

No. 16-5196

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

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, et al.,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs in the district court, who are appellants in this Court, are the 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.

The defendants in this court, who are appellees in this Court, are the U.S. Election Assistance Commission and Brian D. Newby in his official capacity as the Executive Director of the Election Assistance Commission.

The intervenors in the district court, who are appellees in this Court, are Kris W. Kobach, Secretary of State of Kansas; and the Public Interest Legal Foundation.

The Landmark Legal Foundation filed an amicus brief in district court. In this Court, amicus briefs have been filed by Fair Elections Legal Network and by Asian Americans Advancing Justice, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Chicago, Asian Americans Advancing Justice – Los Angeles, American-Arab Anti-Discrimination Committee, Asian American Legal Defense and Education Fund, Campaign Legal Center, Common Cause, Dēmos, Mexican American Legal Defense

and Education Fund, National Asian Pacific American Bar Association, National Association of Latino Elected and Appointed Officials Educational Fund, National Council of Jewish Women, People For the American Way Foundation, Service Employees International Union, and Southern Coalition for Social Justice.

B. Rulings Under Review

The ruling under review is the memorandum opinion and order issued by Judge Richard J. Leon on June 29, 2016, denying plaintiffs’ motion for a preliminary injunction, docket numbers 92 and 93 [JA 1661, 1686]. The opinion is not yet published.

C. Related Cases

This case has not previously been before this Court or any other court. We are unaware of any other related cases within the meaning of Rule 28(a)(1)(C).

s/ Daniel Tenny

Daniel Tenny

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INTRODUCTION

The U.S. Election Assistance Commission is responsible for maintaining a mail voter registration application form (commonly known as the Federal Form) for elections for Federal office. 52 U.S.C. § 20508(a)(2). States must “ensure that any eligible applicant” who timely submits the Federal Form “is registered to vote.” *Id.* § 20507(a)(1). The Federal Form must “include a statement that . . . specifies each eligibility requirement (including citizenship),” and the statement must also “contain[] an attestation that the applicant meets each such requirement” and “require[] the signature of the applicant, under penalty of perjury.” *Id.* § 20508(b)(2). The form “may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” *Id.* § 20508(b)(1) (emphasis added).

State-specific instructions accompanying the Federal Form contain information and directions regarding voter registration in particular States. Governing regulations direct state election officials to notify the Commission of their State’s voter registration eligibility requirements, and to notify the Commission on an ongoing basis of any changes to those requirements. 11 C.F.R. § 9428.6(a)(1), (c).

In this case, Alabama, Georgia, and Kansas asked the Commission to change the Federal Form to include documentary proof of citizenship as a registration requirement in those States. The Commission’s Executive Director granted the requests. The decision letters did not set out the Executive Director’s rationale. In a contemporaneous memorandum and in a court declaration, the Executive Director explained that, in his view, “the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state’s registration process, including qualifications of voters.” Decl. of Brian D. Newby ¶ 25 [JA 292]. *See also* Brian D. Newby, *Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas* (“*Acceptance Memo*”) 4-5 [JA 791-92] (“examples of the need for these changes are irrelevant to my analysis” because inclusion of “state-by-state instructions” on the Federal Form “implies the role and rights of the states to set the framework for acceptance and completion of the form.”).

Plaintiffs are nonprofit organizations who seek to enhance voter participation, and individuals who seek to register to vote in Kansas. When plaintiffs challenged the Executive Director’s action, the Department of Justice, which is charged with representing the Commission in litigation, determined that it could not defend the Executive Director’s decision. The Department explained to the district court that the decision could not be reconciled with the explicit terms of 52 U.S.C. § 20508(b)(1) or with the Supreme Court’s decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), which held that a state requirement that registrants submit

documentary proof of citizenship cannot be imposed on users of the Federal Form unless the Commission determines that such additional documentation is necessary to enable the State to assess eligibility to vote. *Id.* at 2259-60.

