ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 2016

No. 16-5196

IN THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

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-Appellants

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

Defendant-Appellees

and

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

Defendant-Intervenors

On Appeal from the United States District Court for the District of Columbia
Case No. 16-cv-236(RJL)

REPLY BRIEF OF APPELLANTS

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
Commission	U.S. Election Assistance Commission
Commissioner(s)	Commissioner(s) of the U.S. Election Assistance Commission
EAC	U.S. Election Assistance Commission
Executive Director	Executive Director of the U.S. Election Assistance Commission
FEC	Federal Election Commission
Federal Form	Mail-in Voter Registration Form
HAVA	Help America Vote Act
ITCA	Decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013)
JA-	Citation to the Joint Appendix
NVRA	National Voter Registration Act of 1993
PILF	Public Interest Legal Foundation

INTRODUCTION

Appellees U.S. Election Assistance Commission ("EAC") and Brian Newby ("Appellees") appropriately and candidly concede, as they did before the district court, that a preliminary injunction should be entered here because the challenged action by Mr. Newby, the agency's Executive Director, violated the Administrative Procedure Act ("APA") and the National Voter Registration Act ("NVRA"). As such, it is *undisputed* that Mr. Newby "failed to undertake the analysis required by the [EAC's] governing statute and by the Supreme Court's reasoning," 7/27/16 Br. of Fed. Appellees ("Appellees' Br.") at 14, that the "Federal Form 'may require only' information 'necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" *Arizona v. The Inter Tribal Council of Az., Inc.*, 133 S. Ct. 2247, 2258 (2013) ("*ITCA*") (quoting 42 U.S.C. § 1973gg-7(b)(1), now codified at 52 U.S.C. § 20508(b)(1)). The Supreme Court thus made clear in *ITCA* that such a determination is required before the agency can change the national mail-in voter registration form created pursuant to the NVRA (the "Federal Form") to require such documentation. Appellee-Intervenors' arguments to the contrary are flatly inconsistent with this holding and the plain language of the NVRA.

In making this concession, Appellees also expressly concede that absent an injunction Appellants will suffer irreparable harm, and that the balance of harms

from allowing the challenged decision to make it harder to register to vote in federal elections weighs in favor of granting relief, especially in light of the imminence of the November 2016 elections. *See* Appellees' Br. at 22 (agreeing that Appellants "appeared to have satisfied the remaining requirements for a preliminary injunction, including irreparable harm"). Appellees are correct. Mr. Newby's action deprives Appellants, who represent affected voters and seek to assist them in registering to vote, of the "backstop" of the Federal Form for the tens of thousands of voters who do not have ready access to documentary proof of citizenship. As the Supreme Court said in *ITCA*, "[n]o 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. Absent that backstop, Appellants' voter registration efforts will be hampered and chilled, and tens of thousands of eligible citizens will not be able to participate in the upcoming federal elections. Moreover, Appellant voter registration organizations will be forced to expend significant resources to mitigate the effects of Mr. Newby's unlawful action—expenditures which are *unrecoverable* under the APA and are by definition irreparable economic harm.

Having conceded the propriety of injunctive relief, Appellees seek to limit the scope of this Court's analysis, urging that the issues of the Executive Director's authority and the decision-making procedures of the EAC should be left to the

Commission to decide. Though a plenary decision on the merits is proper in this Court, should the Court decide to remand this case to the agency, any remand without reaching the core APA issues raised by Appellants would risk Mr. Newby again making a unilateral decision without the approval of three Commissioners, effecting a sea change in the regulatory scheme Congress charged the EAC with administering without complying with the APA's mandates.

While Appellees and the two Appellee-Intervenors make varying, inconsistent statements regarding the scope of Mr. Newby's authority and the nature of the remand they seek, they cannot controvert the fact that neither the EAC's organic statute nor its Commissioners have delegated to Mr. Newby the authority to reverse the Commission's longstanding policy and precedent that documentary proof of citizenship should not be required with the Federal Form. At bottom, Mr. Newby's decision represented a radical departure from EAC precedent, inexcusably rendered without the approval of three Commissioners as required by the Help America Vote Act ("HAVA"), and effected a shift in the EAC's regulatory scheme without adherence to the APA's notice-and-comment requirements. Congress built bipartisanship into the EAC under HAVA, and the Executive Director, no more than any individual Commissioner, had no authority to unilaterally approve the States' requests. Moreover, the agency document governing the Commissioners' and Executive Director's respective roles and

responsibilities does not even purport to delegate authority to the Executive Director to change the Commission's policy and precedent with respect to the Federal Form. The Executive Director's unilateral actions must be vacated simply because he did not have the power to act as he purported to.

