

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

LEAGUE OF WOMEN VOTERS OF THE	)	
UNITED STATES, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 1:16-236 (RJL)
v.	)	
	)	
BRIAN NEWBY, <i>et al.</i> ,	)	
	)	
Defendants.	)	

---

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**INTRODUCTION**..... 1

**BACKGROUND** ..... 1

**I. National Voter Registration Act and Help America Vote Act**..... 1

**II. Commission Regulations** ..... 4

    A. Federal Form..... 4

    B. Processes for Changing the Federal Form ..... 5

    C. January 29, 2016 Decisions ..... 6

**STANDARD OF REVIEW** ..... 8

**ARGUMENT**..... 8

**I. The January 29, 2016 Decisions Cannot be Upheld on the Merits**..... 8

    A. Administrative Procedure Act Standard ..... 8

    B. The January 29, 2016 Decisions Were not Made on the Basis of the  
        Criteria Required by the NVRA. .... 10

**II. The Court Should Not Reach Plaintiffs’ Other Arguments**..... 12

**CONCLUSION** ..... 13

## INTRODUCTION

The United States consents to plaintiffs’ request for entry of a preliminary injunction. On January 29, 2016, the Executive Director of the U.S. Election Assistance Commission (“Commission”) approved the requests of three states—Alabama, Georgia, and Kansas—to modify their state-specific instructions on the National Mail Voter Registration Form (“Federal Form”). However, in deciding to include the states’ documentary proof of citizenship requirements on the Federal Form, the Executive Director did not make the determination that this information was “necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508. Because the National Voter Registration Act permits only information satisfying this “necessity” requirement to be included on the Federal Form, the Executive Director’s decisions are not consistent with the statute. While plaintiffs have made a number of other arguments, the Court need not reach them in order to issue an injunction. The United States requests that the decisions be enjoined on this narrow ground.

## BACKGROUND

### I. NATIONAL VOTER REGISTRATION ACT AND HELP AMERICA VOTE ACT

The Elections Clause of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, Cl. 1. “The Clause’s substantive scope is broad. ‘Times, Places, and Manner,’ [the Supreme Court has] written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including, as relevant here . . . regulations relating to ‘registration.’” *Arizona v. Inter*

*Tribal Council, Inc.*, 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Exercising its authority under the Elections Clause, Congress enacted the National Voter Registration Act (“NVRA”), Pub. L. No. 103-31, 107 Stat. 77, in 1993 in response to its concern that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office.” 52 U.S.C. § 20501(a)(3).<sup>1</sup> The statute accordingly identifies as its objectives: “increas[ing] the number of eligible citizens who register to vote in elections for Federal office”; “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office”; “protect[ing] the integrity of the electoral process”; and “ensur[ing] that accurate and current voter registration rolls are maintained.” 52 U.S.C.A § 20501(b). The NVRA applies with respect to elections for Federal office in 44 states and the District of Columbia. Six states are exempt from the NVRA by virtue of maintaining election day registration or no registration requirement for federal elections. 52 U.S.C.A §§ 20502, 20503; Statistical Highlights of Fed. Election Comm’n Rep. to Congress (1995-1996), <http://www.fec.gov/votregis/nvraintr.htm>.

The NVRA mandates, among other things, that all covered States allow voters to register to vote in Federal elections “by mail application.” 52 U.S.C.A § 20503(a)(2). The statute directs that the Commission,<sup>2</sup> “in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office” and provides that

---

<sup>1</sup> The NVRA was previously codified at 42 U.S.C. 1973gg *et seq.* The Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. 20901 *et seq.*, discussed below, was previously codified at 42 U.S.C. 15301 *et seq.* In 2014, the relevant provisions were subject to an editorial recodification that made no substantive changes.

<sup>2</sup> Pursuant to HAVA, the Commission assumed all of the functions originally assigned by the NVRA to the Federal Election Commission. 52 U.S.C. § 21132.

“[e]ach State shall accept and use the mail voter registration application form prescribed by the [Commission].” 52 U.S.C.A §§ 20505(a)(1), 20508(a)(2). States must also make the form developed by the Commission (the “Federal Form”), or an “equivalent” form, available for completion at certain State agencies designated as voter registration agencies. 52 U.S.C. §§ 20506(a)(4)(A), 20506(a)(6)(A). States must also “ensure that any eligible applicant [who timely submits the form] is registered to vote.” 52 U.S.C. § 20507(a)(1).

Congress explicitly limited the information the Commission may require applicants to furnish on the Federal Form. In particular, the form “may require *only* such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508(b)(1) (emphasis added). The Federal Form must, however, “include a statement that . . . specifies each eligibility requirement (including citizenship)”; “contains an attestation that the applicant meets each such requirement”; and “requires the signature of the applicant, under penalty of perjury.” 52 U.S.C. § 20508(b)(2). Additionally, pursuant to Help America Vote Act of 2002 (“HAVA”), Pub. L. No. 107-252, 116 Stat. 1666, the Federal Form must include two specific questions, along with check boxes, for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 52 U.S.C. § 21083(b)(4)(A). It was Congress’ intent “that such questions should be clearly and conspicuously stated on the front of the registration form.” H.R. Rep. No. 107-730, § 303, at 76 (2002) (Conf. Rep.).

