

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.

Civ. No. 1:16-cv-00236

BRIAN D. NEWBY, in his capacity as the Acting Executive Director & Chief Operating Officer 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.

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Table of Authorities

Cases

**Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) 1, 10-13, 22

Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd., 15 F. Supp. 2d 1 (D.D.C. 1997)5

Davis v. Billington, 76 F. Supp. 3d 59 (D.D.C. 2014).....5

**Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32 (D.D.C. 2014) 4-5

Florida Dep’t of State v. U.S. Dep’t of Homeland Security, et al., No. 12-cv-00960 (D.D.C. 2012)28

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 16-17

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994),
aff’d sub nom. Miller v. Johnson, 515 U.S. 900 (1995)16

Kingman Park Civic Ass’n v. Gray, 956 F. Supp. 2d 230 (D.D.C. 2013)5

Klayman v. Obama, 2015 U.S. Dist. LEXIS 151826 (D.D.C. Nov. 9, 2015)4

Kobach v. Election Assistance Commission, 6 F. Supp. 3d 1252 (D. Kan. 2014)..... 1-3, 7

Kobach v. Election Assistance Commission, 772 F.3d 1183 (10th Cir. 2014),
cert. denied 133 S. Ct. 2891 (2015) 3, 8-9, 14

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004).....9

Sackett v. EPA, 132 S. Ct. 1367 (2012)8

Sherley v. Sebelius, 644 F.3d 388 (D.C. Cir. 2011) 4-5

Sottera, Inc. v. Food & Drug Admin., 627 F.3d 891 (D.C. Cir. 2010).....4

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) 4-5

Whitman v. Am. Trucking Ass’ns, 531 U.S. 457 (2001)8

Federal Constitution, Statutes and Rules

U.S. Const., Art. I, § 2, cl. 1.....10

U.S. Const., Art. I, § 4, cl. 1.....11

U.S. Const., Art. II, § 1, cl. 210

5 U.S.C. § 704.....9

18 U.S.C. § 611.....29

18 U.S.C. § 911.....29

18 U.S.C. § 1015(f)29

52 U.S.C. § 20508..... 11-13

52 U.S.C. § 20511(2)29

52 U.S.C. § 20901.....13

52 U.S.C. § 20929.....13

11 C.F.R. § 9428.6(c)12

76 Fed. Reg. 58525 (Sept. 21, 2011)27

Other Resources

160 Cong. Rec. S6933 (daily ed. Dec. 16, 2014)3

Criminal Division, Public Integrity Section, U.S. Department of Justice, Election Fraud
Prosecutions & Convictions: October 2002-September 2005 (2006)30

DA reviews newly minted legislator’s admission of voter fraud, Santa Fe New Mexican
(Nov. 12, 2015)25

Daren Briscoe, *Noncitizens Testify They Voted in Compton Elections*, L.A. Times
(Jan. 23, 2002)26

EAC, Commissioners, http://www.eac.gov/about_the_eac/commissioners.aspx3

Eric Shawn, *Non-citizens Caught Voting in 2012 Presidential Election in Key Swing State*,
FOX NEWS (Dec. 18, 2013)26

Government Accountability Office, *Elections: Additional Data Could Help State and Local
Election Officials Maintain Accurate Voter Registration Lists* 42 (2005)26

Guilty Pleas Resolve All Five Voter Fraud Convictions in Iowa, DESMOINES REGISTER.COM
(Dec. 15, 2013)25

Hans A. von Spakovsky, *Election Fraud Uncovered by Patriotic Citizens...Who Promptly Get Sued* (October 23, 2010)29

Hans von Spakovsky, *Who’s Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (Encounter Books, 2012)26

Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do noncitizens vote in U.S. elections?*, *Electoral Studies* 36 (2014)26

Kerry Pickett, *Former DOJ Official: Non-Citizens Registered to Vote through Motor Voter Registration Forms* (April 8, 2015)29

Redacted Pursuant to Protective Order

Marc Caputo, *Florida and feds sue each other over noncitizen purge controversy*, *Miami Herald* (June 11, 2012)28

Michigan Investigation Sought of Non-Citizen Voting, ASSOCIATED PRESS (Dec. 6, 2013) 25-26

National Mail Voter Registration Form – English, *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf.....23

Non-U.S. Citizen Indicted For Voter Fraud In North Texas, CBSDFW.com (Nov. 9, 2015)25

Noncitizen Voting and ID Requirements in U.S. Elections: Hearing Before the Committee on House Administration, 109th Cong. (2006)24

Press Release, *Florida Department of State Receives Commitment from U.S. Department of Homeland Security to Provide Access to Citizenship Database* (July 14, 2012)28

Register to Vote, Election Assistance Commission, http://www.eac.gov/voter_resources/register_to_vote.aspx13

