access to systems that cannot reliably ensure that the individual in a state or local database is the same individual in the DHS registry, or systems used in a way not contemplated by the public notices issued thus far under the Privacy Act (see below).

Section 2(b)(ii) of the Executive Order directs the Department of State to take action to make available "information from relevant databases" to state and local election officials. It is not immediately clear which databases are contemplated, or whether the appropriate Privacy Act procedures have been completed. To the extent that the records of passport holders may be relevant, for example, the utility of those records would seem to depend on the same sort of unique identifier discussed above, like a passport number. For a local official trying to assess the validity of a registration from "John Smith" based on comparisons to passport systems, it would be exceedingly difficult to reliably determine that the official's John Smith was the same person as the John Smith in State's records.

Section 2(b)(iii) of the Executive Order directs DHS, "in coordination with the DOGE Administrator," to "review each State's publicly available voter registration list and available records concerning voter list maintenance activities . . . alongside Federal immigration databases and State records requested, . . . for consistency with Federal requirements." This appears to be

an instruction for DHS and DOGE to compile a national voter file, to be screened against immigration databases. That instruction is likely unlawful, and state and local officials — whom federal executive orders have no ability to command — need not facilitate it in any way.

Federal government access to records with identifying information on individuals is strictly governed by the Privacy Act of 1974, 5 U.S.C. § 552a. The Privacy Act was developed in the aftermath of a vigorous debate about the information that federal agencies collected and the uses to which that information was put — particularly in the context of desires to create national data banks. The Act was designed to ensure that government agencies were thoughtful and careful about how they collected data on Americans, and to require planning and public notice before any government body went about collecting information or attempting to match it to other information. It sets up particular safeguards around data capturing First Amendment activity, and around the matching of data from source to source in a way that might lead to the erroneous withholding or deprivation of benefits. Importantly, this statute strictly regulates federal government entities even when private individuals or organizations could compile the same information without similar obligations: the statute contemplates that there is something special in the federal government's accumulation of data that needs special supervision. There is no indication that either DHS or DOGE has yet complied with this federal statute for any new system of records created by collecting or compiling state voter registration rolls. And until that happens, any attempt by DHS or DOGE to collect state rolls — even if those rolls are otherwise available to the public — would be unlawful.

Apart from the legality of such an effort, state and local officials might also have little desire to facilitate federal construction of a national voter file with unfettered DOGE access, uncertain safeguards for privacy or security, and use permissions that might violate states' own conditions for accessing relevant data. State and local governments regularly conduct various list maintenance programs, pursuant to their responsibility to keep the voter files both complete and accurate. Lawfully curating the voter files requires great care and attention, with twin obligations to update outdated information and remove voters who have become ineligible while also ensuring that eligible registrants are not adversely affected in the process and that private information is properly secured. That process requires profound attention to detail. DOGE's reputation thus far runs decidedly in the other direction, moving fast and breaking things in a push for initial splashy impact that must often later be unwound. Moreover, to the limited extent that the identities of DOGE team members (who are acting as public officials) has been exposed to the public, there is no reason to believe that the team includes individuals who understand how voter registration works, or the errors that can arise in assumptions about which registrants may be eligible when the assumptions do not track state and federal law. State and local officials may not be eager to have DOGE cast aspersions on the state's own list maintenance efforts if superficial DOGE analysis is instead to blame. In a similar 2017 federal effort to compile a national voter file, Mississippi Secretary of State Delbert Hosemann told the commission that they could "go jump in the Gulf of Mexico" rather than acquire Mississippi data — and many other states agreed with the sentiment. Geoff Pender, *Hosemann tells Trump commission 'go jump in the Gulf' on voter records*, Miss. Clarion-Ledger, June 30, 2017.