When drafting the NVRA, Congress considered and specifically rejected language that would have allowed States to require “presentation of documentation relating to citizenship of an

applicant for voter registration.” *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA bill that included this language, the conference committee determined that such a requirement was “*not necessary* or consistent with the purposes of this Act,” could “permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act,” and “could also adversely affect the administration of the other registration programs[.]” *Id.*

## II. COMMISSION REGULATIONS

### A. FEDERAL FORM

Pursuant to its rulemaking authority, the Commission has developed a Federal Form consisting of three basic components: the application, general instructions, and State-specific instructions. *See* 11 C.F.R. § 9428.3(a); *see also* National Mail Voter Registration Form (updated Feb. 1, 2016), Compl. Ex. 14, ECF No. 1-15 (also available on the Commission’s [website](#)). The application portion of the Federal Form “[s]pecif[ies] each eligibility requirement,” including “U.S. Citizenship,” which is “a universal eligibility requirement.” 11 C.F.R. § 9428.4(b)(1).

To complete the form, an applicant must sign, under penalty of perjury, an “attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state’s specific eligibility requirements.” 11 C.F.R. §§ 9428.4(b)(2), (3). For that reason, the State-specific instructions are integral to the Federal Form. *See* Compl. Ex. 14, Application Instructions, Box 9 (“Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that: (1) you meet your State’s requirements . . . .”). *See also* Final Rules, 59 Fed. Reg. 32311, 32312 (June 23, 1994) (“The final rules indicate which items are only requested (optional) and which are required only by certain states and under certain circumstances (such as the declaration of party affiliation in order to participate in

partisan nominating procedures in certain states). The remaining items, by inference, are considered to be required for registration in all covered states.”).

## **B. PROCESSES FOR CHANGING THE FEDERAL FORM**

The Commission’s predecessor, the Federal Election Commission (“FEC”), created the Federal Form after notice and comment. Final Rules, 59 Fed. Reg. 32311 (June 23, 1994). Subsequent changes to the general instructions or the application itself have been made by vote of the FEC or the Commission at a public hearing. The process for changing the state-specific instructions has varied. From 1994-2000, changes to the state-specific instructions were made by vote of the FEC. In 2000, the FEC delegated responsibility for changes to the state-specific instructions to the staff of the Office of Election Administration. After responsibility for the Federal Form was transferred to the Commission, staff continued to be responsible for changes to the state-specific instructions. On several occasions, after the Executive Director denied requests from states for changes to state-specific instructions, including state proof of citizenship instructions, the Commission agreed to reconsider the decision. But on each occasion, the Commission took no further action after deadlocking by a 2-2 vote. *See, e.g.*, Compl. Ex. 4, ECF No. 1-5. As a result, those changes were not accepted for inclusion on the Federal Form. Only once have changes to the state-specific instructions been subject to formal Federal Register public notice and comment. In 2013, after receiving a court order in *Kobach v. U.S. Election Assistance Commission*, No. 5:13-4095 (D. Kan. Dec. 13, 2013), to issue a decision on behalf of the agency, at a time when the Commission had no seated commissioners or an Executive Director or General Counsel, the acting Executive Director elected to seek notice and comment

before deciding requests from Arizona and Kansas. *See* Compl. Ex. 6, ECF No. 1-17; 78 Fed. Reg. 77666 (Dec. 24, 2013).<sup>3</sup>

### C. JANUARY 29, 2016 DECISIONS

Prior to February 1, 2016, the Federal Form’s state-specific instructions informed registrants, *inter alia*:

- To register in Alabama, “[y]our social security number is *requested* (by authority of the Alabama Supreme Court, 17-4-122),” and “you must: be a citizen of the United States . . .”;
- “To register in Kansas you must: be a citizen of the United States”; and
- “To register in Georgia you must: be a citizen of the United States[.]”

*See* Compl. Ex. 1, ECF No. 1-2 (modified Nov. 10, 2010) (emphasis added).

In three letters dated January 29, 2016, the Commission’s Executive Director, Brian Newby, approved requests from Alabama, Georgia, and Kansas to add those states’ statutory requirements of documentary proof of citizenship to the state-specific instructions on the Federal Form. *See* Compl. Exs. 13, 17, 18, ECF Nos. 1-14, 1-18 & ECF No. 2 (Newby letters); *see also* Compl. Exs. 9, 15, 16, ECF Nos. 1-10, 1-16, 1-17 (state requests). The Executive Director’s letters articulated no rationale for the decisions. However, contemporaneous with the decisions, the Executive Director drafted a memorandum explaining his actions. *See* Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas, Feb. 1, 2016 (attached as Exhibit 1); Declaration of Brian Newby ¶¶ 25, 45, 52 (attached as Exhibit 2) (describing

---

<sup>3</sup> The acting Executive Director’s decision to seek notice and public comment in that instance did not change the fundamental nature of the agency’s decisionmaking. As the Tenth Circuit recognized, “The Executive Director’s decision was an informal adjudication carried out pursuant to 5 U.S.C. § 555.” *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1197 (10th Cir. 2014); *id.* at 1194 (finding the acting Executive Director’s decision at that time to be “procedurally sound”).

completion of Feb. 1, 2016 memorandum). In his memorandum, the Executive Director concluded that Kansas’ “examples of the need for these changes are irrelevant to my analysis” because inclusion of “state-by-state instructions” on the Federal Form “implies the role and rights of the states to set the framework for acceptance and completion of the form.” *Id.* at 4-5; *see also* Newby Decl. ¶ 25 (“I began developing a point of view . . . that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state’s registration process, including qualifications of voters.”). For that reason, he stated that “State-specific instructional changes are ministerial, and, thus, routine.” *Id.* at 2; *see also* Newby Decl. ¶ 34 (“[T]he review should focus on the acceptance of state-specific instructions[.]”).<sup>4</sup>

On February 1, 2016, an updated version of the Federal Form was posted on the Commission’s [website](#) reflecting the approved changes:

- “To register in Alabama you must: be a citizen of the United States. The county board of registrars shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.”
- “To register in Georgia you must: be a citizen of the United States; . . . [and] be found eligible to vote by supplying satisfactory evidence of U.S. citizenship.”
- “To register in Kansas you must: be a citizen of the United States; . . . [and] have provided a document, or copy thereof, demonstrating United States citizenship within 90 days of filing the application with the secretary of state or applicable county election officer; . . . acceptable documents demonstrating United States citizenship as required by K.S.A. § 25-2309(1) include [specifying thirteen options].”

