IN THE 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, JOANN BROWN, and PROJECT VOTE

Plaintiffs,

v.

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.

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION

Defendant-Intervenors.

Case No. 16-cv-236 (RJL)

PLAINTIFFS' POST-REMAND REPLY BRIEF

PRELIMINARY STATEMENT

The Chairman of the EAC certified that the Commissioners failed to adopt the Interpretation Memo "having not achieved the requisite 3 votes required by law." Dkt. 141-1 at *7. Nothing in any of the various submissions before this Court refutes that showing. Accordingly, the Court must resolve the parties' cross-motions for summary judgment without affording any deference to the Interpretation Memo.

The Federal Defendants concede, as they must, that the vote to adopt the Interpretation Memo failed, and that Plaintiffs are entitled to summary judgment on Counts IV and V, because Executive Director Newby plainly violated the APA and the NVRA in granting the States' requests without rational explanation and without making the statutorily-required finding of necessity, and on Count II, because the Commission indisputably never delegated authority to the Executive Director to act in violation of the NVRA.

The Federal Defendants erroneously ask this Court to find against Plaintiffs on Count I, which is based on the undisputed failure by Executive Director Newby to obtain the approval of three Commissioners before granting the States' requests. The basis of the Federal Defendants' opposition to Count I is their disagreement with the proposition 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." Dkt. 145 at *3. But that is a straw man. Plaintiffs agree that the Commission can delegate—and likely has delegated—authority to staff to review and grant ministerial or routine requests to modify the state-specific instructions, such as changes of mailing address, voting location, and election dates. As this Court recognized in its Remand Order, however, "some requests for modification of the state-specific instructions are clear-cut, routine while others are anything but." Dkt. 133 at *16. Regardless of whether the

Commission has delegated authority to its staff to handle routine changes, there is no evidence whatsoever that the Commissioners delegated authority to reverse the EAC's longstanding position against requiring documentary proof of citizenship—a request that is anything but routine. The failed vote on the Interpretation Memo only reaffirms that the three sitting Commissioners who voted to adopt the 2015 Policy Statement did *not* delegate the power to permit documentary proof of citizenship.

In an effort to avoid that inescapable conclusion, Defendant-Intervenor Kobach asks this Court to ignore the Commission's failed vote. In Mr. Kobach's view, the Court should pick and choose from among the subtopics addressed in the rejected Interpretation Memo, cobble together the areas of alleged agreement among the Commissioners, and conclude that the Commissioners actually "*agreed that Newby had the authority to make the decision.*" Dkt. 147 at *2 (emphasis in original). That strained line of reasoning directly conflicts with the Commissioners' explicit disagreement about the extent of the delegation, and demonstrates the fundamental illogic of this mix-and-match analysis. Unsurprisingly, no court has ever sanctioned such an approach, and Mr. Kobach suggests no reason why this Court should be the first.

Summary judgment should be entered for Plaintiffs, and the Executive Director's actions, which are preliminarily enjoined, should be permanently enjoined and vacated.

ARGUMENT

I. THE COMMISSION'S FAILED VOTE ON THE INTERPRETATION MEMO CONFIRMS THAT EXECUTIVE DIRECTOR NEWBY LACKED THE AUTHORITY TO GRANT THE STATES' REQUESTED CHANGES

The Federal Defendants concede that the Commission did not muster the three votes required by HAVA to adopt the Interpretation Memo. The Interpretation Memo therefore is not

entitled to consideration, let alone deference. Nothing in the papers filed by the Federal Defendants, Public Interest Legal Foundation ("PILF") or Mr. Kobach refutes that conclusion.

Although the Federal Defendants concede that summary judgment should be entered for Plaintiffs, they strangely suggest that Plaintiffs should be denied summary judgment on Count I because "the Commission has statutory authority to delegate to its Executive Director decisions on requests regarding state-specific instructions on the Federal Form." Dkt. 145 at * 7. But Plaintiffs have never disputed that the EAC staff has the authority to handle routine, ministerial matters, or to enforce the policies and precedents previously established by the EAC. Rather, Count I of the Complaint is simply based on the undisputed fact that three Commissioners *did not* approve Mr. Newby's unilateral actions. The failure to obtain such approval facially violates HAVA's three Commissioner approval requirement. 52 U.S.C. § 20928. Count II relates to *whether* the Commissioners through the 2015 Policy Statement somehow delegated the authority to reverse the EAC's precedent against documentary proof of citizenship. The answer, as Plaintiffs previously demonstrated in their main briefs, is plainly "No." *See* Dkt. 102, Dkt. 115. While it is not entirely clear what the Federal Defendants argue in this regard, they at least concede that Plaintiffs should prevail on Count II because the Commissioners could not have delegated authority to violate the NVRA by failing to make the required statutory finding of "necessity." *See* Dkt. 145 at *8-9.

