IN THE 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.

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION

Defendant-Intervenors.

Case No. 16-cv-236 (RJL)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

The Court of Appeals has held that Plaintiffs demonstrated a "substantial (perhaps overwhelming)" likelihood of success on the merits of their claim that the Election Assistance Commission ("Commission" or "EAC") failed to find that documentary proof of citizenship was "necessary" as required by the National Voter Registration Act ("NVRA"), before Mr. Newby unilaterally amended the Federal Form. Indeed, the D.C. Circuit held that "it is difficult to imagine a more clear violation of the APA[ ]" than the Executive Director's disregard for congressionally-prescribed decision-making standards here. And, importantly, the D.C. Circuit also rejected all of Defendant-Intervenors' arguments to the contrary. Because this is an Administrative Procedure Act ("APA") case where the entire case is a question of law, the D.C. Circuit's findings—compelled by fundamental legal precepts applied to the same issues at play before this Court—constitute the law of the case and dictate that Plaintiffs are entitled to summary judgment on the relevant counts of the Complaint and that Mr. Newby's decisions must be vacated.

Thus, the only proper question remaining for adjudication is whether the Executive Director has the authority to act upon the States' current requests (or any renewed requests) to require documentary proof of citizenship. Under the Help America Vote Act ("HAVA"), any affirmative action by the EAC requires the approval of at least three Commissioners. This Court already concluded that HAVA "makes the three-member requirement applicable to actions taken in regards to the Federal Form." Dkt. #92 at *4 n.4. It is undisputed that three Commissioners did *not* approve the States' requests. Indeed, one of the Commissioners objected to Mr. Newby's action at the time he purported to grant the States' requests. And no party offers any reasonable

basis for concluding that three Commissioners have delegated the authority to approve the States' requests to the Executive Director. Accordingly, summary judgment should be entered on behalf of Plaintiffs on Counts I and II, as well, and there is no basis for remanding to the Commission or the Executive Director for any further consideration.

Finally, any summary judgment ruling should be deferred until after the November 8, 2016 election, in order to avoid further confusion among voters and in the administration of the upcoming federal election. A preliminary injunction is in place that has been widely reported in the press, which Plaintiffs have relied upon in conducting voter registration drives, and which voters have relied upon in registering to vote. Thus, a ruling that disrupts the status quo by tightening voter registration requirements for Federal Form applicants would be extremely confusing to voters and burdensome to election administrators.

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NVRA CLAIMS (COUNTS IV AND V) FOLLOWING THE D.C. CIRCUIT'S DECISION

A. *The Law of the Case Doctrine Applies to the D.C. Circuit's Decision Granting Plaintiffs' Preliminary Relief*

This Court is bound by the D.C. Circuit's determinations in granting Plaintiffs' preliminary injunction: "The purpose of the law-of-the-case doctrine is to ensure that 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result.* The courts are appropriately 'loathe to reconsider issues already decided,' except in the case of 'extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Sherley v. Sebelius*, 689 F.3d 776, 783 (D.C. Cir. 2012) (emphasis in original) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). Though in some instances a decision to grant or deny a preliminary injunction does not constitute law of the case for later proceedings on the merits, this exception does not apply when the preliminary

injunction was decided with the benefit of a full record, such as in the context of an APA case where the administrative record is complete at the time that an appellate court reviews the district court's decision on a preliminary injunction. *Sherley*, 689 F.3d at 782-83. "A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . *does* become the law of the case for further proceedings in the trial court on remand and in any subsequent appeal." 18B Charles A. Wright et al., Fed. Prac. & Proc. Juris. § 4478.5 (2d ed.) (quoted in *Sherley*, 689 F.3d at 783) (emphasis added). Thus, because the D.C. Circuit "issued [a] fully considered … ruling on an issue of law," that ruling is now "the law of the case" and dictates that this Court grant Plaintiffs' motion for summary judgment. *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015).