Because the Executive Director's decision departs from governing law, the decision should be set aside. The timetable established by the Court will permit issuance of timely relief. The Court therefore should address the Executive Director's clear failure to comply with the dictates of the statute, even though the district court did not consider the merits of the case. As discussed below, there is no need to address plaintiffs' other contentions.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court denied a preliminary injunction on June 29, 2016. Mem. Op. [JA 1661]. Plaintiffs filed a timely notice of appeal on July 1, 2016. Pls.' Notice of Appeal [JA 1688]; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the Executive Director failed to adhere to the terms of the governing statute, as interpreted by the Supreme Court, in granting state requests to require documentary proof of citizenship for users of the Federal Form in Alabama, Georgia, and Kansas.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. *The U.S. Election Assistance Commission*

The Elections Clause of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, Cl. 1. “The Clause’s substantive scope is broad. ‘Times, Places, and Manner,’ [the Supreme Court has] written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including, as relevant here . . . regulations relating to ‘registration.’” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). “The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’” *Id.* at 2253-54 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

Exercising its authority under the Elections Clause, Congress enacted the National Voter Registration Act of 1993. Pub. L. No. 103-31, 107 Stat. 77.

Recognizing that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office,” 52 U.S.C. § 20501(a)(3), the Act mandates, among other things, that all covered States allow voters to register to vote in Federal elections “by mail application,” *id.* § 20503(a)(2).

In 2002, Congress established the Election Assistance Commission as an “independent entity” consisting of four members appointed by the President with the advice and consent of the Senate. *See* 52 U.S.C. §§ 20921, 20923(a)(1). The Act requires “the approval of at least three” Commissioners to carry out “[a]ny action which the Commission is authorized to carry out under this chapter.” *Id.* § 20928. Congress transferred to the new Commission, from the Federal Election Commission, responsibility for implementing the portions of the National Voter Registration Act that are relevant here. *Id.* § 21132.

The Commission currently has three Commissioners who were appointed by the President and confirmed by the Senate, as well as a duly appointed Executive Director and General Counsel. *See* U.S. Election Assistance Commission, *Commissioners*¹; U.S. Election Assistance Commission, *Employee Directory*.²

¹ http://www.eac.gov/about_the_eac/commissioners.aspx

² http://www.eac.gov/about_the_eac/staff.aspx

2. *The Federal Voter Registration Form*

The National Voter Registration Act requires the Commission, “in consultation with the chief election officers of the States,” to “develop a mail voter registration application form for elections for Federal office.” 52 U.S.C. § 20508(a)(2). The statute provides that “[e]ach State shall accept and use the mail voter registration application form prescribed by the [Commission].” *Id.* § 20505(a)(1). States must “ensure that any eligible applicant” who timely submits the form “is registered to vote.” *Id.* § 20507(a)(1). Applicants may also register to vote in federal elections through other means, which are not at issue here. *See, e.g., id.* § 20507(a)(1)(A) (registration with a motor vehicle application).

Congress limited the information that may be required on the federal voter registration form. The form “may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508(b)(1) (emphasis added). The form must, however, “include a statement that . . . specifies each eligibility requirement (including citizenship).” *Id.* § 20508(b)(2). The required statement must also “contain[] an attestation that the applicant meets each such requirement” and “require[] the signature of the applicant, under penalty of perjury.” *Id.*

The Federal Election Commission, which was charged with administering the Federal Form before the creation of the Election Assistance Commission, prescribed its contents in 1994 after notice-and-comment rulemaking. *See* 11 C.F.R. § 9428.4; 59 Fed. Reg. 32,311 (June 23, 1994). The regulations provide that the application “shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state’s specific additional eligibility requirements . . . as set forth in the accompanying state instructions.” 11 C.F.R. § 9428.4(b)(1). The regulations direct state election officials to notify the Commission of their State’s voter registration eligibility requirements, and to notify the Commission on an ongoing basis of any changes to those requirements. *Id.* § 9428.6(a)(1), (c).

The state instructions are not codified in the regulations. The instructions address matters such as registration deadlines, state-specific eligibility requirements, and whether party affiliation must be stated on the form. *See* State Instructions, Nov. 10, 2010 [JA 70-87].

