UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*, Plaintiffs, v. BRIAN NEWBY, *et al.*, Defendants, KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION Defendant-Intervenors.	Civil Action No. 1:16-236 (RJL)

FEDERAL DEFENDANTS' SUPPLEMENTAL MEMORANDUM

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TABLE OF CONTENTS

INTRODUCTION

Pursuant to the Court's October 3, 2016 minute order, the U.S. Election Assistance Commission ("EAC" or "Commission") and its Executive Director (collectively "Federal Defendants") submit this supplemental brief to address the significance to the parties' cross-motions for summary judgment of the D.C. Circuit's September 26, 2016 opinion granting plaintiffs' motion for a preliminary injunction.

As explained in Federal Defendants' motion for summary judgment, ECF No. 101 ("Fed. Defs.' Mem."), and their combined reply and response to the cross-motions, ECF No. 112 ("Fed. Defs.' Reply"), the standard that the EAC's Executive Director applied in reaching the decisions challenged here is foreclosed by the Supreme Court's decision in *Arizona v. Inter Tribal Council, Inc.* ("*ITCA*"), 133 S. Ct. 2247 (2013). The D.C. Circuit agreed with this conclusion. *See League of Women Voters of the United States, et al., v. Newby, et al.*, No. 16-5196 (D.C. Cir. Sept. 26, 2016) ("D.C. Cir. Op."). That court held that, because the Executive Director concluded in the challenged decisions "that the criterion set by Congress—*i.e.*, whether the amendments were necessary to assess eligibility—was 'irrelevant' to his analysis," the decisions violate the Administrative Procedure Act ("APA"). D.C. Cir. Op. 12. Further, the court explained that this holding "accords with Supreme Court precedent," citing *ITCA*. *Id.* at 14. For these reasons, and as explained more fully in Federal Defendants' summary judgment briefs, summary judgment on this limited ground is appropriate, and the Court need not and should not reach plaintiffs' other claims in this case.

ARGUMENT

I. THE D.C. CIRCUIT OPINION COMPELS SUMMARY JUDGMENT ON COUNTS IV AND V ON THE BASIS THAT THE EXECUTIVE DIRECTOR DID NOT APPLY THE CORRECT STATUTORY STANDARD.

The APA obligates an agency 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) (citation omitted). Because, as Federal Defendants have acknowledged, *see* Fed. Defs.' Mem. 14-16, Fed. Defs.' Reply 2-6, and as the D.C. Circuit found, the Executive Director's decisions did not comply with this obligation, the decisions cannot be sustained under the APA and should be set aside. As the Court of Appeals explained, because the Executive Director "expressly found that the criterion set by Congress—*i.e.*, whether the amendments were necessary to assess eligibility—was 'irrelevant' to his analysis, it is difficult to imagine a more clear violation of the APA's requirement that an agency 'must examine the relevant data and articulate a satisfactory explanation for its action.'" D.C. Cir. Op. 12 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

Under the NVRA, the Federal 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). As the D.C. Circuit observed:

> In *ITCA*, the Court made plain that the Commission, not the states, determines necessity. . . . The Court's discussion did not envision a process by which a state had the authority to direct the Commission to act so long as its request conformed with state law. Nor would that interpretation of [52 U.S.C. §] 20508(b)(1) have been consistent with the rest of the opinion. The Court explained at some length that the NVRA could not be read to contemplate a scheme whereby a state could mandate inclusion in the Federal Form of every one of its registration

requirements.

D.C. Cir. Op. 14 (citing *ITCA*, 133 S. Ct. at 2255-56 & 2258-60)).

Accordingly, the D.C. Circuit expressly rejected Intervenor Kansas Secretary of State's arguments that it is for state officials—not the EAC—to determine what is necessary to demonstrate compliance with a state's voter registration laws. *See* Kan. Mot. for Summ. J. ("Kan. Mem.") 15, ECF No. 107; Kan. Reply 2, ECF No. 116. Similarly, in light of the D.C. Circuit Opinion, Intervenor Public Interest Legal Foundation's ("PILF's") contention that Plaintiffs' and the Federal Defendants' arguments "amount to nothing more than disagreement with Executive Director Newby's determination that Kansas, Alabama and Georgia have demonstrated that a proof-of-citizenship requirement is necessary in those states," PILF Mot. for Summ. J. ("PILF Mem.") 32, ECF No. 104, cannot prevail. First, as the D.C. Circuit recognized, the Executive Director did not make any determination that the requested documentary proof-of-citizenship requirement is necessary to determine voter eligibility, as the NVRA requires. *See* D.C. Cir. Op. 12; AR0004-05; Fed. Defs.' Mem. 15-16. Second, in support of its argument, PILF argued that in *ITCA*, the Supreme Court "was clear" that if a State determined that "'a mere oath will not suffice to effectuate [the state's] citizenship requirement,'" PILF Mem. 32 (quoting *ITCA*, 133 S. Ct. at 2260), the State need only provide some evidence of noncitizen registration in its borders, triggering in the EAC "a nondiscretionary duty" to include that state's proof-of-citizenship requirement in the state-specific instructions on the Federal Form, *id.* (citing *ITCA*, 133 S. Ct. at 2260). But as the D.C. Circuit explained, in *ITCA*, the Supreme Court made plain that this "nondiscretionary duty" of the EAC is triggered "[o]nly after the Commission . . . determines necessity." D.C. Cir. Op. 14 (citing *ITCA*, 133 S. Ct. at 2260). *See also* 133 S. Ct. at 2259 (suggesting that "a State may request that the EAC alter the Federal Form to include

