No. 16-05196

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C CIRCUIT

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*,
Plaintiffs-Appellants,

v.

BRIAN NEWBY, *et al.*,
Defendant-Appellees

and

KANSAS SECRETARY OF STATE KRIS W. KOBACH
and the PUBLIC INTEREST LEGAL FOUNDATION
Appellee-Intervenors

On Appeal from the United States District Court for the District of Columbia
No. 16-cv-236 (Judge Richard J. Leon)

APPELLEE-INTERVENORS' RESPONSE TO APPELLANTS' EMERGENCY MOTION TO EXPEDITE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for Appellee-Intervenors Secretary of State Kris W. Kobach and Public Interest Legal Foundation[1] hereby provide the following information:

I. Parties and *Amici* Appearing Below

Plaintiffs below are League of Women Voters of the United States, League of Women Voters of Alabama, League of Women Voters of Georgia, League of Women Voters of Kansas, Georgia State Conference of the NAACP, Georgia Coalition for the People's Agenda, Marvin Brown, JoAnn Brown, and Project Vote.

Defendants below are Brian D. Newby, in his capacity as the Executive Director of the United States Election Assistance Commission, and the United States Election Assistance Commission.

Defendant-Intervenors below are Kansas Secretary of State Kris W. Kobach, in his official capacity, and the Public Interest Legal Foundation.

[1] Although Intervenors submit this response to Appellants' Motion to Expedite jointly, Intervenors intend to submit separate briefs as Intervenor Kansas Secretary of State is a government agency and exempt from joint briefing requirements. Local Rule 28(d)(4). Additionally, given that Intervenors have provided defense to the action by the Election Assistance Commission ("EAC"), despite the fact it is purportedly represented by the United States Department of Justice ("DOJ") in this case, Intervenors will file a Motion for increased word limits beyond what is permitted under Local Rule 32(e)(2)(B)(i) given that Intervenors will likely have to respond to both Appellants and the DOJ.

Landmark Legal Foundation appeared as *Amicus Curiae* before the district court.

II. Parties and *Amici* Appearing Before this Court

Appellants here are League of Women Voters of the United States, League of Women Voters of Alabama, League of Women Voters of Georgia, League of Women Voters of Kansas, Georgia State Conference of the NAACP, Georgia Coalition for the People's Agenda, Marvin Brown, JoAnn Brown, and Project Vote.

Appellees here are Brian D. Newby, in his capacity as the Executive Director of the United States Election Assistance Commission, and the United States Election Assistance Commission.

Appellee-Intervenors here are Kansas Secretary of State Kris W. Kobach, in his official capacity, and the Public Interest Legal Foundation ("Intervenors").

III. Rulings Under Review

The ruling under review in this case is the June 28, 2016 Order and Memorandum denying Appellants' motion for a preliminary injunction issued by United States District Court Judge Richard J. Leon. *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727 (D.D.C. June 29, 2016). The district court ruled that some plaintiffs below lacked standing and that the few Appellants that had standing at this juncture did not demonstrate irreparable harm.

IV. Related Cases

This case has not previously been filed with this court or any other court. Counsel are not aware of any related cases.

Dated: July 11, 2016

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CORPORATE DISCLOSURE STATEMENT

The Public Interest Legal Foundation is a non-profit 501(c)(3) organization. It is not a publicly held corporation and no corporation or other publicly held entity owns more than 10% of its stock.

The Kansas Secretary of State is a government entity and is exempt from this requirement.

Appellants ask this Court for extraordinary relief in the form of an expedited appeal of the denial of their request for preliminary injunction, the breadth of which the District Court called "truly astonishing." June 29, 2016 Memorandum Opinion (Doc. 92) ("Slip Op.") at 23. Expedited review is granted "very rarely." U.S. Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 33 (Mar. 1, 2016) ("Handbook"). Appellants must provide "strongly compelling" reasons to justify deviation from the Court's ordinary case management procedures. *Id*. Appellants' Motion to Expedite (hereinafter, "Mtn.") does not provide strongly compelling reasons for expedition and should be denied.

BACKGROUND

From the outset, the Department of Justice ("DOJ") has not defended the position of the Appellees, Election Assistance Commission ("EAC") and Brian Newby. In fact, an EAC commissioner and Mr. Newby made this clear by alerting the district court of the problems created by DOJ representation:

> [T]he DOJ has determined that the initial action taken by the executive director is contrary to DOJ's interpretation of the law and the previous positions argued by the [DOJ]. Thus, they have informed the EAC that they're unable to defend the action, which is their duty and obligation. Accordingly, the DOJ has filed a response that reflects the interests and positions of the [DOJ] and not of the defendants . . . [T]he DOJ has also informed the EAC that it is prohibited from obtaining outside counsel.

Ex. 1, Transcript at 7:10-25, *League of Women Voters of the United States v. Newby* (February 22, 2016). The district court found the DOJ's lack of defense "dramatized" Appellants' already lofty requests. Slip Op. at 24.

