MEMORANDUM

FOR: Don Palmer, Chairman
U.S. Election Assistance Commission
Craig Burkhardt, Acting NIST Director
U.S. Election Assistance Commission Technical Guidelines Development Committee

FROM: Kathy Boockvar, Former Secretary of the Commonwealth of Pennsylvania
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Citizens for Responsibility and Ethics in Washington

DATE: June 27, 2025

SUBJECT: Comment for the U.S. Election Assistance Commission ("EAC") Technical Guidelines Development Committee ("TGDC") regarding the draft of the Voluntary Voting System Guidelines ("VVSG") 2.1 and the implementation of Executive Order No. 14,248, titled "Preserving and Protecting the Integrity of American Elections" (the "EO").

This comment is submitted on behalf of two groups: (1) a bipartisan coalition of former state secretaries of state who faithfully oversaw elections across the "laboratories" of electoral democracy, the states; and (2) Citizens for Responsibility and Ethics in Washington, a non-partisan non-profit organization fighting to protect democracy by reforming ethics, pursuing transparency, and defending strong checks and balances. We share a common commitment to ensuring that elections are free and fair, and we are unified in our understanding of states' pivotal role in enacting and executing election laws, as set forth in the U.S. Constitution. We have substantial concerns regarding the upcoming July 02, 2025, TGDC virtual meeting, the development of the VVSG 2.1 draft, and the EAC's purported implementation of the EO.

Most fundamentally, the EO—and by extension the draft of VVSG 2.1's lock-step adherence to the EO's commands—conflicts with federal law and the U.S. Constitution. The President plays no role in election regulation and administration—the Constitution explicitly leaves those tasks to the states and Congress. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (J. Madison).

We urge the EAC to reject the unconstitutional proposition that the President can direct the EAC to act and defend the independence of our election systems, and the Committee's own independence and bipartisanship, by employing its usual legal processes—not blind adherence to unlawful commands.

But even if the draft of VVSG 2.1 was not tainted by its reliance on the unlawful EO, we would nonetheless object to how the draft was developed. These issues raise serious questions about the substance of the draft and necessitate its meticulous further review, particularly considering the widespread ramifications that would result from implementing the current draft of VVSG 2.1.

I. The Constitution does not permit the President to make election rules or policy.

"Our Constitution entrusts Congress and the States—not the President—with the authority to regulate federal elections . . . [a]nd no statutory delegation of authority to the Executive Branch permits the President to short-circuit Congress's deliberative process by executive order." *League of United Latin Am. Citizens v. Exec. Off. of the President*, --- F. Supp. 3d ----, No. CV 25-0946, 2025 WL 1187730, at *1 (D.D.C. Apr. 24, 2025) ("*LULAC*"); *see also California v. Trump*, --- F. Supp. 3d ---- No. 25-CV-10810-DJC, 2025 WL 1667949, at *8 (D. Mass. June 13, 2025). In their roles as election administrators, commenters witnessed firsthand the Framers' wisdom in giving states authority to enact election laws and administer elections subject only to Congress, as set forth in the Elections Clause and Electors Clause of the U.S. Constitution. That is because, as the Supreme Court recognized in reaffirming the states' role under the Elections Clause, "[d]eference to state lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (cleaned up).

Section 4(b) of the EO is an unlawful attempt by the President to turn those principles on their head. And the draft of VVSG 2.1 is an extension of that usurpation of authority. As the draft itself shows, "[t]his version offers additional clarifications ***based on*** . . . the Preserving and Protecting the Integrity of American Elections Executive Order (EO) signed on March 25, 2025."[1] Later, the draft of VSSG 2.1 states "[t]he EO ***prohibits***" using certain ballots.[2] But as two federal courts have now unequivocally stated, the

[1] Requirements for the Voluntary Voting System Guidelines 2.1 (Draft), p. 9 (emphasis added). *See also id.* pp. 190, 194, 197, 202, 206, 264 (changing guidelines "per the EO").

[2] *Id.* at p. 15 (emphasis added).

President has no power to direct the EAC to issue guidelines nor authority to "prohibit" any local election procedure. The District of Massachusetts recently made that clear in ***citing these same commenters*** for the proposition that "allowing the President to change election rules and procedures on his whim whenever he sees fit, without any input from election administrators charged with executing those rules and without the checks and balances provided by Congress, would be equivalent to dropping an anvil onto the carefully balanced scales of justice." *California*, 2025 WL 1667949, at *17 (brackets omitted). Simply put, "no statutory delegation of authority to the Executive Branch permits the President to short-circuit Congress's deliberative process by executive order." *LULAC*, 2025 WL 1187730, at *1.

