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' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant-Intervenors' briefs offer a series of arguments that are, variously, precluded by United States Supreme Court precedent or other case law, contrary to statute, or internally inconsistent. Their attack on the standing of two organizational Plaintiffs has already been rejected by this Court. Their defenses to the *ultra vires* claims against Defendant Newby are barred by the Help America Vote Act ("HAVA"), contrary to agency policy and procedure, and contrary to the express holding of *Arizona v. The Inter-Tribal Council of Az., Inc.*, 133 S. Ct. 2247 (2013) ("*ITCA*"). Their attempts to sidestep Newby's failure to explain his rejection of EAC policy and precedent or to determine whether the states' requests were "necessary" as required by the National Voter Registration Act ("NVRA") outrightly ignore Newby's express statement that he did not address the policy issue, even though he was, in fact, changing the policy.

The infirmities in Defendant Newby's decision are legion and, for the reasons set forth in Plaintiffs' opening brief and below, Plaintiffs' motion for summary judgment should be granted, and the Intervenors' should be denied.

ARGUMENT

I. THE ORGANIZATIONAL PLAINTIFFS HAVE STANDING

The Public Interest Legal Foundation ("PILF") alone seeks to manufacture an issue of material fact with respect to the Organizational Plaintiffs' standing. There is none.

As an initial matter, this Court has already observed that the League Plaintiffs and Project Vote have a "substantial likelihood of organizational standing" to challenge Newby's action, because it prevents them from fulfilling their missions. Specifically, the Court concluded that (1) the Kansas League's voter registration drives will be impeded, and that (2) the State Leagues and Project Vote "will have to expend some resources to clarify the effects of the requirements to

their members and volunteers and to potential voters they encounter in order to minimize confusion the instructions may cause."[1] Nowhere does PILF challenge the second ground upon which this Court's ruling on standing was based. Accordingly, the State Leagues and Project Vote have standing, even were PILF correct in its other arguments. But it is not, and those arguments can be dealt with summarily.

First, PILF argues that the Kansas League does not have standing, because it does not itself conduct voter registration drives; PILF phrases this argument as one of organizational standing. But PILF overlooks associational standing. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members otherwise would have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (quotation omitted and alteration in original). It is undisputed that the League Plaintiffs' local affiliates conduct voter registration drives and that the State Leagues coordinate the local affiliates' efforts. And, though the local leagues are not before this Court, Dkt. 104 at 22, there is no dispute of fact that the local leagues are members of the State Leagues and that they participate in registration drives.[2]

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[1] *See* Mem. Op. (June 29, 2016), at 13–18, ECF No. 92, 2016 WL 3636604, at *7. This is the same showing necessary on a summary judgment motion. *See, e.g., Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (Williams, J., concurring in part and dissenting in part) ("It follows that the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment."); *Swanson Grp. Mfg. LLC v. Jewell*, Case No. CV 15-1419 (RJL), 2016 WL 3625554, at *5 (D.D.C. June 28, 2016) (noting that threshold for standing is the same at summary judgment and preliminary injunction stages). No other organizational Plaintiffs' standing is challenged.

[2] PILF's position is based on a single deposition statement from another case, taken out of context, to the effect that the Kansas League does not directly hold registration drives. That

PILF's other argument, that the Alabama and Georgia Leagues have not established standing because those states are not currently "enforcing" documentary proof of citizenship requirements, is barred by the prior ruling of this Court that the State Leagues and Project Vote have standing based on the injury "to their mission of encouraging civic participation" caused by the erroneous instructions on the Federal Form. Mem. Opp. at 15, 2016 WL 3636604 at *7.[3]

II. MARVIN AND JOANN BROWN HAVE STANDING.[4]

Secretary Kobach ("Kobach") suggests that the Browns lack standing because they submitted their applications before Newby unilaterally approved changes requested by Kansas.

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deposition is not in the record and is immaterial to this Court's consideration of summary disposition. Regardless, the rest of the deposition states that although the local Leagues organize individual registration events, participants are both local *and* state League members and when individuals join a local league, they become members of the State and the U.S. Leagues as well; their fees fund local, State, and U.S. League efforts. The declarations submitted in this case demonstrate conclusively that the members of the Kansas League participate in voter registration drives. *See* Dkt. 13-8, Furtado Decl. ¶ 8; Dkt. 47-5, Krehbiel Decl. ¶ 1. Interference with voter registration cannot harm "local" Leagues only, because they are affiliated with and composed of members of the Kansas and US Leagues and because the Leagues work together to effectuate voter registration programs. *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1325, n. 11 (S.D. Fla. 2006) (finding harm to state League even though local Leagues operate "autonomously"); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1307-08 (S.D. Fla. 2008) (finding harm to state League where drives "are planned and executed by the local leagues' volunteer members").

[3] Even without enforcement in Alabama and Georgia, each of the Plaintiff organizations will continue to expend resources and time to inform members, other organizations, and voters that the instructions on the Federal Form are incorrect. *See* Dkt. 13-5, Gaddy Decl. ¶ 18; Dkt. 13-6, Poythress Decl. ¶ 20. The inconsistency between the form and the rule enforcement injures the Organizational Plaintiffs by interfering with their efforts to boost civic participation. Dkt. 13-6, Poythress Decl. ¶¶ 19-20; Dkt. 13-8, Permaloff Decl. ¶¶ 31-34; Dkt. 13-9, Slater Decl. ¶¶ 8, 25-29.

[4] As this Court has noted, "Having concluded at least one plaintiff from each state at issue has demonstrated standing, it is unnecessary to analyze the other plaintiffs' standing. *See Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) ("[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case.")." Mem. Op. at 18, 2016 WL 3636604, at *7 n.17. *Accord Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008).