ARGUMENT

I. FEDERAL APPELLEES CONCEDE THAT APPELLANTS ARE ENTITLED TO A PRELIMINARY INJUNCTION VACATING MR. NEWBY'S ACTIONS, BUT ANY DECISION ISSUING THAT INJUNCTION SHOULD CLARIFY THE LIMITED SCOPE OF THE EXECUTIVE DIRECTOR'S AUTHORITY TO ACT

Federal Appellees agree that Appellants are entitled to preliminary injunctive relief, conceding that the Executive Director failed to make a finding that documentary proof of citizenship was "necessary" to enforce a voter eligibility requirement as required by the NVRA and *ITCA*, and that time is of the essence to enter relief well in advance of federal elections. Accordingly, Appellants submit that there is little question that the Court should reverse the district court and grant Appellants' request for a preliminary injunction vacating Mr. Newby's actions. The only question remaining is the scope of the decision outlining the effect of such a preliminary injunction.

A. Federal Appellees Are Correct that Appellants are Entitled to a Preliminary Injunction Under Count III of the Complaint

As Appellees point out, the NVRA provides that the Federal Form may only require such information as is "necessary to enable the [State] to assess the

eligibility of the applicant[.]" 52 U.S.C. § 20508(b)(1). The Supreme Court made clear that the Federal Form could not require additional information or documentation from an applicant pursuant to State laws or otherwise unless the Commission determined that such a requirement was necessary to enable the State to assess eligibility to vote. *ITCA*, 133 S. Ct. at 2259-60. In doing so, the Court explicitly rejected a proposed reading of the NVRA that would require the Commission to include every state-law requirement on the Federal Form. *Id.* at 2256.

Appellees concede that the Executive Director failed to adhere to these substantive requirements delineated by Congress and the Supreme Court. *See* Appellees' Br. at 18. The Executive Director failed to make an independent determination as to whether the instructions requiring "documentary proof of citizenship" requested by Kansas, Alabama, and Georgia were necessary to assess voter eligibility, nor did he address the Commission's prior determinations to the contrary. *See id.* at 17-18. Instead, the Executive Director simply treated these *state* law registration requirements as mandatory to include in *federal* registration procedures, thereby rubber-stamping the States' requests. On this basis, the Federal Appellees agree that the Executive Director's actions must be vacated. However, despite this concession, the Federal Appellees argue that it is

unnecessary for the Court to address Appellants' other grounds for relief under the APA and NVRA.

If the Court should decide remand proper, however, the question of what is to be done on remand is intimately bound up with Appellants' other grounds for relief. That is because, as Appellants demonstrated below and in their opening brief, *see* 7/18/16 Br. of Appellants ("Appellants' Br.") at 31-34, the Executive Director lacked authority to decide whether to grant or deny the States' requests in the first place.

B. Resolution of Appellants' Claims Under Counts I and II That Mr. Newby Lacks Authority to Unilaterally Change the Federal Form Is Necessary For Relief, and Appellants Have Demonstrated a Clear Likelihood of Success on the Merits of Those Claims.

Under HAVA, the Commission may take substantive action "only with the approval of three Commissioners." 52 U.S.C. § 20928. The Executive Director, in turn, may only act when vested with authority from the votes of three Commissioners. But, with respect to substantive matters, the Commission has only authorized the Executive Director to make "policy *recommendations*." *See* JA-1014. (emphasis added)

HAVA's three-vote requirement ensures that at least one member from *both* major political parties is in favor of any action taken. *See id.* Thus, three Commissioners would be required to approve of the dramatic reversal in EAC

policy that Mr. Newby has implemented regarding documentary proof of citizenship. A view that permits the Executive Director broader authority to act unilaterally in a *partisan* manner, when the full Commission can only act with bipartisan consensus, contradicts the carefully-constructed architecture of the EAC. Consistent with that statutory regime, the Commissioners validly declined to delegate policymaking authority to the Executive Director, reserving such authority to themselves in a 2015 Management Statement. Rather, the Commissioners permitted the Executive Director only to "prepare policy *recommendations for commissioner approval*." JA-1014 (emphasis added). Nevertheless, Mr. Newby already has flouted these clear commands. Remanding to the Executive Director, thus, makes no sense unless such a remand is cabined to his limited statutory and delegated authority to make policy recommendations to the Commissioners for their review and collective determination.

