ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 2016

No. 16-5196

In the United States Court of Appeals for the District of Columbia

LEAGUE OF WOMEN VOTERS, et al.,

Plaintiffs-Appellants,

v.

BRIAN D. NEWBY, *et al*.

Defendants-Appellees,

and

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION,

Appellees-Intervenors.

On Appeal from the United States District Court for the District of Columbia
Case No. 16-cv-236 (Hon. Richard J. Leon)

BRIEF FOR APPELLEE-INTERVENOR PUBLIC INTEREST LEGAL FOUNDATION

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for Appellee-Intervenor Public Interest Legal Foundation (the "Foundation") hereby provides the following information:

I. Parties and *Amici* Appearing Below

Plaintiffs below are 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.

Defendants below are Brian D. Newby, in his capacity as the Executive Director of the United States Election Assistance Commission, and the United States Election Assistance Commission.

Defendant-Intervenors below are Kansas Secretary of State Kris W. Kobach, in his official capacity, and the Public Interest Legal Foundation.

Landmark Legal Foundation appeared as *Amicus Curiae* before the district court.

II. Parties and *Amici* Appearing Before this Court

Appellants here are 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.

Appellees here are Brian D. Newby, in his capacity as the Executive Director of the United States Election Assistance Commission, and the United States Election Assistance Commission.

Appellee-Intervenors here are Kansas Secretary of State Kris W. Kobach, in his official capacity, and the Public Interest Legal Foundation.

Briefs of *amici curiae* in support of Appellants have been submitted by the Fair Elections Legal Network; Asian Americans Advancing Justice, AAJC; 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; the Service Employees International Union; and the Southern Coalition for Social Justice.

III. Rulings Under Review

The ruling under review in this case is the June 29, 2016 Order and Memorandum Opinion denying Appellants' motion for a preliminary injunction issued by United States District Court Judge Richard J. Leon. *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727 (D.D.C. June 29, 2016) (JA-1661-1687.)

IV. Related Cases

This case has not previously been filed with this court or any other court. Counsel are not aware of any related cases.

Dated: August 3, 2016

Respectfully submitted,

/s/ Kaylan L. Phillips

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Corporate Disclosure Statement

The Public Interest Legal Foundation is a non-profit 501(c)(3) organization. It is not a publicly held corporation and no corporation or other publicly held entity owns more than 10% of its stock.

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Glossary

Term	Definition
EAC	Election Assistance Commission
States	Kansas, Alabama, and Georgia
Appellants	Appellants 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.
Executive Director	Defendant-Appellee Brian Newby, Executive Director, Election Assistance Commission
JA-	Joint Appendix

Statement of Jurisdiction

Appellants invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court denied the Appellants' motion for a preliminary injunction on June 29, 2016. (JA-1686-87.) The Appellants filed a notice of appeal with the district court on July 1, 2016. (JA-1688.) This Court has jurisdiction under 28 U.S.C. § 1292.

Issues Presented for Review

1. Whether Appellants have demonstrated that they will face irreparable harm as a result of the States' documentary proof-of-citizenship requirement absent a mandatory preliminary injunction.
2. Whether Appellants have demonstrated a likelihood of success on their claim that the EAC's decision to grant the States' request to modify their state-specific instructions to the federal voter registration form violates the Administrative Procedure Act.
3. Whether Appellants have demonstrated that the balance of the equities and the public interest weight in favor of a mandatory preliminary injunction.

Statutes and Regulations

All applicable statutes and regulations are contained in the briefs for the Appellants and Appellees.

Statement of the Case

In 2013, at the suggestion of the Supreme Court in *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) ("*ITCA*"), Arizona, Georgia, and Kansas requested that the Election Assistance Commission ("EAC") modify the state-specific instructions accompanying the Federal voter registration form (hereinafter "the Federal Form") to reflect their state proof-of-citizenship requirements to qualify to vote. Unfortunately, at the time, the EAC did not have

any commissioners or even an executive director. The then-Acting Executive Director refused to act upon Arizona, Georgia, and Kansas's requests, leading to a federal lawsuit brought by Arizona and Kansas in the United States District Court for Kansas. *Kobach v. United States Election Assistance Comm'n*, 6 F. Supp. 3d 1252 (D. Kan. 2014). Three of the Appellants here, the League of Women Voters of the United States, the League of Women Voters of Kansas, and Project Vote, were permitted to intervene as defendants in that lawsuit. *See id.* at 1257. Finding no final agency action, the district court "remanded the matter to the EAC with instructions that it render a final agency action no later than January 17, 2014." *Id.* at 1258.

