UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**, *Plaintiffs*, *v.* **BRIAN D. NEWBY**, in his capacity as the Executive Director of the United States Election Assistance Commission; and **THE UNITED STATES ELECTION ASSISTANCE COMMISSION**, *Defendants*, and **KRIS KOBACH,** in his official capacity as Kansas Secretary of State, and **PUBLIC INTEREST LEGAL FOUNDATION**, *Defendant-Intervenors.*	Civ. No. 1:16-cv-00236

INTERVENOR-DEFENDANT PUBLIC INTEREST LEGAL FOUNDATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a) and Local Rule 7(h), Defendant-Intervenor Public Interest Legal Foundation respectfully requests summary judgment on all counts of Plaintiffs' Complaint as Defendants' actions were not arbitrary and capricious and were lawful. For the

same reasons, Defendant-Intervenor respectfully requests that the Court deny both the Department of Justice's Motion for Summary Judgment (Dkt. 101), and Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Federal Defendants' Motion for Summary Judgment (Dkts. 102 and 103).

Dated: August 19, 2016

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR DEFENDANT PUBLIC INTEREST LEGAL FOUNDATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Following the suggestion of the Supreme Court in *Arizona v. Inter-Tribal Council of Ariz., Inc*., 133 S. Ct. 2247 (2013) ("*ITCA*"), Alabama, Georgia, and Kansas requested that the Election Assistance Commission ("EAC") modify the state-specific instructions accompanying the Federal voter registration form (hereinafter "the Federal Form") to reflect their state proof-of-citizenship requirements to qualify to vote. Defendant Brian Newby, Executive Director of the Election Assistance Commission ("Executive Director"), accepted the States' requests ("2016 Decision"), which have been reflected on the state-specific instructions to the Federal Form since February 1, 2016.

Plaintiffs (hereinafter "the Leagues") seek to force the EAC to withdraw these changes to the Federal Form. Stunningly, the Department of Justice collusively supports the relief the Leagues seek and has filed a motion for summary judgment to be entered against its own client. The 2016 Decision was a valid exercise of the Executive Director's longstanding delegated authority to approve requests to modify state-specific registration instructions through informal adjudication without a formal vote of EAC Commissioners. The 2016 Decision should be upheld and both the Federal Defendants' Motion for Summary Judgment (Dkt. 101) (hereinafter "Department of Justice's Motion"), and the Leagues' Cross-Motion for Summary Judgment and Opposition to Federal Defendants' Motion for Summary Judgment (Dkts. 102 and 103) (hereinafter "the Leagues' Cross-Motion") should be denied.

STATEMENT OF FACTS

I. Constitutional Background

The Federal Constitution reserves to the States the power to control who may vote in federal elections. This power is expressly provided by the Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of

Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures). According to the U.S. Supreme Court, "'[i]t is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.'" *ITCA*, 133 S. Ct. at 2258 (quoting *Oregon v. Mitchell*, 400 U. S. 112, 210 (1970)). Indeed, "[t]he Framers did not intend to leave voter qualifications to Congress." *ITCA*, 133 S. Ct. at 2263 (Thomas, J., dissenting).

The Constitution's Election Clause gives Congress only limited power with respect to regulations concerning the "Times, Places, or Manner" of holding federal elections. U.S. Const., Art. I, § 4, cl. 1; *ITCA*, 133 S. Ct. at 2257 ("[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."). Congress' power to regulate *how* elections are held, however, is only superior to the States' power to do the same when they differ. That is, Congress's regulations "supersede those of the State which are inconsistent therewith." *Id*. at 2254. As the Supreme Court reaffirmed in *ITCA*, "Times, Places, and Manner" encompasses regulations "relating to 'registration'" of voters. *Id*. at 2253 (internal citations omitted).

II. Statutes Governing the Election Assistance Commission

The EAC, "in consultation with the chief election officers of the States," is charged to "develop a mail voter registration application form for elections for Federal office." 52 U.S.C. § 20508(a)(2). Congress specifically limited the authority of the EAC: "The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted

under section 9(a) of the National Voter Registration Act of 1993." 52 U.S.C. § 20929. Section 9(b) lays out the "contents" of the Federal Form. 52 U.S.C. § 20508(b).

A. Contents of the Federal Form

Congress directed that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1).

Congress specified that the Federal Form must "include a statement that . . . specifies each eligibility requirement (including citizenship)." *Id.* § 20508(b)(2). The required statement must also "contain[] an attestation that the applicant meets each such requirement" and "require[] the signature of the applicant, under penalty of perjury." *Id. See* AR0008-13.[1]

B. State Specific Instructions to the Federal Form

The instructions for the Federal Form state that "[e]ach State has its own laws about who may register and vote." (AR0009.) The Federal Form is followed by 18 pages of state-specific instructions reflecting qualifications. (AR0015-32.). One example of state instructions in place prior to February 1, 2016 are those instructions for the state of Louisiana, which inform Louisiana residents using the Federal Form that if they do not have a Louisiana driver's license, special identification card, or a social security number, they will have to attach additional proof of identification to the Federal Form to complete their registration. (*See* AR0021-22.)

[1] The Administrative Record ("AR") was filed by the Department of Justice on March 17, 2016. *See* Dkt. 69.

III. Supreme Court in *ITCA*

The issue in *ITCA* was whether the "Arizona law requir[ing] voter-registration officials to 'reject' any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship" was inconsistent with the instruction of the NVRA that States "accept and use" the Federal Form. 133 S. Ct. at 2251. The Supreme Court decided that issue in the affirmative. Arizona's law permitted election officials to "reject" the Federal Form altogether—to refuse to "accept and use" it—and thus, pursuant to the Election Clause, Arizona's law must give way because Congress' regulation concerning registration via the Federal Form is superior. *Id*. at 2257.

The *ITCA* opinion reaffirmed the States' exclusive constitutional authority to determine *who* may vote, or voter qualifications—which Congress may not preempt. *Id*. at 2258 ("[N]othing in [the Election Clause] lends itself to the view that voting qualifications in federal elections are to be set by Congress.") (internal citations omitted). "Since the power to establish voting requirements is of little value without the power to enforce those requirements . . . it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id*. at 2258-2259.

According to the Court: "[s]ince, pursuant to the Government's concession, a State may request that the EAC alter the Federal Form to include information *the State deems necessary to determine eligibility*…and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act . . . no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading." *Id*. at 2259 (internal citations omitted) (emphasis added).

IV. State Proof of Citizenship Laws.

Currently, four states have proof-of-citizenship requirements: Arizona, Alabama, Georgia, and Kansas. Kansas's proof-of-citizenship requirements for state elections were effective as of January 1, 2013. (AR0151.) *See also Kobach v. United States Election Assistance Comm'n,* 6 F. Supp. 3d 1252, 1256 (D. Kan. 2014). Prior to the EAC's approval of Kansas's request, individuals who completed the Federal Form were only registered to vote in *federal* elections unless and until they provided proof of citizenship. *See* Dkt. 37 at 50:8-17. Once an individual provides the requisite proof of citizenship, they were also registered to vote in state elections.

A. The EAC's 2014 Decision

In 2013, following the guidance in *ITCA*, Arizona, Georgia, and Kansas submitted requests for the EAC to modify the state-specific instructions accompanying the Federal Form to reflect their state proof-of-citizenship requirements to qualify to vote in federal elections. (*See* AR0222-23.)

