IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendants,

and

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

Intervenor Defendant,

and

PUBLIC INTEREST LEGAL FOUNDATION

Intervenor Defendant.

NO. 16-cv-236 (RJL)

REPLY BY DEFENDANT-INTERVENOR KANSAS SECRETARY OF STATE KRIS KOBACH TO FEDERAL DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS' AND DEFENDANT-INTERVENORS' CROSS MOTIONS FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM

TABLE OF CONTENTS

INTRODUCTION

Kansas law requires that a person must provide satisfactory evidence of citizenship prior to being registered to vote. K.S.A. § 25-2309(*l*). Kansas requested the Election Assistance Commission ("EAC") to modify the Kansas-specific instructions of the National Mail Voter Registration Form ("Federal Form") to reflect Kansas's registration requirement in K.S.A. § 25-2309(*l*) and because a mere oath regarding citizenship would not suffice to prevent non-citizens from registering to vote. AR00072-00073. The National Voter Registration Act ("NVRA"), which requires the EAC to maintain the Federal Form, permits States to request information on the Federal Form that is necessary to either determine eligibility or to administer voter registration and other parts of the election process. 52 U.S.C. § 20508(b)(1). The EAC is also constrained by a binding federal regulation that mandates that both "eligiblity requirements" and "registration requirements" found in relevant State laws must be included in the state-specific instructions of the Federal Form. 11 C.F.R. § 9428.3. The Executive Director of the EAC, BrianNewby, granted Kansas's, Georgia's, and Alabama's requests to modify their state-specific instructions to reflect their respective proof-of-citizenship requirements. In so doing, he followed both the statutory standard and the regulatory standard; and his decision should be upheld.

ARGUMENT

I. THE DEPARTMENT MISREPRESENTS THE HOLDINGS OF *ITCA* AND *KOBACH* AND THE FEC'S STATEMENT OF BASIS AND PURPOSE

Kansas explained in its principal brief the holdings of *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) ("*ITCA*") and the limited nature of *Kobach v. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014). Kansas Resp. to Mtn. for Summ. J.

("Kansas MSJ") at 5-6, 8-9, 37 (ECF No. 107-1). *ITCA* was a preemption case concerning the phrase "accept and use" in the National Mail Voter Registration Form. *Id.* at 2251. *Kobach* was an Administrative Procedure Act ("APA") challenge to a previous decision ostensibly issued by the EAC. The Tenth Circuit in *Kobach* reviewed the record before it, gave *Chevron* deference to an EAC memorandum which written by the Department of Justice during litigation, and never addressed the second half of 52 U.S.C. § 20508(b)(1) or 11 C.F.R. § 9428.6(a)(1) or (c). In so doing, the Kobach Court simply came to the limited conclusion that the EAC *could* reject different request by Kansas and Arizona and survive deferential APA review.

The Department of Justice incorrectly argues that *ITCA* and *Kobach* "interpreted [the NVRA] to mean that the EAC (and not the states) must determine the existence of absence" of information on the Federal Form. Federal Defendants' Response ("DOJ Resp.") Br. at 2-3 (ECF Doc. 112), *see also id.* at 4-5. But that is not true. *ITCA* addressed the issue of whether Arizona could decline to use the Federal Form and survive a preemption challenge. The instant case presents a related, but entirely different, question. This case presents the question of whether the EAC may modify the state-specific instructions to reflect the registration requiements of state law in response to a state request. *ITCA* only held that Arizona was preempted in rejecting Federal Forms unaccompanied by documentary proof of citizenship because the NVRA compelled Arizona to "accept and use" the Federal Form. *Id.* at 2257 ("We conclude the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that states 'accept and use' the Federal Form."). It did not interpret the applicable NVRA standard, that might apply, nor did it assess whether the EAC properly applied any standard. Neither issue was before the Court.

But *ITCA* did state that "it would raise constitutional doubt" if the EAC rejected a State's "request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility." *Id.* at 2259. The Supreme Court "[h]appily" avoided a more strained reading of the NVRA because it was assured that Arizona's ability to "enforc[e] its constitutional power to determine voting qualifications remains open to Arizona[,]" namely that Arizona would request modification of its state-specific instructions on the Federal Form, and the EAC would make that alteration. *Id.* at 2259-60. The Court further explained that if the EAC did not make the change, Arizona could challenge that rejection under the APA. *Id.* at 2260. A reviewing court might hold an agency action to be unlawful because it is "contrary to constitutional right" or "not in accordance with law." 5 U.S.C. § 706(2)(A), (B). Reading the NVRA in a way so as to avoid declaring it unconstitutional is a far cry from setting the "standard" that the Department of Justice argues *ITCA* established.