Throughout this litigation, this Court and the D.C. Circuit have had a full administrative record and ample briefing to inform their decisions. In its recent opinion, the D.C. Circuit noted that even at the preliminary injunction stage, "this court has a *full record*, both in the district court and on appeal, the parties amply and ably briefed and litigated all four factors of the preliminary injunction test." *League of Women Voters of United States v. Newby*, No. 16-5196, 2016 WL 5349779 (D.C. Cir. Sept. 26, 2016) at *7 ("Slip Op.") (emphasis added). Moreover, this is an APA case where "[t]he entire case on review is a question of law." *Rempfer v. Sharstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quotation omitted). In such cases there are "no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Id.* (quotation omitted).[1] Thus, the D.C. Circuit's findings are not ones made

[1] Because the oral argument in the D.C. Circuit occurred after the pre-D.C. Circuit decision briefing of summary judgment in this Court, Defendant-Intervenors had the opportunity to raise all of their arguments before the D.C. Circuit (including their eleventh hour regulation argument raised by Secretary Kobach in the D.C. Circuit oral argument, *see* Def.-Int.'s Br. at 5 (Dkt. #116)).

"without the benefit of a fully developed record," nor did the D.C. Circuit reach its conclusions regarding the propriety of Mr. Newby's actions on underdeveloped briefing. *See Sherley,* 689 F.3d at 782. Rather, the D.C. Circuit's findings represent "clear legal conclusions" that should be "afforded law-of-the-case status" and, as explained further below, those conclusions dictate that Plaintiffs are entitled to summary judgment.[2] *See id.*

B. *Plaintiffs are Entitled to Summary Judgment on their NVRA Claims (Counts IV & V)*

The D.C. Circuit opinion dictates that Plaintiffs are entitled to judgment as a matter of law on their fourth and fifth causes of action alleging that Mr. Newby's action violated the NVRA because the agency failed to make a necessity determination. The D.C. Circuit concluded that (1) the Federal Form can require applicants to supply information only upon a showing that such information 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," Slip Op. at 12; *see also* 52 U.S.C. § 20508(b)(1); (2) under the NVRA, it is left to the EAC, and not the States, to make the determination of necessity; (3) this interpretation of the NVRA does not conflict with the Qualifications Clause; and, after review of the administrative record, (4) neither the agency nor Mr. Newby made the required finding of

[2] The D.C. Circuit's decision also definitively establishes that Plaintiffs have standing. Despite the fact that this Court previously determined that the League Plaintiffs had established standing in its preliminary injunction order, *see* Dkt. #92 at *15, both Defendant-Intervenors continued to press their arguments in opposition to Plaintiffs' standing in their summary judgment briefing. The D.C. Circuit has unequivocally resolved this issue in Plaintiffs' favor: "Because, as a result of the Newby Decisions, those new obstacles unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm." Slip Op. at 10.

necessity.[3] The same principles and reasoning should compel this Court to grant summary judgment to Plaintiffs.

Because Mr. Newby "expressly found that the [necessity] criterion set by Congress . . . was irrelevant to his analysis," (Slip Op. at 3), Secretary Kobach has attempted to justify the Executive Director's actions by arguing that the NVRA, the Court's decision in *Arizona v. The Inter Tribal Council of Ariz.*,133 S. Ct. 2247 (2013) *("ITCA*"), the Constitution, and, most recently, 11 C.F.R. § 9428.3, leave the decision of determining necessity to the States, and that the EAC has a nondiscretionary duty to accept changes to the Federal Form that the States request. The D.C. Circuit rejection of each of these arguments is also law of the case here.

The D.C. Circuit rejected Secretary Kobach's arguments regarding his interpretation of the *ITCA* decision and the NVRA statute, stating that under the NVRA and the Supreme Court's precedent in *ITCA*, the Commission determines necessity, *not* the States:

> In *ITCA*, the Court made plain that the Commission, not the states, determines necessity. *Id.* at 2258–60. In the Court's view, section 20508(b)(1) permitted states to "request that the [Commission] alter the Federal Form," which the Commission could "reject[ ]," subject to judicial review under the APA. *Id.* at

[3] The Court should decline any invitation to make the requisite finding of necessity, which would be an improper usurpation of the role of the Commission. The D.C. Circuit correctly observed that even if there was evidence in the record to "support a necessity finding"—which there is not—the Court "cannot cure" the deficiencies in Mr. Newby's decision. Slip Op. at 16 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). This is because it is hornbook law that where "there [is] contemporaneous explanation of [an] agency decision[,]" that decision "must … stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). Of course, the "standard of review is a narrow one[,]" and importantly "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Because the Court is powerless to "'supply a reasoned basis for the agency's action that the agency itself has not given,'" Mr. Newby's failure to abide by the "straightforward" statutory mandate that the Commission determine whether the requested amendments to the Federal Form were necessary "renders [his decision] arbitrary and capricious" and it must therefore be vacated. *See Owner-Operator Independent Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

