UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*, Plaintiffs, v. BRIAN NEWBY, *et al.*, Defendants, KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION Defendant-Intervenors.	Civil Action No. 1:16-236 (RJL)

FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs in this case challenge three decisions issued by Brian Newby, Executive Director of the United States Election Assistance Commission ("EAC"). For the reasons set out in the attached memorandum, Mr. Newby did not apply the relevant statutory standard, and as a result his decisions cannot be sustained. Under the Administrative Procedure Act, the proper remedy for this deficiency is to grant summary judgment to plaintiffs on this limited ground and set aside the challenged decisions. The EAC would then have the opportunity to consider the states' requests under the proper statutory standard. The Court need not and should not reach plaintiffs' other claims.

Date: July 22, 2016

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INTRODUCTION

Under the National Voter Registration Act of 1993 ("NVRA"), the U.S. Election Assistance Commission ("EAC" or "Commission") is charged with "develop[ing] a mail voter registration application form for elections for Federal office." 52 U.S.C. § 20508(a)(2). Among other things, the form must "specif[y] each eligibility requirement (including citizenship)," "contain[] an attestation that the applicant meets each such requirement" and "require[] the signature of the applicant, under penalty of perjury." *Id.* § 20508(b)(2). The 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).

The Commission creates and maintains that form and, in appropriate circumstances, incorporates state-law requirements into state-specific instructions on the form. At issue here are three decisions by the Commission's Executive Director to approve state-specific requirements for proof of citizenship on the federal form. In a contemporaneous memorandum and in a declaration submitted in this Court, the Executive Director explained that, in his view, it was sufficient "that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process, including qualifications of voters." Declaration of Brian Newby ("Newby Decl.") ¶ 25, ECF No. 28-2. The Commission is entitled to substantial deference in implementing its statutory responsibilities, including the creation of the federal election form. But in doing so, the Commission must, among other things, apply the correct legal standard. Here, the statute provides that the form may require identification and information only where it is "*necessary* to enable the [State] 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 Executive Director's decisions did not make such a finding. And the standard that he applied—"that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process," Newby Decl. ¶ 25—is foreclosed by the Supreme Court's decision in *Arizona v. Inter Tribal Council, Inc.* ("*ITCA*"), 133 S. Ct. 2247 (2013). Therefore, summary judgment on this limited ground is appropriate, and the Court need not and should not reach plaintiffs' other claims in this case.

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

A. Constitutional Authority

The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, Cl. 1. "The Clause's substantive scope is broad. 'Times, Places, and Manner,' [the Supreme Court has] written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . regulations relating to 'registration.'" *ITCA*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). By contrast, voter qualifications for federal elections are governed by state law. The Qualifications Clause provides that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," U.S. Const. Art. I, § 2, Cl. 1, and the Seventeenth Amendment establishes the same requirement for senatorial elections. *See ITCA*, 133 S. Ct. at 2258.

B. National Voter Registration Act of 1993

Exercising its authority under the Elections Clause, Congress enacted the National Voter

Registration Act, Pub. L. No. 103-31, 107 Stat. 77, in 1993 in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 52 U.S.C. § 20501(a)(3).[1] The statute accordingly identifies its four objectives: "increas[ing] the number of eligible citizens who register to vote in elections for Federal office"; "enhanc[ing] the participation of eligible citizens as voters in elections for Federal office"; "protect[ing] the integrity of the electoral process"; and "ensur[ing] that accurate and current voter registration rolls are maintained." *Id.* § 20501(b). The NVRA applies with respect to elections for Federal office in 44 states and the District of Columbia. Six states are exempt from the NVRA by virtue of maintaining election day registration or no registration requirement for federal elections. *Id.* §§ 20502, 20503; Administrative Record ("AR") AR0194 n.1, ECF No. 69-3.[2]

The NVRA mandated, among other things, that all covered states allow voters to register to vote in Federal elections "by mail application." 52 U.S.C. § 20503(a)(2). The statute directed that an existing agency, the Federal Election Commission ("FEC"), "in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office" and provided that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [FEC]." *Id.* §§ 20505(a)(1), 20508(a)(2). The Act required states to make the form developed by the FEC (the "Federal Form"), or an "equivalent" form, available at certain state agencies and to "ensure that any eligible applicant [who timely submits the form] is registered to vote." *Id.* §§ 20506(a)(4)(A), 20506(a)(6)(A), 20507(a)(1).

[1] The NVRA was previously codified at 42 U.S.C. § 1973gg *et seq*. The Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. 20901 *et seq*., discussed below, *infra* p. 5, was previously codified at 42 U.S.C. 15301 *et seq*. In 2014, the relevant provisions were subject to an editorial recodification that made no substantive changes.

[2] The administrative record was filed on March 17, 2016, and citations to the record use the pagination containing the "AR" prefix. *See* Notice of Filing of Administrative Record, Mar. 17, 2016, ECF No. 69.

The NVRA required, among other things, that the Federal Form "include a statement that . . . specifies each eligibility requirement (including citizenship)," "contains an attestation that the applicant meets each such requirement," and "requires the signature of the applicant, under penalty of perjury." *Id.* § 20508(b)(2). Moreover, Congress explicitly limited the information the FEC may require applicants to furnish on the Federal Form. In particular, the 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).