The Department of Justice's argument concerning *Kobach v. EAC* is no better. *Kobach* reviewed the record before it and determined, under a "very deferential" standard, that the agency could rationally come to the decision it made. *Kobach v. EAC*, 772 F.3d 1183, 1197 (10th Cir. 2014). The party challenging the decision had to overcome a "presumption of validity." *Id.* The Court did not know that the Department of Justice had commandeered the EAC and issued the opinion itself,[1] and the Court only reviewed whether "the grounds upon which the agency acted [were] clearly disclosed in, and sustained by, the record." *Id.* (citation

[1] The Tenth Circuit repeatedly referred to the decision-maker as being the acting Executive Director. Yet, the current Executive Director, who actually *is* the Department of Justice's client in *this* case, stated that the acting Executive Director could not articulate the basis for her decision in 2014. Decl. of Brian Dale Newby, ¶¶ 21-23 (ECF No. 28-2). In fact, Ms. Miller "suggested that [Mr. Newby] talk to the Department of Justice attorneys, who she said could explain to [him] what [the EAC's] position was." *Id.* at 23. Incredibly, the Department of Justice then filed an affidavit by that same former acting Executive Director in an attempt to contradict their own client's sworn statement. Decl. of Alice Miller ¶¶ 9-11 (ECF No. 48-1).

omitted). The Tenth Circuit never held that the agency must reject a State's request to add proof-of-citizenship to its state-specific instructions on the Federal Form.

Furthermore, even if the Department's view of these opinions were correct, the States did what the Department claims is required. They submitted requests to modify the form with explanations why such modification was necessary, and the agency modified the Federal Form. For example, Kansas provided information about the requirements in Kansas's laws prohibiting an individual from registering to vote without providing proof of citizenship and also provided new evidence of noncitizens successfully registering to vote by mere attestation. AR00072-AR00076. Under either the Department's or Kansas's interpretation of these cases, modification to the Federal Form was required.

Finally, as to the FEC's statement of basis and purpose, the Department misrepresents what was being considered. The FEC statement was regarding its decision not to include certain information *in the general application section* of the Federal Application. It was in no way referring to the state-specific instructions. 59 Fed. Reg. 32,311, 32,316. Additionally, the statement cited by the Department of Justice is only a preamble, not a substantive rule anyway. *See Louisiana Envrionmental Action Network v. U.S. E.P.A.*, 172 F.3d 65, 79 (D.C. Cir. 1999). "[A] preamble does not create law; that is what a regulation's text is for." *Texas Children's Hospital v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. Dec. 29, 2014). A preamble only has any binding effect if the agency intended to bind itself in the manner the Department of Justice suggests. *Swedish American Hosp. v. Sebelius*, 773 F. Supp.2d 1, 13 (D.D.C. Mar. 29, 2011) (citing *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996). Moreover, where "the preamble to [a] rulemaking is inconsistent with the plain language of the regulation…it is invalid." *Barrick Goldstriek Mins, Inc. v. Whitman*, 260 F. Supp.2d 28,

36 (D.D.C. Apr. 2, 2003) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Department's interpretation of the preamble is inconsistent with the text of the rule that was promulgated, 11 C.F.R. §9428.3.

II. THE DEPARTMENT DOES NOT ADDRESS 11 C.F.R. § 9428.3

Even if the Department of Justice were correct in its discussion of these cases, the Department ignores the fact that a binding regulation requires Mr. Newby to make the change that he made. "[I]t is a well-settled rule that an agency's failure to follow its own regulations is fatal[.]" *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997) (citations and internal quotations omitted). That regulation mandates that the application "*shall* list U.S. Citizenship as a universal eligibility requirement and *include a statement that incorporates by reference each state's specific additional eligibility requirements*... as set forth in the accompanying state instructions." 11 C.F.R. § 9428.4(b)(1)(emphasis added). The regulation mandates that the state-specific instructions must include each State's eligibility requirements, and provides for State election officials to notify the EAC of any changes in State requirements. Id. § 9428.6(a)(1), (c).