3. *Delegation of Authority to Commission Staff*

In 2000, the Federal Election Commission approved a procedural change that allowed its Office of Election Administration to make changes to state-specific instructions without submitting each proposed alteration to a vote of the full Commission. *See* Federal Election Commission, “Election Administration: Revised National Mail Voter Registration,” *Federal Election Commission RECORD* 8 (October 2000) [JA 950]. The Commission declared, however, that the Office of Election

Administration was required to “submit for a formal Commission vote any changes to the form that are not specific to a given state.” *Id.*

After responsibility for administering the Federal Form was transferred to the Election Assistance Commission, the Commission’s Executive Director and staff continued to take responsibility for certain types of changes to state-specific instructions such as changes regarding mailing addresses and registration deadlines. *See* Bryan Whitener, *National Mail Voter Registration Form: Background* 5 (Aug. 31, 2007) [JA 995] (describing changes made in September 2006). Until 2008, there appears to have been no written policy regarding which types of changes could be made by the Executive Director without action by the Commissioners.

In 2008, the Commission set out the roles and responsibilities of the Commission and its Executive Director. The Commission specified that a vote of the Commissioners would be required to “establish policy regarding the mission, goals and objectives” of the Commission. U.S. Election Assistance Commission, *Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission* 2 (Feb. 2008) [JA 997] (“2008 *Roles and Responsibilities*”). The Commission delegated to the Executive Director authority to act in various ways “consistent with the agency’s strategic plan and any applicable commissioner adopted policies.” *Id.* at 6-7 [JA 1001-02]. The Executive Director was authorized, in particular, to “[m]aintain the Federal Voter Registration Form consistent with the [National Voter Registration Act] and [Commission] Regulations and policies.” *Id.* at 7 [JA 1002].

In 2015, the Commission adopted a superseding organizational management statement. The Commissioners retain authority to “make and take action in areas of policy.” U.S. Election Assistance Commission, *Organizational Management Policy Statement 2* (Feb. 24, 2015) [JA 1014] (“2015 *Organizational Statement*”). The Executive Director, in consultation with the Commissioners, is expected to prepare policy recommendations, to “implement policies once made,” and to “take responsibility for administrative matters.” *Id.* The 2015 organizational management statement provides significantly less detail regarding the allocation of responsibilities than the 2008 *Roles and Responsibilities* document: whereas the 2008 document contained several pages of explanation of the respective functions of the Commissioners and of the Executive Director, the 2015 statement contains a single, two-paragraph section describing the division of authority. *Compare* 2008 *Roles and Responsibilities* 2-3, 6-8 [JA 997-98, 1001-03] *with* 2015 *Organizational Statement 2* [JA 1014].

B. Previous Litigation

1. In 2006, Arizona requested a change to the state-specific instructions for Arizona, to include a requirement that registrants in that State produce documentary evidence of citizenship. *See* Letter from Thomas R. Wilkey to Jan Brewer, Mar. 6, 2006 [JA 1020]. The Executive Director denied Arizona’s request. The Commission Chairman then called for a vote so that the full Commission could determine whether to reverse the Executive Director’s action. Two Commissioners voted in favor of

reversing the action and two voted against. *See* U.S. Election Assistance Commission, Tally Vote Matter, transmitted July 6, 2006 [JA 1033-36]. Because three affirmative votes are required to take action, the measure failed, and the Executive Director's determination remained in effect. *See* Certification, July 31, 2006 [JA 1032].

The denial of Arizona's request engendered litigation that culminated in the Supreme Court's decision in *Arizona v. Inter Tribal Council, Inc. of Arizona*, 133 S. Ct. 2247 (2013). In that decision, the Court held that Arizona was compelled to accept the Federal Form (which did not then require documentary proof of citizenship) for registration for federal elections. The Court suggested, however, that Arizona could renew its request that the Commission add such a requirement to the Federal Form; if the State did not obtain relief from the agency, it could then seek review under the Administrative Procedure Act. *Id.* at 2259-60.