Despite DOJ's refusal to defend based on its positions, Appellants refer to DOJ's "concession" to the relief they requested as grounds for expediting this appeal. *See* Mtn. 1 ("despite that the agency defendant, through the Department of Justice, consented to the entry of the preliminary relief sought"); 2; and 4 ("Appellants' entitlement to such relief was so clear that the Department of Justice, as counsel for Appellees, *agreed* … that Appellants' were entitled to a proposed preliminary injunction…. The District Court, however, refused to accept the Department's position."). In so doing, Appellants characterize Intervenors as nuisances, merely permitted "to intervene and engage in varying delay tactics." Mtn. 5. In reality, Intervenors defended when the DOJ refused. The position of the DOJ should carry no weight in these unprecedented circumstances.

Appellants also cite allegations, not decided below, as a reason for expedited review. Specifically, Appellants claim that Newby "reversed two decades of consistent agency precedent and policy" related to "documentary proof of U.S. citizenship." Mtn. 3. In reality, Appellants never identified where such "precedent and policy" was established, and when challenged, tellingly refused to cite where it was formally adopted. *See, e.g.*, Ex. 2, Transcript at 68:16-18 (Kobach: "Nowhere

do [Appellants] identify when the EAC ever adopted a policy" prohibiting documentary proof of citizenship.), *id* at 92:6-12 (Appellant: "[T]he Secretary says he doesn't know what policy we're talking about, that the EAC has no policy with respect to documentary proof of citizenship. Boy, if that were true . . . he would not have to have sued the EAC before, and we wouldn't have been fighting all these battles . . . So respectfully, I think it's pretty straightforward and pretty clear.").

Finally, Appellants imply their extraordinary request should be granted, in part, because the district court allegedly "delayed" its ruling, through both granting an appropriate deposition[2] and by not issuing an opinion in Appellants' timeframe. Mtn. at 1, 4-5. In reality, following multiple, comprehensive hearings, the district court issued a detailed, 25-page opinion explaining why Appellants lacked irreparable harm. Slip Op. at 20-23. The district court had already informed Appellants months earlier, in denying their TRO, of their lack of irreparable harm following a full hearing. *See* Doc. 34. In short, Appellants lacked irreparable harm for injunctive relief below and for expedited review here. Appellants also fail to show how expedited review under their briefing schedule prevents any asserted irreparable harm.[3]

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[2] Appellants do not claim that this deposition grants them a right to expedited review. The deposition was facially relevant to refute Appellant's unsupported claims of agency "policy" and to establish who issued the 2014 Memorandum.
[3] Appellants' claims of urgency are further belied by filing their Motion nearly a week after this case was docketed with this Court.

ARGUMENT

A movant seeking expedited review "must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge. The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition." Handbook at 33. "The reasons must be strongly compelling." *Id*. Appellants fail to meet these standards.

I. Appellants' Asserted "Irreparable Injury" Will Not Be Remedied by an Expedited Briefing Schedule.

The only claimed "irreparable injury" Appellants assert in seeking expedited briefing involves ambiguous harms related to "voter registration activities." Mtn. at 9. Given this asserted injury, any decision by this Court would have to be in time for such activities to occur. Thus, the meaningful dates for review involve *voter registration deadlines*, not the election date, and consequently enough time prior to that date that the EAC can modify the Federal Form. Yet, Appellants omit any date by which a decision must be issued to remedy their asserted harm. In reality, expedited briefing cannot cause a decision to be rendered in time.

First, it is clear that no decision will affect "voter registration activities" for this year's primary elections. The primary elections in Kansas take place on August 2, 2016. Even given the unreasonably compacted proposed briefing

schedule, briefing will not even be finished by Kansas's primary. The registration deadline has already passed. *See* K.S.A. § 25-2311(a).

The deadlines for the general election are approaching quickly. *See* Ga. Code Ann., § 21-2-224(a) (voter registration closes October 11, 2016);Ga. Code Ann. § 21-2-385(d)(1)(A) (early voting begins on October 17, 2016); K.S.A. § 25-2311(a) (voter registration closes on October 19, 2016); K.S.A. § 25-1120 (early voting begins October 20, 2016); and Ala. Code § 17-3-50 (voter registration closes October 25, 2016). This Court would have to issue a decision well in advance of even the registration deadline for theses states' elections to repair Appellants' asserted injuries related to "voter registration activities." Mtn. 9. Thus, any decision would have to be provided early enough that "voter registration activities" utilizing the modified Federal Form.