Faced with the EAC's inability to reach consensus on the Interpretation Memo and, specifically, the ultimate question of Mr. Newby's authority, Mr. Kobach attempts to salvage his position by arguing that somehow the Commission agreed that Mr. Newby had authority to

modify the Federal Form despite Commissioner Hicks' forceful dissent.[1] But Mr. Kobach cannot pick and choose his preferred elements from a memorandum that was rejected. The only result of the EAC's June 1, 2017 submission is that the Commission did not ratify Mr. Newby's actions. The Commissioners' inability to agree on a response that Mr. Newby *was* delegated the authority to grant the States' requests only confirms that they *never did* so delegate.

A. Commissioner Hicks Did Not Agree That Mr. Newby Had Authority To Grant The States' Requested Changes

The Chairman of the EAC explained that the measure to adopt the Interpretation Memo failed, because three or more Commissioners could not endorse it as required by HAVA. *See* Dkt. 141-1 at *7. Despite this conclusive and unambiguous fact, Mr. Kobach premises his arguments on the flawed theory that "[a]lthough Commissioner Hicks asserts that Mr. Newby acted *ultra vires*, he also *agreed that Newby had the authority to make the decision*." Dkt. 147 at *2 (emphasis in original). First, Mr. Kobach's statement is incoherent—"*ultra vires*" means beyond one's authority, but Commissioner Hicks obviously does not believe that Mr. Newby's actions were both *beyond* and *within* his authority. Moreover, it is clear from the face of Commissioner Hicks' statement of dissent that he strongly disagrees that the Commissioners delegated authority to permit documentary proof of citizenship requirements. In fact, Commissioner Hicks' statement says he believes that the 2015 Policy Statement "requires the

[1] Mr. Kobach also rehashes arguments that have already been rejected in previous litigation, and even by this Court, when he claims that the Commission is *required* as a matter of law to grant all requested changes to the state-specific instructions. That argument has been disposed of many times over. *See*, *e.g.*, *Arizona v. Inter Tribal Counsel of Ariz.*, 133 S. Ct. 2247, 2250 ("*ITCA*") (noting that a state-specific instruction is only required if the EAC determines that it is "necessary" under the NVRA); *Kobach v. Election Assistance Comm'n*, 772 F. 3d 1183, 1196 (10th Cir. 2014) (holding that "the EAC *does* have discretion to reject such requests") (emphasis added); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 14 (D.C. Cir. 2016)(noting that *ITCA* "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.").

Executive Director to reject or disapprove any state's request on DPC," because the Executive Director lacks authority to unilaterally "reverse precedent or approve an action inconsistent with policy and precedent."[2]

Because the "past decisions of the agency are clear and consistent" in declining to allow documentary proof of citizenship requirements, Mr. Newby's grant of the States' requests reversed EAC precedent of rejecting such requests. Mr. Kobach nonetheless mischaracterizes Commissioner Hicks' position to argue that "Hicks' disagreement, then, stems only from his belief that Newby made the *wrong* decision, not that he lacked the authority to decide." Dkt. 147 at *2. But Commissioner Hicks never agreed that it was within Mr. Newby's authority to "decide" at all—he merely agreed that Mr. Newby could "reject" the documentary proof of citizenship requests, as the *rejection* would have comported with agency precedent. *See* fn. 2.

Simply put, Mr. Kobach is incorrect when he contends that "this issue of whether Newby acted within his authority is effectively removed from consideration." Dkt. 147 at *2. The Commission has declined to adopt the Interpretation Memo, and the Court must make its own determination as to the extent of the authority delegated to the Executive Director. Plaintiffs have amply demonstrated that there was no such delegation.

[2] In fact, it is undisputed that any authority Mr. Newby was granted to "maintain the Federal Form" was limited by the requirement that he do so consistent with statute, regulation, and EAC policy and precedent. This is precisely the delegation that previously was upheld by the Tenth Circuit. *See Kobach*, 772 F. 3d 1183 (holding that "the Executive Director's decision to reject the states' request was a consistent and valid exercise of limited subdelegated authority," while "changing course and acceding to [the states'] requests absent relevant new facts would conflict with the EAC's earlier decision.").