Section 2 of the Order – Other provisions

Finally, Section 2 of Executive Order 14248 requires several other miscellaneous acts by federal agencies. Section 2(c) directs DHS to provide to the Attorney General (and local officials) information on foreign nationals who have indicated on an immigration form that they registered or voted. Section 2(e) directs the Attorney General to prioritize the enforcement of federal immigration statutes that prohibit noncitizens from registering or voting. Section 2(f) directs the Attorney General to coordinate with state attorneys general to assist with state prosecution of noncitizens unlawfully registered to vote or casting votes. Each of these seems to be within the President's lawful authority.

Section 2(d), however, directs each federal agency acting as a voter registration agency under the NVRA to "assess citizenship prior to providing a Federal voter registration form to enrollees of public assistance programs." The NVRA designates federal Armed Forces recruitment offices as voter registration agencies, 52 U.S.C. § 20506(c), and otherwise allows states to designate federal offices as voter registration agencies, with those agencies' permission, 52 U.S.C. § 20506(a)(3)(B)(ii). These designations allow federal agencies to provide convenient one-stop shopping, letting eligible individuals register to vote while they fill out other paperwork at the same time. There are, to my knowledge, regrettably only several federal agencies that the states have designated. Vanishingly few of these agencies provide services exclusively to enrollees of public assistance programs, as defined in the statute, and it is not clear whether the Executive Order intends agencies like Armed Forces recruiting offices to have to determine which of its recruits are also enrolled in public assistance programs (or how these offices would do so), or whether it intends the limitation to apply only to federal offices that serve public assistance enrollees exclusively. And many of those agency offices will as a matter of course already assess citizenship before any registration form is offered. For those that do not, federal law clearly directs that any applicant for agency services must be provided a voter registration form (where applicants will attest to their citizenship). 52 U.S.C. § 20506(a)(6). Because violating that mandate would violate federal statute, two federal courts have enjoined this portion of the Executive Order as well. *LULAC v. Executive Office of the President*, Case No. 1:25-cv-00946, __ F.Supp.3d __, 2025 WL 1187730, *48-49 (D.D.C. Apr. 24, 2025); *California v. Trump*, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949, *11 (D. Mass. June 13, 2025).

Section 3 of the Order

Section 3 of Executive Order 14248 contains several miscellaneous provisions presented as "other assistance" to states. Section 3(a) directs the Commissioner of Social Security to "take all appropriate action" consistent with applicable privacy and data security laws to make several databases available to state and local officials verifying registrants' eligibility. Some of these functions are legal because they are already clearly established. Since the Help America Vote Act of 2002, the Social Security Administration has provided a service for every state to verify the accuracy of voter registration information when the applicant submits the last four digits of a social security number. 52 U.S.C. § 21083(a)(5)(B)(ii), (b)(3)(B)(ii); 42 U.S.C. § 205(r)(9). To the extent that the Executive Order simply contemplates commanding the Social Security

Administration to continue executing existing arrangements under HAVA, those arrangements are (naturally) still lawful.

To the extent that the Executive Order contemplates different databases or different arrangements than those established under current statute, though, it is not clear which systems would reliably distinguish individuals from others with the same name or date of birth, or whether the appropriate Privacy Act notices for the use of such systems have been submitted. And because the Social Security Act includes felony penalties for any official or former official who communicates relevant Social Security information without the written authority of the Commissioner, state and local officials should be exceedingly wary of expanding any programs for matching Social Security information beyond the existing statutory authorization, without abundantly clear statutory authorization. 42 U.S.C. § 205(r)(9)(D), (F).

Sections 3(b) and 3(c) both direct the Attorney General to ensure compliance with federal law, and seem to be unexceptional.

