IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendants,

and

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

Intervenor Defendant,

and

PUBLIC INTEREST LEGAL FOUNDATION

Intervenor Defendant.

NO. 16-cv-236 (RJL)

INTERVENOR-DEFENDANT KANSAS SECRETARY'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

The Court correctly narrowed the threshold issue as to whether Executive Director Newby had authority to rule on the States' instruction requests. If he did not, then the inquiry ends. *See* Court's Order, Doc. 133, p. 8. But if he did, then the Court must go on to assess whether Newby's "reasoning can withstand APA review." *Id*. An APA review must assess whether Newby's decision is consistent with the statute and regulations of the agency. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013). If the agency's decision comports with any reasonable interpretation of the statute, then it should be approved. *Id.* ("an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."). In this case, the relevant statute is the National Voter Registration Act ("NVRA"). 52 U.S.C. § 20501 et seq.

The EAC's submission to the Court confirms that Newby had been delegated the authority to either approve or reject states' instruction requests. Although Commissioner Hicks asserts that Newby acted *ultra vires*, he also *agreed that Newby had the authority to make the decision*. *See* Hicks Position Statement, p. 2 (policy "requires the Executive Director to reject or disapprove any state's request on DPC"). Hicks' disagreement, then, stems only from his belief that Newby made the *wrong* decision, not that he lacked the authority to decide. With this new information, the issue of whether Newby acted within his authority is effectively removed from consideration and replaced with the legality of the decision itself.

To that end, it is significant that Hicks also believes that *any* decision approving a state's use of documentary proof of citizenship ("DPOC") would be inconsistent with "precedent" and in violation of the NVRA. *See* Hick's Position Statement ("decision was not consistent with agency precedent and in violation of NVRA"). This means that even if three Commissioners had approved these instruction requests, Hicks would still consider the agency decision to be wrong. That is simply incorrect. As the rest of the Commission points out in the submission, there was *no existing precedent* or policy in place that would prohibit the EAC—either the Executive Director or the

Commissioners—from approving a state's request to include DPOC in their state-specific instructions. See Submission, p. 5 ("the Commission has not created policy on this matter.")

Because three commissioners agree that Newby had the authority to act, the remaining question is whether the substance of his action was consistent with the NVRA, relevant regulations, and any binding precedents. The agency's current bipartisan commissioners are divided on this answer by party lines. Thus, it lies with the Court to resolve the issue. Newby's action can be justified in either one of two ways. First, the Court could determine that because there was no EAC policy or precedent in place *prohibiting* the EAC from adding a state's DPOC requirement to the state-specific instructions, the agency's action did not violate the APA and so its decision should be affirmed on these grounds. Second, the Court could determine that the meaning of the NVRA must be ascertained to resolve the issue. If so, the Court should apply the clear guidance of the Supreme Court in *Arizona v. Inter Tribal Council of Ariz., Inc.,* 133 S. Ct. 2247 (2013) ("*ITCA*") and affirm the decision on the merits.

Under either analysis, Plaintiffs' claims fail. The lack of EAC precedent prohibiting Newby's decision means that all five counts of Plaintiffs' Complaint fail, as each is solely predicated on the lack of precedent for Newby's decision. Likewise, *ITCA* makes clear that Congress is constitutionally prohibited from preventing states from exercising their authority to determine and enforce voter qualifications, which includes requesting DPOC to verify their eligibility as citizens. *See* the Elections Clause, U.S. CONSTITUTION, ART. I, § 4, cl. 1; *ITCA*, 133 S. Ct. 2247. For these reasons, explained fully below, the motion for summary judgment of Intervenor-Defendant Secretary of State Kobach ("Kansas") should be granted.

STANDARD OF REVIEW AND DEFERENCE

The standard of review has not changed. "[A]gency action may be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Coe v.*

McHugh, 968 F. Supp. 2d 237, 239 (D.D.C. 2013). The agency's interpretation of a statute it is tasked with enforcing is given *Chevron* deference. *United States v. Mid-Am. Apartment Communities, Inc.*, 2017 WL 1154944, at *3 (D.D.C. Mar. 27, 2017). The absence of a formal adjudication process when the agency accepts or rejects the states' instruction requests does not remove that deference. *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (applying *Chevron* when no administrative formality was required and none was afforded). It is not enough for the agency decision to be incorrect; so long as it has some rational basis, the court is bound to uphold the decision. *Hosp. of Univ. of Pa. v. Sebelius,* 634 F. Supp. 2d 9, 13 (D.D.C. 2009). Although the EAC's submission to the Court was not a unanimous opinion, it must still be considered as extra-record material. *United Student Aid Funds, Inc. v. Devos*, 2017 WL 728044, at *3 (D.D.C. Feb. 23, 2017).

