IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, et al.,

Plantiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendants,

and

KRIS W. KOBACH, in his official capacity as the Kansas Secretary of State

Intervenor Defendant,

and

PUBLIC INTEREST LEGAL FOUNDATION

Intervenor Defendant.

NO. 16-cv-236 (RJL)

SUPPLEMENTAL BRIEF ON SUMMARY JUDGMENT OF DEFENDANT INTERVENOR KANSAS SECRETARY OF STATE KRIS KOBACH

TABLE OF CONTENTS

I. The Court of Appeals Decision Does not Constitute Law of the Case 1

II. It is Law of the Case That No Regulation was Required to Amend the State-Specific Instructions and That This is a Informal Adjudication 4

III. The Court of Appeals Did Not Address Two Independently Dispositive Issues 5

A. The Second Clause of 52 U.S.C. § 20508(b)(1) Supports the EAC Decision 6

B. A Controlling Federal Rule Compelled the EAC's Decision 7

IV. The Court of Appeals Committed Logical Errors in Applying the Doctrine of Constitutional Avoidance 8

A. The Majority Opinion's Reasoning was Circular 8

B. The Majority Opinion Committed the Fallacy of the Inverse 10

C. The Majority Opinion Cannot Logically be Squared with *ITCA's* Suggestion to Arizona 12

D. The Court of Appeals Ignored the Second Basis of Constitutional Doubt 13

V. This Court Did not Displace this Court's Authority to Review Whether Mr. Newby's Decision was Supported by the Administrative Record 15

VI. Two Factual Questions Remain Open for this Court 17

CONCLUSION 18

I. The Court of Appeals Decision Does not Constitute Law of the Case

The Court of Appeals decision is not controlling in the disposition of the pending summary judgment motions. "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*." *Sherley v. Sebelius*, 689 F.3d 776, 780-81 (D.C. Cir. 2012) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). "The law of the case doctrine 'bars reconsideration of a court's explicit decisions [in earlier phases of a case] as well as those issues decided by necessary implication." *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 52 (quoting *New York v. Microsoft*, 209 F. Supp.2d 132, 1441 (D.D.C. 2002); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) *LaShawn A v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (*en banc*)). However, an "exception to the law-of-the-case doctrine" exists regarding preliminary injunctions. *Id.* "[T]he decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits." *Id.* (quoting *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974).[1]

The exception exists for two reasons. First, it exists when "a determination [by an Appellate court] had been made without discovery or the other full range of exploratory and preparatory pretrial procedures and without a full trial on the merits." *Sherley*, 689 F.3d at 782 (citation omitted). This often requires the appellate court to consider "preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations." *Id.* As a result, review "in a later phase of the litigation with

[1] This exception does not apply when "there has been an order of consolidation pursuant to Rule 65(a)(2)." *Berrigan*, 499 F.2d at 518. No consolidation was entered in this case.

a fully developed record, full briefing and argument, and fully developed consideration of the issue need not bind itself to the time-pressured decision it earlier made on a less adequate record." *Id.*

Second, the exception exists when "because [the preliminary injunction] fails to satisfy an element of the law-of-the-case rule itself: the requirement that a court must 'affirmatively decide []" an issue, explicitly or by necessary implication, to establish law of the case." *Sherley*, 689 F.3d at 782 (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). An appellate court's decision that a party "*probably* or *likely* will or will not succeed on the merits" means that a court did not "affirmatively decide[]" an issue to bind later litigation." *Sherley*, 689 F.3d at 782. Unless a point of law was conclusively decided "explicitly or by necessary implication," it does not become "law-of-the-case." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (citing *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990)). "Questions that merely could have been decided do not become law of the case." *Bouchet v. National Urban League*, 730 F.2d 799, 806 (D.C. Cir. 1984).

Only when *both* of these reasons are lacking does the law-of-the-case exception for preliminary injunctions not apply. *Sherley*, 689 F.2d at 783. In the instant case, each of these reasons is present. First, the briefing schedule in this Court during the preliminary injunction phase was expedited. The Court of Appeals likewise put this case on an expedited briefing schedule regarding the preliminary injunction. Indeed, the schedule was so expedited due to the upcoming election that the Court of Appeals issued an order before even issuing an opinion. Thus, although the administrative record was before the appellate court, the preliminary

injunction was considered "on briefing and argument abbreviated ... by time considerations." *Sherley*, 689 F.3d at 782.