C. Help America Vote Act of 2002

The Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666, created the U.S. Election Assistance Commission and transferred to EAC all of the functions originally assigned by the NVRA to the Federal Election Commission. 52 U.S.C. § 21132. HAVA vests authority in four commissioners appointed by the President, no more than two of which can be from the same political party. *Id.* § 20923. HAVA also requires "the approval of at least three" commissioners to carry out "[a]ny action which the Commission is authorized to carry out under this chapter." *Id.* § 20928.

HAVA amended the requirements for the Federal Form to include two specific questions, along with check boxes, for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. *Id.* § 21083(b)(4)(A). It was Congress's intent "that such questions should be clearly and conspicuously stated on the front of the registration form." H.R. Rep. No. 107-730, § 303, at 76 (2002) (Conf. Rep.).

II. COMMISSION REGULATIONS AND ACTIONS

A. Federal Form

Pursuant to its rulemaking authority, the FEC and its successor, the EAC, developed a Federal Form that meets NVRA and HAVA requirements. *See* 11 C.F.R. part 9428 (implementing regulations); 52 U.S.C.A §§ 20508(a), 20929. The form consists of three basic components: the application, general instructions, and state-specific instructions. *See* 11 C.F.R. § 9428.3(a); *see also* National Mail Voter Registration Form (updated Mar. 1, 2016), AR0008-32. The application portion of the Federal Form "[s]pecif[ies] each eligibility requirement," including "U.S. Citizenship," which is "a universal eligibility requirement." 11 C.F.R. § 9428.4(b)(1).

To complete the form, an applicant must sign, under penalty of perjury, an "attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements." *Id.* §§ 9428.4(b)(2), (3). For that reason, the state-specific instructions are integral to the Federal Form. *See* AR0010, Application Instructions, Box 9 ("Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that: (1) you meet your State's requirements . . . ."). *See also* Statement of Basis and Purpose for Regulations on the National Voter Registration Act of 1993, 59 Fed. Reg. 32,311, 32,312 (June 23, 1994) ("Final Rules") ("The final rules indicate which items are only requested (optional) and which are required only by certain states and under certain circumstances (such as the declaration of party affiliation in order to participate in partisan nominating procedures in certain states). The remaining items, by inference, are considered to be required for registration in all covered states.").

B. Actions Related to the Federal Form from 1994-2014

The FEC created the Federal Form after notice and comment. Final Rules, 59 Fed. Reg.

32,311. Subsequent changes to the content of the general instructions or the application itself have been made by vote of the FEC or the EAC at a public hearing. *See, e.g.*, AR0168 (July 2002 change to race/ethnicity categories), AR0204-05 (Aug. 2003 vote to change general instructions and application after public comment), AR0208 (Aug. 2004 EAC policy statement published in Federal Register); *cf.* AR0208 (Mar. 2006 style and grammatical edits to the general instructions made by EAC staff). The process for changing the state-specific instructions has varied. From 1994-2000, changes to the state-specific instructions were made by vote of the FEC. AR0163, AR0204. In 2000, the FEC adopted several changes to the state-specific instructions by vote of the Commissioners and stated that in the future, the staff of the Office of Election Administration ("OEA") could make such changes and notify the Commission, though any changes that were not specific to a given state would still be subject to a Commission vote. AR0163, AR0204.[3] It appears that FEC staff exercised this authority in July 2002, and again in October 2003 after conducting a survey of states regarding relevant changes to state law. AR0168-69, 0204-05.

After responsibility for the Federal Form was transferred to the EAC, it appears that no changes to state-specific instructions were made until March 2006. *See* AR0040-57. EAC staff continued to be responsible for at least certain changes to the state-specific instructions, *see, e.g.*, AR0208 (describing Sept. 2006 changes to state-specific instructions for six states regarding mailing addresses, registration deadlines, ID number requirements, and treatment of social security numbers), although there is no evidence of a written operating procedure. *See*, *e.g.*,

[3] The text of the FEC's delegation to its staff is not available to the EAC, and the available records characterize the delegation in slightly different ways. *Compare* AR0168 n.1 (Aug. 2002) ("allow[ing] the OEA to make any changes to the [Federal Form] that are required by changes to state law"); *with* AR0163 (Oct. 2000) ("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. "); AR0204 ("permits the [OEA] to make changes to the [Federal Form] that are required by . . . State law").

AR0442, AR0374-75.

On July 26, 2005, the EAC's Associate General Counsel issued a letter regarding a state law that Florida construed to require check boxes regarding mental capacity and felony status. AR0230-32. The letter concluded that the "checkbox" requirement did not alter Florida's voter qualifications but instead was "merely a means to determine, document, and communicate existing voter eligibility requirements." AR0231. The letter informed the state that it could not require additional information, but must "accept and use" the Federal Form. AR0232.

On March 6, 2006, the EAC's Executive Director rejected Arizona's request to include the state's documentary proof of citizenship requirement in the state-specific instructions. AR0233-35. The Executive Director's letter noted that the relevant state law "did not amend Arizona's registration qualifications" but instead modified the state's registration form and registration requirements. AR0233. As EAC's then-General Counsel explained at a public meeting, "at the time, it was at least the staff's understanding those types of questions with regard to changing state-specific instructions went to staff for decision, so [the Executive Director] sent the letter." AR0442 (Sept. 6, 2007).