Federal Appellees misapprehend Appellants' argument regarding authority in suggesting that Appellants argue that "the governing statute prohibits *any* delegation of authority to the Executive Director." Appellees' Br. at 19. Appellants have argued no such thing. Rather, Appellants have consistently argued that absent a delegation, HAVA prohibits the Executive Director from taking any action on behalf of the Commission, and that this Commission has *not* delegated authority to the Executive Director to unilaterally rule on state requests

of the nature and magnitude at issue here, let alone to reverse longstanding EAC policy and precedent. Under the current Management Statement, the Commission delegated to the Executive Director the authority to *implement* and *recommend* policies, while retaining for itself the authority to *create* or *change* policies. *See* JA-1014. And although the Commissioners previously had validly delegated authority to the Executive Director to maintain the Federal Form consistent with existing EAC policy in a 2008, which the Tenth Circuit relied upon in *Kobach* to uphold the Executive Director's rejection of Kansas' earlier request, *see Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015), the new quorum of Commissioners expressly withdrew that prior delegation in 2015. *See* JA-1013.

In addition to not having the authority to act, Mr. Newby did not have the 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, which was substantially weaker than the allegations provided by Arizona and Kansas to the EAC in 2013. JA-845-46, 848-49, 852-53, 862-63. Regarding those earlier allegations, the EAC found that the "paucity of evidence provided by the States regarding noncitizens registering to vote" was insufficient to establish necessity. JA-1103-05. Not only did the Tenth Circuit agree, but it found that had the EAC approved the request of Kansas and Arizona, it would have

"risked arbitrariness, because [Kansas] and [Arizona] offered little evidence that was not already offered in Arizona's 2005 request, which the EAC rejected." *Kobach*, 772 F.3d at 1198. Because under longstanding D.C. Circuit precedent, "an agency's unexplained departure from precedent must be overturned as arbitrary and capricious," *Comcast Corp v. F.C.C.*, 526 F.3d 763, 769 (D.C. Cir. 2008) (emphasis added), Mr. Newby's decision cannot stand as he (and the Commission) lacked the evidence to validly overturn longstanding policy and precedent.

Simply put, the Executive Director's actions should be summarily vacated in view of the clear and conceded violations of the APA. To the extent remand is deemed warranted, the Court should strictly circumscribe its remand by addressing the authority of the Executive Director and the procedures required for the EAC to make an appropriate and lawful policy determination regarding documentary proof of citizenship in connection with use of the Federal Form.

II. APPELLEE-INTERVENORS MISREPRESENT THE APPLICABLE LEGAL STANDARDS

Appellee-Intervenors Kansas Secretary of State ("Kobach") and Public Interest Legal Foundation ("PILF") misconstrue the standards applicable to a preliminary injunction motion.

First, Appellee-Intervenors seek to artificially inflate Appellants' burden by framing Appellants' request as seeking a mandatory preliminary injunction to

return to a "status quo ante," arguing that such injunctions are disfavored and require a very high showing. As an initial matter, it defies credulity to frame Appellants' requests as seeking a return to "status quo ante," as opposed to seeking maintenance of the status quo pendente lite. Indeed, D.C. Circuit precedent confirms that what Appellants seek is ordinary injunctive relief: "The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation. *The status quo is the last uncontested status which preceded the pending controversy*." *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) (citation and quotation omitted) (emphasis added). And, of course, the last uncontested status which preceded the controversy before this Court was the state of affairs that had persisted for two decades—*i.e.*, that documentary proof of citizenship was not required to register using the Federal Form. Moreover, even indulging the wholly unsupported argument that this action seeks a mandatory injunction, this Circuit has declined to require a heightened showing in such actions. *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 834 n.31 (D.C. Cir. 1984) ("In this circuit, however, no case seems to squarely require a heightened showing [for a mandatory injunction], and we express no view as to whether a heightened showing should in fact be required."). Thus, no heightened showing is required.

Second, and contrary to Appellee-Intervenors' suggestion, Appellants' arguments do not rest on the application of this Circuit's "sliding-scale" analysis, though that analysis remains the law of this Circuit. *E.g.*, *Sherley v. Sebelius*, 644 F.3d 388, 393, 399 (D.C. Cir. 2011) (applying the "sliding-scale" approach to "conclude [plaintiffs] are not entitled to preliminary injunctive relief").[1] Rather, Appellants have argued that the district court's denial of injunctive relief was "based only on a flawed determination that Appellants failed to establish irreparable harm" and that "[a] full analysis of the four [preliminary injunction] factors makes clear that Appellants are entitled to injunctive relief." Appellants' Br. at 48. Thus, regardless of whether this Court applies the traditional "sliding-scale" approach to Appellant's request for injunctive relief, or chooses now to depart from that approach for the first time, a full analysis of all four preliminary

[1] It bears noting that this Circuit's departure from the "sliding scale" approach is not the foregone conclusion that Kobach represents it as. In the wake of *Winter v.Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), other courts of appeals have found that the "'sliding scale' approach to preliminary injunctions remains valid". *E.g.*, *McCormack v. Hiederman*, 694 F.3d 1004, 1016 n.7 (9th Cir. 2012); *see also Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) ("If the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself."). In fact, in the case Kobach cites as the death knell of this Circuit's flexible, "sliding-scale" approach, this Court expressly declined to "wade into this circuit split" and instead applied the traditional "sliding scale" approach to plaintiffs' request for a preliminary injunction. *Sherley*, 644 F.3d at 393, 399.

injunction factors compels the conclusion that Appellants are entitled to the preliminary injunctive relief they seek.