Section 3(d) purports to direct the Secretary of Defense to update the Federal Post Card Application for voter registration to require documentary proof of citizenship and some unspecified proof of eligibility to vote. The Federal Post Card Application is a special resource created by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and administered by the Department of Defense, to serve our deployed military and overseas citizens; it is designed to facilitate voter registration quickly and easily, in a fashion even more straightforward than the single federal voter registration form for Americans at home. Unlike the EAC, there is no question that the President can direct the Department of Defense; and unlike the NVRA, Congress is not currently debating an amendment to UOCAVA. But that latter fact is part of why the Executive Order's command is legally questionable. Even the SAVE Act, which would require documentary proof of citizenship in many circumstances, does not contemplate such requirements for deployed military, because Congress recognizes the profound logistical difficulties of registering to vote while in combat theaters, and does not want to make registration more cumbersome for our men and women in uniform. UOCAVA requires that the federal government provide, and state governments accept and use, a straightforward postcard; a direction to append further documentation to that postcard significantly undermines the Congressional purpose. For that reason, a federal court has also enjoined this portion of the Order. *California v. Trump*, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949, *9-10 (D. Mass. June 13, 2025)

Section 4 of the Order - Funding

Section 4 of Executive Order 14248 contains several provisions directed to federal funding. Section 4(a), for example, purports to direct the Election Assistance Commission to cease providing federal funding to states that do not comply with certain federal laws, including the use of a federal voter registration form purportedly required to demand documentary proof of citizenship under section 2 of the Order. Beyond the fact that Congress has repeatedly declined to authorize consistent, stable federal funding to any degree that would make the potential loss of such funding into a meaningful threat, there are several reasons why this purported mandate is unlawful.

First, as explained above, the President has no power to direct the Election Assistance Commission, which is an independent agency. Second, as explained above, the President may not direct that the federal voter registration form require documentary proof of citizenship, so the EAC cannot condition funding on this unlawful requirement. Third, at least one of the statutory provisions cited in Section 4(a) as justification for the directive on funding (52 U.S.C. § 21142(c)) is itself expressly contingent on Comptroller General audits conducted before November 26, 2014, and so cannot justify any withholding of funding at this time. Fourth, the other statutory provision cited as justification (52 U.S.C. § 21003(b)(3)) requires compliance with federal laws as a condition of funding, but only for specified federal laws "as such laws apply with respect to this chapter," and the legal chapter in question concerns provisions of election administration quite distinct from the federal requirement to accept the federal registration form. As such, even the meager federal funds that Congress has authorized for future disbursement may not lawfully be conditioned on any state's use of a federal form requiring documentary proof of citizenship, *even if* it were lawful to create such form in the first place.

Section 4(c) of the Executive Order purports to direct the Election Assistance Commission to audit HAVA fund expenditures and report issues to the Department of Justice. The Election Assistance Commission may indeed conduct audits of the kind the Executive Order suggests, but as explained above, the President has no power to direct the Election Assistance Commission to do so. Indeed, for the largest historical source of federal funding disbursed by the EAC — requirements payments authorized under 52 U.S.C. § 21001 — the schedule for EAC audits is expressly committed by statute to the discretion of the Commission itself. 52 U.S.C. § 21442(b)(4).

Section 4 of the Order – Voting Systems

Section 4 of Executive Order 14248 also has several provisions relating to the Election Assistance Commission's role in certifying voting systems. Section 4(b), for example, purports to direct the EAC to amend its voting system guidance to "protect election integrity," including a purported requirement to require voter-verified paper records and preclude ballots in which votes are contained in barcodes or QR-codes except where necessary for disability accommodation. It further purports to direct the EAC to rescind the certifications of voting systems that do not comply with the ostensible new standards. There are, once again, several reasons why this purported mandate is unlawful.

First, as explained above, the President has no power to direct the Election Assistance Commission, which is an independent agency. Second, even if the President had the power to direct the EAC to amend its voting systems guidance, the President could ask the EAC to consider the issue of barcodes and voter-verified paper records, but could not lawfully direct the outcome here. Under the Administrative Procedure Act, the federal law that governs most federal administrative decisions, agency decisions dependent on scientific expertise and factual inputs must be based on scientific expertise and factual inputs: it's fine if the facts yield a conclusion that certain systems should be certified, but that outcome cannot be predetermined. Furthermore, the federal statute that provides for the particular voting systems guidance that the

Executive Order purports to modify specifically requires recommendations to be subject to review by the EAC's multiple advisory bodies (with distinct membership carefully constructed to ensure nonpartisan and bipartisan technical expertise), and subject to notice and comment by the public; this means that the EAC's output has to at least consider the feedback it receives in those processes, and meaningfully reflect on them. 52 U.S.C. §§ 20962, 21102. The Presidential mandate that a purportedly deliberative process arrive at a particular conclusion may not lawfully cut the corners expressly designated by federal statute.

