TESTIMONY OF DAVID J. BECKER

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before the Election Assistance Commission

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Madam Chair, Madam Vice-Chair, Commissioners Hillman and Hunter, thank you for the opportunity to speak with you today regarding the proposal to change, for the first time in the EAC's history, regulations regarding the NVRA. This is a matter of great importance, that will have tangible effects on the ability of eligible voters to partake of the fruits of our democracy, and PFAW hopes that, in this new era of transparency and accountability that the Chair has declared for this agency, that the commissioners are given the opportunity to fully consider all the legal considerations and practical ramifications of these actions. In my experience, having served as a senior trial attorney with the Voting Section of the Justice Department for seven years, during both the Clinton and the current administrations, and more recently directing the Democracy Campaign at PFAW, I can testify to the importance of comprehensive, expert, and unvarnished analysis of issues the resolution of which could result in the disenfranchisement of otherwise eligible voters. Unfortunately, from what has publicly been made available to date, most of it released only 24 hours ago, it appears that there is still a long way to go before you can be assured that you have all the information you need to make this decision.

As my time is limited, I'd like to focus on three gaps that need further development before you can be assured that you have all the information you need to make this important decision. First, some of the legal analysis of these issues is troubling and incomplete. There is no question that courts have consistently held that the NVRA is

a constitutional exercise of Congress' authority to regulate federal elections, including the standardization of registration of voters for those elections. Since HAVA, while the EAC has *some* authority to regulate regarding the NVRA, that authority is limited, only to the extent expressly called for in the statute, primarily the creation of a national mail voter registration form, and only to the extent such regulations do not conflict with the express unambiguous terms of the NVRA. Mr. Wilkey's letter of March 6, 2006 recognized this, and held that, under the NVRA, states "*shall* accept the mail voter registration application." There is no room to regulate to allow states *not* to accept and use the form, as the statute cannot be reasonably be read to do other than unambiguously require states to register, for federal elections, those voters who complete and submit the federal form. Indeed, until the recent Arizona litigation – a case in which PFAW Foundation and I are co-counsel, and in which neither the EAC nor the DOJ is a party – such a reading of the statute has not seriously been entertained in the nearly 15 years since the passage of the NVRA, and even in that case, the 9th Circuit and the Supreme Court have expressly declined to rule on this issue at this early stage in the proceedings. Furthermore, the NVRA unambiguously mandates that the agency "shall develop *a* mail voter registration form" – one form, to be standardized amongst all the states, rather than multiple forms or standards to be permitted for each different state, resulting in a patchwork of standards – exactly the kind of patchwork that the NVRA was enacted to eliminate.

Second, it would be damaging to the EAC's credibility if it were to reverse its public position on its interpretation of the NVRA and other statutes, while litigation regarding the application of those statutes is ongoing, until *final* judgment is issued, and all appeals are exhausted. Otherwise, stakeholders will have no idea where the agency

stands on any issues – its policies could change 180 degrees on the whim of any court in the country – which would create a crisis in credibility for this agency. Should the EAC choose to set a precedent where it reverses its policy positions based on the preliminary rulings of a federal court, then the floodgates will open, with multiple litigants and jurisdictions requesting statements of policy consistent with any ruling, no matter how preliminary, of any court, and the EAC will have created a precedent where these jurisdiction will be entitled to such a public statement, regardless of any prior statements of policy the EAC has made, which could do substantial damage to the EAC's credibility as a rational interpreter of federal law.

For example, as you know, the DOJ is currently appealing an adverse ruling in a Missouri case regarding the voter list maintenance provisions of Section 8 of the NVRA. Given that the DOJ's interpretation of the NVRA has been rejected by the federal district court – in a case in which, unlike the Arizona case, discovery *has* been completed, the federal government *is* a party, and final judgment *has* been issued – should this agency now adopt a public statement or regulation agreeing with the court's determination, and rejecting the DOJ's theory? The DOJ is maintaining a consistent position – it's not one that I or PFAW agrees with, or the federal judge for that matter, but everyone knows where they stand. They are not considering changing that position because a court ruled against them, and likely will not until they have exhausted all appeals. However, if the EAC changes its regulations, or its public statements of policy, to comport with preliminary rulings made by a single court, and if it views its regulatory as broadly as has been suggested, the precedent will be set – the EAC will have no choice but to do so in *every* case, most likely starting very soon with the Missouri NVRA case. Such a

statement or regulation in that case, as required by the precedent you are apparently considering establishing, could impact the DOJ's ability to continue litigating in Missouri, and perhaps elsewhere.

Finally, we understand that in light of recent criticisms regarding the voter fraud and voter ID reports, and hearings held in Congress, the EAC has stated its public intention to bring greater transparency and accountability to its operations, and we applaud this effort. As Professor David Super, an expert on administrative law at the University of Maryland law school, testified before the House Elections Subcommittee last month, "EAC's research activities should be wholly transparent. In such a politically charged atmosphere, transparency is even more vital than quality." However, unfortunately, the rushed and secretive process to amend and implement regulations, some of which may directly contradict earlier EAC policy statements, has not been a good start. Until yesterday, the EAC had posted only a vague agenda regarding these important issues, releasing its analysis less than 24 hours before the hearing. That testimony failed to include specific questions on which the commissioners would be expected to vote, if any, and makes vague and unexplained statements, for instance alleging that "some changes [to the regulations] must be made in order to … comply with HAVA," while failing to specifically identify any such regulations that fail to comply with HAVA, or why. If this agency were to rush to judgment on this issue, without giving the public and stakeholders an adequate opportunity to provide the EAC with *all* viewpoints on this issues, and in particular if this agency were to adopt administrative policies which reduced or eliminated public comment over an adequate time period, not only would such a decision be of questionable legal merit, as has already been recognized

in Congress, it would do lasting damage to the reputation and integrity of the EAC. While we applaud the Chair's, and the other commissioners' efforts to bring greater transparency to this agency and its processes, adopting plans to establish NVRA regulations that are not published prior to the meeting is not the way to operate fully transparently and ensure that you have all the information in front of you. Therefore, we urge the EAC to resist efforts to rush to judgment on this, or any other issue, and allow for further testimony and more-reasoned consideration of this important issue. It's far more important to do this right, than to do it fast. Thank you, and I'm happy to answer any questions you may have.