Unfortunately, at the time, the EAC did not have any commissioners or even an executive director. The then-Acting Executive Director refused to act upon Arizona, Georgia, and Kansas's requests, leading to a federal lawsuit brought by Arizona and Kansas in the United States District Court for Kansas. *Kobach v. United States Election Assistance Comm'n*, 6 F. Supp. 3d 1252. Three of the Plaintiffs here, the League of Women Voters of the United States, the League of Women Voters of Kansas, and Project Vote, were permitted to intervene as defendants in that lawsuit. *See id*. at 1257. Finding no final agency action, the district court "remanded the matter to the EAC with instructions that it render a final agency action no later than January 17, 2014." *Id*. at 1258.

In response to the district court's directive, then-Acting Executive Director Alice Miller took the unusual step of requesting notice and comment on the States' requests. (AR0276-AR0281.) Comment submissions then followed, including many comments from special interest groups such as various plaintiffs here. Miller then issued a 46-page decision on January 17, 2014, denying the States' requests (the "2014 Decision") as urged by the same special interest groups. (AR0283-0328.) The origin of this decision was questioned by Intervenor-Appellee Secretary Kobach during the hearing on the Leagues' Motion for Temporary Restraining Order. (Dkt. 37 at 59:10-61:6 (Secretary Kobach explaining his belief that the Department of Justice drafted the 2014 agency Decision, not the EAC); *see also* Declaration of Brian Dale Newby (Dkt. 28-2 ¶ 22 ("Ms. Miller suggested I talk to the Department of Justice attorneys, who she said could explain to me what our position was . . . . [S]he could not articulate the substance of the final agency decision that was previously released by her, and which had been written by the Department of Justice attorneys . . . .").)[2] The Department of Justice informed this court that it "advised" the EAC on the 2014 decision (*see* Dkt. 37 at 41:7-43:6), and, in response to questioning from the Court, Secretary Kobach stated his belief that Bradley Heard was one of the Department of Justice lawyers who authored the 2014 decision, (Dkt. 37 at 59:10-61:3.) According to Secretary Kobach, Attorney Heard is not an attorney in the Federal Programs Branch, or in the Civil Division. He is an attorney in the Voting Right Section of the Civil Rights Division. (Dkt. 37 at 60:11-22.)

Arizona and Kansas challenged the 2014 Decision in federal court and the district court found that the EAC had "'a nondiscretionary duty' to include the states' concrete evidence

[2] It is unclear to Defendant-Intervenor Public Interest Legal Foundation why this declaration was not included in the Administrative Record but, at a minimum, it is properly considered for the reasons outlined in the Department of Justice's Motion at 16 n. 8.

requirement in the state-specific instructions on the federal form." *Kobach*, 6 F. Supp. 3d at 1271. The Tenth Circuit Court of Appeals reversed, finding that the "EAC does have discretion to reject such requests." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1196 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015).

B. The EAC's 2016 Decision

On January 13, 2015, following a Presidential nomination and unanimous U.S. Senate confirmation, Thomas Hicks, Matthew Masterson, and Christy McCormick were sworn in as EAC Commissioners. EAC, Commissioners, http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Aug. 19, 2016). (*See also* AR 0845-46). In November 2015, Brian Newby was hired as the EAC's new Executive Director. (AR0001.)

Also, in November 2015, Kansas requested that the EAC modify its state-specific instructions on the Federal Form to reflect current state law, including a new regulation that allows individuals 90 days to provide the requisite proof of citizenship. (AR0072-76.) With its request, Kansas also provided examples of noncitizens voting in its elections in order to demonstrate the necessity of its proof-of-citizenship requirements. *Id*.

Executive Director Newby evaluated Kansas's request along with other outstanding requests from Georgia, Alabama, and Michigan. (Dkt. 28-2 ¶¶ 30, 38-39, 49.) "After determining that the changes to the state-specific instructions were necessary and proper," Mr. Newby finalized and mailed his acceptance of the requests from Alabama, Kansas, and Georgia on January 29, 2016 (hereinafter, the "2016 Decision"). (Dkt. 28-2 at ¶¶ 46, 49; *see also* AR0001-0007, AR0063-64, AR0070-71, AR0109-10.) The changes were posted on the EAC's website as of February 1, 2016. (Dkt. 28-2 at ¶ 51.)

V. Procedural History

On February 12, 2016, the Leagues filed their Complaint for Declaratory and Injunctive Relief below. (Dkt-1.) On February 17, 2016, the Leagues filed their motion for a temporary restraining order and preliminary injunction (Dkt. 11), and supporting Memorandum, (Dkt. 11-1). On February 19, Kansas Secretary of State Kris Kobach filed a motion to intervene. (Dkt. 20.) On February 20, the Public Interest Legal Foundation filed its motion to intervene. (Dkt. 24.) On February 22, the Department of Justice filed its response to the Leagues' motion for temporary restraining order, stunningly stating that "[t]he United States consents to plaintiffs' request for entry of a preliminary injunction." (Dkt. 28 at 1.)

This Court granted both Intervenors' Motions on February 22, 2016. (Minute Orders, February 22, 2016.) On the same day, this Court held a hearing on the Leagues' motion for a temporary restraining order, which it denied on February 23, 2016. (Dkt. 34.) The Court then allowed Intervenors to file responses to, and the Leagues and the Department of Justice to file supplemental briefing on, the preliminary injunction motion. (Dkts. 47, 48, 55, 56, 60, 61.)

On February 29, 2016, this Court held a telephonic conference to address Defendant-Intervenor Secretary Kobach's request for limited discovery, specifically a deposition of EAC Commissioner Christy McCormick. Plaintiffs and Federal Defendants objected to the taking of the deposition. "Upon due consideration of the parties' oral arguments," the Court granted the request and ordered that the deposition be taken by March 2, 2016. Minute Order (Feb. 29, 2016). The deposition took place pursuant to the terms stated in Secretary Kobach's Deposition Notice. (Dkt. 38.) Defendants-Intervenors then referenced Commissioner McCormick's testimony in their

respective responses to the Leagues' motion for preliminary injunction filed under seal on March 6, 2016. (Dkts. 60 and 61.)[3]

On March 9, 2016, the Court held a hearing on the Leagues' motion for preliminary injunction. Afterwards, the Court allowed the parties to file additional supplemental briefs on the motion. (Dkts. 71, 72, 73, 83, and 84.) On June 29, 2016, this Court issued an order denying Plaintiffs' motion, finding that "because plaintiffs have failed to demonstrate they will be irreparably harmed absent injunctive relief, they have not met their burden of showing their entitlement to a preliminary injunction." *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727, *36 (D.D.C. June 29, 2016). This Court acknowledged that "there are extremely important competing interests at stake in this case" and concluded that:

> But, in the final analysis, what lies at the heart of this case are the scope of the authority and the legality of the actions of an *independent* federal agency that is represented here by Executive Branch counsel who, for the most part, decline to defend it. The Court will carefully weigh these competing positions on the merits when it turns to the dispositive motions phase of this litigation in the weeks ahead.

Id. *41.

On July 1, 2016, the Leagues filed a notice of appeal. (Dkt. 95.) The Court of Appeals granted the Leagues' motion to expedite on July 13, 2016. As of August 10, 2016, the appeal has been fully briefed, with oral argument scheduled for September 8. *See* League of Women Voters, et al. v. Newby, No. 16-05196 (D.C. Cir. 2016).