The Department of Justice's arguments about discretion possessed by the agency are misplaced in this regard. Even if the EAC Director may have once possessed the discretion under the NVRA that the Department claims, the point is meaningless now because the agency promulgated a regulation specifying what information the agency *must* include in the state-specific instructions. In other words, the EAC limited whatever discretion it might otherwise have exercised by issuing a regulation that constrained its future decision making with respect to the state-specific instructions. If the EAC wishes to exercise the broad discretion that the

Department envisions, then the EAC must promulgate new regulations repealing the mandate of 11 C.F.R. § 9428.4(b)(1). *See Steenholdt v. F.A.A.*, 314 F.3d 633, 639 (D.C. Cir. 2003) (the *Accardi* doctrine requires federal agencies to follow their own rules, even gratuitous rules); *United Space Alliance, LLC v. Solis*, 824 F. Supp.2d 68, 82 (D.D.C. Nov. 14, 2011) (The *Accardi* doctrine applies "even to regulations which need never have been promulgated—sometimes called 'gratuitous' regulations—because 'a court's duty to enforce an agency regulation, while most evidence when compliance with regulation i[s] mandated by the Constitution or federal law, embraces as well agency regulations that are not so required.") (quoting *Wilkinson v. Legal Services Corp*, 27 F. Supp.2d 32, 50 & n.28 (D.D.C. Nov. 19, 1998) (An agency must follow its own regulations, even a "gratuitous" regulation that limits the agency's discretion.); *CityFed Financial Corp. v. Federal Home Loan Bank Bd.*, 615 F. Supp. 1122, 1132 (D.D.C. Aug. 14, 1985) ("An agency's own regulations [can] provide such 'practical limits on its discretion.'").

Here, the relevant regulation states, "The state-specific instructions *shall contain*…information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b) (emphasis added). Whether one claims that Kansas's proof-of-citizenship requirement is a "voter eligibility" or a "registration" requirement does not matter. *See* DOJ Br. at 7. The relevant rule that binds the agency requires *both* to be listed in the instructions. Indeed, Mr. Newby's actions would have been arbitrary and capricious if he did *not* follow this binding regulation and modify the state-specific instructions. *Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 122 (D.D.C. Oct. 24, 2001 (While "[a]gency interpretations of their own of their own regulations are consistently afforded deference," they should be rejected if

the interpretation is "plainly erroneous or inconsistent with the regulation.") (citation omitted and internal quotation mark omitted).

It is telling that the Department does not even respond to this point. Instead, in another part of their brief, they continue to assert that some distinction between "'eligibility requirements' and 'registration procedures'" is relevant in this case. *See* DOJ Resp. at 7. Yet they completely ignore the fact that 11 C.F.R. § 9428.3(b) plainly and unambiguously requires *both* of those things to be included in the state-specific instructions of the Federal Form. Thus, not only is the Department completely incorrect in arguing that Mr. Newby violated the applicable standard (because they ignore the standard created by the regulation), they clearly could have "defend[ed] the Executive Director's decisions challenged here[.]" DOJ Br. at 1.

III. NEWBY'S DECISION SHOULD BE UPHELD BECAUSE IT CONTAINED A RATIONAL BASIS IN THE RECORD

The Department of Justice next argues that Mr. Newby's decision cannot be upheld under the second half of 52 U.S.C. § 20508(b)(1)—that the NVRA requires the Federal Form to contain information that is "necessary…to administer voter registration and other parts of the election process." DOJ Br. at 4. The Department presents two nonsensical reasons why it believes this to be true.

First, the Department argues that it cannot be upheld because Kansas did not expressly quote in the letter to the EAC the statutory language. DOJ Br. at 3-4. That argument is deeply flawed. The Department has failed to cite any case that requires a State to expressly quote the statutory text of the NVRA to the EAC before the EAC can render a decision in its favor on that ground. Furthermore, no EAC regulation requires that. Instead, to uphold an agency action, "the

court must find a rational basis for the agency's decisions…in the facts of record, and must ensure that the agency has demonstrated a rational connection between the facts found and the choice made." *Wawszkiewicz v. Dep't of Treasure*, 670 F.2d 296, 301 (D.C. Cir. 1981) (citations and internal quotation marks omitted). The Court may even uphold agency decisions, that are not "a model of clarity." *Chiquita Brands Intern. Inc. v. S.E.C.*, 805 F.3d 289, 299 (D.C. Cir. 2015) (citations omitted). Kansas's letter did that. It informed the EAC of the Kansas registration and eligibility requirements and Mr. Newby accordingly modified the Federal Form as a result. AR0072-AR0076.

