

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

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

**FEDERAL DEFENDANTS' SUPPLEMENTAL MEMORANDUM REGARDING
THE SIGNIFICANCE OF THE U.S. ELECTION ASSISTANCE COMMISSION'S
JUNE 1, 2017 SUBMISSION TO THE COURT**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 5

I. If the Court Reaches Count I, It Should Deny Plaintiffs’ Motion for Summary Judgment. 5

II. If the Court Reaches Count II, It Should Conclude that the Commission’s Delegation Did Not Include Authority to Violate the NVRA. 6

CONCLUSION..... 9

INTRODUCTION

Pursuant to the Court's February 24, 2017 Memorandum Opinion ("Mem. Op."), ECF No. 133, and its orders dated February 24 and June 19, 2017, Federal Defendants submit this supplemental brief regarding the result of the Court's remand to the U.S. Election Assistance Commission ("Commission" or "EAC") to interpret whether the Commission's 2015 delegation of authority to its Executive Director included the authority to make the decisions challenged in this lawsuit.

The Court has stated that Counts I and II of Plaintiffs' complaint, addressing the Executive Director's authority, could provide the best "opportunity for a narrow disposition" of this case because those counts raise "threshold questions and are potentially dispositive." Mem. Op. at 8. On remand, however, the Commission was unable to reach full agreement regarding the issues raised by the Court. *See* Commission Tally Vote and Memorandum (June 1, 2017), ECF No. 141-1. Nevertheless, the Commission's actions in response to the Court's remand Order provide guidance on resolving this case.

Specifically, the Court should deny summary judgment to Plaintiffs on Count I. That Count contends that the Commission cannot as a matter of law delegate to the Executive Director the authority to decide requests from states to modify their state-specific instructions on the Federal Form. The Commission unanimously disagreed and found that the statutory scheme does not prohibit such a delegation, *see* ECF No. 141-1 at ECF pages 1, 2, 6, 10-11, which is consistent with Federal Defendants' prior briefs that argued the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") do not foreclose such delegation.

The Commissioners, however, did not reach consensus on the Court's query whether the Commission *did* delegate such authority to the Executive Director. *See* Mem. Op. at 9

(“Assuming, without deciding, that the Commissioners *may* subdelegate their authority to grant or deny States' requests for modification of their state-specific instructions on the Federal Form to the Executive Director, the next question for the Court will be whether they did so.”); ECF No. 141-1 at 1, 2, 5-6, 8-10 (showing no consensus by the Commissioners on that question). The Commission's response to the remand Order therefore does not clarify the delegation issue raised in Count II of the complaint and does not present an “opportunity for a narrow disposition” of the case. *See* Mem. Op. at 18 (“[I]n order to afford substantial deference to a reasonable interpretation set forth by the Commission, the Commission must first adopt one.”). The Commission's lack of consensus regarding the scope and meaning of its 2015 delegation of authority to the Executive Director cautions against resolving Count II on the basis of this disputed issue. Instead, Count II should be resolved, if at all, on narrow grounds related to Counts IV and V. Specifically, the Court should rule that, whatever the intended scope of the Executive Director's delegated authority, it cannot have included authority to violate the NVRA.

This Court already has concluded that, in deciding the states' requests, the Executive Director did not “consider whether the states ‘needed’ documentary proof of citizenship to enforce their qualifications that registered voters be citizens and stated such a consideration was ‘irrelevant to his analysis.’” Mem. Op. at 4 (quoting Administrative Record (“AR”) at AR0004, ECF No. 69-2). That failure to conduct the required statutory analysis provides an appropriately narrow basis for the Court to resolve this case under Counts IV and V, without unnecessarily resolving whether the Executive Director had delegated authority to take the action he did in deciding the states' requests. Accordingly, the Court should remand this matter to the Commission so it has an opportunity to decide the states' requests under the governing statutory standard.