[3] Voluminous discovery materials and pleadings remain under seal in this case. Although Defendant-Intervenor Public Interest Legal Foundation does not believe these materials should remain under seal, in light of the expedited nature of this briefing and the Foundation's belief in the public's general right of access to court filings, the Foundation opted not to reference any sealed materials herein. However, the Foundation contends that these record materials may be relied on by the Court in deciding motions for summary judgment and, if the Court deems appropriate, may be unsealed *sue sponte*.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., permits "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review of the agency action. 5 U.S.C.S. § 702. Upon review a court "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).

The "arbitrary and capricious" scope of review is "a narrow one." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285, (1974). The court must only "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. (citations and quotations omitted). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009) (citations and quotations omitted).

"The court is not empowered to substitute its judgment for that of the agency." *Bowman Transp., Inc.*, 419 U.S. at 285 (internal citations omitted). While "the focal point for judicial review should be the administrative record already in existence," the court may consider a "contemporaneous explanation of the agency decision" and "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). The court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.*, 419 U.S. at 286.

A "court accords substantial deference to an agency's views." *Petit v. USDE*, 675 F.3d 769, 778 (D.C. Cir. 2012) (quotations and citations omitted). "[A]n agency interpretation that 'does not violate the Constitution or a federal statute . . . must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)).

ARGUMENT

I. The Leagues Are Not Entitled to Summary Judgment Because They Have Not Established They Have Standing to Challenge the Executive Director's Decision.

The "irreducible constitutional minimum of standing contains three elements": (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and, (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

"To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment—as opposed to a motion to dismiss—however, mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits." *DOC v. United States House of Representatives*, 525 U.S. 316, 329 (1999) (citations omitted).

The Leagues' pleadings and affidavits fail to establish that there are no genuine issues of material fact as to some or all of the elements of standing, and summary judgment should be accordingly denied.

A. The Kansas League Has Not Established Standing Because There is a Disputed Issue of Material Fact as to Whether It Will Suffer an Injury in Fact That is Concrete and Particularized.

The Supreme Court has held that "the constitutional standing requirement under [the APA] to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976).

The Kansas League alleges that it "leads voter registration drives, distributes information about the electoral process, and promotes electoral laws and practices that encourage voter participation." (Dkt. 1 at ¶ 10.) The Kansas League further alleges that the Executive Director's actions "hinders the ability of Plaintiffs to assist voters to register" and will therefore "harm Plaintiffs' mission to ensure that all eligible voters can register and cast a ballot that counts." (*Id*. at ¶ 69.)

However, after declarations were submitted to this Court, the current president of the Kansas League testified as a Rule 30(b)(6) deponent in a different federal action that, "The League of Women Voters of Kansas as a State organization does not conduct voter registration drives." (*See* League of Women Voters v. Newby, D.C. Cir. No. 16-5196, Exhibit 3 to Appellee-Intervenors' Response to Emergency Motion to Expedite (Doc. #1624047) (Excerpt of Deposition of Marge Ahrens, 90:4-6 (June 8, 2016)).)[4] It is thus far from clear that the Kansas League will in fact suffer the harm to voter registration efforts it has alleged.

[4] "Article III courts are required to satisfy themselves of their own jurisdiction before proceeding to the merits of a case." *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 144 (D.D.C. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998)). Because this rule is "inflexible and without exception," *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982), the Foundation respectfully requests that this Court take judicial notice of the Kansas Leagues' testimony before another federal court.

Before the Court of Appeals on this Court's denial of the Leagues' request for a preliminary injunction, the Kansas League admits that only "*local* leagues of the Kansas League . . . conduct [voter registration] drives" and that the Kansas League "gives guidance, education, and training to the local leagues in that regard…." (*See* League of Women Voters v. Newby, D.C. Cir. No. 16-5196, Appellants' Reply to Responses to Motion to Expedite (Doc. #1624317) at 6 n.1) (emphasis added.) Of course, those "local leagues" are not parties to this case and such statements appear to conflict with the allegations in the Leagues' Complaint. (*See* Dkt. 1 at ¶ 10 ("the Kansas League leads voter registration drives").)

A plaintiff organization may establish standing if it can show that the defendant's actions cause a "'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'" *Citizens for Responsibility & Ethics v. United States Dep't of the Treasury*, 21 F. Supp. 3d 25, 37 (D.D.C. 2014) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) Standing is established only where an organization's activities are "perceptibly impaired" by the defendant's actions. *Havens Realty Corp.*, 455 at 379. To show this, the "organization must allege that discrete programmatic concerns are being *directly* and adversely affected by the challenged action." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (quotations and citation omitted) (emphasis added); *see also Citizens for Responsibility & Ethics*, 21 F. Supp. 3d at 37 ("[P]rogrammatic injury arises only from 'a *direct* conflict between the defendants' conduct and the organization's mission.'") (citations omitted) (emphasis added).

Importantly, the Leagues' Complaint does not describe the interplay between the state-level Kansas League and its local affiliates such that this Court can conclude that injuries to the voter registration activities of local Kansas affiliates—if any—will cause direct and perceptible

harm to the Kansas League that is "concrete and particularized." *Lujan*, 504 U.S. at 561. At best, affidavits submitted by the Kansas League explain generally that it has "coordinated the activities of [its] local affiliates on a range of statewide issues . . . and communicated with [its] local affiliates and [has] been kept apprised of their activities." (Dkt. 13-7 at ¶ 3.) These statements, however, do not allege any harm to the local affiliates or explain how any alleged harm to the Kansas League will be caused by harm to its local affiliates.

The Kansas League is not entitled to summary judgment unless "there exists no genuine issue of material fact as to justiciability or the merits." *DOC*, 525 U.S. at 329. The record does not sufficiently establish that the Kansas League will suffer an injury in fact to its voter registration activities or that such injury, if inflicted on its local affiliates, will harm the Kansas League in a way that is "concrete and particularized." Accordingly, summary judgment should be denied.

B. The Alabama and Georgia Plaintiffs Have Not Established Standing Because They Have Not Demonstrated a Credible Threat of Enforcement or That a Decision in Their Favor Will Redress Their Alleged Injuries.

The Alabama and Georgia Leagues lack of entitlement summary judgment is even clearer. As this Court found, the record demonstrates that in Alabama and Georgia, "the documentation of citizenship requirements are not even being enforced." *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727 at *34 (D.D.C. June 29, 2016). That is, residents using the Federal Form to register to vote are not required to show proof of citizenship.

Although the Leagues' action challenges the actions of the Executive Director under the APA, their alleged injuries stem from enforcement of the proof-of-citizenship requirement. *Califano v. Sanders*, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of

subject-matter jurisdiction permitting federal judicial review of agency action."). Because the proof-of-citizenship requirement is not being enforced in Alabama and Georgia, the plaintiffs in those states must satisfy the elements of a pre-enforcement challenge to establish standing.

A plaintiff satisfies the injury-in-fact requirement for a pre-enforcement challenge where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (internal citations omitted). Even assuming the Alabama and Georgia Leagues have satisfied the first two elements of this test, they cannot establish a credible threat of enforcement. Importantly, there is no "history of past enforcement," *Driehaus*, 134 S. Ct. at 2345, on which to base their injuries, and the Leagues do not provide any indication that the law will be enforced prior to the November election or any time thereafter.

In other words, the Alabama and Georgia Leagues' alleged injuries are not "actual or imminent," but are "conjectural or hypothetical." *Lujan*, 504 U.S. at 560.[5] They do not have standing and summary judgment should be denied.

C. Plaintiffs League of Women Voters of the United States and Project Vote Do Not Have Standing Because There Are Genuine Issues of Fact Regarding Whether Their Alleged Injuries Are Concrete and Particularized and Because Their Alleged Injuries Depend on the Actions of Other Parties That Lack Standing.