Moreover, even if the mandate were lawful, and even if it could lawfully direct a particular outcome, it need not affect state and local operations overmuch. The Election Assistance Commission is empowered to produce guidance on voting systems, but that guidance is expressly designated by statute as voluntary for state and local officials. 52 U.S.C. §§ 21101-21102. Indeed, even the Executive Order seems to acknowledge this, correctly labeling the voting systems guidance as the "Voluntary Voting System Guidelines 2.0." In the past, state and local jurisdictions have found the VVSG quite helpful, given the bipartisan and nonpartisan technical expertise available to formulate the guidance and the extremely deliberate process for arriving at final conclusions. Indeed, a few jurisdictions have found the VVSG sufficiently helpful that they have chosen to tie their own voting systems to EAC certification. Those choices are, however, only choices, and one might expect that jurisdictions will remain linked to EAC process only to the extent that EAC process is affirmatively useful. If the EAC were to begin making voting systems recommendations to suit political purposes, insufficiently supported by technical expertise, it is to be expected that state and local jurisdictions would decouple their own purchasing power and authority from the EAC's suggestions,

Section 4(d) of the Executive Order purports to instruct DHS and the Federal Emergency Management Agency (FEMA) to "heavily prioritize" state and local jurisdictions' adoption of the VVSG in considering DHS/FEMA funding for Homeland Security Grant Programs. It is true that DHS/FEMA have significant discretion in awarding Homeland Security Grants under 6 U.S.C. § 605, and the agency has historically adjusted the conditions for applicants to be considered or prioritized. Given the discussion above on the various reasons to believe that the President may not lawfully direct the content of the VVSG, however, it is unlikely that the VVSG will be changed pursuant to the Executive Order; if the VVSG were nevertheless modified, there would likely be legal challenges to Homeland Security Grants conditioned on state adoption of guidance that was itself unlawfully procured. It is a different question whether DHS/FEMA may legally prioritize state and local adoption of the current VVSG 2.0 in making decisions about the Homeland Security Grant program; it seems plausible that the agencies will make adoption of the existing guidance a more prominent factor in those grants.

Section 5 of the Order

Section 5 of Executive Order 14248 focuses on the prosecution of several federal crimes related to elections. Section 5(a) instructs the Attorney General to enter into information-sharing agreements with state officials, so that state officials can inform the DOJ about conduct that might run afoul of federal law. To the extent that states wish to enter into such agreements, they have the legal authority to do so. (It is not clear whether personnel actions at DOJ depriving the federal government of long-serving expertise with respect to violations of election law, or the

proclivity of this Administration to announce potential criminal liability before the relevant facts are all in, amount to a shift in historical law enforcement practice that renders federal support substantially less useful to state agencies engaged in meaningful law enforcement work. That is, it is not clear that even state law enforcement agencies inclined to partner with the federal government in the past will still want to do so now.)

Section 5(b) purports to punish states who do not wish to enter into information-sharing agreements with the Attorney General, by instructing the Attorney General to "prioritize enforcement" in such states and by reviewing the potential withholding of grants and other funds. It is wildly improper to adopt as a predicate for law enforcement activity the decision of a jurisdiction to decline a partnership that is its entirely lawful right to decline. That said, if the facts show a violation of federal law in a given jurisdiction, it will be quite difficult in practice to challenge an investigation or prosecution based on the original motivation for initiating the law enforcement activity.