First, Circuit precedent precludes the relief Appellants seek. This Court has ruled that when a district court denies a preliminary injunction solely on the basis of irreparable harm, the proper remedy is remand to the district court to allow it to consider the remaining preliminary injunction factors, including likelihood of success. *Chaplaincy of Full Gospel Churches v. England*, 454 F. 3d 290, 305 (D.C. Cir. 2006). This would effectively preclude a decision prior to the election, let alone permit registration activity to occur prior to registration deadlines. And, as the district court noted, even if Appellants were successful, vacating the EAC

decision may not be appropriate. Slip Op. 24, n.22 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

Second, even if *Chaplaincy* did not require remand and instead permitted review of all previously unconsidered factors, this Court would have to render a decision with enough lead time to instruct the district court to order vacating the agency decision (assuming this Court also took the step of considering the factual issue identified in *Allied-Signal*), permit the agency to modify the Federal Form, and permit registration activity to occur. The EAC has stated it takes seven to ten business days to modify the Federal Form. Attached as Ex. 4. Thus, any decision, realistically, must be rendered sometime in early to mid-September when Appellants' proposed Reply Brief is suggested to be in mid-August.

Finally, the nature of this case requires careful review, as evidenced by the district court permitting oral argument *twice*. Given the importance of this case and the effect it will have on Kansas's ability to conduct the upcoming elections, oral argument is appropriate, further delaying any decision this Court could render. Given the lateness of this appeal, the requirement that the district court address the other preliminary injunction factors, and that the only claimed irreparable injury that would result absent expedited briefing relates to "voter registration activities," expedited review is not warranted.

II. Appellants Have Not Shown Irreparable Injury.

Even if this Court could issue an opinion in time to redress Appellants' alleged irreparable injury, the claimed injury itself, vaguely identified as "voter registration activities," does not rise to the level of irreparable harm.

This Court sets a "high standard for irreparable injury," requiring the movant's injury to "be both certain and great" and "beyond remediation." *United States v. Huges*, 813 F.3d 1007, 1010 (D.C. Cir. 2016). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Appellants have the burden of satisfying irreparable harm.

As an initial matter, Appellants seem to argue irreparable injury related to their *preliminary injunction*, not injury resulting from a delay *of an expedited hearing*, the proper question posed in their motion. *See supra* at 5. In fact, Appellants do not seem to have attempted to show how a non-expedited briefing schedule will irreparably harm them at all, instead focusing on district court findings. Mtn. at 9-10. But, assuming Appellants' "voter registration activities" form the basis for their need for expedited briefing, Appellants have not demonstrated that irreparable harm will result absent expedition. Vague assertions of "voter registration activities" harm do not satisfy their burden and the cited cases fail to show a "presumption" of harm from such activities by organizations. Organizations do not have the right to vote.

A. Appellants Have Not Suffered *Any* Harm Related to "Voter Registration Activities" From the Federal Form Change.

Appellants League of Women Voters of Alabama ("AL League") and League of Women Voters of Georgia ("GA League") will suffer no irreparable harm if expedited briefing schedule is not granted. Appellants state that Georgia and Alabama have not yet implemented the changes to the Federal Form. *See* Mtn. at 9, n.2. Nevertheless, they claim irreparable harm because they must "educat[e] voters . . . where the new rules are not being enforced, but voters might believe they are ineligible to register because of the new rules[.]" *Id*. This asserted "injury," voluntarily telling individuals that something is not being enforced because unnamed individuals "might" not be aware of this fact, is too speculative and conjectural to qualify as "irreparable harm" justifying an incredibly short briefing schedule. Indeed, this harm likely does not satisfy standing requirements. *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (standing requires a showing of "concrete and particularized"); *Equal Rights Center v. Post Properties, Inc.*, 633 F.3d 1136, 1139-40 (D.C. Cir 2011) (discussing "self-inflicted" injury).

Footnote two of Appellants' motion is the first time the need to "educat[e]" hypothetical registrants was raised. As the district court noted, the AL League and GA League "merely provide conclusory claims that as long as the state-specific instructions remain on the Federal Form their voter registration activities will be hindered. . . . Curiously, they fail to explain how this can be so when they could

simply inform the voter registration applicants they assist that the requirement is not being enforced." Slip Op. 17 (citations to supplemental declarations omitted).[4] A claim that one must inform hypothetical individuals of what is not being enforced does not demonstrate irreparable harm. *Wisc. Gas Co.*, 758 F.2d at 674.[5]

As to Appellant League of Women Voters of Kansas ("KS League"), the district court accepted, for purposes of standing, its assertion that it would be harmed in some way in conducting voter registration drives. *See* Slip Op. 15 (citing Furtado Aff. ¶ 7). That appears to be the same position Appellants take before this Court by referencing "voter registration activities." However, after that declaration was submitted, the current president of the KS League testified in as a Rule 30(b)(6) deponent that, "The League of Women Voters of Kansas as a State organization does not conduct voter registration drives." Excerpt of Deposition of Marge Ahrens, 90:4-6 (June 8, 2016) (Ex. 3). Thus, the claimed "voter registration activities" harm is not even applicable to the KS League.

Furthermore, even if it was determined that the KS League conducts voter registration drives, Appellants' amorphous "voter registration activities" does not reach irreparable harm. Presumably, the voter registration activities to which

[4] This discussion by the district court involved standing, not irreparable harm.
[5] Additionally, this new claim seems at odds with what they previously asserted was their irreparable harm, as the district court noted. Slip Op. 21 ("[I]njuries to voter registration drive efforts are far from certain in Alabama and Georgia . . .").