Plaintiff League of Women Voters of the United States ("LWV") vaguely alleges, "As part of its mission, the League—with its state and local affiliates—operates one of the longest-

[5] As this Court has already determined, the individual plaintiffs, Joann and Marvin Brown do not have standing. They "have not demonstrated any injury—irreparable or otherwise stemming from the administrative actions at issue in this case" because "they submitted their Federal Form applications before [the Executive Director] modified the form to include Kansas's documentation of citizenship requirement and . . . Kansas accordingly approved their Federal Form applications." *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727 at 33 n.18.

running and largest nonpartisan voter registration efforts in the nation." (Dkt. 1 at ¶ 7.) The LWV makes no other allegations of direct harm specific to itself, but simply joins the allegation made by all plaintiffs that the Executive Director's action "hinders the ability of the Plaintiffs to carry out their mission of promoting voter participation through voter registration drives." (Dkt. 1 at ¶ 67.) Yet even assuming the LWV provides resources to facilitate the activities of the other plaintiffs, such allegations do not explain how LWV will be prevented from doing so as a result of the Executive Director's actions. LWV's ability to support its state and local affiliates is simply not "perceptibly impaired." *Havens Realty Corp.*, 455 at 379.

Nor can LWV rely on harms to voter registration activities pleaded by the Kansas League. As explained above, the Kansas League has not pleaded sufficient facts to establish that its activities—as opposed to its local affiliates—will be hindered in any concrete way as a result of the Executive Director's actions. Like the Kansas League, the LWV does not describe how it interacts with local affiliates such that an injury to the local affiliates can be imputed to the LWV. LWV has not alleged "programmatic injuries" that are "direct." *Citizens for Responsibility & Ethics*, 21 F. Supp. 3d at 37.

Moreover, the LWV lacks standing in Alabama and Georgia for the same reasons the Alabama and Georgia Leagues lack standing: the proof-of-citizenship requirement is not being enforced. The LWV, despite the resources they might provide in those states, cannot establish a credible threat of enforcement necessary to establish standing.

For nearly identical reasons, Plaintiff Project Vote also lacks standing. Project Vote alleges that it "plans to conduct and facilitate voter registration activities in 2016 including in Georgia." (Dkt. 13-9 at ¶ 11.) Of course, such plans do not establish an "imminent" injury because the challenged law is not being enforced and no credible threat of enforcement exists.

Project Vote does not allege that it will conduct any voter registration drives in Kansas. Rather, Project Vote vaguely alleges that it has and will provide "technical assistance" to "state-based organizations conducting voter registration drives in Georgia and other states." *Id*. Project Vote does not describe what type of "technical assistance" it will provide. And even if Kansas is one of those "other states" Project Vote plans to assist, it does suffice to establish an injury-in-fact because the state-level Kansas League does not conduct voter registration drives.[6] Project Vote's alleged injuries are simply "too attenuated" to constitute a concrete injury. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

II. Intervenor-Defendants Are Entitled to Summary Judgment on Counts I and II of the Leagues' Complaint Because the Executive Director Act in Accordance with Law and Policy.

Counts I and II of the Leagues' Complaint are distinct, but related. The Leagues readily concede that in 2008, the EAC voted to delegate to the Executive Director the authority to unilaterally approve requests by each state to alter the state-specific registration instructions on the Federal Form. (Dkt. 102 at 24.) However, the Leagues contend that such authority was superseded in 2015. (*Id*.) The Leagues thus argue that the States' proof-of-citizenship requirement should be set aside because the Executive Director exceeded his statutory authority

[6] Project Vote explains that it also "produces state-specific voter registration drive guides for 35-40 states, including state-specific guides for Alabama, Kansas, and Georgia." (Dkt. 13-9 at ¶ 27.) However, Project Vote explains that the guides are updated as a matter of course "each election cycle" and "when Project Vote learns of new voter registration laws or procedures being implemented in a state." (*Id*.) Project Vote does not allege that it has refrained from updating its voter guides as a result of the Executive Director's actions, but rather alleges that such changes have caused "uncertainty regarding what the currently-applicable procedures are for voters." (*Id*. ¶ 28.) Yet there is no uncertainty. Kansas is currently enforcing the proof-of-citizenship requirement and Alabama and Georgia are not. The decision to not update their voter guides to reflect this is of Project Vote's own choosing. It is thus not sufficient to establish an injury traceable to the Executive Director. *See Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012); *see also Lujan*, 504 U.S. at 560-61 (1992) (causal connection required to establish standing).

under HAVA by approving the requirement without the affirmative vote of at least three EAC Commissioners (Count I), and his delegated authority (Count II). As will be explained, neither contention has merit.

A. The Executive Director Did Not Exceed his Authority Under HAVA Because Established Policy and Procedure of the Federal Election Commission Directs Changes to State-Specific Registration Instructions to be Made Without a Formal Vote of Commissioners.

Prior to the creation of the EAC, the duty to maintain the Federal Form was vested in the Federal Election Commission ("FEC"). (*See* AR0758.) The Administrative Record here reflects the procedure and policy of the FEC for modifying the state-specific instructions on the Federal Form. In a 2008 EAC Meeting, former EAC Vice-Chair Hunter discussed the policy, (AR0758-0761) and read the following into the record:

> [T]he Office of Election Administration has requested a Commission vote on all changes to the form, from the initial development of the National Mail Voter Registration form in 1993 to the present. Yet changes to state law that in turn require changes to the state information on the National Form *are beyond the control of the Commission*. Therefore, the Office of Election Administration proposes that in the future all changes to the state information be completed without a formal vote --- *without a formal Commission vote.* The Office of Election Administration will notify the Commissioners via Information Bulletin as such changes are made. This will enable our office to more quickly update the Form for changes in state information.
>
> The Office of Election Administration will continue to submit for Commission vote all other applicable changes, such as revisions to the postcard application or to the parts of the instructions that are *not state specific.*

(AR0761) (emphasis added.) On August 8, 2000, the FEC approved this procedural policy change, which placed a duty on the FEC to "make any changes to the National Voter Registration Form that are required by changes in state law." (AR0163 and AR0168 at n.1.) The change made adoption of state-specific changes effectively non-discretionary: "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." (AR0163.) The procedural change required the FEC to "submit for a formal Commission vote" only those changes to the Federal Form "that are not specific to a given state." (*Id.*)

In 2002, the Help America Vote Act ("HAVA") created the EAC and transferred to the EAC "all functions which the Federal Election Commission exercised" under the NVRA. 52 U.S.C. § 21132. As the aforementioned FEC policy explains that "all changes to state information" were "completed without a formal Commission vote." (AR0761) (*see also,* AR0163 and AR0168 at n.1.) The FEC had no discretion to vote on or reject such changes. Such actions were thus not a "function" that was "exercised" by the FEC at the time HAVA transferred authority over the Federal Form to the EAC.

The policy of the FEC remains the policy of its successor, the EAC. HAVA is not to the contrary. HAVA requires "the approval of at least three" commissioners only to carry out "[a]ny action which the Commission is authorized to carry out under this chapter." 52 U.S.C. § 20928. Under the adopted policy of the FEC, which was binding on the EAC, the EAC was not "authorized," and thus not required, to adjudicate state-specific changes by formal Commission vote.

