IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, et al.,

Plantiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendants,

and

KRIS W. KOBACH, in his official capacity as the Kansas Secretary of State

Intervenor Defendant,

and

PUBLIC INTEREST LEGAL FOUNDATION

Intervenor Defendant.

NO. 16-cv-236 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR DEFENDANT KANSAS SECRETARY OF STATE KRIS KOBACH'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

Pursuant to Fed. R. Civ. P. 56(a) and Local Rule 7(h), Intervenor Defendant Kansas Secretary of State Kris Kobach ("Kansas") hereby submits this memorandum in support of his motion for summary judgment on the ground that Defendants' actions were lawful and consistent with governing statutes and regulations. This memorandum is also submitted in response to the Federal Defendants' motion for partial summary judgment and Plaintiffs' cross-motion for summary judgment. The Court should deny the Federal Defendants' motion for partial summary judgment, deny Plaintiffs' cross-motion for summary judgment, and grant Intervenor Defendant's cross-motion for summary judgment.

STATEMENT OF FACTS

The United States Election Assistance Commission ("EAC") maintains a Federal Voter Registration Application Form ("Federal Form") for elections for Federal office. 52 U.S.C. § 20508(a)(2); AR0008-32, States "ensure that any eligible applicant" who timely submits the Federal Form "is registered to vote." 52 U.S.C. § 20507(a)(1). The Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary *to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process*." *Id.* § 20508(b)(1)(emphasis added).

The state-specific instructions accompanying the Federal Form are eighteen pages long. *See* AR0015-332. They contain directions regarding specific voter registration requirements imposed by the laws of the particular States. Governing regulations direct state election officials to notify the EAC of their State's voter registration eligibility requirements reflected in their state

laws, and to notify the EAC on an ongoing basis of any changes to those requirements. 11 C.F.R. § 9428.6(a)(1), (c).

The National Voter Registration Act ("NVRA") originally tasked the Federal Election Commission ("FEC") with maintaining the Federal Form. *See* 52 U.S.C. § 20508(a). In 2004, the Congress created the EAC and transferred responsibility of maintaining the Federal Form to the EAC. 52 U.S.C. 20921, 20923(a)(1). The NVRA requires the EAC, "in consultation with the chief election officers of the States," to "develop a mail voter registration application form for elections for Federal office." 52 U.S.C. § 20508(a)(2). The statutes require also that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [Commission]." *Id.* § 20505(a)(1).

Regarding the contents of the Federal Form, Congress specified that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official *to assess the eligibility of the applicant and to administer voter registration and other parts of the election process*." 52 U.S.C. § 20508(b)(1)(emphasis added). The form must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)." *Id.* § 20508(b)(2). The required statement must also "contain[] an attestation that the applicant meets each such requirement" and "require[] the signature of the applicant, under penalty of perjury." *Id.*

Following the NVRA's enactment, the FEC initially drafted the nationwide elements and layout of the Federal Form (not including the content of the State-specific instructions) through notice-and-comment rulemaking. *See* 11 C.F.R. § 9428.4; 59 Fed. Reg. 32,311 (June 23, 1994). The FEC also promulgated regulations that now bind the EAC. The relevant rule mandates that

the agency must modify the instructions to reflect the registration laws of the States; the Federal Form "*shall* list U.S. Citizenship as a universal eligibility requirement and *include a statement that incorporates by reference each state's specific additional eligibility requirements*... as set forth in the accompanying state instructions." 11 C.F.R. § 9428.4(b)(1)(emphasis added). The regulations mandate that the state-specific instructions must include each State's eligibility requirements, and they provide for State election officials to notify the EAC of any changes in State requirements. *Id.* § 9428.6(a)(1), (c).

Changes to the general application and general instructions of the Federal Form have differed procedurally than changes to the state-specific instructions. Changes to the general application have always required a vote of the commissioners. But changes to the state-specific instructions have followed a different procedure.

On August 8, 2000, the FEC adopted the following procedure regarding modifications to the state-specific instructions: "Instead of requesting a formal Commission vote approving the update of state information, the [Office of Election Administration ("OEA")] will make the changes and notify the Commission of them. The OEA will, however, continue to submit for a formal Commission vote any changes to the form that are not specific to a given state." AR0163. Following that procedure, changes to the general instructions of the Federal Form (i.e. "changes…that are not specific to a given state") were made by a formal Commission vote and changes to the state-specific instructions (i.e. "the update of state information") were made by staff with the OEA. *See e.g.* AR0168, AR0204-05, AR208.

After Congress transferred responsibility for maintaining the Federal Form to the EAC, the EAC continued this procedure, permitting EAC staff to make changes to the state-specific instructions, while requiring commissioner votes for modifications of the general application.

The vast majority of changes to the state-specific instructions have simply been made informally by the EAC's Executive Director, in response to a letter or email message from the relevant State requesting the modification. *See* AR0208, AR0219-AR0225. As the Supreme Court has observed, "the whole request process appears to be entirely informal…" *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"), 133 S. Ct. 2247, 2260 n.10 (2013). State requests are virtually always granted, and no written explanation of why the request was granted is provided. This had always been the experience of Kansas prior to the 2013-14 episode in which the Department of Justice hijacked the EAC, described below.

In the instant case, Kansas requested a change in the Kansas-specific instructions to conform with a Kansas law requiring documentary proof of citizenship to complete an applicant's registration. AR0072. The Executive Director of the EAC changed the Kansas-specific instructions at the request of the State of Kansas, effective February 1, 2016. The Executive Director simultaneously changed the state-specific instructions of Alabama and Georgia to require documentary proof of citizenship, in response to requests from those States. AR0105.[1]

A. Kansas's Proof-of-Citizenship Law

In 2011, the Kansas enacted, by large bipartisan majorities in both houses of the Kansas Legislature, HB 2067, the "Secure and Fair Elections Act" (hereinafter the "SAFE Act"), which amended various Kansas statutes concerning elections. Relevant here is section 8(l) of HB 2067, codified as Kan. Stat. Ann. ("K.S.A.") 25-2309(l); that statute provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but

[1] Four States currently require proof of citizenship to register to vote. The fourth is Arizona, but the Federal Form does not currently include this requirement.

an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." AR0148. The law enumerated thirteen different documents that constitute satisfactory evidence of citizenship, enabling Kansas election officials to assess the eligibility of voter registration applicants. *Id*. The proof of citizenship requirements took effect on January 1, 2013. AR0150.

B. *Arizona v. Inter Tribal Council of Arizona, Inc.*

After Kansas passed its proof of citizenship law, the Supreme Court issued the opinion of *ITCA*. *ITCA* was a preemption case examining whether Arizona's practice of "reject[ing]" the Federal Form was preempted by the NVRA's requirement that a State must "accept and use" the Federal Form. *Id.* at 2253. The *ITCA* Court did not review whether the EAC had adopted a correct standard (or any standard) under the NVRA when the Executive Director rejected Arizona's original request to modify the Federal Form (or when the commissioners deadlocked 2-2 after Arizona appealed to the full commission). The *ITCA* Court did not examine the authority that the Executive Director had to reject Arizona's request. And the *ITCA* Court did not review the governing regulations related to the Federal Form. These issues were not before the Court because Arizona did not bring any suit challenging the EAC's decision under the Administrative Procedure Act ("APA"). *ITCA*, 133 S. Ct. at 2260. Rather, the case arose out of a challenge by private organizations and two Arizona residents to Arizona's practice of rejecting Federal Form applications that did not include proof of citizenship. *Id.* at 2250.

The Supreme Court concluded its opinion in *ITCA* by suggesting that Arizona renew its request to the EAC to modify the Arizona-specific instructions of the Federal Form to require proof of citizenship. *Id*. at 2260, 2260, n.10. Following the suggestion of the *ITCA* Court, Kansas and Arizona requested in 2013 that the EAC modify the state-specific instructions of the

Federal Form to reflect their respective proof-of-citizenship requirements. At that time, the EAC lacked any commissioners and lacked an executive director. The Acting Executive Director Alice Miller responded that she therefore could not act on the States' requests. The States sued in the United States District Court for District of Kansas. *Kobach v. Election Assistance Commission*, 6 F. Supp. 3d 1252 (D. Kan. 2014). This, too, was in response to the Supreme Court's suggestion in *ITCA*. *See ITCA*, 133 S. Ct. at 2260, n.10.

C. The Department of Justice Commandeers the EAC

After the district court ruled that the EAC must answer the States' requests, the EAC Acting Executive Director went beyond the district court's order and took the unprecedented step of first asking for public comments, with a comment period lasting only ten days, before answering the States' request. 78 Fed. Reg. 77,666 (Dec. 24, 2013), AR0276-AR0281. *Never before had the EAC asked for public comment on any state request for modification of the state-specific instructions of the Federal Form*. Fed. Defs.' Mtn. Summ. J. ("DOJ Br.") at 25; *see also* AR0204-AR0208, AR0219-AR0225. There had been dozens of requests by States across the country since the Federal Form was first created, and not once had such a request been subjected to public comment. Rather, the States simply asked; and the EAC responded.