In response to the district court's directive, then-Acting Executive Director Alice Miller took the unusual step of requesting notice and comment on the States' requests and, after receiving comments from many special interest groups including several Appellants here, issued a 46-page decision on January 17, 2014, denying the States' requests (the "2014 Decision"). (JA-1070-1115.) The origin of this decision was questioned by Intervenor-Appellee Secretary Kobach during the hearing on Plaintiffs' Motion for Temporary Restraining Order. (JA-382-384 (explaining his belief that the Department of Justice drafted the 2014 agency Decision, not the EAC); *see also* JA-292 ¶ 22 ("Ms. Miller suggested I talk to the Department of Justice attorneys, who she said could explain to me what our

position was . . . . [S]he could not articulate the substance of the final agency decision that was previously released by her, and which had been written by the Department of Justice attorneys . . . .").) The United States admitted below that the 2014 Decision was made with the involvement of attorneys with the Department of Justice. (JA-364-366 at 41:7-43:5).[1]

The states challenged the 2014 Decision in federal court and the district court found that the EAC had "'a nondiscretionary duty' to include the states' concrete evidence requirement in the state-specific instructions on the federal form." *Kobach*, 6 F. Supp. 3d at 1271. The Tenth Circuit Court of Appeals reversed, finding that the "EAC does have discretion to reject such requests." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1196 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015).

On January 13, 2015, following a Presidential nomination and unanimous U.S. Senate confirmation, Thomas Hicks, Matthew Masterson, and Christy McCormick were sworn in as EAC Commissioners. EAC, Commissioners,

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[1] A substantial amount of discovery materials and associated pleadings have been filed under seal in this case. While these materials do not squarely implicate the irreparable harm prong at issue before this Court, the materials may well be relevant to the other preliminary injunction elements such as likelihood of success on the merits. The Foundation submits that a thorough examination of the merits of the other preliminary injunction prongs cannot be complete without review of those materials under seal and in that circumstance urge that they be unsealed or other procedures undertaken to appropriately review the full record.

http://www.eac.gov/about_the_eac/ commissioners.aspx (last visited Aug. 1, 2016); *see also* 160 Cong. Rec. S6933 (daily ed. Dec. 16, 2014). In November 2015, Brian Newby was hired as the EAC's new Executive Director. (JA-291.)

Kansas then requested that the EAC modify its state-specific instructions on the Federal Form to reflect current state law, including new regulations pertaining to Kansas's proof of citizenship requirement. (JA-292 at ¶¶ 20-21.) With its request, Kansas included newly discovered evidence demonstrating the need for its state-specific instructions. (JA-292 at ¶ 21.)

"After determining that the changes to the state-specific instructions were necessary and proper," Mr. Newby finalized and mailed his acceptance of Kansas's request on January 29, 2016 (hereinafter, the "2016 Decision"). (JA-294 at ¶¶ 46, 49.) Mr. Newby also notified Alabama and Georgia of the acceptance of their similar requests. (*Id.*; *see also* (Dkts. 11-15, 11-19, and 11-20).) The changes were posted on the EAC's website as of February 1, 2016. (JA-294 at ¶ 51.)

On February 12, 2016, Appellants here filed their Complaint for Declaratory and Injunctive Relief below. (JA-27.) On February 17, 2016, Appellants filed their motion for a temporary restraining order and preliminary injunction (Dkt. 11), and supporting Memorandum, (Dkt. 11-1). On February 19, Kansas Secretary of State Kris Kobach filed a motion to intervene. (Dkt. 20.) On February 20, the Public Interest Legal Foundation filed its motion to intervene. (Dkt. 24.) On February 22,

Federal Appellees filed their response to Appellants' Motion, stunningly stating that "[t]he United States consents to plaintiffs' request for entry of a preliminary injunction." (Dkt. 28 at 1.) The district court granted both Intervenors' Motions on February 22, 2016. (Minute Orders, February 22, 2016.) On the same day, the court held a hearing on Appellants' Motion for a Temporary Restraining Order, which it denied on February 23, 2016. (Dkt. 34.) The court then allowed Intervenors to file responses to, and the Appellants and Federal Appellees to file supplemental briefing on, the preliminary injunction motion. (Dkts. 47, 48, 55, 56, 60, 61.) On March 9, 2016, the court held another hearing on Appellants' Motion. Afterwards, the court allowed the parties to file more supplemental briefing on issues raised in the hearing. (Dkts. 71, 72, 73, 83). On June 29, 2016, the district court issued an order denying Plaintiffs' Motion. (JA-1686-87.) On July 1, 2016, Appellants filed the present appeal. (JA-1688.) On July 7, 2016, Appellants filed their emergency motion to expedite, which Intervenors opposed. The Court granted the motion to expedite on July 13, 2016.

