IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE

Plaintiffs,

vs.

BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and

THE UNITED STATES ELECTION ASSISTANCE COMMISSION

Defendants.

Case No. 16-cv-236 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

On the eve of presidential primaries with voter registration deadlines fast approaching, Mr. Brian Newby, the Executive Director ("Executive Director") of the U.S. Election Assistance Commission ("EAC" or "Commission"), has unlawfully modified the national uniform mail-in voter registration form ("Federal Form") prescribed by the National Voter Registration Act of 1993, 52 U.S.C. § 20501 *et seq.* ("NVRA"). On January 29, 2016, the Executive Director unilaterally granted requests by Alabama, Georgia and Kansas (collectively, the "States") to modify the Federal Form's instructions to require voter registration applicants in those States to submit documentary proof of U.S. citizenship. By doing so, the Executive Director acted beyond his authority and contrary to longstanding Commission policy and precedent that documentary proof of citizenship was not "necessary for States to assess the eligibility" of a voter registration application submitted on the Federal Form. As a result of the Executive Director's actions, and for the first time since Congress created the Federal Form, documentary proof of citizenship is now required to register to vote in *federal* elections in Alabama, Georgia, and Kansas. The Executive Director immediately implemented these changes to the Federal Form on the EAC's website. Unless the Court enjoins the Executive Director's actions, thousands of voters may be disenfranchised.

The Executive Director's actions violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596, 706, in at least *five* respects, any of which individually is grounds for vacating the Executive Director's actions:

First, the Executive Director acted contrary to law when he unilaterally changed longstanding EAC policy without the approval of three Commissioners as required by the Help America Vote Act ("HAVA"), 52 U.S.C. § 20928.

Second, The Executive Director acted contrary to the EAC's *own* internal policy and governance guidelines by issuing final policy determinations that altered longstanding precedent on matters that the Commission had expressly reserved to itself through formal Commission votes. On information and belief, the Executive Director also violated EAC policy by engaging in prohibited *ex parte* communications with officials from the States, irrevocably tainting the decision making process over these important policy determinations. The Executive Director's violation of the EAC's own internal governance guidelines also render his actions *ultra vires.*

Third, the Executive Director did not provide formal notice and opportunity to comment or present the States' requests to the Commissioners for their consideration, procedures which are required by HAVA and the EAC's own internal policies. As those are the administrative procedures that the EAC utilized in establishing and enforcing its original policy, the agency is required to employ those same mechanisms to make substantive changes to that policy. Instead, the Executive Director unilaterally granted the requests himself, which is plainly insufficient to create a new rule governing the Federal Form.

Fourth, the Executive Director did not explain the grounds for this sudden reversal in EAC policy and precedent. This is a telling omission because the NVRA permits the EAC to require only information that it concludes is "necessary," and the EAC reaffirmed its conclusion that documentary proof was *unnecessary* just two years ago in a well-reasoned 46-page opinion. The failure to provide any contemporaneous rationale for the dramatic change in EAC policy and precedent renders the Executive Director's decision arbitrary and capricious on its face.

Finally, the Executive Director's actions exceeded the scope of the EAC's statutory authority. The NVRA prescribes the content of the Federal Form, and precludes any documentary proof of U.S. citizenship requirement absent a showing of necessity. *See Arizona*

v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2259 (2013) ("*ITCA*"). By adding a documentary proof of citizenship requirement beyond the specific substantive voter registration requirements set forth in the Federal Form, without concluding such information was "necessary," the Executive Director acted beyond the EAC's statutory authority.

The Executive Director's unlawful actions are the latest chapter in a continuing campaign by certain states over the past decade to require that voter registration applicants present documentary proof of U.S. citizenship when using the Federal Form. Beginning with Arizona in 2006, several States have requested—multiple times in some cases, like Kansas and Arizona—that the EAC amend the Federal Form to require documentary proof of citizenship. The EAC has repeatedly denied those requests. Arizona's refusal to accept voter registration applications on the Federal Form without documentary proof culminated in the U.S. Supreme Court's decision in *ITCA*, 133 S. Ct. 2247, which held that States must "accept and use" the Federal Form as implemented by the EAC. Arizona, Kansas and Georgia thereafter submitted new requests to require documentary proof of citizenship, which the EAC's prior Executive Director rejected in 2014, based on existing EAC policy, in a formal decision finding that documentary proof of citizenship requirements were inconsistent with the purposes of the NVRA, and were not shown to be necessary by any evidence provided by the States. The U.S. Court of Appeals for the Tenth Circuit affirmed the prior Executive Director's decision and rejected Kansas and Arizona's subsequent APA challenge (Georgia did not challenge the EAC's decision). *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

It is against the backdrop of this failed campaign by these states that Mr. Brian Newby assumed office as the EAC's Executive Director in November 2015. Mr. Newby is a former

Kansas election official appointed by the Kansas Secretary of State. As a Kansas official, Mr. Newby publicly supported Kansas's efforts to achieve documentary proof of citizenship requirements, including by filing an affidavit before the EAC in support of Kansas's 2014 request to modify the Federal Form. Just two weeks after Newby was appointed as the EAC's Executive Director, Kansas submitted its *fifth* request to amend the Federal Form. Tellingly, while Mr. Newby failed to provide formal public notice and an opportunity to comment before changing the EAC's policy, he entertained several *ex parte* communications from the Kansas Secretary of State, along with similar communications with officials from Alabama and Georgia, before he approved the States' requests.

The timing of the Executive Director's decision jeopardizes the integrity of several upcoming federal elections. Alabama's primary election will be held on March 1, 2016, and the deadline for registration just passed on February 15, 2016. Kansas's caucuses will be held on March 5, 2016, with registration available up to and including the day of the caucus for one of the two major political parties. The voter registration deadline for Georgia's March 1 presidential primary election has already passed, but the registration deadline for its May 24 general federal and state primary election is April 26, 2016. The Executive Director's decisions directly impact these upcoming elections.

The Executive Director's decision will substantially burden the Plaintiffs' ability to conduct voter registration drives, and will deprive eligible voters of the right to vote in federal primary and general elections. Without a temporary restraining order and preliminary injunction, the Executive Director's unlawful actions will cause substantial, immediate and irreparable harm to the Plaintiffs and voters in Alabama, Georgia and Kansas. The Executive Director's unilateral modifications to the Federal Form should be immediately enjoined.

I. BACKGROUND

A. Origins of the Federal Form

Congress enacted the National Voter Registration Act principally to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1). By providing for a single registration form that "[e]ach State shall accept and use," *id.* § 20505(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements. *See ITCA*, 133 S. Ct. at 2255. In passing the NVRA, Congress also recognized the need to protect the "integrity of the electoral process." 52 U.S.C. § 20501(b)(3). Both Houses of Congress debated and voted on the specific question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, striking a balance among the statute's purposes, and ultimately rejected such a proposal. *See* S. Rep. No. 103-6 (1993); 139 Cong. Rec. 5098 (1993); H.R. Rep. No. 103-66, at 23 (1993) ("Conf. Rep."); 139 Cong. Rec. 9231-32 (1993). In particular, the final Conference Committee Report concluded that it was "not necessary or consistent with the purposes of this Act" and "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the [Act's] mail registration program." Conf. Rep. at 23-24 (1993).

The Federal Form was also intended to benefit voter registration organizations, such as Plaintiffs the League, Project Vote and others, to streamline the voter registration process and mitigate varying and confusing state registration laws. *See* 52 U.S.C. § 20505(b) (mandating that state officials make the Federal Form available to "governmental and private entities, with particular emphasis on making them available for organized voter registration programs"). Underlying these efforts was the understanding that states could not unilaterally change the

Federal Form. Rather, the development and implementation of the Federal Form was—and remains—a responsibility delegated exclusively to a federal agency.

The NVRA mandated that the Federal Form could be utilized by the citizens of any state covered by the NVRA to register for federal elections.[1] *Id.* §20505. The EAC's predecessor agency, the Federal Election Commission ("FEC"),[2] developed the initial Federal Form through an extensive notice and comment rulemaking process. *See* 58 Fed. Reg. 51,132 (Sept. 30, 1993) (Advanced Notice of Proposed Rulemaking); 59 Fed. Reg. 11,211 (Mar. 10, 1994) (Notice of Proposed Rulemaking); 59 Fed. Reg. 32,311 (June 23, 1994) (Final Rules).

The Federal Form is formatted as a postcard that the applicant can simply fill out and mail in. The contents of the Form are governed by 11 C.F.R. § 9428.4(b)(1)-(3), which specifies the precise information that the Federal Form can request from an applicant. Pursuant to those duly enacted regulations, the Federal Form has a number of safeguards to prevent non-citizen registration, including an attestation clause that sets out the requirements for voter eligibility, requiring registrants to confirm U.S. citizenship under penalty of perjury, and imposing criminal penalties on persons who knowingly and willfully engage in fraudulent registration practices. Applicants must check a box at the top of the form to affirm U.S. citizenship, and are clearly directed at several points in the instructions and on the postcard itself not to complete the form if they are not citizens. The Federal Form further requires the applicant to sign the bottom of the form and swear or affirm under penalty of perjury that he or

[1] The NVRA applies to 44 states. Six states are exempt because they have either no voter registration requirement or continuously offered same day voter registration at the polls since 1994. *See* 52 USC § 20503.