It has since been revealed why this unprecedented notice and comment procedure was taken, in contrast to the "informal" process traditionally taken by the EAC in making modifications to the Federal Form. *ITCA*, 133 S. Ct. at 2260, n.10. As the Acting Executive Director subsequently stated to EAC Executive Director Brian Newby, "the Department of Justice issued the opinion." Declaration of Brian Dale Newby, Doc. No. 28-2 ¶ 22 (July 18, 2016) (hereinafter "Newby Decl."). With the EAC lacking commissioners or a duly-appointed executive director, the partisan Department of Justice was able to commandeer the empty ship.

What was supposed to be a decision of a bipartisan, independent EAC was instead issued by a partisan Department of Justice. Indeed the Justice Department actually *drafted* the decision that was presented as a decision of the EAC. Trans. of Temporary Inj. Hearing, Dist. Dkt. No. 37, pp 59-61 (hereinafter "TRO Trans."); Newby Decl. ¶ 22.[2] [redacted] Kansas and Arizona were not informed at the time that the Justice Department had commandeered the EAC for the purpose of denying their requests.

Prior to December 2013, when States sought modification of their respective state-specific instructions, such modifications did not undergo a formal notice and comment process. DOJ Br. 25; [redacted] The difference after December 2013 was that the Department of Justice effectively took the helm of a leaderless EAC. Newby Decl. ¶ 22. Indeed the Justice Department actually *drafted* what was supposed to be a decision by the bipartisan, independent EAC. *Id.*; [redacted]

[redacted]

[redacted]

[redacted] Kansas, Arizona, and Georgia were not informed at the time that the Justice Department had taken over the EAC for the purpose of denying their requests.

After the Acting Executive Director, through an opinion authored by the Justice Department, refused to grant the States' requests, the States renewed their demand for relief in the district court. The district court reversed the Acting Executive Director's denial, holding as follows: "Consistent with *ITCA*, because the states have established that a mere oath will not suffice to effectuate their citizenship requirement, 'the EAC is therefore under a nondiscretionary duty' to include the states' concrete evidence requirement in the state-specific instructions on the federal form." *Kobach*, 6 F. Supp. 3d at 1271 (*quoting ITCA*, 133 S. Ct. at 2260).

The Tenth Circuit reversed. The panel's review was limited to the record before it at the time; and the State Appellees did not know that the Department of Justice had commandeered the EAC to deny the States' requested changes to their state-specific instructions. The panel

ultimately held that the NVRA granted EAC discretion to determine what information is necessary for state officials to assess voter eligibility and therefore had the authority to deny the States' requests. *Kobach v. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied* 133 S. Ct. 2891 (2015).

D. Kansas Makes a Different Request for Modification of the Kansas-Specific Instructions of the Federal Form

In the year that passed between the Tenth Circuit's decision on November 7, 2014, and the State of Kansas's November 17, 2015, request to the EAC to modify the Kansas-specific instructions of the Federal Form several significant developments occurred. First, the United States Senate confirmed a quorum of commissioners to serve on the EAC. Second, those Commissioners acted officially to appoint Brian Newby as the Executive Director of the EAC. Third, the State of Kansas promulgated regulations stipulating that voter registration applicants would have 90 days to complete their applications by providing proof of citizenship to the relevant county election office. Failure to do so would result in the "cancellation" of the application, but the applicant could fill out the five-line application once again as often as he wished and give himself another 90 days to provide proof of citizenship. *See* K.A.R. § 7-23-15.

Against the backdrop of these new rules modifying registration procedures, and with a duly-appointed EAC Executive Director capable of approving state requests for modification of the state-specific instructions, on November 17, 2015, the State of Kansas requested instruction language significantly different from language requested in 2013. Specifically, (1) the new language included the 90-day limit imposed by K.A.R. § 7-23-15, (2) the new language listed the thirteen acceptable documents under Kansas law that constitute sufficient evidence of citizenship, (3) and the new language notified applicants of their right under K.S.A. § 25-2309(m) to submit other evidence of citizenship. AR0072.

In addition, Kansas provided to the EAC a spreadsheet of eighteen cases of aliens in a single Kansas county who had either successfully registered to vote prior to Kansas's proof of citizenship requirement, or who had been successfully prevented from registering after the law went into effect. All but one of these cases were newly discovered and had not been presented to the district court in 2013 or the EAC's Acting Executive Director in 2014. Notably, the spreadsheet included a case of an alien who used the Federal Form. This case dispelled the nonsensical argument that somehow the affirmation of U.S. citizenship on the Federal Form was more powerful to prevent fraud than the affirmation of U.S. citizenship on the state forms.

On January 29, 2015, EAC Executive Director Brian Newby granted Kansas's requested modification of the state-specific instructions of the Federal Form, along with similar requests by the States of Georgia and Alabama. AR0109. The Executive Director also issued a contemporaneous written memorandum explaining in detail the basis for the decisions. AR0001-0007. The Executive Director further explained his decision in a subsequent declaration. Newby Decl., Doc. No. 28-2. The EAC posted revised State-specific instructions on its website on February 1, 2016. AR0001, AR0006-0007.

For nearly seven months, Kansas has been operating under the revised instructions. The State has accepted a total of 70,133 applications to register to vote in that time span.[4] Now that the instructions on the Federal Form conform to the instructions on the state form, the administration of elections in the State of Kansas has become significantly less difficult; and a loophole through which noncitizens could register has been closed. The State now treats all mail

[4] As calculated by the State of Kansas Election Voter Information System ("ELVIS") database on August 19, 2016. This number reflects the total number of registration applications received from February 1, 2016, through August 18, 2016, inclusive. This total reflects all applications, of which Federal Form applications are a small percentage. The system does not separately track the number of Federal Form applications.

registration forms in the same way and need not administer a separate process for Federal Form applicants who decline to provide proof of citizenship.

STANDARD OF REVIEW

"Under the APA, the agency's role is to resolve factual issues to arrive at a decision that is supported by the administrative record, while the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Coe v. McHugh*, 968 F. Supp. 2d 237, 239 (D.D.C. 2013) (citations and internal quotation marks omitted). "[A]gency action may be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). Review under the "arbitrary and capricious' standard is 'highly deferential' and 'presumes the agency's action to be valid.'" *Coe*, 968 F. Supp. at 240 (quoting *Envt'l Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)). In reviewing the agency's decision, a court's review is limited to whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Coe*, 968 F. Supp. at 240 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted)). The Court's review is "narrow" and the court should "not…substitute its judgment for that of the agency." *Coe*, 968 F. Supp. 2d at 240 (quoting *Motor Vehcile Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983) (internal quotation marks omitted)). And, a court "may not set aside an agency [decision] that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute, so long as the agency has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made." *Id.* (internal quotation marks and citation omitted). This review is very deferential. "[N]othing more than a 'brief statement' is necessary, as long as the agency explains 'why it chose to do what it

did.'" *Id.* (quoting *Tourus Records, Inc. v. Drug*, 259 F.3d 731, 737 (D.C. Cir. 2001)). "If a court can 'reasonably discern[]' the agency's path, it will uphold the agency's decision.'" *Coe*, 968 F. Supp. at 240 (quoting *Pub. Citizen, Inc. v. F.F.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993), *Bowman Transp., Inv. V. Arkansas-Best Freight Sys., Inc.* 419 U.S. 281, 286 (1974)). Review of an agency's decision is "subject to a presumption of validity[.]" *Coe*, 968 F. Supp. at 240; *see also Charter Operators of Alaska v. Blank*, 844 F. Supp.2d 122, 127 (D.D.C. 2012) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)) ("The agency's decision are entitled to a 'presumption of regularity.'").

ARGUMENT

I. The Browns Lack Standing and Should Be Dismissed

At the preliminary injunction phase of this case, Kansas produced evidence that Marvin Brown and Joann Brown registered *prior to* February 1, 2016. As a result, they did not utilize the modified Federal Form; and they were accordingly registered to vote in elections for federal office. *See* Affidavit of Bryan Caskey, Doc. No. 27-1 ¶¶ 17-18. Plaintiffs did not refute this evidence. *See League of Women Voters v. Newby*, 2016 WL 36366604, *8, n.18 (D.D.C. June 29, 201). In the past primary election of August 2, 2016, Marvin Brown and Joann Brown were registered to vote for federal office and voted in that election. Affidavit of Bryan Caskey, August 19, 2016 (Exhibit C) ¶¶ 11-12; *see also* Electronic Voter Information System record of Marvin Brown (Exhibit D) and Electronic Voter Information System record of Joann Brown (Exhibit E).[5] Plaintiffs Marvin Brown and Joann Brown have suffered no injury by the EAC's

[5] Marvin and Joann Brown were not placed on the official voter roll of the State of Kansas because they have not yet provided proof of citizenship to the State of Kansas. Instead, they were

decision and they should be dismissed for lack of standing. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) (standing requires showing that challenged conduct be "fairly traceable" to plaintiffs' purported injury).