In light of litigation arising out of a private challenge to Arizona's state law, the EAC Chairman called for a tally vote of the Commission in July 2006, expressing concern that Arizona's action and the litigation "have created significant confusion for the Arizona voters." AR0251. The EAC deadlocked, with two commissioners voting in favor and two voting against the proposed reversal. AR0245-50.

Over the next two years, the EAC unsuccessfully sought a way to resolve the deadlock, debating both what the standard should be for approving state-specific instructions[4] and

[4] Commissioner Hunter publicly argued that every state law should be acknowledged in the state-specific

(*footnote continued on next page*)

considering several alternative proposals for who at the EAC should have the authority to decide the requests. *See* AR0375-76 (Sept. 7, 2007) (EAC General Counsel proposing that the Commission "inform those states as to how they would make such a request and how we would consider such a request"); AR0530-32, 0700 (Oct. 4, 2007) (considering and rejecting by tie vote Commissioner Hunter's interim proposal to require staff to adopt all changes to state-specific instructions that "properly reflect[] the state's law"); AR0711-19 (Dec. 11, 2007) (voting tied on five pending state requests because two commissioners stated that an interim solution, such as the one proposed by Commissioner Hillman, should be set first); AR0746-47 (Jan. 17, 2008) (again considering and rejecting by tie vote Commissioner Hunter's interim proposal, with two commissioners recommending consideration of an alternative staff proposal); AR0793-96 (Mar. 20, 2008) (voting to approve four state requests, but rejecting new Arizona request by tie vote).[5]

On September 12, 2008, the EAC, by unanimous vote of the Commissioners, approved a document that "identif[ied] the specific roles and responsibilities of the . . . Executive Director

instructions and that the EAC lacked authority to refuse such instructions. AR0448, 0525-26 (Sept. 7, 2007); AR0760-61 (Jan. 17, 2008). However, EAC staff consistently took the view that the EAC had discretion to determine whether information was necessary under the statutory standard. The 2006 Arizona letter took the position that the EAC had authority to determine whether a state law change should be added to the Federal Form. *See* AR0233-35. Similarly, at the September 6, 2007 public meeting, the EAC General Counsel stated that the NVRA's use of the word "necessary" sets a ceiling, that "[w]e can't have more items on the form than is required to assess the eligibility of the applicant or to otherwise administer the voter registration process." AR0412, 0416. At that meeting, EAC's Election Research Specialist noted that the FEC's regulation implementing the NVRA "did make policy decisions on things to not only include but exclude from the form because they didn't believe that certain things met or were necessary to determine the eligibility of the applicant." AR0458-60. The EAC staff's views appeared to be shared by several commissioners. *See* AR0262 (Commissioner DeGregorio) ("[T]he EAC determines the procedural and evidentiary requirements of the National Form"); AR0250 (Commissioner Hillman) ("[T]he decision of our Executive Director . . . was right."); AR0260 (Commissioner Martinez) ("For the reasons put forth in [the 2006 Arizona letter] . . . I continue to believe that our current agency position accurately reflects the plain language of NVRA, as well as Congressional intent in passing this historic law.").

[5] While Commissioner Hunter's proposal was the only one voted on, other proposals were discussed. In December 2007 and January 2008, Commissioner Hillman proposed delegating to EAC staff authority to update state eligibility information and other categories of information already included on the Federal Form. *See* AR0739-42, 0770-75. In January 2008, EAC staff proposed, and Commissioner Hillman ultimately favored, a similar delegation of authority which would have further specified what categories of information could be updated by staff. AR0776-78.

and its four Commissioners." AR0209-16. The document, entitled "Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission," set out as a "general division of responsibility" that the Executive Director "is expected to (1) prepare policy for commissioner approval, (2) implement policies once made, and (3) take responsibility for administrative matters." AR0209. It also directed the Executive Director to "[p]rovide for the overall direction and administration of EAC's operating units and programs, consistent with the agency's strategic plan and any . . . commissioner adopted policies," and delegated to the Executive Director the responsibility to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." AR0215.[6] Finally, the Commission provided that, as to the matters delegated to the Executive Director, "the commissioners will not directly act on these matters." AR0216.

From 2008 to 2010, all decisions regarding changes to the state-specific instructions were made by vote of the Commission. AR0217, 0219-20 (describing votes on Mar. 20, June 6, July 29, Aug. 23, and Dec. 21, 2008; Nov. 3 and Dec. 28, 2009; and Sept. 7, 2010). In December 2010, the EAC lost its quorum with the resignation of Commissioner Hillman. *See* Statement of Gracia M. Hillman, Dec. 6, 2010, http://www.eac.gov/assets/1/Documents/GH%20Statement_12_06_10.pdf (last visited July 21, 2016). In November 2011, the Executive Director, Thomas Wilkey, adopted an interim internal operating procedure stating that until a quorum was restored, EAC staff would update state mailing addresses or "proposed modification[s] . . . required by a change in State law" but would

[6] Other specific delegations to the Executive Director included: "[m]anage the daily operations of EAC consistent with Federal statutes, regulations, and EAC policies"; "[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners"; and "[a]nswer questions from stakeholders regarding the application of NVRA or HAVA consistent with EAC's published Guidance, regulations, advisories and policy." *Id.*

defer "[r]equests that raise issues of broad policy concern to more than one State." AR0217-18. Thereafter, in the absence of a quorum, EAC staff made a number of decisions regarding changes to the state-specific instructions (none of which involved documentary proof-of-citizenship). AR0220 (describing changes approved in Nov. 2011 and Feb. 2012); AR0043-56 (noting additional updates in 2012 (Illinois, Kansas, Louisiana, Maine, Washington), 2013 (Georgia and Wisconsin), and 2014 (New York and Tennessee)).