B. Mr. Newby Had *Limited* Authority To Address Requested Changes To The State-Specific Instructions

At several points, Mr. Kobach argues that the Commissioners unanimously agree that the authority delegated to Mr. Newby "included requests related to changes to the State Specific Instructions,"[3] as though that could be construed to mean that Mr. Newby was thus authorized to unilaterally decide *all* such requests. In fact, it is undisputed that Mr. Newby's authority, under the 2015 Policy Statement and in practice, included "implementing policies once made," and "tak[ing] responsibility for administrative matters," which might involve certain ministerial matters related to the state-specific instructions. However, as Plaintiffs have explained, the question of whether to include documentary proof of citizenship requirements is a determination of policy, not a mere administrative matter, and the Commissioners expressly reserved policy decisions to their own discretion in that same 2015 Policy Statement. *See* Dkt. 102 at *20-22. As indicated in the failed Interpretation Memo, the Commissioners disagree on whether a change to the state-specific instructions can be a policy issue and thus require the consideration of the Commission. "The changes to State Specific Instructions range from minute address changes (which Commissioner Hicks would classify as administrative) to legal requirements imposed by states and territories (which Commissioner Hicks believes would fall within the policy realm if it is determined to impact the 'accept and use' aspects of the NVRA)." Dkt. 141-1 at *12.

As Plaintiffs have previously explained, the question of whether to include documentary proof of citizenship requirements on the Federal Form is a policy issue to be considered by the Commission, not an administrative task within the purview of the Executive Director. *See*, *e.g.*,

[3] The bulk of Defendant-Intervenor PILF's brief makes the same inapposite point. See Dkt. 148 at * 4. Plaintiffs have never argued that the Executive Director did not have authority to act on *any* state-specific requests, but only that his authority is limited to administrative matters and to implementing Commission policies *once made*.

Dkt. 102 at *25-30; Dkt. 115 at *15-17. Congress set the default position by prescribing the objective contents of the Federal Form and rejecting proposals that would have permitted or mandated States to require documentary proof of citizenship. The FEC and the EAC conducted rulemakings in adopting the Federal Form and uniformly rejected documentary proof of citizenship. The bipartisan Commission has consistently rejected documentary proof of citizenship. This question has arguably been the most complex and far-reaching one the Commission has been called upon to answer, and it unquestionably has been the most litigated issue. Moreover, the required determination of "necessity" calls for an interpretation of the NVRA itself—an act that cannot be considered ministerial. Far from fulfilling state requests to update an election office address or phone number—administrative tasks within his delegated authority—Mr. Newby took unilateral action to decide a major policy question that will have substantial effects on voters in multiple States.

C. State Requests for Documentary Proof Of Citizenship Requirements Are Not "Administrative"

Mr. Kobach is also wrong to argue that because some *administrative* decisions regarding state-specific instructions have been informally adjudicated, *all* decisions regarding the instructions are therefore administrative and within Mr. Newby's purview. *See* Dkt. 147 at*9. On the contrary: The EAC's determinations regarding documentary proof of citizenship requirements have always been made after substantive consideration by the Commissioners. The Commission adopted the contents of the Federal Form and its state-specific instructions through a formal voting process without documentary proof of citizenship requirements, and has repeatedly declined to include proof of citizenship requirements, including by tally votes[4] after

[4] Although not necessary to our argument, Plaintiffs reiterate that the memorandum prepared in 2006 by then-Executive Director Wilkey ("Wilkey Memorandum") was a memorialization of the

specific discussion of the issue. The one time an Executive Director made an independent determination of a documentary proof of citizenship request, she did so in the absence of a quorum of Commissioners, pursuant to a specific delegation of authority that permitted her to resolve decisions consistent with agency policy and precedent. Indeed, her determination to reject the requests was directly informed by the precedent of rejection established by the Commission itself. *See Kobach*, 772 F. 3d 1183.

D. The Commission Did Not Agree That There Is No EAC Policy Or Precedent Against Inclusion Of Documentary Proof Of Citizenship

Mr. Kobach urges, based on the position of only two Commissioners, that "no policy was in place preventing the inclusion of Kansas's DPOC requirements on the Federal Form."[5] However, the Commission itself was unable to agree on that point. As the failed Interpretation Memo notes, Commissioner Hicks believes that as "[t]he Commission has addressed this matter several times over the last decade and voted to decline requests to add [proof of citizenship requirements to the Federal Form]," Mr. Newby's "decision constitutes a change of policy, which can only be made following official adoption by at least three Commissioners." Although Mr. Kobach argues that "there has *never* been a vote of three Commissioners prohibiting DPOC

Commission's consensus determination not to allow documentary proof of citizenship requirements in response to Arizona's request, prepared at the Commission's behest, and did not reflect a unilateral decision by the Executive Director. *See* Dkt.102 at *13-14.