III. APPELLANTS HAVE DEMONSTRATED IRREPRABLE HARM

Kobach seeks to minimize the significant harm occasioned by Mr. Newby's unlawful action, arguing incredibly that "[t]he right to vote … is not the issue in this case," reasoning that all that is at "issue here is the Leagues' alleged inconvenience stemming from the change in the State-specific instructions on the Federal Form, and how it affects the Leagues' efforts assisting applicants to register to vote." 8/3/16 Br. for Appellee-Intervenor Sec'y of State of Kansas ("KS Br.") at 17. Kobach cannot so easily dismiss the irreparable harm here.

First, Kobach is wrong in framing the issue before the Court as mere inconvenience to Appellants. Appellants allege not that they are "inconvenienced," but instead that Mr. Newby's approval of the requested changes to the State-specific instructions on the Federal Form "restrict[s] … their ability to help eligible voters register for the November elections. . . ," and unduly burdens the exercise of their right to engage in voter registration activities. Appellants' Brief at 44-45. Thus, "[t]he assertion that the challenged provisions implicate no constitutional rights is plainly wrong." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158-59 (N.D. Fla. 2012). "The [Appellants] wish to speak, encouraging others to vote," to "act collectively with others,

implicating the First Amendment right of association," and "to assist others with the process of registering and thus, in due course, voting." *Id.* As at least one other Court of Appeals has recognized, voter registration organizations like Appellants have legally protected "rights to conduct registration drives," *Charles H. Welsley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005), and still other courts have recognized that "participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment." *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).[2] Further, "[t]hese rights belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing registration rolls." *Id.* What is more, the type of harm to constitutional rights of which Appellants complain is one long recognized by the Supreme Court. That is, by hindering Appellants' voter

[2] Kobach also attempts to evade the evidence of irreparable injury to the Kansas League by quoting deposition testimony from another case out of context. In the excerpt Kobach cites, Ms. Ahrens was simply referring to the organizational structure of the Kansas League. The remainder of her testimony demonstrates that the local subchapters of the Kansas League do conduct voter registration drives directly and are coordinated and guided in that effort by the overarching State League. *See* Ex. 3 to Appellant-Intervenor's Brief in Response to Emergency Motion to Expedite at 90:6-14; *see also* JA-263. Moreover, several courts have held that the State League may represent its local chapters. *See, e.g., League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1325 n.11 (S.D. Fla. 2006); *League of Women Voters of Florida v. Browning*, 575 F. Supp. 2d 1298, 1301 (S.D. Fla. 2008).

registration activities, Mr. Newby's decision "has reduced the total quantum of speech." *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d at 1333 (relying on *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988)). And, as this Court has recognized, "[i]t has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quotation omitted).

Second, Kobach is wrong in claiming that the right to vote is somehow not at issue in this case. The Supreme Court long has recognized that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" are "overlapping … rights." *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Thus it defies logic to accept Kobach's argument that this Court can decide this case without attention to the considerable burden that Mr. Newby's decision has imposed on voters.[3] And Courts more generally find that impairments

[3] Plaintiffs Marvin and Joanne Brown are two such individuals. Kobach suggests that the Browns do not have standing because they were already registered to vote prior to the unauthorized change to the Federal Form instruction on February 1, 2016. But this is incorrect; Kobach *has refused to register the Browns* despite receiving their Federal Form applications more than six month ago. Indeed, during a recent hearing and bench ruling from a Kansas state court, *Brown v. Kobach*, Case No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016), Kobach has insisted that the Browns and other Federal Form registrants should not "be added to the

on the right to vote impose irreparable harm. *E.g.*, *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) ("[R]egistration applicants . . . would certainly suffer irreparable harm if their right to vote were impinged upon"); *see also Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) ("The loss of the protected right to vote 'for even minimal periods of time, constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Third, even putting to one side the harms to constitutional rights that Appellants have suffered, it is undisputed that Mr. Newby's unlawful decision has forced the League and other Appellants to expend precious resources to reeducate volunteers and would-be voters on the current voter registration requirements. The extent of these expenditures is fully set out in Appellants' opening brief, and such economic losses may constitute irreparable harm "'[w]here a plaintiff cannot recover damages from an agency because the agency has sovereign immunity[.]'" Appellants' Br. at 55-56 (alterations in original) (quoting *Smoking Everywhere*,

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principal voter roll in Kansas." *Id.* at 12:23-13:8. Appellants request that this Court take judicial notice of the proceedings in Kansas state court. *Dupree v. Jefferson*, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981). Because Kobach has not registered the Browns or other Federal Form users, they have continued to receive notices from Kobach's office advising them that they are not registered and will be precluded from voting unless they provide documentary proof of citizenship.