C. January 17, 2014 Decision

In June 2013, Arizona and Kansas submitted requests to amend the state-specific instructions on the Federal Form to reflect their state laws regarding documentary proof of citizenship, and Georgia submitted a similar request in August 2013. AR0268, 0285-86. Pursuant to the EAC's interim internal operating procedure, EAC staff responded to all three letters stating that a decision would be deferred until the Commission regained a quorum. AR0269, 0285-86. Kansas and Arizona filed suit, and a district court ordered the EAC to issue a decision on the requests. *See* Order, *Kobach v. U.S. Election Assistance Commission*, No. 5:13-4095 (D. Kan. Dec. 13, 2013). In compliance with that order, the acting Executive Director, after seeking notice and comment, issued a decision in which she denied the three states' requests. *See* AR0287-92; Notice and Request for Public Comment on State Requests, 78 Fed. Reg. 77,666 (Dec. 24, 2013); AR0283-328; *see also* Declaration of Alice P. Miller ¶ 9, ECF No. 48-1. Kansas and Arizona challenged the decision, which was upheld by the U.S. Court of Appeals for the Tenth Circuit. *See Kobach v. EAC*, 772 F.3d 1183, 1196 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (mem) (2015).

D. New Commissioners

In January 2015, three new commissioners were confirmed. At the public meeting on February 24, 2015, the Commission adopted a new organizational management statement,

superseding the 2008 document that had set out roles and responsibilities. AR0858-61; AR0226-29. The new organizational management statement retained the same general division of responsibility, adding only that the Executive Director "in consultation with the Commissioners" is expected to carry out the same three responsibilities: "(1) prepare policy recommendations for commissioner approval, (2) implement policies once made, and (3) take responsibility for administrative matters." AR0227; *cf.* AR0209. The new organizational management statement, however, removed the sections that had assigned specific tasks to the commissioners, Chair, and Executive Director. *Compare* AR00226-29 *with* AR0209-16. At the adoption of the new organizational management statement, one of the commissioners clarified that the choice not to list specific tasks for the Executive Director did not remove those responsibilities. *See* AR0860 ("I and my fellow Commissioners agree that this document continues to instruct the Executive Director to continue maintaining the federal form consistent with the Commissioners' past directives, unless and until such directions were counter made should the agency find itself again without a quorum."). The Commission appointed a new Executive Director and General Counsel in November 2015. *See* Newby Decl. ¶ 3; Nov. 2, 2015 Press Release, http://www.eac.gov/assets/1/Documents/ED.GC%20Press%20Release.11-2-15.pdf (last visited July 21, 2016).

E. January 29, 2016 Decisions

Prior to February 1, 2016, the Federal Form's state-specific instructions informed registrants, in relevant part:

- To register in Alabama, "[y]our social security number is *requested* (by authority of the Alabama Supreme Court, 17-4-122)," and "you must: be a citizen of the United States";
- "To register in Kansas you must: be a citizen of the United States"; and

- "To register in Georgia you must: be a citizen of the United States[.]"

See AR0040, AR0043, AR0045 (emphasis added).

On November 17, 2015, Kansas renewed its request to add its state statutory requirement for documentary proof of citizenship to the state-specific instructions on the Federal Form. AR0072-74. A similar request from Alabama remained pending. AR0061-62 (Feb. 19, 2015). Another similar request from Georgia had been denied in 2014, but the Executive Director confirmed that the state still wished it to be considered. AR0003, 0065-69.

In three letters dated January 29, 2016, the Commission's Executive Director, Brian Newby, approved these states' requests to add their statutory requirements of documentary proof of citizenship to the state-specific instructions on the Federal Form. *See* AR0063-64, 0070-71, 0109-10 (approval letters). The Executive Director's letters articulated no rationale for the decisions. However, contemporaneous with the decisions, the Executive Director drafted an internal memorandum explaining his actions. *See* AR0001-07 (Feb. 1, 2016) ("Decision Memorandum"); *see also* Newby Decl. ¶¶ 25, 45, 52. In his memorandum, the Executive Director concluded that Kansas' "examples of the need for these changes are irrelevant to my analysis" because inclusion of "state-by-state instructions" on the Federal Form "implies the role and rights of the states to set the framework for acceptance and completion of the form." AR0004-05; *see also* Newby Decl. ¶ 25 ("I began developing a point of view . . . that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process, including qualifications of voters."). For that reason, he stated that "State-specific instructional changes are ministerial, and, thus, routine." AR0002; *see also* Newby Decl. ¶ 34 ("[T]he review should focus on the acceptance of state-specific instructions.").

On February 1, 2016, an updated version of the Federal Form was posted on the

Commission's website reflecting the approved changes:

- "To register in Alabama you must: be a citizen of the United States. The county board of registrars shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship."