> 2259. To prevail in court, the requesting state would have to "establish" that the information it wanted the Commission to add to the Federal Form was "necessary." *Id.* at 2260. 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." *Id.* The Court's discussion did not envision a process by which a state had the authority to direct the Commission to act so long as its request conformed with state law. Nor would that interpretation of section 20508(b)(1) have been consistent with the rest of the opinion. The Court explained at some length that the NVRA could not be read to contemplate a scheme whereby a state could mandate inclusion in the Federal Form of every one of its registration requirements. *See id.* at 2255–56 & n.4. Finally, the interpretation advanced by intervenors is that reflected in Justice Alito's dissenting opinion, additional evidence that the ITCA majority considered and rejected that reading. *See id.* at 2274 (Alito, J., dissenting); *cf. id.* at 2270 (Thomas, J., dissenting). As the Tenth Circuit observed, "[t]his is one of those instances in which the dissent clearly tells us what the law is not." *Kobach*, 772 F.3d at 1188.

Slip Op. at 14. Moreover, the D.C. Circuit (citing the Supreme Court) explained why Kobach's interpretation of the NVRA was nonsensical because it would render the Federal Form a nullity:

> If Congress intended to give the states the power to decide what information the Federal Form contains, then it would have had little reason to include this separate permission for states to use their own forms. *ITCA*, 133 S.Ct. at 2255–56. Similarly, permitting the states to dictate the contents of the Federal Form would undermine the Federal Form's role as a mandatory "backstop" to state registration forms. *See* 52 U.S.C. §§ 20505(a)(1), 20507(a)(1)(B); *ITCA*, 133 S.Ct. at 2255. A state could turn the Federal Form into mere duplicative paperwork, a facsimile of the state registration form. *See ITCA*, 133 S.Ct. at 2255–56.

Slip Op. at 13-14. Further, the D.C. Circuit, referencing the Supreme Court's decision in *ITCA*, disposed of Secretary Kobach's constitutional argument that conflict with the Qualifications clause would render unconstitutional the EAC's authority to make the determination of necessity:

> The canon of constitutional avoidance does not compel or support a different interpretation of the NVRA. The Elections Clause directs states to regulate the

> time, place, and manner of congressional elections, but gives Congress the power to preempt state regulation. U.S. CONST. art. I, § 4, cl. 1. The Qualifications Clause and the Seventeenth Amendment, on the other hand, bestow on the states exclusive authority to decide the eligibility criteria for voters in federal elections. Id. art. I, § 2, cl. 1; id. amend. XVII. Thus, as *ITCA* recognized, it would raise a serious constitutional question "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S.Ct. at 2258–59. 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." Accordingly, the constitutional question dovetails with the statutory one—if the proposed change to the Federal From is "necessary" to enforce voter qualifications, then the NVRA and probably the Constitution require its inclusion; if not, the NVRA does not permit its inclusion and the Constitution is silent.

Slip Op. 14-15; *see also Fish v. Kobach*, No. 16-3147 (10th Cir. Sept. 30, 2016) (holding that "no constitutional doubt arises" from its ruling that the NVRA precludes the imposition of Kansas's documentary proof of citizenship requirement on motor-voter applicants).

Finally, during his oral argument before the D.C. Circuit, Secretary Kobach offered at length his most recent theory that in enacting 11 C.F.R. § 9428.3(b), the EAC essentially ceded its authority to determine necessity to the States.[5] Oral Argument at 32:24, *League of Women Voters v. Newby*, No. 16-5196 (D.C. Cir. Sept. 8, 2016), *available at* https://www.cadc.uscourts.gov/recordings/recordings2017.nsf/8CB057E3EC5BAF8D8525802800652599/$file/16-5196.mp3. The Secretary's interpretation of the regulation is an entirely novel one, and has never been offered by any party of interest, let alone endorsed by a court or agency over the past