Appellants allude are "redirect[ing] time, energy, and resources toward educating applicants on the new registration requirements and varying stages of enforcement" and the speculative statement that they will need to "reeducate staff and volunteers, produce new voter education materials, and assist otherwise-eligible applicants to secure the requisite proof of citizenship documentation to register to vote." Mtn. at 9-10. Yet, Appellants do not explain how this harm will be prevented with expedited briefing. The district court already considered, and thoroughly rejected, these conclusory claims: "The Kansas League merely speculates that it 'will likely spend thousands of dollars on producing and distributing additional instructional videos.' Furtado Decl. ¶ 39. To say the least, this injury is far from 'certain.'" Slip Op. 23, n.21 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). Indeed, Appellants' Motion still does not explain what injuries they will suffer absent expedited briefing.

Lack of injury is further established by the fact that the modified Federal Form became effective in Kansas on February 1, 2016—more than six months ago. Voter registration ends in Kansas in three months. Presumably, all of these claimed injuries—which appear to be the same injuries claimed below—have already occurred. Thus, it is unclear how *expedited briefing* will prevent these injuries.[6]

[6] Appellants also include other purported "harms" related to entirely hypothetical individuals not before this Court. *See* Mtn. at 10 (discussing "tens of thousands of

Furthermore, the district court rightly found that these claimed injuries were self-inflicted, also preventing a finding of irreparable harm. *See* Slip Op. 22, n.20. The Federal Form has instructions that each individual must follow to register to vote. Appellants have not explained what additional education and training is required beyond informing voter registration applicants to comply with these instructions—something Appellants would already have to do. And, in Kansas, to register in state elections, a documentary proof of citizenship requirement has been in effect since 2013. As the district court rightly found, even if Appellees were successful, they would still be required to explain the requirements of providing proof of citizenship. Slip Op. 16; *see also* Slip Op. 22-23, n.20, n.21. Appellants again fail to explain their harm in their motion.

B. The Cases Cited By Appellants Do Not Support Their Position

Given that Appellants' claimed irreparable harms are either non-existent, entirely speculative, or based on hypothetical facts not before the court, Appellants resort to claiming that, "It is settled law that government actions which substantially burden voter registration activities give rise to a *presumption* of

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voters . . . threatened with disenfranchisement), 11 (discussing hypothetical "individual voters who have been made aware of the proof of citizenship requirements, but are unaware that Georgia and Alabama are not currently enforcing them . . ."). No evidence that any of these individuals exist is in the record. But, even if they were, Appellants cannot claim injuries based on theoretical harms to third parties.

irreparable harm." Mtn. at 9. (emphasis in original). Appellants provide no quote from any case to support their broad assertion and instead cite five cases, prefaced with a "*See, e.g.*" signal. The only pinpoint citation provided is not to a discussion of irreparable harm. Appellants' out-of-circuit citations do not support their claim.

Of the cases that Appellants cite, only two district court cases, *League of Women Voters of Fla. v. Browning*, 863 F. Supp.2d 1155 (N.D. Fla. 2012) and *Project Vote v. Blackwell*, 455 F. Supp. 694 (N.D. Ohio 2006), involve voter registration activities by organizations. Neither of them presume irreparable harm, but instead closely scrutinize the alleged injury. In *Browning*, the challenged statute "severely restrict[ed]" the ability of the plaintiffs to even conduct voter registration drives. *Id.* at 1157-58. The challenged laws "impose[d] a harsh and impractical 48-hour deadline for an organization to deliver applications . . . and effectively prohibit[ed] an organization from mailing applications in." *Id.* at 1158. The laws also "impose[d] burdensome record-keeping and reporting requirements that serve little if any purpose, thus rendering them unconstitutional . . . ." *Id.* In *Project Vote*, the district court found irreparable injury because of "fear on the part of individual registration workers . . . of being charged with felony criminal charges[.]" 455 F. Supp. 2d at 707-08.

The remaining cases do not involve "voter registration activities." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 233, 247 (4th Cir. 2014)

(addressing same day voter registration at the polls by voters as related to minorities); *Obama for Am. v Husted*, 697 F.3d 423, 427 (6th Cir. 2012) (inconsistent in-person early voting deadlines for military and non-military); *Wash. Ass'n of Churches v. Reed*, 292 F. Supp.2d 1264, 1266, 1277 (W.D. Wash. 2006) (State's "matching" statute). Put simply, none of the cases cited by Appellants stand for their proposition that if one makes unsupported allegations that "voter registration activities" are being hampered, irreparable injury will be presumed.

Furthermore, even if any of the cases could support Appellants' argument, under Appellants own argument, they would have to show a "substantial burden" on those activities. Mtn. 9. Appellants have not even met their own standard.

In summary, Appellants have not demonstrated that irreparable harm will result if an expedited briefing schedule is not granted.