Testimony of Hans A. von Spakovsky, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and the Subcommittee on Health Care, Benefits, and Administrative Rules (February 12, 2015) 25, 26-27, 29-30

Testimony of Kris W. Kobach, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and the Subcommittee on Health Care, Benefits, and Administrative Rules (February 12, 2015)27

Transcript, United States Election Assistance Commission Public Meeting (Feb. 24, 2015),
available at http://www.eac.gov/public_meeting_2-24-15/15

Introduction

Plaintiffs seek to force the Election Assistance Commission (“EAC”) to withdraw changes to the Federal voter registration form that were requested and substantiated by three States and which have been in place since February 1, 2016. In so doing, Plaintiffs fail to satisfy the requirements for the extraordinary remedy of a preliminary injunction, much less the heightened showing needed to obtain an equitable order that alters the status quo. Even under the lesser standard that applies to preliminary injunctions seeking to preserve the status quo, Plaintiffs would fail because they have not demonstrated that they will suffer irreparable injury absent an injunction, nor have they shown that they are likely to succeed on the merits. In light of this failure, Plaintiffs’ Motion should be denied.

Statement of Facts

In 2013, at the suggestion of the Supreme Court in *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (“*ITCA*”), Arizona, Georgia, and Kansas requested that the 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. 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 (D. Kan. 2014). 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 and, after receiving comments from many special interest groups including several Plaintiffs before the Court now, issued a 46-page decision on January 17, 2014, denying the States’ requests (the “2014 Decision”). *See* Exhibit 6 to Plaintiffs’ Complaint (Dkt. 1-7). The origin of this decision was questioned by Defendant-Intervenor Secretary Kobach during the hearing on Plaintiffs’ Motion for Temporary Restraining Order. Exhibit A to Affirmation of Kaylan Phillips, Hearing Transcript, *League of Women Voters, et al. v. Newby, et al.* at 59:10-61:6 (February 22, 2016) (“Hearing Transcript”) (explaining his belief that the Department of Justice drafted the 2014 Decision); *see also* Exhibit 2 to Federal Defendants’ Response to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction, Declaration of Brian Dale Newby (Dkt. 28-2) ¶ 22 (“Newby Declaration”) (“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”). The United States admitted to this Court that the decision was made with the involvement of attorneys with the Department of Justice. Exhibit A, Hearing Transcript at 41:7-43:5. Redacted Pursuant to Protective Order

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[REDACTED]

[REDACTED]

The States 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 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).

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 March 4, 2016); *see also* 160 Cong. Rec. S6933 (daily ed. Dec. 16, 2014). In November 2015, Brian Newby was hired as the EAC’s new Executive Director. Newby Declaration, ¶ 3.

Kansas then requested that the EAC modify its state-specific instructions on the Federal Form to reflect current state law, including new regulations pertaining to Kansas’s proof of citizenship requirement. Newby Declaration, ¶¶ 20-21. With its request, Kansas included newly discovered evidence demonstrating the need for its state-specific instructions. *Id.*, ¶ 21.

“After determining that the changes to the state-specific instructions were necessary and proper,” Mr. Newby finalized and mailed his acceptance of Kansas’s request on January 29, 2016 (hereinafter, the “2016 Decision”). Newby Declaration, ¶ 46, 49. Mr. Newby also notified Alabama and Georgia of the acceptance of their similar requests. *See* Exhibits 13, 17, and 18 to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Dkts. 11-15, 11-19, and 11-20). The changes were posted on the EAC’s website as of February 1, 2016. Newby Declaration, ¶ 51.

On February 12, 2016, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. (Dkt. 1.) On February 17, 2016, Plaintiffs filed the present Motion for Temporary Restraining Order and Preliminary Injunction, (Dkt. 11,) and supporting Memorandum, (Dkt. 11-1,) (hereinafter, the “Mem.”). 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, Federal Defendants filed their response to Plaintiffs’ Motion, stunningly stating that “[t]he United States consents to plaintiffs’ request for entry of a preliminary injunction.” (Dkt. 28 at 1.) The Court granted both Intervenors’ Motions on February 22, 2016. On the same day, the Court held a hearing on Plaintiffs’ Motion for a Temporary Restraining Order, which it denied on February 23, 2016. (Dkt. 34.)

Standard of Review

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In resolving a request for a preliminary injunction, the court considers ““whether (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest.”” *Klayman v. Obama*, 2015 U.S. Dist. LEXIS 151826, *21 (D.D.C. Nov. 9, 2015) (quoting *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir. 2010)). Out of the four factors, “[i]t is clear beyond cavil that two of the prongs of the four-factor preliminary injunction test—likelihood of success and irreparable injury—are the most significant aspects of the court’s inquiry because they relate directly to the purpose of a preliminary injunction.” *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014).