[2] When the NVRA was originally passed, the agency responsible for implementing the NVRA was the FEC. HAVA later created the EAC and transferred to the EAC the responsibility of prescribing regulations necessary for a mail voter registration form for elections for Federal office. *See* 52 U.S.C. §§ 20508(a), 20921, 20929.

she is a U.S. citizen and further that, "[i]f I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States."

The Federal Form was adopted without any requirement for documentary proof of citizenship. *See* 11 C.F.R. § 9428.4; Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). The FEC did not expressly address documentary proof of citizenship during the course of the rulemaking; no state suggested that documentary proof might be "necessary" under the NVRA. Addressing whether to require information regarding naturalization, the agency determined that "[t]he issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form." 59 Fed. Reg. 32, 316 (June 23, 1994).

To ensure that applicants "receiv[e] the information needed to correctly complete the [Federal Form] and attest their eligibility," 59 Fed. Reg. 32,317, the Form includes instructions as to each state's voter eligibility requirements and instructions for filling out the fields on the form. *See* 11 C.F.R. § 9428.4. Even prior to the Executive Director's action in this case, a U.S. citizenship requirement was additionally listed in the state-specific instructions for several states, including Alabama, Arizona, Georgia and Kansas. *See* Schmidt Dec. Ex. 1. The instructions did not mention documentary proof of citizenship.

B. Arizona's EAC Requests and the Supreme Court's *ITCA* Decision

In 2006, Arizona requested that the EAC modify Arizona's state-specific instructions to the Federal Form to reflect new state legislation that required documentary proof of citizenship for voter registration. On March 6, 2006, after consideration by a quorum of Commissioners, the Executive Director denied the request on behalf of the agency, noting that the EAC had concluded that inclusion of a documentary proof requirement would violate the NVRA and that

Arizona must "accept and use" the Federal Form without imposing additional burdens. Nonetheless, Arizona continued to reject Federal Form applicants who did not present proof of citizenship, and submitted a request for reconsideration. In July 2006, the EAC again considered the question and voted on whether to reverse course and modify the Federal Form pursuant to Arizona's request. The measure failed by a 2-2 vote, having not received approval of three members of the EAC as required by law for the EAC to take any action. *See* Schmidt Dec. Ex. 2; 52 U.S.C. § 20928. As Commissioner Ray Martinez III explained, the EAC had "established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from [the FEC]." *See* Schmidt Dec. Ex. 3. Under this precedent, the "'language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls.'" *Id.*

Rather than challenge the EAC's rejection of its request under the APA, Arizona continued to require proof of citizenship from Federal Form applicants, prompting the lawsuit that resulted in the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc*. ("*ITCA*"). 133 S. Ct. 2247 (2013). In *ITCA*, the Supreme Court held that Arizona's documentary proof of citizenship requirement was preempted by the NVRA with respect to applicants using the Federal Form. *Id*. The decision noted that the NVRA required the EAC to include in the form "only such identifying information . . . as is *necessary* to enable the appropriate State official to assess the eligibility of the applicant," 52 U.S.C. § 20508(b)(1) (emphasis added). The Supreme Court agreed that the NVRA requires all states to "accept and use" the "Federal Form," which, as developed and approved by the EAC, did not require documentary proof of citizenship. As the Court explained, "[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." *Id.* at 2255. The *ITCA* Court further found that the NVRA's "accept and use" requirement is a constitutional exercise of Congress' power under the Elections Clause, and preempts state regulations governing the "Times, Places and Manner" of holding federal elections. *Id.* at 2253. Accordingly, the only route for any state to add a documentary proof of citizenship requirement to Federal Form applicants would be to request that the EAC alter the Federal Form and, if necessary, to "challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act." *Id*. at 2259.

C. The Tenth Circuit Holds that the EAC's Denial of States' Requests was Permissible

Just two days after the U.S. Supreme Court decision in *ITCA*, Arizona once again renewed its request that the EAC modify the Federal Form, and Kansas renewed a similar request it had first made in 2012. Georgia submitted a request of its own a month later. The Executive Director respectfully deferred all three requests because the EAC lacked a quorum of Commissioners to consider the matter. In an effort to compel EAC action, Arizona and Kansas[3] brought suit against the agency. The district court granted motions to intervene in that action brought by the League, Project Vote, Inc., and others. *See Kobach v. U.S. Election Assistance Comm'n*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *5 (D. Kan. Dec. 12, 2013). Despite the absence of a quorum required to consider changes in agency policy, the district court ordered the EAC to issue a final agency action responding to the requests.

On January 17, 2014, after a public notice and comment period, the Executive Director of the EAC issued a thorough 46-page decision denying the pending requests of Arizona, Georgia and Kansas. Consistent with all previous determinations since its inception, the EAC found that the states had failed to demonstrate that documentary proof of citizenship was "necessary"

[3] This suit was brought by Kris Kobach and Ken Bennett, secretaries of state of Kansas and Arizona.

within the meaning of the NVRA. Considering the extensive record submitted in response to its request for public comment, the Executive Director determined that Congress had rejected a similar requirement when deliberating over the NVRA; that granting the States' requests would contravene other EAC rules; that the States' requests were inconsistent with previous EAC determinations; and that the requests would undermine the purposes of the NVRA by hindering voter registration and thwarting organized registration efforts. *See* Schmidt Dec. Ex. 4 at 20-42.

Kansas and Arizona challenged the EAC's action under the APA; Georgia declined to do so. Ultimately the U.S. Court of Appeals for the Tenth Circuit sustained the EAC's decision, ruling that the EAC was not obligated under either the NVRA or the Constitution to allow the requested modifications to the Federal Form. *See Kobach*, 772 F.3d 1183. The Tenth Circuit held that "permitting such state alterations threaten[s] to eviscerate the [Federal] Form's purpose of 'increasing the number of eligible citizens who register to vote.'" *Id.* at 1195 (quoting *ITCA*, 133 S. Ct. at 2256). Unless the information is "necessary to enforce the States' voter qualifications, the Federal Form must remain free of the State's "procedural hurdles," as Congress intended. *ITCA*, 133 S. Ct. at 2255. Noting that the EAC had previously rejected the States' request to include documentary proof of citizenship, the court determined that "had the EAC accepted the states' requests, it would have risked arbitrariness, because Arizona and Kansas offered little evidence that was not already offered in Arizona's 2005 request, which the EAC rejected. Changing course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision." *See* 772 F.3d at 1198..

Arizona and Kansas filed a petition for certiorari before the Supreme Court, which was denied. *See Kobach v. U.S. Election Assistance Comm'n*, 135 S. Ct. 2891 (2015).

D. Authority of the EAC Executive Director

Although the EAC lacked a quorum of Commissioners at the time of the EAC decision, the Tenth Circuit concluded that under a prior delegation of authority by the Commission when a quorum existed (which has been subsequently superseded, *see infra* at Part I.E.), the Executive Director had authority to reject the requests of Arizona, Georgia and Kansas because they were inconsistent with the EAC's policies and then-existing procedures. *Kobach*, 772 F.3d at 1193-94.

In rejecting requests from Arizona, Georgia and Kansas to modify the Federal Form, EAC Executive Director Alice Miller was acting under two sources of authority: (1) prior EAC policy established through notice and comment rulemaking, and consistently maintained by votes of at least three Commissioners operating with a full quorum, and (2) an express delegation of authority from the Commissioners to apply agency policy and "maintain the [Federal Form]."

While HAVA provides that any action that the EAC is authorized to take "may be carried out only with the approval of at least three of its members," a "limited subdelegation of decisionmaking authority" may be granted to EAC staff with formal approval of three or more Commissioners. 52 U.S.C. § 20928; *Kobach*, 772 F.3d at 1191.

In its "Roles and Responsibilities Statement," dated September 15, 2008, a quorum of EAC Commissioners validly delegated certain authority to the Executive Director, including the responsibility to "[i]mplement and interpret [policies, regulations, and guidance] issued by the commissioners," and to "[m]anage the daily operations of EAC consistent with Federal statutes, regulations and EAC policies." The Statement also charged the Executive Director with authority to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." However, as the Tenth Circuit noted, "the 2008 subdelegation did not transfer the Commission's full power," but rather limited the Executive Director's authority to "maintaining the Federal Form *consistent with the Commissioners' past directives*

unless and until those directions were countermanded." *Kobach*, 772 F.3d at 1193-94 (emphasis added).

Additionally, the Executive Director is prohibited from engaging in certain *ex parte* communications, as outlined in the EAC's 2006 "Ex Parte Communications Policy." *See* Schmidt Dec. Ex. 5. That policy specifies that "[n]o Commissioner or staff member with decision making authority shall communicate ex parte with any prohibited individual regarding a particular matter before the Commission." *Ex parte* communications are defined as "off the record and nonpublic communications" while "prohibited individuals" include "any individual representing an entity or industry which is regulated" by the EAC. "Particular matters" are "matters over which EAC has decision making authority."