III. Appellants Have Not Shown that the District Court's Opinion is Subject to Substantial Challenge.

Appellants' claim that the district court's decision is subject to "substantial challenge" is entirely conclusory and consists of two reasons: (1) the Department of Justice agreed with their position, and (2) that after determining that Appellants failed to establish irreparable harm, the district court neglected to review the other three factors for a preliminary injunction. Additionally, Appellants omit the extraordinarily high burden they must satisfy given the type of preliminary injunction they seek. Appellants' assertions lack merit.

A. Concessions by the Department of Justice, Which Went Against the Agency's Finding, Are Both Meaningless and Suspect.

Appellants' reliance on the "concession of the [DOJ] that the injunction be issued" is misplaced for numerous reasons. First, as discussed previously, the DOJ has not provided a true defense in this case, but instead effectively supported Appellants. Indeed, various procedures below highlight this strange case. The DOJ filed a brief *after* Intervenors' Response to the motion for preliminary injunction, articulating why Intervenors positions were incorrect. *See* Doc. 56. Additionally, Appellants attempted to assert attorney-client privilege on behalf of the DOJ for the EAC. *See* Doc 54, at 11-12.

Second, even with the DOJ siding with Appellants throughout, Appellants omit that the Department of Justice did *not* concede a likelihood of success on all claims. Rather, the Department argued that Appellants have *not* demonstrated a likelihood of success on Counts I and III, and argued the court should await review of the record as to Count II. *See* Doc. 48 at 7-10. Nevertheless, Appellants include all five claims in their motion to this Court. Mtn. at 12.[7]

B. Appellants Are Incorrect that the District Court Was Required to Consider All of the Factors to a Preliminary Injunction

[7] The EAC was likely afforded great deference in responding to Counts IV and V, yet DOJ refused to challenge Appellants' claims.

Appellants are also incorrect that the district court must address the merits of their claims and balance the harms, rather than limit its holding to lack of irreparable harm. Mtn. 12. In fact, the district court properly applied this Court's precedent. *See, e.g.*, *Chaplaincy*, 454 F. 3d at 297 ("A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief"); *CityFed Fin. Corp. v. Office of Thrift Supervision, United States Dep't of Treasury*, 58 F.3d 738, 747 (D.C. Circ. 1995) ("Because CityFed has made no showing of irreparable injury here, that alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting CityFed's request.")

Incredibly, Appellants cite *Chaplaincy* to claim the district court abused its discretion in considering only irreparable harm, when the case itself rejects Appellants' position. In *Chaplaincy*, the district court "confined its analysis to determining whether irreparable harm would visit Appellants without interim relief. It expressly withheld consideration of the three other factors that enter into the preliminary injunction calculus." 454 F. 3d at 305. On appeal, this Court found that the appellants demonstrated irreparable harm but rejected the appellants' request to consider the other preliminary injunction factors *Id*. at 304-305. Instead, once this Court "remand[ed] to the district court to pick up where it left off." *Id*. at 305. According to this Court:

> [B]ecause our review of the legal findings supporting a district court's preliminary injunction determination is de novo, the absence of legal findings does not necessarily preclude us from undertaking appellate review…. But our review of the district court's balancing of the four preliminary injunction factors and ultimate decision to grant or deny such relief is for abuse of discretion, and without any conclusions of law as to the three remaining factors, we are unable to determine whether the district court properly carried out this function. A remand would also effect greater development of the remaining preliminary injunction factors. … Both precedent and prudence, therefore, counsel a remand to the district court so that a "full understanding of the issues" may be attained.

Id. (internal citations omitted).

The same is true here. The district court did not abuse its discretion in confining its analysis to Appellants' lack of irreparable harm. Contrary to Appellants' claim that "[i]mmediate attention to the merits of Appellants' claim is essential," Mtn. 12, even if this Court were to find that Appellants have shown irreparable harm, "[b]oth precedent and prudence…counsel a remand to the district court so that a 'full understanding of the issues' may be attained." *Chaplaincy*, 454 F. 3d at 305. Because the district court has discretion to balance the factors, equities, and determine whether to issue a preliminary injunction, law of the Circuit requires remand even if Appellants are successful in demonstrating irreparable harm.

IV. Appellants Have Not Shown that the Public Has an Unusual Interest in Prompt Disposition of this Appeal.

Contrary to Appellants' assertions, non-parties and the public at large actually have a strong interest in a prudent and thorough review by this Court. As

discussed earlier, this Court cannot remedy the alleged irreparable injuries asserted in Appellants' motion, given Circuit precedent that remand must occur. Yet, even if this Court were to reject established Circuit precedent, granting Appellants the relief they seek this late of a date, will actually cause severe problems and confusion to the voters in Kansas. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). "As an election draws closer, that risk will increase." *Id.* at 5.

Reversing the district court at such a late date would require Kansas to determine which individuals applied to register to vote utilizing the federal form, send out confusing notices to any affected registrants who have already been informed that they are not registered to vote until they provide proof of citizenship, and even send notices to individuals whose applications have already been canceled. It would be extremely confusing to voters to receive conflicting notices.