Courts in this Circuit review these four factors on a “sliding scale,” allowing “a strong showing on one factor [to] make up for a weaker showing on another.” *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Following *Winter*, however, there has been disagreement within the Circuit regarding whether the sliding scale analysis still applies. *See Davis v. Billington*, 76 F. Supp. 3d 59, 63 n.5 (D.D.C. 2014). Courts have chosen to “bypass this unresolved issue and proceed to explain why a preliminary injunction is not appropriate under the ‘sliding scale’ framework. If a plaintiff cannot meet the less demanding ‘sliding scale’ standard, then it cannot satisfy the more stringent standard alluded to by the Court of Appeals.” *Kingman Park Civic Ass’n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013). Importantly, even with the flexibility of the sliding scale, “a movant must demonstrate ‘at least some injury’ for a preliminary injunction to issue.” *Elec. Privacy*, 15 F. Supp. 3d at 38 (internal citations omitted).

Additionally, movants have a significantly higher burden ““where an injunction is mandatory—that is, where its terms would alter, rather than preserve, the status quo by commanding some positive act.”” *Id.* at 39 (quoting *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997)). As the Plaintiffs seek to alter the status quo, namely to *modify* a federal voting registration form approved by the Defendants and presently being used in several states, they must demonstrate that they are ““entitled to relief or that extreme or very serious damage will result from the denial of the injunction.”” *Id.*

ARGUMENT

Plaintiffs have not satisfied any of the requirements for the issuance of a preliminary injunction. First, Plaintiffs have failed to show that they will suffer irreparable harm absent an injunction. In fact, not only have the registration deadlines for the primary elections or caucuses passed, the elections or caucuses themselves also have passed. Second, Plaintiffs have not shown

that they are likely to succeed on the merits, in part because of their efforts to downplay the necessity of the inclusion of the state-specific instructions. But, as has been established already, the States' proof-of-citizenship requirements are necessary because, without them, noncitizens are registering to vote. Third, Plaintiffs have failed to demonstrate that the issuance of an injunction would not substantially injure other parties, namely the States' and their election officials and electorate who have now been relying upon the Federal Form as amended. Finally, Plaintiffs have not shown that the grant of an injunction would further the public interest.

I. Plaintiffs Have Failed to Show Irreparable Harm Absent an Injunction.

Plaintiffs have failed to show that they will suffer irreparable harm absent a preliminary injunction. First, Plaintiffs' allegations that the actions of Defendant Newby will cause "[i]mmediate" harm are not supported by the uncontroverted facts. As Plaintiffs acknowledge, Alabama's and Georgia's primary elections were on March 1, 2016, with the deadline to register to vote passing before Plaintiffs even filed their Motion for relief. Mem. at 4.¹ Kansas's Republican and Democrat caucuses were held on March 5. Even still, as Defendant-Intervenor Secretary Kobach noted during the hearing on the motion for a temporary restraining order, the rules of registration for the caucuses are governed by the political parties and, although the Democrat party does allow same-day registration, it does not require proof of citizenship. Exhibit A, Hearing Transcript at 46:1-4. From a practical standpoint, Plaintiffs have not demonstrated an imminent harm.

In support of Plaintiffs' allegation that they will suffer irreparable harm absent an injunction, their main contention is that Defendant Newby's action "hinders the ability of the Plaintiffs to carry out their mission of promoting voter participation through voter registration

¹ Notably, the bemoaned decision by Defendant Newby occurred on January 29, 2016, yet Plaintiffs did not file their Complaint until February 12 and filed their present Motion almost a week later on February 17.

drives.” Mem. at 19. According to the Plaintiffs, incorporating the *state required* proof-of-citizenship mandates “will make it difficult or impossible” for them “to conduct effective registration drives in those states, and, even when drives are possible, they will have to expend significantly more effort on less effective ways of helping citizens register.” Mem. at 41. Yet it is unclear how educating the public about the duly enacted state requirements is a “less effective way” of assisting with voter registration. The *status quo ante* the Plaintiffs seek, from a practical standpoint minimally in Kansas, is incongruent with their stated goals of increasing voter registration.

Kansas’s proof-of-citizenship requirements were effective as of January 1, 2013. *See Kobach v. United States Election Assistance Comm’n*, 6 F. Supp. 3d at 1256. As Defendant-Intervenor Secretary Kobach explained, 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. Exhibit A, Hearing Transcript at 50:8-17. Once an individual provides the requisite proof of citizenship, they were also registered to vote in state elections.