Compl. Ex. 14, ECF No. 1-15 (modified Feb. 1, 2016).

---

<sup>4</sup> The Executive Director’s declaration explains aspects of his reasoning process in more detail than his February 1, 2016 memorandum, but it does not aver that he made any determination pursuant to the NVRA’s “necessary” requirement. *See generally* Newby Decl.

## STANDARD OF REVIEW

A preliminary injunction “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20; *Minney v. U.S. Office of Personnel Mgmt.*, \_ F. Supp. 3d \_, 2015 WL 5442403, at \*3 (D.D.C. Sept. 15, 2015).

## ARGUMENT

The United States concedes that, because the challenged actions were not made on the basis of the NVRA’s “necessity” criterion, defendants cannot succeed on the merits. Because the government consents to entry of a preliminary injunction, the Court need not weigh all of the other injunction factors. *Cf. Phillips v. Mabus*, 894 F. Supp. 2d 71, 76 (D.D.C. 2012) (noting that “plaintiffs and federal defendants agreed and stipulated to a consent preliminary injunction”); *United States v. Am. Honda Motor Co., Inc.*, 143 F.R.D. 1, 5 (D.D.C. 1992) (“A preliminary injunction was simultaneously filed by consent, approved by the Court and became immediately effective.”). Nor does the Court need to reach subsidiary questions raised by plaintiffs, including whether such decisions must be made after notice and comment or whether the Executive Director lacked authority to make the decisions.

### **I. THE JANUARY 29, 2016 DECISIONS CANNOT BE UPHELD ON THE MERITS.**

#### **A. ADMINISTRATIVE PROCEDURE ACT STANDARD**

The Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.*, provides for courts to “hold unlawful and set aside agency action, findings, and conclusions” if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C.

§ 706(2)(A), or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right,” *id.* § 706(2)(C). Under the APA's “arbitrary or capricious” standard, the Court “must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). An agency is required to “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). “[A]n agency cannot ‘fail[] to consider an important aspect of the problem’ or ‘offer[] an explanation for its decision that runs counter to the evidence’ before it,” *District Hosp. Partners, L.P. v. Sebelius*, 973 F. Supp. 2d 1, 57 (D.D.C. 2014) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). However, a decision that is not fully explained may be upheld “if the agency's path may reasonably be discerned.” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The “arbitrary or capricious” standard is “narrow . . . as courts defer to the agency's expertise.” *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 138 (D.D.C. 2012) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). The court “is not to substitute its judgment for that of the agency.” *Id.*

The Court reviews each of the disputed rulemakings based on the administrative record that was before the agency at the time of rulemaking. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (Court “should have before it neither more nor less information than did the agency when it made its decision”). Thus, “[i]n evaluating each rulemaking, the Court must exclude all information that pertains to events after that rulemaking, including information in the administrative records for subsequent rulemakings.” *Banner Health v. Burwell*, No. 10-cv-1638, 2015 WL 5164965, at \*25 (D.D.C. Sept. 2, 2015); *see also id.* at \*37

(Court uses “the judicial time machine” to focus on the record that was before the agency at the time of the rulemaking).

**B. THE JANUARY 29, 2016 DECISIONS WERE NOT MADE ON THE BASIS OF THE NVRA’S “NECESSITY” CRITERION.**

The NVRA states that the Federal Form “may require only such identifying information . . . and other information . . . *as is necessary* to enable the [State] to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508(b)(1) (emphasis added). In *Inter Tribal Council*, the Supreme Court rejected “Arizona’s reading [that] would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form.” 133 S. Ct. at 2256. Instead, the Court concluded that the NVRA’s necessity clause “acts as . . . a ceiling . . . with respect to the contents of the Federal Form.” *Id.* at 2259. The Court held that in addition to the “may require only” language, “other provisions of the Act indicate that” the Commission “is statutorily required” to make a necessity determination before adding information to the form. 133 S. Ct. at 2259.

In upholding the Commission’s January 17, 2014, decision denying requests by Arizona, Kansas, and Georgia to incorporate documentary proof-of-citizenship requirements into the applicable state-specific instructions on the Federal Form, *see* Compl. Ex. 6, ECF No. 1-7, the Tenth Circuit interpreted *Inter Tribal Council* to require it to reject Kansas’ argument that the “EAC has a nondiscretionary duty to approve state requests to include state voter qualifications on the Federal Form,” explaining that the Supreme Court’s decision “would make no sense if the EAC’s duty was nondiscretionary.” *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1194-96 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (June 29, 2015). The court also held that the Commission’s January 17, 2014, decision fully evaluated the extensive

administrative record (including information provided by the states in support of their requests), rationally connected that evidence to the conclusions drawn, and “was fully consistent with the EAC’s own regulations and prior reasonable interpretation of the NVRA in its 2006 response to Arizona,” which similarly denied that state’s request for inclusion of proof-of-citizenship instructions on the Federal Form. *Id.*, at 1197.