E. The EAC's Quorum is Restored

On January 13, 2015, three new Commissioners were sworn into the EAC following their nomination by the President and unanimous confirmation by the U.S. Senate. The appointment of the Commissioners, including two Republicans and one Democrat, restored the EAC's quorum for the first time since 2010.

Among the EAC's first official actions was to clarify and further restrict the Commission's previously delegated authority to the Executive Director through a new "Election Assistance Commission Organizational Management Policy Statement," which became effective February 24, 2015 ("2015 Policy Statement"). *See* Schmidt Dec. Ex. 6. Among other things, the 2015 Policy Statement confirmed that

> Any action of the Commission authorized by HAVA requires approval of at least three of its members. 42 U.S.C. § 15328.
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> . . . .
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> **II. Division of authority regarding policymaking and day-to-day operations**

> 1. **The Commissioners shall make and take action in areas of policy**. Policymaking is a determination setting an overall agency mission, goals and objectives, or *otherwise setting rules, guidance or guidelines*. Policymakers set organizational purpose and structure, or the ends the agency seeks to achieve. *The EAC makes policy through the formal voting process*.
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> 2. **The Executive Director in consultation with the Commissioners is expected to:** (1) *prepare policy recommendations* for commissioner approval, (2) implement policies *once made*, and (3) take responsibility for administrative matters. The Executive Director may carry out these responsibilities by delegating matters to staff.

Id. at 2 (emphasis added). The 2015 Policy Statement expressly superseded the Commission's earlier delegations of authority to the Executive Director, including the 2008 "Roles and Responsibilities Statement," *see id*. at 1 (providing that the 2015 Policy Statement supersedes 2008-2012 statements and "replaces any existing EAC policy or document that is inconsistent with its provisions"). The 2015 Statement makes no reference to the Federal Form, or policy changes thereto, as being within the authority of EAC Executive Director.

F. Brian Newby is Appointed as Executive Director of the EAC

On November 2, 2015, the Commission appointed Brian Newby to serve as Executive Director. For the 11 years prior to his appointment, Mr. Newby acted as an election official in the state of Kansas. As the Election Commissioner of Johnson County, the largest county in Kansas, Mr. Newby worked under the Kansas Secretary of State making the request at issue here, and has been involved in Kansas's continuous efforts to compel burdensome proof of citizenship requirements as a barrier to voter registration, including testifying in favor of implementation of the requirement and publicly commenting on his actions to help enforce the law on many occasions. *See* Schmidt Dec. Ex. 7.

On January 3, 2014, Newby submitted comments to the EAC in support of granting Kansas's August 9, 2012 request to require documentary proof of citizenship with the Federal Form. Writing to the EAC, Newby "respectfully request[ed] that the voter registration form maintained for Kansans by the Election Assistance Commission (EAC) be modified to the full extent previously requested by the Kansas Secretary of State." Schmidt Dec. Ex. 8.

Under the Secretary of State's leadership, tens of thousands of voter registration applications in Kansas have been held on a "suspense list" as incomplete because of their supposed failure to provide documentary proof of citizenship. In January 2014, only a year after the requirement was first enforced, that list contained over 20,000 names. Kansas then reduced the list after using birth certificate records to verify the citizenship and Kansas birth of nearly half of the voters with suspended applications. By October of 2014, the number of people on the suspense list exceeded 27,000. By August 2015, it exceeded 35,000. As of February 2016, after Kansas implemented a new policy of removing the names of those whose applications have been incomplete for over 90 days, the suspense list still contains more than 10,500 names.

G. The Executive Director Unilaterally Grants Requests by Alabama, Georgia and Kansas to Require Documentary Proof of Citizenship

On or about November 17, 2015, just fifteen days after Mr. Newby's appointment as Executive Director, Kansas submitted its *fifth* request to the EAC to require documentary proof of citizenship. *See* Schmidt Dec. Ex. 9. Kansas referenced its statutory requirement of documentary proof of citizenship to register to vote, and purported to include new evidence showing noncitizens registering or voting. In fact, the evidence was of the same type already reviewed by the EAC in its January 17, 2014 decision, and included individual cases of alleged non-citizen registration that had already been submitted to the EAC. Kansas also cited its adoption of Kansas Administrative Regulation 7-23-15, which purported to interpret the state's

new election code by adding a 90-day requirement to provide proof of citizenship after registering, but the request added no new substance relating to Federal Form applicants.

On November 19, 2015, two days after receiving Kansas's request, Mr. Newby wrote to Kansas stating that "this office" was "currently reviewing" the state's request. Schmidt Dec. Ex. 10.

On December 21, 2015, Counsel for the League submitted a letter to Mr. Newby in response to Kansas's latest request. The letter reminded the EAC that it could implement new modifications to the Federal Form only through notice and comment rulemaking, that modifying the Federal Form as requested by Kansas would constitute an official EAC action requiring a vote of at least three Commissioners, and that modifying the Federal Form to allow documentary proof of citizenship would violate the NVRA, as previously affirmed by the EAC and the Tenth Circuit. *See* Schmidt Dec. Ex. 11. Mr. Newby confirmed receipt of this letter on January 23, 2016, thirty-two days after the League's letter was submitted.

On December 24, 2015, Counsel for Project Vote submitted a letter to Mr. Newby in response to Kansas's latest request, noting that the specific issue had been considered and denied following a notice and comment procedure in 2014. The letter also explained that any modification to the Federal Form would require a notice and comment rulemaking procedure because it would require a revision to relevant federal regulations and would reverse a substantive position of the EAC, and that granting Kansas's request would be arbitrary and capricious and contrary to law. *See* Schmidt Dec. Ex. 12. Mr. Newby confirmed receipt of this letter on January 23, 2016, twenty-nine days after Project Vote's letter was submitted.

On January 21, 2016, the Kansas Secretary of State appeared before a Kansas Senate Committee and addressed the status of the state's renewed request to the EAC. On information

and belief, the Secretary of State twice assured committee members that the Federal Form would be changed before the next election, though the EAC had not yet publicly taken action on Kansas's request. *See* Zachary Roth, *Federal agency helps red states make voter registration harder*, MSNBC.com, Feb. 4, 2016, http://www.msnbc.com/msnbc/federal-agency-helps-red-states-make-voter-registration-harder. In an interview with a media organization, the Executive Director admitted that he had communicated with election officials in Alabama and Kansas, including Kansas's Secretary of State, regarding changes pertaining to documentary proof of citizenship requirements prior to making a final decision. Commissioners were not included in those discussions because, according to Mr. Newby, "[i]t wouldn't have been proper." *See id.*

On January 29, 2016, Mr. Newby—in his capacity as the recently-appointed Executive Director of the EAC—took unlawful action to unilaterally alter the Federal Form. The EAC did not issue any notice seeking public comment on Kansas's request; nor did the Commission consider or vote on Kansas's renewed request; nor did three Commissioners approve Kansas's renewed request. Nonetheless, in contravention of these clear legal requirements and longstanding and established EAC policy on this very question, of which the Executive Director was expressly advised by the League and Project Vote, the Executive Director granted Kansas's request and immediately changed the Federal Form on the EAC website with instructions informing Kansas voter registration applicants that they must submit a "document [specified therein] demonstrating United States citizenship within 90 days of filing the application." *See* Schmidt Dec. Exs. 13 & 14.

Mr. Newby did not stop there. Alabama and Georgia previously had requested that the EAC amend the Federal Form to require voter registrations in those states to supply documentary proof of citizenship. Alabama's request was made on December 18, 2014, and Georgia's request

was submitted on August 1, 2013. *See* Schmidt Dec. Exs. 15 & 16. (In his January 29, 2016 letter to Alabama, Newby referred to a follow-up request, purportedly submitted by Alabama to the EAC on February 19, 2015, but no such letter appears on the EAC website.) The EAC had already denied Georgia's request on January 17, 2014, following the notice and comment period during which the Arizona and Kansas requests were considered. (Unlike Arizona and Kansas, Georgia did not challenge the EAC's denial of its request.)

Neither the Executive Director nor the EAC provided any public notice that either of those outdated requests were again under consideration, and the Executive Director did not offer any explanation for the sudden review and subsequent approval of those modifications. Yet the Executive Director granted Alabama's and Georgia's requests without any additional notice seeking public comment on the requests from Alabama or Georgia; without any consideration or vote by the Commission; and without the approval of three Commissioners. The Executive Director immediately changed the Federal Form on the EAC website to require Alabama and Georgia voter registration applicants to submit documentary proof of citizenship with their voter registration applications on the Federal Form. *See* Schmidt Dec. Exs. 17 & 18. The respective state-specific instructions were modified to require Georgia applicants to supply "satisfactory evidence of U.S. citizenship," and to require (rather than "request," as in the original version) Alabama applicants to provide their social security numbers at registration, and to inform them that they "shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." *See* Schmidt Dec. Ex. 14.[4]

[4] The Executive Director's letter to Alabama stated that additions to the state-specific instructions were indicated in italics. The addition of the proof of citizenship instruction was, apparently erroneously, not indicated in italics, but it was in fact an addition to the state-specific instructions for Alabama, as requested by the state on December 18, 2014. *See* Schmidt Dec. Ex. 17.