2. Immediately after the Supreme Court's decision, Arizona, joined by Kansas, reiterated its request that the federal voter registration form include citizenship-documentation requirements. At that point, the Commission had no seated Commissioners, Executive Director, or General Counsel.

The Acting Executive Director ultimately denied the States' requests. The Tenth Circuit upheld that determination, and the Supreme Court denied certiorari. *See Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015). The court of appeals rejected a challenge to the 2008 *Roles and Responsibilities* delegation, which authorized the Executive Director to

“[m]aintain the Federal Voter Registration Form consistent with the [National Voter Registration Act] and [Electoral Assistance Commission] Regulations and policies.” U.S. Election Assistance Commission, 2008 *Roles and Responsibilities* [JA 1002]. The Tenth Circuit stated that this delegation “instructed the Executive Director to continue maintaining the Federal Form consistent with the Commissioners’ past directives unless and until those directions were countermanded,” and analogized the situation to that of the “faithful servant who continues to follow his master’s orders even while his master is absent.” *Kobach*, 772 F.3d at 1194. The court further concluded that the Executive Director’s decision in that case “was a consistent and valid exercise of limited subdelegated authority.” *Id.* at 1196.

C. Facts and Prior Proceedings

1. At issue here are three letters dated January 29, 2016, in which the Commission’s Executive Director, Brian D. Newby, approved requests from Alabama, Georgia, and Kansas to add requirements of documentary proof of citizenship to the state-specific instructions on the federal voter registration form. The Executive Director’s letters articulated no rationale for the decisions. *See* Letter from Brian D. Newby to the Honorable John H. Merrill, Alabama Secretary of State, Jan. 29, 2016 [JA 850]; Letter from Brian D. Newby to the Honorable Brian P. Kemp, Georgia Secretary of State, Jan. 29, 2016 [JA 857]; Letter from Brian D. Newby to Bryan Caskey, Election Director, Kansas Secretary of State’s Office, Jan. 29, 2016 [JA 896].

In an internal memorandum executed shortly after the decisions and made public during this litigation, the Executive Director opined that he did not need to consider whether the changes were necessary for the administration of the voter eligibility laws. He stated that Kansas’s “examples of the need for these changes are irrelevant to my analysis” because inclusion of “state-by-state instructions” on the Federal Form “implies the role and rights of the states to set the framework for acceptance and completion of the form.” Brian D. Newby, *Acceptance of State-Instructions to Federal Form for Alabama, Georgia, and Kansas* (“*Acceptance Memo*”) 4-5 [JA 791-92]. In a declaration filed in district court, the Executive Director confirmed his view “that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state’s registration process, including qualifications of voters.” Newby Decl. ¶ 25 [JA 292].

On February 1, 2016, an updated version of the Federal Form was posted on the Commission’s website reflecting the changes approved by the Executive Director, including the instruction that voters in Alabama, Georgia, and Kansas would need to provide documentary proof of citizenship to register to vote. *See* Federal Form, Feb. 1, 2016 [JA 795-819]. According to district-court filings, only Kansas is currently enforcing the requirement. *See* Mem. Op. 7 n.7 [JA 1667 n.7].

2. Plaintiffs are voting rights groups and individuals who sought to register to vote in Kansas. They sought a preliminary injunction to enjoin use of the new state-specific instructions that direct voters to submit documentary proof of citizenship.

The Secretary of State of Kansas and the Public Interest Legal Foundation intervened to defend the approval of the States' requests.

The Department of Justice represents the Commission in litigation. *See* 28 U.S.C. § 516. Appearing on behalf of the Commission, the Department consented to plaintiffs' request for preliminary relief. The Department's filing explained that the Executive Director's actions were not consistent with the governing statute because no determination had been made as to the necessity of documentary proof-of-citizenship, as required by the statute. *See* 52 U.S.C. § 20508(b)(1) (the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), *as is necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process") (emphasis added). The Department thus acknowledged that plaintiffs were likely to succeed on the merits of their arguments that the Executive Director had not determined that the States' documentary proof-of-citizenship requirements met the statutory standard and that the Executive Director had not adequately explained the grounds for his decision.