Unless the Organizational Plaintiffs’ voter registration drives in Kansas have only been focused on federal elections for over three *years*, they should (or do) already have the infrastructure in place to inform citizens of the specific state requirements that are now reflected on the Federal Form. *See* Newby Declaration at ¶ 19 (describing how one Kansas county “loaned the use of an iPad to allow the League [of Women Voters] to capture proof of citizenship from new citizens registering to vote following their naturalization ceremony.”).

In light of the States' primary or caucus schedule, along with the system that has been in place in Kansas for years, Plaintiffs have not shown that they will suffer irreparable harm absent an injunction.

II. Plaintiffs Have Failed to Show a Likelihood of Success on the Merits

Plaintiffs' Complaint alleges that the 2016 Decision was improper because it (1) exceeds the Executive Director's and the EAC's statutory authority, Complaint, ¶¶ 70-74, (2) exceeds the Executive Director's delegated authority, Complaint, ¶¶ 75-82, (3) failed to provide notice and comment, Complaint, ¶¶ 83-86, (4) was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, Complaint, ¶¶ 87-91, (5) violates the National Voter Registration Act of 1993 ("NVRA"), Complaint ¶¶ 92-96.

As a threshold matter, Plaintiffs have not demonstrated that the 2016 Decision constitutes final agency action. When considering the appeal of the 2014 Decision, the Tenth Circuit specifically noted that "[u]nder the unique circumstances of this case (involving a quorum-less EAC), an appeal from the Executive Director's decision to deny the states' requests to modify the contents of the Federal Form was impracticable. Consequently, the Executive Director's decision constitutes final agency action." *Kobach*, 772 F.3d at 1199; *see also* Newby Declaration ¶ 28 ("In my discussion with General Counsel, we determined that acceptance or rejection by the Executive Director could still be reviewed by the Commissioners and, thus, did not represent final agency action.").

The cases relied upon by the Plaintiffs for the contention that the 2016 Decision was a final agency action are inapposite. For example, in *Sackett v. EPA* the plaintiffs were unsuccessful in getting a hearing and were told that the action was "not subject to further agency review." 132 S. Ct. 1367, 1372 (2012). Another case cited by Plaintiffs further betrays their

position. In *Whitman v. Am. Trucking Ass'ns*, the agency “refused in subsequent rulemakings to reconsider” the decision for which review was sought. 531 U.S. 457, 479 (2001). Here, there is no indication that Plaintiffs sought a hearing or otherwise had *any* discussions with the EAC or its staff prior to the filing of this suit. Therefore, Plaintiffs have not satisfied the requirements for judicial review pursuant to 5 U.S.C. § 704.

The inquiry could end there as “[t]he APA authorizes judicial review only of final agency actions.” *Kobach*, 772 F.3d at 1189 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004)). But even if the 2016 Decision constituted final agency action, Plaintiffs have failed to show that they are likely to succeed on the merits of their claims.² First, Plaintiffs misunderstand the constitutional authority the States have over setting the qualifications for eligibility to vote. The 2016 Decision is consistent with this constitutional authority and, likewise, with statutory authority such as the NVRA.

Second, the Executive Director acted within his authority when he made the 2016 Decision and was not required to seek notice and comment. Redacted Pursuant to Protective

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² Further, as Defendant-Intervenor Secretary Kobach substantiated, the individual plaintiffs, Marvin Brown and Joann Brown, lack standing because they have not suffered *any* injury as a result of the 2016 Decision. *See* Exhibit A, Hearing Transcript at 50:25-51:21. .

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Finally, the 2016 Decision was appropriate because the requests from the States were a necessary result of the failure of the Federal Form’s citizenship “safeguards.”

A. The States’ Requests to Modify Their State-Specific Instructions for the Federal Form Concern the Qualification of Voters.

The modifications requested by the States to their state-specific form were to include qualifications found in state law establishing who may vote in state elections. Proof of citizenship is, by definition, a “qualification” for voting. Those who cannot establish they are citizens are not qualified to vote in those states. Those who can establish they are citizens are qualified to vote. The States, not Congress, and certainly not an independent federal agency, have the authority to establish voter qualifications, including the power to ensure that the franchise is exercised only by citizens. Plaintiffs seek to upset the constitutional balance and to give federal bureaucrats the power to reject state registration qualifications in the event they are ideologically opposed to them or if a given administration determines they are a political liability.

1. The power to prescribe the qualifications and registration of voters is expressly reserved to the States by the federal Constitution.

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). The

plain meaning of these constitutional provisions is clear: “The 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, or in other words, *how* elections are held. 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).

Arizona’s proof-of-citizenship law was scrutinized under the Election Clauses’ dual regime in the Supreme Court’s *ITCA* decision. The issue in *ITCA* was whether Arizona’s law that required election officials to “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship”—including the Federal Form—is inconsistent with the instruction of the NVRA that States “accept and use” the Federal Form. *Id.* 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. *ITCA*, 133 S. Ct. at 2257.