[5] Secretary Kobach has also pointed to policies enacted by a different agency, the Federal Elections Commission ("FEC"), as supposedly providing the Executive Director the authority to approve the States' requests. However, the FEC is an entirely different agency, and the EAC expressly declined to adopt the FEC's procedures on approving state-specific instruction requests. *See* Dkt. #55-5 at 9-10. Moreover, even if the FEC's procedures governed the Executive Director's decision-making authority, Mr. Newby would *still* have lacked the ability to unilaterally grant the States' requests. Under FEC rules, issues impacting more than one state *could not* be decided by commission staff, as staff must "submit for a formal Commission vote any changes to the form that are not specific to a given state." *Fed. Election Comm'n RECORD*, Oct. 2000, at 8 (AR0163). Therefore, even under this standard, Mr. Newby could not have ruled on proof-of-citizenship requests affecting Kansas, Georgia, and Alabama, and was required to refer such a decision to the Commission.

decade of hotly-contested litigation on this issue. Indeed, the D.C. Circuit was sufficiently unimpressed by this argument that the Court summarily disposed of it without discussion in its opinion. Contrary to Secretary Kobach's unprecedented reading, the regulation merely states that "[t]he state-specific instructions [for the Federal Form] shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b). It does not state that the EAC must include *all* of a state's voter eligibility and registration requirements, regardless of whether or not they comply with the NVRA, as Secretary Kobach suggests it does.[6]

Thus, the D.C. Circuit disposed of each of the Defendant-Intervenors' lines of reasoning, and unequivocally concluded that under the NVRA, the Commission may only approve those state instruction requests that it deems "necessary" to assessing voter eligibility. The D.C. Circuit further concluded that the EAC is the proper body to make the required determination of necessity, that the EAC made no such finding, and that Mr. Newby made his decision without making such a finding. These legal conclusions formed the foundation of the D.C. Circuit's statement that "[t]he Leagues have a substantial (perhaps overwhelming) likelihood of success on the merits." Slip Op. at 12. And these legal conclusions "apply equally" to the record before this Court. *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1360 (11th Cir. 2014). Therefore, Plaintiffs are entitled to summary judgment on their NVRA claims.

[6] This argument is little more than an attempt to get through the back door what Defendant-Intervenors could not get through the front. Even if Secretary Kobach's interpretation of the regulation was plausible, such a reading would be in conflict with the statute and the Supreme Court's decision in *ITCA*, and would also be nonsensical because it would require the EAC to accept state changes to the Federal Form even if they conflicted with federal law. For example, if a state passed a law making the registration deadline 45 days before elections and a state requested that change on the Federal Form, the EAC would have to make the change even though this would conflict with the NVRA's requirement that registration deadlines can be no longer than 30 days before federal elections.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR AUTHORITY CLAIMS (COUNTS I & II) AND THE COURT SHOULD RESOLVE THESE COUNTS NOW

For reasons set forth in detail in Plaintiffs' previous briefs, (*see* Pls.' 8/5/16 Br. at 20-32 (Dkt. #102); Pls.' 9/2/16 Reply Br. at 6-13 (Dkt. #115)), Plaintiffs are also entitled to summary judgment on Counts I and II – in approving the changes to the Federal Form requested by Kansas, Alabama, and Georgia unilaterally, Mr. Newby acted without the approval of three Commissioners in violation of HAVA. Though this Court could decide this case in favor of Plaintiffs without resolving these counts, judicial economy militates in favor of resolving this issue now. Invalidating the Executive Director's decision on necessity grounds, and leaving open the possibility that the Executive Director may illegally revisit the States' requests to make a necessity finding without Commission approval, runs a high risk of further litigation and voter confusion. An unnecessary second round of litigation on this issue would be an unwise use of judicial resources. As continued litigation is entirely foreseeable in the absence of judicial confirmation that the Executive Director lacks authority to grant the requests, judicial economy favors this Court avoiding future proceedings by resolving Plaintiffs' authority claims now. *Cf. Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, n.2 (D.C. Cir. 2011) (observing that "considerations of judicial economy strongly favor" addressing in one instance "statutory interpretation question[s]" where "the district court is likely to confront the same … question[s] again in the near future").