I. NEWBY LACKED DISCRETION TO DENY THE REQUESTED FEDERAL FORM CHANGE

At the outset, Kansas reiterates two points demonstrating that, regardless of the level of authority delegated to the Executive Director, the EAC and by extension Mr. Newby, is compelled by both the Constitution and an agency regulation to grant Kansas's request.

A. The Constitution Requires Kansas's Requested Proof-of-Citizenship Requirement to be Included on the Federal Form

The Supreme Court in *ITCA* avoided "serious constitutional doubts" in interpreting the NVRA's "accept and use" provision by accepting the Federal Government's "concession" that "a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility[.]" *ITCA*, 133 S. Ct. at 2258-2259. Thus, according to *ITCA*, even though the NVRA says that the EAC "may" include certain information on the Federal Form, the only constitutional-permissible reading of the NVRA requires that such information "will" be included. *Id.* The Constitutional gives the States the authority to set and enforce voter

qualifications. *Id.* at 2257-59. The Constitution is violated if the State no longer determines who the qualified electors are. Likewise it is violated if those whom the State determines are ineligible to vote are nevertheless permitted to vote in federal elections. *Id.* at 2258 (citing Art. I, 2, cl. 1; CONST. AM. XVII). But rejecting Kansas's request would do just that. It would create a situation where *Congress*, through the EAC, is telling *Kansas* who the federal electors are—i.e., any individual who merely attests to citizenship rather than complies with Kansas's DPOC law. This is not permitted. *Wiley v. Sinkler*, 179 U.S. 58, 63-64 (1900) (The States "define who are to vote for the popular branch of their own legislature, and the constitution of the United States says *the same person shall vote for members of congress in the state.*"). Thus, the Constitution deprives Congress of the authority that would allow such a rejection. Instead, it reserves this judgment to the States. As a result, the EAC also lacks the authority to delegate to the Executive Director the discretion to reject Kansas's request. *See Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 12 (D.D.C. 2011) ("A basic prerequisite to any act by a federal agency is that the agency possess actual legal authority to undertake such action."). This constitutional reality is why the EAC's duty to include Kansas's proof-of-citizenship requirement on the form is "nondiscretionary." *ITCA*, 133 S. Ct. at 2260.

B. 11 C.F.R. § 9428.3 Requires that Kansas's DPOC Instruction be Included

Even if the Constitution did not require such inclusion, the EAC is *bound by its own regulations* to include Kansas's proof-of-citizenship requirement. One regulation requires that the "state-specific instructions *shall* contain . . . information regarding *the state's specific voter qualification and registration requirements*."[1] 11 C.F.R. § 9428.3(b) (emphasis added). Another regulation requires that the Federal Form specify each eligibility requirement (including citizenship)

[1] The EAC's regulation is consistent with its predecessor, the Federal Election Commission's (FEC) guidelines. The National Clearinghouse on Election Administration, Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples (Jan. 1, 1994), *available at* http://www.eac.gov/assets/1/Page%Implementing%20the%20NVRA%201993%20Requirements%20Issues%20Approaches%20Examples%20Jan%201%201994.pdf. In the Guidelines, the FEC highlighted Congress's desire to avoid a construction of the NVRA that would displace the role of state officials regarding voter registration.

"and include by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompanying state instructions." 11 C.F.R. § 9428.4(b)(1). The regulations also require the state election official to "notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section."11 C.F.R. § 9428.6(c).

II. NEWBY'S DECISION DID NOT VIOLATE APA REQUIREMENTS

A. Newby Had Authority to Decide By Hicks's Admission and By Longstanding Agency Precedent, as reaffirmed by the Submission

The three commissioners are unanimous in answering two of the five questions. *See* 141-1, p. 5-6. Furthermore, the Commissioners are unanimous in Section 5 that deadlocked votes of the Commission do not establish policy; nor can they change EAC regulations, policies, guidelines, advisories or procedural actions. *Id.* at 6, 14. Finally, the Commissioners are unanimous that the Executive Director "continued to possess the delegated authority to 'maintain' the Federal Form under the 2015 Policy Statement" which "included requests related to changes to the State Specific Instructions . . ." *Id.* at 11. And in Section 3, they were unanimous that this delegation includes "tak[ing] responsibility for administrative matters" under the 2015 Policy Statement. *Id.*