Summary of the Argument

Appellants seek a mandatory preliminary injunction that would vacate the EAC's decision to grant Alabama, Georgia and Kansas's request to add a proof-of-citizenship requirement to each state's state-specific voter registration instructions.

Appellants have failed to demonstrate clearly that they are entitled to such extraordinary relief.

The district court denied Appellants' request for an injunction on the sole ground that none of the plaintiffs below could demonstrate that they will face irreparable harm absent immediate relief. This Court can and should do the same. Appellants' alleged injuries amount to nothing more than expenditures of time, money, and resources they believe are necessary to inform voters about the proof-of-citizenship requirements. Under Circuit precedent, such expenditures do not constitute irreparable harm.

As a threshold matter, it is not clear that the Kansas League will face *any* harm as a result of the 2016 Decision. In deposition testimony before another federal court, the organization's current president conceded that the state-level organization—that is, the party before this Court— does not conduct voter registration drives.

Even if the Kansas League has standing, its alleged injuries do not even come close to demonstrating the "great" harm necessary to warrant preliminary injunctive relief. A proof-of-citizenship requirement has been in place in Kansas for state elections since 2013. As a result of the 2016 Decision, the Kansas League must now do nothing more than inform voters that the same requirement now applies to registrations using the Federal Form.

Appellants' lack of entitlement to relief in Alabama and Georgia is even clearer. In those states, the proof-of-citizenship requirement *is not being enforced*. Appellants muster only speculation that the requirement will, at some future date, take effect. Such bald speculation falls woefully short of demonstrating an injury that is "certain" and "imminent."

Although the district court did not establish that any organization has standing to represent the interests of their members and would-be registrants, Appellants assert that the 2016 Decision will prevent thousands of individuals from registering to vote. Despite these naked assertions, Appellants could only offer two individuals to the district court who claimed to be unable to register to vote. In the end, their claims rang hollow. The district court found they lacked standing, having had their Federal Form applications approved by the State of Kansas.

Even if this Court believes Appellants have demonstrated some irreparable harm to warrant reversal, the proper action, under Circuit precedent, is to remand the matter to the district court for consideration of the remaining preliminary injunction factors. Importantly, the district court is contemporaneously considering motions for summary judgment on an expedited schedule.

Should this Court reach the remaining factors itself, it should find each weighs heavily in favor of denial. Appellants cannot demonstrate that they are likely to succeed on the merits. The 2016 Decision was a valid exercise of the

Executive Director's longstanding delegated authority to grant or deny requests to modify state-specific registration instructions through informal adjudication. Appellants' entire argument rests on unsupported assumptions that the 2016 Decision was both a rulemaking and a change in agency policy. Neither contention is correct.

Appellants are also incorrect that the Executive Director failed to adequately explain the reasons for his decision. The record reflects otherwise. The Executive Director issued a thorough and detailed memorandum explaining his decision to grant the States' request to modify their state-specific instructions. (JA-788.) The Executive Director noted that the granting or denying of changes to state-specific instructions has, as a matter of precedent, been a "ministerial duty carried out by the Executive Director . . . without Commissioner involvement." (JA-791.) Further, in sworn testimony before the district court, the Executive Director explained that his decision to grant the state-specific changes was made after he determined they were both "necessary and proper," (JA-294 at ¶ 46), and based on "new information that had not been provided to the EAC previously, consisting of a spreadsheet of non-citizens who recently registered to vote," (JA-292 at ¶ 21.) Because the reasoning for the 2016 Decision can be reasonably discerned from the record, it must be upheld.

The balance of harms and the public interest also weigh in favor of denying the requested relief. While Appellants will possibly face minimal added burdens as a result of the 2016 Decision, Intervenor-Appellee Public Interest Legal Foundation's mission to ensure the integrity of elections nationwide will be frustrated if the States are unable to verify its voters' citizenship. Such a requirement is necessary to verify eligibility and without it, the risk of vote dilution is great.