Moreover, the Executive Director does not have the authority to unilaterally act on the States' requests under HAVA. The statute unambiguously states: "Any action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval

of at least three of its members." 52 U.S.C. § 20928; *see also* NVRA, 59 Fed. Reg. 11,211 (Mar. 10, 1994); NVRA, 58 Fed. Reg. 51,132 (Sept. 30, 1993). As this Court has already noted, HAVA "makes the three-member requirement applicable to actions taken in regards to the Federal Form." Dkt. #92 at *4 n.4. This is in keeping with the bipartisan structure of the Commission, which is designed to have two appointees from each major political party. *See* 52 U.S.C. § 20923(a)(2). The required approval from three members thus ensures that any action the Commission takes will have bipartisan consensus. This congressionally-implemented guarantee of bipartisanship would be foiled if the Executive Director could grant state proof-of-citizenship requests with no authorization from the Commission. Therefore, the Executive Director cannot sidestep the clear intent of Congress to claim such decision-making authority.[7]

As explained in Plaintiffs' principal brief, the Commission *has not* delegated to Mr. Newby any authority to make or alter policy decisions. The Executive Director is limited to only making policy *recommendations* and enforcing policies once made by the Commission. He is, therefore, not the appropriate decision-maker to pass upon state proof-of-citizenship requests—the most controversial and highest-profile issue confronted by the Commission. Mr. Newby thus cannot be the correct actor at the EAC to reconsider the States' requests at issue here, or to consider them in the first instance. Because the Commission has not vested Mr. Newby with such decision-making authority, Plaintiffs are entitled to summary judgment as a matter of law.

[7] For the same reasons, this Court should not remand the decision to Mr. Newby. If the Court remands this matter (and it should not), the remand should be to the Commissioners, and not to the Executive Director. Remand to the Executive Director would be inappropriate for the reasons just stated. First, it would subvert the will of Congress. Congress plainly required Commissioner approval for EAC action, and demonstrated its intent by explicitly requiring the agreement of *three* Commissioners in order for the Commission to take any action. *See* 52 U.S.C. § 20928. To remand the decision directly to Mr. Newby would bypass the Congressionally-created Commission altogether and empower agency staff at the expense of the Commission.

III. THE EXECUTIVE DIRECTOR'S DECISION SHOULD BE VACATED

The Executive Director's decision should be vacated. Mr. Newby's decision was entirely without authority, and involved several clear violations of the APA. Agency decisions that violate the APA are appropriately vacated and remanded for agency consideration. Therefore, Mr. Newby's decision must be vacated.

As explained in Plaintiffs' reply brief, the Executive Director's decision was highly deficient, and vacating that decision will not cause any disruption. *See* Pls.' Reply Br. at 23-25. "The decision whether to vacate depends on the seriousness of the [decision's] deficiencies . . . and the disruptive consequences of an interim change that may itself be changed." *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009). Courts have vacated agency rules when the agency's explanation for its action is "palpably inadequate" with "no reasoning to support its conclusion[,]" *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 799 n.2 (D.C. Cir. 1983), and when the rule involves clear violations of the APA, *see Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) ("Normally when an agency so clearly violates the APA we would vacate its action . . . and simply remand for the agency to start again[.]"); *see also Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) ("[I]n cases governed by the [APA], I have long believed that the law requires us to vacate the unlawful agency rule[.]").

Here, the Executive Director's explanation for his decision was "palpably inadequate," and his decision itself committed clear violations of the APA. The D.C. Circuit determined that he "expressly found that the criterion set by Congress . . . was irrelevant to his analysis . . . it is difficult to imagine a more clear violation of the APA[.]" Slip Op. at 12. By refusing to review

the States' requests under the standard legislated by Congress, the Executive Director utterly failed to provide the requisite reasoning to support his decision.[9] His disregard for the statutory standard prescribed by Congress in the NVRA amounts to a clear violation of the APA. Moreover, vacating his decision will cause no disruption given that enforcement of Mr. Newby's decision has already been preliminarily enjoined.