In making his January 29, 2016 decisions accepting the states’ requests to include proof-of-citizenship instructions on the Federal Form, the Commission’s current Executive Director interpreted the NVRA in a way foreclosed by *Inter Tribal Council* and *Kobach*. He expressly disclaimed any analysis of whether the additional information was “necessary” for the eligibility determination. *See* Feb. 1, 2016 Memorandum at 4. Instead, he stated that all state requirements consistent with state law should be included in the state-level instructions of the Federal Form. *See id.*; *see also* Newby Decl. ¶ 25 (“I began developing a point of view . . . that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state’s registration process, including qualifications of voters.”). But this view is contrary to governing law.

As the United States stated in opposing certiorari in *Kobach*,

Indeed, it is not only that the EAC is *authorized* to make an independent necessity determination; the EAC would *violate* the NVRA were it to incorporate a state-law documentation requirement into the Federal Form that the Commission found was unnecessary to verify voter eligibility. The NVRA states that the Commission “may require *only*” information that is necessary, 52 U.S.C.A. 20508(b)(1) (emphasis added), which acts as “a ceiling” with respect to the contents of the Federal Form, *ITCA*, 133 S. Ct. at 2259. Were the Commission to automatically adopt any state-law registration requirement, no matter how unnecessary and onerous, it would violate that statutory command, and it would undermine the basic purpose of the NVRA to eliminate “unfair registration laws and procedures,” 52 U.S.C.A. 20501(a)(3).

Brief for the Federal Respondents in Opposition to Petition for Certiorari, *Kobach v. U.S. Election Assistance Comm'n*, No. 14-1164 (May 26, 2015) (emphasis original).

Accordingly, because the Executive Director did not determine that the states' documentation requirements were necessary to verify voter eligibility, the decisions cannot pass muster under the APA. The Executive Director did not "consider[] the relevant factors," *Marsh*, 490 U.S. at 378, or "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

## **II. THE COURT SHOULD NOT REACH PLAINTIFFS' OTHER ARGUMENTS**

The Court need not reach plaintiffs' arguments based on Counts I-III of their complaint. Counts I and II claim that only the commissioners had authority to make the decisions at issue here. Count II also alleges that an internal policy about *ex parte* communications with regulated entities was violated. Count III alleges that the decisions at issue here should have been preceded by notice and a comment period. Determination of likelihood of success on the merits of these questions would benefit from review of a complete administrative record. More importantly, it is unnecessary to resolve these questions because they would not provide a basis for any more relief than the United States has already conceded is appropriate.

In the absence of a complete administrative record, it is most appropriate to rule on the narrowest grounds necessary to reach the undisputed result. *See Pearson v. Shalala*, 130 F. Supp. 2d 105, 112 n.21 (D.D.C. 2001) ("Plaintiffs contend that the FDA also violated [a prior court decision in another way], but the Court need not reach that issue for purposes of ruling on Plaintiffs' Motion for a Preliminary Injunction."); *cf. U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 125, 126 (D.D.C. 2015) ("The need for narrow tailoring, moreover, is particularly important in the context of a preliminary injunction or temporary restraining order, where the court has yet finally to resolve the merits of the dispute.").

**CONCLUSION**

For the foregoing reasons, the Court should grant plaintiffs' motion for a preliminary injunction, on the ground that the January 29, 2016 decisions did not determine that the approved information was "necessary" to determine state eligibility requirements or articulate reasons pursuant to that statutory criterion.

Dated: February 22, 2016

Respectfully submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Director  
LESLEY R. FARBY  
Assistant Director  
Civil Division, Federal Programs Branch

/s/ Galen N. Thorp  
GALEN N. THORP (VA Bar # 75517)  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave. NW, Room 6140  
Washington, D.C. 20530  
Tel: (202) 514-4781  
Fax: (202) 616-8460  
E-mail: galen.thorp@usdoj.gov

*Attorneys for Defendants*

**Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas**

**Brian D. Newby, EAC Executive Director**

**February 1, 2016**

Background

On November 17, 2015, the State Election Director for Kansas sent a letter to request changes to the instructions on the federal NVRA form. This was a completely new request related to an October 2015 Kansas Administrative Regulation. These changes were in association with a recent approval of a Kansas Administrative Regulation related to the Secure and Fair Elections Act, a Kansas law that requires photo identification at the polls when voting and proof of citizenship when registering.

Kansas has made similar requests in the past, and the State and the EAC have a legal history, whereby courts have supported the ability of the acting Executive Director of the agency, and ostensibly a permanent Executive Director, to make binding administrative decisions on state requests.

The request from Kansas joined requests from Alabama, Michigan, Georgia, and Arizona as requests awaiting resolution for the arriving Executive Director. My employment as Executive Director was announced by the agency on November 2, 2015, and my first day at the agency as Executive Director was November 16, 2015.

All of these state requests are related to the state-specific instructions of the Federal Form, not requests to change the form itself. Changes to the form must be considered by the EAC Commissioners through a formal rulemaking process. These are changes to the voter instructions only.

For purposes of analyzing these state requests, I sought to discuss with each state the status of the request. While I knew the Kansas request was current, I was not positive that the same could be said for Michigan, Georgia, and Arizona. Alabama's Secretary of State had sent the EAC Commissioners a letter earlier in 2015 to check on the status of that state's request, so I thought it was still active, but I also clarified this with Alabama's Secretary of State office during my review.

