

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, and JOANN BROWN,

Plaintiffs,

v.

Civ. No. 1:16-cv-00236

BRIAN D. NEWBY, in his capacity as the Executive Director of the United States Election Assistance Commission; and **THE UNITED STATES ELECTION ASSISTANCE COMMISSION,**

Defendants,

and

KRIS KOBACH, in his official capacity as Kansas Secretary of State, and **PUBLIC INTEREST LEGAL FOUNDATION,**

Defendant-Intervenors.

**INTERVENOR-DEFENDANT PUBLIC INTEREST LEGAL FOUNDATION'S
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

On February 24, 2017, this Court issued an Order, stating:

ORDERED that the Executive Director's grants of Kansas's, Alabama's, and Georgia's requests to include their documentary proof of citizenship requirements in their state-specific instructions on the Federal Form are remanded to the Election Assistance Commission for the Commission to provide its interpretation of the Executive Director's authority to grant or deny state instruction requests under the 2015 Policy Statement.

(Dkt. 134 at 1.) This Court further explained that this remand would “ensure the *Commission*—not Government counsel—brings its expertise and insight to bear.” (Dkt. 133 at 18.) The Court indicated that it expected the Commission to address, “at a minimum,” certain points, “including whether deadlocked votes of the Commission constitute ‘policymaking’ and whether approving and denying state instruction requests is an administrative task, a policy implementation function, or neither.” (Dkt. 133 at 18-19.) The Court deferred ruling on the pending motions for summary judgment and stayed the case pending the Commission's response. (Dkt. 133 at 19.)

On June 1, 2017, the Department of Justice filed the Commission's tally vote and memorandum. (Dkt. 141.) In the tally vote, the Commissioners voted on the “Recommendation to approve the adoption and submission of the memo entitled ‘Interpretation of the 2015 Organizational Management Policy Statement and Response to the Order of the District Court in *League of Women Voters et al. v. Newby et al.*’” (Dkt. 141-1 at 1.) Commissioners Masterson and McCormick approved the recommendation to adopt the memo (hereinafter, “Interpretation Memo”). (Dkt. 141-1 at 1-2.) Commissioner Hicks disapproved the recommendation but did “approve the submission of the tally vote and the memo to the court.” (Dkt. 141-1 at 3.) Commissioner Hicks provided a position statement outlining the specific portions of the Interpretation Memo with which he disagrees. (Dkt. 141-1 at 5-6.) Specifically, Commissioner

Hicks did not approve of Sections one or five but did “concur with Sections two, three and four of the Interpretation Memo.” (Dkt. 141-1 at 6.)

ARGUMENT

The Commission “identified a list of questions the Court has asked the Commission in order to resolve identified ambiguities.” (Dkt. 141-1 at 8.) The Commission identified five such questions and addressed each of them in the Interpretation Memo. The Foundation believes that the Interpretation Memo supports its Motion for Summary Judgment in the following ways.

1. The 2015 Operational Management Policy Did Not Strip the Executive Director of Authority.

In its summary judgment briefing, the Foundation argued that “the 2015 Policy Statement did not supersede the Executive Director’s longstanding authority to informally adjudicate the States’ request for modification to their state-specific instructions without a formal Commission vote.” (Dkt. 104 at 22.) In its Interpretation Memo, the Commission unanimously agreed that, in accordance with “past practice of the Commission and the Federal Election Commission before it,” authority to maintain the Federal Form “could be delegated to the Executive Director and/or staff.” (Dkt. 141-1 at 10.) The Commissioners agreed that, in 2008, “the Commissioners delegated to the Executive Director the ability to manage the day-to-day operations of the agency, which included the Federal Form maintenance program.” (Dkt. 141-1 at 11.) The Commissioners stated that “[t]he 2015 Operational Management Policy did not alter that delegation.” (Dkt. 141-1 at 11.) Relatedly, the Commissioners also asked whether this delegation “include[s] the power to approve or reject requests related to changes to the state-specific instructions?” (Dkt. 141-1 at 11.) As to this point, “[a]ll three commissioners agree that this [delegation] included requests related to changes to the State Specific Instructions....” (Dkt. 141-1 at 11.)

In their summary judgment briefing, Plaintiffs concede that “the Commission previously delegated specific authority to the Executive Director” in 2008, they believe that “the 2015 Policy Statement rescinded that specific subdelegation.” (Dkt 102 at 24.) The Interpretation Memo confirms that the Plaintiffs are mistaken.

2. This Case Presents Serious Constitutional Questions.

In the Interpretation Memo, Commissioner McCormick stressed her belief “that the Commission has no authority to change any legal requirement passed by duly elected legislators of a state and that the responsibility of the [Commission] is to provide the voters with accurate State-Specific Instruction information so that the voters are not disenfranchised from any part of their ballot.” (Dkt. 141-1 at 12-13.) Indeed, this further emphasizes the grave constitutional concerns at issue in this case, concerns that the Foundation explained in its supplemental briefing. (*See* Dkt. 120.)

CONCLUSION

The Interpretation Memo from the Commission supports the positions taken by the Foundation. For these reasons and those stated in the Foundation’s earlier briefing, the Foundation’s Cross-Motion for Summary Judgment should be granted and both Department of Justice’s Motion and the Plaintiffs’ Cross-Motion should be denied.

Dated: August 7, 2017

Respectfully submitted,

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** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I caused the foregoing to be filed with the United States District Court for the District of Columbia via the Court's CM/ECF system, which will serve all registered users.

I further certify that I caused paper copies of the foregoing to be mailed via USPS to the following non-registered users.

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Dated: August 7, 2017

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