But this does not affect the relevant statutory injury for purposes of standing: Newby (1) unlawfully altered the requirements for Federal Form registration while the Browns' applications were pending, and (2) invalidly changed the Form's instructions to state that the Browns were ineligible to register unless they provided citizenship documents. The NVRA "create[s] . . . statutory right[s] . . . the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975).[5] Newby's actions inflicted "injury in fact" on the Browns that is "fairly traceable" to the defendants and would "likely be redressed" by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The Browns' standing to enforce these statutory rights is not impacted by Kobach's bare representations that he subsequently treated them as "registered" to vote for federal offices. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("reject[ing] the argument" that individual NVRA plaintiff "lacks standing because as an already registered voter, she suffered no injury").

In any event, Kobach has *not*, in fact, registered the Browns to vote despite his representations to the contrary. In advance of the August 2, 2016, primary, the Browns were given provisional ballots reserved for individuals who are unregistered. Marvin Brown Declaration, Exhibit A, ¶ 4, Joann Brown Declaration, Exhibit B, ¶ 4. The instructions on the provisional ballots and notices sent to the Browns state clearly that the Browns are ***not*** registered and will be precluded from voting unless they produce documentary proof of citizenship. *See* Brown Provisional Ballot Voter Instructions, Ex. A-2, Ex. B-2 ("YOUR BALLOT AND

[5] The Browns also have standing to challenge "informational injury" caused by the addition of invalid eligibility requirements to the federal form instructions while their applications were pending. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24–25 (1998) ("[I]nformational injury . . . directly related to voting, the most basic of political rights, is sufficiently concrete and specific [to confer standing]."); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982).

CITIZENSHIP DOCUMENT MUST BE RECEIVED BY 5:00 P.M. MONDAY, THE DAY BEFORE THE ELECTION IN ORDER TO BE VALID."); *see also* Johnson County Election Notice to Browns (Exhibit A-1; B-1).[6] Indeed, Kobach concedes that "Marvin and Joann Brown were not placed on the official voter roll of the State of Kansas because they have not yet provided proof of citizenship to the State of Kansas." Dkt. 107 at 12 n. 5. As confirmed by decisions in *Brown v. Kobach*, Case No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016) (attached as Exhibit D), and *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Jan. 15, 2016) (Exhibit E), there is no other legal mechanism in Kansas for the Browns to become registered.[7] Accordingly, they have standing to enforce their statutory right to be registered to vote. *See* 52 U.S.C. § 20507(a)(1) ("[E]ach State shall . . .ensure that any eligible applicant is registered to vote in an election . . . .").

III. NEWBY ACTED *ULTRA VIRES*

In response to Plaintiffs' cross-motion for summary judgment as to Counts I and II of the Complaint, and in support of their own cross-motion, Intervenors press two equally untenable sets of arguments: (1) that Newby had authority to act as he did without Commission approval,

[6] Likewise, the affidavit of Kansas's Election Director Bryan Caskey does ***not*** assert that the Browns are registered to vote—only that they are "***eligible*** to vote for federal office" although their "registration application[s] [have been] designated as incomplete." Dkt. 106, Ex. C, Affidavit of Bryan Caskey, August 19, 2016 ¶¶ 11-12 (emphasis added).

[7] Kobach misleadingly represents that the Browns are registered because they were "placed on a federal-elections-only voter roll." Dkt. 107 at 12 n. 5. The *Brown* and *Belenky* cases make clear that no such "federal-elections only" registration roll exists in Kansas and Kobach lacks authority to create one. *See* Exhibit D, *Brown v. Kobach* at 11:16 ("dual registration is prohibited"); Exhibit E, *Belenky v. Kobach* at 17 ("In Kansas, a person is either registered to vote or he or she is not."). Even if Kobach had such authority, the Browns have never received any notice from state election officials suggesting that they are on such a list or that they are registered in any manner. Marvin Brown Declaration, Exhibit A, ¶ 5; Joann Brown Declaration Exhibit B, ¶ 5; Orion Danjuma Declaration, Exhibits C, C-1, C-2 (Browns do not appear on Kansas's website of registered voters.). The Browns remain on Kansas's suspense list and are unregistered both as a matter of fact and law.

and (2) in any event, the EAC has to defer to state requests for changes to the Federal Form as a matter of statutory and constitutional law. The first argument is barred by HAVA and the EAC's own internal governing policies. The second, a rehashed version of previously rejected arguments, is barred by the Supreme Court's decision in *ITCA*.

A. HAVA Requires Majority Approval for the Commissioners to Act on Changes to the Federal Form

As Intervenors acknowledge, HAVA unambiguously provides, "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." 52 U.S.C. § 20928.[8] The purpose of doing so was to ensure that the Commission's decisions would have bipartisan consent.[9] Development of the Federal Form and its instructions is among the actions the Commission is authorized to carry out, 52 U.S.C. §20508(A)(1), (2); *ITCA*, 133 S. Ct. at 2251.

In his February 1, 2016 memo explaining his approval of the states' request, Newby concedes that changes to the Federal Form required Commission approval:

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[8] PILF creatively argues that the majority requirement under HAVA does not apply to decisions regarding State Instructions on the Federal Form, because at the time HAVA transferred the FEC's authority to the EAC, the FEC had delegated authority to the Office of Election Administration and therefore decisions regarding requests for changes to State Instructions "were thus not a 'function' that was 'exercised by the FEC" transferred to the EAC. Dkt. 104 at 19. PILF cites no authority for this argument. It is a fundamental precept of administrative law that "[w]hen an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). Accordingly, it long has been settled "that the head of an agency retains the authority to make final decisions for the agency even if he or she delegates the authority to make these decisions to his or her subordinates." *Heggestad v. DOJ*, 182 F. Supp. 2d 1, 9-10 (D.D.C. 2000).

