UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*, Plaintiffs, v. BRIAN NEWBY, *et al.*, Defendants.	Civil Action No. 1:16-236 (RJL)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The United States consents to plaintiffs' request for entry of a preliminary injunction. On January 29, 2016, the Executive Director of the U.S. Election Assistance Commission ("Commission") approved the requests of three states—Alabama, Georgia, and Kansas—to modify their state-specific instructions on the National Mail Voter Registration Form ("Federal Form"). However, in deciding to include the states' documentary proof of citizenship requirements on the Federal Form, the Executive Director did not make the determination that this information was "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." 52 U.S.C. § 20508. Because the National Voter Registration Act permits only information satisfying this "necessity" requirement to be included on the Federal Form, the Executive Director's decisions are not consistent with the statute. While plaintiffs have made a number of other arguments, the Court need not reach them in order to issue an injunction. The United States requests that the decisions be enjoined on this narrow ground.

BACKGROUND

I. NATIONAL VOTER REGISTRATION ACT AND HELP AMERICA VOTE ACT

The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, Cl. 1. "The Clause's substantive scope is broad. 'Times, Places, and Manner,' [the Supreme Court has] written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here . . . regulations relating to 'registration.'" *Arizona v. Inter*

Tribal Council, Inc., 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Exercising its authority under the Elections Clause, Congress enacted the National Voter Registration Act ("NVRA"), Pub. L. No. 103-31, 107 Stat. 77, in 1993 in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 52 U.S.C. § 20501(a)(3).[1] The statute accordingly identifies as its objectives: "increas[ing] the number of eligible citizens who register to vote in elections for Federal office"; "enhanc[ing] the participation of eligible citizens as voters in elections for Federal office"; "protect[ing] the integrity of the electoral process"; and "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C.A § 20501(b). The NVRA applies with respect to elections for Federal office in 44 states and the District of Columbia. Six states are exempt from the NVRA by virtue of maintaining election day registration or no registration requirement for federal elections. 52 U.S.C.A §§ 20502, 20503; Statistical Highlights of Fed. Election Comm'n Rep. to Congress (1995-1996), http://www.fec.gov/votregis/nvraintr.htm.

The NVRA mandates, among other things, that all covered States allow voters to register to vote in Federal elections "by mail application." 52 U.S.C.A § 20503(a)(2). The statute directs that the Commission,[2] "in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office" and provides that

[1] The NVRA was previously codified at 42 U.S.C. 1973gg *et seq*. The Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. 20901 *et seq*., discussed below, was previously codified at 42 U.S.C. 15301 *et seq*. In 2014, the relevant provisions were subject to an editorial recodification that made no substantive changes.

[2] Pursuant to HAVA, the Commission assumed all of the functions originally assigned by the NVRA to the Federal Election Commission. 52 U.S.C. § 21132.

"[e]ach State shall accept and use the mail voter registration application form prescribed by the [Commission]." 52 U.S.C.A §§ 20505(a)(1), 20508(a)(2). States must also make the form developed by the Commission (the "Federal Form"), or an "equivalent" form, available for completion at certain State agencies designated as voter registration agencies. 52 U.S.C. §§ 20506(a)(4)(A), 20506(a)(6)(A). States must also "ensure that any eligible applicant [who timely submits the form] is registered to vote." 52 U.S.C. § 20507(a)(1).

Congress explicitly limited the information the Commission may require applicants to furnish on the Federal Form. In particular, the form "may require *only* such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *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." 52 U.S.C. § 20508(b)(1) (emphasis added). The Federal Form must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)"; "contains an attestation that the applicant meets each such requirement"; and "requires the signature of the applicant, under penalty of perjury." 52 U.S.C. § 20508(b)(2). Additionally, pursuant to Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666, the Federal Form must include two specific questions, along with check boxes, for the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 52 U.S.C. § 21083(b)(4)(A). It was Congress' intent "that such questions should be clearly and conspicuously stated on the front of the registration form." H.R. Rep. No. 107-730, § 303, at 76 (2002) (Conf. Rep.).

When drafting the NVRA, Congress considered and specifically rejected language that would have allowed States to require "presentation of documentation relating to citizenship of an

applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). In rejecting the Senate version of the NVRA bill that included this language, the conference committee determined that such a requirement was "*not necessary* or consistent with the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs[.]" *Id.*

II. COMMISSION REGULATIONS

A. FEDERAL FORM

Pursuant to its rulemaking authority, the Commission has developed a Federal Form consisting of three basic components: the application, general instructions, and State-specific instructions. *See* 11 C.F.R. § 9428.3(a); *see also* National Mail Voter Registration Form (updated Feb. 1, 2016), Compl. Ex. 14, ECF No. 1-15 (also available on the Commission's website). The application portion of the Federal Form "[s]pecif[ies] each eligibility requirement," including "U.S. Citizenship," which is "a universal eligibility requirement." 11 C.F.R. § 9428.4(b)(1).