Additionally, it would require Kansas, on extraordinarily short notice, to determine how to comply with this Court's order. Thus, to avoid causing massive confusion, this Court should take a measured approach to ensure voters do not suffer the confusion that is sure to result if the district court is reversed.

Appellants' reliance on *Veasey v. Abbott*, 136 S. Ct. 1823 (2016), is misplaced. This cite is to a denial of stay by Justice Thomas where he clarified that

the petitioners could seek another stay if the court of appeals had not ruled by a July 20, a date that is a month further than the briefing schedule proposed by Appellants. Indeed, the Supreme Court has refused to permit modifications to election procedures like that which would be required if Appellants' preliminary injunction were granted. *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 National Ass'n for the Advancement of Colored People*, 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.").

IV. Even if Expedited Review is Appropriate, Appellants' Proposed Schedule Is Not Workable.

Even if Appellants satisfied the standards for expedited review, the schedule Appellants' propose is impracticable. "An order granting expedition does not automatically shorten the briefing schedule. When time is a critical consideration, counsel may wish to propose a specific date for the hearing and to move for an abbreviated briefing schedule." Handbook at 34. Appellants failed to propose a specific date for a hearing, merely "request[ing] an expedited briefing and argument schedule so that a decision may be issued well in advance of the November election." Mtn. at 2. Yet, Appellants' schedule makes it impossible for Intervenors to craft a meaningful defense.

Appellants propose that Amici should be given seven days to support them and that the DOJ should be given fourteen days to respond to their brief. Mtn. 13. Yet, as discussed previously, the DOJ are in such lock step with Appellants, that Appellants were supporting DOJ's claims of attorney-client privilege. Appellants then only give Intervenors *seven* days to respond to DOJ's brief, knowing full well that Intervenors will be required to respond to *both* Appellants' Brief and DOJ's brief. Furthermore, Appellants do not propose *any* Amici should be permitted to support Intervenors, despite the fact that DOJ will likely not oppose Appellants.

Intervenors will be effectively filing a principal brief defending the EAC decision against two parties and any amici, rather than assuming the traditional role of an intervenor envisioned by this Court's Local Rule 28(d)(2). Thus, a more reasonable timeline would allow Intervenors at least twenty-one days to respond to the briefs of both Appellants and DOJ. However, twenty-one days imposes additional prejudice to Intervenors due to obligations in expedited consideration in the Tenth Circuit Court of Appeals. Oral argument is scheduled for August 23, 2016 in *Fish v. Kobach*. Thus, if this Court grants expedited briefing, Intervenors provide an alternative, less-prejudicial schedule:

Appellants' Opening Brief	July 18, 2016
Brief of Any Amici in Support of Appellants	July 25, 2016
Appellees' Brief	August 1, 2016
Brief of Amici in Support of Appellees	August 8, 2016

Briefs of Intervenor-Appellees[8]	August 29, 2016[9]
Briefs of Amici in Support of Intervenor-Appellees	September 6, 2016
Appellants' Reply Brief	September 6, 2016

Of course, a more realistic schedule also illustrates why expediting this appeal at this late stage of the proceedings is not appropriate. As mentioned previously, to give Appellants the relief they claim is needed, any ruling would require remand to the district court. Yet, the more appropriate schedule would not even have a Reply Brief due until early September, without even finding the time for this Court to prepare and have oral arguments.

CONCLUSION

For the reasons articulated above, Intervenors request that Appellants' Motion to Expedite be denied.

Dated: July 11, 2016

Respectfully submitted,

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[8] As is stated in footnote 1, *supra*, Intervenors will submit separate briefs on the merits and will request additional word limit by separate motion.

[9] Twenty-one days would require a response on August 21, 2016, just before oral argument in the Tenth Circuit. This means, even a briefing schedule permitting twenty-one days from the DOJ Brief would effectively limit Intervenor Kansas to responding to two principal appellate briefs in approximately fourteen days.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that on July 11, 2016, I caused four (4) copies of the foregoing to be hand delivered to the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit.

/s/ Garrett Roe___
Garrett Roe
Kris Kobach*
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, ET AL.,	)	
Plaintiffs,	)	CA No. 16-236
vs.	)	Washington, D.C. February 22, 2016 2:30 p.m.
BRIAN D. NEWBY, ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER/
PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff
League of Women Voters:

Michael Keats
Joel T. Dodge
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180 Maiden Lane
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they don't have a copy, I have extra copies here, and my Deputy Clerk will provide you one if you'd like to have one.

Addressed to the Court: "Your Honor, Richard J. Leon, U.S. District Court, District of Columbia.

"Your Honor, as you know, today, the Election Assistance Commission, EAC, is appearing before the Court on a motion for a Temporary Restraining Order.

"Pursuant to 28 U.S. Code Section 516, the Department of Justice is appearing on behalf of the agency. Unfortunately, the DOJ has determined that the initial action taken by the executive director is contrary to their interpretation of the law and the previous positions argued by the Department of Justice. Thus, they have informed the EAC that they're unable to defend the action, which is their duty and obligation.