The Department argued that plaintiffs had not established a likelihood of success on the merits of their claim that the challenged decision could only be made after notice-and-comment rulemaking. The Department also argued that plaintiffs had not demonstrated a likelihood of success with regard to their claim that the

Commission lacked statutory authority to delegate any of its duties to the Executive Director. The Department urged the district court not to reach the question whether the Executive Director had acted within the bounds of the delegation of authority that the Commission had actually executed.

3. On February 23, the district court denied the request for a temporary restraining order, but withheld judgment on the motion for a preliminary injunction. *See* Mem. Order [JA 320]. On June 29, the district court denied the request for a preliminary injunction. Without addressing the merits of plaintiffs' claims, the court concluded that plaintiffs had not established that they would suffer irreparable injury in the absence of preliminary relief. Mem. Op. 20-23 [JA 1680-83]. The court also stated that injunctive relief was inappropriate at this stage of the litigation, as the court intended to consider the merits "in the weeks ahead." *Id.* at 25 [JA 1685].

The district court adopted a schedule for considering motions for summary judgment, with oral argument set for September 12, 2016. *See* Scheduling Order, July 11, 2016 (Dkt. No. 99). After the district court issued that scheduling order, this Court granted plaintiffs' motion to expedite this appeal.

SUMMARY OF ARGUMENT

The Department of Justice cannot defend the Executive Director's action in this case, which failed to undertake the analysis required by the governing statute and by the Supreme Court's reasoning in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2255 (2013).

Congress specified that the federal voter registration form “may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 52 U.S.C. § 20508(b)(1). The Executive Director made clear, however, that in granting the requests at issue here, he considered it sufficient that the legislatures of Alabama, Georgia, and Kansas had required documentation of citizenship, and that he had not otherwise considered whether the new requirements were necessary.

Unless the Court resolves the entitlement to injunctive relief on this appeal, there will be no prospect for meaningful appellate review prior to the November elections. Because the Executive Director’s decision is inconsistent with governing law, this Court should reverse. This Court need not address plaintiffs’ other claims.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion, but reviews legal conclusions de novo. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

ARGUMENT

THE EXECUTIVE DIRECTOR’S DECISION DID NOT ADDRESS THE RELEVANT STATUTORY STANDARD, AND PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

As explained below, the government cannot defend the action taken by the Executive Director of the U.S. Election Assistance Commission because his decision failed to address the statutory standard. Accordingly, plaintiffs are entitled to relief from the Executive Director’s action. It is unnecessary for this Court to reach any of plaintiffs’ other contentions, which should be left for the Commission to address in the first instance.

A. The Executive Director’s decision failed to undertake the analysis required by the governing statute and Supreme Court precedent.

1. The National Voter Registration Act requires the Election Assistance Commission to publish a Federal Form that must be accepted as sufficient to register to vote for federal elections in States subject to the Act. 52 U.S.C. §§ 20505(a)(1), 20508(a)(2). Congress provided that the Federal Form “may require only such identifying information . . . and other information . . . as is necessary to enable the [State] to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” *Id.* § 20508(b)(1).

As the Supreme 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.” *Arizona v. Inter Tribal Council of Ariz., Inc.*,

133 S. Ct. 2247, 2255 (2013). The Supreme Court thus rejected a proposed reading of the statute “that would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form.” *Id.* at 2256.

The Supreme Court concluded that even if a state statute purported to require registrants to submit documentary proof of citizenship, that requirement could not be imposed on users of the Federal Form for federal elections unless the Commission determined that such additional documentation was necessary to enable the State to assess eligibility to vote. *Inter Tribal Council*, 133 S. Ct. at 2259-60. The requirement that States accept and use the Federal Form “precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself,” but permits the State to establish before the Commission that additional information should be required on the Federal Form. *Id.* at 1260.