information the State deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the [APA]").

In light of the D.C. Circuit Opinion, Intervenors' constitutional arguments fare no better. Before the appellate court, Kansas pressed the same argument it advances here: that Plaintiffs' and Federal Defendants' reading of the NVRA "gives rise to severe constitutional doubt." Kan. Mem. 18; *see also id.* at 14. The D.C. Circuit rejected this argument: "The canon of constitutional avoidance does not compel or support a different interpretation of the NVRA." D.C. Cir. Op. 14. As the appellate court noted, "[t]he Elections Clause directs states to regulate the time place and manner of congressional elections, but gives Congress the power to preempt state regulation." *Id.* And although "as *ITCA* recognized, it would raise a serious constitutional question 'if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications[,] . . . such a scenario would not arise under our interpretation of section 20508(b)(1) because that provision requires the Commission to include information shown to be 'necessary.'" *Id.* at 15. The court further rejected the notion that the Federal Form must include information required by state law. *Id.* at 13 ("[P]ermitting the states to dictate the contents of the Federal Form would undermine the Federal Form's role as a mandatory 'backstop' to state registration forms. A state could turn the Federal Form into mere duplicative paperwork, a facsimile of the state registration form.").

Finally, Kansas may argue that, notwithstanding the D.C. Circuit's opinion, a regulation promulgated by the Federal Election Commission ("FEC") "mandates" the Executive Director's decisions here even if the statute does not. *See* Kan. Reply 5-7. The D.C. Circuit decision disposes of this theory too. The regulation provides that "[t]he state-specific instructions shall contain the following information for each state, arranged by state: the address where the

application should be mailed and information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b). The most straightforward reading of this regulation makes clear that it simply implements the statutory requirements as to the content of the Federal Form. This is supported by the fact that the FEC adopted this regulation at the same time that it exercised its authority to decide whether states registration requirements were or were not necessary for inclusion on the Federal Form. *See* 59 Fed. Reg. 32311, 32324 (June 23, 1994) (adopting 11 C.F.R. § 8.3, which is now § 9428.3); *id.* at 32316 (excluding items from Federal Form because the FEC "determined . . . they do not meet the 'necessary threshold' of the NVRA"). Importantly here, the D.C. Circuit, after hearing Kansas' argument about this regulation, adopted the straightforward reading in its treatment of the regulation in its opinion. *See* D.C. Cir. Op. 3 (citing to the NVRA as prescribing the contents of the Federal Form and to and 11 C.F.R. §§ 9428.3 and 9428.4(b)(1) as describing the information the Form must include).

Regardless, Kansas's argument ignores that the regulation cannot be interpreted in a way that is inconsistent with the statute. *See, e.g.*, *Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements. Courts must construe regulations in light of the statutes they implement." (internal quotations and citations omitted)). Here, the NVRA limits what information the Federal Form may demand of applicants. Thus, notwithstanding any allegedly mandatory language in the regulation, under *the statute*, if a state requirement—whether eligibility or registration—demands that the applicant furnish information to the state, the EAC may only include such information on the Federal Form if the EAC has made the requisite necessity determination. *See* D.C. Cir. Op. 13-14. Here, where the Executive Director made no such determination and did not rely on or cite

this regulation in issuing his decisions, AR 004-05, Kansas's regulatory argument—and its corollary suggestion that "Mr. Newby's actions would have been arbitrary and capricious if he did not follow this binding regulation and modify the state-specific instructions," Kan. Reply 6—must be rejected.