During my analysis, we received an additional inquiry from the New Jersey Election Director. Apparently, instructions for New Jersey also are outdated based on state law. Further, during my deliberations, another change in New Jersey state law went into effect, causing an additional, potential instruction change. In addition, during this deliberation period, a request from another state, Iowa, was received.

So, as I analyzed the pending requests for state-specific instruction changes, more requests were coming in. We were entering a busy voter participation year with the expectation that

prospective voters will frequently be coming to the EAC website to learn about registering to vote. There is a heightened need to have the instructions current and consistent.

As a former election administrator, I know that elections are year-round. In Johnson County, Kansas, for instance, we had nine elections in 2015 alone.

However, presidential elections, by far, have the greatest voter participation. Heading into 2016, I believe urgency was justified in addressing these instructions so that voters have accurate information when reaching the EAC website.

In fact, inquiries about voter registration are consistently the most visited portions of the EAC website. Therefore, my objective was to make decisions on these outstanding requests in preparation of 2016's election cycle.

### Process

Therefore, I've looked at these requests in three phases, as part of an outline of a structured process that is being followed and will be followed going forward. The EAC lacked a structured and consistent process for review, but authority has been granted by the 2015 EAC Commissioner quorum, in a Roles and Responsibilities document, for the Executive Director to carry out policies set by the Commissioners.

State-specific instructional changes are ministerial, and, thus, routine. The Executive Director will review the request for clarity and accuracy. Only if a request requires a change in the actual registration form will a request be taken to the Commissioners, who, then, must open a formal rulemaking procedure.

Thus the procedure is for processing state requests to change state-specific instructions:

1. Those outstanding requests that I could confirm by yearend as being valid and current requests will be evaluated with disposition (approved, denied, or forwarded to commissioners because they introduce changes to the form itself) in the same period.
2. Requests for which I could not confirm urgency in this period will be evaluated in a second phase (item 3 below) unless the state later confirms the urgency and requests changes sooner. (I could not confirm Michigan or Arizona in this timeframe, but did talk with representatives of the Secretary of State's office in Alabama, Georgia, and Kansas).
3. Based on the notices from New Jersey and Iowa as triggering events, the EAC is sending to each state a request to complete a form either confirming that the form's instructions are current or will provide updates as necessary. This procedure has been completed in the past and will be a regular yearend procedure in each year before a federal election (2015, 2017, 2019, etc.). We will request each state to return these forms by the end of January, with all changes in this phase completed by the end of February. In future years, beginning in 2017, the objective should be to send the form out by Nov. 1, with changes updated by Dec. 31.
4. EAC staff will prepare a flow chart that documents the process of state-specific instruction change requests. The flow chart will create a clear expectation of the

timeframe for EAC review. The process must include a reasonable amount of time to review the changes, but also be responsive to the state requests. Delays impact voters, causing confusion through a process that is intended to do the exact opposite.

There is a need for changes to be considered, updated, proofread, and converted into several languages. When I arrived in November, I was told the typical turnaround time was 20 days. While this was a driver for me to respond to Kansas, I found the 20-day process to be a loose guideline. We will create realistic but rapid guidelines in this flow chart for requests.

In approving the requests, I considered the Federal Form “Postcard” (as it initially was called) and Guide “For U.S. Citizens” on the EAC Website. I evaluated the requests in the context of other instruction changes, verified that no requests required a change to the form, and considered them in the same context as New Jersey and Iowa.

This was important because there did not appear to be a structured procedure that the EAC followed related to for requests to modify the form’s instructions, so I wanted to create one during this review. In fact, discussions with the EAC Inspector General revealed concerns previously raised during 2015 by the IG about formalized procedures and operating policies at the EAC—specifically, a strong need exists for them. Much of this can be directed at the fact that the EAC operated without Commissioners for some time, but the lack of operations procedures is notable because the agency has been in existence for more than 10 years.

Specific to changes to the NVRA form instructions, the EAC has evaluated more than a dozen over the years, and there are memos and other correspondence that speak to the need for a formal policy of review, but no actual codified policy exists. There were procedures for review in the absence of commissioners, but the EAC has had a quorum of commissioners for nearly a year now. There has been no consistent method of review, and part of this evaluation was to create a process going forward.

In my view, there should be a step-by-step service level agreement that the EAC follows for requests, diagrammed out in a flow chart with timelines and expectations that can be given to the states when inquiring about a request. States deserve a roadmap towards adjudication of their request. This issue, frankly, just reinforces the need the Commissioners had to hire a permanent Executive Director, with the expectation that formalized procedures be developed for the agency.

Generally, I’ve been told by staff members, that decisions regarding changes to the instructions to the form are completed within 20 days. I’m not sure that is a proper interval, but at the very least it suggests that would be the window for response and resolution to Kansas. Such a window would have the resolution made by December 8. There is also an interval to modify the instruction form, and that has been communicated by staff to be at least a 10-day process, furthering encroaching on this 20-day interval.

Another general view by staff was that the Executive Director determines state requests unless there is a matter of policy. Policy in this context does not appear to have a definition. However, “policy” is a term often used by staff. There has been mention in documents of “broad policy” and “impacting many states,” but these items aren’t defined further. Further, in fact, the Commissioners, in the 2015 Roles and Responsibilities document, instruct the Executive Director to carry out the policies of the Commission. Policies, in this context, are agency policies, and related to the NVRA form and instructions, means that by policy, changes to the form require Commission approval and changes to the instructions consistent with state law do not.