- "To register in Georgia you must: be a citizen of the United States; . . . [and] be found eligible to vote by supplying satisfactory evidence of U.S. citizenship."

- "To register in Kansas you must: be a citizen of the United States; . . . [and] have provided a document, or copy thereof, demonstrating United States citizenship within 90 days of filing the application with the secretary of state or applicable county election officer; . . . acceptable documents demonstrating United States citizenship as required by K.S.A. § 25-2309(l) include [specifying thirteen options]."

AR0008-32 (modified Feb. 1, 2016), *also available at* http://www.eac.gov/voter_resources /register_to_vote.aspx (last visited July 21, 2016).

ARGUMENT

I. ADMINISTRATIVE PROCEDURE ACT STANDARD

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 (2011), *et seq.*, courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C). Pursuant to the APA's "arbitrary or capricious" standard, the Court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). "[A]n agency cannot 'fail[] to consider an important aspect of the problem' or 'offer[] an explanation for its decision that runs counter to the evidence' before it," *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). However, a decision that is not fully explained may be upheld "if the agency's path may reasonably be

discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The Court "is not to substitute its judgment for that of the agency." *Id.* The Court's review of an agency decision is "confined to consideration of the decision of the agency" and "the evidence on which it was based." *Federal Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citation omitted). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617 (D.C. Cir. 1988) (citations omitted) (the court's review is "confined to the administrative record").

II. BECAUSE THE EXECUTIVE DIRECTOR DID NOT APPLY THE CORRECT STATUTORY STANDARD, SUMMARY JUDGMENT ON COUNTS IV AND V IS APPROPRIATE.

Although the Commission is entitled to substantial deference in implementing the NVRA, the Executive Director did not determine whether the requested proof-of-citizenship requirements met the NVRA's "necessary" standard. Instead, he applied a standard—"that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process," Newby Decl. ¶ 25—that is foreclosed by Supreme Court precedent. *See ITCA*, 133 S. Ct. at 2255-56 (finding that "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available" and rejecting a "reading [that] would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form"). It is therefore appropriate to set aside the challenged decisions and allow the EAC the opportunity to consider the states' requests under the proper statutory standard.

A. The NVRA Requires the Commission to Determine that a State Instruction to Applicants to Provide Information is "Necessary" Before the Instruction May Be Included on the Federal Form.

The NVRA permits a state instruction to applicants to provide information to be included on the Federal Form "only" to the extent the instruction is "necessary to enable the [State] 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). As the Supreme Court's construction of this statutory language reflects, the existence or absence of such necessity is a discretionary determination to be made by the EAC. *See ITCA*, 133 S. Ct. at 2259 ("validly conferred discretionary executive authority"); *see also Kobach*, 772 F.3d at 1196 ("[S]tates must 'request' (rather than direct) the EAC to include the requested text, and must 'establish' (rather than merely aver) their need for it."). Reading the NVRA to require a determination of necessity is consistent with the original interpretation by the FEC, the EAC's predecessor, in its implementing regulations. *See, e.g.*, Final Rules, 59 Fed. Reg. at 32,316 ("The [FEC] has determined . . . to exclude the following items from the national mail voter registration form because they do not meet the 'necessary threshold' of the NVRA to assess the eligibility of the applicant or to administer voter registration or other parts of the election process.").[7]

B. The Executive Director Did Not Apply the Statutory Standard.

In reaching the decisions challenged here, the Executive Director expressly disclaimed any analysis of whether the additional information was "necessary" for the eligibility determination. His contemporaneous memorandum describing his decisions states:

[7] Kansas's assertion that "the federal form in the past was always a perfect mirror image of state law," Feb. 22, 2016 Temporary Restraining Order/Preliminary Injunction Hr'g Tr. at 71:3-4, is inaccurate. The NVRA was designed to eliminate "unfair registration laws and procedures." 52 U.S.C. § 20501(a)(3). And the original final rule promulgated by the FEC excluded numerous state requirements. *See, e.g.*, Final Rules, 59 Fed. Reg. at 32,316 (excluding, *inter alia*, "place of birth," even though 33 States required it on their own forms, "information regarding naturalization," and "specific information regarding criminal conviction or mental incapacity").

> [W]hile proof of citizenship will be the focal point many will place upon these requests, *it's not the issue I am evaluating*. With respect to the Kansas State Election Director, his examples of the need for these changes are *irrelevant* to my analysis. Similarly, for those who object to proof of citizenship laws, again, that's not what the EAC has been asked to evaluate.

AR0004 (emphasis added). And the decision memorandum sets forth the Executive Director's view that all state requirements consistent with state law should be included in the Federal Form's instructions. *See id.* at 5 ("[S]tate-specific instruction changes should be considered routine[.]"). The Executive Director's February 21, 2016 declaration likewise makes clear that his decisions were not made based on the NVRA standard. *See* Newby Decl. ¶ 25, ECF No. 28-2 ("I began developing a point of view . . . that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process . . . ."); *id.* ¶ 48 ("[M]y view [was] to accept the state-specific instructions as submitted.").[8] This pro forma acceptance of the states' requests failed to satisfy the requirement under the NVRA to apply the "necessary" threshold as a prerequisite to amending state-specific instructions. *See ITCA*, 133 S. Ct. at 2259-60 (concluding that even if a state purported to require registrants to submit documentary proof-of-citizenship, the requirement could not be imposed on Federal Form applicants unless the EAC determined that such additional documentation was necessary to enable the state to assess eligibility).