II. The Agency Decision is Lawful

A. The Agency Decision is Consistent with the NVRA.

The Leagues attempt to construct a false standard that must be met in order for the state-specific instructions to be changed. This fictitious edifice comes from the word "necessary" in the NVRA. *See* Pls.' Cross-mot. Summ. J. and Opp'n to Fed. Defs.' Mot. Partial Summ. J. ("Leagues Br.") at 40-42; *see also* DOJ Br. 17-21. However, this standard was never applied until the Department of Justice commandeered the EAC and *invented* the standard in 2013-14. It is an incorrect interpretation of the law.

1. The Leagues Take the Word "Necessary" Out of Context

The word "necessary" comes from the section of the NVRA describing "federal coordination" with the States in developing the Federal Form. 52 U.S.C. § 20508. Specifically, Federal Form may only require "such… information… as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and *to administer voter registration and other parts of the election process*…." 52 U.S.C. § 20508(b)(1)(emphasis added). The Leagues obfuscate the fact that there are *two* justifications for why requested instructions may be necessary, and they ignore the second one italicized above. Something is necessary *either* if it helps assess the eligibility of the applicant *or* if enables the State election official to "administer

placed on a federal-elections-only voter roll that was created during the interim period when the Federal Form did not conform to the proof-of-citizenship requirement of K.S.A. § 25-2309(l).

[the] voter registration and… election process." That election process is defined by state law. The job of the EAC is to make sure that the Federal Form reflects state law by "consult[ing]" the chief election officers of the States and including any changes in the state-specific instructions of the Federal Form that are reflected in new state laws. 52 U.S.C. § 20508(a)(2).

Since it would violate Article I, Section 2 of the Constitution if the requirements for voting in federal elections differed from the requirements for voting in state elections, the only reasonable reading of this sentence is one that allows the state officials to determine what information is necessary to comply with their own voter registration laws.[6] The Leagues ignore this second reason why such information may be "necessary" to state election officials. Moreover, it should be recognized that *many changes to the state-specific instructions of the Federal Form can only be understood as necessary for the second reason*. For example, several States' instruction have been modified to include a link to the website of the States' election offices. *See* AR0016 (California), AR0024 (Mississippi), AR0026 (Nevada). Such instructions can only be understood as being necessary for the administration of the States' voter registration laws, not necessary to assess eligibility.

2. The Supreme Court's Explanation of the Word "Necessary"

The Leagues attempt to read the law in a manner that the text cannot bear. They declare that the EAC *must* require a State to prove necessity to the satisfaction of the EAC before modifying the state-specific instructions in response to a State's request. However, the Supreme Court has already weighed in on this subject. And its reading of the NVRA is very different: "a State may request that the EAC alter the Federal Form to include information *that*

[6] "[T]he electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Art. I, Sec. 2, cl. 1.

the State deems necessary to determine eligibility…." *ITCA*, 133 S. Ct. at 2259 (emphasis added). The Court made clear that the determination of necessity resides with the States, not the EAC. Moreover, the Court also considered the possibility that the EAC might decline to act. Even under those circumstances, the relevant State would not have to prove to the EAC that its requested modifications were "necessary." Rather, the State should simply sue and establish that mere oath will not suffice: "Should the EAC's inaction persist, Arizona would have the opportunity to *establish in a reviewing court that mere oath will not suffice* to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the federal form." *Id.* at 2260 (emphasis added).[7]

The Department of Justice and the Leagues misconstrue *ITCA* to claim that *ITCA* required some heightened showing of necessity prior to the Federal Form being changed. *See* DOJ Br. at 17-18; Leagues Br. at 9-10, 19, 34. It did not. *ITCA* was a preemption case, not an Administrative Procedure Act case. *ITCA*, 131 S. Ct. at 2251, 2260. The only issue before the Court was whether Arizona could "reject" the Federal Form without accompanying documentary proof of citizenship when the Arizona-specific instructions of the Federal Form did not list such a requirement. *Id.* at 2251. The *ITCA* Court held that Arizona could not. The Court then suggested that Arizona should renew its request to the EAC to change the Arizona-specific instructions. If the EAC refused to act Arizona could *compel* the agency to modify instructions by showing *in federal court* that "a mere oath would not suffice to effectuate its citizenship requirement." 133 S. Ct. at 2260. The EAC would be "under a nondiscretionary duty to include

[7] In addition, the Court suggested that it would be "arbitrary" for the EAC to refuse such a request: "Arizona might also assert (as it has argued here) that it would be arbitrary for the EAC to refuse to include Arizona's instruction when it has accepted a similar instruction requested by Louisiana." *ITCA*, 133 S. Ct. at 2260. Mr. Newby also recognized the arbitrariness of the 2014 opinion in light of the Louisiana instruction. AR0004-0005.

Arizona's concrete evidence requirement on the Federal Form." *Id*. The *ITCA* Court never suggested that the EAC could not modify the state-specific instructions under a standard that takes state law into account. Indeed, the EAC has already done that pursuant to a binding federal rule promulgated by the FEC. *See infra* Sec. II.B. (discussing 11 C.F.R. §§ 9428.1 *et seq.*).

The Department also misconstrues *ITCA* to claim that Kansas's Qualifications Clause argument is wrong because of a supposed "clear distinction between eligibly requirements…and registration procedures…" DOJ Br. at 18. In support of that argument, they misleadingly state that, "The Court did not accept the theory that documentation was itself an eligibility requirement, but left room for the EAC to determine whether it was necessary under the statute. *Id*. at 18. In fact, the Supreme Court expressly *disclaimed* addressing the argument that registration itself (or documentary proof of citizenship to complete a registration) was a voter qualification because the argument was not raised in the court below. *ITCA*, 133 S. Ct. at 2258 n.9. ("In their reply brief, petitioners suggest for the first time that 'registration is itself a qualification to vote.'…We resolve this case on the theory on which it was hitherto been litigated: that *citizenship* (not registration) is the voter qualification Arizona seeks to enforce."). What is before *this Court* is the issue of whether the NVRA can be constitutionally read to create an electorate that is qualified to vote in federal elections but not qualified to vote in state elections. In Kansas, registration is itself a qualification for voting. *See infra* at 24.

Similarly, the Department cites *Kobach* to support its claim that, "[t]he Tenth Circuit definitively rejected intervenors' constitutional argument as well." DOJ Br. 18 (citing *Kobach*, 772 F.3d at 1198-99). The Tenth Circuit did not do so. Rather it erroneously concluded that the (implicit) meaning of the Elections Clause trumped the (explicit) provision of the Qualifications Clause. *Kobach*, 772 F.3d at 1198-99. That conclusion runs directly contrary to *ITCA*. "One

cannot read the Elections Clause as treating implicitly what other constitutional provisions regulate explicitly. … Surely noting in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *ITCA*, 133 S. Ct. at 2258. Moreover, if the Tenth Circuit opinion could plausibly be read to permit *Congress* to dictate to the States who may vote in Federal Elections and to create a separate class of qualified voters for state elections, then the decision would be wrong and would contradict *ITCA*. *ITCA*, 133 S. Ct. at 2257 ("[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.").

3. An Objective Definition of Necessary is More Appropriate

Within the context of the NVRA, it is possible to define "necessary" either subjectively or objectively:

- The subjective definition: "*Better than all other policy options, and without an adequate substitute policy*."
- The objective definition: "*Required by state law*."

These definitions are quite different. The former is a subjective judgment about good and bad policy choices when attempting to limit registration to citizens, whereas the latter is an objective statement of what state law requires. The objective definition of "necessary" is correct for two reasons. It is a more natural reading of 52 U.S.C. § 20508(b)(1), and it is more appropriately administered by an agency or court.

First, consider the wording of the statute. The NVRA states that the Form may require information that is "necessary to *enable the appropriate State election official* to assess the eligibility of the applicant and *to administer voter registration and other parts of the election process*[.]" 52 U.S.C. § 20508(b)(1)(emphasis added). The context of the sentence makes clear that whether something is necessary is defined by what the State election official is required to

obtain *in order to comply with state law*. That is the natural reading of "administering voter registration and other parts of the election process." Administering a process entails complying with relevant laws. This reading is consistent with the ordinary meaning of "necessary": "needed for some purpose or reason[.]" Black's Law Dictionary (10th ed. 2014), necessary. The purpose or reason is to administer the voter registration laws of the State.