In this case, Alabama, Georgia, and Kansas seek changes to the state instructions for the Federal Form that would require registrants in those States to submit documentary proof of citizenship. In acting on the request, the Executive Director did not determine whether such documentation was necessary to allow the States to assess eligibility. Instead, the Executive Director treated the state statutes as dispositive. In a memorandum executed shortly after he issued his determinations, the Executive Director stated that he did not need to consider whether the changes were necessary for the administration of voter registration eligibility laws. He stated

that Kansas’s “examples of the need for these changes are irrelevant to my analysis” because inclusion of “state-by-state instructions” on the Federal Form “implies the role and rights of the states to set the framework for acceptance and completion of the form.” *Acceptance Memo* 4-5 [JA 791-92]. In district court, he confirmed that in his view “the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state’s registration process.” Newby Decl. ¶ 25 [JA 292].³

Because the Executive Director’s stated rationale was directly at odds with the language of the statute and with Supreme Court precedent, the Department of Justice, which is charged with representing the Commission in court, *see* 28 U.S.C. § 516, determined that it could not defend the agency’s decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943).

2. Because the Court can provide complete relief on the ground discussed above, it is unnecessary to reach plaintiffs’ other contentions. Judicial consideration of such arguments would be enhanced to the extent that they are addressed by the Commission itself in future decisions.

³ Although plaintiffs assert (Appellants’ Br. 38) that the Executive Director’s memorandum was a post hoc rationalization, it is established that courts should rely on “contemporaneous explanation of the agency decision” or, if none is available, on “affidavits or testimony” that provide “additional explanation of the reasons for the agency decision.” *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). There appears to be no dispute that the reasoning set out in the Executive Director’s memorandum and later declaration is, in fact, the basis of his decision.

Plaintiffs assert, for example, that the Executive Director acted beyond the scope of the authority delegated to him by the Commission in taking the action at issue here. The Commission did not and could not authorize the Executive Director to violate the governing statute, and the action taken here was therefore beyond the Executive Director's authority. Accordingly, this Court need not determine the precise extent to which the Commission could delegate its authority or the extent to which it has actually done so.

Plaintiffs are mistaken to the extent that they suggest that the governing statute prohibits *any* delegation of authority to the Executive Director. The operative management statement, adopted by the Commission, states that “[t]he Commissioners shall make and take action in areas of policy,” while the Executive Director is expected to, among other things, “implement policies once made.” 2015 *Organizational Statement 2* [JA 1014]. The division of responsibilities is consistent with the governing provision of the Help America Vote Act, which requires “the approval of at least three” Commissioners to carry out “[a]ny action which the Commission is authorized to carry out under this chapter,” 52 U.S.C. § 20928. Although the Commission appropriately requires a vote of three members in order to “take action in areas of policy,” the statute should not be understood to preclude delegations of authority to “implement policies once made.” 2015 *Organizational Statement 2* [JA 1014]. As the Tenth Circuit concluded, consistent with the federal government's

position in that case, the statute creating the Election Assistance Commission “provides for an Executive Director, a General Counsel, and other staff,” suggesting that “Congress contemplated some degree of subdelegation to those staff members.” *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183, 1190-91 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

Plaintiffs also appear to suggest that any change to the Federal Form would be beyond the scope of the Executive Director’s authority as set out in the Commission’s 2015 organizational management statement. As noted above, the decision at issue here cannot be defended as a proper implementation of Commission policy. And insofar as the Executive Director believed he was interpreting the scope of the 2015 delegation, his decision was premised on the mistaken assumption that all “[s]tate-specific instructional changes are ministerial, and, thus, routine.” *Acceptance Memo 2* [JA 789]. The Court should decline plaintiffs’ invitation to speculate on whether a determination of the Executive Director resting on other grounds would be within the scope of the current delegation, a matter that would appropriately be addressed in the first instance by the Commission itself. *See Chenery Corp.*, 318 U.S. at 93-94.