[9] The House Report, accompanying the legislation explained: "The four commissioners will be recommended by the congressional leadership and will be appointed by the President. No more than two commissioners may be of the same party, to assure that the Commission acts in a nonpartisan fashion." H.R. Rep. 107-329, 33 (2001) (Conf. Rep.).

- "Changes to the [Federal Form] must be considered by the EAC Commissioners through a formal rulemaking process." AR0001.

- "Only if a request requires a change in the actual registration form will a request be taken to the Commissioners . . . ." AR0002.

- "Policies, in this context are agency policies, and related to the NVRA form and instructions, means that by policy, changes to the form require Commission approval . . . ." AR0004.

Newby believed that the state instructions were not part of the Federal Form. *See* AR0001 ("[R]equests . . . related to the state-specific instructions [are] not requests to change the form itself."); *see also* AR0004 ("[C]hanges to the instructions consistent with state law do not [require Commission approval]."). Newby was wrong. The state-specific instructions are part of the Federal Form, by express regulation: "Form means the national mail voter registration application form, *which includes the . . . state-specific instructions*." 11 C.F. R. § 9428.2(a) (emphasis added). The regulations further provide that the Federal Form "shall consist" of three components: the application, general instructions, "and accompanying state-specific instructions." 11 C.F.R. § 9428.3(a); *see also ITCA*, 133 S. Ct 2252 ("The Federal Form . . . *contains* a number of state-specific instructions . . . .") (emphasis added). The authorization of three Commissioners is needed to change the state-specific instructions included on the Federal Form.

B. EAC's Consistent Policy is that a Majority of the Commissioners Alone Have The Power to Make Material Changes to the State-Specific Instructions to the Federal Form

Kobach correctly observes that courts should defer to an agency's interpretation of the statute it is charged with administering, including the interpretation of the agency's scope of authority under a statute. Doc 107 at 27 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870–01 (2013)). His brief identifies the wrong "agency" however, to whom deference is owed. It is

not the FEC, which no longer has authority over the Federal Form. It is also not Newby, who has no right to define his own scope of authority independent of the EAC's directives. It is the EAC itself, acting through the approval of at least three Commissioners. And the Commissioners have acted consistently in a manner that forecloses Kobach's claim. From the first request by a state to add proof of citizenship to the state-specific instructions to the Federal Form until Newby took his unauthorized action, the Commission has steadfastly maintained that it alone has the right to approve such requests.

1. The FEC Procedures are Irrelevant

Intervenors argue that the EAC is bound by the procedures of another agency— the ***FEC***—which purportedly allowed the changes to be made to the state-specific instructions to the Federal Form without Commission approval. Dkt. 107 at 27-28; Dkt. 104 at 18-19. Whatever the practice was under the FEC's regime,[10] it is irrelevant to the issues in this case, because the FEC lost authority over the Federal Form when Congress created the EAC in HAVA in 2002, more than fourteen years ago. Indeed, the Intervenors' position that the Executive Director should be allowed to make these changes without Commission approval was expressly rejected

[10] The FEC developed the Federal Form through notice and comment rulemaking, during which it made clear that "decisions may have to be made that information considered necessary by certain states may not be included on the [Federal Form]." National Voter Registration Act, 58 Fed. Reg. 51,132, 51,132 (Sept. 30, 1993). As explained by Edgardo Cortes, EAC Election Research Specialist, at the EAC's October 4, 2007 public meeting, the FEC Commissioners had adopted a "policy" that allowed staff to make changes to the state instructions to the Federal Form in only six areas: "state voter eligibility requirements, a voter identification number required by the state, whether the state required a declaration of race or ethnicity, the state deadline for accepting border registration application, and the state election office address where applications should be mailed." AR0551-52. As Cortes explained, "state voter eligibility requirements" did not mean a change like adding proof of citizenship requirements. It meant "what a person has to be in order to register to vote, not what they have to do to prove it or to show that they are whatever that thing is." AR0568. "Any other requests for change were sent to the FEC commissioners for a formal vote of the Commission in order to make the requested changes." AR0552

by the EAC. In 2008, Commission Vice-Chair Caroline Hunter proposed to allow the EAC staff to make all changes to the Federal Form's state-specific instructions without a Commission vote. AR0761. The Commission rejected Vice-Chair Hunter's proposal by a 2-2 vote. AR0767.

2. The EAC Has Consistently Interpreted Material Changes to the State-Specific Instructions to the Federal Form to be the Commissioners' Decision

Contrary to Kobach's argument, the Commission neither routinely approved virtually all requests for changes to the federal form, nor handled these requests informally. Dkt. 107 at 4, 30, 32. Only purely ministerial requests, such as those dealing with changes in mailing addresses, were handled routinely at times, although even those were sometimes voted upon by the Commission.[11] Until the Commission lost its quorum in 2010, as the discussion below as to proof of citizenship demonstrates, the Commission established a consistent practice of conducting reasoned analysis and Commission-level review of *all* material changes to the Federal Form.[12]

In 2006, the Commission concluded that the inclusion of a documentary proof citizenship requirement would violate the NVRA, and the Executive Director sent a letter informing Arizona of that decision. AR0233-35. Arizona then asked the Commission to take a formal vote, which it did, and the Commission reconsidered the request by Arizona, which failed on a 2-2 vote of the Commission. AR0246-49. The Commission entertained another request by

[11] *See* STATE REQUESTS TO MODIFY THEIR STATE-SPECIFIC INSTRUCTIONS ON THE NVRA MAIL APPLICATION, AR0219-25.