Importantly, the *ITCA* opinion reaffirmed the States’ exclusive constitutional authority to determine *who* may vote, or voter qualifications—which Congress may not preempt. *ITCA*, 133 S. Ct. at 2258 (“Nothing in [the Election Clause] lends itself to the view that voting qualifications

in federal elections are to be set by Congress.”) (internal citations omitted). The present case concerns a voter qualification—the “who,” not the “how,” of elections.

And so here, the States have determined that proof of citizenship is, as outlined in Section 9 of the NVRA, “necessary to enable the appropriate State election official to assess the eligibility of the applicant.” 52 U.S.C. § 20508(b)(1). Therefore, as the Supreme Court outlined in *ITCA*, the States have requested that the EAC “alter the Federal Form to include information the State deems necessary to determine eligibility.” 133 S. Ct. at 2259.

According to Plaintiffs, Mr. Newby “exceeded the EAC’s statutory authority under the NVRA,” claiming that Congress considered and rejected the concept of states requiring evidence to verify citizenship. Mem. at 38-39. But the Supreme Court foreclosed such a limitation on the States. *ITCA* acknowledged that “the power to establish voting requirements is of little value without the power to enforce those requirements.” 133 S. Ct. at 2258. If a small federal agency is given the ability to render a state qualification meaningless, the Qualifications Clause has been offended.³ Accordingly, the constitutional power to set voter qualifications must include the power to verify whether those qualifications are satisfied, lest the States’ constitutionally granted authority is merely aspirational. *Id.* at 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.”). Further, as is shown below, evidence of noncitizen registration bolsters the necessity of the changes reflected in the 2016 Decision.

³ Importantly, the NVRA does not require that a State submit a “request” to the EAC. The regulations merely require each chief state election official to “notify” the EAC of “any change to the state’s voter eligibility requirements.” 11 C.F.R. § 9428.6(c). And the regulations are silent as to discretion.

2. The EAC is limited to prescribing the contents of the Federal Form in connection with the States.

The stark juxtaposition between the constitutional authority of the States to set voter qualifications and the clear limited purpose of the EAC further supports the Foundation's position. "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 NVRA]." 52 U.S.C. § 20929. Section 9 of the NVRA provides that the EAC "shall develop a mail voter registration form for elections" in consultation with chief state election officials. 52 U.S.C. § 20508(a)(2). Section 9(b) lays out the "contents" of the Federal Form. 52 U.S.C. § 20508(b). The EAC's authority with regard to the Federal Form is strictly limited to the four corners of the form itself. The States have not requested that the EAC change the "contents" of the Federal Form or asked to enforce state laws that "reject" the Federal Form, as in *ITCA*, or to change the citizenship question that currently exists on the top, left-hand corner of the Federal Form as required by the Help America Vote Act of 2002, 52 U.S.C. § 20901 *et seq.* ("HAVA"). The States simply asked the EAC to change the instructions for their states to reflect the actual qualifications to vote, as the EAC previously did for a "similar instruction requested by Louisiana." *ITCA*, 133 S. Ct. at 2260.

The webpage of the EAC hosting the Federal Form already accommodates state-specific qualifications. The "Register to Vote" webpage⁴ specifically warns applicants in bold-faced font that:

You must follow the state-specific instructions listed for your state. They begin on page 3 of the form and are listed alphabetically by state.

⁴ Register to Vote, Election Assistance Commission, http://www.eac.gov/voter_resources/register_to_vote.aspx.

The Federal Form is followed by 17 pages of state-specific instructions reflecting qualifications. *See* Exhibit 1 to Plaintiffs’ Motion (Dkt. 11-3.). This includes the instructions for the state of Louisiana on page nine—inserted by the EAC—that 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. This Louisiana qualification that the EAC previously listed in the state-specific instructions for the Federal Form is no different from the instructions that the States requested to be listed in their state-specific qualifications. The EAC may no more refuse to print the States’ qualifications than the reader’s desktop printer may refuse to print this brief.

B. The Executive Director Acted Within His Administrative Authority.

At the heart of Plaintiffs’ arguments is a misunderstanding of the action taken by the Executive Director. Plaintiffs refer to it as a “rulemaking” and complain that proper notice and comment did not taken place. Mem. at 35. However, even the 2014 Decision, with its notice and comments, was deemed to be an “informal adjudication” by the 10th Circuit. *Kobach*, 772 F.3d at 1197.