By accepting its first change to the state-specific instructions to the federal form years ago, precedence was set as a ministerial duty carried out by the Executive Director. Commissioners did approve the initial change, and subsequent state-specific instruction changes have been made without Commissioner involvement. The policy impact here can be correlated with the states’ ability to request changes to the form based on state law, and that path has been crossed many times now without Commissioner involvement.

The form itself, according to HAVA, was to be developed in conjunction with state election officials. Changes to the form’s instructions, related to individual state law have been made in other states.

#### Analysis and Conclusions

It is here where my analysis focused, on these states, specifically--on the changes to the instructions.

For instance, while proof of citizenship will be the focal point many will place upon these requests, it’s not the issue I am evaluating. With respect to the Kansas State Election Director, his examples of the need for these changes are irrelevant to my analysis. Similarly, for those who object to proof of citizenship laws, again, that’s not what the EAC has been asked to evaluate.

The specific request is to modify the federal form’s instructions to include an attachment to finalize registration. As has been debated before, this is similar to Louisiana’s instructions for attachments to include, potentially, a driver’s license, utility bill or a bank statement to prove identity. Contrasts also have been drawn in past documents that submission of a driver’s license is consistent with NVRA, but the simple fact is that the registration is not complete without this information. In Nevada, for instance, a voter does not have a state-issued ID, the applicant is directed to call his or her local Nevada election office to be assigned a unique number, again in such a way that state-specific instructions to the federal NVRA form is a not a “one and done” process. Similarly, the Kansas registration is not complete without that state’s requested documentation, spelled out in Kansas law.

In fact, the Kansas instructions are uniformly applied to all applicants and, it could be argued, are more clear to applicants than instructions in other states. Similarly, the State of New Hampshire has an extremely uniform list of instructions that, in the end, simply result in the submission of

the postcard to a local election office that, in turn, sends out another form to complete the registration.

The federal form, itself, has state-by-state instructions. This implies the role and rights of the states to set the framework for acceptance and completion of the form.

Further, the form, more than 20 years old, initially was a postcard. With the proliferation of information moving to the Internet, the “postcard” was moved to an online document that can no longer be mailed as a postcard.

Advances in technology are important and relevant, because, as an example, the state of Iowa’s instructions include a link to the state election office for voters to get complete information on their registration process. And, there are many examples of subsequent changes to instructions once the initial policy decision to allow for changes to the instructions was recognized as a routine administrative matter.

While state-specific instruction changes should be considered routine, it is my view that the EAC could do a better job of servicing future state requests by formalizing a process that will be posted on our website and serve as timeline for evaluating requests. Part of my analysis in this issue has demonstrated the need for this document procedure and I am directing our staff to begin this a procedure by the end of the first quarter of 2016.

Following are the specific changes requested and made to the instructions posted on the website (letters were mailed on January 29, 2016):

### Alabama

**Registration Deadline-** Voter registration is closed during the 14 days preceding an election. Applications must be postmarked or delivered by the 15<sup>th</sup> day prior to the election.

**6. ID Number.** *Your social security number is requested (by authority of the Alabama Supreme Court, 17-4-122) (now omitted)* If you have one, you must provide your Alabama driver’s license number or Alabama nondriver identification card number. If you do not have an Alabama driver’s license or no driver identification card, you must provide the last 4 digits of your Social Security number. If you have not been issued any of these numbers you must write the word “NONE” and a unique identified will be provided for you.

**9. Signature.** To register in Alabama you must:

- be a citizen of the United States. The county board of registrars shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.
- be a resident of Alabama and your county at the time of registration
- be 18 years old before any election
- not have been convicted of a felony *punishable by imprisonment in the penitentiary (or have had your civil and political rights restored (now omitted) involving moral turpitude (or have had your civil and political rights restored.)*

## Georgia

### **Mailing address:**

Election Division  
Office of the Secretary of State  
*Suite 802 Floyd West Tower*  
*2 Martin Luther King, Jr. Drive*  
*Atlanta, GA 30334*

Insertion of an additional bullet after the last bullet in the Signature section with the following text:

### **9. Signature.** To register in Georgia you must:

- be a citizen of the United States
- be a legal resident of Georgia and of the county in which you want to vote
- be 18 years old within in six months after the day of registration, and be 18 years old to vote
- not be serving a sentence for having been convicted of a felony
- not have been judicially determined to be mentally incompetent, unless the disability has been removed
- *be found eligible to vote by supplying satisfactory evidence of U.S. citizenship*

## Kansas

### **9. Signature.**

To register in Kansas you must:

- be a citizen of the United States
- be a resident of Kansas
- be 18 by the next election
- *have provided a document, or copy thereof, demonstrating United States citizenship within 90 days of filing the application with the secretary of state or applicable county election officer*
- have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote
- not claim the right to vote in any other location or under any other name
- not be excluded from voting by a court of competent jurisdiction
- *Acceptable documents demonstrating United States citizenship as required by K.S.A. §25-2309 (1) include the following:*
  - (1) A driver's license or non-driver state identification card indicating on its face that the holder has provided satisfactory proof of United States citizenship;*
  - (2) A birth certificate indicating birth in the United States;*
  - (3) Pertinent pages of a valid or expired United States passport identifying the applicant and the applicant's passport number;*
  - (4) A naturalization document indicating United States citizenship;*
  - (5) A document issued by the federal government pursuant to the Immigration and Naturalization Act of 1952, and amendments thereto, indicating United States citizenship;*