Second, and more importantly, the Court of Appeals decision cannot garner law of the case effect because of the limited scope of the decision. It left numerous issues completely unanswered. "The [law-of-the-case] doctrine only applies to issues that were previously litigated and decided." *U.S. v. Science Applciations Intern. Corp.*, 958 F. Supp.2d 53, 60 (D.D.C. July 22, 2013) (citing *Cobell v. Salazar*, 679 F.3d 909, 916-17 (D.C. Cir. 2012)). "Questions that merely could have been decided do not become law of the case." *Bouchet v. National Urban league*, 730 F.2d at 806. Beyond the issues addressed by the Court of Appeals, there are two additional, independent reasons that Mr. Newby's decision could have been affirmed—the requirements of 8 C.F.R. 9428.3(b) and the remaining portion of the 52 U.S.C. 20508(b)(1). Neither of these reasons was addressed by the Court of Appeals. *See infra* at Section III. As such no "law of the case" can extend to those issues.[2]

Finally, the limited issues that the Court of Appeals *did* address cannot be given law-of-the-case status because the Court's reasoning was "clearly erroneous and would work a manifest injustice." *LaShawn A.*, 87 F.3d at 1393.[3] Relying on the NVRA, the Court of Appeals stated

[2] Furthermore, there are other issues which remain unresolved for this Court which are discussed throughout this brief.

[3] In explaining why it would follow the law of the case doctrine, the *Sherley* court construed other Circuits and explained that, only "prior clear legal conclusions reached at the preliminary injunction stage" or decisions that are "carefully considered in deciding the course of the preliminary injunction appeal" should be given law of the case effect. *Sherley*, 689 F.3d at 782-83 (citing *This That and The Other Gift and Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1284-85 (11th Cir. 2006), *Entergy, Arkansas, Inc. v. Nebraska*, 241 F.3d 979, 987 (8th Cir. 2001), *Royal insurance Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 880-81 (5th Cir. 1993); *see also* 18B Charles A. Wright et al., Fed. Prac. & Proc. Juris. § 4478.25 (2d Ed.) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal, however,

that constitutional doubt "would not arise under [its] interpretation of section 20508(b)(1) because that provision requires the Commission to include information shown to be 'necessary.'" *League of Women Voters v. Newby*, Case No. 16-5196 (D.C. Cir. Sept. 26, 2016), slip op. p. at 15. However, as is explained at length in Section IV, below, there are multiple errors in the Court's reasoning, and the Court failed to even address one of the two reasons that constitutional doubt would arise

Thus, the Court of Appeals decision is "not controlling" with respect to the vast majority of the pending motions for summary judgment, and can only be given "persuasive" value "for [its] reason and authority to the extent applicable in any new context." *Sherley*, 689 F. 3d at 783. Because the Court of Appeals did not consider two independent and sufficient reasons that Mr. Newby was compelled to grant the States' requests, and the Court of Appeals erred with respect to the avoidance of constitutional doubt, this Court is free to "tak[e] a fresh look" at the case. *Sherley*, 689 F.3d at 783.

II. It is Law of the Case That No Regulation was Required to Amend the State-Specific Instructions and That This is a Informal Adjudication

Plaintiffs argued at length in their briefs to the Court of Appeals that any change to the state-specific instructions must be made by regulation and that Mr. Newby's action was actually a "rule," as opposed to an informal adjudication. Brief of Appellants, Case No. 16-5196, Dkt. 1625105 (LWV Opening Br) at 31-35. Yet the Court of Appeals repeatedly referred to the Executive Director's changing of the instructions as a "decision." *Newby*, slip op. at 11-13, 15-

---

does become the law of the case for further proceedings in the trial court on remand and in any subsequent appeal.").