Second, the objective definition of "necessary" is more capable of EAC administration and subsequent judicial determination. If the subjective definition is used, then the EAC must wade into the policy realm and attempt to determine whether the benefit of requiring proof of citizenship outweighs the costs of doing so. And any judicial review of the EAC's decision must also make a pure policy judgment about the desirability of requiring proof of citizenship. In so doing, the court would have to assume the posture of a policy maker and second guess the subjective policy judgments of the three States' legislatures. These are policy questions on which reasonable people may disagree. Consequently they are legislative (not legal) in nature and not appropriate for judicial determination. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1881 (2013), *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003), *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976), and *Serafyn v. F.C.C.*, 149 F.3d 1213, 1217 (D.C. Cir. 1998). Executive Director Newby appropriately applied the objective definition of the word necessary, eschewing any second-guessing of the policy decisions of State legislature.

4. The Agency's Interpretation Avoids Constitutional Doubt

It is a fundamental rule of statutory construction that an Act of Congress must not be construed in a manner that raises doubts as to its constitutionality. *Clark v. Martinez*, 543 U.S. 381 (2005); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The Supreme Court in *ITCA* pointed out that this was a risk when interpreting the NVRA: "Since the power to

establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that *it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications*." *ITCA*, 133 S. Ct. at 2258-2259 (emphasis added). The Court then considered the possibility that it would have to accept Arizona's less-persuasive reading of the words "accept and use" in 52 U.S.C. § 20505(a)(1) in order to avoid this constitutional doubt. *ITCA*, 133 S. Ct. at 2259. But the Court found a way out. "Happily, we are spared that necessity, since the statute provides another means by which Arizona may obtain information needed for enforcement. …[W]e are aware of nothing that prevents Arizona from renewing its request [to the EAC]." *Id.* at 2259-2260. In other words, constitutional doubt could be avoided if the EAC responded by granting a subsequent request from the State of Arizona to add proof of citizenship to the Arizona-specific instructions of the Federal Form.

In the instant case, the EAC's interpretation of 52 U.S.C. § 20508(b)(1) is consistent with the rule of avoiding constitutional doubt. The EAC has adopted a reading of the statute that does not "preclude a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2259. However, the Leagues urge this Court to force the agency to adopt a different reading of the statute—one that gives rise to severe constitutional doubt in two respects.

a. The NVRA Would Override the States' Authority to Enforce Qualifications

The first reason is that the Leagues' reading interprets the NVRA as overriding the State's constitutional authority to set the qualifications for electors. Article I, Section 4, clause 1, of the U.S. Constitution (the "Elections Clause") gives the States the initial authority to determine the time, places and manner of holding federal elections, but gives Congress the power

to alter those regulations. *ITCA*, 133 S. Ct. at 2253. The Supreme Court recognized that "[t]he Election Clause's substantive scope is broad" enough to authorize regulations "relating to" registration. *Id.* at 2253. But the Court has emphatically limited what Congress can do: "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id.* at 2257.

Instead, the Constitution gives the States the exclusive power to determine *who* may vote in federal elections. Article I, Section 2, clause 1 (the "Qualifications Clause") provides that the electors in each State for members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise, the Seventeenth Amendment provides that the electors in each State for the Senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Interpreting these provisions, *ITCA* concluded, "Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *ITCA*, 133 S. Ct. at 2258 (internal quotations omitted). The Court therefore determined that "[p]rescribing voting qualifications ... 'forms no part of the power to be conferred upon the national government' by the Elections Clause." *Id.* (*quoting* The Federalist No. 60, at 371 (A. Hamilton)). Rather, the Court held that these constitutional provisions assign the power of establishing voter qualifications to the States. *ITCA*, 133 S. Ct. at 2258–59.

Importantly, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements," the Court held that the States also possess the exclusive power to *enforce* those voter qualifications. *Id.* at 2258–59. Indeed, all nine justices in *ITCA* agreed that the States have the exclusive power to both establish and enforce voter qualifications for federal elections. *ITCA*, 133 S. Ct. at 2258–59 (majority opinion); *id.* at 2261

(Kennedy, J., concurring); *id.* at 2262-64 (Thomas, J., dissenting); *id.* at 2270-73 (Alito, J., dissenting). In the instant case, the qualification of citizenship is enforced by the State's proof-of-citizenship requirement. At the same time, under Kansas law the proof-of-citizenship registration requirement is also a qualification in and of itself. As explained *infra* at 23, in Kansas completion of the registration process is necessary to become a qualified elector.

In addition to the States' qualification power, the Supreme Court has elsewhere held, "States are thus entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (internal quotation omitted). The "States have broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013)(quotation marks and citation omitted). "The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Since the States possess the constitutional power to establish and enforce voter qualifications, the States' power can be limited only by the Constitution itself.[8]

Importantly for the purposes of the instant case, the *ITCA* Court specifically held that it would raise serious constitutional doubts if the NVRA were interpreted to give the EAC the authority to reject Arizona's request to that agency to include Arizona's proof of citizenship instruction on the state-specific instructions the Federal Form:

> [W]e think that—by analogy to the rule of statutory interpretation that avoids questionable constitutionality—validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt. That is to say, it is surely permissible if not requisite for the

[8] Notably, no party argues that the States' proof-of-citizenship laws are unconstitutional.

> Government to say that necessary information which may be required [by the States] will be required [by the EAC].

ITCA, 133 S. Ct. at 2259. The Leagues completely ignore this central holding of *ITCA*. The EAC's decision to grant the States' requests in the instant case avoids an interpretation of "necessary" that would raise this constitutional doubt.

The Department argues that this constitutional argument is incorrect because "*ITCA* drew a clear distinction between *eligibility requirements*…and *registration procedures*…" DOJ Br. at 18 (emphasis added). This argument fails for three reasons. First, the Department ignores the fact that proof-of-citizenship is the State's means of enforcing its citizenship eligibility requirement. "[I] it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2258-2259. Second, in Kansas, registration is itself a qualification. *See infra* at 23. Therefore, the supposed "clear distinction" that the Department imagines simply does not exist in Kansas. Third, the Department overlooks the fact that a controlling regulation already mandates that the EAC include *both* "eligibility requirements" and "registration procedures" in the state-specific instructions: "The state-specific instructions *shall contain*…information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b) (emphasis added). Thus, while the Department's discussion about this supposed distinction in *ITCA* is academically interesting, the undeniable fact is that a regulation in place since 1994 already binds the EAC to include both "voter eligibility and registration requirements," making Defendants' theory largely irrelevant. *Id.*

b. Separate State and Federal Voter Qualifications Would Exist

The second reason that the Leagues' reading of the NVRA raises constitutional doubt is that it creates a situation in which the qualifications for voting in federal elections in Kansas

differ from the qualifications for voting in State elections in Kansas. It is undeniable that Article I, Section 2, of the United States Constitution prohibits this. The Constitution is "straightforward" regarding the powers reserved to the States and the powers granted to the federal government with respect to defining the federal electorate. *ITCA*, 133 S. Ct. at 2251. The Qualifications Clause is unambiguous: "the Electors in each State [for congressional elections] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Article I, § 2, cl. 1. Equivalent words are found in the Seventeenth Amendment, with respect to the qualifications of electors in elections for the United States Senate. The Legislature of Kansas has exercised its sovereign authority to make the provision of documentary proof of citizenship a qualification for being an elector in state elections. K.S.A. 25-2309(l). The standard of documentary proof of citizenship is unquestionably a "standard ... which may be established … by the State itself." The Federalist No. 52, at 326 (Madison).

The State of Kansas has also made completion of the registration process, itself, a qualification for being an elector. "It is well settled in this state that the legislature may require registration as a prerequisite to the right to vote." *Dunn v. Board of Com'rs of Morton County*, 165 Kan. 314, 327-28 (1948)(citing *State v. Butts*, 31 Kan. 537 (1884)). Qualified electors means "persons who have the constitutional (Kan. Const., art. 5, §§ 1, 4) qualifications of an elector *and who are duly and properly registered*." *Id.* at 328 (emphasis added). One is not entitled to vote under Kansas law until one is a qualified elector; and becoming a qualified elector entails not only possessing the attributes of an elector (such as being a Unites States citizen), but also completing the registration process.

After the State has established its qualifications for being an elector, the federal government must accept such qualifications as the same qualifications of electors for congressional elections. *ITCA*, 133 S. Ct. at 2258 ("voting qualifications in federal elections are [not] set by Congress"). There is no other plausible way to interpret the Qualifications Clause.

However, the Leagues urge a reading of the NVRA that would plainly violate the Qualifications Clause and the Seventeenth Amendment. The relief that they seek would require that all Federal Form applicants be considered fully registered to vote for *federal elections*, even if those applicants had not provided documentary proof of citizenship. However, under Kansas law those applicants remain unqualified to participate in state and local elections. K.S.A. § 25-2309(l).[9] The relief sought by the Leagues would disrupt the constitutional plan of Article 1, Section 2, Clause 2, and the Seventeenth Amendment. The EAC avoided this problem by adopting a reading of 52 U.S.C. § 20508(b)(1) that is fully consistent with the United States Constitution. This Court should not now adopt the Leagues' reading and give rise to the constitutional doubt that the EAC successfully avoided.