*(6) A Bureau of Indian Affairs card number, tribal treaty card number; or tribal enrollment number;*

*(7) A consular report of birth abroad of a citizen of the United States;*

*(8) A certificate of citizenship issued by the U.S. Citizenship and Immigration Services*

*(9) A certificate of report of birth issued by the U.S. Department of State;*

*(10) An American Indian card with KIC classification issued by the U.S. Department of Homeland Security;*

*(11) A final adoption decree showing the applicant's name and United States birthplace;*

*(12) An official U.S. military record of service showing the applicant's United States birthplace;*

*(13) An extract from a U.S. hospital record of birth created at the time of the applicant's birth indicating the applicant's United States birthplace.*

*If one does not possess any of the listed documents, the person may alternatively prove his or her citizenship through process described in K.S.A. §25-2309(m).*

## Declaration of Brian Dale Newby

Case No. 1:16-cv-00236-RJL

**Brian Dale Newby, for his declaration, pursuant to 28 U.S.C. Section 1746, deposes and says:**

1. My name is Brian Dale Newby.
2. I currently work as Executive Director of the United States Election Assistance Commission (EAC).
3. I began working in this role on November 16, 2015.
4. Previously, I worked as Election Commissioner for Johnson County, Kansas.
5. Election Commissioners are appointed in Kansas by the Secretary of State for the four most-populated counties in the state.
6. I was appointed Election Commissioner by Kansas Secretary of State Ron Thornburgh (R) on January 10, 2005, to fill an unexpired term from Connie Schmidt, who retired.
7. I was re-appointed to a four-year term by Secretary Thornburgh (R) on September 1, 2006.
8. I was re-appointed to a four-year term by Secretary Chris Biggs (D) on September 1, 2010.
9. I was re-appointed to a four-year term by Secretary Kris Kobach (R) on September 1, 2014.
10. I resigned my position in October 2015 to accept my current role at the EAC.
11. In Johnson County, I held the position of Election Commissioner longer than all but one of my predecessors.
12. In this role, I administered more elections than any of my Johnson County predecessors any other election official in state history.
13. I routinely testified, in this role, on legislative issues in front of the state's House of Representatives and State Senate.
14. As Johnson County Election Commissioner I was responsible for registering and accepting applications for voter registration.
15. Even though Johnson County includes the most registered voters in Kansas, very few registrants used the federal NVRA form when registering, yet for those who did, there was confusion regarding the new rules.
16. Federal form registrants who did not provide proof of citizenship were allowed to only vote on federal races.
17. Despite the controversy created by the media from this process, only five voters who registered using the federal form and did not provide proof of citizenship voted in Johnson County in the November 2014 election.
18. In fact, in January 2014, I filed comments with the EAC related to Rulemaking EAC-2013-0004. I explained that non-approval of a previous request from Kansas to change

state-specific instructions on the federal NVRA form impacted voter eligibility, causing voter confusion and leading some voters not qualified to vote in all Kansas races.

19. One specific area of outreach I conducted with proof of citizenship was with the League of Women Voters, where our office loaned the use of an iPad to allow the League to capture proof of citizenship from new citizens registering to vote following their naturalization ceremony. In fact, this practice earned awards from the Election Center and the League, itself, in May 2014.
20. On November 18, 2015, I received an overnighted letter from the state of Kansas. I also received an email version of that letter (dated November 17), from the Kansas election director.
21. I opened the letter with my chief operating officer, Alice Miller (previously the acting executive director), in my office. We read the letter and called another staff member in to discuss. The letter cited a new Kansas Administrative Regulation and made a new request to include in state-specific instructions language consistent with that new regulation. The regulation related to proof of citizenship. The letter also included new information that had not been provided to the EAC previously, consisting of a spreadsheet of non-citizens who recently registered to vote in Sedgwick County, Kansas.
22. Ms. Miller suggested I talk to the Department of Justice attorneys, who she said could explain to me what our position was. Because she 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, we discussed the value of waiting to consult with our new general counsel, who would start in December.
23. I notified Commissioners of the new request and sent the state director a brief letter acknowledging receipt of the letter. The letter also was posted to our website.
24. I began evaluating previous requests and saw that requests in the past were not consistently evaluated, but had been received by the Executive Director and staff of the Commission. There was no timetable and process clearly communicated to states for state-specific instruction requests, although they were expected to be received, as we received from Kansas, within 30 days of any legal change.
25. I began writing a document to articulate my findings. I had first-hand knowledge of the concerns raised regarding proof-of-citizenship eligibility issues in Kansas and fully analyzed and considered the spreadsheet that came with the Kansas request that detailed non-citizens who had registered to vote. After evaluating it, I began developing a point of view that previous decisions by the EAC might have been wrong, that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process, including qualifications of voters.
26. I recognized that changes to the state-specific instructions were different than to the NVRA form itself. Changes to the form itself required Commissioner Review through a rulemaking process.
27. 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.