[5] Mr. Kobach goes so far as to argue that inclusion of Kansas's own statutory requirements is required by the Constitution. Contrary to the assertions of both Mr. Kobach and PILF, the Supreme Court in *ITCA* held that the States are entitled to choose voter qualifications—such as citizenship—under the Qualifications Clause of the Constitution, but the Elections Clause leaves to the Federal Government the authority to determine the procedures for assessing eligibility under those qualifications—*i.e.* whether or not documentary proof of citizenship can be required. *See ITCA*, 133 S. Ct. at 2257-58; *Kobach*, 772 F. 3d at 1195. With regard to the contents of the Federal Form, the EAC is charged with determining which procedures are "necessary" under the NVRA. As noted in *ITCA*, no constitutional infirmities arise from this system, as a State is entitled to "'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].'" *Kobach*, 772 F. 3d at 1196 (quoting *ITCA*, 133 S. Ct. at 2259).

requirements" (Dkt. 147 at *8), he fails to acknowledge that the Commission voted unanimously to adopt the FEC's regulations—including a version of the Federal Form that did not include documentary proof of citizenship requirements. And while Mr. Kobach further argues that the Commissioners agree that "deadlocked votes do not constitute policy," (Dkt. 147 at *8) Commissioner Hicks only agrees that deadlocked votes "do not *establish* policy," but *do* "effectively continue an existing policy, procedure or decision that has been established." Dkt. 141-1 at *6 (emphasis added). Mr. Kobach cannot controvert the undisputed facts that the EAC has never changed course on its position against documentary proof of citizenship, and that the Commission's deadlocked votes have maintained the precedent set by the EAC's initial adoption of a Federal Form free of such requirements.

II. A VOTE OF THREE COMMISSIONERS WAS REQUIRED BECAUSE NEWBY LACKED AUTHORITY TO GRANT THE STATES' REQUESTS,

In order for the EAC to now change course on such a significant matter, HAVA unambiguously requires the approval of three Commissioners. *See* Dkt. 102 at *20; *see also* 52 U.S.C. § 20928 ("Any action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members."); NVRA, 59 Fed. Reg. 11,211 (Mar. 10, 1994); NVRA, 58 Fed. Reg. 51,132 (Sept. 30, 1993). Mr. Kobach mischaracterizes the position of Commissioner Hicks to say that "even if three Commissioners had approved these instruction requests, Hicks would still consider the agency decision to be wrong." Dkt. 147 at *2. In fact, Commissioner Hicks explained that the Executive Director is not endowed with authority to take action "inconsistent with policy and precedent *without express consent of at least three of the Commissioners*." Dkt. 141-1 at *5 (emphasis added). The EAC maintains discretion to change course on matters of policy, but only with the affirmative approval of at least three Commissioners.

It strains credulity that the EAC would empower the Executive Director to overturn the affirmative and repeated decisions of the Commissioners through a 2015 Policy Statement that this Court has already found ambiguous. Commissioner Hicks noted that allowing the Executive Director to "continue moving the agency forward," even when the Commission itself was unable to act due to a deadlocked vote would "give[] the Executive Director more authority than the Commissioners." Dkt. 141-1 at *6. If Mr. Newby were allowed to unilaterally grant the States' requests to include documentary proof of citizenship, he would necessarily hold more power than even two Commissioners—as evidenced by the various 2-2 votes in which the Commission declined to grant nearly identical requests, despite two Commissioner votes in favor. Such a delegation would run contrary to HAVA and the NVRA, which contemplate bipartisan consensus as a prerequisite to substantive rulemaking in order to better protect would-be voters and the voter registration process at large. As such, Mr. Newby exceeded the bounds of his delegated authority, and his *ultra vires* action must be vacated.

CONCLUSION

For the foregoing reasons, this Court should disregard the failed memorandum submitted by the EAC on June 1, 2017, and proceed to the merits of Plaintiffs' Cross-Motion for Summary Judgment. As the record and briefing amply demonstrate, Plaintiffs are entitled to summary judgment on all counts, and the Executive Director's actions should be vacated. The Court of Appeals already has concluded that Plaintiffs have demonstrated a substantial likelihood of success on the merits. Even the Federal Defendants concede that Plaintiffs are entitled to summary judgment on Counts II, IV and V. Mr. Newby's actions were utterly *ultra vires*, and in violation of both the APA and the NVRA. As such, Plaintiffs respectfully request that the Court grant their motion on all counts, and vacate Executive Director Newby's unlawful actions.

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Respectfully submitted,

By: /s/ Michael C. Keats

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**Pro hac vice motion pending*
***Admitted pro hac vice*