To complete the form, an applicant must sign, under penalty of perjury, an "attestation . . . that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements." 11 C.F.R. §§ 9428.4(b)(2), (3). For that reason, the State-specific instructions are integral to the Federal Form. *See* Compl. Ex. 14, Application Instructions, Box 9 ("Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that: (1) you meet your State's requirements . . ."). *See also* Final Rules, 59 Fed. Reg. 32311, 32312 (June 23, 1994) ("The final rules indicate which items are only requested (optional) and which are required only by certain states and under certain circumstances (such as the declaration of party affiliation in order to participate in

partisan nominating procedures in certain states). The remaining items, by inference, are considered to be required for registration in all covered states.").

B. PROCESSES FOR CHANGING THE FEDERAL FORM

The Commission's predecessor, the Federal Election Commission ("FEC"), created the Federal Form after notice and comment. Final Rules, 59 Fed. Reg. 32311 (June 23, 1994). Subsequent changes to the general instructions or the application itself have been made by vote of the FEC or the Commission at a public hearing. The process for changing the state-specific instructions has varied. From 1994-2000, changes to the state-specific instructions were made by vote of the FEC. In 2000, the FEC delegated responsibility for changes to the state-specific instructions to the staff of the Office of Election Administration. After responsibility for the Federal Form was transferred to the Commission, staff continued to be responsible for changes to the state-specific instructions. On several occasions, after the Executive Director denied requests from states for changes to state-specific instructions, including state proof of citizenship instructions, the Commission agreed to reconsider the decision. But on each occasion, the Commission took no further action after deadlocking by a 2-2 vote. *See, e.g.*, Compl. Ex. 4, ECF No. 1-5. As a result, those changes were not accepted for inclusion on the Federal Form. Only once have changes to the state-specific instructions been subject to formal Federal Register public notice and comment. In 2013, after receiving a court order in *Kobach v. U.S. Election Assistance Commission*, No. 5:13-4095 (D. Kan. Dec. 13, 2013), to issue a decision on behalf of the agency, at a time when the Commission had no seated commissioners or an Executive Director or General Counsel, the acting Executive Director elected to seek notice and comment

before deciding requests from Arizona and Kansas. *See* Compl. Ex. 6, ECF No. 1-17; 78 Fed. Reg. 77666 (Dec. 24, 2013).[3]

C. JANUARY 29, 2016 DECISIONS

Prior to February 1, 2016, the Federal Form's state-specific instructions informed registrants, *inter alia*:

- To register in Alabama, "[y]our social security number is *requested* (by authority of the Alabama Supreme Court, 17-4-122)," and "you must: be a citizen of the United States . . .";
- "To register in Kansas you must: be a citizen of the United States"; and
- "To register in Georgia you must: be a citizen of the United States[.]"

See Compl. Ex. 1, ECF No. 1-2 (modified Nov. 10, 2010) (emphasis added).

In three letters dated January 29, 2016, the Commission's Executive Director, Brian Newby, approved requests from Alabama, Georgia, and Kansas to add those states' statutory requirements of documentary proof of citizenship to the state-specific instructions on the Federal Form. *See* Compl. Exs. 13, 17, 18, ECF Nos. 1-14, 1-18 & ECF No. 2 (Newby letters); *see also* Compl. Exs. 9, 15, 16, ECF Nos. 1-10, 1-16, 1-17 (state requests). The Executive Director's letters articulated no rationale for the decisions. However, contemporaneous with the decisions, the Executive Director drafted a memorandum explaining his actions. *See* Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas, Feb. 1, 2016 (attached as Exhibit 1); Declaration of Brian Newby ¶¶ 25, 45, 52 (attached as Exhibit 2) (describing

[3] The acting Executive Director's decision to seek notice and public comment in that instance did not change the fundamental nature of the agency's decisionmaking. As the Tenth Circuit recognized, "The Executive Director's decision was an informal adjudication carried out pursuant to 5 U.S.C. § 555." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014); *id.* at 1194 (finding the acting Executive Director's decision at that time to be "procedurally sound").

completion of Feb. 1, 2016 memorandum). In his memorandum, the Executive Director concluded that Kansas' "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." *Id.* at 4-5; *see also* Newby Decl. ¶ 25 ("I began developing a point of 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."). For that reason, he stated that "State-specific instructional changes are ministerial, and, thus, routine." *Id.* at 2; *see also* Newby Decl. ¶ 34 ("[T]he review should focus on the acceptance of state-specific instructions[.]").[4]

On February 1, 2016, an updated version of the Federal Form was posted on the Commission's website reflecting the approved changes:

- "To register in Alabama you must: be a citizen of the United States. The county board of registrars shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship."