It is a different matter when it comes to the DOJ's withholding of grant funding based on a state's legitimate and available decision to decline to assist the federal government. States are protected by the Tenth Amendment from many federal mandates, and even in the election realm, states may be subject to federal obligations only when Congress has passed a relevant law. U.S. Const., art. I, § 4. In the first Trump Administration, states exercised their lawful discretion to decline to cooperate with the federal government on immigration matters; when the DOJ attempted to withhold grants on that basis, courts interceded, finding DOJ's withholding to be illegal. The court explained, "Federal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities." *United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019) (emphasis in original). In the elections context, Congress has the constitutional authority to require state and local assistance. The President does not. And so DOJ withholding of grants for the sole reason that applicant states declined to enter into an information-sharing agreement, promoted by the President and without Congressional approval, would most likely be unconstitutional.

Section 5(c) of the Executive Order instructs the Attorney General to align DOJ's litigating positions with the purpose and policy of the Executive Order. There is a vigorous debate about the propriety of the President instructing the Attorney General to take or decline particular specific litigating positions. But even if the Attorney General conformed all of DOJ's litigating positions accordingly, the power of the DOJ in civil litigation depends on courts buying what the Department is selling. Historically, the DOJ has been quite persuasive (and therefore powerful) in civil litigation because it is an institution known for careful deliberation, profound attention to detail in facts and legal analysis, rigorous standards of propriety, and exceptional work-product. To the extent that the DOJ adopts positions that are poorly reasoned or unsupported by facts or legal doctrine, there is little reason to believe that courts will sacrifice their own institutional authority in similar manner.

Section 6 of the Order

Section 6 of Executive Order 14248 ostensibly focuses on voting system security. Section 6(a) directs the Attorney General and the Secretary of Homeland Security to "take all appropriate

actions . . . to prevent all non-citizens from being involved in the administration of any Federal election, including by accessing election equipment, ballots, or any other relevant materials used in the conduct of any Federal election." There is no statute of which I am aware that grants the federal government any authority at all over the personnel that state or local officials deploy in administering elections. Congress might have the authority to pass a statute limiting noncitizen engagement with some pieces of the election process. But in the absence of Congressional authorization, neither the President nor the Attorney General nor the Secretary of Homeland Security have any such lawful authority. The set of "all appropriate actions" for this portion of the Executive Order is empty.

Section 6(b) directs the Secretary of Homeland Security, in coordination with the EAC, to review and report on the security of electronic systems used in voter registration and voting. As discussed above, the President may not lawfully direct the EAC, but to the extent this provision seeks to invite the EAC to coordinate with DHS, such an invitation is certainly permissible. And the President may lawfully require DHS to review and report on voting system security if he wishes. The utility of such a review will depend on the care with which it is undertaken, and the scientific and technical bona fides of those who conduct it.

Section 7 of the Order

Section 7 of Executive Order 14248 concerns ballots received after Election Day. In Section 1 of the Order, the President asserts that the statutes establishing a uniform Election Day for federal elections — 2 U.S.C. § 7 and 3 U.S.C. § 1 — mean that ballots must be received by Election Day in order to be lawful. This reading is, admittedly, consistent with a recent decision of the federal appellate court covering Mississippi, Louisiana, and Texas. *RNC v. Wetzel*, 120 F.4th 200 (5th Cir. 2024).

But that decision is itself a radical outlier. Several courts have already decided that even if the federal uniform Election Day statutes require ballots to be submitted by Election Day, they do not require ballots to be received by Election Day. *See, e.g.*, *Bost v. Illinois State Bd. of Elections*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023), *aff'd on other grounds*, 114 F.4th 634 (7th Cir. 2024); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020). And there are several reasons to believe that these other courts are correct. These include, for example, the fact that Congress has never thought its statute to preclude receipt after Election Day: indeed, Congress modified the Presidential Election Day statute in 2022, with full knowledge that 14 states and the District of Columbia allow receipt of ballots after Election Day, but did not think that practice to be worth addressing in its modification. *See* Electoral Count Reform Act of 2022, Pub. L. 117-328, div. P, title I, § 102, 136 Stat. 5233-34. The reasons include the fact that other federal laws (UOCAVA, HAVA) allow valid ballots to be received after Election Day in certain circumstances. They include the consistent understanding of states that states have had the latitude to receive valid ballots after Election Day if they wish (and the fact that some have chosen to do so and others have chosen not to do so does not deprive states of that choice).