17, 20-21. It also stated that a State could prevail in requesting modification of the state-specific instructions of the Federal Form by "establish[ing]" that the information was "necessary." *Id*. at 14. By labelling these determinations as "decisions" and by noting that a State merely had to "establish" something, as opposed to the Commission being required to undertake notice-and-comment rulemaking, the Court of Appeals "decided by necessary implication" that Plaintiffs' theories related to notice-and-comment rulemaking were wrong. *Pro-Football, Inc.*, 567 F. Supp. 2d at 52. Thus, it is law of the case that modifications to the state-specific instructions do not require notice-and-comment rulemaking and that Mr. Newby's decision was not a rule within the meaning of the APA.[4]

III. The Court of Appeals Did Not Address Two Independently Dispositive Issues

The Court of Appeals majority devoted only five pages of its 22-page opinion to the merits of this case. In those five pages, it considered only two questions: (1) whether Executive Director Newby correctly considered whether the States' proof-of-citizenship requirements were "necessary to assess eligibility," *Newby*, slip op. at 12; and (2) whether the canon of constitutional avoidance required the Court to agree with Mr. Newby's decision. *Id*. at 14-16. It is impossible to resolve the merits of this case by considering only those two questions. There are two additional issues presented in this case that constitute *independent and sufficient reasons* for sustaining Executive Director Newby's decision. This Court may sustain the Newby decision on either or both of those grounds without in any way contradicting the Court of Appeals

[4] Even if, in the alternative, this Court determines that not to be law of the case, it is clear that Executive Director Newby possessed the authority to make the decision and that Mr. Newby was correctly interpreting the authority given to him by the EAC Commissioners and exercised repeatedly by past executive directors. Kansas SJ Br. at 27-30.

majority opinion authored by Judge Rogers. The two issues are summarized and reiterated briefly below.

A. The Second Clause of 52 U.S.C. § 20508(b)(1) Supports the EAC Decision

The panel majority quoted 52 U.S.C. § 20508(b)(1) in full, but only referred to a single "criterion," namely "whether the amendments were necessary *to assess eligibility*." *Id*. at 12 (emphasis added). However, the statutory section contains not one, but two, criteria that may be used to justify modifications to the state-specific instructions of the Federal Form. *See* Kansas SJ Br. at 13-14, 17-18, 37, 42-43. The second criterion is whether the modification is necessary to enable the State election official "to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). The full text of the subsection is as follows:

> **(b) Contents of mail voter registration form**
> The mail voter registration form developed under subsection (a)(2)-
> > (1) 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*;

U.S.C. § 20508(b)(1) (emphasis added). Regardless of whether the requested language can be construed as "identifying information … necessary to assess eligibility," the requested language also constitutes "other information … necessary … to administer voter registration and other parts of the election process." *Id*. Either reason may justify inclusion of the requested language in the state-specific instructions of the Federal Form. Judge Rogers' majority opinion completely ignored the second reason.

Accordingly, this Court can and should hold that the second statutory reason fully justifies the EAC's granting of the States' request. The D.C. Circuit simply did not address the issue. What "other information" is necessary to administer the voter registration part of the

election process is defined by state law. The requested information is "necessary…to administer voter registration" in Kansas because providing satisfactory proof of citizenship is a prerequisite under Kansas law to completing the registration process. K.S.A. 25-2309(*l*) The job of the EAC is to make sure that the Federal Form reflects relevant state law by "consult[ing]" the chief election officers of the States and including any changes in the state-specific instructions of the Federal Form that are reflected in new state laws. 52 U.S.C. § 20508(a)(2).

B. A Controlling Federal Rule Compelled the EAC's Decision

The majority opinion also completely ignored the federal rule that compelled the Executive Director to grant the States' requests to add the proof-of-citizenship language. *See* Kansas SJ Br. at 2-3, 5, 22. The relevant regulatory provision states: "The state-specific instructions *shall contain* … information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b) (emphasis added). It is important to note that this regulation requires the requested language to be included, regardless of whether one views the States' proof-of-citizenship requirements to be "voter eligibility" or "registration" requirements (a distinction that the Department attempts to rely upon). *See* DOJ Br. at 7; *see also* Kansas SJ PI Br. at 22. The relevant regulation that binds the agency requires *both* to be listed in the instructions.

This binding rule is fully sufficient to justify Executive Director Newby's decision to include the requested language in the state-specific instructions, regardless of the D.C. Circuit's opinion regarding other questions presented in the case. It also fully explains why he stated that he must look to State law in updating the Federal Form's state-specific instructions. AR0004-AR0005. Indeed, Mr. Newby's actions would have been arbitrary and capricious if he did *not*

follow this rule and modify the state-specific instructions. *Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 122 (D.D.C. Oct. 24, 2001 (While "[a]gency interpretations of their own of their own regulations are consistently afforded deference," they should be rejected if the interpretation is "plainly erroneous or inconsistent with the regulation.") (citation omitted and internal quotation mark omitted). Additionally, no matter how one reads *Arizona v. Inter Tribal Council of Arizona, Inc*. ("*ITCA*"), 133 S. Ct. 2247 (2013), *or Kobach v. EAC,* 772 F.3d 1183 (10th Cir. 2014), it is undisputed that this regulation was not construed in either of those cases. Accordingly, the Executive Director's decision must be affirmed as required by federal rule.