The Executive Director provided no written explanation for these decisions, nor did he state that the EAC had made any conclusion regarding the consistency of the changes with federal law. In an interview with a media organization that is not part of the administrative record, the Executive Director took the position that he had the authority to unilaterally alter the instructions to the Federal Form, and further stated that he was in fact *required* to change the instructions in response to any state's request. *See* Zachary Roth, *Federal agency helps red states make voter registration harder*, MSNBC.com, Feb. 4, 2016, http://www.msnbc.com/msnbc/federal-agency-helps-red-states-make-voter-registration-harder. Mr. Newby's post-regulatory action rationale flies in the face of the Tenth Circuit's express holding "that the EAC is *not* compulsorily mandated to approve state-requested changes to the Federal Form." *Kobach*, 772 F.3d at 1194 (emphasis added).

The Executive Director did not make, and did not have the authority to make, the statutorily-required finding that the requested changes were "necessary" for the States to enforce their voter qualifications. No significant facts or circumstances have changed since the EAC's 2014 decision rejecting requests from Arizona, Georgia and Kansas to modify the Federal Form by requiring documentary proof of citizenship.

Upon the Executive Director's modifications to the Federal Form, voter registrants in Alabama, Georgia and Kansas are now being informed that they cannot register to vote in federal elections using the Federal Form without first supplying documentary proof of citizenship. Indeed, on February 5, 2016, Alabama further signaled that it will promptly begin requiring documentary proof of citizenship from new voting registrants using the Federal Form, stating that its "Office of the Secretary of State will begin working towards implementation now that we have received permission from the Election Assistance Commission[.]" *Alabama Secretary of*

State Releases Statement Regarding Voting Citizenship, Feb. 6, 2016, *available at* http://www.sos.alabama.gov/PR/PR.aspx?ID=10291; *see also* Permaloff Declaration ¶ 21. Additionally, Kansas has already begun requiring documentary proof of citizenship from new voting registrants using the Federal Form. *See* Chris Arnold, *Kobach enforcing debated voter registration rule*, KSN.com, Feb. 12, 2016, http://ksn.com/2016/02/12/kobach-enforcing-debated-voter-registration-rule/. That is a substantial change in the law because, previously, voter registrants in those states were permitted to register to vote in federal elections using the Federal Form without supplying such evidence.

H. The EAC's Action Will Cause Immediate and Irreparable Harm

Requiring documentary evidence of citizenship pursuant to the EAC Executive Director's recent actions substantially and illegally burdens the rights of voter registrants in violation of the NVRA, the APA, and the Commission's regulations, and hinders the ability of the Plaintiffs to carry out their mission of promoting voter participation through voter registration drives. *See* Furtado Declaration ¶ 15; Leonard Declaration ¶ 8. It also forces Plaintiffs in all affected jurisdictions to expend substantial resources to educate the public about the new requirements, when Plaintiffs have already, in the current election cycle and previously, spent significant time and money to educate voters and other organizations that engage in voter outreach about the existing and properly implemented voter registration rules that the Executive Director has unlawfully changed mere weeks or months before the election. *See* Leonard Declaration ¶ 24; Permaloff Declaration ¶¶ 32-33. Further, it requires several Plaintiffs to divert resources previously used to help voters register to instead assist eligible applicants in securing proper proof-of-citizenship documents in order to exercise their right to vote. *See* Butler Declaration ¶ 10; Permaloff Declaration ¶ 34. These Plaintiffs have already been required to expend and divert resources in this manner where such requirements have been in effect for registrants who use a

state voter registration form, including in Kansas. *See* Permaloff Declaration ¶ 31. If the Executive Director's decision is allowed to stand, the high costs of educating voters about these new requirements, and of restructuring voter registration efforts to address these requirements would have a significant detrimental impact on all of Plaintiffs' other activities. *See* Furtado Declaration ¶¶ 38-39; Permaloff Declaration ¶¶ 32-34; Gaddy Declaration ¶¶ 16-18; Poythress Declaration ¶¶ 13-21; Leonard Declaration ¶¶ 25-37; Butler Declaration ¶ 11; Johnson Declaration ¶ 11.

Moreover, Plaintiffs concentrate their voter registration drives at locations that reach large numbers of unregistered voters, such as high schools, community colleges, sporting events, naturalization ceremonies, shopping malls or transportation hubs. *See* Furtado Declaration ¶ 7; Permaloff Declaration ¶¶ 14-16; Gaddy Declaration ¶ 5; Poythress Declaration ¶ 9; Slater Declaration ¶ 9. Many otherwise eligible voters would not have the required documents while at these locations or during these times, and may not otherwise register to vote. *See* Gaddy Declaration ¶¶ 9-12; Poythress Declaration ¶ 18; Permaloff Declaration¶ 25; Slater Declaration ¶¶ 16-17. Other potential voters who do not currently possess qualifying documents, including individual members of several Plaintiffs' organizations, would be faced with the costs and burdens of securing such evidence, often within short time frames given upcoming elections and registration deadlines, or risk being denied their right to vote in federal elections altogether. *See* Permaloff Declaration ¶¶ 27-29; Poythress Declaration ¶¶ 14-15. Even if voter registration applicants did have these documents, many of Plaintiffs' members and other individuals who participate in voter registration drives organized by Plaintiffs would not have the capacity to make copies of them to submit along with the registration forms. *See* Poythress Declaration ¶¶ 17; Permaloff Declaration ¶ 24. Moreover, Plaintiffs' members or those who participate in their

voter registration drives would not feel comfortable handling sensitive citizenship documents such as birth certificates. *See* Furtado Declaration ¶ 17; Permaloff Declaration ¶ 26; Slater Declaration ¶ 18. Further, some potential registrants may decline to register through a drive facilitated by Plaintiffs because they would feel uncomfortable providing such sensitive documents to a person they do not know. *See* Slater Declaration ¶ 20.

Additionally, several Plaintiffs would have to divert resources from helping new voters register to assisting applicants who have already attempted to register to vote but have not provided, or do not have access to, documentary proof of citizenship information, as has already occurred in Kansas. *See* Furtado Declaration ¶ 36; Butler Declaration ¶ 10; Johnson Declaration ¶ 10. Many voters will be confused and uncertain over whether they are eligible to register in light of the close proximity of the Executive Director's decision to upcoming primary elections in these States, likely reducing voter participation.[5] *See* Poythress Declaration ¶ 21; Permaloff Declaration ¶ 35; Slater Declaration ¶ 8. The modification to the Federal Form's state-specific instructions would thus impede the Plaintiffs' mission of promoting full civic participation in elections, and would impose concrete financial and other costs on the Plaintiffs' organizations and, where applicable, their members in carrying out that mission. *See* Slater Declaration ¶ 17. This poses imminent harm to Plaintiffs' voter registration efforts, and to new voters who will be unable to provide the requested documentation. Each of the individual Plaintiffs have already been prevented from registering to vote because their registration forms were not accompanied by documentary proof of citizenship. *See* Declaration of Marvin L. Brown ¶¶ 7-8; Declaration of

[5] According to a local Kansas newspaper, "yet another element of confusion and controversy has been injected into the Kansas election system. The courts say people using the federal form don't have to present proof of citizenship, but the head of the EAC says that, if they live in Kansas, they do. . . .[T]he state needs to get these questions resolved in a manner that conforms with federal law and facilitates registration of qualified voters. The current chaos in Kansas registration laws is both a deterrent to voter participation and a disservice to the state." *Editorial: Voting chaos*, Lawrence Journal-World, Feb. 15, 2016, available at http://www2.ljworld.com/news/2016/feb/15/editorial-voting-chaos/.

JoAnn Brown ¶¶ 6-7. The Executive Director's unlawful action has harmed Plaintiffs, and will have similar negative impact on myriad otherwise-eligible voters who should not be required to provide proof of citizenship.

The Federal Form has played a substantial role in a number of Plaintiffs' voter registration drives and serves as an important tool for bolstering democratic participation, *see* Furtado Declaration ¶ 35, Gaddy Declaration ¶ 15; Permaloff Declaration ¶¶ 17-18, 30, and a simple backup to potentially cumbersome state voter registration procedures. *See* Slater Declaration ¶ 23. The addition of documentary proof of citizenship requirements to that option makes it significantly harder for citizens to register to vote, especially for those in underrepresented communities. *See* Permaloff Declaration ¶ 29; Slater Declaration ¶ 4, 23. For instance, a 2006 survey sponsored by the Brennan Center for Justice reveals that as many as 13 million American citizens do not have ready access to citizenship documents, and as many as 21 million citizens do not have government-issued photo identification, such as a driver's license. *See* Leonard Declaration ¶ 35; Slater Declaration ¶ 14; *see also Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice, 2-3 (November 2006), http://www.brennancenter.org/analysis/citizens-without-proof. Under the Executive Director's decision, American citizens eligible to vote will not be permitted to register without providing sufficient proof of citizenship, such as a driver's license. *See* Declaration of Marvin L. Brown ¶¶ 7-8; Declaration of JoAnn Brown ¶¶ 6-7.