Inc. v. U.S. FDA, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010)). Yet Kobach's response to this argument is intolerably mute.[4]

IV. APPELLANTS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS

Appellee-Intervenors make no credible defense of the Executive Director's decision. They do not contest the fact that three Commissioners did not approve a change to the EAC's policy and precedent regarding documentary proof of citizenship, as required by HAVA. Instead, Appellee-Intervenors' arguments are largely attempts to relitigate previous cases, rehashing points made before and rejected by the Supreme Court in *ITCA* and the Tenth Circuit in *Kobach*.

[4] For its part, PILF argues that even though Appellants' economic losses are unrecoverable under the APA, Appellants still must show "that the economic harm is so severe as to cause extreme hardship to the business or threaten its very existence." 8/3/16 Br. of Appellee-Intervenor Public Interest Legal Foundation ("PILF Br.") at 21. But PILF's argument confuses the standards applicable to economic harm in general and unrecoverable economic harm: "[E]conomic harm in itself is generally not 'irreparable'; ***there are exceptions,*** however, when the harm threatens the very existence of the movant's business, ***or*** where economic losses are certain, imminent, and unrecoverable." *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133, 162 (D.D.C. 2015) (citations and quotations omitted) (emphasis added). Appellants' economic losses satisfy this latter exception. PILF's further argument that "[i]f any expenditure of money was sufficient to warrant injunctive relief, it would unnecessarily wreak havoc on the enforcement of countless duly enacted laws," PILF Br. at 22, is imagined. "Where the movant has shown some quantum of irreparable harm, the likelihood of irreparable harm to the movant is only one of several balance-of-hardships factors that must be considered in determining whether to grant preliminary injunctive relief." *N.C. Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 664, 671 n.5 (M.D.N.C. 2009).

Appellee-Intervenors otherwise ask this Court to lend its imprimatur to the extraordinary notion that requiring voter applicants to produce citizenship papers imposes no irreparable harm. None of these stale arguments have held any water before, and should accordingly be soundly rejected by this Court as well.

A. Appellee-Intervenors Propose an Interpretation of the NVRA that the Statute Expressly Forecloses and that Already Has Been Rejected by the Supreme Court and the Tenth Circuit

Appellee-Intervenors try in vain to contort the NVRA to require *compulsory* federal approval of state registration instruction requests. However, their arguments rest on an interpretation of the NVRA that has already been rejected by both the Supreme Court and the Tenth Circuit.

1. The States do not determine whether documentary proof-of-citizenship is "necessary" under the NVRA

Appellee-Intervenors argue that it is within the *states'* discretion to determine what information is "necessary" to assess voter eligibility within the meaning of the NVRA. *See* KS Br. at 27; PILF Br. at 29. In their view, the EAC is under a nondiscretionary duty, requiring it to grant the States' request regardless of necessity. But, not only does the legislative history of the NVRA preclude this interpretation, the Supreme Court also has foreclosed this argument and the Tenth Circuit later followed suit. In *ITCA*, the Supreme Court did not "ma[k]e clear that the determination of necessity resides with the States, not the EAC." *Contra* KS

Br. at 27. Rather, the Supreme Court made clear that the EAC's authority with respect to the Federal Form and its contents (including state instructions) is a "discretionary" one and that it is for the Government "to say [w]hat necessary information *may* be required … ." *ITCA*, 133 S. Ct. at 2259. And the Tenth Circuit recognized under *ITCA* that the EAC "does have discretion to deny" state requests to amend the Federal Form to require documentary proof of citizenship, rejecting the argument the EAC's duty is "nondiscretionary" and reasoning that such a construction "would, of course, … render[] the … option of Administrative Procedure Act … appellate review both unnecessary and inapplicable." *Kobach*, 772 F.3d at 1188, 1196.

Appellee-Intervenors brazenly advance the exact statutory interpretation expressed by Justice Alito in dissent, "that the [NVRA] lets States decide for themselves what information 'is necessary … to assess the eligibility of the applicant'" by requiring that "applicants provide supplemental information when appropriate." *ITCA*, 133 S. Ct. at 2274 (Alito, J., dissenting). If this interpretation were correct, then Justice Alito's view would have prevailed, and *ITCA* would have been decided differently. As the Tenth Circuit held, *ITCA* represents "one of those instances in which the dissent clearly tells us what the law is not." *Kobach*, 772 F.3d at 1188. For the same reasons, Kobach's novel semantic argument

regarding the meaning of "necessary" in light of the full context of 52 U.S.C. § 20508(b)(1) cannot carry the day.