BACKGROUND

The Court's February 24, 2017 Memorandum Opinion describes in some detail the overall background of this matter, as do the earlier decisions issued by this Court and the Court of Appeals. We focus here only on the background related to the remand.

In its February 24, 2017 Memorandum Opinion, the Court focused on the question of whether the Executive Director had the internally-delegated authority to decide the states' requests, reasoning that this question presented "the true opportunity for a narrow disposition." Mem. Op. at 8. But after examining the administrative record, the Court found that "there has been no consistent or longstanding practice as to the Executive Director's authority to grant or deny state instruction requests." *Id.* at 10; *see also id.* at 14 ("Due to this near-constant fluctuation of procedures for processing state instruction requests, the Court cannot draw conclusions from the Commission's practices as revealed in the record."). The Court further concluded that the 2015 Organizational Management Policy Statement ("2015 Policy Statement")—the Commission's most recent delineation of the Executive Director's authority—is ambiguous. *Id.* at 17; *see also id.* at 15 ("[E]ven if the Executive Director continued to possess the delegated authority to 'maintain' the Federal Form under the 2015 Policy Statement, it is far from clear that authority included the power to approve or reject requests related to changes to the state-specific instructions."). The Court therefore remanded the challenged decisions to the Commission "for the limited purpose of providing an interpretation of" that internal directive. *Id.* at 2.

On June 1, 2017, the Commission reported the results of the vote it undertook pursuant to the Court's February 24, 2017 Order. *See* ECF No. 141-1. The Commission could not reach full agreement regarding the issues raised by the Court. The Commission voted regarding whether to adopt a memorandum prepared by its General Counsel that set forth responses to five questions

the Commission understood to be posed by the Court. *See id.*¹ Commissioners Masterson and McCormick voted to adopt the memorandum, while Commissioner Hicks voted to reject the memorandum. *See id.* at ECF pages 1, 2, 4. Commissioner Hicks, however, “concur[red] with Sections two, three and four of the Interpretation Memo.” *Id.* at ECF page 6. In sum, the Commissioners agreed regarding the responses to Questions 2 and 4; agreed that the response to Question 3 accurately reflected their disagreement; and disagreed regarding Questions 1 and 5. *See id.* at ECF pages 5-6, 8-14.

Specifically, the Commissioners unanimously agreed that it has statutory authority to delegate to its Executive Director decisions on whether to update the state-specific instructions on the Federal Form (what the Commission identified as Question 2). *See id.* at ECF pages 6, 10-11. The Commissioners also unanimously agreed that its 2015 Policy Statement continued the Executive Director’s delegated authority to make decisions on certain requests to update state-specific instructions. *See id.* The delegation at least includes the authority to “continue maintaining the [F]ederal [F]orm consistent with the Commissioners’ past directives” and “consistent with NVRA and EAC . . . regulations and policy.” AR0860, ECF No. 69-3; ECF No. 141-1 at ECF pages 5-6, 11-13. The Commissioners, however, did not agree regarding whether

¹ The Commission understood those questions to be:

- (1) Was the Executive Director’s action [in approving the modifications to state specific instructions] *ultra vires* (conducted without the authority to do so)?
- (2) May the EAC rule upon States’ requests only through a vote of the Commissioners?
- (3) If the Executive Director continued to possess the delegated authority to “maintain” the Federal Form under the 2015 Policy Statement, did this authority include the power to approve or reject requests related to changes to the state-specific instructions?
- (4) When Commissioners vote on State Specific Instruction requests does the decision to and the action of taking this vote change the action of making a decision on state instruction requests from an action that was not classified as “policy making” to one that is classified as “policy making” regardless of who is taking this action moving forward?
- (5) Do “deadlocked votes” of the Commission constitute “policymaking”?

ECF No. 141-1 at ECF pages 8-14 (answers omitted).

its delegation included authority to take the specific actions challenged here—granting state requests regarding an issue over which the Commission had previously deadlocked in repeated 2-2 votes, and which had previously been denied as a result. ECF No. 141-1 at ECF pages 6, 14.