For similar reasons, the Court should decline to reach plaintiffs’ claim that the Commission was required to proceed by notice-and-comment rulemaking. The contents of the Federal Form are set by regulation, which was promulgated through notice-and-comment rulemaking. *See* 11 C.F.R. § 9428.4. That regulation provides that the Federal Form shall “include a statement that incorporates by reference each

state’s specific additional eligibility requirements . . . as set forth in the accompanying state instructions.” *Id.* § 9428.4(b)(1). The regulations further provide that state election officials shall notify the Commission of changes to their eligibility requirements or other relevant information. *Id.* § 9428.6(c). The regulations do not, however, specify how the Commission should respond to such changes.

In this case, Alabama, Georgia, and Kansas have asked the Commission to add a citizenship-documentation requirement to their specific additional eligibility requirements, and have not asked the Commission to alter its regulations. The Commission has consistently and properly made determinations regarding instructions relevant to a particular State through informal adjudication, for which no notice-and-comment procedure is required.

Plaintiffs at times appear to be arguing that incorporation of a requirement of this kind for several states alters the Federal Form in a way that might require rulemaking rather than informal adjudication. *See* Appellants’ Br. 34 (arguing that 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’”) (quoting *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015)). The Commission has never addressed an argument of this kind, and should be allowed to do so in the first instance. That a previous Executive Director solicited public comment before declining to require documentary proof of citizenship (and thus declining to alter any state instruction) did not thereby transform changes to state instructions from an adjudication to a

rulemaking for which notice-and-comment would be required under the Administrative Procedure Act. To the contrary, in considering that prior decision, the Tenth Circuit expressly stated that “[t]he Executive Director’s decision was an informal adjudication carried out pursuant to 5 U.S.C. § 555.” *See Kobach*, 772 F.3d at 1197.

B. This Court should resolve the merits of plaintiffs’ claims.

The district court’s ruling did not resolve the merits of plaintiffs’ claims, but instead declared that plaintiffs had not suffered irreparable harm sufficient to justify a preliminary injunction. The district court reasoned that if plaintiffs were correct on the merits, the court could grant relief at the end of the case that would allow eligible voters to participate in the November elections. *See* Mem. Op. 22 [JA 1682].

In district court, the federal government stated that plaintiffs appeared to have satisfied the remaining requirements for a preliminary injunction, including irreparable harm. The intervenors’ opposition to plaintiffs’ motion for expedition in this Court confirms that view. The intervenors argued that the period before the November elections was too short to permit this Court to provide meaningful relief. Citing state registration deadlines in mid-October, the intervenors declared that “[t]his Court would have to issue a decision well in advance of even the registration deadline for these states’ elections to repair Appellants’ asserted injuries related to ‘voter registration activities.’” Appellee-Intervenors’ Response to Appellants’ Emergency Mot. to Expedite 5.

This Court accordingly scheduled argument on September 8. Unless this Court resolves the entitlement to injunctive relief on this appeal, there will be no prospect of granting meaningful relief at a later time.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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JULY 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 5,232 words.

s/ Daniel Tenny

Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I also caused eight paper copies of this brief to be filed with the Court by the noon filing deadline.

s/ Daniel Tenny

Daniel Tenny

ADDENDUM

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52 U.S.C. § 20503

§ 20503. National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office--

- (1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 20504 of this title;
- (2) by mail application pursuant to section 20505 of this title; and
- (3) by application in person--
 - (A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and
 - (B) at a Federal, State, or nongovernmental office designated under section 20506 of this title.

(b) Nonapplicability to certain States

This chapter does not apply to a State described in either or both of the following paragraphs:

- (1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.
- (2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this chapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

52 U.S.C. § 20505

§ 20505. Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(B) who is provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 20507(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 20507(d) of this title.

52 U.S.C. § 20507

§ 20507. Requirements with respect to administration of voter registration

a) In general

In the administration of voter registration for elections for Federal office, each State shall--

- (1) ensure that any eligible applicant is registered to vote in an election--
 - (A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
 - (B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
 - (C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and
 - (D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
- (2) require the appropriate State election official to send notice to each applicant of the disposition of the application;
- (3) provide that the name of a registrant may not be removed from the official list of eligible voters except--
 - (A) at the request of the registrant;
 - (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
 - (C) as provided under paragraph (4);
- (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--
 - (A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

...