[12] At the time of the EAC's 2006 decision rejecting documentary proof of citizenship on the Federal Form, decisions on policy matters, including changes to the federal form instructions, were made by consensus of the Commissioners. Position Statement, Commissioner Martinez, July 10, 2006, AR0253, 257-8. Subsequently, the agency made such decisions by full Commission vote. *See* AR0219-25. Regardless of the procedure used, all decisions relating to major changes to the Federal Form instructions were made with the approval of three or more Commissioners.

Arizona to amend the instructions to require citizenship documentation in 2008, again rejecting it by a 2-2 vote. AR0219. Those votes demonstrate conclusively that the Commission recognized that the decision whether to alter the Federal Form so as to include a state's proof of citizenship requirement was for the Commission to make, not for the Executive Director.

When Arizona next renewed its request, together with Kansas and Georgia, the Commission was without a quorum. Under the then-governing procedural statement adopted by the three sitting Commissioners, the Commissioners had made a limited delegation of their authority to the Executive Director to "maintain" the Federal Form "consistent" with prior agency policy and precedent. AR0215. Executive Director Miller therefore acted at the specific direction of the Commission when, in 2014, she rejected these States' requests, on the basis that the decision was consistent with existing Commission policy and precedent.

The Commission regained a quorum in 2015, and expressly superseded the limited authority given to the Executive Director to deal with the situation when there was no quorum. In the 2015 Management Statement, the Commissioners permitted the Executive Director only to "prepare policy recommendations for commissioner approval." AR0227. As this management policy was being adopted, Commissioner Hicks put on the record the following statement:

> *I and my fellow Commissioners agree* that this document continues to instruct the Executive Director to continue maintaining the federal form consistent with the Commissioners' past directives, unless and until such directions were counter made should the agency find itself again without a quorum. AR0860 (emphasis added).

The transcript indicates that no Commissioner voiced disagreement with Commissioner Hicks. AR0860. In light of the two decisions not to approve Arizona's requests in 2006 and 2008, the decision not to approve Kansas and Arizona's requests in 2014, the position taken by the EAC in the briefing to the Supreme Court in *ITCA* and to the Tenth Circuit in *Kobach v.*

United States Election Assistance Commission ("*Kobach*"), 772 F.3d 1183, 1196 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015), there is no doubt that the "past directives" to which Commissioner Hicks referred included those that prohibited proof of citizenship requirements in the state-specific instructions to the Federal Form.

3. Both the Procedure for Reviewing Requests to Change the State-Specific Instructions and the Substantive Decision Itself Constitute EAC "Policy" that Newby Disregarded.

Intervenors seem to agree that, under no circumstances, could Newby set policy. Instead, they question what policy Newby's decision altered. Dkt. 107 at 26. The answer is two-fold.

First, there is the policy as to the procedure used to handle requests to change the state-specific instructions (i.e. whether such requests are to be addressed by EAC staff, or the Commission itself). The administrative record is clear that for months during the early part of its existence, the Commissioners struggled to agree on that procedure, always referring to the issue as one of "policy." *See, e.g.*, AR0610 (Commissioner Hunter's reference to her attempt to reinstate the FEC's procedures as a "policy" issue). Twice, Hunter tried to get the full Commission to adopt the "policies" Intervenors claim were in place in 2016. Both times, the Commission deadlocked 2-2, thus declining to adopt these policies.[13] Newby's arrogation of the power to decide on state-specific changes violated this Commission's procedural policy that only the Commissioners have the power to approve material changes to the state-specific instructions of the Federal Form.

[13] In October 2007, Commissioner Hunter moved that the Commission allow the Executive Director to decide on all amendments to the state instructions. AR0640-2. This was voted down on a 2-2 vote. AR0644. In January 2008, Commissioner Hunter moved that "all changes to the state information be completed . . . without a formal Commission vote." AR0761. This motion was rejected also. AR0767.

Second, there is the substantive policy that the state-specific instructions should not include a documentary proof of citizenship requirement. This has been consistent federal policy since Congress enacted the NVRA without including that requirement, continuing when the FEC created the Federal Form without that requirement, and when Arizona's first request was denied by vote of the Commissioners in 2006,[14] long before the Commission's 2014 decision, which Intervenors so baselessly attack. At a 2007 public hearing of the Commission, the EAC's General Counsel expressly described that vote as having "created a policy statement by the Commission." AR0442.

It is no surprise then that Executive Director Miller referred to the policy and precedent of the EAC in not approving requests to add proof of citizenship requirements to the federal form in the 2014 decision.[15] Indeed, the Tenth Circuit expressly found that the 2014 decision "is consistent with and relies in substantial part upon the EAC's established policies . . . ." *Kobach*, 772 F. 3d at 1193.[16] It follows necessarily that Newby's decision was inconsistent with these policies.

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[14] PILF concedes that, at a minimum, "policy" is that set by formal vote of the Commission. Dkt. 104 at 21.

[15] In this regard, PILF's argument, Dkt. 104 at 23, that the "past directives" of the Commission in connection with the maintenance of the Federal Form did not include a denial of requests for proof of citizenship documentation is inexplicable.

[16] Intervenors also are critical of the Department of Justice's interaction with the EAC, its client, in connection with Kansas's prior 2013 request to add documentary proof of U.S. citizenship to its state-specific instructions. Doc 107 at 6–9; Dkt. 104 at 6. The issue is a red herring that has no relevance to the present case concerning Kansas's separate and different 2015 request. In any event, it is typical and appropriate for an agency, like any client, to interact with its counsel in preparing a decision. "The only requirement is that the decision in the ultimate must be that of the administrative officer." *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 461 (D.C. Cir. 1967). The administrative record shows that, whatever counsel DOJ may have provided, the Acting Executive Director, acting at the direction of the Commission, issued the decision concerning the pending requests. *See* Memorandum of Decision Concerning State Requests to Include

Even without this history, it is difficult to identify a more significant policy issue the EAC has confronted during its existence than the inclusion of state citizenship documentation requirements on the Federal Form. Congress debated whether states could demand documentary proof of citizenship on the Federal Form.[17] The issue has been litigated up to the Supreme Court twice, in *ITCA* and in *Kobach*. The consistent rejection of the requests has been based primarily not on the specific characteristics of a given state, but, rather, on the basis of policy considerations applicable to all states, such as Congress' consideration and rejection of such requirements, the inconsistency of such requirements with EAC's NVRA regulations, and a determination that such requirements were not necessary for a state to determine eligibility to vote and would undermine the purposes of the NVRA. AR0302-327. This is EAC policy. Newby did not have the authority to "maintain" the Federal Form contrary to that policy.