5. The Agency's Interpretation is Owed Deference

[9] A state court challenge is ongoing as to whether the Kansas Secretary of State has the statutory authority to bifurcate the election process to separate voters who are qualified to vote only in federal elections from voters who have proven their citizenship and are qualified to vote in all elections. *See Brown v. Kobach*, Case no. 2016CV550 (Shawnee Cnt. Dist. Ct. July 29, 2016). The district court granted a temporary restraining order questioning whether the Secretary had the authority under existing state law to bifurcate the election process. Briefing on that case is ongoing and a hearing is scheduled for late September. If the state court were to hold that bifurcating the election process is not possible under current Kansas law, then the consequences for the State's constitutional authority to control the qualifications of electors would be grave; a federal agency could refuse to place the State's proof-of-citizenship requirement on the state-specific instructions of the Federal Form, and the State would have to allow an applicant using the Form to vote in state elections too. This would make the qualifications for voting in state elections dependent upon a federal agency, completely upending the constitutional design of the Qualifications Clause.

In evaluating this statutory scheme under the traditional framework of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if the statute "can be read more than one way," *AFL-CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003)(citation omitted), or if the statute is "silent" regarding the relevant question, *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016), then the statutory ambiguity or silence is effectively deemed "'an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *Id.* at 495 (quoting F*DA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)(emphasis omitted)). Consequently, the court must "accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation[.]" *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005)(citation omitted). Such deference reflects the principle that the agency is "the authoritative interpreter (within the limits of reason)" of "an ambiguous statute [it] is charged with administering[.]" *Id.* at 983. Moreover, the nature of judicial review of an ambiguous statute under *Chevron* Step Two is "highly deferential." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 667 (D.C. Cir. 2011)(citation omitted).

B. The Executive Director's Decision was Compelled by Federal Rule

Of decisive importance in this case is the rule that binds the EAC to include each State's eligibility requirements in the state-specific instructions. The Leagues ignore this rule entirely, and the Department offers no explanation of how its position can be squared with the rule. The rule mandates that the Federal Form "*shall* list U.S. Citizenship as a universal eligibility requirement and *include a statement that incorporates by reference each state's specific additional eligibility requirements*... as set forth in the accompanying state instructions." 11 C.F.R. § 9428.4(b)(1)(emphasis added). Presumably, the FEC used the word "shall"

intentionally. The rule does not permit the FEC (or its successor, the EAC) to second-guess which of a "state's specific additional eligibility requirements" are desirable ones and which requirements are unnecessary. The regulations also provide for State election officials to notify the EAC of any changes in State requirements. *Id.* § 9428.6(a)(1), (c). This too, indicates the expectation that any changes in State requirements would be reflected in the State-specific instructions of the Federal Form.

Executive Director Newby's Memorandum regarding the approval of State-specific instructions is entirely consistent with this federal rule. *See* AR0004. Mr. Newby explained that "changes to the instructions consistent with state law do not" fall under the term "policy" as defined by the Commissioners. *Id.* He pointed out the long-established "ministerial duty" of the Executive Director in changing the State-specific instructions of the Federal Form. *Id.* Neither the Leagues nor the Department of Justice address this regulatory mandate, much less offer any legal basis for disregarding it. The Leagues belittle the Executive Director for deeming his responsibility to be ministerial, but they neglect to even address the federal rule supporting that understanding. The Executive Director not only was permitted to grant the three States' request to modify the State-specific instructions, he was compelled to do so.[10]

C. The Executive Director's Decision was not Inconsistent with Procedural Requirements of the Statute or any EAC Procedure

The Leagues assert that the Executive Director acted contrary to a requirement that the EAC act on "policy" matters through a bipartisan consensus process. Leagues Br. 20-22. The Leagues fail to explain how the inclusion of proof-of-citizenship requirements in the Kansas-specific instructions constitutes "policy" and what "long-standing" policy the inclusion violated.

[10] The Tenth Circuit completely failed to address this issue in *Kobach*, when it held that the EAC had the discretion to either grant or deny a State's requested instruction. *See* 772 F.3d 1183.

While the law requires "the approval of at least three" commissioners to carry out "[a]ny action which the Commission is authorized to carry out," 52 U.S.C. § 20928, this requirement does not preclude delegation of authority. "[S]ubdelegation to a subordinate federal officer… is presumptively permissible absent affirmative evidence of a contrary congressional intent." *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also Kobach*, 772 F.3d at 1190-91 (because the statute "provides for an Executive Director, a General Counsel, and other staff, …Congress contemplated some degree of subdelegation to those staff members").

Courts normally owe deference to an agency's interpretation of the statute it is charged with administering, even to the point of its interpretation of its own jurisdiction. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013) (deference extends to an agency's interpretation of the scope of its own authority under a statute). Absent some indication in an agency's enabling statute that delegation is forbidden, delegation to subordinate personnel within the agency is generally permitted. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.").

The Leagues fail to recognize that the EAC and its predecessor the FEC determined that state-specific instruction changes did not require Commissioner attention. The Department, however, acknowledges that the EAC and the FEC have, over the years, delegated the authority to modify the state-specific instructions to staff. DOJ Br. 5-10. The most recent organizational management statement says nothing about responsibility for approving State-specific instruction changes and does not prohibit the Executive Director from making those decisions.

In 2000, the FEC delegated such decisions to staff in the Office of Election Administration. AR0163. ("Instead of requesting a formal Commission vote approving the update of state information, the OEA will make the changes and notify the Commission of them."), AR0168-AR0169. Indeed, when the FEC was in charge of the Federal Form, the FEC publicly announced the procedural steps necessary to modify the State-specific instructions. The FEC announced that Commission approval would be necessary to modify the nationwide portions of the Federal Form, but modifications to the State-specific instruction would be made by the Office of Election Administration (now the EAC Executive Director).

In August of 2002, the FEC reaffirmed this policy:

> On August 8, 2000, the Commission approved a procedural change that allows the OEA [Office of Election Administration] to make any changes to the National Mail Voter Registration Form *that are required by changes in state law*, and to notify the Commission of the revisions. The OEA must submit for a formal Commission vote those changes to the form that are not specific to a given state.

AR0168 n.1; *see also* AR0163. In other words, the OEA professional staff would be permitted to approve all requests for modification of the *State-specific instructions* of the Federal Form *without a vote of the FEC Commissioners*. The EAC continued this practice. AR0208. In 2008, the EAC reiterated that responsibility for modifying the state-specific instructions rested with the Executive Director. AR0215.

[redacted]

[redacted]

Without an unequivocal statement in law or regulation that the Executive Director may not decide changes in state-specific instructions, this court must presume that the Executive Director's decision was regularly made. The EAC's decision, absent clear evidence to the contrary, must be accorded a presumption of regularity. *See, e.g.*, *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981) (agencies receive "the benefit of the presumption of good faith and regularity in agency action"). The Leagues have presented no evidence or argument sufficient to overcome the presumption of regularity.

Moreover, the Executive Director's decision is due greater deference as to the interpretation of the EAC's substantive regulations, interpretative regulations, and policy unless that interpretation is plainly erroneous. *Auer v. Robbins*, 519 U.S. 452 (1997).[11] Under *Auer*, when an agency interprets "its own ambiguous regulation[s]," courts will defer to that interpretation unless it is "plainly erroneous or inconsistent with the regulation[s][,]" or there "is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 132

[11] Even in litigation briefs submitted by the agency, the agency's interpretation is subject to deference. This is not true of Justice Department interpretations of agency regulations.

S. Ct. 2156, 2166 (2012) (internal quotation marks omitted). Thus, "an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Environ. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). This Court has concluded that *Auer* provides for an even greater degree of deference to the agency than *Chevron*. *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995)).

D. Notice and Comment Rulemaking on State-Specific Instructions Was Not Required

The Leagues argue that they are entitled to Summary Judgment because, in their view, the EAC was required to make changes to the state-specific instructions through notice-and-comment rulemaking under the APA. Leagues Br. at 32-37. The Department of Justice disagrees with the Leagues on this point. DOJ Br. at 24-25. The Leagues' argument has no merit.