Further, Plaintiffs have not shown that they are likely to succeed on their claim that the 2016 Decision constituted an agency policy at all, much less that it was contrary to “long standing” EAC “policies.” The evidence before the Court verifies that Mr. Newby’s actions were consistent with past actions of the EAC. According to Mr. Newby, “State-specific instructional changes are ministerial, and, thus, routine.” Exhibit 1 to Federal Defendants’ Response to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. 28-1). Mr. Newby affirmed that he “reviewed significant materials showing decisions the Executive Director previously made regarding state-specific instructions” and determined that he “was to

allow changes to state-specific instructions without Commission action.” Newby Declaration ¶

37. Further, according to Mr. Newby:

I discussed the request with each commissioner and received various types of feedback. All three agreed that the Executive Director, through the 2015 Roles and Responsibilities document, was the point person for a decision related to the Kansas request. I could refer it to the Commissioners or accept or reject the request.

Newby Declaration ¶ 27. Mr. Newby also kept the Commissioners informed about his activities throughout the process. *Id.* ¶¶ 40, 42. Then, upon “determining that the changes to the state-specific instructions were necessary and proper,” he accepted the States’ requests. *Id.* at ¶46.

Plaintiffs admit that the Executive Director did have the authority to “maintain the Federal Form *consistent* with the EAC’s established policies in 2008,” but claim, without citation, that the Commission’s adoption of the “Election Assistance Commission Organization Management Policy Statement” (the “2015 Policy Statement”) means “that prior delegation no longer exists.” Mem. at 33 (emphasis in original). But, such a position appears to be inconsistent with the understanding of the Commissioners themselves when adopting the 2015 Policy Statement. Specifically, 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 NVRA and HAVA consistent with EAC policies and guidelines and advisory and policies as set by the Commissioners.

Transcript, United States Election Assistance Commission Public Meeting at 74 (Feb. 24, 2015), available at http://www.eac.gov/public_meeting_2-24-15/ (emphasis added). Redacted

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1. The 2014 Decision Was an Ethically Questionable Usurpation of EAC Ministerial Powers by the Justice Department.

Plaintiffs often refer to the 2014 Decision as the benchmark for EAC action. *See, e.g.*, Complaint ¶ 2 (“well-reasoned 46-page opinion”) and ¶ 31 (“thorough 46-page decision considering the extensive record submitted in response to its request for public comment”), Mem. at 2 (“well-reasoned 46-page opinion”) and 9 (“thorough 46-page decision”). However, according to Mr. Newby, then-Acting Executive Director “Ms. Miller . . . 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.” Newby Declaration ¶ 22. Redacted Pursuant to

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[REDACTED] In *Johnson v. Miller*, 864 F. Supp. 1354, 1362 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995), Voting Section lawyers became impermissible advocates for outside interest groups. The district court found that interest groups were “in constant contact with . . . the DOJ line attorneys . . .” *Id.* Finding this coordination “disturbing,” the court declared, “[i]t is obvious from a review of the materials that [the ACLU attorneys’] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities.” *Id.* The court concluded, “the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. . . . It is surprising that the

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C. The States' Citizenship Verification Measures Are Necessary.

Plaintiffs allege that “the Federal Form has a number of safeguards to prevent noncitizen registration, including an attestation clause that sets out the requirements for voter eligibility and a checkbox “to affirm U.S. citizenship.” Mem. at 6; *see also* Complaint ¶ 25. Yet despite this attestation, there is evidence of noncitizens registering to vote.

The States' requested modifications to the Federal Form may be conclusively considered *necessary* to combat the serious problem of noncitizen registration and voting. Aliens are registering to vote and voting in federal elections because the Federal Form has proven inadequate to prevent it. The basic Federal Form, as constituted by the EAC, has failed to prevent noncitizen registration. If nothing else, the EAC or the States may deem it necessary, and thus the actions of the Defendants are valid.

Following the Court's instruction to show that “a mere oath will not suffice to effectuate [the state's] citizenship requirement,” *ITCA*, 133 S. Ct. at 2260, the States provided evidence of

noncitizen registration in their respective states. *See, e.g.*, Newby Declaration, ¶ 21. According to the Supreme Court in *ITCA*, the EAC was then “under a nondiscretionary duty” to provide state-specific instructions that will satisfy the state’s requirement. *ITCA*, 133 S. Ct. at 2260.

The States are addressing the problem of noncitizen voting that plagues the Federal Form nationwide. These same problems have plagued the use of the Federal Form since its inception. The minimal requirements of the Federal Form have failed to keep aliens off the voter rolls and out of the voting booth. The States are taking the lead nationwide to prevent this criminal activity by ensuring that only American citizens vote in their elections.

1. The Federal Form Has Failed to Prevent Noncitizens from Registering to Vote and Casting Ballots.

The citizenship “safeguards” of the Federal registration form (“Federal Form”) are nothing more than an honor system. They include a checkbox at the top of the form, the words “For U.S. Citizens” on the cover page, and an attestation of citizenship by the signature box. *See* National Mail Voter Registration Form – English, *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf. Despite Plaintiffs’ bald assertions, these measures have unequivocally failed to prevent noncitizens from registering to vote and from actually voting.

a. The citizenship checkbox, even when checked “no,” does not prevent noncitizen registration without additional citizenship verification.