IV. The Court of Appeals Committed Logical Errors in Applying the Doctrine of Constitutional Avoidance

The Court of Appeals did address Defendant-Intervenors' argument that the doctrine of constitutional avoidance requires an interpretation of the NVRA that allows States unfettered discretion to control the means of enforcing their qualification (and that does not result in qualifications for federal elections that differ from the qualifications for state elections). *Newby*, slip op. at 14-16. However, this Court is not bound to commit any logical errors that the Court of Appeals may have committed in analyzing that argument. *See, e.g.*, *LaShawn A.*, 87 F.3d at 1393 (law-of-the-case does not apply when a decision is "clearly erroneous"). There are three logical errors in the majority opinion. In addition, as explained in subsection D below, the Court of Appeals failed to address the second basis of constitutional conflict that comes into play under the doctrine of constitutional avoidance. With respect to that basis, there is no law of the case binding this Court.

A. The Majority Opinion's Reasoning was Circular

In attempting to find some way around the doctrine of constitutional avoidance, the majority claimed that a constitutional conflict "would not arise under our interpretation of section 20508(b)(1) because that provision requires the Commission to include information shown to be 'necessary'." *Newby*, slip op. at 15. The majority maintained that because a proof-of-citizenship requirement is not "necessary" to enforce a State's citizenship qualification, it would not be a violation of the Qualifications Clause or the Seventeenth Amendment if Congress passed a statute effectively barring a State from imposing such a requirement. *Id*.

The problem with the majority's analysis is that the word "necessary" comes from the statute itself. 52 U.S.C. § 20508(b)(1). It is not found in the Qualifications Clause or the Seventeenth Amendment. The standard for assessing whether a statute is constitutional cannot be set by the statute itself. That is circular reasoning, by which a court concludes that a statute is constitutional simply because the statute itself defines the requirements of the Constitution. Stated differently, Congress cannot avoid a constitutional conflict when drafting a statute by simply defining the relevant constitutional provision narrowly in the text of the statute itself. *See City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997) ("'[C]ongressional enforcement power [under the Fourteenth Amendment] is not unlimited.' . . . Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.") (citation omitted). The meaning of the Qualifications Clause and the Seventeenth Amendment cannot be changed by an act of Congress. Nor can it be changed by an Article III judge. That is presumably why Judge Randolph stated in dissent that not only did the majority holding "raise[] the 'serious constitutional' issue," *Newby* slip op., dissent at 2, but also "[t]hat order is unconstitutional." *Id*. at 1.

Judge Rogers apparently sensed that she was merging the constitutional analysis with the statutory text. She stated: "Accordingly, the constitutional question dovetails with the statutory one." *Newby* slip op. at 15. It would be more accurate to say that, under her reasoning, the constitutional question *becomes dependent upon* the statutory one. This cannot occur. Such circular reasoning would allow Congress to define away any unconstitutionality that its statutes might otherwise suffer.

B. The Majority Opinion Committed the Fallacy of the Inverse

The majority opinion reached its conclusion by relying on the following sentence in *ITCA*, 133 S. Ct. 2247, 2258-59: "[I]t would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Quoted in Newby*, slip op. at 15. The majority opinion then offered the following conditional statement: "[I]f the proposed change to the Federal F[or]m is 'necessary' to enforce voter qualifications, then … probably the Constitution require[s] its inclusion; if not, … the Constitution is silent." *Id*.

This conditional conclusion offered by the majority is an example of the fallacy of the inverse, also known as the fallacy of denying the antecedent. This fallacy is demonstrated in the following construction: If P, then Q; therefore if not P, then not Q.[5] The majority applied that flawed reasoning to the above sentence from *ITCA*. The majority concluded that if (in the majority's view) proof of citizenship is *not* necessary to enforce a State's voter qualifications, then the States do not have the constitutional authority to require it. But that conclusion cannot

[5] For example:

If it is raining, then the grass is wet.
It is not raining.
Therefore, the grass is not wet.