Plaintiffs will also have to revise procedures and educational materials to inform, as applicable, community voter registration drives, their own members, and members of the public regarding the new procedures and the means by which eligible citizens without proof of

citizenship may become registered to vote. *See* Leonard Declaration ¶ 24. The EAC's modification to the state-specific instructions would thus harm Plaintiffs' missions to ensure that all eligible voters can register and cast a ballot that counts. *See* Slater Declaration ¶ 3

Voters in all three states are now being informed, via the Federal Form's instructions, that they may not register to vote in upcoming federal elections without documentary proof of citizenship. Kansas and Alabama are already implementing the Executive Director's decision, directly impacting upcoming federal primary elections. Alabama will hold its primary election on March 1, 2016. If a runoff election is needed, it will be held on April 12, 2016, with the deadline to register on March 28, 2016. *See* Permaloff Declaration ¶ 35. Moreover, Kansas will hold its caucuses on March 5, 2016, with registration for one of its political parties available up to and including the day of the caucus. Although the voter registration deadline for Georgia's March 1 presidential preference primary has passed, the April deadline for its general primary is fast approaching. If the Executive Director's decision is allowed to stand, it would significantly hamper Plaintiffs' ability to accomplish their core missions of assisting voters to register. Several Plaintiffs would also be forced to expend substantial resources to educate the public about the new requirements and assist eligible voters to secure proper proof-of-citizenship documents in order to exercise their right to vote. *See* Johnson Declaration ¶¶ 9-10. In the current election cycle, several Plaintiffs have already expended substantial financial and time resources in drafting and circulating voter information materials, which include instructions on how to register to vote. *See* Butler Declaration ¶ 9; Slater Declaration ¶ 27. Updating or replacing these materials would place significant strain on those Plaintiffs' voter education capacity. *See* Gaddy Declaration ¶¶ 16-18; Slater Declaration 25-26. The high costs of educating voters about these new requirements would have a significant detrimental impact on all of their other activities.

II. ARGUMENT

A. Plaintiffs are Entitled to a Temporary Restraining Order and a Preliminary Injunction.

In order to obtain injunctive relief, "a moving party must show: (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Baumann v. Dist. of Columbia*, 655 F. Supp. 2d 1, 6 (D.D.C. 2009) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). "Plaintiff's probability of success on the merits is the most critical of the criteria when considering a motion for preliminary injunction." *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011). "The same standard applies for both temporary restraining orders and preliminary injunctions." *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003); *see also Hall v. Johnson*, 599 F. Supp. 2d 1, 6 n.2 (D.D.C. 2009). Plaintiffs meet all of these standards based on the extraordinary, and what will be undisputed, facts of this case.

Courts regularly restrain agency actions for failure to comply with the APA. *See Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 63-66 (D.D.C. 2004) (granting preliminary injunction where plaintiff alleged that agency Director's action exceeded his statutory authority in violation of the APA, and satisfied all four prongs of the test for a preliminary injunction); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 60 (D.D.C. 2004) (same); *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 237 (D.D.C. 2003) (granting a preliminary injunction where plaintiff alleged that agency action would violate applicable restrictive statutes, thus violating the APA, and showed likelihood of success on the merits and irreparable harm, while agency failed to show adverse effect to itself or the public

interest); *see also* 5 U.S.C. § 705 (courts may "postpone the effective date of [an agency] action" in order to "prevent irreparable injury").

Here, a temporary restraining order and preliminary injunction are warranted because Plaintiffs can demonstrate a strong likelihood of success on the merits and will suffer irreparable harm if the Executive Director's *ultra vires* actions are permitted to interfere with voters' rights to participate in presidential primaries. There will be no harm to the EAC if a preliminary injunction is issued, which will simply maintain the longstanding policy of the EAC determined through appropriate procedures under the APA and consistent with the NVRA. The public interest plainly weighs in favor of upholding the rights of eligible voters to register without the hindrances that Alabama, Georgia and Kansas seek to subject them to.

B. The Executive Director's Actions Are Final Agency Action

As an initial matter, the Executive Director's decision to grant requests made by Alabama, Georgia and Kansas to amend the Federal Form and require documentary proof of citizenship constitutes final agency action. "[T]o be final, agency action must mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004) (quotations omitted). There is a "presumption in favor of judicial review of administrative action." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984). Even if "the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior [could] belie[] the claim that its interpretation is not final." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

Here, the Executive Director's unilateral action granting the pending requests of Alabama, Georgia and Kansas constitutes final agency action under § 704 of the APA. The policy change enacted by the Executive Director took instant legal effect on the EAC website,

immediately imposing an obligation on Federal Form applicants in Alabama, Georgia and Kansas to provide documentary proof of citizenship. The Executive Director's letters approving the States' requests similarly had immediate effect. Indeed, Alabama has already stated that its Secretary of State will begin implementing the Executive Director's decision, demonstrating that it considers such decision to constitute final agency action. *See Alabama Secretary of State Releases Statement Regarding Voting Citizenship*, Feb. 6, 2016, *available at* http://www.sos.alabama.gov/PR/PR.aspx?ID=10291.

While the Executive Director has suggested to the press that interested parties may seek reconsideration of his decision, the APA expressly provides that "otherwise final" agency action remains subject to judicial review under § 704, "whether or not there has been [a request] for any form of reconsideration [or] for an appeal to superior agency authority." 5 U.S.C. § 704. "[T]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (holding that an EPA compliance order implemented with immediate effect constituted final agency action, despite the agency's invitation to report inaccuracies and informally discuss terms). And despite one lone Commissioner's protest and call for a formal vote by the full Commission, the other two Commissioners have not agreed to hold such a vote. Nor would it matter if they did, because the Federal Form has already been altered and registration deadlines are imminent. The EAC's decision-making process is complete for all intents and purposes.

C. Plaintiffs Have Standing to Challenge the Executive Director's Actions

Most of the plaintiffs here have been parties to lawsuits relating to earlier efforts by States to ignore or alter the Federal Form and plainly have standing. A plaintiff has standing to bring suit where (a) it has suffered a concrete injury that (b) is fairly traceable to the challenged

action and (c) the requested relief will redress the alleged injury. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).

1. Individual Plaintiffs

The individual plaintiffs plainly have standing to challenge the EAC's actions. Plaintiffs Marvin Brown and JoAnn Brown have been prevented from registering to vote on the Federal Form based on Kansas's documentary proof of citizenship requirement. *See* Declaration of Marvin L. Brown ¶¶ 7-8; Declaration of JoAnn Brown ¶¶ 6-7. This harm is directly traceable to the Executive Director's actions, and deprives them of the ability to register using the Federal Form without obtaining documentary proof of citizenship. Enjoining and vacating the Executive Director's decision would allow the Browns to register using the Federal Form and exercise their right to vote, fully redressing the injury they have suffered. Therefore, plaintiffs Marvin and JoAnn Brown have standing to challenge the Executive Director's actions.

2. Organizational Plaintiffs

"An organization can have standing on its own behalf or on behalf of its members." *Abigail Alliance for Better Access to Devel. Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (citations omitted). When an organization sues on its own behalf, it does so based on an injury-in-fact that it has suffered. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("An organization has standing on its own behalf if it meets the same standing test that applies to individuals."). Thus, the "organization 'must demonstrate that the organization has suffered injury in fact, including such concrete and demonstrable injury to the organization's activities--with [a] consequent drain on the organization's resources--constituting … more than simply a setback to the organization's abstract social interests.'" *A.N.S.W.E.R. Coal. v. Kempthorne*, 493 F. Supp. 2d 34, 43 (D.D.C. 2005) (alterations in original) (quoting *Nat'l Taxpayers Union, Inc. v.*

United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995)). To determine whether an injury is "concrete and demonstrable," courts in this Circuit "ask, first, whether the agency's action … injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (second alteration in original). An organization may also sue on behalf of its members "even without a showing of injury to the [organization] itself … when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food & Commercial Workers Union v. Brown Grp., Inc.* (*UFCWU*), 517 U.S. 544, 552-53 (1996) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Here the League, Project Vote, the Georgia State Conference of the NAACP, and the Georgia Coalition for the People's Agenda (the "Organizational Plaintiffs") each have standing to challenge the EAC's actions on their own behalf; the League, the Georgia State Conference of the NAACP, and the Georgia Coalition for the People's Agenda further have standing on behalf of their members. *See* Butler Declaration ¶ 4; Johnson Declaration ¶¶ 3-6.