The EAC's process for developing the Federal Form has been characterized by the Supreme Court as "entirely informal." *ITCA*, 133 S. Ct. at 2260 n.10 ("Indeed, the whole request process appears to be entirely informal, Arizona's prior request having been submitted by e-mail."). The decision to alter the state-specific instructions is accomplished through "informal adjudication." *Kobach v. EAC*, 772 F.3d 1183, 1197 (10th Cir. 2014), cert. denied 135 S. Ct. 2891 (2015). Adjudication is the APA default; and an agency may, if Congress has delegated authority, choose to proceed by rulemaking. However, informal adjudications do not require notice-and-comment procedures. *See International Internship Program v. Napolitano*, 718 F.3d 986, 988 (D.C. Cir. 2013)("[N]otice-and-comment procedures" are not "trigger[ed]" when the agency action is an "informal adjudication.") (citations omitted).

Neither the EAC nor the FEC ever made such a choice. The EAC has not published notices or solicited comments in the *Federal Register* in the process of deciding whether to grant a State's request to update its state-specific instructions on the Federal Form. The single

exception was one discretionary notice during the prior litigation, when the commissioner-less EAC was commandeered by the Department of Justice. *See* EAC, *Notice and Request for Public Comment on State Requests To Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form*, 78 Fed. Reg. 77,666 (December 24, 2013). The Department concedes that this is the *only* time notice and comment has ever been sought for updates to the state-specific instructions. DOJ Br. 25. That Notice contained no regulatory words of issuance or codification, and the 10-day public comment period would have likely violated the APA advance notice and an opportunity for public comment requirements of fair notice of a proposed rule. An agency is not obliged to issue more public notices merely because it did so once in the past.

The Leagues erroneously cite (multiple times) a notice of proposed rulemaking and an advance notice of proposed rulemaking by the EAC's predecessor FEC as authority for adoption of the form by rulemaking. But they never cite a final rule adopting state-specific instructions or requiring notice and comment rulemaking for changes to the state-specific instructions. Leagues Br. 5, 20, and 27 n.6, *citing* FEC, *Nat'l Voter Registration Act of 1993*, 59 Fed. Reg. 11,211 (Mar. 10, 1994)(notice of proposed rulemaking); FEC, *Nat'l Voter Registration Act*, 58 Fed. Reg. 51,132 (Sept. 30, 1993) (advance notice of proposed rulemaking). Neither was ever promulgated; and no such proposal obligates an agency in the future.

The Leagues also erroneously rely on the APA's standards for rulemaking, 5 U.S.C. § 553, rather than the standards for informal adjudications, 5 U.S.C. § 555. LWV Br. at 32-37. Indeed, they spend several pages attempting to convince this Court that the challenged agency action was a "legislative rule" as opposed to an "informal adjudication," despite the Supreme Court's description of the process as entirely "informal." *ITCA*, 133 S.Ct. 2260 n.10. However,

as the DOJ rightly acknowledges, modifications to the state-specific instructions have always been informal adjudications. DOJ Br. at 25.

The Leagues' theory as to why notice and comment rulemaking is required is unclear. They appear to suggest that, because the FEC initially created the nationwide components of the Federal Form using a rulemaking procedure, all subsequent modifications (including state-specific ones) must be done through the same procedure. Two problems exist with this theory.

First, as noted *supra* the Tenth Circuit and the Supreme Court both disagreed with this assessment. *See ITCA*, 131 S. Ct. at 2260 n.10 (describing process as "entirely informal") and 2260 (describing any action by EAC as a "decision); *Kobach*, 772 F.3d at 1197. Second, the Leagues' theory ignores the numerous other requests to the EAC, and to the FEC before it, for modification of the state-specific instructions. In none of those decisions was rulemaking required or was it even suggested that some form of rule was being issued. The 2006 rejection of Arizona's request unilaterally issued by the EAC Executive Director and the 2014 rejection issued through the Acting Executive Director by the Department of Justice did not follow the League's rulemaking theory. Neither did the dozens of other modifications of the state-specific instructions require notice-and-comment rulemaking. AR0219-AR0225. The League's theory bears no resemblance to past agency practice.

E. The EAC's Course was Clear from its Decision

In his declaration, Executive Director Newby explained that he received a request from Kansas which contained "new information" related to noncitizens "register[ing] to vote" and, after consulting with the Commissioners and reviewing past agency practices, he "determin[ed] that the changes to the state-specific instructions were necessary…." Newby Decl. ¶¶ 21, 46. In the context of what the Supreme Court has described as an "entirely informal" process, that

explanation was sufficient. *See ITCA*, 133 S. Ct. at 2260 n.10. Appellants' argument that this was insufficient explanation fails because the Executive Director's decision was clear from the entirety of the record and, separately, in light of his contemporaneous exposition.

First, this Court should "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). In this case, Kansas presented evidence of noncitizens registering and made clear that the proof-of-citizenship requirement was designed to prevent such noncitizen registrations. AR0072, AR0075. Kansas also demonstrated that the requirement was reflected in Kansas law. AR0072-AR0073. The EAC's decision to change the Kansas-specific instructions to comport with Kansas law was reasonably discernable when it approved the change.

In an informal adjudication, the EAC is not required to cite every piece of evidence that it has considered and rationalize every possible interpretation. *See Menkes v. Dep't of Homeland Sec.*, 486 F.3d, 1307, 1314 (D.C. Cir. 2007)("Of course, this was an informal adjudication, and it is common for the record to be spare in such cases.") (citing *Camp v. Pitts*, 411 U.S. 138, 139-41 (1973)). Nor has it imposed such a requirement on itself by regulation. Most importantly, *none of the prior grants of state request in the history of the Federal Form were accompanied by any EAC explanation*. The Executive Director's memo goes well beyond the past practice of the agency, and the scope of the decision here comports with the scope of the issue presented.

Second, the Executive Director prepared a memorandum contemporaneous with his decision and the posting of the changes to the Kansas-specific instructions, AR0001-AR0007, that the Department of Justice agrees must be considered part of his decision. DOJ Br. 16, n.8.[12]

[12] The Leagues seem to argue that this Memorandum was a *post hoc* rationalization. *See* Leagues Br. 40, n.10. However, "[t]he *'post hoc rationalization'* rule is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids

This contemporaneous statement explaining the decision abundantly satisfies the APA in the context of an informal adjudication, especially where no previous grant of a State request was ever accompanied by any statement at all. *See* 5 U.S.C. § 706(2), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 and n.30 (1971), *abrogation on other grounds recognized by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 604 (D.C. Cir. 2007)("[I]n an informal adjudication the agency can provide the court with any evidence it had before it when it made its decision."); *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 337-39 (D.C. Cir. 1989).

Mr. Newby stated in a declaration that the request letter from the Kansas Secretary of State included "new information that had not been provided to the EAC previously, consisting of a spreadsheet of non-citizens who recently registered to vote in Sedgwick County, Kansas." Newby Decl. ¶ 21. He also explained that he began by "evaluating previous requests and saw that requests in the past were not consistently evaluated," that "there was no specifically defined process, other than the established procedure that requests were reviewed by staff and/or the Executive Director," and that "[c]onclusions in the most recent EAC past appeared to be drawn by emotion regarding specific requests." *Id.* at ¶ 25, 32.

The Leagues claim that this Court should disregard Mr. Newby's affidavit. Leagues Br. at 41, n.11. The Department disagrees. DOJ Br. at 16, n.8. Instead, the Leagues want this Court to focus on another contemporaneous document Mr. Newby drafted entitled "Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas." AR0001. This is a document explaining how requests for modifications to the state-specific instructions were being

judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." *Menkes v. U.S. Dept. of Homeland Sec.*, 637 F.3d 319, 337 (D.C. Cir. 2011)(quoting *Local 814, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen v. N.L.R.B.*, 546 F.2d 989, 992 (D.C. Cir. 1976)).

processed "as part of an outline of a structured process that is being followed and will be followed going forward." *Id.* In that document, Mr. Newby noted that a quorum of the EAC Commissioners passed a "Roles and Responsibilities document" which requires "the Executive Director to carry out policies set by the Commissioners." AR0002. He explained that "State-specific instructional changes are ministerial, and, thus, routine" and that the Executive Director reviews those for "clarity and accuracy." *Id.* It is only when changes to the general instructions or the form itself are required by a request does it reach Commissioner level approval. *Id.* Mr. Newby followed these procedures "because there did not appear to be a structured procedure that the EAC followed related to… requests to modify the form's instructions." *Id.* His declaration explaining his decision to this Court was consistent with those points. Newby Decl. ¶ 32.

Mr. Newby also interpreted the Roles and Responsibilities document itself, which Appellants rely on to claim he was somehow precluded from making this decision. AR0004. Mr. Newby explained that "changes to the instructions consistent with state law do not" fall under the term "policy" as defined by the Commissioners. *Id.* He pointed out the long-established "ministerial duty" of the Executive Director in changing the State-specific instructions of the Federal Form, *Id.*, which was apparently only deviated from when Acting Executive Alice Miller denied Kansas's previous request because she was directed to do so by the Department of Justice. Newby Decl. ¶ 22.