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. Exhibit E to Affirmation of Kaylan Phillips, Thirteen Federal Forms from the Harris

County Tax Assessor Collector.⁶ In this sample, four of the individuals actually checked “no” on the citizenship question,⁷ six checked “no” and “yes,”⁸ 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 also* Exhibit F to Affirmation of Kaylan Phillips, Testimony of Hans A. von Spakovsky, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and the Subcommittee on Health Care, Benefits, and Administrative Rules at 8-9 (February 12, 2015), *available at* <http://oversight.house.gov/wp-content/uploads/2015/02/Testimony-of-Hans-von-Spakovsky-2-12-15.pdf> (hereinafter “Mr. von

⁶ The Foundation redacted all street addresses and birthdates on these faulty registration forms.

⁷ 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?” Exhibit E at 1-4.

⁸ 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?” Exhibit E at 5-10.

Spakovsky Testimony”).⁹ Unfortunately, as we shall see below, the United States Department of Justice was alerted to the incidents in Harris County and evidently took no action in response.

b. The citizenship affirmation does not prevent noncitizen registration and voting.

Nor does requiring individuals merely to check a box that they are citizens under penalty of perjury prevent noncitizens from registering and voting. For example, 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*, DESMOINES REGISTER.COM (Dec. 15, 2013).

In another example, just 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-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

⁹ 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.

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 three 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 6.¹⁰ 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 the Federal Form's "safeguards." Thus, and contrary to the Plaintiffs' assertions, there is a clear need for the States' proof of citizenship requirement.

2. The United States Has Aggravated the Necessity to Require Instructions for Citizenship Verification.

a. The United States Has Fought States' Attempts to Verify Citizenship.

In their Complaint, Plaintiffs rely heavily on the then-Acting Executive Director of the EAC's 2014 determination, including the finding that there are databases—such as "the federal 'SAVE' database and the multistate 'EVVE' database—that the states can use and are already using to verify citizenship status." Complaint ¶ 33. To be sure, the Systematic Alien Verification

¹⁰ Defendant-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 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>.

for Entitlements Program System of Records database (“SAVE”) database is a “fee-based intergovernmental initiative designed to help Federal, state, tribal, and local government agencies check immigration status when granting benefits, licenses, and other lawful purposes.” 76 Fed. Reg. 58525, 58526 (Sept. 21, 2011). One such lawful purpose is voter registration. *See* 76 Fed. Reg. 58525, 58527. But the Plaintiffs’ intimation that the SAVE database is readily available demonstrates Plaintiffs’ lack of understanding of various states’ efforts to gain access to—and the federal government’s blocking of—citizenship verification measures.

The United States blocked Florida’s request to utilize the SAVE database to verify citizenship. In fact, in 2012, the State of Florida had to *sue* the United States in this Court in order to gain access to the SAVE database. *Florida Dep’t of State v. U.S. Dep’t of Homeland Security, et al.*, No. 12-cv-00960 (D.D.C. 2012). Florida needed access to the database because it discovered that “non-citizens were registered to vote in Florida” and the State realized that it “only had a limited ability to validate a person’s citizenship status.” *Florida Dep’t of State v. U.S. Dep’t of Homeland Security, et al.*, No. 12-cv-00960, Complaint ¶¶ 22-23 (D.D.C. June 11, 2012). But the Federal Government refused to provide access to the SAVE database, despite Florida’s frequent requests from August 2011 until the state finally filed suit in June. *See id.* ¶¶ 25-46. Just over a month after Florida filed its lawsuit, the federal government finally agreed to provide access to the SAVE database. Press Release, *Florida Department of State Receives Commitment from U.S. Department of Homeland Security to Provide Access to Citizenship Database* (July 14, 2012), available at <http://dos.myflorida.com/communications/press-releases/2012/florida-department-of-state-receives-commitment-from-us-department-of-homeland-security-to-provide-access-to-citizenship-database/>.

However, the Department of Justice's initial response to the lawsuit was not conciliatory but retaliatory, threatening a lawsuit of its own against the state. Marc Caputo, *Florida and feds sue each other over noncitizen purge controversy*, Miami Herald (June 11, 2012), available at <http://www.miamiherald.com/news/politics-government/article1940509.html>. While Plaintiffs suggest that Kansas and other states have access to the SAVE database, the behavior of the United States undermines that claim.

b. The United States Justice Department Has Failed to Prosecute Noncitizens for Illegally Registering and Voting.