ARGUMENT

I. IF THE COURT REACHES COUNT I, IT SHOULD DENY PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT.

The Court need not reach Count I of plaintiffs’ complaint because Counts IV and V provide a sufficient basis for disposition. *See* ECF No. 121 at 2-6, ECF No. 112 at 1-7, ECF No. 101 at 14-21. In the event that the Court reaches Count I, however, it should deny summary judgment to Plaintiffs because the Commission has statutory authority to delegate to its Executive Director decisions on requests regarding the state-specific instructions on the Federal Form.

“[S]ubdelegation to a subordinate federal officer . . . is presumptively permissible absent affirmative evidence of a contrary congressional intent,” *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004), and here the statutory scheme does not foreclose such delegation. Plaintiffs rest their claim on the fact that the Help America Vote Act of 2002 requires “the approval of at least three” Commissioners to carry out “[a]ny action which the Commission is authorized to carry out under this chapter.” 52 U.S.C. § 20928. But that provision does not foreclose subdelegation; it simply requires that any subdelegation be made pursuant to an affirmative vote of three commissioners. And the Commission, to which deference is due in the interpretation of its organic statute, *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), unanimously agrees that it has statutory authority to delegate decisions regarding the state-specific instructions on the Federal Form. *See* ECF No. 141-1 at ECF pages 1, 2, 6, 10-11. Moreover, as other courts have noted, other aspects of the statutory scheme

suggest that delegation is appropriate. *See Kobach v. U.S. EAC*, 772 F.3d 1183, 1190-91 (10th Cir. 2014) (concluding that because the statute “provides for an Executive Director, a General Counsel, and other staff, . . . Congress contemplated some degree of subdelegation to those staff members”).

II. IF THE COURT REACHES COUNT II, IT SHOULD CONCLUDE THAT THE COMMISSION’S DELEGATION DID NOT INCLUDE AUTHORITY TO VIOLATE THE NVRA.

Plaintiffs also claim that the Commission did not delegate to its Executive Director the authority to make the decisions challenged in this action. *See* Compl. ¶¶ 76-82, ECF No. 1. On remand, the Commission reported that the Commissioners do not agree whether the Commission’s delegation reaches the decisions challenged here. *See supra*, Background. The absence of a consensus decision cautions against unnecessarily resolving this claim on the basis of the record before the Court. Because the ambiguity of the 2015 Policy Statement and the diversity of the Commissioners’ views make it very difficult to resolve Count II, the better course is to resolve this case on the basis of Counts IV and V.²

If the Court finds it necessary to address Count II, it should rule narrowly that the Executive Director’s actions were *ultra vires* because—whatever the scope of his delegated authority—it did not include the authority to violate the NVRA’s requirements. This Court already has concluded, based on the administrative record, that the Executive Director made his decision on “ministerial” grounds, “review[ing] the request only for clarity and accuracy,” and that he did not determine whether the states “needed documentary proof of citizenship to enforce

² The Court did not suggest that it would be helpful for the Commissioners to address Count III. *See* Mem. Op. at 8-9. Nor have Plaintiffs prioritized this claim. *See* Pls.’ Supp’l Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 119 (not addressing Count III). In any event, if the Court reaches this claim, it is clear that the Commission does not have to act through notice and comment rulemaking to decide requests to update the state-specific instructions on the Federal Form. *See* Fed. Defs.’ Combined Resp. to Pls.’ and Def.-Intervenors’ Cross-Mot. for Summ. J. at 9, ECF No. 112; Fed. Defs.’ Mot. for Summ. J. at 24-25, ECF No. 101.