"Accordingly, the DOJ has filed a response that reflects the interests and positions of the Department of Justice and not of the defendants.

"The conduct of litigation in which the United States, an agency or an officer thereof is a party is reserved to the Department of Justice under the direction of the Attorney General.

"Standing on that authority, the DOJ has also informed the EAC that it is prohibited from obtaining outside counsel.

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: February 24, 2016 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, ET AL.,	)	
	)	
Plaintiffs,	)	CA No. 16-236
	)	
	)	Washington, D.C.
vs.	)	March 9, 2016
	)	2:30 p.m.
BRIAN D. NEWBY, ET AL.,	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER/
PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff
League of Women Voters:

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So, again, we're talking about a speculative harm at best. Certainly not enough that's -- certainly nothing irreparable, and certainly nothing imminent.

Okay. Now I'd like to go to the merits. This is an important point, I think.

The plaintiffs have never identified any policy that is being countered or violated. They keep talking about a policy. You hear them say longstanding policy over and over again.

Well, according to their logic, an EAC policy can only be established by a vote of three commissioners. And they identified the policy as, "Documentary proof of citizenship is not necessary under the NVRA to determine voter eligibility, and thus may not be required on the federal form." That's what they call the policy.

Nowhere do they identify when the EAC ever adopted that policy by three commissioners or even by two commissioners. They can't even come close.

And the list -- or, rather, the issue of documentary proof of citizenship came before the EAC twice, and neither times did they adopt a policy.

Once was when the State of Arizona was refused on March 6th, 2006, by the Executive Director acting alone, he wanted to change the Arizona -- I'm sorry. Arizona wanted to change the state instructions on the federal form.

back here. I don't think that solves anything at all.

And, frankly, he already has explained some basis. If he writes up some other basis, he risks arbitrary and capriciousness just alone. Never mind with respect to everything that's come before.

On that point, the Secretary says he doesn't know what policy we're talking about, that the EAC has no policy with respect to documentary proof of citizenship. Boy, if that were true, he would not be -- he would not have to have sued the EAC before, and we wouldn't have been fighting all these battles over the last decade. So respectfully, I think it's pretty straightforward and pretty clear.

On the question of necessity, I'm not going to get into that. I think the Supreme Court case is clear. I think the EAC -- I think the Tenth Circuit did a very nice job of explaining how that worked, and obviously, you've looked at that opinion. We've addressed it in our briefs, but I just think that he's just re-litigating an issue that he previously lost, and there's no reason to spend a whole lot more time on it.

A couple of more detailed points.

You know, we should also know -- we talked about post hac rationalizations. You know, we haven't previously pointed it out before, but we have it in the record, Tom Hicks, who's the Democratic Commissioner, dissented pretty

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: March 10, 2016 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, et al.,
on behalf of themselves and all
others similarly situated,
Plaintiffs,
vs. Case No. 16-2105-JAR-JPO
KRIS KOBACH, in his official
capacity as Secretary of State
for the State of Kansas, et al.,
Defendants

CODY KEENER, et al.,
Plaintiffs,
vs. Case No. 15-9300-JAR-JPO
KRIS KOBACH, in his official
capacity as Secretary of State
for the State of Kansas, et al.,
Defendants.

DEPOSITION OF
MARGE AHRENS,

registration drive that the League of Women Voters of Kansas has done that has been affected by the safe law or the DPOC requirement?

A. The League of Women Voters of Kansas as a State organization does not conduct voter registration drives. We supply -- we help to establish policy. We give guidance and we give education and training and we -- and leadership to local leagues. And we help them share information about methods that they use.

Q. Okay, fair enough. Just to make sure that I understand. So the registration drives are done by the local leagues?

A. Correct.

Q. Okay, very good. Your first amended complaint makes reference to a diversion of -- let me take a look at it and see if I can get this language correct. Okay, this Exhibit, the first amended complaint, which has been filed of record is Exhibit 16 and I'm looking at page 12, which would be part of paragraph 22. The -- the last two sentences of that paragraph on page 12 seems to sum up the League's position on the safe law and you're looking at page 11?

A. I'm at 12.

CERTIFICATE

STATE OF KANSAS

SS:

COUNTY OF SHAWNEE

I, Kenda K. Falley, a Certified Court Reporter, Commissioned as such by the Supreme Court of the State of Kansas, and authorized to take depositions and administer oaths within said State pursuant to K.S.A 60-228, certify that the foregoing was reported by stenographic means, which matter was held on the date, and the time and place set out on the title page hereof and that the foregoing constitutes a true and accurate transcript of the same.

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

Given under my hand and seal this 13th day of June, 2016.