Contrary to the Leagues' argument, it has long been the established policy of the FEC and EAC to approve state-specific requests "without Commissioner involvement." (AR0004.) By acting in accordance with that established policy, the Executive Director did not exceed his authority under HAVA and therefore did not violate the APA when he approved the States' requests.

B. The 2015 Election Assistance Commission Organizational Management Policy Statement Did Not Supersede the FEC's Policy of Making Changes to State-Specific Registration Instructions Without a Formal Vote of Commissioners.

Relatedly, the Leagues' argue, under Count II, that the Executive Director exceeded his *delegated* authority approving the States' request with the affirmative vote of three Commissioners. This argument also fails.

In 2008, the EAC adopted a policy statement entitled the Roles and Responsibility Statement ("2008 Policy Statement"). (AR0209-16.) In that policy, the EAC stated that "This policy supersedes and replaces any existing EAC policy that is inconsistent with its provisions. Any existing policies (not inconsistent with this policy) *issued by an authority no longer responsible for the matter covered,* shall be treated as if issued by the authority identified in this policy." (AR0216) (emphasis added). The underlined language must refer to the FEC because the FEC was the federal agency responsible for maintaining the Federal Form prior to the creation of the EAC under HAVA.

The 2008 Policy Statement delegated to the Executive Director, *inter alia*, the authority to "[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals, and other policies of general applicability issued by the commissioners…Maintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies; and…Manage the collection of election information from states consistent with the requirements of the NVRA, HAVA, UOCAVA, EAC Regulations, and EAC policy." (AR0215-AR0216.) None of these responsibilities is "inconsistent" with the FEC's policy, articulated above, of making "all changes to state information . . . without a formal Commission vote." (AR0761.) (*see also,* AR0163 and AR0168 at n.1.)

The Leagues nonetheless contend that the Executive Director's authority to approve state-specific changes without formal Commission vote was "superseded" in 2015 by the "Election Assistance Commission Organizational Management Policy Statement," which became effective February 24, 2015 ("2015 Policy Statement"). (Leagues' Cross-Motion at 14.) The 2015 Policy Statement provides, "This document supersedes the Roles and responsibilities Statement dated September 15, 2008 . . . and replaces any existing EAC policy or document *that is inconsistent with its provisions*." (AR0226) (emphasis added.) Contrary to the Leagues' belief, nothing in the 2015 Policy Statement is "inconsistent" with either the FEC's policy requiring no formal Commission vote, or the 2008 Policy Statement. The 2015 Policy Statement provides in relevant part,

> **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.) The plain text of the 2015 Policy Statement refutes the Leagues' arguments. The 2015 Policy Statement requires "Policymaking" to be accomplished through the "formal voting process" of a quorum of commissioners. *Id*. Importantly, "Policymaking" is explicitly defined. It includes a "determination setting overall agency mission, goals, and objectives, or otherwise setting rules, guidance or guidelines." *Id*.

As the Tenth Circuit confirmed, the decision whether to grant or deny modification to state-specific requests is an "informal adjudication carried out pursuant to 5 U.S.C. § 555." *Kobach*, 772 F.3d at 1197. It is neither the setting of "overall policy" or "rules, guidance or guidelines," rendering it outside the scope of the 2015 Policy Statement. *See* 5 U.S.C. § 551 (defining "rule" and "adjudication").[7] It was precisely under this correct understanding of these terms that the Executive Director relied on his long-standing authority—dating back to the FEC—to approve the States' requests as a matter of course without Commissioner involvement. (AR0004 ("Policies, in this context, are agency policies, and related to the NVRA form and instructions, means that by policy, changes to the form require Commission approval and changes to the instructions consistent with state law do not.").)

Contrary to the Leagues' unsupported belief, the 2015 Policy Statement did not supersede the Executive Director's longstanding authority to informally adjudicate the States' request for modification to their state-specific instructions without a formal Commission vote. In fact, what evidence exists on this matter plainly contradicts the Leagues' interpretation of the 2015 Policy Statement.

When the 2015 Policy Statement was adopted, now-Chairman Hicks stated:

> I and my fellow Commissioners agree that [the 2015 Policy Statement] *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 Executive Director will still be able to manage the daily functions of the agency consistent with federal statute, regulation and the EAC policies, answer questions from stakeholders regarding the application of [National Voter Registration Act] and [Help America Vote Act] consistent with EAC policies and guidelines and advisory and policies as set by the Commissioners.

[7]Although the 2015 Policy Statement is not a statute, "the statutory construction principle, *expressio unius est exclusio alterius*, that is, the mention of one thing implies the exclusion of another thing" *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997), applies equally here.

(AR0860) (emphasis added.) The Department of Justice, likewise, agrees. (Department of Justice's Motion at 11 (The EAC's "choice not to list specific tasks for the Executive Director [in the 2015 Policy Statement] did not remove those responsibilities" provided in the 2008 Policy Statement.).

Authority to "maintain the federal form" is precisely the authority the Leagues concede gives the Executive Director the power to grant or deny proof of citizenship requirements. (Leagues' Cross-Motion at 24.) The "past directives" referenced by Chairman Hicks necessarily includes the FEC's longstanding policy of making changes to state-specific instructions without formal Commission vote, because, as explained, they were not "counter made" by either the 2008 Policy Statement or the 2015 Policy Statement.

As the Tenth Circuit noted, the judiciary owes "deference to the EAC's interpretation of the statute it was charged with administering when it issued [the 2008 delegation of authority], and to its conclusion that HAVA, the EAC's enabling statute, permitted the Executive Director to issue decisions on behalf of the agency in maintaining the Federal Form." *Kobach*, 772 F.3d at 1190 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870-71 (2013) (deference extends to an agency's interpretation of the scope of its own authority under a statute)). It was plainly the intention of the Commissioners to preserve—not supersede—the policy of adjudicating state-specific changes without the formal Commission vote.

In an attempt to save their argument, the Leagues claim that the EAC had at one point adopted a "longstanding policy," under which "the Commission would not approve state requests to include their proof of citizenship requirements on the Federal Form," (Leagues' Cross-Motion at 24), and therefore approval of the States' request was a change in agency policy that required a

formal Commission vote. However, the Leagues' citation for this argument reveals no such policy.

Rather, the League cites to the then-Executive Director Alice Miller's 2014 memorandum denying Kansas' proof-of-citizenship requirement. (AR0283-0328.) The action which the Leagues' believe established a "policy" was, at best, nothing more than another informal adjudication—specifically, a 2006 Commission vote on whether to "grant Arizona an 'accommodation' and include Arizona's proof of citizenship requirements in the state-specific instructions on the Federal Form." (AR0305.) The EAC deadlocked 2-2 and the accommodation was denied.

Although the Leagues, quoting Executive Director Miller, claim that denial "established a governing policy," (Leagues' Cross-Motion at 24), they do not provide any actual policy. Nor do they explain how a 2-2 vote of Commissioners could even create a policy. The entire basis for the Leagues' argument is that policymaking (or what they believe to be policymaking) requires the vote of *three* Commissioners, as required by HAVA. The Leagues cannot have it both ways.