Second, DOJ simply claims that "the record is clear" that Mr. Newby did not make a determination of the change to be "necessary either for eligibility or for administrability." DOJ Br. at 4. Tellingly, Plaintiffs include only a "see" citation to two pages of the Administrative Record in support of this argument. *Id.* In reality, Mr. Newby fully explains what he was evaluating. "The specific request is to modify the federal form's instructions to include an attachment to finalize registration...[T]he simple fact is that the registration is not complete without this information." AR0004. Looking at Kansas specifically, Mr. Newby explained that"the Kansas registration is not complete without the state's requested documentation, [which is] spelled out in Kansas law." *Id.* Not only is that consistent with the 52 U.S.C. § 20508(b)(1)—"necessary…to administer voter registration and other parts of the election process"—it is also a change that is mandated by 11 C.F.R. § 9428.3(b) ("The state-specific instructions *shall contain*…information regarding the state's specific…registration requirements.").[2]

[2] The Department of Justice also presents an argument for the first time in their brief changing what must or may be included on the Federal Form. Previously, the Department of Justice argued that, something could only be included in the state-specific instructions only upon "a determination of necessity." DOJ Memo. Sppt. Summ. J. at 15. Now, according to the

IV. THE DEPARTMENT CANNOT ESCAPE THE CONSTITUTIONAL DOUBT THAT ITS INTERPRETATION CREATES

As explained at length in the State's Principal Brief, the Department of Justice's reading of the relevant provisions of the NVRA would give rise to the constitutional doubt that the Supreme Court in *ITCA* took pains to avoid. *See* Kansas MSJ Br. at 18-24. The Department attempts to escape the constitutional doubt generated by its reading by asserting that "the Constitution makes a clear distinction between *eligibility requirements*—which the Qualifications Clause leaves to states—and *registration procedures*—which Congress can preempt under the Elections Clause." DOJ Br. 7 (emphasis in original). The Department claims that anything that can be described as a "registration procedure" (the Department's term) is within Congress's authority to preempt.

But that is not what the *ITCA* Court held. Not only do the States retain sole authority to set the qualifications for voters, *ITCA*, 133 S.Ct. at 2258 ("Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress."), but also the States possess the authority to *enforce* voter qualifications: "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that *it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications*." *Id.* at 2258–59 (emphasis added). The "information necessary to enforce" the citizenship qualification

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Department of Justice, although Kansas's request to include a "registration requirement" is improper, even though 11 C.F.R. § 9428.3(b) requires its inclusion, it would not be improper for Kansas to include a website which allows voters to "get complete information on their registration process." AR0005 (describing the Iowa website). If all kinds of information which is not related to registration requirements or eligibility requirements can be on the Federal Form, it is unclear exactly what is left of the "necessity" argument that the Department of Justice has been arguing throughout this case.

that the Supreme Court was referring to was, of course, documentary proof of citizenship. The *ITCA* Court did not denigrate documentary proof of citizenship as a mere "registration procedure" as the Department does. Rather, the *ITCA* Court described the proof-of-citizenship requirement as a means of "enforce[ing] [the State's] voter qualification."

Thus, the Department attempts to do exactly what the Supreme Court said must never be done: interfere with the States' exclusive constitutional power to enforce its voter qualifications. Such a reading of the NVRA would be impermissible. In *ITCA*, the Court was "[h]appily… spared that necessity [of determining whether an alternative interpretation of the NVRA was possible that did not raise constitutional doubt], since the statute provides another means by which Arizona may obtain the information needed for enforcement." *Id*. at 2259. Specifically, Arizona could "request anew that the EAC include such a requirement among the Federal Form's state-specific instructions…." *Id*. at 2260. Clearly, the Court expected that the EAC could grant Arizona's renewed request and thereby avoid the constitutionally doubtful interpretation of the NVRA that would deny Arizona its enforcement mechanism.

Finally, the Department attempts clumsily to turn the tables regarding the constitutional doubt issue. The Department declares, "It is Kansas's assertion that 'registration is itself a qualification' that raises constitutional doubts…." DOJ Br. 7. The Department then claims that "a state cannot intrude on Congress's 'authority under the Elections Clause to set procedural requirements for registering to vote in federal elections….'" *Id*. (*quoting Kobach*, 772 F.3d at 1195).

There are three problems with the Department's argument. First, the Department misunderstands how the Elections Clause works. The States possess the default authority to "prescribe" the "Times, Places and Manner of holding Elections for Senators and

Representatives." U.S. Const. Art. I, Sec. 4. That "default" authority remains undisturbed unless Congress chooses to "pre-empt state legislative choices." *ITCA*, 133 S.Ct. at 2253. "The Clause is a default provision" that "invests the States with responsibility for the mechanics of congressional elections… only so far as Congress declines to preempt state legislative choices[.]" *Foster v. Love*, 522 U.S. 67, 69 (1997). It is nonsensical for the Department to claim that States cannot "intrude" in this area, when the States are vested with *default control* over this area.