Commissioner Hicks's Policy Statement and an explanation within the submission under Section 3 indicate where there is disagreement. *Id.* at 5-6, 11-12. As to Section 5, Hicks disagrees with the following statement: "[T]hat in the event of a deadlocked vote the Executive Director can continue moving the agency forward" because he believes, without explanation, that it "in affect (sic) gives the Executive Director more authority than the Commissioners." *Id.* at 6. As to Section 1, the Commissioners are unanimous that the 2015 Organizational Management Policy grants the Executive Director authority to maintain the Federal Form; but such delegation must be consistent with federal statute, regulations, and precedents established by the agency. *Id.* at 5. According to

Hicks, Newby's decision was "not consistent with agency precedent and in violation of the NVRA." *Id.* at 6. Hicks does not identify with which agency precedent Newby's decision was "not consistent" with. He also does not identify how it was "in violation of the NVRA." Finally, as to Section 3, there is no disagreement that the 2015 Policy Statement "include[s] requests related to changes to the State Specific Instructions, the established practice of the Commission, and the FEC. It was delegated by the Commission to the previous Executive Director and to the Acting Executive Director previously, *and that has not changed*." *Id.* at 11 (emphasis added).

Thus, the Commissioners have confirmed that Newby had authority to approve Kansas's request, provided that the requested instructions are not prohibited by the NVRA or agency policy, precedent, or regulations. *Id.* 5, 6, 11, 14. Indeed, it would be difficult for the Commissioners to *not* come to that conclusion under the existing record.

As this Court noted, the Executive Director made decisions on state instruction requests for the majority of the years the EAC has been in existence. *See* Order, p. 14, citing AR0860. While the Commission did vote on decisions from 2008-2010 while the 2008 Policy was in place, Order pp. 12-13, this Court noted that the Tenth Circuit determined that the Executive Director possessed the authority to make those decisions under the 2008 Policy. *Id.*at 13. Nowhere did the Commissioners state that these votes were establishing any new agency policy, which the submission to the Court confirms. ECF 141-1, p.13 ("[N]ot every vote of the Commission establishes policy. If the Commission is creating policy by a vote, then it will say so.").

Thus, based on both the submission to the Court and the factual record evidencing the EAC's and FEC's history in approving modifications to the state-specific instructions, Newby had the authority to approve Kansas's request. Therefore, the question remaining for the Court is whether Mr. Newby's decision was inconsistent with EAC policy or in violation of the NVRA.

B. Newby's Decision Did Not Violate Policy Because No Policy Exists that Bans Requiring DPOC, and Decisions on State Instruction Requests are Not Policy Decisions

As the submission makes clear, decisions by the Executive Director that are not later affirmed by the Commissioners do not create agency "policy." *Id.* at 6, 14. And, "deadlocked" votes do not constitute policy. *Id.* Indeed, the Supreme Court already confirmed this in *ITCA*. 133 S. Ct. at 2259-61. Therefore, unless Plaintiffs can point to a decision of three votes by the Commissioners prohibiting DPOC requirements, Newby's actions do not violate agency policy.

It cannot be disputed that there has *never* been a vote of three Commissioners affirming or rejecting DPOC requirements. And, even if there had been, there has not been a statement by the Commission that such a vote was establishing policy. Following the initial Wilkey rejection of Arizona's request, there were one deadlocked vote, AR0245-62, and there were no votes following the Alice Miller decision. AR0283. Thus, according to the EAC submission, *no policy of prohibiting proof of citizenship requirements has ever been created by the EAC*. While Plaintiffs have been unable to pinpoint exactly *when* this policy was established, in their summary judgment brief they tried to explain it: "In denying the requests for Kansas and Arizona in 2014, the *Commission* stated that the policy was adopted in 2006 when it denied Arizona's set of request from the earlier time[.]" ECF 102, p. 24 (emphasis added). Plaintiffs' citation for "the Commission" is to the Alice Miller memorandum. And Plaintiffs' theory hinges on the "decision" of former commissioners ending in a "2-2 vote." *Id.* Thus, now that the EAC's submission confirms that "deadlocked votes" do not establish policy and that the Commission will "say so," when a vote is to establish policy, it is undisputed that no policy was in place preventing the inclusion of Kansas's DPOC requirement on the Federal Form.