Kobach's attempts to create a constitutional controversy by arguing that "documentary proof of citizenship" is a voter qualification are similarly unavailing. The qualifications for being an elector in Kansas legislative elections are set out in Kansas's Constitution, Article 5, Section 1: "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. The Kansas legislature in K.S.A. 25-2309 simply has identified the "proper proofs of the right of suffrage." K.S.A. Const. Art. 5, § 4; K.S.A. 25-2301. Thus, as was the case in *ITCA*, "*citizenship* (not registration) is the voter qualification [Kansas] seeks to enforce." *ITCA*, 133 S. Ct. at 2259 n.9; *see also Kobach*, 772 F.3d at 1195 (observing 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).")).[5]

[5] Kobach's argument that Federal Rule compelled Mr. Newby to grant the states' requests to require documentary proof of citizenship must be rejected on the same basis. The referenced Federal Rule specifies that the Federal Form must "list U.S. Citizenship as a universal eligibility requirement and include a statement that

Indeed, the radical view espoused by Appellee-Intervenors—that the *states* are entitled to dictate to the federal government the instructions contained on the federal government's *own* registration form—utterly undermines the core purpose of the Federal Form. 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. This essential element of the Federal Form would be entirely defeated if the Executive Director were required to simply rubber-stamp state-enacted procedural hurdles like documentary proof-of-citizenship.[6]

Therefore, Appellee-Intervenors' revival of their own failed interpretation of the NVRA is expressly foreclosed.

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incorporates by reference each state's specific additional eligibility requirements . . . as set forth in accompanying state instructions." 11 C.F.R. § 9428.4(b)(1). But documentary proof of citizenship *is not* an eligibility requirement. The eligibility requirement is citizenship, which the Federal Form already universally provides for.

[6] Even if the decision here had been made by the full Commission, rather than the Executive Director, that decision *still* would be invalid if it failed to evaluate the States' requests for necessity. "[A]n 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). Because the EAC evaluated proof-of-citizenship requests from Kansas and Arizona for necessity in 2014, *see* JA-1100-05, suddenly abandoning that statutorily-required standard without explanation, as the Executive Director did here, would be arbitrary and capricious.

2. The EAC's review of state requests is not ministerial

Appellee-Intervenors attempt to save the Executive Director's irreparably flawed decision by arguing that he appropriately fulfilled a ministerial duty by deferring to state determinations of necessity. This is just a repackaging of Kobach's flawed reading of *ITCA* and *Kobach*. Far from fulfilling state requests to update election office information or voter registration deadlines—ministerial tasks within the scope of his delegated authority—the Executive Director took it upon himself to grant a request of a type that had always been considered by the Commission itself, thereby overstepping his own bounds to overturn the EAC's consistent rejections of such requests. Thus, Kobach's argument that this was entirely a ministerial decision rests on his argument that this Court should adopt his foreclosed definition of "necessary" under the NVRA. *See* KS Br. at 29 (acknowledging that "[i]f the subjective definition [of necessity] is used, then the EAC must wade into the policy realm and attempt to determine whether the benefit of requiring proof of citizenship outweighs the cost of doing so"). In fact, Kobach is demanding that the EAC defer to *his* subjective interpretation of what is necessary and "depart from [the EAC's] longstanding policy of declining to require proof of citizenship on the Federal Form." Reply Brief of the United States Election Assistance Commission, *Kobach v. U.S. Election Assistance Comm'n*, Nos. 14-3062, 14-3072, 2014 WL 3696897, at *25-26 (10th Cir. July 17, 2014)

("EAC Reply Brief, *Kobach*"). The dispositive question is not whether the word "necessary" is subject to an "objective" understanding, but whether the *federal* government determines what is necessary to assess the eligibility of registrants for *federal* elections.

Moreover, Appellee-Intervenors ignore the inconvenient problem that, by Mr. Newby's own sworn statements, he was operating under the mistaken belief that changes to the state-specific instructions were nondiscretionary because he erroneously believed that the instructions were not a part of the Federal Form—a distinction Appellee-Intervenors also try to draw here. Mr. Newby fully admits, as he must, that changes to the Federal Form "require[] *Commissioner Review* through a rulemaking process." JA-292 (emphasis added). But he mistakenly concluded that "changes to the state-specific instructions [a]re different than to the NVRA form itself" and therefore somehow exempt from the three-vote requirement. *Id.* To the contrary, both Supreme Court precedent and EAC regulations make clear that the state specific-instructions are an *integral part* of the Federal Form. *See* 11 C.F.R. 9428.2 ("Form means the national mail voter registration application form, *which includes the … . state-specific instructions*.") (emphasis added); *ITCA*, 133 S. Ct. 2247, 2252 (2013) ("The Federal Form . . . *contains* a number of state-specific instructions … .") (emphasis added). Because of this erroneous understanding of the Federal Form, Mr. Newby's review of the

States' requests was flawed from the start. Appellee-Intervenors' attempts to reconcile his thought process after the fact are thus futile.