[8] An agency declaration can be admitted where it "merely illuminate[s] reasons obscured but implicit in the administrative record." *See Consumer Fed'n v. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1507 (D.C. Cir. 1996) (citation omitted). Because these portions of the declaration elaborate the Executive Director's reasoning without contradicting his February 1, 2016 memorandum or offering new rationalizations, they may be considered. *See Olivares v. TSA*, 819 F.3d 454, 463-64 (D.C. Cir. 2016), *petition for cert. filed*, __ U.S.L.W. __ (July 19, 2016) (No. 16-88) (holding that "critical point" to finding post hoc declaration "admissible for [the court's] consideration" is that such declaration "contains 'no new rationalizations'; it is 'merely explanatory of the original record'"); *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) ("[N]ew material should be merely explanatory . . . and should contain no new rationalizations." (citation omitted)).

C. Intervenors' Arguments Cannot Cure the Fatal Deficiency in the Executive Director's Decisions.

Kansas and PILF have made numerous arguments at hearings and in briefs in an effort to support the result reached by the Executive Director's decisions. But none of their arguments can provide a sufficient basis to sustain the challenged action. Although these arguments would be relevant to any future consideration of this issue by the EAC, they are irrelevant here because where a "contemporaneous explanation of the agency decision" "indicate[s] the determinative reason for the final action," the action's validity "must . . . stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 143.

1. Intervenors' statutory and constitutional arguments are contrary to Supreme Court precedent and have been rejected by the Tenth Circuit.

Kansas and PILF argue that the NVRA gives states—not the EAC—the discretion to determine what is necessary under the statute, and that any contrary reading raises constitutional concerns. *See, e.g.*, Kansas Resp. to Preliminary Inj. at 2-3, ECF No. 27; Kansas Opp'n to Preliminary Inj. at 2-3, 27-29, ECF No. 51-1; PILF Opp'n to Preliminary Inj. at 10-12, 22-23, ECF No. 53; *see also* Feb. 22, 2016 Hr'g Tr. at 68:16-69:14. This argument cannot be squared with the *ITCA* decision, which rejected a "reading [that] would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form." 133 S. Ct. at 2256. Instead, the Court held that it is for the EAC to determine in the first instance whether a state requirement is "necessary" to assess eligibility and administer the election process. *See id.* at 2259 ("validly conferred discretionary executive authority"). The Tenth Circuit also previously rejected the argument Kansas and PILF raise here, explaining that the *ITCA* decision "would make no sense if the EAC's duty was nondiscretionary." *Kobach*, 772 F.3d at 1194-96.

Intervenors' constitutional argument is likewise misplaced. *ITCA* drew a clear distinction between eligibility requirements—which the Constitution leaves to States—and registration procedures—which Congress can preempt under the Elections Clause. *See* 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." (emphasis in original)); *id.* at 2257 (Elections Clause legislation "necessarily displaces some element of a pre-existing legal regime erected by the States"). 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 2260. Here, the EAC did not undertake an analysis of whether the requested documentary proof-of-citizenship was necessary to enable the states to assess voter eligibility. The Tenth Circuit definitively rejected intervenors' constitutional argument as well. *See Kobach*, 772 F.3d at 1198-99 ("Kobach's . . . argument that the states' Qualifications Clause powers trump Congress' Elections Clause powers is foreclosed by precedent.").

2. Kansas misconstrues the Executive Director's declaration.

Kansas also suggested that the Executive Director's use of the word "necessary" in one clause of his declaration demonstrates that—contrary to the Executive Director's own decision memorandum and the rest of his declaration—his decisions actually were made on the basis of the NVRA's statutory standard. *See* Kansas Opp'n to Preliminary Inj. at 30 ("In his declaration, Executive Direct[or] Newby states that he 'determin[ed] that the changes to the state-specific instructions were necessary . . . .' *See also* Newby Decl. In the context of what the Supreme Court has described as an 'entirely informal' process, that is all he need do." (citing *ITCA*, 133 S. Ct. at 2260 n.10.)); Feb. 22, 2016 Hr'g Tr. at 68:11-15 ("[I]n Executive Director Newby's affidavit, which is attached to the DOJ brief, he does say, in paragraph 46, that he determined that it was necessary. Now, he doesn't elaborate into all the reasons he thinks it's necessary, but

he said he determined it was necessary.").

Viewed in context, however, this statement in the Executive Director's declaration does not reflect application of the statutory standard, which he expressly disclaimed when he issued his decisions. *See* AR0004 ("[T]he need for the[requested] changes are irrelevant to my analysis."); AR0005 ("The federal form, itself, has state-by-state instructions . . . implies the role and rights of the states to set the framework for acceptance and completion of the form."). The fact that the Executive Director, in a declaration submitted in court, summarized his analysis by describing an alteration to the state-specific instructions as "necessary and proper" cannot be regarded as an alteration of the Executive Director's reasoning set out in the internal memorandum prepared in connection with the challenged decisions. *See Camp*, 411 U.S. at 143 (where a "contemporaneous explanation of the agency decision" "indicate[s] the determinative reason for the final action," the action's validity "must . . . stand or fall on the propriety of that finding").