II. THE COURT SHOULD NOT REACH PLAINTIFFS' OTHER CLAIMS

Because, in light of the D.C. Circuit decision, Plaintiffs are entitled to summary judgment on Counts IV and V of their Complaint, which would provide them complete relief from the challenged action, the Court should not reach Plaintiffs' other claims. *Cf.* D.C. Cir. Op. 16 ("assuming without deciding whether [Newby] had authority to grant the requests"). Any further challenges would be more appropriately addressed, if necessary, following any EAC decision under the appropriate statutory standard. Moreover, Plaintiffs' assertions in Counts I, II and III of their Complaint raise questions concerning EAC authority and procedures that the agency should have the opportunity to decide in the first instance. *See, e.g.*, *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799, 809 (D.C. Cir. 2004) (Roberts, J., concurring) (courts should not go beyond "narrow and effectively conceded basis for disposition" to address additional issues "wholly unnecessary to the disposition of the case" that "at the end of the day lead[] to the same result"); *cf. Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1246 (D.C. Cir. 2012) ("an agency is entitled to construe its own regulations in the first instance"). To the extent the Court finds it necessary to reach these claims, it should narrowly rule that the Executive Director's authority did not extend to the action he actually took—adopting a statutory interpretation not previously adopted by the Commission that is contrary to the plain text of the NVRA and the Supreme Court's *ITCA* decision. Whatever authority the Commission delegated, it could not reasonably be construed to include reinterpretation of the EAC's organic statute in a manner, as the D.C. Circuit held, inconsistent with Supreme Court authority. *See* Fed. Defs.' Mem. 23-24.

III. THE COURT SHOULD SET ASIDE THE CHALLENGED DECISIONS AND ALLOW THE AGENCY THE OPPORTUNITY TO TAKE FURTHER ACTION CONSISTENT WITH THE CORRECT STATUTORY STANDARD

In light of the D.C. Circuit decision, it is clear that the Executive Director "made an error of law," and therefore "the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 331 (D.C. Cir. 2006) (citation omitted). "The norm is to vacate agency action that is held to be arbitrary and capricious and remand for further proceedings consistent with the judicial decision, without retaining oversight over the remand proceedings." *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C. 2008) (collecting cases); *see also Cnty of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (holding that it was error for court to "retain jurisdiction to devise a specific remedy for the [agency] to follow").

Kansas has suggested that the Court require the Executive Director to submit a supplemental declaration conducting the necessity analysis. Kansas Reply 12, ECF No. 116. But the D.C. Circuit concluded that the Executive Director's contemporaneous internal memorandum unambiguously rejected such an analysis, *see* D.C. Cir. Op. 12, so an additional declaration would serve little purpose. As previously discussed, *see* Fed. Defs.' Reply 10-11, ECF No. 112, D.C. Circuit precedent holds that a supplemental declaration may not be relied upon insofar as it contradicts the agency's contemporaneous decision. *Olivares v. TSA*, 819 F.3d 454, 463-64 (D.C. Cir. 2016), *cert. denied*, No. 16-88, 2016 WL 5640339 (Oct. 3, 2016); *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987). The cases Kansas has cited in support of its proposal are not to the contrary. In *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 5 (D.C. Cir. 2006), the D.C. Circuit merely found the agency's explanation inadequate and remanded without vacatur for additional explanation. And in *University of Colorado Health at*

Mem'l Hosp. v. Burwell, No 14-1220, 2016 WL 695982, at *6 (D.D.C. Feb. 19, 2016), the court accepted a supplemental declaration submitted by an agency with a motion for reconsideration, which did not contradict the agency's prior declaration.

Kansas has argued that if the Court grants summary judgment to Plaintiffs it should remand without vacatur. Kansas Reply 13, ECF No. 116. Regardless of the merits of that suggestion at the time it was made, the D.C. Circuit has now ordered the Commission to undo the action at issue here, and the Commission has complied with that directive. Because a judgment from this Court would dissolve the preliminary injunction, Kansas' proposal could have the anomalous effect of reinstating the challenged action at the moment of granting relief to Plaintiffs. Moreover, under the standard set out in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), this case is not a reasonable candidate for remand without vacatur. *Accord NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 114-15 (D.D.C. 2013), *rev'd on other grounds*, 746 F.3d 474 (D.C. Cir. 2014). Indeed, as to *Allied-Signal*'s disruption factor, the D.C. Circuit has already balanced the equities, including the potential hardships to all interested parties and the public interest, and enjoined application of the decisions. The cases Intervenors have cited to date include no circumstances where, following the entry of a preliminary injunction by the court of appeals, a court found that remand without vacatur was appropriate.

CONCLUSION

For the reasons stated herein and in Federal Defendants' Memorandum and Reply, because the challenged decisions did not apply the statutory standard, they cannot be sustained. The proper remedy under the APA is to set aside the challenged decisions, giving the EAC the opportunity to consider the states' requests under the proper statutory standard.

Dated: October 7, 2016

Respectfully submitted,

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