What actual policies exist—and which are in the record—permit adjudication of state-specific changes to the Federal Form without the formal vote of the Commission. The Executive Director's approval of the States' requests was plainly consistent with its "past directives," specifically, the FEC's 2000 procedural policy, which instructs that changes to State information be completed "without a formal Commission vote." (AR0761)

The policies of the FEC and EAC are not simply a matter of administrative convenience—they are compelled by the Constitution. The Federal Constitution's "Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *ITCA*, 133 S. Ct. at 2257. Who may vote in elections is expressly reserved to the States. *Id.* at 2258. ("Surely

nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.") (internal quotations omitted). "Since the power to establish voting requirements is of little value without the power to enforce those requirements . . . *it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications*." *ITCA*, 133 S. Ct. at 2258-2259 (emphasis added). Interpreting the EAC's authority to include the power to deny the States the power to enforce its voter qualifications would plainly contravene the Constitutional balance reiterated by the Supreme Court in *ITCA*. This is precisely why the FEC's policy recognized that decision concerning State changes to voter registration instructions were "beyond the control of the Commission" and should be adopted "without a formal Commission vote." (AR0761.)

III. The Leagues Are Not Entitled to Summary Judgment on Count III Because Informal Adjudications Are Not Subject to the Administrative Procedure Act's Notice and Comment Requirement.

The Leagues' argument that the 2016 Decision was subject to the Administrative Procedure Act's notice-and-comment requirement depends on their incorrect assertion that the Executive Director's consideration of the States' requests was an act of legislative rulemaking. (Leagues' Cross-Motion. at 35.) As previously explained by the Tenth Circuit, the Executive Director's decision to grant the States' requests was not an act of rulemaking, but a routine informal adjudication, *Kobach*, 772 F.3d at 1197, conducted under the authority of longstanding FEC and EAC policy. This crucial distinction renders the Leagues' entire argument on this point fatally irrelevant.

The Tenth Circuit's determination that consideration of the States' requests is an act of informal adjudication is consistent with the definitions of the relevant terms under the APA.[8] "'[A]djudication' means agency process for the formulation of an order." 5 U.S.C § 551(7). An "order," in turn, is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(7).

A "disposition," as used here, is as a "final settlement or determination." Black's Law Dictionary, 2d Pocket Ed., 211 (West Group 2001). Consistent with that well-known definition, the legislative history "indicates that an agency adjudication represents the judicial, rather than legislative, function of the agency . . . ." *Nat'l Prison Project of ACLU Found., Inc. v. Sigler*, 390 F. Supp. 789, 791-92 (D.D.C. 1975) (citing H.R. Report No. 1980, 79th Cong., 2d Sess. 17 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., appendix B (1945)).

Guided by these terms, it is clear that the Executive Director acted in an adjudicatory capacity when considering and then approving the States' requests. "The logical description of such proceeding, wherein a decision is rendered upon consideration of opposing factual claims in the context of defined standards, is an adjudication." *Sigler*, 390 F. Supp. at 792 (holding that decision to approve or deny parole applications is an "adjudication" under the APA). Indeed, the

[8] The Leagues attempt to narrowly remake the Tenth Circuit's determination that consideration of state-specific changes to the Federal Form is an "informal adjudication." They erroneously claim that the Tenth Circuit determined only that the Executive Director's decision to *deny* the states' request was an informal adjudication. (Leagues' Cross-Motion at 35 n.8.) The Tenth Circuit did no such thing. The court broadly construed the authority in question: "The key inquiry then involves what kind of questions the Executive Director is authorized to decide in maintaining the Federal Form. . . . [T]he EAC contends that the Executive Director was subdelegated the authority to *make decisions* regarding state requests to modify the contents of the Federal Form. We agree." *Kobach*, 772 F.3 at 1191 (emphasis added.) Nowhere in its opinion does the Tenth Circuit make the narrowing limitation suggested by the Leagues.

Executive director rendered a "final disposition," or "determination" of the States' requests and did so in the "affirmative." 5 U.S.C. § 551(7).

An agency adjudication can be either formal or informal. "Under the APA, a formal adjudication is necessary . . . only when some statute requires a determination 'on the record after opportunity for an agency hearing.'" *Izaak Walton League v. Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981) (quoting 5 U.S.C. § 554). There is no statute setting forth such a requirement for the adjudication of requests to modify state-specific instructions to the Federal Form. The process is therefore an "informal adjudication," which "is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings. The APA fails to specify the procedures that must be followed for agency actions that fall within this category." *Id*. at n. 37.

It is the law of this Circuit, consistent with the APA, that when a decision is "not rules" under the Act, but "informal adjudications," the Act's notice-and-comment procedures are not "trigger[ed]." *Int'l Internship Program v. Napolitano*, 718 F.3d 986, 988 (D.C. Cir. 2013). The Department of Justice agrees. (Department of Justice's Motion at 24-25 ("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….An agency has no obligation to issue public notice merely because it has voluntarily done so once.").

Accordingly, the Executive Director did not contravene the APA when he approved the States' requests without issuing public notice.

IV. The Leagues and the Department of Justice Are Not Entitled to Summary Judgment on Count IV Because the Executive Director Did Not Depart from Agency Policy, But Acted Consistent with It.

Under Count IV the Leagues argue that the 2016 Decision must be set aside as "arbitrary and capricious" because the EAC allegedly did not explain why "they were departing from agency precedent." (Leagues' Cross-Motion at 38.) The Leagues are wrong. As explained in detail in Part II of this memorandum, the Executive Director acted in accordance with longstanding, established policy, under which the FEC and its successor, the EAC, approve requested modifications to state-specific instructions "without a formal Commission vote," (AR0761) as well as a valid delegation of authority, under which the Executive Director may unilaterally approve such requests.

The Leagues' arguments to the contrary again rest on their unsupported belief that the EAC adopted, in 2006, a "policy not to allow states to amend the Federal Form so as to require proof of citizenship documentation." (Leagues' Cross-Motion at 39.) The Leagues provide no actual EAC policy to support their argument. Nor could they, as the Constitution would not permit it. Nevertheless, the Leagues point to a single, out-of-court statement by former EAC acting-Executive Director Alice Miller, stating her belief that the EAC established such a policy. (AR0305.) Ms. Miller's statement—which contradicts actual written policies described earlier—is in turn supported by a 2-2 vote of the EAC, which rejected a request by a single state, Arizona, to include proof-of-citizenship requirements in the state-specific instructions on the Federal Form. (*Id*.) The Leagues' arguments fail under HAVA and by their own admissions.

As the Leagues' concede, policymaking requires the affirmative vote of at least three Commissioners. Even assuming an agency can establish policy through an informal adjudication, the 2-2 vote relied upon by Ms. Miller and the Leagues failed to satisfy the explicit, three-vote requirement of HAVA and therefore created no policy.

Furthermore, the 2-2 vote itself was essentially a courtesy to then-Chairman Paul DeGregorio. (*See* AR0305 (vote conducted after Chairman "recommended" that EAC grant Arizona an "'accommodation'").) The vote on Arizona's proof-of-citizenship came only *after* then-Executive Director Thomas R. Wilkey had already unilaterally rejected Arizona's request. (AR0233-35.) Under FEC and EAC policy, the Commissioners were not authorized to vote on that request. Regardless, there are simply no indications that the vote was anything other than a one-time adjudication of Arizona's request.

V. The Leagues and the Department of Justice Are Not Entitled to Summary Judgment on Count V Because the Decision to Grant the States' Request Can Be Reasonably Discerned from the Record and Did Not Violate the NVRA.

Under Count V, the Leagues and the Department of Justice argue that the Executive Director's decision must be set aside as arbitrary and capricious because the EAC did not explain "why documentary proof of citizenship was 'necessary,' in accordance with the prescription in the NVRA." (Leagues' Cross-Motion at 38; *see also* Department of Justice's Motion at 15.) On this point, the Leagues and the Department of Justice are also wrong.