C. The States Cannot Direct the EAC to Include Proof of Citizenship Requirements in the Instructions to the Federal Form

Intervenors posit a series of arguments, each of which is a variation on the same theme: it does not matter whether Newby had authority, because the EAC *must* grant the states' requests.

Additional Proof-Of-Citizenship Instructions on the National Mail Voter Registration Form (Docket No. EAC-2013-0004), January 17, 2014 n. 1 (AR283-328) ("The undersigned Acting Executive Director has determined that the authority exists to act on the [States'] requests and therefore issues this decision on behalf of the agency").

[17] Contrary to Kobach's argument, Dkt. 107 at 36 n. 13, the legislative history demonstrates, as recognized by the Tenth Circuit, that "[b]oth houses of Congress debated and voted . . . and ultimately rejected . . . a proposal" to allow States to require proof of citizenship from NVRA applicants. *Kobach*, 772 F. 3d at 1195 n. 7. That proposal was the Simpson Amendment, which sought "to ensure that States will continue to have the right . . . to require documents to verify citizenship." 139 Cong. Rec. S2897-04, (daily ed. Mar. 16, 1993), 1993 WL 73164. The Simpson Amendment was initially adopted by the Senate, but was ultimately stripped from the bill by the House-Senate Conference Committee. *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). Senator Ford, whose statements Kobach relies on, supported the Simpson Amendment. 139 Cong. Rec. S2902, 1993 WL 73164. His comments were not memorialized in an official congressional report, and are "certainly not controlling in analyzing legislative history." *Weinberger v. Rossi*, 456 U.S. 25, 35 n. 15 (1982).

Each of these arguments has been expressly rejected by the Supreme Court in *ITCA*, or is clearly foreclosed by the reasoning of that opinion. Indeed, Intervenors' arguments are premised on a statement so blatantly wrong as to undercut the credibility of their entire brief. Kobach states unequivocally: "The Court [in *ITCA*] made clear that the determination of necessity resides with the States, not the EAC." Dkt. 107 at 15. In fact, the Court in *ITCA* held precisely the opposite, that (1) "NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form," 133 S. Ct. at 2257, and (2) the power to decide necessity is "validly conferred discretionary executive authority" in the EAC, *id.* at 2259. While a state "may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility," the agency retains discretion to grant or deny the request—a decision that is subject to challenge under the Administrative Procedure Act. *Id.* Contrary to Intervenors' assertions, the Court in *ITCA* did not rule that the state could "*compel* the agency to modify instructions by showing in *federal* court that 'a mere oath would not suffice to effectuate its citizenship requirement.'" Dkt. 107 at 15 (quoting *ITCA*, 133 S. Ct. at 2260). Rather, the Court held merely that the state "would have the opportunity to establish" this in an APA challenge. *ITCA*, 133 S. Ct. at 2260. Kansas had that opportunity in *Kobach*. The Tenth Circuit rejected the challenge, and the Supreme Court declined to review it.

ITCA stands for another unassailable principle, equally antithetical to Intervenors' position in this case: the manner in which an individual proves eligibility to vote is not the same as eligibility itself. Thus, in *ITCA*, the Court held that the Elections Clause, U.S. Const. art. I, §4, cl. 1, gave Congress the right in the NVRA to define the scope of information permitted in the Federal Form, including whether to permit "a state-imposed requirement of evidence of citizenship." 133 S. Ct. at 2257. It viewed the NVRA as constitutionally regulating "*how*

federal elections are held." *Id.* The Court distinguished requirements of evidence from Arizona's "constitutional authority [under the Qualifications Clause] to establish qualifications (such as citizenship) for voting," *i.e.,* "*who* may vote . . . ." *Id; see also Kobach*, 772 F. 3d 1195 (explaining that the Supreme Court in *ITCA* "noted that individual states retain the power to set *substantive* voter qualifications (*i.e.,* that voters be citizens,)" but "the United States has authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections (*i.e.,* that documentary evidence of citizenship may not be required).").

If more is needed, this Court need look only to the *dissents* in *ITCA*, each of which espoused the same positions pressed by Intervenors here. Justice Alito stated his view that the NVRA "lets States decide for themselves what information 'is necessary . . . to assess the eligibility of the applicant'. . . ." *ITCA*, 133 S. Ct. at 2274 (Alito, J., dissenting). And Justice Thomas argued that "the Voter Qualifications Clause, U.S. Const. art. I, §2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied." *ITCA*, 133 S. Ct. at 2262 (Thomas, J., dissenting). As the Tenth Circuit explained when Kobach pressed these same arguments before it, "the dissent clearly tells us what the law is not." *Kobach*, 772 F.3d at 1188. Under no circumstances can Intervenors prevail on the bases that a state, and not the EAC, determine necessity under the NVRA, or that a requirement of evidence for citizenship is a voter eligibility requirement within the meaning of *ITCA* or the Constitution.