As an initial matter, the Organizational Plaintiffs clearly have standing to challenge the EAC's actions in their own right. As set forth more fully above, the Organizational Plaintiffs' respective missions are to promote political participation by assisting voters to register, and central to this mission are the Organizational Plaintiffs' voter registration efforts. *See* Butler Declaration ¶ 6; Johnson Declaration ¶¶ 7-8. For example, the League's efforts in this regard are among the longest-running and largest nonpartisan voter drives in the nation. *See* Furtado Declaration ¶¶ 4,6; Leonard Declaration ¶ 8. Project Vote provides voter education materials

and in-depth technical assistance to voter registration drives in states across the country, including Georgia. *See* Slater Declaration ¶ 7, 27. Even in the absence of the EAC's challenged action, each of the Organizational Plaintiffs expend substantial time and resources in helping new voters register and educating the public about how to register to vote. *See* Johnson Declaration ¶ 9. The EAC's eleventh-hour decision to add documentary-proof-of-citizenship requirements to the Federal Form for Alabama, Georgia, and Kansas on the eve of those states' primary elections and caucuses, however, directly contravenes the Organizational Plaintiffs' core programmatic concerns and directly and adversely affects their respective missions to increase the number of eligible persons who register to vote and participate in elections, particularly those who are unable to produce documentary proof of citizenship. *See id.* ¶¶ 9-11.

The injuries that the EAC's actions have and will cause the Organizational Plaintiffs are not speculative, representing a mere specter of the need to expend future resources at some uncertain time in the future. *See Am. Immigration Lawyers Ass'n v. Reno,* 18 F. Supp. 2d 38, .49 (D.D.C. 1998) ("The plaintiffs' claims that they *may* have to expend or divert resources is simply too speculative to confer Article III standing.") (citing *Fair Employment Council of Greater Wash., Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)). Rather, the Organizational Plaintiffs currently engaging voters in the affected states have already incurred and will continue to incur significant expenses as a result of the EAC's actions. And the injuries that the Organizational Plaintiffs have suffered are not "self-inflicted" ones. *Fair Empl. Council of Greater Wash., Inc. v. BMC Mktg. Corp*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (rejecting as grounds for standing expenses plaintiff organization incurred "testing" defendant's allegedly discriminatory practices); *see also Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (recognizing that "an organization's diversion of

resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing"). To the contrary, the Organizational Plaintiffs have, and will continue to, expend significant resources in educating voters and groups that help voters register on the new documentation requirements that the EAC's unlawful actions have introduced in Alabama, Georgia, and Kansas. *See* Johnson Declaration ¶¶ 8-11; Slater Declaration ¶ 25. Such expenditures are clearly aimed at counteracting the harm that the EAC's actions will cause the Organizational Plaintiffs' respective missions--namely, preventing citizens from registering to vote if they fail to provide the proper documentation of citizenship and preventing voter registration drives from reaching the maximum number of eligible but unregistered citizens. *See PETA*, 797 F.3d at 1094; Slater Declaration ¶¶ 16-22. Thus, the Organizational Plaintiffs fall squarely within the scope of *Havens*-standing in that the EAC's "illegal action increase[d] the resources the group[s] must devote to programs independent of [their] suit challenging the action." *Spann*, 899 F.2d at 27.

Additionally, the League has associational standing. The League is a membership organization comprised of individuals committed to promoting political participation in the electoral process. *See* Leonard Declaration ¶ 6. As explained more fully above, the EAC's action poses direct harm to the League members' ability to register new voters, particularly those who are unable to produce documentary proof of citizenship. *See* Poythress Declaration ¶¶ 13-15. This harm is directly traceable to the Executive Director's decision to unilaterally reverse settled EAC policy. Enjoining this decision from taking effect would provide relief to the League and its members by maintaining the voter registration status quo and allowing them to continue registering potential voters with the ease and simplicity of the Federal Form, as was intended by the NVRA. Therefore, the League's individual members have standing to sue the

Defendants in this action. *See UFCWU*, 517 U.S. at 553. What is more, the injury the League's individual members have suffered as a result of EAC action--i.e., burdening their ability to register new voters--are interests "germane to the [League's] purpose." *See id.* And, finally, the relief the League seeks, "if granted, will inure to the benefit of [its] members … actually injured" making participation of the individual League members unnecessary. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975).

D. The Executive Director's Actions Were Arbitrary, Capricious and in Excess of the EAC's Statutory Authority Under the NVRA and HAVA

1. *The Executive Director Acted Contrary to Law by Unilaterally Changing Longstanding EAC Policy Without the Statutorily Required Approval of Three Commissioners*

The EAC may only act on policy matters through a formal Commission vote in which at least three Commissioners approve, which the Executive Director indisputably failed to obtain here. HAVA unambiguously states: "Any action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members."52 U.S.C. § 20928; *see also* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 11,211 (Mar. 10, 1994); Nat'l Voter Registration Act, 58 Fed. Reg. 51,132 (Sept. 30, 1993). HAVA accordingly expressly requires that the Commission vote on the States' requests (and then authorize a notice and comment rulemaking if the Commission wants to change the EAC's longstanding policy).[6]

[6] While the Tenth Circuit in *Kobach* recognized that the approval of three Commissioners is required to carry out any action authorized under HAVA, *see Kobach*, 772 F.3d at 1193, in *dicta* the Court suggested that because "§ 20928 [of HAVA] explicitly applies only to actions authorized in the same chapter," the three-vote requirement did not apply to the"[t]he decision at issue in [*Kobach*]," as it "was authorized by 52 U.S.C. § 20508, which was contained in a different chapter of the Code when § 20928 was passed." *Id.* The court cited the word "chapter" in the U.S. Code, but this was added in codification. *See* 52 U.S.C. § 20928 (References in Text). HAVA itself states, "Any action which the Commission is authorized to carry out under this *Act* may be carried out only with the approval of at least three of its members." Help America Vote Act of 2002, Pub. L. 107–252, title II, §208, Oct. 29, 2002, 116 Stat. 1678 (emphasis added). HAVA explicitly transferred authority to the EAC to carry out all duties previously delegated to the Federal Election Commission pursuant to §20508(a) of the NVRA, *see* PL 107-252 (52 U.S.C. § 21132), including developing and regulating the Federal Form. *See* 52 U.S.C. § 20929; 52 U.S.C. §§ 20508(a)-(a)(1). The EAC's three-Commissioner approval requirement is much like the FEC's four-vote Commissioner

It is undisputed that three Commissioners did not vote to or otherwise approve the Executive Director's change in EAC policy rendering the Executive Director's decision *ultra vires*. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010) (invalidating actions taken by two members of the National Labor Relations Board ("NLRB") when the statute required a quorum of at least three members to be present). Where there is a full, functioning three-member Commission, there is no valid procedure by which the Executive Director could effect a substantive policy change through unilateral action. The Executive Director's actions therefore were *ultra vires* and must be set aside as contrary to the governing law. 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .").

2. *The Executive Director Failed to Follow the EAC's Own Internal Procedures and Guidelines*

The Executive Director also lacked the authority under the EAC's own policies and procedures to unilaterally change the EAC's longstanding policy and legal position that documentary proof of citizenship was not "necessary" within the NVRA's meaning. The EAC's own governing documents specify that only the Commissioners could make policy decisions through voting; the Executive Director was only empowered to make *recommendations* with respect to policy matters. *See* Schmidt Dec. Ex. 6. In addition, the Executive Director also violated EAC policy by engaging in prohibited *ex parte* communications with officials from the States. *See* Schmidt Dec. Ex. 5; *see also Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495

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requirement (the FEC has six Commissioners), which governed the FEC's adoption and development of the Federal Form prior to HAVA. *See* 52 U.S.C. §30106(c). It would, therefore, make little sense that when Congress transferred authority over the Federal Form from the FEC to the EAC, that the majority-vote requirement would not apply.

U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide" by its own governing rules and regulations); *VanderMolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) ("It is, of course, a fundamental tenet of our legal system that the Government must follow its own regulations. Actions by an agency of the executive branch in violation of its own regulations are illegal and void.") (citation omitted).

The Executive Director's authority does *not* include making or changing EAC policy under the EAC's own internal rules. Pursuant to the "Election Assistance Commission Organization Management Policy Statement" (the "2015 Policy Statement"), which is currently in effect, "Commissioners shall make and take action in areas of policy," including "setting rules, guidance or guidelines," and "makes policy through the formal voting process." *See* ex 6. By contrast, the Executive Director, "in consultation with the Commissioners," may only "(1) *prepare* policy recommendations for commissioner approval, (2) *implement* policies *once made*, and (3) take responsibility for administrative matters." *See id.* (emphasis added). Whether or not to require documentary proof of citizenship is plainly a core policy concern of the Commissioners, as shown by the prior commission-level attention that the EAC has devoted to the subject. And while the Commission previously had delegated authority to the Executive Director to maintain the Federal Form *consistent* with the EAC's established policies 2008, which the Tenth Circuit upheld in *Kobach*, that prior delegation no longer exists. Just as an agency can delegate certain responsibilities to subordinates, it also can retract a prior delegation of authority, as the Commission did here. *See Black v. Snow*, 272 F. Supp. 2d 21, 26 (D.D.C. 2003). At all events, the Executive Director certainly did not "maintain" the Federal Form consistent with prior EAC policy here by changing that policy.