Kenda Falley

KENDA KAY FALLEY STATE OF KANSAS CERTIFIED SHORTHAND REPORTER

Kenda K. Falley, C.C.R. No. 1003

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, *et al.* *Plaintiffs,* v. UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*, *Defendants.*	CIVIL ACTION NO. 5:13-CV-4095-EFM-DJW

DECLARATION OF ALICE P. MILLER

1) I am the Chief Operating Officer and Acting Executive Director of the United States Election Assistance Commission ("EAC"). I have held the position of Acting Executive Director since May 2008. Before joining EAC, I was the Executive Director of the District of Columbia Board of Elections, a position I held from 1996 to 2008.

2) My official duties and responsibilities include overseeing the direction of the EAC and its day-to-day administration consistent with federal statutes, regulations and EAC policy. I am responsible for developing written procedures concerning the process by which agency policy and executive operational matters are researched, developed, reviewed and approved. Specifically, the duties delegated to me by the Commissioners include, *inter alia*, developing and executing internal operating policies and procedures; managing the distribution and publication and inventory of official EAC documents; and maintaining the National Mail Voter Registration Form ("Federal Form") consistent with the National Voter Registration Act, its implementing regulations and

EAC policy. Through subordinate staff, I assess and guide supporting activities, including those of contractors, and I approve and release procurement requests and contract modification requests.

3) The statements contained in this declaration are based upon my personal knowledge and information provided to me by EAC staff and contractors in the course of my official duties.

4) The States of Arizona and Kansas asked the EAC to change the state-specific instructions on the Federal Form, as follows:

a. The Kansas Secretary of State asked the EAC to modify the state-specific instructions for Kansas by adding the following language "after the third bullet in the 'Signature' section:" "'To cast a regular ballot an applicant must provide evidence of U. S. citizenship prior to the election day.'" *See* Complaint ("ECF No. 1"), ECF No. 1-4 at 1, and ECF No. 1-8, at 1 (Kansas' proposed changes to its initial request for modification to the Kansas state-specific instructions); and

b. The Arizona Secretary of State asked the EAC to modify the state-specific instructions for Arizona by adding the following language:

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or non-operating identification issued after October 1, 1996, write the number in box 6 on the front of the federal form. This will serve as proof of citizenship and no additional documents are needed. If not, you must attach proof of citizenship to the form. Only one acceptable form of proof is needed to register to vote.

- A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your current legal name

- A legible photocopy of the pertinent pages of your passport
- Presentation to the County Recorder of U. S. naturalization documents or fill in your Alien Registration Number in box 6
- Your Indian Census Number, Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal Enrollment Number in box 6
- A legible photocopy of your Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.

ECF No. 1-15, at 1-2.

5) Upon receipt of the Court's March 19, 2014 Order requiring the EAC to include immediately the above-requested language, I immediately consulted my staff to determine the steps necessary to implement the Court's Order.

6) The Federal Form is currently maintained in the following seven languages: English, Spanish, Chinese, Japanese, Tagalog, Korean, and Vietnamese. The EAC does not have the necessary in-house language expertise to translate the Federal Form into these languages. Accordingly, the EAC contracts with outside vendors, most recently with Translations International Inc. to translate its public forms.

7) The following are the steps required to implement the changes the Court ordered to be made to the state-specific instructions on the Federal Form:

a. EAC staff has sent the modified state-specific instructions to the EAC-contracted vendor for translation;

b. the vendor will incorporate the modified state-specific instructions into the English version of the Federal Form;

c. the vendor will ensure that the changes are Section 508-compliant;[1]

[1] Section 508 of the Rehabilitation Act, as amended by the Workforce Investment Act of 1998 (P.L. 105-220), August 7, 1998, requires federal agency electronic and information technology to be as accessible to members of the public with disabilities as they are to members of the public without disabilities. 29 U.S.C. § 794d (a)(1)(A)(2).

d. once the vendor determines that the form is Section 508-compliant, the vendor will send the revised form back to the EAC;

e. EAC staff will review the form to make sure appropriate changes were made to the correct state-specific instructions and that the changes are dated at the heading of each state for which the changes are being made;

f. if approved, the vendor will translate the changes from English into Spanish, Chinese, Japanese, Tagalog, Korean, and Vietnamese;

g. the vendor will ensure that the translations are Section 508-compliant and will send the final product to the EAC in both .pdf and Adobe InDesign file formats (Adobe InDesign is a type of desktop publishing software used by graphic designers);

h. EAC staff will perform a final review to make sure appropriate changes have been made, as requested; and

i. EAC staff will send the final product to the EAC Director of Communications, Clearinghouse and Congressional Affairs, who will post the revised Federal Form on the EAC web site.[2]

[2] The EAC does not produce hard copies of its forms and publications.

8) I have been advised that it will take from seven to ten business days from the date that the vendor receives the proposed changes to finalize the modifications to the state-specific instructions of the Federal Form as ordered by the Court. Accordingly, we estimate that the final, modified Federal Form will be ready to post on the EAC's web site by or before April 11, 2014.

I declare under penalty of perjury that the forgoing is true and correct.

Signed this 31st day of March 2014.

ALICE P. MILLER
Acting Executive Director
Chief Operating Officer
United States Election Assistance Commission