This conclusion is a logical fallacy because there are may be other reasons that the grass is wet, such as because it was recently sprayed with a water hose.

logically be drawn from the *ITCA* sentence. There may be circumstance other than necessity in which the Constitution protects a State's authority under the Qualifications Clause to enact a proof-of-citizenship requirement. To name but a few: (1) the State may deem it advisable, even if it is not strictly necessary; (2) the State may have a rational basis for believing it to be necessary; and (3) the State may see it as reflecting the will of its citizens.

Stated differently, it is inconceivable that when Justice Scalia wrote the *ITCA* sentence on which the majority relied, he was intending to confine the States' authority under the Qualifications Clause (and the Seventeenth Amendment) only to those situations in which an Article III judge determines that the State's action is "necessary." Indeed, Justice Scalia has cautioned courts against committing the fallacy of the inverse: "To assume otherwise, as the majority does, is to commit the fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q." *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2250, 2603 (2014) (Scalia, J. concurring in the judgment). The D.C. Circuit has also cautioned against the logical fallacy committed by the majority. *New England Power Generators Ass'n v. F.E.R.C.*, 707 F.3d 364, 371 (D.C. Cir. 2013). Consequently, constitutional doubt arises *any* time a federal statute is interpreted in a way that denies a State the authority to enforce its voter qualifications. The *ITCA* Court made this clear. "'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. 2258 (*quoting Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)). Moreover, "the power to establish voting requirements is of little value without the power to enforce those requirements." *ITCA*, 133 S. Ct. at 2258. If a federal agency or an Article III court is given the

authority to interpret a federal statute so as to block a State's exercise of that power, then constitutional doubt is raised—indeed, the Constitution is *violated*; that interpretation must be avoided. *See id*. For this reason, the majority's conclusion violates the doctrine of constitutional avoidance and actually creates a constitutional conflict.

C. The Majority Opinion Cannot Logically be Squared with *ITCA's* Suggestion to Arizona

The final logical problem with the majority opinion in *Newby* is that, if correct, it would render meaningless the *ITCA* suggestion that Arizona should renew its request to the EAC. The *ITCA* opinion implied that "it would raise constitutional doubt" if the EAC rejected a State's "request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility." *Id.* at 2259. The Supreme Court "[h]appily" avoided a more strained reading of the NVRA because it was assured that Arizona's ability to "enforc[e] its constitutional power to determine voting qualifications remains open to Arizona[,]" namely that Arizona would request modification of its state-specific instructions on the Federal Form, and the EAC would make that alteration. *Id.* at 2259-60. In the event that the EAC denied Arizona's request or refused to act on it, Arizona could then sue the agency under the APA and gain relief in an Article III Court. *Id*. at 2260. The *ITCA* majority even suggested that Arizona should point out in a reviewing court "that it would be arbitrary for the EAC to refuse to include Arizona's instruction when it has accepted a similar instruction requested by Louisiana." *Id*. None of this would make sense if the EAC adopted a reading of the NVRA that blocked it from granting a State's request – much less if the EAC *granted* the State's request but an Article III court intervened (at the behest of interest groups) to block the State's request.

Finally, the majority's opinion cannot be squared with the specific sentence in *ITCA* that describes what a reviewing court must assess. The sentence reads as follows: "Should the

EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice *to effectuate its citizenship requirement* and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form." *Id*. at 2260 (emphasis added). The italicized phrase is important. *ITCA* did not say that a State must establish that mere oath will not suffice to determine whether someone is a citizen. Rather *ITCA* said that a State must establish that mere oath will not suffice "to effectuate its citizenship requirement." *Id*. To effectuate a requirement means to carry it into effect or to implement it.[6] If a State's laws require that proof of citizenship must be submitted in order to prove one's citizenship, then that requirement is not effectuated unless the Federal Form reflects that state requirement. The majority omitted the phrase "to effectuate its citizenship requirement" when it discussed this portion of the *ITCA* opinion. That omission is significant. *ITCA* made clear what a State must show in a reviewing Court. The majority opinion requires the States in the instant case to show something else entirely. Consequently the majority opinion cannot be squared with *ITCA*.

For all three of these reasons, this Court should reject the D.C. Circuit's deeply flawed analysis of the doctrine of constitutional avoidance.