1. "Registration" is Not a "Voter Eligibility Requirement" for Purposes of the Elections Clause

Unable to rewrite Supreme Court precedent, Kobach attempts to repackage the argument a different way, arguing: "In Kansas, registration is itself a qualification for voting." Dkt. 107 at

16, 23 (citing *Dunn v. Bd. of Comm'rs of Morton Cty.*, 165 Kan. 314, 327-28 (1948)). Incredibly, however, Kobach gets Kansas law wrong. *Dunn* stands only for the limited proposition that "qualified electors," as used in a particular statute, "means persons who have the constitutional qualifications of an elector, and who are properly registered." 165 Kan. at 327-28. On the other hand, Article 5, Section 1 of the Kansas Constitution "fixes the qualifications of electors," which do not include registration. *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940).[18] Indeed, years ago, the Supreme Court of Kansas answered the question of whether a requirement that a qualified voter be registered to vote amounts to "an additional qualification" in the negative. *State v. Butts*, 31 Kan. 537, 618 (1884). Thus, "[r]equiring a party to be registered is not in any true sense imposing an additional qualification . . . ." *Id.* at 621. Registration requirements "are simply matters of proof—steps to be taken in order to ascertain who and who are not entitled to vote." *Id.*[19]

In any event, Kobach's creative definition of "voter eligibility" would swallow whole the Elections Clause whole along with *ITCA*'s rationale. Under his view, every aspect of a state's registration requirements would be deemed a voter qualification, including using blue and black ink to fill out a form. This directly contradicts *ITCA*:

> *The [Election] Clause's substantive scope* is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which '*embrace authority to provide a complete code* for congressional elections,' *including*, as relevant here and as petitioners do not contest, *regulations relating to 'registration.*'. . .

[18] "Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he seeks to vote shall be deemed a qualified elector." K.S.A. Const. Art. 5, § 1.

[19] Were statutory registration requirements, as Kansas claims, an additional voter qualification, the statute itself would be unconstitutional under Kansas law, because the legislature cannot, by "legislating concerning evidence, in fact, overthrow constitutional provisions." *Butts*, 31 Kan. at 618.

> The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, *the regulations effected supersede those of the State which are inconsistent therewith.*'

133 S. Ct. at 2253-54 (emphasis added) (citations omitted). Kobach's effort to turn "registration" into a "voter qualification" is squarely foreclosed under governing law.

2. No Federal Regulation Mandates that the Federal Form Include a State's Specific Additional Requests

Intervenors argue that 11 C.F.R. § 9428.4(b)(1) "binds the EAC to include each State's eligibility requirements in the state-specific instructions." Dkt. 107 at 25. But that rule states only that the Federal Form shall "list U.S Citizenship as a universal eligibility requirement," which the Federal Form does, and that the Federal Form also include a statement that incorporates by reference each state's specific additional eligibility requirements in the state instructions, which it also does. The rule's reference to a "state's specific additional eligibility requirements" does not refer to documentary proof of citizenship. As the Court made clear in *ITCA,* the EAC retains discretionary authority to accept or reject documentary proof of citizenship requirements.

3. There is No "False Standard" of "Necessity"

Remarkably, Kobach accuses Plaintiffs of constructing "a false standard" of "necessity" to support changes in state-specific instructions to the Federal Form, claiming that this "false standard" was "invented" by the Department of Justice in 2013-2014 during the Tenth Circuit litigation. Dkt. 107 at 13. Kobach's argument is bizarre, in light of the express wording of the NVRA and the decision in *ITCA.* As the Court explained, Section 9(b)(1) of the NVRA, 52 U.S.C. § 20508, "provides that the Federal Form 'may require only such identifying information . . . and other information . . . 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.'" *ITCA*, 133 S. Ct. at 2259 (emphasis added) (citation omitted). Further, the Court indicated that it was "requisite for the Government to say that *necessary* information which *may* be required *will* be required." *Id.* (first emphasis added). Accordingly, the Court ruled that "a State may request that the EAC alter the Federal Form to include information the State deems *necessary* to determine eligibility," and challenge the agency action or inaction under the APA. *Id.* at 2259-60. All of this, of course, was on June 17, 2013, before the Department of Justice supposedly "invented" the "false standard" of "necessity" in the subsequent Tenth Circuit litigation.

a. The Commission Has the Authority to Decide Necessity for Both Eligibility and for Administration of the Election Process

Kobach then argues that Plaintiffs "take the word 'necessary' out of context," because they "obfuscate" the fact that "there are *two* justifications for why requested instructions may be 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*." Dkt. 107 at 13 (quoting 52 U.S.C. §20508(b)(1)). Plaintiffs, Kobach argues, "ignore the second one italicized above," Dkt. 107 at 13, as if this has always been his position.[20] Kobach rewrites the NVRA, which states that information must be "necessary to enable the appropriate State election official to assess the eligibility of the applicant *and* to administer voter registration . . . [,]" 52 U.S.C. § 20508(b)(1) (emphasis added). Both reasons must support the "necessary" determination, not one *or* the other.

Even if the second justification were all that the "necessary" decision had to address, the result is the same. Under *ITCA*, the necessity of proof of citizenship would still be a procedural

[20] In fact, Kobach adopted this position only recently.

requirement governed by the EAC's determination, whether for reason of a state's assessing voter eligibility or for reason of the state's administering its election process. As the Supreme Court held, Congress intended for the Federal Form to "provide[] a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *ITCA*, 133 S. Ct. at 2255.

b. Kobach's Purported "Objective" Definition of Necessary is Contrary to *ITCA*.

Next, Kobach argues that an "objective definition" of "required by state law," is all that is needed to prove necessity under the NVRA. Dkt. 107 at 17. This argument flies in the face of *ITCA*, which rejected a reading of the NVRA that "would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state—specific form." 133 S. Ct. at 2256.