Finally, Mr. Newby explained his decision regarding Kansas specifically. He explained that he treated Kansas like the EAC treats other states—he looked at the state law and saw that "the Kansas registration is not complete without that state's requested documentation, spelled out in Kansas law." AR0004. He noted this was consistent with the way the EAC treated requests by Louisiana and Nevada. *Id.* He also noted other states where the Federal Form simply

requires applicants to consult their state's election office for a complete explanation of the state's requirements. AR0005.

The Leagues present two arguments in claiming that Mr. Newby acted beyond his authority. First, they argue that Mr. Newby's decision was arbitrary because he required proof of citizenship when the Congress allegedly "rejected" such a requirement. Leagues Br. at 4, 11, 22, 25, 34, and 31. But the *ITCA* Court had already *rejected* the Leagues' theory by suggesting that Arizona could re-request a modification of its state-specific instructions to include proof of citizenship. 133 S.Ct. at 2259-60. If proof of citizenship was prohibited by the NVRA, as the Leagues claim, then the Supreme Court would have said so, instead of encouraging the State to renew its request to the EAC.[13]

Second, the Leagues ask this Court to ignore the substance of the Newby memorandum and instead focus on one word, "irrelevant," in relation to the term "necessity." Leagues Br. at 19, 38, 40-41. In making their argument, the Leagues misconstrue *ITCA* as holding that "[u]nless the information is 'necessary to enforce [the States' voter] qualifications,' the Federal Form must remain free of the State's procedural hurdles, as Congress intended." Leagues Br. at 13. The Department of Justice similarly asks this Court to order the EAC to limit its review of Kansas's request to whether it is "necessary to enable the appropriate State election official to assess the eligibility" of the applicant. DOJ Br. at 1, 4, 15, 20.

[13] The League's reading of the legislative history is wrong. The referenced amendment was nothing more than a "rule of construction" making clear that the NVRA should not be read to bar proof-of-citizenship laws. H.R. Rep. No. 103-66, at 23 (1993)(Conf. Rep.). It was deemed "not necessary" by the conference committee. *Id.* And Senate sponsor of the NVRA, Wendell Ford, who also sat on the committee, explained why it was not necessary: "I say there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship. I think basically this is redundant…." Page S2902, Cong. Record, March 16, 1993.

There are four fatal flaws with this argument. First, it misstates the holding of *ITCA*. The Supreme Court made clear that the question is whether the *State* deems proof of citizenship necessary. "[A] State may request that the EAC alter the Federal Form to include information *the State deems necessary* to determine eligibility." *ITCA*, 133 S. Ct. at 2259 (emphasis added). And the Court specifically suggested that Arizona renew its proof-of-citizenship request to the EAC. *Id.* at 2260. Nowhere did the Court suggest that the EAC should, or even could, engage in a subjective policy-making inquiry to determine whether proof-of-citizenship was desirable. *See id.* at 2258-2260. Accordingly the *ITCA* Court did not discuss any criteria the EAC might use in second-guessing State requests. *See id.*[14]

Second, the argument ignores the remainder of 52 U.S.C. § 20505(b)(1). The subsection has a second half that neither the Department of Justice nor the Leagues attempt to construe—information may be "necessary to enable the appropriate State election official… to administer voter registration and other parts of the election process." *Id.* Whether the Leagues and the Department are correct in their interpretation of the first half of § 20505(b)(1) is "irrelevant" to Mr. Newby's actual decision here. *See* AR0004. Mr. Newby was focused on the second half of that subsection—something that the Tenth Circuit in *Kobach v. EAC* entirely overlooked in reaching its conclusion.[15]

Third, Mr. Newby was required to follow agency regulations that require modification of the state-specific instructions to reflect relevant State law. The Federal Form "shall …include a

[14] *ITCA* noted that if a court were called on to review an EAC denial of a State's request, the State need only show that "mere oath would not suffice to effectuate its citizenship requirement[.]" 133 S.Ct. at 2260. This can refer to *either* half of 52 U.S.C. § 20505(b)(1). Mere oath may not suffice "to assess the eligibility of the applicant," and it may not suffice to "administer voter registration" laws at of the State. *Id.*

[15] Nowhere in *Kobach* is the statute even quoted, making the Court's rationale unclear on this point. *See* 772 F.3d at 1183.

statement that incorporates by reference each state's specific additional eligibility requirements...." 11 C.F.R. § 9428.4(b)(1). Those regulations reflect the NVRA's second reason why a State's requested language may be necessary: "to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). If Mr. Newby had denied the States' requests, he would violated 11 C.F.R. § 9428.4(b)(1). Oddly, the Department does not even attempt to address the argument that an agency is required to follow its own regulations.

Fourth and finally, even if one were to ignore the second reason of 52 U.S.C. § 20508(b)(1) and ignore the controlling regulation of 11 C.F.R. § 9428.4(b)(1), and instead focus solely on necessity to assess the eligibility of the applicant, Mr. Newby's decision would satisfy that standard. He described all of the information that he considered in the Administrative Record. Of great importance was Kansas's presentation of "new" information regarding noncitizens who had successfully registered under a mere-oath regime. Newby Decl. ¶ 21. Based on that fact alone, *ITCA* required Mr. Newby to modify the state-specific instructions of Federal Form because Kansas had proven empirically that a "mere oath [did] not suffice" to prevent noncitizens from registering. *ITCA*, 133 S. Ct. at 2260. In conclusion, Mr. Newby's explanation is consistent with the statute, required by 11 C.F.R. § 9428.4(b)(1), goes far beyond past (unexplained) grants of State requests, and is deserving of *Chevron* deference.

F. There was no Prior "Policy" of EAC Opposition to Proof-of-Citizenship Requirements

The Leagues argue that the Executive Director failed to articulate a rationale for an alleged reversal of what the Leagues claim was "policy" or "precedent." Leagues Br. at 38-39. The Leagues fail to acknowledge, however, that *never did a majority of the EAC commissioners adopt a "policy" opposing proof of citizenship*. All that existed was a 2006 decision by an Executive Director declining Arizona's request and a 2-2 deadlock of the Commissioners when

Arizona appealed to the EAC. Neither of these actions constitutes the formal establishment of an EAC policy; and the 2-2 deadlock meant that "no action could be taken," not that any policy of rejecting proof-of-citizenship requirements was established. *ITCA*, 133 S. Ct. 2260 (citing 52 U.S.C. § 20928). With respect to the January 2014 memorandum denying Kansas's and Arizona's requested instructions, there were no EAC commissioners at the time; and there was no Executive Director. As Acting Executive Director Alice Miller told Mr. Newby, "the Department of Justice issued the opinion." Newby Decl. ¶ 22. It cannot be said to constitute an EAC *policy* in any meaningful sense.

To the extent that the Leagues claim these informal adjudications constituted some sort of "precedent" rather than formal policy, there are three flaws with this claim. First, the EAC never published the prior decisions and designated them as "precedent decisions." Second, Kansas's presentation of new facts proving that numerous noncitizens were registering or attempting to register (including by using the Federal Form) changed the factual landscape. *Id.* at ¶ 21. A different decision is entirely appropriate under such circumstances. *See Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. N.L.R.B.*, 603 F.2d 862, 870 (D.C. Cir. 1978)(" new fact" can warrant agency "conclusion that its earlier decision is not a binding precedent") *opinion adhered to on denial of reh'g*, (D.C. Cir. June 20, 1979); *Seven Star, Inc. v. United States*, 873 F.2d 225, 227 (9th Cir. 1989)("a decision by an administrative agency in one case does not mandate the same result in every similar case in succeeding years"); *Third Nat. Bank v. Stone*, 174 U.S. 432, 432-34 (1899). Third, Kansas's requested instructions in 2015 were different, giving applicants much more information about how to complete their applications and comply with Kansas law. *See* AR0004 (explaining that Kansas's newly requested instructions were "more clear to applicants than instructions in other states.").

Furthermore, assuming *arguendo* that the previous denials could somehow be construed as official precedent decisions of the agency, Mr. Newby's explanations in his declaration to the district court and his February 1, 2016, memoranda adequately explain his reasons for departing from a precedent decision. *See* Newby Decl. ¶ 21 (that this request "included new information"), *id.* at ¶ 32 (explaining his understanding that previous conclusions were "drawn by emotion,"), AR004 (that it was consistent with EAC responses to other State requests).

III. This Court Should Not Vacate the EAC's Decision

As explained above, the EAC's decision is perfectly consistent with the NVRA, is required by controlling federal rule, and was accompanied by explanation far beyond that which normally occurs when a State's request is granted. However, assuming *arguendo* that this Court were to agree with the Leagues that the Executive Director erred by not sufficiently explaining his decision, this Court should not substitute its judgment for that of the agency and vacate the decision modifying the state-specific instructions. Instead, this Court has two possible options, neither of which requires vacatur of the EAC's decision.