Moreover, even if this sentence of the declaration could be read as Kansas proposes, it would not "articulate a satisfactory explanation" for the Executive Director's action. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Olivares*, 819 F.3d at 464. Nothing in the Executive Director's decision memorandum or declaration indicates that the word "necessary" in paragraph 46 of his declaration refers to a conclusion about states' needs to enforce eligibility requirements or explains why it would be appropriate, in these circumstances, to conclude that the information requested for inclusion here was in fact necessary. *See* AR 0004; *see also* Newby Decl. ¶¶ 25, 48. Such a reading would also constitute an impermissible post hoc rationalization. *See Olivares*, 819 F.3d at 463-64.

3. Kansas's proposed definition of "necessary" cannot be reconciled with the NVRA.

At the March 9, 2016 preliminary injunction hearing and in its supplemental brief submitted after that hearing, Kansas attempted to recast its argument that only states should have the discretion to determine what information is necessary under the NVRA. Kansas argued that "necessary" means no more or less than "required by state law." *See* Kansas Suppl. Mem. at 11, ECF No. 75; Mar. 9, 2016, Preliminary Injunction Hr'g Tr. at 78. Kansas contended that this is an "*objective*" definition of the word "necessary," while any other definition would be inherently "*subjective*." Kansas Suppl. Mem. at 11. This theory cannot be reconciled with the text and purpose of the NVRA or the Supreme Court decision interpreting it.

The NVRA permits information to be required on the Federal Form "only" to the extent it is "necessary to enable the [State] 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). Kansas's argument that every state law requirement is objectively "necessary," and must therefore be included on the Federal Form, *see* Kansas Suppl. Mem. at 11, would not only remove all discretion from the EAC, but also contradict Kansas's own prior assertion that State election officials have authority to "determine what is necessary to enforce their own registration requirements." Kansas Opp'n to Preliminary Inj. at 28; *see also* Feb. 22, 2016 Hr'g Tr. at 68:24-69:1 ("A normal reading of [52 U.S.C. § 20508(b)(1)], you'd say, well, the state election official gets to decide what's necessary."). Neither Kansas's prior nor its new reading can be squared with *ITCA*, which rejected a "reading [that] would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form," 133 S. Ct. at 2256, and acknowledged the EAC's "validly conferred discretionary executive authority." *See id.* at 2259; *see also Kobach*, 772 F.3d at 1194-96 (explaining that the *ITCA*

decision "would make no sense if the EAC's duty was nondiscretionary"). Indeed, if every state law regarding voter registration procedures were reproduced on the Federal Form, the NVRA would serve little purpose. It certainly could not counteract "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office." 52 U.S.C. § 20501(a)(3).

III. THE COURT SHOULD NOT REACH PLAINTIFFS' OTHER CLAIMS.

The Court should not reach plaintiffs' other claims because plaintiffs are entitled to summary judgment on the limited grounds discussed above, and any further challenges would be more appropriately addressed, if necessary, following any EAC decision under the appropriate statutory standard. Moreover, plaintiffs' assertions in Counts I, II and III of their complaint raise questions concerning EAC authority and procedures that the agency should have the opportunity to decide in the first instance. To the extent the Court nevertheless reaches these subsidiary claims, as explained below, Federal Defendants are entitled to summary judgment on Count III.

A. The Scope of the Executive Director's Delegated Authority Need Not and Should Not Be Resolved at This Time.

Because the Court should set aside the challenged decisions on the basis of Counts IV and V, the Court need not and should not weigh in on the Commission's internal delegation of authority. But if the Court finds it necessary to reach this claim, it should narrowly hold that, wherever the outer bounds of that delegation lie, it could not have included the ability to reinterpret the statutory standard contrary to the NVRA and the Supreme Court's decision in *ITCA*.

While the Help America Vote Act of 2002 requires "the approval of at least three" commissioners to carry out "[a]ny action which the Commission is authorized to carry out under this chapter," 52 U.S.C. § 20928, this requirement does not preclude subdelegation. To the

contrary, "subdelegation 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). The statutory framework shows that subdelegation is permissible. *See Kobach*, 772 F.3d at 1190-91 (concluding that because the statute "provides for an Executive Director, a General Counsel, and other staff, . . . Congress contemplated some degree of subdelegation to those staff members").

The Commission's operative delegation states as follows:

> **II. Division of authority regarding policymaking and day-to-day operations**
>
> **1. The Commissioners shall make and take action in areas of policy.** Policymaking is a determination setting an overall agency mission, goals and objectives, or otherwise setting rules, guidance or guidelines. Policymakers set organizational purpose and structure, or the ends the agency seeks to achieve. The EAC makes policy through the formal voting process.
>
> **2. The Executive Director in consultation with the Commissioners is expected to:** (1) prepare policy recommendations for commissioner approval, (2) implement policies once made, and (3) take responsibility for administrative matters. The Executive Director may carry out these responsibilities by delegating matters to staff.

AR0227. In the decisions challenged here, the Executive Director acknowledged that under this delegation, he only had authority to "carry out policies set by the Commissioners." AR0002.