A. The Reasoning for the Executive Director's Decision is Easily Discernible from the Record.

The Executive Director issued a thorough and detailed memorandum on February 1, 2016, explaining his decision to grant the States' request to modify their state-specific instructions. (AR0001.) The Executive Director noted, as explained further in Part II of this memorandum, that the approval of changes to state-specific instructions has, as a matter of precedent and policy, been a "ministerial duty carried out by the Executive Director . . . without Commissioner involvement." (AR0004.) Importantly, the Executive Director recognized that the "federal form, itself, has state-by-state instructions. This implies the role and rights of the states to set the framework for acceptance and completion of the form." (AR0005.) His decision, the

Executive Director concluded, was consistent with similar requests made by Louisiana and Nevada. (AR0004.) Accordingly, Executive Director Newby granted the States' requests. Furthermore, in testimony before the district court, Executive Director Newby swore, "After determining that the changes to the state-specific instructions were necessary and proper," (Dkt. 28-2 at ¶ 46), he accepted the state-specific changes.

Whether the Executive Director has provided what the Leagues' personally believe is an adequate justification for its adjudication is irrelevant. Indeed, the Leagues appear to have never once supported any effort to verify the citizenship of registrants. The Supreme Court has made clear that while the States must "accept and use" the Federal Form, *see ITCA*, 133 S. Ct. at 2257, the determination of necessity does not reside with the EAC, but resides with the states, and certainly not with the Leagues or Department of Justice: "a State may request that the EAC alter the Federal Form to include information that the *State deems necessary to determine eligibility*…." *ITCA*, 133 S. Ct. at 2259 (emphasis added). The Leagues and the Department of Justice may be zealously opposed to efforts to verify that non-citizens are barred from voting, but that is not their decision to make.

Even if other aspects of the Executive Director's reasoning are somehow viewed as unclear, it makes no difference: "[T]his Court "will . . . uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (citations and quotations omitted). The EAC's decision to approve the States' request to require proof-of-citizenship can be easily discerned. Executive Director Newby testified that Kansas provided to him "*new information* that had not been provided to the EAC previously" concerning non-citizen voters in Kansas. (Dkt. 28-2 at ¶ 21) (emphasis added).

In footnotes, the Leagues argue that the Executive Director's February 1 memorandum and his sworn affidavit should be disregarded. (Leagues' Cross-Motion at 40 nn.10-11.) Neither contention is correct. It is established law that where an agency decision may be inadequate to permit judicial review, the court may consider a "contemporaneous explanation of the agency decision" and may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *see also Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989). And as the Department of Justice explains, "[a]n agency declaration can be admitted where it 'merely illuminate[s] reasons obscured but implicit in the administrative record.'" (Department of Justice's Motion at 16 n.8 (citing *Consumer Fed'n v. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1507 (D.C. Cir. 1996) (citation omitted). This Court thus can and should consider these records.

Executive Director Newby rightly understood his duty to approve the States' request to be "routine" and "ministerial." (AR0004-0005.) In the context of what is an "entirely informal" process, *ITCA*, 133 S. Ct. at 2260 n.10, the Executive Director's detailed explanation is plainly sufficient. Nonetheless, he has further testified that he considered evidence provided by Kansas showing that non-citizen registration is a problem in that state, and that such evidence demonstrates the necessity of the changes. The EAC's decision to grant the States' request was plainly consistent with the evidence before it. Lastly, based on the abundance of evidence throughout the country of non-citizen registration *and* voting, *infra*, the EAC's decision cannot be characterized as arbitrary or capricious. Aliens are registering and voting in federal elections, and failing to implement citizenship verification efforts are facilitating these crimes. In fact, *refusing* to grant the States' request could be considered arbitrary or capricious because, as the

Supreme Court noted in *ITCA*, the EAC had previously "accepted a similar instruction requested by Louisiana." *ITCA*, 133 S. Ct. at 2260. Accordingly, the Leagues have failed to show that the 2016 Decision was in any way arbitrary or capricious.

B. The Executive Director's Decision Was Consistent with the National Voter Registration Act and *ITCA*.

The Federal Form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process[.]" 52 U.S.C. § 20508(b)(1). As interpreted by the Supreme Court in *ITCA*, this provision does not preclude proof-of-citizenship requirements as the Leagues' contend. Rather, the Supreme Court was clear that if a State determines that "a mere oath will not suffice to effectuate [the state's] citizenship requirement," *ITCA*, 133 S. Ct. at 2260, it may provide evidence of noncitizen registration in their respective states, (Dkt. 28-2 at ¶ 21 (discussing evidence received by the EAC).) Upon presentation of such evidence, the EAC is "under a nondiscretionary duty" to provide state-specific instructions that will satisfy the state's proof-of-citizenship requirement. *ITCA*, 133 S. Ct. at 2260. The Supreme Court's guidance is plainly consistent with the established policies of the FEC and EAC.

The Leagues' citations showing that Congress considered a proof-of-citizenship requirement, but declined to require it for *all* states (Leagues' Cross-Motion at 41), says nothing about whether an individual state may, in accordance with the NVRA, request that the EAC grant its request to implement such a safeguard in its specific state. The Supreme Court decision in *ITCA* expressly invites and authorizes such a request. *ITCA*, 133 S. Ct. at 2259-60.

The Leagues' and the Department of Justice's arguments amount to nothing more than disagreement with Executive Director Newby's determination that Kansas, Alabama and Georgia have demonstrated that a proof-of-citizenship requirement is necessary in those states. The

Leagues' and the Department of Justice might be opposed to citizenship verification measures, but Executive Director Newby's decision to approve measures designed to protect the integrity of American elections is valid.

In granting the States' request, the EAC acted consistently with its authority under the National Voter Registration Act and *ITCA*. Its decision was thus not arbitrary and capricious and summary judgement on Count V should be denied.

VI. Remanding this Matter to the Executive Director for Supplemental Reasoning Would Unnecessarily Consume Judicial and Administrative Resources and Cause Undue Harm to the Electoral Process in Light of the Overwhelming Evidence Demonstrating that the States' Proof-of-Citizenship Requirements Are Necessary to Prevent the Genuine and Corrosive Problem of Noncitizens Registering and Voting.

If this Court believes it "cannot evaluate the challenged agency action on the basis of the record before it, the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). However, the overwhelming body of evidence showing the need for proof-of-citizenship requirements strongly suggests this is one of those "rare circumstances" where remand is not warranted. The Federal Form—absent documentary proof-of-citizenship requirements—has failed to prevent noncitizens from registering to vote *and* casting ballots. Remanding this matter to EAC for further explanation would not serve the interest of promoting judicial and administrative economy, and would cause undue harm to the electoral process in Kansas, Alabama and Georgia.

Although the Executive Director believed the evidence submitted by Kansas was sufficient to demonstrate the States' need for a documentary proof-of-citizenship requirement, there remains an abundance of additional examples of noncitizen registration on which he could rely to support his decision. Upon this evidence, the States' requested modifications to the

Federal Form may be conclusively considered *necessary* to combat the serious problem of noncitizen registration and voting.

One ominous demonstration of the ineffectiveness of the citizenship checkbox at the top of the Federal Form comes from a small sample of materials collected from Harris County, Texas. (Dkt. 53-7.)[9] In this sample, four of the individuals actually checked "no" on the citizenship question,[10] six checked "no" and "yes,"[11] and the remaining three left the checkbox blank entirely.

