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 SUPPLEMENTAL BRIEF IN SUPPORT OF ITS 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

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INTRODUCTION

The highly unusual nature of this case continues to manifest. Just four days before this Court was scheduled to hear summary judgment arguments, the Court of Appeals heard argument on Plaintiffs' appeal of this Court's denial of their motion for preliminary injunction. The Intervenor-Defendant Public Interest Legal Foundation ("Foundation") argued that the Court of Appeals should remand for further proceedings if it found that Plaintiffs carried their burden on irreparable harm, the only preliminary injunction prong addressed by this Court. *See League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727 (D.D.C. June 29, 2016). Nevertheless, the Court of Appeals issued an order the day after oral argument, reversing this Court's decision and enjoining the 2016 Decision of the U.S. Election Assistance Commission ("EAC"). *League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 16835, at *3-6 (D.C. Cir. Sep. 9, 2016). Seventeen days later, the Court of Appeals issued its opinion. *League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 17463 (D.C. Cir. Sep. 26, 2016). This Court permitted supplemental briefing to address the impact of the Court of Appeals' decision.

Due to the limited nature of this briefing, the Foundation raises only two points. First, the Court of Appeals' interpretation of the role of the Election Assistance Commission ("EAC") presents serious constitutional concerns, concerns which would impact the power of the EAC. Second, the Court of Appeals decision was preliminary in nature and does not foreclose further proceedings by this Court.

ARGUMENT

I. The Court of Appeals Decision Raises Serious Constitutional Concerns.

The Court of Appeals majority believed their "interpretation accords with Supreme Court precedent." *League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 17463, *20. Specifically, the Court of Appeals claims that the Supreme Court in *Arizona v. Inter Tribal Council of Ariz., Inc*., 133 S. Ct. 2247 (2013) ("*ITCA*") "made plain that the Commission, not the states, determines necessity." *Id*. This conclusion is constitutionally suspect because the exercise of power by the EAC to impair state qualifications requirements intrudes impermissibly into state powers to set qualifications. To the extent federal statutes intrude on these state powers, those federal laws are unconstitutional. Judge Randolph's dissenting opinion outlined this point, saying plainly that the majority's "order is unconstitutional." *Id*. at *32. Further, as the Foundation discussed extensively in its summary judgment briefing, Executive Director Newby's actions were consistent with the Supreme Court's decision in *ITCA*. (*See, e.g*., Dkt. 105 at 4, 32-33, Dkt. 114 at 2-4.)

A. Pursuant to the Constitution, States Determine Who Is Qualified to Vote.

The Federal Constitution reserves to the States the power to control who may vote in federal elections. *See* 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). "'It 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)).

According to Black's Law Dictionary, a "qualification" is "[t]he possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible…to perform a public duty or function." BLACK'S LAW DICTIONARY 575 (2nd ed. 2001). Kansas has deemed that some evidence of citizenship is "legally necessary to make one eligible . . . to perform a public duty or function," namely voting. *Id.*

The Court of Appeals recognized the serious constitutional problems that would arise if they interpreted the NVRA in such a way as to contravene the authority of the States to determine the qualifications of voters. *League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 17463, *22. According to the Court of Appeals, "it would raise a serious constitutional question 'if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.'…But such a scenario would not arise under our interpretation of section 20508(b)(1) because that provision requires the Commission to include information shown to be 'necessary.'" *Id*.

In other words, it is unconstitutional to preclude a state from getting the information it needs pursuant to the Qualifications Clause. But giving the EAC power to deny effectiveness of those qualifications unless *the EAC* determines they are "necessary" to assess voter eligibility crosses the constitutional line. Under such an interpretation, the EAC is the decision maker, not the States. The result is to effectively write the Qualifications Clause power out of the Constitution and give it to the EAC. The effect of that interpretation on the powers granted to the States by the Constitution is unavoidable.

Judge Randolph, in his dissent, demonstrated the constitutional issues at stake here. As he explained,

> Of utmost importance is that on the eve of a Presidential election, and elections for federal office, a court has issued an injunction forbidding Kansas, Georgia and

> Alabama from enforcing their election laws, laws requiring those who seek to register to vote to prove that they are citizens of this country.
>
> That order is unconstitutional.
>
> Under Article I, § 2, cl. 1, of the Constitution and the Seventeenth Amendment, it is the States, and the States alone, who have the authority and the power to determine the eligibility of those who wish to vote in federal elections. There is no claim in this case that the laws of these three States violate the Fourteenth Amendment or any other constitutional provision. And so neither the Congress nor the President nor any federal commission and, most certainly, not two federal judges sitting in Washington, D.C. (or even eight or nine) have the authority to prevent Kansas, Georgia and Alabama from enforcing their laws in the upcoming federal elections.