The Court need not and should not reach plaintiffs' claims regarding the scope of this delegation. For the reasons described above, regardless of whether the Executive Director had delegated authority to decide the states' requests, the challenged decisions cannot stand because they did not apply the statutory standard. Under these circumstances, the Court should rule only on the basis of Counts IV and V and leave it to the EAC to resolve first internally any uncertainty about the subdelegation of its own authority. *Cf. Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 372–73 (1955) ("[P]erplexing questions . . . admonish[] us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the

disposition of the immediate case."); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799, 809 (D.C. Cir. 2004) (Roberts, J., concurring) (courts should not go beyond "narrow and effectively conceded basis for disposition" to address additional issues "wholly unnecessary to the disposition of the case" that "at the end of the day lead[] to the same result"); *Cartier v. Sec'y of State*, 506 F.2d 191, 198 (D.C. Cir. 1974) (finding it "unnecessary and indeed unwise to attempt to resolve [complex] questions" where a "more sensible statutory remedy exists for the disposition of the underlying dispute in this case").

To the extent the Court finds it necessary to reach this claim, it should narrowly rule that the Executive Director's delegated authority did not extend to the action he actually took—adopting a statutory interpretation not previously adopted by the Commission, let alone one that is contrary to the plain text of the statute and the Supreme Court's *ITCA* decision. Whatever authority the Commission delegated, it could not reasonably be construed to include re-interpretation of the EAC's organic statute. As discussed above, the Executive Director founded his analysis on the conclusion that "State-specific instructional changes are ministerial, and, thus, routine," AR0002, and concluded that having a section for state-specific instructions on the Federal Form "implies the role and rights of the states to set the framework for acceptance and completion of the form." AR0005. On that basis the Executive Director opined that he need not "evaluat[e]" the "proof of citizenship" issue and that the state's "examples of the need for these changes are irrelevant." AR0004. At the very least, these statements are new statutory interpretations and do not constitute implementation of policies previously adopted by the Commission.[9] Whatever the scope of the Executive Director's delegated authority, it could not

[9] To the extent the Executive Director characterizes the FEC's 2000 delegation of some responsibility for updating the state-specific instructions as the relevant "policy," *see* AR0004 ("By accepting its first change to the state-specific instructions to the federal form years ago, precedence was set ...."), even assuming that this delegation was

(*footnote continued on next page*)

have included the policymaking in which he actually engaged.[10]

There is good reason for the Court not to reach further and decide hypothetical questions regarding the Commission's internal policymaking. Not only is the scope of the delegation subject to debate, it is an issue that might never need judicial resolution. For example, if the Court holds that the state requests required a determination about whether the information presented met the statutory standard and sets aside the challenged decisions, the Commission may decide to resolve the requests itself—either in its discretion or based on consensus that such a determination involves non-delegated policymaking. Regardless, the Court should permit the Commission to decide the appropriate application of its delegation policy in the first instance. *See, e.g.*, *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (noting that "the responsibility of applying the statutory provisions to the facts of the particular case" is "given in the first instance to the [agency]" and "[a] reviewing court usurps the agency's function . . . and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action").

B. There Is No Statutory or Regulatory Requirement That the Challenged Decisions Be Made Only After Notice and Comment.

For similar reasons, the Court should decline to reach plaintiffs' claim that the EAC was required to proceed by notice-and-comment rulemaking. However, to the extent the Court reaches the issue, it should grant summary judgment to the Federal Defendants on this claim.

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uninterrupted by all subsequent events and that it authorizes the Executive Director to act on the requests at issue here, this delegation does not constitute a conclusion that the statutory standard can be disregarded.

[10] In addition, courts are not empowered to substitute alternative grounds for agencies' decisions. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[I]n dealing with a determination or judgment which an administrative agency alone is authorized to make, ... the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015) ("[W]e cannot make that determination [whether the Board's interpretation is contrary to statute or arbitrary and capricious] yet because we are left wondering how the Board in these circumstances interprets [the relevant provision].").

Plaintiffs erroneously rely on the APA standards for rulemaking, 5 U.S.C. § 553, rather than the APA standards for informal adjudications, 5 U.S.C. § 555. *See* Pls.' Mot. for Temp. Restraining Order & Preliminary Inj. at 35, ECF No. 11-1. As the Tenth Circuit previously found, the Executive Director's decisions on the states' requests are "informal adjudication[s]," *Kobach*, 772 F.3d at 1197, "for which neither notice-and-comment nor an on-the-record hearing is required." *New Life Evangelistic Ctr. Inc. v. Sebelius*, 753 F. Supp. 2d 103, 116 (D.D.C. 2010). The EAC has not issued public notice or solicited comments before deciding a state's request to update its state-specific instructions on the Federal Form, except the one notice issued on a voluntary basis during the prior *Kobach* litigation. *See* State Requests, 78 Fed. Reg. 77,666. An agency has no obligation to issue public notice merely because it has voluntarily done so once in the past.

CONCLUSION

Because the challenged decisions did not apply the statutory standard, they cannot be sustained. The proper remedy under the APA is to set aside the challenged decisions, giving the EAC the opportunity to consider the states' requests under the proper statutory standard. Although the Court should decline to reach plaintiffs' other claims, if it finds it necessary to reach those claims, it should grant summary judgment to Federal Defendants on Count III.

Dated: July 22, 2016

Respectfully submitted,

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