A. This Court May Direct Mr. Newby to Issue a Declaration Explaining His Decision Further

The option that would be the most efficient for this Court is to seek clarification from Mr. Newby through a subsequent declaration. Under *Menkes*, this Court can seek *additional* clarification from Mr. Newby if it so chooses to allow him to further articulate the reasoning for his decision. "[The decisionmaker's declaration was presented in response to this court's direction to the Coast Guard to offer an 'explanation regarding [its decision]." *Id.* "As the D.C. Circuit has explained, 'there is nothing improper in receiving declarations that merely illuminate[] reasons obscured but implicit in the administrative record.'" *Univ. of Colo. Health at*

Mem'l Hosp. v. Burwell, No. CV 14-1220 (RC), 2016 WL 695982 at *6 (D.D.C. Feb. 19, 2016) (quoting *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C.Cir.1996)). *See also Alpharma, Inc. v. Leavitt* 460 F.3d 1 (D.C. Cir. 2006). "Prohibition against post-hoc rationalizations applies only to rationalizations offered for first time in litigation affidavits and arguments of counsel and does not prohibit agency from submitting amplified articulation of its original conclusions." *Clement v. S.E.C.*, 674 F.2d 641 (7th Cir. 1982).

In *U.S. v. Levin*, the government "filed the Declaration, [after the dismissal of Levin,] … to establish that dismissal from school constitute[d] a breach under the agency's interpretation of its regulation." *Levin*, 496 F. Supp. 2d 116, 122 (D.D.C. 2007). This Court held that "the Declaration should be entitled to deference despite the government's litigation interests in the present case." *Id.* at 124. Plaintiffs are simply incorrect that Mr. Newby is not permitted to provide the Court with additional explanation for his decision, if this Court deems it helpful. As the case law cited above demonstrates, it is well established that declarations by agency decision makers may be ordered by Courts reviewing agency decisions under the APA. This would be a relatively expeditious means by which the Court could obtain such information, if the Court deems it useful, that would not unduly delay the resolution of this case.

B. This Court May Remand Without Vacating

The second option for this Court would be to retain jurisdiction over this case, but remand the decision to the agency for additional clarification from Mr. Newby without vacating it. The DC Circuit has consistently held that courts retain discretion even when the APA provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); *see Overton Park*, 401 U.S. at 413-14. "The

decision whether to vacate depends on the seriousness of the order's deficiencies… and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)(internal quotation marks omitted).

The DC Circuit frequently remands without vacatur where there is a likelihood of a cure of the defect in the decision on remand and a substantial disruptive effect that would result from vacatur. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009); *United States Sugar Corp. v. EPA*, D.C. Cir. No. 11-1108 (July 29, 2016), at 77, 131, 132 (remanding rule without vacatur to the EPA to adequately explain how carbon monoxide acts as a reasonable surrogate for non-dioxin/furan organic hazardous air pollutants, to explain its decision to exclude synthetic boilers from permitting requirements, and to explain why one set of standards is applicable rather than another). The DC Circuit has also remanded without vacatur even when the agency acted without statutory authority. *See Michigan v. EPA*, 576 U.S. ___ (Nos. 14-46, 14-47, and 14-49, June 29, 2015), on remand *White Stallion Energy Center LLC. v. EPA*, D.C. Cir. No. 12-1100 (Dec. 15, 2015)(remand to EPA to make "appropriate and necessary" finding prior to undertaking rulemaking, without vacating rulemaking promulgated without finding).

Regardless of whether Mr. Newby were to rely on the first reason that an instruction may be necessary under 52 U.S.C. § 20508(b)(1) ("to assess the eligibility of the applicant") or the second reason ("to administer voter registration and other parts of the election process"), the Administrative Record contains more than enough factual information to support a reissued decision. With respect to the first reason, Kansas provided an abundance of evidence sufficient for Mr. Newby to determine that a mere oath would not suffice to prevent noncitizens from

registering to vote. *See ITCA*, 133 S. Ct. at 2260. Therefore the proof-of-citizenship requirement was "necessary" under the NVRA to assess the eligibility of applicants. Kansas provided a list of noncitizens who had registered to vote in just one of Kansas's 105 counties under a mere oath regime. AR0073, AR0075. Kansas also provided a list of noncitizens in the same county who attempted to register, but were successfully prevented from registering to vote, because of Kansas's proof of citizenship requirement. AR0073, AR0075-AR0076. One of those attempts was by a noncitizen using the Federal Form. AR0076. The proof-of-citizenship requirement has therefore been proven to be "necessary" to assess an applicant's eligibility. A re-issued decision that granted Kansas's request and explained that a mere oath does not suffice to prevent non-citizens from registering based on this evidence alone would more than meet the requirement that the decision have a rational connection to the facts in the record. *American Trucking Ass. Inc. v. Federal Motor Carrier Safety Admin.*, 742 F.3d 243, 249 (D.C. Cir. 2013). It bears repeating, however, that *never*, in the history of the EAC/FEC, has the agency issued any explanation whatsoever of the many decisions granting State requests for modification of the state-specific instructions. So this would be the first such explanation of its kind.

With regard to the second reason under 52 U.S.C. § 20508(b)(1) ("to administer voter registration and other parts of the election process"), a reissued decision would look much like the decision already issued. The fact that the State's laws and regulations have changed, combined with an assessment that the requested language accurately reflects those laws and regulations, and an assessment that the language is sufficiently clear to the applicant, should be enough to justify the decision. This is particularly true in light of the fact that 11 C.F.R. § 9428.4(b)(1) also compels the EAC to modify the state-specific instructions of the Federal Form to reflect the requirements of each State's laws and regulations.

Vacating the EAC's decision at this late juncture would have serious disruptive effects on the upcoming federal elections. *Allied-Signal, Inc.*, 988 F.2d at 150-51. Kansas has been accepting and using the modified Federal Form since February 1, 2016. At this point, the primary election has already concluded and advance-ballot voting in the general election is only two months away. Voter registration closes just over thirty days after this Court's September 12 *hearing* on summary judgment. *See* K.S.A. § 25-2311(a) (voter registration closes on October 19, 2016).[16] Moreover, the Record indicates that it takes twenty to thirty days to modify the state-specific instructions. AR0003.

Of the 70,133 voter registration applicants in Kansas since February 1, 2016, 11,292 have not yet completed their registration by providing proof of citizenship.[17] Vacating the EAC's decision would require Kansas's county election officers to manually search through the 11,292 records for individuals who used the Federal Form. There is no electronic system or computer program that can accomplish this task automatically. Then each applicant would have to be sent a notice informing him of his changed registration status. While it would be possible to accomplish this massive undertaking before the November 8, 2016, election, doing so at such a late date would cause serious disruption of the administration of the upcoming federal election. Under *Allied-Signal*, there is no basis for causing such substantial disruption of the upcoming election when Mr. Newby could easily resubmit the *same* decision he just provided, with whatever additional explanation this Court deems appropriate.

Vacating the EAC's decision at this late juncture would also cause severe confusion among the voters themselves, because of the constant yo-yoing of the language on the Federal

[16] Similar voter registration deadlines apply to Georgia and Alabama. *See* Ga. Code Ann. § 21-2-385(d)(1)(A) (October 11, 2016); Ala. Code § 17-3-50 (October 25, 2016).
[17] As calculated by the State of Kansas ELVIS database on August 19, 2016.

Form. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). The Supreme Court has consistently rejected making such a drastic change to the State's election procedures at such a late date. *See Frank v. Walker*, 135 S. Ct. 7 (Oct. 9, 2014); *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6 (Oct. 8, 2014); *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (Sept. 29, 2014); *see also Veasey v. Perry*, 769 F.3d 890, 894 (5th Cir. 2014)("The Supreme Court has continued to look askance at changing election laws on the eve of an election.").

Finally, it should be noted that the Leagues are organizations whose sole claim of injury is based on vague assertions of difficulty in voter registration efforts and the supposed burden of changing the content of instructional materials. *League of Women Voters of the United States v. Newby*, 2016 WL 3636604, *6-*7 (D.D.C. June 29, 2016) (citing various declarations filed by Plaintiffs).[18] Given that there are only five weeks between the September 12, 2016 summary judgment hearing and the October 19, 2016, close of voter registration in Kansas, it is unclear how vacating the EAC's decision could redress their "injury" in any practical manner with respect to the 2016 election cycle. For all of these reasons, vacatur is unwarranted.

CONCLUSION

For all of the reasons stated herein, Plaintiffs' Cross-Motion for Summary Judgment should be DENIED; Defendants' Partial Motion for Summary Judgment should be DENIED; Kansas's Cross-Motion for Summary Judgment should be GRANTED.

[18] Plaintiffs do not include any additional affidavits in their Motion for Summary Judgment claiming how this decision harms them.

Dated: August 19, 2016

Respectfully submitted,

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