The *Wetzel* case above was a challenge to Mississippi's law permitting ballots to be received after Election Day. Several litigants have sued other states, hoping for a similar result. *See, e.g.*,

RNC v. Burgess, Case No. 3:24-cv-00198, 2024 WL 3445254 (D. Nev. July 17, 2024), *on appeal*, Case No. 24-5071 (9th Cir.); Complaint, *Issa v. Weber*, Case No. 3:25-cv-00598, 2025 WL 822845 (S.D. Cal. Mar. 13, 2025) (Doc. 1). As mentioned above, several courts have already come to a conclusion different from the *Wetzel* court, and it is not particularly likely that other courts will follow the *Wetzel* court's lead, which means that the Supreme Court may be asked to resolve a conflict between courts in different regions.

These courts will ultimately determine whether the federal Election Day statutes permit or preclude counting otherwise valid ballots that eligible voters submit by Election Day but which officials receive afterward. The President has no authority to determine the meaning of these statutes unilaterally.

Section 7(a) of the Executive Order directs the Attorney General to "take all necessary action to enforce" 2 U.S.C. § 7 and 3 U.S.C. § 1 against states that include ballots received after Election Day in their final tallies. The Attorney General may well advance her interpretation of the statutes by filing briefs in existing litigation — where the interpretation will be only as persuasive as the reasoning behind it. But the Attorney General has no power under any federal statute to bring litigation to invalidate ballots that have been cast. Absent Congressional authorization, that power belongs solely with private parties and with state and local officials. That means that there is no civil action that the Attorney General may lawfully take to "enforce" the President's irregular perspective on the Election Day statutes. As a result, a federal court has enjoined the Attorney General from taking any civil or criminal enforcement actions against a set of 13 states pursuant to this section of the Executive Order as well. *California v. Trump*, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949, *12-14 (D. Mass. June 13, 2025).

Section 7(b) of the Order directs the Election Assistance Commission to "condition any available funding to a State" on a state adopting uniform and nondiscriminatory rules invalidating ballots received after Election Day, except for ballots cast by deployed military and overseas citizens. As explained above, because Congress has provided such minimal federal funding for elections, this provision amounts to little meaningful threat.

But for the little money that does remain available, this direction is unlawful for several reasons. First, as explained above, the President has no authority to direct the EAC. Second, EAC funding is (by statute) expressly conditioned on representations of compliance with several other federal laws, but the election-day statutes are not among them, *see* 52 U.S.C. §§ 20901(c), 21003(b), 21145; because Congress has determined that compliance with <u>some</u> statutes may affect funding, ostensible compliance with <u>other</u> statutes is independent from any decisions on funding. Third, the fact that the Executive Order expressly excludes ballots cast by deployed military and overseas citizens from this portion of the purported mandate directly contradicts the statutory direction to treat votes in a uniform and nondiscriminatory fashion (and is something of a concession that the Election Day statutes don't <u>actually</u> require receipt by Election Day). 52 U.S.C. § 21081(a)(6).