Yet *each person was registered to vote* by the local state government officials, as evidenced by the resulting voter registration numbers (VUID) listed on the defective forms. In an unrelated matter, the former Voter Registrar for Harris County, Texas (the county in which Houston is situated) testified before the U.S. Committee on House Administration in 2006 and stated that while the extent of illegal voting by foreign citizens in the county was impossible to determine, "it has and will continue to occur." Noncitizen Voting and ID Requirements in U.S. Elections: Hearing Before the Committee on House Administration, 109th Cong. (2006) (statement of Paul Bettencourt, Harris County Tax Assessor-Collector and Voter Registrar); (*see*

[9] The Foundation redacted all street addresses and birthdates on these faulty registration forms.

[10] Bayron Leo Castro (VUID #117187524), Giovanna Guzman (VUID #1171828471), Marta D. Morales (VUID #009429514), and Rodrigo Salazer (VUID #1171853313) all marked "NO" to the question, "Are you a United States Citizen?" (Dkt. 53-7 at 1-4.)

[11] Gregorio Matias (VUID #1171964586), Pedro Morin (VUID #1171874884), Chong Wang (VUID #1171938695), Sanchez R. Sanrbez (VUID # 1172025775), Suadoca Eliser (VUID #1171743204), and Oswald Hernandez (VUID #1171961390) marked "NO" (as well as "Yes") to the question, "Are you a United States Citizen?" (Dkt. 53-7 at 5-10.)

also Dkt. 53-8 (hereinafter "Mr. von Spakovsky Testimony").)[12] The examples from Harris are mere examples of the evidence of non-citizen voting.

Requiring individuals to merely check a box that they are citizens under penalty of perjury prevent has also plainly failed to prevent noncitizens from registering and voting. In 2004 a citizen of Kenya voted in the 2004 federal election by checking the "yes" box on the Federal Form, "represent[ing] that he [was] a citizen of the United States." *Kimani v. Holder*, 695 F.3d 666, 668 (7th Cir. 2012). In 2006, a Philippine citizen was also able to vote simply by checking "yes" on the box asserting U.S. citizenship on the Federal Form. *Keathley v. Holder*, 696 F.3d 644, 645 (7th Cir. 2012). Just the same, a citizen of Peru was able to register and vote in 2006 by signing "a voter registration application in which she checked a box indicating that she was a United States citizen." *Matter of Margarita Del Pilar Fitzpatrick*, Board of Immigration Appeals (Decided May 7, 2015).

And there are plenty of other examples. Just a few years ago, a Bosnian citizen "readily admitted registering and voting" claiming that he did "not read the section of the voter registration form that includes the affirmations of citizenship." *Guilty Pleas Resolve All Five Voter Fraud Convictions in Iowa*, Des Moines Register.com (Dec. 15, 2013), *available at* http://www.desmoinesregister.com/story/news/politics/2013/12/16/guilty-pleas-resolve-all-five-voter-fraud-convictions-in-iowa/4037125/. Last November, Idalia Lechuga-Tena was appointed to the New Mexico state legislature *and* admitted to voting prior to becoming a U.S. citizen. *DA reviews newly minted legislator's admission of voter fraud*, Santa Fe New Mexican (Nov. 12, 2015), *available at* http://www.santafenewmexican.com/news/local_news/da-reviews-newly-

[12] Mr. von Spakovsky, a member of the Foundation's Board of Directors, is also a former member of the Federal Election Commission. Prior to that, he served as counsel to the Assistant Attorney General for Civil Rights at the Justice Department.

minted-legislator-s-admission-of-voter-fraud/article_220d67ab-60c9-5fb7-b14c-54c598ee0900.html. According to the report, Rep. Lechuga-Tena claimed that "she did not understand that she had to be a citizen to vote." *Id*.

And those are not isolated incidents. Again, just last November, Rosa Maria Ortega, a noncitizen in Tarrant County, Texas, was indicted for repeatedly voting illegally. *Non-U.S. Citizen Indicted For Voter Fraud In North Texas*, CBSDFW.com (Nov. 9, 2015), *available at* http://dfw.cbslocal.com/2015/11/09/voter-fraud-alleged-in-dallas-tarrant-counties/. According to reports, Ms. Ortega "fraudulently registered to vote in Dallas County by claiming to be a U.S. citizen." *Id*. It was that easy. The so-called citizenship "safeguards" of the Federal Form did nothing to deter Ms. Ortega from registering and voting. Neither Iowa, Texas, nor New Mexico has citizenship verification requirements on their version of the federal voter registration form. These examples are not the only instances of demonstrable alien participation in American elections.

Other states are starting to take notice of the national problem of noncitizen voting. Michigan Secretary of State Ruth Johnson recently asked her attorney general to investigate "10 people who aren't U.S. citizens but have voted in past Michigan elections." *Michigan Investigation Sought of Non-Citizen Voting,* Associated Press (Dec. 6, 2013). And Ohio Secretary of State Jon Husted announced that he had found that seventeen noncitizens "illegally cast ballots in the 2012 presidential election." Eric Shawn, *Non-citizens Caught Voting in 2012 Presidential Election in Key Swing State*, Fox News (Dec. 18, 2013). There is evidence in big and small elections, from admitted noncitizen voting in the Compton, California mayoral race, Daren Briscoe, *Noncitizens Testify They Voted in Compton Elections*, L.A. Times (Jan. 23, 2002), at B5, to hundreds of votes by noncitizens in the 1996 congressional contest between

Republican incumbent Bob Doman and Democratic challenger Loretta Sanchez, Mr. von Spakovsky Testimony at 5.

More broadly, a 2005 Report from the Government Accountability Office found that up to three percent of the 30,000 individuals chosen for jury duty from voter registration rolls in just one U.S. district court over a two-year period were not U.S. citizens. Government Accountability Office, *Elections: Additional Data Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists* 42 (2005), *available at* www.gao.gov/assets/250/246628.pdf. According to a study released in 2014 by several professors at Old Dominion University and George Mason University, approximately 6.4% of noncitizens voted in 2008 and 2.2% of noncitizens voted in 2010. Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do noncitizens vote in U.S. elections?*, Electoral Studies 36 (2014) 149-157. Mr. von Spakovsky outlines more examples in Chapter Five of his book *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (Encounter Books, 2012).

Disturbingly, the extent of noncitizen registration and voting is not easily quantified. According to Mr. von Spakovsky,

> Obtaining an accurate assessment of the size of this problem is difficult. There is no systematic review of voter registration rolls by most states to find noncitizens, and the relevant federal agencies—in direct violation of federal law—have either refused to cooperate with those few state election officials who seek to verify the citizenship status of registered voters or put up burdensome red tape to make such verification difficult.

Mr. von Spakovsky Testimony at 6.[13] While how many noncitizens are registering and voting may not be readily ascertainable, one thing is sure—it is happening. And it is happening despite

[13] Appellee-Intervenor Kris W. Kobach testified before the same committee on the problem and reality of noncitizen registration and voting. Testimony of Kris W. Kobach, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National

the Federal Form's "safeguards." Thus, there is a clear need for the States' proof of citizenship requirement.

CONCLUSION

For these reasons, Defendant-Intervenor's Motion should be granted and both Department of Justice's Motion and the Leagues' Cross-Motion should be denied.

Dated: August 19, 2016

Respectfully submitted,

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Security and the Subcommittee on Health Care, Benefits, and Administrative Rules at 1-3 (February 12, 2015), *available at* http://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2016, I caused the foregoing to be filed with the United States District Court for the District of Columbia via the Court's CM/ECF system, which will serve all registered users.

Dated: August 19, 2016

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