II. The process for drafting and potentially voting on VVSG 2.1 has been deeply problematic.

The draft of VVSG 2.1 appears to have been thrown together quickly and opaquely. In fact, the draft—whether intentionally or through negligence—appears to misrepresent its purported "redline" supposedly reflecting proposed changes from VVSG 2.0. In Section 9.1.5-C of the VVSG 2.1 draft, the redline suggests that phrase "for accessibility purposes" was deleted from VVSG 2.0. But that phrase ***never appeared in VVSG 2.0.*** And although the cover page of the VVSG 2.1 draft says the document was "Prepared by the Election Assistance Commission at the direction of the Technical Guidelines Development Committee," there is no evidence that the majority of the TGDC actually provided such direction, and if so what the details of and basis for that direction was.

Additionally, updates to the VVSG are governed by HAVA and EAC policy, which are designed to ensure that the VVSG reflects the input of important stakeholders.[3] But the draft of VVSG 2.1 appears to have been hurriedly developed at the behest of the President in a process designed to engineer his desired result. Although these commenters were fortunate enough to learn about the draft of VVSG 2.1 in time to provide this comment, many others will not have been so lucky given the speed with which the TGDC is hastening to vote. Thus, in considering the draft of VVSG 2.1, neither the TGDC nor the EAC will have had the benefit of the robust stakeholder input that the legislation and EAC rules contemplate. The rush to consider the draft of VVSG 2.1, the lack of transparency about how the draft was created, and the lack of public input regarding the draft, are additional reasons for the TGDC not to approve the draft. There are very good reasons why thorough, meticulous, and transparent stakeholder input and guidance is required—technical decisions can cause huge voting reverberations across the country. Involving and receiving thorough, unhurried feedback and guidance from

[3] 52 U.S.C. § 20962; VVSG Lifecycle Policy §§ 4.3-4.5.

election officials at every level and other stakeholders is critical to make sure that unelected federal officials don't make decisions that can unintentionally poorly impact voting for American citizens and election officials alike

III. The TGDC should not take any other action on the EO, including decertification of voting systems

The Federal Register Sunshine Act Notice for the TGDC's upcoming July 2, 2025, meeting is also concerningly opaque. It suggests the Committee may consider other actions regarding the EO. The notice states that, in addition to discussing the draft of VVSG 2.1, the TGDC will "discuss . . . the Executive Order to Protect the Integrity of American Elections."[4] But it does not say what about the EO the TDGC is discussing. The agenda for the meeting is no clearer, stating that there will be a "[d]iscussion of the [i]mplementation of" the EO.[5] This is woefully inadequate notice of any other action the Committee may intend to take regarding the EO—including, for example, taking up the EO's attempted command regarding rescission of previous certifications. In any event, as shown above, the EO is legally unsound. Several sections of the EO that purport to direct the EAC to take various actions have already been enjoined. *See LULAC*, 2025 WL 1187730, at *2; *California*, 2025 WL 1667949, at *21. Because those courts' rationale for enjoining much of the EO—that the President does not make election policy—apply with equal force to all of the EO's other directions to the EAC, the Committee should not take any other action to "implement" the EO, including decertification or rescission of certification. Further, even setting aside the EO, there is no lawful path to decertification here, which is only permitted in very limited circumstances not currently present.

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In conclusion, we implore the TGDC and EAC to slow down, allow for comprehensive, transparent, and thoughtful input from stakeholders across the country, and further consider the serious issues with the current draft of VSSG 2.1, which is legally and procedurally flawed. The President has no power to make election administration policy, and that fact alone means that adopting this draft of VSSG 2.1 would be unlawful. Now more than ever, the EAC must remain a bipartisan and independent agency that receives and incorporates stakeholder input, as mandated by several laws and policies.

[4] https://www.federalregister.gov/documents/2025/06/11/2025-10679/sunshine-act-meetings

[5] https://www.eac.gov/sites/default/files/2025-06/TGDC_2025_Annual_Meeting_Agenda.pdf.

Further, legitimate updates to the VVSG require adherence to rules set through HAVA and EAC policy. This case demonstrates the importance of following those rules. Because in practice, racing to adopt the proposed draft of VSSG 2.1 would have deeply problematic consequences: potentially forcing jurisdictions across the country to choose between either getting new voting equipment—imposing an enormous unfunded mandate of potentially hundreds of millions of dollars on already underfunded election administrators—or risking the further proliferation of controversy around elections, regarding the continued use of equipment the EAC has effectively condemned (notwithstanding the fact that such equipment has been used safely and effectively for years). In other words, a rush to judgment by the TGDC here will provide fodder for misinformation and even outright lies about election security.

For all of the foregoing reasons, we respectfully urge the TGDC to rescind or reject the draft of VVSG 2.1 and to refrain from taking any action implementing the EO.

Sincerely,

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