

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs-Appellants,

v.

BRIAN D. NEWBY, in his capacity as the  
Executive Director of the United States  
Election Assistance Commission, et al.,

Defendants-Appellees.

No. 16-5196

**RESPONSE OF FEDERAL APPELLEES TO MOTION TO EXPEDITE**

The government takes no position on plaintiffs' motion to expedite. To assist the Court in setting a schedule with appropriate sequencing of briefs, we provide a brief summary of the case and of the positions that the parties took in district court. As discussed below, the government acknowledged that plaintiffs had a likelihood of success on some of their claims, but disagreed with some of plaintiffs' arguments.

1. The National Voter Registration Act mandates that all covered States allow voters to register to vote in federal elections "by mail

application.” 52 U.S.C. § 20503(a)(2). In 2002, Congress established the U.S. Election Assistance Commission as an “independent entity” consisting of four members appointed by the President with the advice and consent of the Senate. *See id.* §§ 20921, 20923(a)(1). Congress transferred to the new Commission the responsibility for implementing the portions of the National Voter Registration Act that are relevant here. *Id.* § 21132.

The statute requires the Commission, “in consultation with the chief election officers of the States,” to “develop a mail voter registration application form for elections for Federal office,” and provides that “[e]ach State shall accept and use the mail voter registration application form prescribed by the [Commission].” 52 U.S.C. § 20505(a)(1), 20508(a)(2). States must “ensure that any eligible applicant” who timely submits the form “is registered to vote.” *Id.* § 20507(a)(1).

The Commission is represented in litigation by the Department of Justice. *See* 28 U.S.C. § 516.

2. Until the events described below, the federal voter registration form had never required applicants to submit documentary proof of citizenship. The present dispute arises out of requests by Alabama, Georgia, and Kansas to add requirements of documentary proof of

citizenship to their state-specific instructions for the federal voting forms. The Commission's Executive Director approved the requests on January 29, 2016, and directed that the state-specific instructions for those States be altered on the Commission's web site. *See* Newby Decl. ¶ 49 (Dkt. No. 28-2).

3. Plaintiffs are nonprofit organizations who seek to enhance voter participation, and individuals who seek to register to vote in Kansas. They brought this suit to challenge, on several grounds, the Executive Director's action approving the state requests. The Secretary of State of Kansas and the Public Interest Legal Foundation have intervened to support the Executive Director's approval of the requests of the three States.

In response to plaintiffs' motion for a temporary restraining order or preliminary injunction against the implementation of the change in the instructions regarding documentation of citizenship for the federal voting form in the three States, the government informed the district court that it could not defend the Executive Director's approval on the merits, and therefore consented to entry of a preliminary injunction. *See* Defs.' Response to Pls.' Mot. for Temporary Restraining Order and Preliminary Injunction 10-12 (Dkt. No. 28). The government explained that the

National Voter Registration Act provides that the Federal Form “may require only such identifying information . . . and other information . . . *as is necessary* to enable the [State] to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508(b)(1) (emphasis added). In construing that provision, the Supreme Court has rejected a “reading [that] would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013).

The government stated that Executive Director did not apply that standard when he issued the approval challenged here. The Executive Director stated that, with respect to his approval here of the States’ request for requiring documentation of citizenship for the federal form in those States, his decision was premised on his view “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,” Newby Decl. ¶ 25 (Dkt. No. 28-2), without regard to whether they are necessary to enable the State to assess the eligibility of the applicant and to administer voter registration. The Director thus concluded that Kansas’s

“examples of the need for these changes are irrelevant to my analysis” because inclusion of “state-by-state instructions” on the Federal Form “implies the role and rights of the states to set the framework for acceptance and completion of the form.” Brian D. Newby, *Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas* 4-5 (Feb. 1, 2016) (Dkt. No. 28-1) (internal memorandum prepared contemporaneously with decision). Accordingly, the government acknowledged that plaintiffs were likely to succeed on their arguments that the Executive Director had not determined that the States’ documentary proof-of-citizenship requirements met the statutory standard and that the Executive Director had not adequately explained the grounds for his decision. *See* Defs.’ Supp. Br. Regarding Pls.’ Mot. for a Preliminary Injunction 2-4 (Dkt. No. 48).

In its filings in district court, the government urged, however, that plaintiffs had not established a likelihood of success on the merits of certain other claims, namely, that the Commission lacked authority to delegate some of its duties to its Executive Director, and that the challenged decision could only be made after notice and comment. *See* Defs.’ Supp. Br. Regarding Pls.’ Mot. for a Preliminary Injunction 7-10 (Dkt. No. 48).

4. In February 2016, the district court denied the motion for a temporary restraining order, but reserved judgment on the motion for a preliminary injunction. Mem. Order (Dkt. No. 34). On June 26, 2016, the district court denied the motion for a preliminary injunction. Mem. Op. (Dkt. No. 92). Without reaching the merits of plaintiffs' claims, the court concluded that plaintiffs had not established that they would suffer irreparable injury in the absence of injunctive relief. *Id.* at 20-23. The court also concluded that injunctive relief would be inappropriate at this stage of the litigation. *Id.* at 23-25.

Plaintiffs filed a notice of appeal on July 1, 2016, and filed the pending motion on July 7, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 2016, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. I also caused four paper copies of the foregoing to be delivered by hand to the Court.

*s/Daniel Tenny*

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Daniel Tenny