52 U.S.C. § 20508

§ 20508. Federal coordination and regulations

(a) In general

The Election Assistance Commission--

- (1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);
- (2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;
- (3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this chapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this chapter; and
- (4) shall provide information to the States with respect to the responsibilities of the States under this chapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2)--

- (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
- (2) shall include a statement that--
 - (A) specifies each eligibility requirement (including citizenship);
 - (B) contains an attestation that the applicant meets each such requirement; and
 - (C) requires the signature of the applicant, under penalty of perjury;
- (3) may not include any requirement for notarization or other formal authentication; and
- (4) shall include, in print that is identical to that used in the attestation portion of the application--
 - (i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

11 C.F.R. § 9428.3

§ 9428.3. General information

(a) The national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 9428.4; general instructions for completing the application; and accompanying state-specific instructions.

(b) The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements.

(c) States shall accept, use, and make available the form described in this section.

11 C.F.R. § 9428.4

§ 9428.4. Contents

(a) Information about the applicant.

The application shall provide appropriate fields for the applicant's:

- (1) Last, first, and middle name, any suffix, and (optional) any prefix;
- (2) Address where the applicant lives including: street number and street name, or rural route with a box number; apartment or unit number; city, town, or village name; state; and zip code; with instructions to draw a locational map if the applicant lives in a rural district or has a non-traditional residence, and directions not to use a post office box or rural route without a box number;
- (3) Mailing address if different from the address where the applicant lives, such as a post office box, rural route without a box number, or other street address; city, town, or village name; state; and zip code;
- (4) Month, day, and year of birth;
- (5) Telephone number (optional); and
- (6) Voter identification number as required or requested by the applicant's state of residence for election administration purposes.
 - (i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine what type of voter identification number, if any, is required or requested by the applicant's state.
 - (ii) For each state that requires the applicant's full social security number as its voter identification number, the state's Privacy Act notice required at 11 CFR 9428.6(c) shall be reprinted with the instructions for that state.
- (7) Political party preference, for an applicant in a closed primary state.
 - (i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine if the applicant's state is a closed primary state.
 - (ii) The accompanying instructions shall state that if the applicant is registering in a state that requires the declaration of party affiliation, then failure to indicate a political party preference, indicating "none", or selecting a party that is not recognized under state law may prevent the applicant from voting in partisan races in primary elections and participating in political party caucuses or conventions, but will not bar an applicant from voting in other elections.

(8) Race/ethnicity, if applicable for the applicant's state of residence. The application shall direct the applicant to consult the state-specific instructions to determine whether race/ethnicity is required or requested by the applicant's state.

(b) Additional information required by the Act. (42 U.S.C. 1973gg-7(b)(2) and (4)).

The form shall also:

(1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompanying state instructions;

(2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements;

(3) Provide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature;

(4) Inform an applicant on the application of the penalties provided by law for submitting a false voter registration application;

(5) Provide a field on the application for the name, address, and (optional) telephone number of the person who assisted the applicant in completing the form if the applicant is unable to sign the application without assistance;

(6) State that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(7) State that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

(c) Other information. The form will, if appropriate, require an applicant's former address or former name or request a drawing of the area where the applicant lives in relation to local landmarks.

11 C.F.R. § 9428.6

§ 9428.6. Chief state election official

(a) Each chief state election official shall certify to the Commission within 30 days after July 25, 1994:

- (1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including but not limited to the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is a closed primary state.
- (2) Any voter identification number that the state requires or requests; and
- (3) Whether the state requires or requests a declaration of race/ethnicity;
- (4) The state's deadline for accepting voter registration applications; and
- (5) The state election office address where the application shall be mailed.

(b) If a state, in accordance with 11 CFR 9428.4(a)(2), requires the applicant's full social security number, the chief state election official shall provide the Commission with the text of the state's privacy statement required under the Privacy Act of 1974 (5 U.S.C. 552a note).

(c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section.