their qualifications.” Mem. Op. at 4; *see also League of Women Voters v. Newby*, 838 F.3d 1, 9-10 (D.C. Cir. 2016). Without such a determination, the Commission cannot satisfy the NVRA’s command to require only information “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); *see League of Women Voters*, 838 F.3d at 10 (noting that NVRA requires “considering whether these amendments [to the Federal Form] were ‘necessary.’”); *id.* (“the criterion set by Congress—*i.e.*, whether the amendments were necessary to assess eligibility”). The alternative standard the Executive Director applied—“review the request only for clarity and accuracy” Mem. Op. at 4 (quoting AR0002)—is contrary to the Supreme Court’s decision in *Arizona v. Inter Tribal Council, Inc.* (“*ITCA*”), 133 S. Ct. 2247 (2013). *See League of Women Voters*, 838 F.3d at 10 (“In *ITCA*, the Court made plain that the Commission, not the states, determines necessity.”) (citing *ITCA*, 133 S. Ct. at 2258–60). Because the Commission cannot have delegated to its Executive Director the authority to strip the Commission of its responsibility to make the statutory “necessity” determination, the Executive Director’s action was, in that limited but dispositive way, *ultra vires*.³

Plaintiffs and Defendant-Intervenors may press this Court to adopt a definitive interpretation of the Commission’s 2015 Policy Statement, specifying what constitutes “implement[ing] policies” versus “administrative matters,” AR0227. *See* Oct. 13, 2016 Hr’g Tr. at 12:13-13:3, ECF No. 125 (Defendant-Intervenors and Plaintiffs speculating about future

³ While the Court has suggested that Defendant-Intervenors’ constitutional claims raise “thorny . . . questions,” Mem. Op. at 9, the Court of Appeals found a straightforward path through them. *See League of Women Voters*, 838 F.3d at 11 (“The canon of constitutional avoidance does not compel or support a different interpretation of the NVRA.”). The Court of Appeals observed that “[t]he Elections Clause . . . 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.*

agency actions and future litigation). But the Court should not address that issue now because there is a far simpler and clearer way to resolve the case. *See, e.g., PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799, 809 (D.C. Cir. 2004) (Roberts, J., concurring) (explaining that 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”). As explained above, the delegation of authority, whatever its scope, cannot reasonably be interpreted to include violation of the NVRA.

On remand, the Commission might need to address anew the question Federal Defendants recommend the Court leave open—whether its internal delegation permits the Executive Director to grant the relevant state requests. It would be inappropriate, however, for the Court to presume what may transpire after vacatur of the challenged decisions and remand to the agency. There is no certainty of an impasse. The Commission could act on the state requests itself. Or, it could resolve the ambiguity in its current delegation by adopting a new delegation statement. *See* ECF No. 141-1 at ECF page 14 (explaining that the agency is currently considering a number of alternative proposals). In the future the Commission may have a full complement of Commissioners, and any new or successor Commissioners may be able to reach agreement. And regardless, the imprecision of the operative document, the disagreement among the authors of the 2015 Policy Statement as to its application to these facts, and the backdrop of widely-varying past practices on this issue caution against premature judicial intervention. In the absence of a particular set of facts that may occur, a judicial pronouncement at this point might not anticipate the relevant issue to be resolved. *Cf. Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 372–73 (1955) (“[P]erplexing questions . . . admonish[] us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of

the immediate case.”).

CONCLUSION

For the reasons stated herein and in Federal Defendants’ prior memoranda, the Court should not reach Counts I and II of the complaint. If it does, it should find that the Commission had the authority to delegate the type of decision at issue here to the Executive Director (Count I), but rule narrowly on Count II that, regardless of what the full scope of the Executive Director’s delegated authority is, the Commission did not authorize, and could not have authorized, the Executive Director to disregard the requirements of the NVRA. Finally, for the reasons set forth in Federal Defendants’ summary judgment briefs, *see* ECF Nos. 101, 112, and 121, the Court should rule that, because the Executive Director expressly found irrelevant whether the requested changes to the Federal Form were “necessary” for the states to determine voter eligibility, his decisions cannot be sustained. The proper remedy under the APA is to set aside the challenged decisions, giving the Commission the opportunity to consider the states’ requests under the correct statutory standard.

Dated: August 7, 2017

Respectfully submitted,

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