D. The Court of Appeals Ignored the Second Basis of Constitutional Doubt

In addition to committing logical errors in analyzing the first basis of constitutional doubt presented by Defendant-Intervenor (the constitutional problem that arises if a State is denied the means of enforcing its citizenship qualification), the Court of Appeals ignored the second basis of constitutional doubt presented by Defendant-Intervenor (the violation of the Qualifications

[6] *Baylor v. Mitchell Rubenstein & Associates*, P.C., 55 F. Supp. 3d 43, 54 n.6 (D.D.C. 2014) (noting that "effectuate" can be defined "as 'to carry into effect, to bring to pass, to fulfill.'").

Clause that occurs when the qualifications for voting in federal elections differ from the qualifications for voting in state elections). *See* Kansas SJ Br. 22-24. This second basis of constitutional doubt did not receive any consideration by the Court of Appeals. Nor is it disposed of by asking whether the requested modification of the state-specific instructions is "necessary." Nor was it addressed in *ITCA*. *See ITCA*, 133 S. Ct. at 2257-60.

It is undeniable that the Qualifications Clause prohibits the qualifications of electors for federal office from differing from the qualifications of electors for state office. "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, Sec. 2. This unconstitutional situation arises if the EAC is compelled to give the NVRA the reading urged by the Court of Appeals. The qualifications for federal electors in Kansas described in the Federal Form then differ from the qualifications for state electors described in Kansas law at K.S.A. § 25-2309(*l*).[7] One of the qualifications for state electors in Kansas is completing the registration process, which includes providing proof of citizenship. Qualified electors are "persons who have the constitutional (Kan. Const., art. 5, §§ 1, 4) qualifications of an elector *and who are duly and properly registered*." *Dunn v. Board of Com'rs of Morton County*, 165 Kan. 314, 328 (1948)(emphasis added). Kansas statute makes clear that registration is a prerequisite to being qualified to vote—one is not "entitle[d] … to vote" until one registers in accordance with Kansas law. K.S.A. § 25-2302. And Kansas law forbids registration—i.e. forbids someone from being entitled to vote—without

[7] The Department and the Plaintiffs in this case have attempted to draw distinctions between "eligibility" and "registration." But Kansas statute makes clear that one cannot be eligible (or qualified) until one has registered. K.S.A. § 25-2302; *Dunn*, 165 Kan. at 328. The Plaintiffs have quibbled that this qualification is not expressed in the Kansas Constitution, but they forget that qualifications (a criterion that must be met in order to possess the right to vote) for electors may also be created by statute in Kansas. *Id.* ("It is well settled in this this state that the Legislature may require registration as a prerequisite to the right to vote.").

first providing satisfactory evidence of citizenship. K.S.A. § 25-2309(*l*). Given the requirements of being an elector set by Kansas law, Congress (or a federal agency) cannot deem individuals entitled to vote for federal elections, if they are not entitled to vote in state elections. Doing so would present a direct conflict with the Qualifications Clause and the Seventeenth Amendment. Accordingly, the canon of the avoidance of constitutional doubt requires a different reading of the NVRA. This basis of constitutional doubt is distinct from the first basis and was not addressed by the Court of Appeals. Therefore, this Court may rely upon it in construing the relevant text of the NVRA.

V. This Court Did not Displace this Court's Authority to Review Whether Mr. Newby's Decision was Supported by the Administrative Record

The Court of Appeals decision did not displace this Court's ability to review whether Mr. Newby's decision should be upheld based on the evidence in the record. "An agency decision will be reversed *only* if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *EEX Corp. v. U.S. Dep't of Interior,* 111 F.Supp.2d 24, 30 (D.D.C.2000) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (emphasis added)). Under the APA, the court "presumes the validity of agency action" and "cannot substitute its judgment for that of an agency." *Id.* (quoting *LaRouche's Comm. for a New Bretton Woods v. Fed. Elec. Comm'n,* 439 F.3d 733, 737 (D.C.Cir.2006)). The APA only requires an agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation mark existed).