Notably, at the time of his decision, Newby articulated the reason for his action and made a connection between the facts known and the choice made. This precludes a finding that his decision was arbitrary or capricious. *PPL Wallingford Energy LLC v. Fed. Energy Reg. Comm'n*, 419 F.3d 1194, 1198 (D.D.C. 2005). As Newby stated, "changes to the instructions consistent with state law do not" fall under the term "policy" as defined by the Commissioners. *See* AR0004. He pointed out the long-established "ministerial duty" of the Executive Director in changing the State-specific instructions. *Id.* The Executive Director not only was permitted to grant the three States' request to modify the State-specific instructions, he was *compelled* to do so. On August 8, 2000, the Commission approved a procedural change allowing the Office of Election Administration (OEA) to make any changes to the Form that are required by changes in state law, and to notify the Commission of the revisions. The OEA had to submit for a formal Commission vote only those changes to the form that were not specific to a given state. AR0168 n.1; AR0163. In 2008, the EAC reiterated that responsibility for modifying the state-specific instructions rested with the Executive Director. AR0215. The EAC also confirmed that the 2015 Policy continued this same delegation of authority to the Executive Director. *See* Submission, Doc. 141-1, p. 4, Answer of "Yes" to Ques. 3.

C. The Lack of Formal Adjudication Process for Decisions on State Instructions Confirms That They Are Not Policy Decisions

The fact that these are ministerial and not policy decisions is also supported by the absence of their subjection to a notice and comment period or any formal adjudication process. Indeed, the decision to alter the state-specific instructions is accomplished through "informal adjudication." *Kobach v. EAC,* 772 F.3d 1183, 1197 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015). Congress did not formalize the process anywhere in statute. *See Neustar, Inc. v. FCC*, 857 F.3d 886, 896 (D.C. Cir. 2017) ("Because the FCC's Order does not fall within the APA's definition of a rule and qualifies as an informal adjudication, it is not subject to notice-and-comment procedures.")

There is no notice period required for the EAC's decisions because it is not the EAC's job to create state law or state policy. Rather, its duties are mandated by Congress, in part, as follows:

> **52 U.S.C. § 20922. Duties**
> The Commission shall serve as a *national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections* by--
> **(1)** carrying out the duties described in subpart 3 of this part (relating to the adoption of voluntary voting system guidelines), including *the maintenance of a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general*;

The scope of duties and authority given the EAC by Congress limits it to being a "clearinghouse," and a "resource for the compilation of procedures" regarding the "administration of" Federal elections. Nowhere is the duty of deciding whether to accept or reject a state law entrusted to the EAC; rather, the EAC is entrusted with administering and maintaining the laws as reported to them by the States. Indeed, the EAC is prohibited from imposing rules on the States:

> **52 U.S.C. § 20929. Limitation on rulemaking authority**
>
> The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 20508(a) of this title.

III. NEWBY'S DECISION CORRECTLY ENFORCES THE NVRA

A. The Supreme Court's Decision in *ITCA* Holds That Although EAC Controls the Content of the Federal Form, States the Control Content of State Instructions

The *ITCA* decision remains the most relevant opinion on the division of powers between the States and the Federal government regarding elections. It affirmed that the state instructions remained in the purview of the States, *and that Arizona could request a DPOC instruction*:

> "We hold that 42 U.S.C. § 1973gg–4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act."

133 S. Ct. 2247 (2013). This holding of the Court would make no sense if Hicks were correct in asserting that DPOC is prohibited by the NVRA. The Court clearly held that "a State may request that the EAC alter the Federal Form to include information *the State deems necessary* to determine eligibility." *ITCA*, 133 S. Ct. at 2259 (emphasis added). Notably, the Court specifically suggested that Arizona renew its proof-of-citizenship request to the EAC. *Id.* at 2260. *ITCA* noted that if a court were called on to review an EAC denial of a State's request, the State need only show that "mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form." *Id.*

CONCLUSION

In summary, the Commissioners agree that Mr. Newby has the authority to modify the state-specific instructions, that Commissioners set policy through votes, that deadlocked votes do not set policy, and that the Executive Director does not set "policy." Furthermore, it is undisputed that a policy vote of at least three Commissioners has never occurred denying the inclusion of proof-of-citizenship requirements in the state-specific instructions. Therefore, it is now appropriate for this Court to enter final judgment in favor of Intervenors on Counts I-IV of Plaintiffs' Complaint. As to Count V, Intervenor is entitled to summary judgment because Kansas's request is consistent with the NVRA. If, however, this Court believes that Mr. Newby's decision is unclear, it would be appropriate for this Court to seek a more thorough explanation from him. There is no longer any dispute that Mr. Newby has been delegated the authority to act as the "decision-maker" for the purposes of approving modifications to the state-specific instructions of the Federal Form.

Dated: August 7, 2017

Respectfully submitted,

/s/ Kris W. Kobach*
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CERTIFICATE OF SERVICE

I hereby certify that I did serve a copy of this Supplemental Brief in Support of Motion for Summary Judgment on all counsel who have made appearance in this case and consented to service by electronic means through the Electronic Case Filing system.

Dated: August 7, 2017

/s/ John Miano
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