State documentary proof-of-citizenship laws like those at issue here have been the most prominent and important issue that the Commission has had to decide. After more than a decade of Commission-level decision-making and litigation on this issue, including trips to the Supreme Court and Tenth Circuit, it strains belief to maintain that documentary proof is a mere ministerial matter.

B. The Executive Director's Decision was Inconsistent with EAC Policies and Procedures

Kobach and even the EAC seem to suggest that the Executive Director has plenary authority to grant or deny State requests concerning documentary proof of citizenship, citing the Executive Director's denial of Kansas' requests on behalf of the EAC in 2014 and 2006. But Kobach and the EAC neglect to mention that the 2014 Executive Director action was pursuant to a specific delegation of authority by the Commissioners to "maintain" the Federal Form "consistent" with policies previously set by the Commission. That limited delegation was withdrawn in 2015 when the Commission's quorum was restored and the operative 2015 Management Statement was adopted. It makes no sense to suggest that the Executive Director's authority to modify the Federal Form was somehow made plenary by the withdrawal of the 2008 delegation.

Indeed, the 2015 Management Statement confirms that the Executive Director lacks any authority over policy matters and can only implement policies once they have been adopted by the Commissioners. Additionally, one Commissioner, Thomas Hicks, issued a statement following the Executive Director's decision demanding that the States' requests be put to a full Commission vote. *See* JA-408. This means that the Commission *does not* have three members in agreement that this decision should be delegated to the Executive Director.

At all events, Appellee-Intervenors mischaracterize the EAC's clear history of conducting full Commission-level review over documentary proof-of-citizenship requests.[7] The Executive Director plainly lacks authority to unilaterally decide state proof-of-citizenship requests, which have always been elevated to the Commission level. State requests to require proof of citizenship have always been

[7] The Commission's practice is consistent with HAVA's requirement that the Commissioners must approve changes to the Federal Form's state-specific instructions. At a 2008 meeting, the Commission reviewed eight requests for modifications to the Federal Form's state-specific instructions, unanimously approving (1) an address change of Colorado's Secretary of State; (2) updates to registration deadlines in New Jersey, Delaware, Iowa, and Utah; (3) an update to voter qualifications in Rhode Island, including requirements that registrants be U.S. citizens, residents of Rhode Island, 18 years old by election day, and not be incarcerated for a felony conviction; and (4) a Georgia requirement that registrants provide a driver's license, state ID, or social security number, while those registrants without such documentation would be issued a unique identifier. *See* JA-1581-82. Simultaneously, the Commissioners again denied Arizona's renewed request to include proof of citizenship requirements in a 2-2 vote. *Id.* at 1582-83.

treated as policy questions for the EAC, consistently handled and rejected by the Commission itself over the years. Federal Appellees mistakenly note that Arizona's 2006 request to include such requirements was initially rejected by the Executive Director at that time. In fact, the Executive Director merely undertook the administrative task of communicating the Commission's decision to Arizona on the Commission's behalf.

Appellee-Intervenors also erroneously argue that changes to the state-specific instructions of the Federal Form do not require the Commissioners' attention. Appellee-Intervenors repeatedly direct this Court to the informal process for states to request changes to the Federal Form instructions, such as submitting requests by letter or email. But just because the process for states to *request* changes was informal does not mean that the Commission *reviewed* these requests informally. To the contrary, the Commission has established a consistent practice of conducting reasoned analysis and Commission-level review of *all* material changes to the Federal Form.[8] Consistent with HAVA's three-Commissioner

[8] *See* Letter from Thomas Wilkey, Executive Director, to Arizona (Mar. 6, 2006), JA-1020; Certification of Tally Vote (July 11, 2006), JA-1032; Thomas Wilkey, State Requests to Change Their State-Specific Instructions on the National Mail Voter Registration Form (Nov. 9, 2011), JA-1004; Summary of State Requests to Modify Their State-Specific Instructions on the NVRA Mail Application (2007-2014), JA-1006; Letter from Alice Miller, Acting Executive Director, to Kansas (Jan. 17, 2014), JA-1069; Letter from Alice Miller, Acting Executive Director, to Arizona (Jan. 17, 2014), JA-1119.

approval requirement, the EAC's practice has been to review at the Commission-level any requests to amend the Federal Form (including its state-specific instructions) that materially impact its use. For example, in 2005, the EAC unanimously declined to approve a Florida request to include information regarding an applicant's mental capacity on Florida's section of the state-specific instructions, issuing that decision in a written memorandum through the EAC's Associate General Counsel. *See* JA-1017. Similarly, in 2006, the Commission unanimously declined to approve Arizona's request to include documentary proof of citizenship in connection with the Federal Form, issuing that decision in a written memorandum through the Executive Director. When Arizona requested that the Commission grant it a special accommodation in view of ongoing litigation involving the Federal Form, the Commissioners submitted the question to a tally vote and divided 2-2, thereby confirming that the EAC could take no action on Arizona's request. *See* JA-129.