The Court of Appeals left open question of whether facts in the administrative record (other than those specifically addressed by the Court) and in Mr. Newby's declaration would suffice to justify Mr. Newby's decision. *Newby*, slip op. at 16. As Defendant-Intervenor has explained, there is more than enough evidence in the record to conclude that the modification to the state specific-instructions was required to "administer . . . voter registration and other parts of the election process" as required by the NVRA. *See* Kansas MSJ at 37. There is also more than enough information in the record to conclude that it was required pursuant to a binding regulation. *Id.* at 21-22, 37-38. As noted previously, neither of these issues were addressed by the Court of Appeals. There is more than enough evidence to meet the "rational connection" standard. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

In addition, this Court retains discretion whether to consider Mr. Newby's subsequent declaration or to request further explanation from Mr. Newby. *See* Kansas SJ Br. at 38-40. The Court of Appeals acknowledged that a court could consider a contemporaneous memorandum, *Newby*, slip op. at 12 (citing *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 738 (D.C. Cir. 2001), but did not address Mr. Newby's declaration. In that declaration, Mr. Newby clarified why the decision was made. Declaration of Brian Dale Newby, Dkt. 28-2 ("Newby Decl."), ¶¶ 21, 22, 25, 32. He also indicated that, based on the record, the States had shown that the change was "necessary." *Id.* at ¶ 46. And, even if this Court were not satisfied with Mr. Newby's explanations, this Court would retain the discretion to seek further clarification from Mr. Newby regarding why he granted the States' requests. *See* Kansas SJ Br. at 40-41 (citing *Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307 (D.C. Cir. 2007), *Alpharma, Inc. v. Leavitt*, 460 F.3d 1

(D.C. Cir. 2006), *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, No. CV 1401220 (RC), 2016 WL 695982, at *6 (D.D.C. Feb., 2016). The Court of Appeals left this Court substantial room on this point. *Newby*, slip op. at 14 ("Only after the Commission (or a reviewing court) determines necessity…"). As Defendant-Intervenor pointed out in its opening brief, the Court could do this without remanding to the agency to ensure that this issue is resolved promptly. *See* Kansas MSJ Br. at 40-41.

VI. Two Factual Questions Remain Open for this Court

Finally, two factual questions remain open for this Court to address. The first factual question is whether the 2014 "decision," purportedly issued by the EAC regarding Kansas's request, was actually drafted and issued by the Department of Justice rather than by an independent, bipartisan agency. If the "decision" was actually a product of the Department of Justice, then it should be entirely ignored, because it does not constitute a prior decision of the EAC in any meaningful sense. *See* Kansas SJ Br. at 6-9; *see also* Ex. A, Declaration of Christy McCormick.[8] The second factual question is whether the evidence presented by Kansas of twenty-five noncitizens in one county alone who registered in the absence of a proof-of-citizenship requirement (or who would have successfully registered had the requirement not been in effect) demonstrates that "a mere oath will not suffice to effectuate [the States'] citizenship requirement[.]" *ITCA*, 133 S. Ct. at 2260. Neither of these questions were addressed by the Court of Appeals.

[8] Intervenor-Defendant again notes that the Department of Justice does not argue that this "decision" should be given any effect; only Plaintiffs so argue.

CONCLUSION

For all of these reasons, this Court remains free to sustain the EAC's decision and grant summary judgment in favor of Defendant on multiple, independent grounds. Accordingly, Plaintiffs' Cross-Motion for Summary Judgment should be DENIED; Defendants' Partial Motion for Summary Judgment should be DENIED; Kansas's Cross-Motion for Summary Judgment should be GRANTED; and the EAC's decision of January 29, 2016, should be given effect and the requested language be added again to the state-specific instructions of the Federal Form.

Dated: October 7, 2016

Respectfully submitted,

/s/ Kris W. Kobach*

Kris W. Kobach
**Appearing pro hac vice*
Kansas State Bar No. 17280
Garrett Roe
Appearing pro hac vice
Kansas State Bar No. 27687
Office of Kansas Secretary of State
120 S.W. 10th Ave.
Topeka, KS 66612
Telephone: (785) 296-4575
Facsimile: (785) 368-8033
Email: kris.kobach@sos.ks.gov

/s/ John M. Miano
John Miano
D.C. Bar No. 1003068
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
Facsimile: (202) 464-3590
E-mail: miano@colosseumbuilders.com
Counsel for Defendant-Intervenor Kris Kobach

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I filed the attached Supplemental Brief on Summary Judgment of Defendant Intervenor Kansas Secretary of State Kris Kobach with the United States District Court for the District of Columbia via the Court's ECF CM/ECF system, that will provide notice and service to all parties.

/s/ John Miano
John Miano
Counsel for Defendant-Intervenor Kris Kobach