Further, the EAC's 2006 "Ex Parte Communications Policy" prohibits the Executive Director from engaging in certain *ex parte* communications. *See* Schmidt Dec. Ex. 5. Specifically, "[n]o Commissioner or staff member with decision making authority shall communicate ex parte with any prohibited individual regarding a particular matter before the Commission." *Id.* *Ex parte* communications are defined as "off the record and nonpublic communications" while "prohibited individuals" include "any individual representing an entity or industry which is regulated" by the EAC. *Id.* "Particular matters" are "matters over which EAC has decision making authority." *Id.*

Here, according to news reports, the Executive Director admitted to communicating with election officials from the States making these requests regarding amending state-specific instructions to the Federal Form prior to issuing the determination letters on January 29, 2016. In an interview with a media organization, he stated that he had discussions with the Kansas Secretary of State, along with elections officials in Alabama and Georgia. Because the communications were off the record and nonpublic, with individuals representing entities regulated by the EAC, and regarding particular matters before the Commission, they violated the EAC's Ex Parte Communications Policy and irrevocably tainted the decision making process under which the Executive Director promulgated his unilateral change in EAC policy.

An agency's failure to comply with its own internal procedures is a separate and independent ground for concluding the Executive Director's actions were arbitrary, capricious and an abuse of discretion. *See Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) ("explaining that federal agencies are required to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions"); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997) ("It is a well-settled rule that an agency's failure to follow its own

regulations is fatal to deviant action") (internal quotation marks omitted); *see also Mazaleski v. Treusdell*, 562 F.2d 701, 717-19 n.38 (D.C. Cir. 1977) (invalidating agency action that was inconsistent with agency personnel manual). Because the Executive Director exceeded the limited scope of authority granted to him by the Commission and violated the agency's *ex parte* communications policy in implementing his unlawful change to longstanding EAC policy,, the Executive Director's actions were *ultra vires.*

3. *The EAC Failed to Provide a Formal Notice and Comment Period as Required by the Administrative Procedure Act*

"The Administrative Procedure Act's general rulemaking section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply in promulgating legislative rules." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 752 (D.C. Cir. 2001). Specifically, "there must be publication of a notice of proposed rulemaking; opportunity for public comment on the proposal; and publication of a final rule accompanied by a statement of the rule's basis and purpose." *Id.*; *see also Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999). Accordingly, "[i]f the agency fails to provide this notice and opportunity to comment . . . , the 'regulation must fall on procedural grounds, and the substantive validity of the change . . . need not be analyzed.'" *Public Citizen, Inc. v. Mineta*, 427 F. Supp. 2d 7, 14 (D.D.C. 2006) (quoting *AFL-CIO v. Donovan*, 757 F.3d 330, 338 (D.C. Cir. 1985)). An agency may only change a rule or fixed policy using the "same procedures [as the agency] used to issue the rule in the first instance." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1205 (2015); *see also Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) ("[W]hen an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public . . . the agency must adhere to the notice and comment requirements of § 553 of the APA.").

The Federal Form was developed by the FEC in accordance with the goals of the NVRA through official notice and comment rulemaking, and did not require documentary proof from any registrants. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 11,211 (Mar. 10, 1994); Nat'l Voter Registration Act, 58 Fed. Reg. 51,132 (Sept. 30, 1993). Over the next decade, the EAC consistently rejected all state requests to require documentary proof of citizenship. The Commission, with a full quorum, rejected such a request from Arizona with a 2-2 Commission vote in July 2006. Most recently, in 2014, the EAC's Executive Director considered and rejected earlier requests from all three States, but only after conducting a notice and comment period. *See Kobach*, 772 F.3d at 1188-89 ("After receiving and reviewing 423 public comments, including comments from Arizona, Kansas, and each of the Intervenor-Appellants, the EAC's Executive Director issued a memorandum on January 17, 2014, denominated as final agency action, denying the states' requests.").

Here, the EAC did not conduct a formal notice and comment proceeding. Nor did the Commission vote on the States' requests before the Executive Director granted them. The EAC's failure to follow its procedures, either by conducting a notice and comment rulemaking or presenting the matter to a vote of the Commission, renders the Executive Director's decision *ultra vires*.

4. *The EAC Did Not Articulate Any Rationale for its Reversal of Policy and Precedent*

An agency's decision to cast off its prior policies and legal decisions must be the product of reasoned decision-making; otherwise, the rule must be invalidated as arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the

first instance."). Executive agencies are required to explain the bases for their decisions, especially when they change longstanding rules, regulations, and policies. Indeed, "[i]t is axiomatic that an agency choosing to alter its regulatory course must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (quotation omitted); *see also FCC v. Fox Television Stations*, 556 U.S. 502, 535 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("[A]n agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so."); *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-91 (9th Cir. 2007) (agency departure from a two-decade-old precedent is arbitrary and capricious without reasoned explanation); *see also INS v. Yang*, 519 U.S. 26, 32 (1996). When an agency fails to provide such an explanation for a change in course, its "unexplained departure from prior agency determinations is inherently arbitrary and capricious" and, therefore, must be overturned. *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457 (D.C. Cir. 2005); *see also Comcast Corp. v. F.C.C.*, 526 F.3d 763, 769 (D.C. Cir. 2008) ("[A]n agency's unexplained departure from precedent must be overturned as arbitrary and capricious.").

Here, the Executive Director did not provide *any* explanation for the change in the EAC's policy, and failed to point to any changed circumstances or new evidence. As the Tenth Circuit previously found, accepting the States' position without new evidence would "risk[] arbitrariness, because [. . .] [c]hanging course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision." *Kobach*, 772 F.3d at 1198 (citing *Eagle Broad. Grp., Ltd. v. F.C.C.*, 563 F.3d 543, 550 (D.C. Cir. 2009)). Nevertheless, the Executive

Director still "has offered neither facts nor analysis to the effect" that new evidence warranting departure from EAC precedent. *See Action for Children's Television*, 821 F.2d at 746. To the contrary, the Executive Director provided no written explanation at all for his "*volte face*," making his abrupt departure from EAC precedent "intolerably mute." *Id.* The Executive Director's "failure to follow [the EAC's] own well-established precedent without explanation is the very essence of arbitrariness" and his decision therefore must be set aside. *Nat'l Treasury Emps. Union*, 404 F.3d at 457; *see also Comcast Corp.*, 526 F.3d at 769.

5. *The EAC's Decision Exceeds Its Statutory Authority Under the NVRA*

By adding a substantive requirement not set forth in the NVRA without giving adequate weight to the clear and manifest intent of Congress, the Executive Director exceeded the EAC's statutory authority under the NVRA. The NVRA prescribes the Federal Form's specific content and requirements. Specifically, the form "may require only such identifying information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1) (emphasis added). The form "may not include any requirement for notarization or other formal authentication." 52 U.S.C. 20508(b)(3). The Federal Form must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)"; "contain[ ] an attestation that the applicant meets each such requirement"; and "require[ ] the signature of the applicant, under penalty of perjury." 52 U.S.C. § 20508(b)(2). Additionally, pursuant to HAVA, the Federal Form must include two specific questions and 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).

To determine the scope of statutory authority, courts must always "begin with the statute." *See Am. Fed. of Gov't Emps. v. Shinseki*, 709 F.3d 29, 33 (D.C. Cir. 2013). And "[f]ew

principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted). Importantly, when Congress passed the NVRA, it considered but ultimately rejected language allowing states to require "presentation of documentary evidence of the citizenship of an applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). The conference committee rejected this provision, determining 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.* (emphasis added). "An agency action is arbitrary, capricious, or an abuse of discretion when it . . . irrationally departs from an agency's governing policy, or frustrate[s] the policy that Congress sought to implement." *Beaty v. Food & Drug Admin.*, 853 F. Supp. 2d 30, 41 (D.D.C. 2012) *aff'd in part, vacated in part sub nom. Cook v. Food & Drug Admin.*, 733 F.3d 1 (D.C. Cir. 2013) (internal citations and quotation marks omitted). As the EAC previously acknowledged, "Congress's rejection of the very requirement that . . . Georgia[ ] and Kansas seek here is a significant factor the EAC must take into account in deciding whether to grant the States' requests." EAC-2013-0004 at *20-21 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the [States] urge[ ] here weighs heavily against the [States'] interpretation.")).

Here, by adding substantive requirements above and beyond those specific requirements Congress deemed necessary to be included in the Federal Form without giving sufficient weight to the plain legislative intent or making any determination of necessity, the Executive Director

exceeded the EAC's statutory authority unambiguously set forth in the NVRA, and exercised his purported authority in a manner "the statute simply cannot bear," *see Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1178 (D.C. Cir. 2003), and courts must set aside agency actions that are "in excess of statutory … authority … ." 5 U.S.C. § 706(2)(C).

E. The Organizational Plaintiffs, the Individual Plaintiffs and Other Potential Voters Will Face Irreparable Harm in the Absence of a TRO and Preliminary Injunction

"Irreparable injury" must be "'both certain and great; it must be actual and not theoretical.'" *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). The moving party must show a "clear and present need for equitable relief," that is "beyond remediation." *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 179-80 (D.D.C. 2011).