League of Women Voters of the United States v. Newby, 2016 U.S. App. LEXIS 17463, at *32-33. As Judge Randolph pointed out, the constitutional issues that flow from the majority's opinions are the same that the Supreme Court said it "was '[h]appily' spared from having to decide" in *ITCA*. *Id*. at *34. Those constitutional issues have now fully matured in the case now before this Court.

B. Executive Director Newby's Decision Was Consistent with Supreme Court Precedent.

As the Foundation explained in its earlier briefing, Executive Director Newby's Decision was consistent with the Supreme Court's decision in *ITCA*. (*See*, *e.g.*, Dkt. 105 at 4, 32-33, Dkt. 114 at 2-4.)

To be sure, *ITCA* involved a different set of facts than those presented here. It was not an Administrative Procedures Act ("APA") challenge to a denial of requested changes to state-specific instructions but a challenge to a state law requiring the rejection of Federal Forms not accompanied by documentary proof-of-citizenship. Specifically, the issue 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. According to the Supreme Court, 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 majority's contention that, in *ITCA*, Supreme "Court made plain that the Commission, not the states, determine necessity[,]" *League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 17463, at *20, is simply erroneous. *ITCA* held no such thing. The question of who determines necessity was not before the Court. As Judge Randolph explained, the Supreme Court, happily so, avoided the serious constitutional issues by focusing on the narrower and dispositive issue of whether a state can refuse to accept a Federal Form. *See League of Women Voters of the United States v. Newby*, 2016 U.S. App. LEXIS 17463, at *34. 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." *ITCA*, 133 S.Ct. at 2259 (internal citations omitted) (emphasis added).

The Supreme Court did provide some insight into how an APA challenge of the EAC's denial of a State's request for a modification to its state-specific instructions may fair. As another federal court noted,

> At oral argument, Justice Scalia, who authored the majority opinion in ITCA, expressed concern multiple times about Arizona's failure to challenge the EAC's 2-2 vote in 2005 that resulted in no action being taken on Arizona's initial request to add identical proof-of-citizenship language. Transcript of Oral Argument at 9,

> 11, 15-16, 18…. Justice Scalia expressed skepticism about how the EAC would fare in such a challenge under the APA. Id. at 56-57 ("So you're going to be—in bad shape—the government is going to be—the next time somebody does challenge the Commission determination in court under the Administrative Procedure Act.").

Kobach v. United States Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1261 n.39 (D. Kan. 2014).

What is clear is that *ITCA* reaffirmed that the States have exclusive constitutional authority to determine who may vote, or voter qualifications. 133 S. Ct. 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).

Any contrary interpretation would upset the delicate balance of power agreed upon in 1787. That constitutional prerogative of states to manage their own elections was before the Supreme Court recently. In *Shelby County. v. Holder*, the Supreme Court considered whether Section 4 of the Voting Rights Act of 1965, the formula by which covered jurisdictions were chosen for the Act's "preclearance" requirement for changes in voting procedures pursuant to Section 5. 133 S. Ct. 2612, 2619-20 (2013). Ultimately, the Court determined that Section 4 was unconstitutional. *Id*. at 2631. In so finding, the Court acknowledged that Section 5, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Id*. at 2618. One of the "basic principles of federalism" is that States control the qualifications of electors. The fact that Section 4 "applied [Section 5] only to some States" was "an equally dramatic departure from the principle that all States enjoy equal sovereignty." *Id*. But such "strong medicine" was chosen in order "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Id*. As Judge Williams noted in his dissent in the D.C. Circuit case later reversed

by the Supreme Court, "the federalism costs of § 5 are 'substantial.'" *Shelby County. v. Holder*, 679 F.3d 848, 885 (2012) (J. Williams, dissenting) (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)). The federalism costs of shifting power away from the States and to the EAC to set qualifications are also substantial.