Second, when Congress does seek to displace the default State laws in any respect, it must do so in accordance with the plain statement rule. As *ITCA* made clear, the text of the federal statute must plainly spell out what a State is prohibited from doing. "[T]he reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." 133 S.Ct. at 2257. Elections Clause legislation cannot be read to have hidden, implicit prohibitions; a court must "read Elections Clause legislation simply to mean what it says." *Id*. at 2257. States are free to act as they wish until Congress preempts with a plain statement in federal law that "directly conflict[s]" with a State's law. *Voting for America, Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013). Nothing in the NVRA even remotely suggests that a State may not deem registration, itself, to be a qualification.

Third, the Department forgets that the canon of avoidance of constitutional doubt is a rule of statutory construction. *ITCA*, 133 S.Ct. at 2258. The State is not claiming that the NVRA says anything about registration being a qualification for voting. The canon has no applicability to the State's argument that under Kansas law, completing the registration process is itself a qualification for voting.[3]

[3] It must also be remembered that the *ITCA* Court expressly declined to address the question of whether "registration is itself a qualification to vote." 133 S.Ct. at 2259, n.9.

Thus, the State's additional argument concerning constitutional doubt—that completing the registration process is itself a qualification for voting in Kansas, and that the NVRA cannot be read to displace that qualification—remains unrebutted. The Department does not deny that Kansas law makes completion of the registration process a qualification for voting. *See Dunn v. Board of Comm'rs of Morton County*, 165 Kan. 314, 328 (1948). And the Department does not offer any other explanation of why registration cannot be regarded as a qualification for voting.

V. EVEN IF THE DEPARTMENT IS CORRECT, NEITHER REMAND NOR VACATUR IS APPROPRIATE

The Department of Justice argues that this Court should set aside the EAC's decision to modify the Federal Form which has been in place since February 1, 2016.[4] But that remedy makes little sense. The EAC could have reconsidered this decision at any time in the past seven and a half months, but they have not done so. Now the Federal Defendants ask this Court to vacate the decision and remand it to the agency. That is simply not appropriate.

Remand is not even necessary here. As Kansas explained in its brief, Mr. Newby's decision was rationally related to the facts before him and could be justified for any number of reasons. Kansas MSJ Br. at 33-38. But even if the explanation was not sufficiently clear based on a few words in two sentences of a seven page contemporaneous memorandum or in his subsequent five page declaration to this Court, this Court has the option of seeking additional clarification from Mr. Newby. *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, No. V 14-1220 (RC), 2016 WL 695982 at *6 (D.D.C. Feb. 19, 2016) (quoting *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) ("[T]here is nothing improper in receiving declarations that merely illuminate[] reasons obscured by implicit in the administrative record."); *see also Alpharma, Inc.*

[4] Defendants do not address *Allied-Signal* in their brief at all.

v. Leavitt 460 F.3d 1 (D.C. Cir. 2006). Given the closeness of the upcoming election and the multitude of applications that have been submitted with the modified instructions in place, this would be the most prudent action for the Court to take.

However, if this Court determines that based on all of the evidence in the Administrative Record, Mr. Newby could not have rationally come to the conclusion that he did, vacatur is certainly not appropriate. The Department claims that, at most, Mr. Newby applied the wrong standard and could come to the same conclusion he did in this case, although the Department does not explain what has prevented the EAC from taking this action over the past seven months on their own. DOJ Br. at 9 ("That is not to say the EAC cannot reconsider the states' requests under the statutory standard, as Federal Defendants have explained previously."). In this situation, setting aside the agency action is unnecessary and unwarranted. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see also See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009); *United States Sugar Corp. v. EPA*, D.C. Cir. No. 11-1108 (July 29, 2016); *See Michigan v. EPA*, 576 U.S. ___ (Nos. 14-46, 14-47, and 14-49, June 29, 2015), on remand *White Stallion Energy Center LLC. v. EPA*, D.C. Cir. No. 12-1100 (Dec. 15, 2015). Accordingly, vacatur cannot be justified.

CONCLUSION

For all of the reasons stated herein, Plaintiffs' Cross-Motion for Summary Judgment should be DENIED; Defendants' Partial Motion for Summary Judgment should be DENIED; Kansas's Cross-Motion for Summary Judgment should be GRANTED.

Dated: September 2, 2016 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: September 2, 2016

/s/ John Miano
John Miano