Compounding the problem of noncitizen registration—and the need for the measures taken by the States—is the Justice Department's refusal to prosecute noncitizens caught participating in American elections since 2009. The Department of Justice has shown itself to be impotent in enforcing federal laws that criminalize noncitizen registration and voting, despite its duty and authority to do so. *See* 52 U.S.C. § 20511(2) (fraudulent registration and voting under the NVRA); 18 U.S.C. § 1015(f) (false claims to register or vote); 18 U.S.C. § 911 (false claim of citizenship); and 18 U.S.C. § 611 (voting by aliens). For example, the Justice Department Voting Section and Election Crimes Branch of the Criminal Division was alerted about and provided copies of the thirteen Federal Forms from Harris County, Texas discussed above but no known action has been taken. *See, e.g.,* Kerry Picket, *Former DOJ Official: Non-Citizens Registered to Vote through Motor Voter Registration Forms* (April 8, 2015), available at <http://dailycaller.com/2015/04/08/former-doj-official-non-citizens-registered-to-vote-through-motor-voter-registration-forms/> and Hans A. von Spakovsky, *Election Fraud Uncovered by Patriotic Citizens... Who Promptly Get Sued* (October 23, 2010), available at <http://pjmedia.com/blog/election-fraud-uncovered-by-patriotic-citizens-who-promptly-get-sued/>.

Unfortunately, that inaction is not an isolated occurrence. According to Mr. von Spakovsky:

In 2011, when I was still on the Fairfax County Electoral Board in Virginia, we discovered 278 individuals who had registered to vote despite telling the Virginia Department of Motor Vehicles that they were not U.S. citizens. 117 of those noncitizens had “a history of voting in Virginia.”¹ We provided that information to both the U.S. Attorney for the Eastern District of Virginia and the Public Integrity Section of the Justice Department. No action was taken to either investigate or prosecute these cases.

Mr. von Spakovsky Testimony at 4. The Justice Department did not always largely ignore alien voting in American elections. In previous decades, the Justice Department prosecuted noncitizens for registering and voting in Alaska, Colorado, Florida, and North Carolina. Criminal Division, Public Integrity Section, U.S. Department of Justice, Election Fraud Prosecutions & Convictions: October 2002-September 2005 (2006).

The current Justice Department’s lack of action on noncitizen voting bolsters the reasonableness and, in fact, *need* for the States’ proof of citizenship verification.

III. The Defendants Will Suffer an Administrative and Constitutional Injury if an Injunction is Issued.

Plaintiffs claim that “Defendants will not be harmed by injunctive relief.” Mem. at 43. But such a statement ignores one of the primary purposes of the EAC, which is to maintain the Federal Form. An injunction of the 2016 Decision would require the EAC to revert back to the Federal Form as it was nearly six weeks ago, with untold administrative burden and potential for confusion during an important election year. This would constitute an invasion into the Constitutional prerogative of Kansas to set the state’s voter qualifications.

Public Interest Legal Foundation will likewise be injured as its mission is to ensure the integrity of elections nationwide. As was explained above, the States’ measures are necessary to ensure that noncitizens do not register and do not vote in federal elections.

As Defendant-Intervenor Secretary Kobach explained, the issuance of an injunction would place a high administrative burden on Kansas. Exhibit A, Hearing Transcript at 44:2-7. This burden is heightened by the fact that the EAC's directives are already implemented in Kansas and, minimally, are in the process of being implemented in Alabama and Georgia.

IV. An Injunction Would Not Further the Public Interest.

Finally, Plaintiffs have not shown that the grant of an injunction would further the public interest. This is especially true in light of Plaintiffs' failings on every one of the other injunction factors and the harm to Defendants if the injunction issues. The public has an interest in the preservation of the status quo, i.e. Federal Form that includes the States' proof-of-citizenship requirements.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for a Preliminary Injunction should be denied.

Dated: March 6, 2016

Respectfully submitted,

/s/ Kaylan L. Phillips

Kaylan L. Phillips (D.C. 1110583)
PUBLIC INTEREST LEGAL FOUNDATION
209 West Main Street
Plainfield, Indiana 46168
(317) 203-5599 (telephone)
(888) 815-5641 (fax)
kphillips@publicinterestlegal.org
*Counsel for Defendant-Intervenor Public
Interest Legal Foundation*

J. Christian Adams*
PUBLIC INTEREST LEGAL FOUNDATION
300 N. Washington Street, Ste. 405
Alexandria, Virginia 22314
(703) 963-8611 (telephone)
adams@publicinterestlegal.org

**Pro Hac Vice Motion pending*

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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: March 6, 2016

/s/ Kaylan L. Phillips
Kaylan L. Phillips (D.C. 1110583)
kphillips@publicinterestlegal.org
*Counsel for Defendant-Intervenor Public
Interest Legal Foundation*