Lastly, the public interest lies heavily in favor of ensuring only eligible voters cast ballots in this year's elections. Absent citizenship safeguards—which the States and the EAC Executive Director have deemed necessary—the votes of eligible citizens may be canceled out by the votes of ineligible voters.

Introduction

The relief Appellants ask for is, in the words of the district court, "truly astonishing." (JA-1683.) Not only do they seek the extraordinary relief of a preliminary injunction, they seek a mandatory injunction altering the status quo. However, Appellants' request is not the only part of this case that is astonishing. This case also involves the highly unusual action of the Department of Justice *consenting* to the relief sought, causing Intervenor-Appellee Public Interest Legal Foundation (the "Foundation") and Intervenor-Appellee Kansas Secretary of State to provide the only defense for an independent federal executive agency. The

Department of Justice has repeatedly taken positions at odds with its agency-client on a wide range of matters in this litigation, including privileges and even the adequate representation of the positions of EAC commissioners, leading the former chair of the EAC, Christy McCormick, to formally request permission to hire outside counsel to adequately represent and defend the agency. (*See* Dkt. 36-1) (Department of Justice responding to Commissioner McCormick's request to the court.)

Appellants failed to demonstrate that they will suffer irreparable injury absent an injunction. Under Circuit precedent, such a failure is alone grounds for a denial of a motion for preliminary injunction and the district court's decision should be affirmed. But, not only have they failed to establish irreparable harm, Appellants fail to show that they are likely to succeed on the merits, that an injunction would be in the public interest, and that the balance of equities tips in their favor.

Standard of Review

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

Argument

I. This Court's Review is Limited to the Issue of Irreparable Harm.

Under this Court's precedent, a "movant's failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Finding that Appellants did not demonstrate any irreparable harm, the district court properly denied the Appellants' request for a preliminary injunction without assessing the remaining elements of the preliminary injunction test. (*See* JA-1683.)

Appellants, echoed by the Department of Justice, urge this Court to review not only the district court's holding on irreparable harm, but to assess, in the first instance, the merits of their claims, the balance of harm to the parties, and to what extent an injunction would serve the public interest. (App. Br. at 31; Fed. Br. at 22.) Circuit precedent forecloses Appellants' and the Department of Justice's requests.

In *Chaplaincy*, as here, the lower court denied the plaintiff's request for a preliminary injunction on the sole finding that the plaintiff did not demonstrate irreparable harm. This Court reversed. 454 F.3d at 305. This Court then assessed "whether to proceed with the remainder of the preliminary injunction determination . . . or remand the case to the district court." *Id.* at 304.

This Court recognized that review of legal findings is *de novo*, and the absence of such findings therefore does not necessarily preclude review. *Id*. at 305. However, in the context of a preliminary injunction, "the district court's balancing of the four preliminary injunction factors and ultimate decision to grant or deny relief is for abuse of discretion, and without any conclusions of law as to the three remaining factors, [the court] is *unable* to determine whether the district court properly carried out this function." *Id*. (emphasis added). Counseled by both "precedent and prudence," this Court remanded the case to the district court. *Id*.

On top of precedent, prudence likewise counsels remand in this case. Summary judgment briefing, which will resolve Appellants' allegations on the merits, is currently underway at the district court. The district court is working expeditiously and has scheduled oral argument for September 12—just four days after this Court will hear argument in this appeal. (Dkt. 99.)[2] Consideration of additional issues by this Court risks conflict with the district court's consideration of the facts and ultimately may cause confusion among the parties and the public.

As *Chaplaincy* instructs, remand is appropriate so that a "'full understanding of the issues'" may be attained. 454 F.3d at 305 (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997)). Considering

[2] Notably, Appellants did not request that the district court stay its proceedings pending the resolution of this expedited appeal.

that this case implicates the integrity of the upcoming federal general election, the importance of reaching a full understanding of the issues below is heightened.

II. Appellants Have Not Demonstrated Entitlement to a Preliminary Injunction.

A preliminary injunction is an "extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Chaplaincy*, 454 F.3d at 297. The elements of the preliminary injunction test are well known: the 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. *Id*.

The district court determined that the "sliding scale analysis"—that is, a balancing of the four factors—"remains the law of [this] Circuit." (JA-1672 n.14.) However, Appellants "must demonstrate at least some injury for a preliminary injunction to issue, for the basis of injunctive relief in the federal courts has always been irreparable harm." *Chaplaincy*, 454 F.3d at 297. "[F]ailure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Id*.