4. The "Necessary" Standard is Constitutional

Whether proof of citizenship is sought by the state to determine voter eligibility or to administer its election process, there is no conflict between the Elections Clause and the Qualifications Clause. *See* Dkt. 107 at 14, 18-22; Dkt. 104 at 25. While Kobach repeatedly quotes *ITCA* to the effect that constitutional doubts would be raised if federal law precluded a State from obtaining the information necessary to enforce its voter qualifications, 133 S. Ct. at 2258–59, he ignores the next sentence in the opinion, which dispels any constitutional doubts, because "the statute provides another means by which Arizona may obtain information needed for enforcement." *Id.* at 2259. So long as the state may request the EAC to approve additional information and to challenge a denial, there is no constitutional dilemma. *Id.*; *see also Kobach*, 772 F.3d at 1198–99 ("Kobach's . . . argument that the states' Qualifications Clause powers trump Congress' Elections Clause powers is foreclosed by precedent.").

Nor does a ruling that the EAC may reject Kansas's proof of citizenship documentation requirement in the Federal Form result in the establishment of differing qualifications to vote in state and federal elections violate Article I, Section 2 of the Constitution. Dkt. 107 at 23. *ITCA* expressly acknowledged that, where registration requirements were different for state and federal election, voters would be able to vote in federal elections, but not state elections. 133 S. Ct. 2255. But the pertinent qualification—citizenship—would remain the same for both federal and state elections. Only the manner and procedural requirement for verifying citizenship are different. Equally important, if there is a dual system, it is of Kobach's own doing, and is one that two state court judges have already declared violates Kansas law.[21]

IV. FEDERAL DEFENDANTS FAILED TO PROVIDE FOR NOTICE AND COMMENT AS REQUIRED BY THE APA

The Federal Defendants and Intervenors continue to rely on the Tenth Circuit's decision in *Kobach* to argue that Defendant Newby's decision, too, was an "informal adjudication." Their argument, however, fails to come to terms that the decision at issue in this case is different in kind from the decision at issue in *Kobach*.[22] This much the Federal Defendants concede in recognizing that Newby's decision represented a "reinterpretation of the EAC's organic statute" resulting in "a statutory interpretation not previously adopted by the Commission that is contrary

[21] During the 2014 elections, Kobach permitted voters who used the federal registration form to vote for federal offices only. This two-tiered system was challenged and declared to violate Kansas state law. *See* Exhibit E, *Belenky v. Kobach*, No. 2013CV1331, at 25 (Shawnee Cty. Dist. Ct. Jan. 15, 2016). Kobach's motion for reconsideration of that decision was denied. *See* Ex. F, *Belenky*, at 5 (Shawnee Ct. Dist. Ct. June 14, 2016). On July 29, 2016, a different court granted a preliminary injunction barring Kobach from operating such a two-tiered system. *See* Ex. D, *Brown*, No. 2016CV550 (Shawnee Ct. Dist. Ct. July 29, 2016).

[22] PILF incorrectly claims that the court in *Kobach* "broadly construed" decisions as to state instructions as being "informal adjudications." Dkt. 104 at 26 n. 8. Not so. In assessing whether the specific agency decision was "procedurally valid," the Court held only "that the Executive Director's *to reject* the states' request was a consistent and valid exercise of limited subdelegated authority. . . . The Executive Director's decision was an informal adjudication carried out pursuant to 5 U.S.C. § 555." *Kobach*, 772 F.3d at 1196–97 (emphasis added).

to the text of the NVRA and the Supreme Court's *ITCA* decision." Dkt. 112 at 8-9; *see also* Dkt. 103 at 34–35. Clearly, Newby could not have been merely applying existing policy or "defined standards" to facts or "explaining or clarifying the Act's language." *Occupational Safety & Health Admin.*, 636 F.2d 464, 469 (D.C. Cir. 1980). Rather, Newby's decision "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy," and it is therefore a "legislative rule" subject to the APA's notice-and-comment requirements. *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014). To be sure, if Newby's decision is allowed to stand, it would "create *de facto* a new regulation" that effectively writes the necessity requirement out of the NVRA.

V. FEDERAL DEFENDANTS FAILED TO PROVIDE ADEQUATE REASONS FOR NEWBY'S DECISION

Neither Newby nor the EAC provided adequate reasons for the decision. They did not explain why they were departing from established policy and precedent, or how the states showed that documentary proof of citizenship was "necessary" as required under the NVRA. In response, Intervenors rely on a mish-mash of Newby's post hoc February 1 explanation of his January 29 decision and his litigation-generated declaration, to argue that (1) his reasons can be "reasonably discerned," and, (2) in any event, he did not have to provide any reasons, because his actions were simply "ministerial." Dkt. 107 at 32-39; Doc 104 at 28-31).

This is not an issue of "reasonable discernment." It is clear that Newby completely misunderstood the law when he altered the Federal Form. As he explained in his post hoc February 1 memorandum, he did not believe he needed to reconcile the decision with conflicting precedent, because (1) he did not consider changes to the state instructions to be policy, and (2) because he did not consider the state instructions to be part of the form. This is wrong. The state instructions are part of the Federal Form. 11 C.F. R. 9428.2(a). Also, as explained in part

III.B.3, *supra*, material changes to the Federal Form have always been considered "policy" decisions to be made by the Commission, not by the Executive Director. Here, the Commission did not explain the change in its policy.