Here, Plaintiffs will suffer actual damage without a temporary restraining order and preliminary injunction. Enforcement and implementation of the Executive Director's decision will destroy the long-standing status quo and interfere with Plaintiffs' mission to help marginalized communities in the voter registration process, and will thereby cause irreparable harm. In addition to funding and managing registration drives, several of the Organizational Plaintiffs are membership organizations that represent prospective voters, many of whom would find it unduly burdensome, if not impossible, to register to vote if required to produce documentary evidence of citizenship with the Federal Form. For example, Kansas has placed tens of thousands of voter registration applications in "suspense" for failing to supply documentary proof of citizenship. *See* Furtado Declaration ¶ 34.

The irreparable harm threatened by the EAC's action is imminent. Changing the Federal Form's requirements at this time will be particularly damaging because registration is ongoing

for presidential primary elections and federal congressional elections in both Alabama and Kansas. *See* Furtado Declaration ¶ 41; Permaloff ¶ 34. Alabama, which is already beginning to implement the Executive Director's decision, will hold its primary election on March 1, 2016, with the deadline for registration having just passed on February 15, 2016. Kansas is enforcing the decision as well, and its caucuses will be held on March 5, 2016, with registration for one of its political parties available up to and including the day of the caucus for one political party. While Georgia's registration deadline for the March 1 presidential primary has passed, the Organizational Plaintiffs will also be helping voters register for the November general elections, with planning and program development already in progress. *See* Slater Declaration ¶ 7. Enforcement of the Executive Director's decision will deprive the League and other voter registration organizations of the ability to help register eligible citizens, including those who lack the States' prescribed documents. *See* Furtado Declaration ¶ 37; Permaloff Declaration ¶ 22. Applying documentary proof of citizenship requirements as approved by the Executive Director will make it difficult or impossible for the Organizational Plaintiffs to conduct effective registration drives in those states, and, even when drives are possible, they will have to expend significantly more effort on less effective ways of helping citizens register. *See* Leonard Declaration ¶ 24; Johnson Declaration ¶¶ 9-11; Butler ¶¶ 9-11. These burdens will fall heavily on members of communities that are already underrepresented at the polls, including young people, minorities and the poor—the very communities that the Organizational Plaintiffs target with their registration drives. *See* Slater Declaration ¶ 5; Gaddy Declaration ¶ 11; Poythress Declaration ¶ 15. Moreover, the state-based Organizational Plaintiffs will be forced to divert efforts considerably from collecting and delivering new registration applications to assisting

citizens who have already attempted to vote but need help in obtaining and submitting citizenship documents, as has already been the case in Kansas. *See* Furtado Declaration ¶ 36.

Finally, no form of remediation will be sufficient to address the imminent harm to the Organizational Plaintiffs and, where applicable, their members. Even corrective relief administered at a later date will do nothing to remedy the missed opportunity to register thousands of otherwise-eligible voters in time for their participation in the presidential primaries. Only injunctive relief at this crucial juncture will adequately protect Plaintiffs' work and the multitudes of rightful voters who will be impacted by the EAC's unlawful action.

The individual plaintiffs, who sought to register using the Federal Form but were blocked from registering solely due to the fact that their registration forms were not accompanied by documentary proof of citizenship, also face the prospect of irreparable harm in the form of denial of their voting rights. *See* Declaration of Marvin L. Brown ¶¶ 7-8; Declaration of JoAnn Brown ¶¶ 6-7. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014). *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("[T]he right to vote is a precious and fundamental right"). If individual Plaintiffs are denied their right to vote in upcoming Kansas elections such as the March 5 primary, the August Kansas state primary elections, or the November general election, there will be no sufficient remedy after the fact.

F. There is No Possibility of Harm to Defendants if Relief is Granted

In order to sustain a motion for temporary injunctive relief, a moving party must show that the injunction would "not substantially injure other interested parties." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. When agency action is involved, the Court should balance the actual irreparable harm to the plaintiff and the potential harm to the government. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429 (2006). In this case it is clear that the EAC and the Executive Director will suffer no cognizable injury if enjoined from enforcing their unauthorized letters to the States. If this court provides the injunctive relief requested, the EAC and the Executive Director will merely be returned to the policy environment that the agency, with good reason, determined was required by the NVRA for the past twenty years. *See, e.g., Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014). Defendants thus will not be harmed by injunctive relief, and will simply be required to do what is part and parcel with their agency's mission: to further the NVRA's purpose of helping, rather than hindering, voter registration.

G. There is a Strong Public Interest in Granting Plaintiffs' Motion

Finally, in considering whether to grant temporary injunctive relief, the Court must consider whether "the public interest would be furthered by the injunction." *Baumann*, 655 F. Supp. 2d at 6. The public interest is undoubtedly served by maintaining the EAC's long-term implementation of the NVRA. Denying Plaintiffs' request for injunctive relief would upend two decades of agency policy, frustrate a central purpose of the NVRA, harm U.S. citizens residing in Alabama, Georgia and Kansas who lack the documentation the States demand, and harm the election process more generally.

In enacting the NVRA, Congress explicitly sought "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 52

U.S.C. § 20501(b)(1). Immediate enforcement of the Executive Director's decision would alter a status quo that has governed voter registration in federal elections for over twenty years and frustrate the public's compelling interest in a simple, straightforward voter registration process just weeks before presidential primary elections and months before other federal primary and general elections. As the Supreme Court warned, giving States *carte blanche* to add all of their state-specific requirements to the Federal Form would result in "the Federal Form ceas[ing] to perform any meaningful function," and becoming "a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" 133 S. Ct. at 2256 (quoting 52 U.S.C. § 20501(b)). Therefore, there is a strong public interest in granting temporary injunctive relief.

Finally, the public interest especially favors injunctive relief given the last-minute nature of the Executive Director's imposition of new restrictions on voter registration, which come on the eve of elections in all three affected States. Voters have been using the Federal Form to register without having to comply with a documentary proof of citizenship requirement for over two decades, but the Executive Director's sudden unilateral changes to the Federal Form – implemented without public notice – ratchet up the requirements for registering to vote at the last-minute, mere weeks before primary elections and a presidential caucus in the affected states. Imposing such eleventh-hour restrictions on voting risks voter and election official confusion and is contrary to the public interest. *See Frank v. Walker*, 135 S. Ct. 7 (2014); *see also id.* (Alito, J., dissenting) (indicating that the Supreme Court's order vacating stay and leaving in place an injunction against Wisconsin's voter ID law was based on "the proximity of the upcoming general election"); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Given the impending elections, and the likelihood of eligible voters missing their rightful opportunity to participate due to the

unlawful burdens enacted by the Executive Director, temporary injunctive relief is appropriate to restore the status quo.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a temporary restraining order and preliminary injunction.

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Respectfully submitted,

By: /s/ Amelia J. Schmidt

Amelia J. Schmidt
D.C. Bar No. 1012380
STROOCK & STROOCK & LAVAN LLP
1875 K Street NW
Washington, DC 20006
(202) 739-2800
aschmidt@stroock.com

- and –

Michael C. Keats*
Joel T. Dodge*
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400
mkeats@stroock.com

Wendy R. Weiser*
Jonathan Brater*
Tomas Lopez*
Robert Ferguson*
BRENNAN CENTER FOR

JUSTICE
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(646) 292-8310
wendy.weiser@nyu.edu

Susan M. Davies
D.C Bar No. 1015133
D.D.C. Atty. No. 54867
Jonathan D. Janow
D.C. Bar No. 1002399
D.D.C. Atty. No. D00333
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW, Suite 1200
Washington, DC 20005
(202) 879-5000
susan.davies@kirkland.com

Attorneys for Plaintiffs the League of Women Voters of the United States, the League of Women Voters of Kansas, the League of Women Voters of Alabama, and the League of Women Voters of Georgia

Dale E. Ho
D.D.C. Bar No. NY0142
Orion Danjuma*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
dale.ho@aclu.org

Stephen Douglas Bonney*
ACLU FOUNDATION OF KANSAS
6701 W. 64th Street, Ste. 210
Overland Park, KS 66202
(913) 490-4102
dbonney@aclukansas.org

Jon M. Greenbaum
D.C. Bar No. 489887
Ezra D. Rosenberg
D.C. Bar No. 360927
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600
jgreenbaum@lawyerscommittee.org

Attorneys for Plaintiffs Marvin Brown, JoAnn Brown, the Georgia State Conference of the NAACP, and Georgia Coalition for the People's Agenda

Linda Stein
D.C. Bar No. 376217
Errol R. Patterson
D.C. Bar No. 379715
Jason Abel
D.C. Bar No. 490382
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
(202) 429-3000
lstein@steptoe.com

Attorneys for Plaintiffs the Georgia State Conference of the NAACP, and Georgia Coalition for the People's Agenda

John A. Freedman
D.C. Bar. No. 453075
ARNOLD & PORTER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
John.Freedman@aporter.com

Michelle Kanter Cohen
D.C. Bar No. 989164

PROJECT VOTE
1420 K Street, 7th Floor
Washington, DC 20005
(202) 546-4173
mkantercohen@projectvote.org

Attorneys for Plaintiff Project Vote

**Pro hac vice motion pending*