Moreover, in ostensibly directing the EAC to withhold funding, the Executive Order refers to a statute that does not gibe with the interpretation that the Order places upon it. The Order says that states have the obligation to adopt uniform and nondiscriminatory standards within that state

that define what constitutes a vote and what will be counted as a vote. That much is correct. 52 U.S.C. § 21081(a)(6). But that statute expressly speaks to uniformity within a state. *See LULAC v. Executive Office of the President*, Case No. 1:25-cv-00946, __ F.Supp.3d __, 2025 WL 1187730, *52 (D.D.C. Apr. 24, 2025). Nothing in that statute plausibly implies that a state would have to choose its standards to hit a Presidentially imposed national deadline, or risk losing funding. Because the statute does not support such a reading, the EAC may not lawfully withhold funding based on any state's determination of when it will count ballots submitted by Election Day. For these reasons, a federal court has enjoined this section of the Order as well. *California v. Trump*, Case No. 1:25-cv-10810, __ F.Supp.3d __, 2025 WL 1667949, *14-15 (D. Mass. June 13, 2025).

Section 8 of the Order

Section 8 of Executive Order 14248 concerns the enforcement of federal laws that prevent foreign nationals from contributing money in U.S. elections and that prevent the use of federal funds in lobbying. (The Executive Order asserts that 31 U.S.C. § 1352 "prohibits lobbying by organizations or entities that have received any Federal funds." That is not what the text of the statute reflects. The statute actually prohibits the use of federal funds for lobbying for certain purposes. That is, the statute is a restriction on the use of the funds, not a restriction on the activities of the recipient. *See, e.g.*, *United States v. Nat'l Training & Info. Ctr.*, 532 F. Supp. 2d 946, 955 (N.D. Ill. 2007).)

Aside from the misinterpretation of federal law, this section of the order directs the Attorney General to prioritize enforcement of particular federal statutes. That sort of direction is lawful.

Section 9 of the Order

Section 9 of Executive Order 14248 instructs agencies to cease all agency actions implementing Executive Order 14019, which the President revoked on January 20, 2025. It is true that the President revoked Executive Order 14019, and that Presidents may revoke the Executive Orders of previous Presidents. The revocation of the Order is entirely within the President's authority.

However, some provisions of Executive Order 14019 required agencies to take steps protected by or required by statute, and the President has no power to prohibit by Executive Order agencies from complying with those statutes. As just one example, Executive Order 14019 instructed federal offices, to the greatest extent practicable, to accept the designation of a state asking that federal office to become a voter registration agency under the National Voter Registration Act. 52 U.S.C. § 20506(a)(3)(B)(ii). Several states have formally designated federal offices in their states as voter registration agencies, and those offices have accepted the designation, which means that those federal offices have an affirmative federal statutory mandate to cooperate with the states in providing voter registration services. 52 U.S.C. § 20506(b). To the extent that section 9 of Executive Order 14248 purports to interfere with this statutory mandate, it is unlawful.

Similarly, Executive Order 14019 instructed the General Services Administration to ensure that the vote.gov website complied with sections 504 and 508 of the Rehabilitation Act of 1973 and

the 21st Century Integrated Digital Experience Act, among other federal laws. To the extent that section 9 of Executive Order 14248 purports to interfere with those statutory mandates, it is similarly unlawful. And Executive Order 14019 instructs the Attorney General to facilitate voter registration for all eligible individuals in the custody of the Federal Bureau of Prisons; to the extent that section 9 of Executive Order 14248 purports to suggest that the Attorney General may interfere with the ability of an eligible individual in federal custody to register to vote, that instruction may well violate the Constitution. Other actions that federal agencies have taken in compliance with Executive Order 14019 that similarly implicate statutory or constitutional rights are similarly protected from unilateral modification by Executive Order.

Sections 10 and 11 of the Order

Sections 10 and 11 of Executive Order 14248 are standard boilerplate provisions for Executive Orders. Section 10 says that unlawful portions of the Order are to be "severed" from the lawful provisions, such that an order enjoining one piece of the Order should not enjoin the whole. And Section 11 says that the Order does not affect statutory authority or requirements, and that parties cannot rely on any provisions in the Order in order to sue the federal government. These provisions are unexceptional — but reiterate the fundamental truth that the President cannot by Executive Order alter the statutory mandates described above.