When Arizona renewed its request, along with Kansas and Georgia, in the wake of the *ITCA* decision, the Commission found itself without a quorum. But under a 2008 procedural statement adopted by the three sitting Commissioners (now withdrawn), the Commissioners made a limited delegation of their authority to the Executive Director to "maintain" the Federal Form "consistent" with prior agency policy and precedent. *See* JA-1002. Executive Director Miller therefore

acted for the *entire* Commission by rendering her 2014 decision to reject the state requests, which unquestionably was consistent with the EAC's prior policy and precedent to deny requests to accommodate state documentary proof of citizenship laws.[9] *See id.*

Appellee-Intervenors also argue that the EAC is bound by FEC regulations purporting to require it to indiscriminately include all state-specific eligibility instructions on the Federal Form. But the FEC is an entirely different agency, and after the EAC was formed and vested with authority over the Federal Form, the Commissioners expressly *declined* in 2008 to adopt the FEC's procedure by a 2-2 EAC Commissioner vote.[10] Therefore, contrary to Appellee-Intervenors'

[9] In denying the requests of Kansas and Arizona, the Commission stated that this policy was adopted in 2006 when it had previously denied Arizona's requests: "[T]he EAC established a governing policy for the agency, consistent with the NVRA, HAVA, and EAC regulations, that the EAC will not grant state requests to add proof of citizenship requirements to the Federal Form." JA-1092. In the corresponding litigation in *Kobach*, the Commission reiterated that it was longstanding policy to reject citizenship documentation requirements. *See supra* EAC Reply Brief, *Kobach*, at *25-26 (discussing the Commission's "longstanding policy of declining to require proof of citizenship on the Federal Form").

[10] Specifically, 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. *See* JA-1556 (Proposal to Adopt Federal Election Commission Policy for Amending State Instructions to Reflect State Law Offered by Vice-Chair Caroline C. Hunter). The Commission rejected Vice-Chair Hunter's proposal by a 2-2 vote, thus retaining the requirement that material changes to State-specific instructions cannot simply bypass a Commission vote. *See* JA-1554.

arguments, the EAC has not imported any FEC requirement that it mandatorily approve state eligibility instruction requests.

The Commission thus has consistently elevated the issue of documentary proof of citizenship to the consideration of the Commissioners themselves. Given this established practice, Mr. Newby's decision to take it upon himself to *reverse* clear agency policy and precedent is all the more egregious.

C. The EAC was Required to Undertake Notice and Comment Rulemaking

Kobach, PILF, and the EAC all argue that notice and comment rulemaking is not required to change the Commission's position on documentary proof-of-citizenship, and in so doing confuse the distinction between interpretative and legislative rules. The decision at issue before the Tenth Circuit in *Kobach* was squarely an interpretative rule—i.e., one that "remind[s] parties of existing statutory or regulatory duties, or merely tracks preexisting requirements and explain[s] something the statute or regulation already required." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (alteration omitted). And "unless another statute provides otherwise, the notice-and-comment requirement 'does not apply' to 'interpretative rule[s]' … ." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). But Mr. Newby's 2016 decision "adopt[ed] a new position inconsistent with existing regulations [and] effect[ed] a substantive change in existing law or policy." *Mendoza*, 754 F.3d at 1021. Plainly, Mr. Newby's

decision does much more than "merely explain the statute," his decision "endeavors to implement the statute" and seeks to modify the policy decision previously provided and established for decades—*i.e.*, what information is necessary to determine the eligibility of voters using the Federal Form. *Chamber of Commerce of the U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 469 (D.C. Cir. 1980). Moreover, and as explained above, Mr. Newby's decision simply cannot be framed as "explaining or clarifying the [NVRA's] language," *id.*, because Mr. Newby's purported explanation has been foreclosed by statute and precedent. It is therefore a "legislative rule" subject to Section 553's general notice-and-comment requirement. *Mendoza*, 754 F.3d at 1020-21.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court for the District of Columbia and grant Appellants' motion for a preliminary injunction vacating the Executive Director's unauthorized and unlawful actions.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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