In the context of Section 5, while "[t]he Federal Government does not…have a general right to review and veto state enactments before they go into effect[,]" *Shelby County*, 133 S. Ct. at 2623, there were "exceptional circumstances" that merited the "uncommon exercise of congressional power," *id.* at 2624. An interpretation of EAC authority that would shift power away from the States and to the EAC regarding the determination of "necessity" would create federal power to effectively reject state voting qualifications. This power would be even more unbound than the powers contained within Section 5 of the Voting Rights Act.

Fundamentally, requiring a state to seek agreement from a federal agency that a state-specific instruction to the Federal Form is "necessary" runs afoul of the federalism framework which animated the Court's decision in *Shelby*. Such an interpretation would create a new version of a preclearance obligation for state qualification instructions by a federal agency. Such a "drastic departure from basic principles of federalism[,]" *Shelby County*, 133 S.Ct. at 2618, cannot withstand constitutional scrutiny. Especially here where there is *no* indication that Congress has or even *can* show exceptional circumstances meriting such a departure from federalist principles. While the power exercised at issue in *Shelby* is different than the power at issue here, Plaintiffs seek the same outcome where federal bureaucrats can deem a state election law not to their liking and effectively block it. This upsets the important federalist balance at issue also in *Shelby*. This is what would render the EAC's exercise of power to determine necessity to be unconstitutional.

Surely the same Court that decided *Shelby County* and *ITCA* within days of each other did not intend the result the majority reached here. According to the Supreme Court in *ITCA*, "[s]ince 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. Unfortunately, it appears that is exactly what Plaintiffs would have. There are even fewer grounds than there were in 1965 for such an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Shelby County*, 133 S. Ct. at 2624 (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-501 (1992)).

II. The Court of Appeals Decision Is Preliminary and Does Not Foreclose Further Proceedings by this Court.

In its Opinion, the Court of Appeals "enjoined the Commission and anyone acting on its behalf from giving effect to the Newby Decisions. Further, the court ordered that the Commission take 'all actions necessary to restore the status quo ante,' *pending a determination on the merits*." *League of Women Voters of the United States v. Newby*, No. 16-5196, 2016 U.S. App. LEXIS 17463, at *31 (emphasis added.) The Court of Appeals specified that "the preliminary injunction did not vacate the Newby Decisions but merely prohibits the Commission from giving them effect, *pending entry of the final judgment*." *Id*. at *32 (emphasis added).

The Plaintiffs' Complaint contains five counts. The Court of Appeals, however, preliminarily addressed only Count IV, which avers that Director Newby's decision to grant the states' request was arbitrary and capricious in violation of the Administrative Procedure Act because Director Newby allegedly did not consider whether the proof-of-citizenship requirements were "necessary" within the meaning of the NVRA. Specifically, the Court of Appeals limited its holding to the issue of whether Director Newby "'examine[d] the relevant

data and articulate[d] a satisfactory explanation for [his] action.'" *League of Women Voters of the United States v. Newby*, No. 16-5196, 2016 U.S. App. LEXIS 17463, at *19 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983)).

It's important to note that the Court of Appeals did not interpret the term "necessary" within its meaning under the NVRA, but decided only that "necessity" is a threshold finding for proof-of-citizenship requirements. *League of Women Voters of the United States v. Newby*, No. 16-5196, 2016 U.S. App. LEXIS 17463, at *28 ("This court need take no position now on what evidence the Commission ought to require to show that documentary proof of citizenship is 'necessary.'"). As is explained above, this finding raises serious constitutional concerns. However, even under the majority's own terms, a "reviewing court," presumptively such as this Court, has the ability to "determine[] necessity." *Id*. at *21. ("Only after the Commission (or a reviewing court) determines necessity is the Commission 'under a nondiscretionary duty to include [a state proof-of-citizenship] requirement on the Federal Form.'") Certainly the evidence provided by Kansas and the Foundation more than establishes that proof of citizenship is necessary to prevent the genuine and corrosive problem of noncitizens registering and voting. (*See, e*.g. Dkt. 105 at 33-38.) Further, this Court is empowered to "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).

CONCLUSION

For these reasons and those stated in the Foundation's earlier briefing, the Foundation's Cross-Motion for Summary Judgment should be granted and both Department of Justice's Motion and the Leagues' Cross-Motion should be denied.

Dated: October 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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.

I further certify that I caused paper copies of the foregoing to be mailed via USPS to the following non-registered users.

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