- "To register in Georgia you must: be a citizen of the United States; . . . [and] be found eligible to vote by supplying satisfactory evidence of U.S. citizenship."

- "To register in Kansas you must: be a citizen of the United States; . . . [and] have provided a document, or copy thereof, demonstrating United States citizenship within 90 days of filing the application with the secretary of state or applicable county election officer; . . . acceptable documents demonstrating United States citizenship as required by K.S.A. § 25-2309(l) include [specifying thirteen options]."

Compl. Ex. 14, ECF No. 1-15 (modified Feb. 1, 2016).

[4] The Executive Director's declaration explains aspects of his reasoning process in more detail than his February 1, 2016 memorandum, but it does not aver that he made any determination pursuant to the NVRA's "necessary" requirement. *See generally* Newby Decl.

STANDARD OF REVIEW

A preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *Minney v. U.S. Office of Personnel Mgmt.*, _ F. Supp. 3d _, 2015 WL 5442403, at *3 (D.D.C. Sept. 15, 2015).

ARGUMENT

The United States concedes that, because the challenged actions were not made on the basis of the NVRA's "necessity" criterion, defendants cannot succeed on the merits. Because the government consents to entry of a preliminary injunction, the Court need not weigh all of the other injunction factors. *Cf. Phillips v. Mabus*, 894 F. Supp. 2d 71, 76 (D.D.C. 2012) (noting that "plaintiffs and federal defendants agreed and stipulated to a consent preliminary injunction"); *United States v. Am. Honda Motor Co., Inc.*, 143 F.R.D. 1, 5 (D.D.C. 1992) ("A preliminary injunction was simultaneously filed by consent, approved by the Court and became immediately effective."). Nor does the Court need to reach subsidiary questions raised by plaintiffs, including whether such decisions must be made after notice and comment or whether the Executive Director lacked authority to make the decisions.

I. THE JANUARY 29, 2016 DECISIONS CANNOT BE UPHELD ON THE MERITS.

A. ADMINISTRATIVE PROCEDURE ACT STANDARD

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, provides for courts to "hold unlawful and set aside agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right," *id.* § 706(2)(C). Under the APA's "arbitrary or capricious" standard, the Court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). An agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "[A]n agency cannot 'fail[] to consider an important aspect of the problem' or 'offer[] an explanation for its decision that runs counter to the evidence' before it," *District Hosp. Partners, L.P. v. Sebelius*, 973 F. Supp. 2d 1, 57 (D.D.C. 2014) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). However, a decision that is not fully explained may be upheld "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The "arbitrary or capricious" standard is "narrow . . . as courts defer to the agency's expertise." *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 138 (D.D.C. 2012) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). The court "is not to substitute its judgment for that of the agency." *Id.*

The Court reviews each of the disputed rulemakings based on the administrative record that was before the agency at the time of rulemaking. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (Court "should have before it neither more nor less information than did the agency when it made its decision"). Thus, "[i]n evaluating each rulemaking, the Court must exclude all information that pertains to events after that rulemaking, including information in the administrative records for subsequent rulemakings." *Banner Health v. Burwell*, No. 10-cv-1638, 2015 WL 5164965, at *25 (D.D.C. Sept. 2, 2015); *see also id.* at *37

(Court uses "the judicial time machine" to focus on the record that was before the agency at the time of the rulemaking).

B. THE JANUARY 29, 2016 DECISIONS WERE NOT MADE ON THE BASIS OF THE NVRA'S "NECESSITY" CRITERION.

The NVRA states 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 *Inter Tribal Council*, the Supreme Court rejected "Arizona's 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." 133 S. Ct. at 2256. Instead, the Court concluded that the NVRA's necessity clause "acts as . . . a ceiling . . . with respect to the contents of the Federal Form." *Id.* at 2259. The Court held that in addition to the "may require only" language, "other provisions of the Act indicate that" the Commission "is statutorily required" to make a necessity determination before adding information to the form. 133 S. Ct. at 2259.