28. In my discussion with General Counsel, we determined that acceptance or rejection by the Executive Director could still be reviewed by Commissioners and, thus, did not represent final agency action.
29. Other staff members were especially unhelpful during this time. Ms. Miller resigned in December and the staff member responsible for previous requests was very disengaged. At one point, after asking her for all information on requests, I found an entirely different binder of materials that she had provided to one of the Commissioners. This information was very helpful in my analysis.
30. That finding led to more discussions with Commissioners. During those discussions, one Commissioner even presented a letter from Alabama's Secretary of State that represented an outstanding request similar to that in the Kansas letter. I was unaware of other outstanding requests. At a staff meeting, I asked about this letter only to find we had unresolved requests from Georgia and Michigan as well.
31. In the meantime, we received different state-specific instruction requests from New Jersey and Iowa.
32. It was clear to me at this point that previous decisions regarding state-specific instructions were evaluated without Commission-enacted policy by the previous Executive Director and the Acting Executive Director. As there was no specifically defined process, other than the established procedure that requests were reviewed by staff and/or the Executive Director, I began documenting one. Conclusions in the most recent EAC past appeared to be drawn by emotion regarding specific requests.
33. In my discussion with Commissioner Hicks, he stated that the Kansas request should go to the Commissioners because it represented "policy." However, he couldn't define an agency view of "policy," but did say proof of citizenship requests had been reviewed by the Supreme Court, and the Commissioners were appointed by the President, so it seemed logical that this was a big enough topic to go to the Commissioners.
34. I explained to Commissioner Hicks that I thought the review should focus on the acceptance of state-specific instructions, and that review should determine what would go to Commissioners, rather than just moving along a topic because it had visibility or was controversial.
35. It was never suggested by anyone to me during this time that the Commissioners should review these requests because they spoke to voter qualifications. I reviewed a draft statement from former Commissioner Gracia Hillman who said that EAC discretion to act on state-eligibility instructions based, she said, on Article 1, Section 2 and the Seventeenth Amendment to the U.S. Constitution.
36. Therefore, I focused on the phrase, "policy," and decided that the only policy I could address is the Commissioners' recently validated policy that the Executive Director administers policies, as explained in the Roles and Responsibilities document.
37. I reviewed significant materials showing decisions the Executive Director previously made regarding state-specific instructions. The policy, I concluded, was to allow changes to state-specific instructions without Commission action, and this policy had previously been followed.

38. Once I took this lens, I sought to determine if all outstanding requests were current. I attempted to contact the Secretary of State offices in Kansas, Georgia, Alabama, and Michigan. This was done in late December.
39. Believing time was of the essence and that I had already taken too long to evaluate simple state-specific requests, I had hoped to conclude this process in 2015. I was unable to ever connect with the state election director in Michigan during this time.
40. Throughout the month of December, I regularly updated the Commissioners on this activity through emails and phone calls.
41. I determined that the EAC would implement new procedures whereby we would ask states to review their state-specific instructions every two years and provide any changes to the EAC. This, and my overall review, I thought, was consistent with our role to modify changes “in consultation with the states.”
42. In early January, the EAC conducted a public meeting. I briefed these items to the Commissioners at this time.
43. The next day, in an industry conference (Joint Election Official Conference), I elaborated publicly on this process, explaining that we soon would be asking states to review their instructions.
44. I continued to discuss this topic with those staff members who previously worked on or who had direct experience with this topic while they worked at the Federal Election Commission.
45. I consulted further with EAC Counsel and sought to finalize my internal document.
46. After determining that the changes to the state-specific instructions were necessary and proper, on January 15, I drafted the letters to states explaining our acceptance of their state-specific change requests and asked our staff to work with our contractor on the instructions to be ready to post them to the website should I accept these requests.
47. On January 15, I also saw a new court decision in Kansas regarding voter qualifications associated with proof of citizenship. I forwarded this decision to the Commissioners to say that I was unsure if this had any impact on my analysis and would be discussing that with counsel.
48. I met with counsel to discuss the impact of this voter eligibility court decision and we determined that it was not inconsistent with my view to accept the state-specific instructions as submitted.
49. I finalized my letters to the states on January 29 and mailed them. I instructed our webmaster to post the instruction changes.
50. I notified the commissioners of this action.

51. I emailed the letters to the states on Monday, February 1, and also emailed copies to Commissioners. These letters also were posted to our website by 10 a.m.
52. On February 1, I also completed my documentation of my decision and titled it "Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas."

I declare under penalty of perjury that the foregoing is true and correct.



---

Brian Dale Newby

Executed on:  
February 21, 2016  
Silver Spring, MD

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<hr/>		)	
LEAGUE OF WOMEN VOTERS OF THE		)	
UNITED STATES, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	Civil Action No. 1:16-236 (RJL)
v.		)	
		)	
BRIAN NEWBY, <i>et al.</i> ,		)	
		)	
Defendants.		)	
<hr/>		)	

**[PROPOSED] ORDER**

Upon consideration of Plaintiffs’ application for a temporary restraining order and preliminary injunction, and Defendants’ response consenting to entry of a preliminary injunction, along with all other filings in this action and the arguments of counsel, it is hereby

ORDERED that Plaintiffs’ application for a preliminary injunction is granted; and it is further

ORDERED that Defendants shall immediately rescind the letters issued to Alabama, Georgia, and Kansas on January 29, 2016; and it is further

ORDERED that Defendants shall immediately reinstate on the Commission’s website the version of the National Mail Voter Registration Form that was in place prior to February 1, 2016; and it is further

ORDERED that Defendants will instruct election officials in Alabama, Georgia and Kansas to replace any unused copies of the February 1, 2016 version of the National Mail Voter Registration Form with the reinstated version of the form; and it is further

ORDERED that the amount of security considered proper pursuant to Fed. R. Civ. P. 65(c) is \$0; and it is further

ORDERED that Plaintiffs' application for a temporary restraining order is now moot.

---

RICHARD J. LEON  
United States District Judge