IV. THE COURT SHOULD NOT ISSUE A RULING UNTIL AFTER THE NOVEMBER ELECTION

In granting Plaintiffs preliminary relief, the D.C. Circuit not only found that the Plaintiffs had established a likelihood of success on the merits, but found that the other three factors – "likely irreparable harm in the absence of preliminary relief, a balance of the equities in [the moving party's] favor, and accord with the public interest," Slip. Op. at 6, favored Plaintiffs as well. The Court granted the preliminary injunction on an expedited basis out of concern that Mr. Newby's decision would improperly disqualify eligible registrants for the November 8 election: "Notably, this court granted expedition precisely because if appellants prevailed, then there would exist a hard deadline for meaningful injunctive relief. A fundamental constitutional issue is at stake and time is of the essence. The November 8 elections loom, and the registration cutoff for using the federal registration form comes well before that: 21 days before in Kansas; 30 days before in Georgia; and 15 days before in Alabama." Slip Op. at 7.

[9] Indeed, the record ***cannot*** support the requisite finding of necessity. Tellingly, Defendant-Intervenors have at every turn sought to bolster the dearth of evidence of "necessity" before the EAC with extra-record evidence. But "[i]t is 'black-letter administrative law that in an [Administrative Procedure Act] case, a reviewing court 'should have before it neither more nor less information than it did when the agency when it made its decision." *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014). Thus, Defendant-Intervenors' arguments relying on extra-record evidence are "procedurally foreclosed" and not properly before this Court. *See id.* Moreover, the Tenth Circuit has already found that similar evidence was so weak that if the Commission accepted it as grounds for necessity, it would "risk[ ] arbitrariness[.]" *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1998 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015).

Unless and until there is a subsequent decision to approve the request of Kansas, the terms of the preliminary injunction require Kansas to accept Federal Form registrants even if they do not provide proof of citizenship, including those who were previously rejected. The registration deadline in Kansas is October 18, five days from the date of the oral argument. It is implausible that the series of events required to change the status quo – a decision by this Court followed by a decision by the Commission finding that the States met their burden of necessity – would happen. Even if they did, for this election, it would only affect voter registration for those who used the Federal Form in Kansas after the date of the Commission's decision and before October 18.

In addition, a decision approving Kansas' request would likely result in a new request by Plaintiffs for expedited relief, would disrupt the election process in Kansas, and would cause unnecessary voter confusion. Regarding the latter two issues, pursuant to an Interim Agreement with the Kansas League and other plaintiffs in parallel litigation in the District of Kansas, on or before October 12—*i.e.*, the day before summary judgment oral argument in this case—Secretary Kobach must "instruct the county election officials to send out a new notice that unequivocally advises" various voters, including Federal Form applicants who have not submitted documentary proof of citizenship, "that they 'are deemed registered and qualified to vote for the appropriate local, state, and federal elections for purposes of the November 8, 2016, general election, subject only to further official notice.'" *See* Joint Status Report, *Fish v. Kobach*, No. 16-2105-JAR-JPO, Doc. 226 (D. Kan. Sept. 29, 2016). Any change to the registration requirements for Federal Form applicants after that day would likely result in the disenfranchisement of voters who rely on the notice informing them that they do not need to

provide documentary proof of citizenship in order to vote in November; it would, at a minimum, be extremely confusing to affected voters. It would also be extremely burdensome and confusing for election officials who would then have to attempt to re-educate affected voters about heightened registration requirements, just days after sending contrary notices. Moreover, even though Alabama and Georgia have represented to Secretary Kobach that they do not intend to enforce their proof of citizenship requirements until after the November 8 election, a decision that approves the requests of those States is likely to cause voter confusion.

Consistent with the D.C. Circuit's ruling on the equitable considerations favoring Plaintiffs, especially as pertaining to the November election, the Court should defer issuing its ruling until after the November 8 election.

V. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Cross Motion for Summary Judgment—vacating the Executive Director's decision and clarifying that the Executive Director lacks authority to act upon the States' requests (or any similar future requests). Moreover, in order to avoid voter confusion in the crucial days before the election, this Court should refrain from issuing its decision until after the general election on November 8, 2016.

October 7, 2016

Respectfully submitted,

By: /s/ Michael Keats

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**Pro hac vice motion pending*
***Admitted pro hac vice*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on the 7th day of October, 2016, they caused one copy each of the foregoing SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDMGENT AND OPPOSITION TO DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT and attachments, to be served by electronic mail and/or the Court's ECF system on the following:

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Respectfully submitted,

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