In upholding the Commission's January 17, 2014, decision denying requests by Arizona, Kansas, and Georgia to incorporate documentary proof-of-citizenship requirements into the applicable state-specific instructions on the Federal Form, *see* Compl. Ex. 6, ECF No. 1-7, the Tenth Circuit interpreted *Inter Tribal Council* to require it to reject Kansas' argument that the "EAC has a nondiscretionary duty to approve state requests to include state voter qualifications on the Federal Form," explaining that the Supreme Court's decision "would make no sense if the EAC's duty was nondiscretionary." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1194-96 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (June 29, 2015). The court also held that the Commission's January 17, 2014, decision fully evaluated the extensive

administrative record (including information provided by the states in support of their requests), rationally connected that evidence to the conclusions drawn, and "was fully consistent with the EAC's own regulations and prior reasonable interpretation of the NVRA in its 2006 response to Arizona," which similarly denied that state's request for inclusion of proof-of-citizenship instructions on the Federal Form. *Id,* at 1197.

In making his January 29, 2016 decisions accepting the states' requests to include proof-of-citizenship instructions on the Federal Form, the Commission's current Executive Director interpreted the NVRA in a way foreclosed by *Inter Tribal Council* and *Kobach*. He expressly disclaimed any analysis of whether the additional information was "necessary" for the eligibility determination. *See* Feb. 1, 2016 Memorandum at 4. Instead, he stated that all state requirements consistent with state law should be included in the state-level instructions of the Federal Form. *See id.*; *see also* Newby Decl. ¶ 25 ("I began developing a point of 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."). But this view is contrary to governing law.

As the United States stated in opposing certiorari in *Kobach,*

> Indeed, it is not only that the EAC is *authorized* to make an independent necessity determination; the EAC would *violate* the NVRA were it to incorporate a state-law documentation requirement into the Federal Form that the Commission found was unnecessary to verify voter eligibility. The NVRA states that the Commission "may require *only*" information that is necessary, 52 U.S.C.A. 20508(b)(1) (emphasis added), which acts as "a ceiling" with respect to the contents of the Federal Form, *ITCA,* 133 S. Ct. at 2259. Were the Commission to automatically adopt any state-law registration requirement, no matter how unnecessary and onerous, it would violate that statutory command, and it would undermine the basic purpose of the NVRA to eliminate "unfair registration laws and procedures," 52 U.S.C.A. 20501(a)(3).

Brief for the Federal Respondents in Opposition to Petition for Certiorari, *Kobach v. U.S. Election Assistance Comm'n*, No. 14-1164 (May 26, 2015) (emphasis original).

Accordingly, because the Executive Director did not determine that the states' documentation requirements were necessary to verify voter eligibility, the decisions cannot pass muster under the APA. The Executive Director did not "consider[] the relevant factors," *Marsh*, 490 U.S. at 378, or "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

II. THE COURT SHOULD NOT REACH PLAINTIFFS' OTHER ARGUMENTS

The Court need not reach plaintiffs' arguments based on Counts I-III of their complaint. Counts I and II claim that only the commissioners had authority to make the decisions at issue here. Count II also alleges that an internal policy about *ex parte* communications with regulated entities was violated. Count III alleges that the decisions at issue here should have been preceded by notice and a comment period. Determination of likelihood of success on the merits of these questions would benefit from review of a complete administrative record. More importantly, it is unnecessary to resolve these questions because they would not provide a basis for any more relief than the United States has already conceded is appropriate.

In the absence of a complete administrative record, it is most appropriate to rule on the narrowest grounds necessary to reach the undisputed result. *See Pearson v. Shalala*, 130 F. Supp. 2d 105, 112 n.21 (D.D.C. 2001) ("Plaintiffs contend that the FDA also violated [a prior court decision in another way], but the Court need not reach that issue for purposes of ruling on Plaintiffs' Motion for a Preliminary Injunction."); *cf. U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 125, 126 (D.D.C. 2015) ("The need for narrow tailoring, moreover, is particularly important in the context of a preliminary injunction or temporary restraining order, where the court has yet finally to resolve the merits of the dispute.").

CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' motion for a preliminary injunction, on the ground that the January 29, 2016 decisions did not determine that the approved information was "necessary" to determine state eligibility requirements or articulate reasons pursuant to that statutory criterion.

Dated: February 22, 2016

Respectfully submitted,

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