Nor does "reasonable discernment" help Intervenors on the issue of whether Newby's explanation satisfied the NVRA's requirement of finding that the state's request was "necessary." Newby stated in no uncertain terms that proof of citizenship was "not the issue I am evaluating." AR0004. Although Kobach stresses the "evidence" he had submitted with his request, Dkt. 107 at 33, Newby expressly disclaimed relying on that evidence: "his examples of the need for these changes are irrelevant to my analysis." AR00004.[23]

Further, contrary to Kobach's argument, Dkt. 107 at 39, Newby did not have facts before him sufficient to change the EAC's longstanding precedent. In total, Kansas, Alabama and Georgia provided allegations that seventeen noncitizens had registered to vote, substantially weaker evidence than provided by Arizona and Kansas to the EAC in 2013. AR0316; AR0075-76. Considering the evidence presented in 2013, the EAC found that "the paucity of evidence provided by the States regarding noncitizens registering to vote" was insufficient to establish necessity. AR0317-18. Not only did the Tenth Circuit agree, but it found that, had the EAC *approved* the requests of Kansas and Arizona, it would have "risked arbitrariness." *Kobach*, 772

[23] The Newby Declaration, prepared only after this litigation began, should be given no weight to the extent it is inconsistent with the February 1 memorandum. In any event, even in the Declaration, nowhere does Newby state that he made the requisite NVRA analysis. Rather, he reiterates his position that no analysis was necessary because he believed that the state-specific voter instructions should be accepted "if they were duly passed state laws affecting the state's registration process, including qualifications of voters," a position directly contrary to *ITCA*. Dkt. 28-2 at 2. Moreover, Newby acknowledges that Commissioner Hicks told him that "the Kansas request should go to the Commissioners because it represented 'policy,'" thus refuting any possibility that three Commissioners could approve what Newby did. *Id.* at 3. Thomas Hicks, the sole Democratic commissioner, released a statement saying that this decision required the vote of the three Commissioners. Statement by Vice-Chair Thomas Hicks, Feb. 2. 2016, Dkt. 47-2.

F. 3d at 1198. Because "an agency's unexplained departure from precedent must be overturned as arbitrary and capricious," *Comcast Corp. v. FCC.*, 526 F. 3d 763, 769 (D.C. Cir. 2008), even if a scintilla of thought could be "reasonably discerned" as to whether the requirement was "necessary" and why Newby was deviating from past precedent, the decision would have to be overturned nonetheless. More fundamentally, neither PILF nor Kansas can establish the requisite necessity for documentary proof of citizenship in this Court, as the "law does not allow [the Court] to affirm an agency decision on a ground other than relied upon by the agency." *Manin v. NTSB*, 627 F.3d 1239, 1242-43 (D.C. Cir. 2011).

Ultimately, Intervenors' arguments against summary judgment on Counts IV and V rest on their demonstrably wrong view of *ITCA*. As PILF states in its brief, "The Supreme Court has made clear that . . . the determination of necessity does not reside with the EAC, but resides with the states . . . ." Dkt. 104 at 30. That was Newby's belief too. And that is why he did not give adequate reasons to support his *ultra vires* decision.

VI. *VACATUR* IS THE APPROPRIATE REMEDY

"When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989). Intervenors rely on *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993), for the proposition that "[a]n inadequately supported rule . . . need not necessarily be vacated." In that case, the court held that "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Id.* at 150–51.

Newby's decision was more than an "inadequately supported rule." It contravened both the plain meaning of the NVRA and decades of federal policy. When an agency's actions are

contrary to the governing statutory authority and the agency's own policies and procedures, the proper remedy is to vacate the agency action. *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 24 (D.D.C. 2013) (vacating agency action because the misreading of a statutory authority is "grave indeed"). Newby also exceeded his scope of delegated authority, another severe offense that requires *vacatur*. *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 12 (D.D.C. 2011) ("[T]he particular official acting on behalf of the agency must have been delegated the authority to act; otherwise such agency action is invalid.").

In light of these deficiencies, there is no "serious possibility that the Commission will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. Indeed, the Executive Director could not do so consistent with the statute.[24] Finally, as the Federal Defendants concede, there is no reason to remand for further findings. Newby clearly explained that he was rejecting the statutory standard, and "no supplementation can change that fact." Dkt. 113 at 11. As such, the first factor of the *Allied-Signal* test is dispositive. *See Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("Of course, the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation.").

The second *Allied-Signal* factor—the potential for disruption—also supports *vacatur* in this case. Erasing Newby's decision will simply reassert the prior federal voting policy that existed for years before Newby's unlawful action and will return the parties to the status quo. *See Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) ("The status quo is the last uncontested status which preceded the pending controversy."). The only evidence of disruption presented by Intervenors comes from Kansas, and Kobach concedes that even there "it would be possible to accomplish" the required

[24] For the same reasons, Kobach's request that the Court seek yet another declaration from Newby, Dkt. 107 at 40-41, is futile.

administrative updates in time for the election. Dkt. 107 at 44. Such a small and thinly substantiated delay cannot avoid *vacatur*. Moreover, any delays the state suffered would be the result of its own decision to enact laws in violation of the NVRA. "If the State wishes to change voter registration laws that directly contradict the provisions of the NVRA, it does so at its own risk." *Fish v. Kobach*, Case No. 16-2105-JAR-JPO, 2016 WL 2866195, at *30 (D. Kan. May 17, 2016).

By contrast, unless Newby's decision is overturned, thousands of eligible voters may be deterred from casting a ballot in the upcoming election. As Plaintiffs have shown, Newby's action has created widespread confusion, as voter outreach groups struggle to educate eligible voters about what is required. Vacating the decision and returning to the *status quo ante* would simplify the registration process and further Congress's design to provide a "backstop" for registration, "[n]o matter what procedural hurdles a state's own form imposes. . . ." *ITCA*, 133 S. Ct. at 2255.

CONCLUSION

For the foregoing reasons, and those explained in Plaintiffs' cross-motion for summary judgment and opposition to the Federal Defendants' motion for partial summary judgment, this Court should vacate Newby's unlawful action.

Respectfully submitted this 2nd day of September, 2016,

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