This Court has set a "high standard for irreparable injury." *Id*. The injury complained of "must be both certain and great; it must be actual and not

theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The moving party must demonstrate that its injuries are "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. (quotations and citations omitted) (emphasis in original).

The injury must also be "beyond remediation." *Chaplaincy*, 454 F.3d at 297. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm. *Id*. at 297-98.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Appellants have asked for relief that does not preserve the status quo, but alters it. That is, Appellants have asked for a mandatory injunction. They have asked that voter registration procedures that have been in place for nearly 6 months not simply be changed, but also vacated. (JA-58-59.)

The D.C. Circuit has expressly cautioned that "[t]he power to issue a preliminary injunction, especially a mandatory one, should be sparingly

exercised." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (citation omitted).

A. Appellants Will Not Suffer Irreparable Harm Absent an Injunction.

Despite Appellants' broad statements of harm that "every day, eligible voters in three states are being prevented from registering to vote—and civil groups are being prevented from conducting effective voter registration drives," (App. Br. at 1), they failed to demonstrate concrete and irreparable harms that will occur absent an injunction. This is especially true given that Alabama and Georgia are not currently enforcing their proof of citizenship requirement and Kansas has been enforcing its requirement for several years. Failure to demonstrate irreparable harm absent an injunction is fatal to Appellants' request for a preliminary injunction.

1. Alabama and Georgia

Appellants' lack of entitlement to relief in Alabama and Georgia is clear. As the district court found, the record demonstrates that in Alabama and Georgia, "the documentation of citizenship requirements are not even being enforced." (JA-1681.) That is, residents using the Federal Form to register to vote are *not* required to show proof of citizenship.

Nevertheless, Appellants claim their voter registration activities are being irreparably harmed in Alabama and Georgia because "there is no way to know"

when Alabama and Georgia will decide to implement their proof of citizenship laws." (App. Br. at 53.)

Appellants' claimed injuries are too speculative to satisfy the demanding standard for a preliminary injunction. Even assuming, *arguendo*, that the added task of informing registrants that they must provide proof of citizenship to register to vote amounts to an irreparable injury, Appellants have asserted no more than a "possibility" of such harm.

In *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008), the Supreme Court rejected the "possibility" standard as "too lenient" to justify injunctive relief.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Id. (citations omitted) (emphasis in original).

As prudently stated by the district court, Appellants can "simply inform the voter registration applicants they assist that the requirement is not being enforced." (JA-1677.) A claim that one must inform hypothetical individuals of what is not being enforced does not demonstrate irreparable harm. *See Wisc. Gas Co.*, 758 F.2d at 674. Such a minor burden falls woefully short of justifying the extraordinary remedy of a preliminary injunction.

2. Kansas

In Kansas, the proof-of-citizenship law is currently being enforced. However, the record does not provide a "clear showing" that Appellant League of Women Voters of Kansas ("Kansas League") will suffer *any* injury absent an injunction. Moreover, the alleged harms amount to nothing more than "redirect[ing] time, energy, and resources toward educating applicants on the new registration requirements," injuries that do not reach a level that constitutes the type of irreparable harm that warrants injunctive relief.

a. The Record Demonstrates Factual Conflict Regarding Harm to the Kansas League.

The district court accepted, for purposes of standing, the Kansas League's allegation that it would be harmed in some way in conducting voter registration drives. (JA-1675.) That appears to be the same position Appellants take before this Court by referencing harm to "voter registration efforts." (App. Br. at 50.) However, after declarations were submitted at the district court, the current president of the Kansas League testified as a Rule 30(b)(6) deponent in a different federal action that, "The League of Women Voters of Kansas as a State organization does not conduct voter registration drives." (*See* Exhibit 3 to Appellee-Intervenors' Response to Emergency Motion to Expedite (Doc. #1624047) (Excerpt of Deposition of Marge Ahrens, 90:4-6 (June 8, 2016)).) It is

thus far from clear that the alleged harm to "voter registration efforts" is even applicable to the Kansas League.

The Kansas League even admits this is true. In its reply brief to its Motion to Expedite before this Court, the Kansas League explains that only "*local* leagues of the Kansas League . . . conduct [voter registration] drives" and that the Kansas League simply "gives guidance, education, and training to the local leagues in that regard…" (Doc. 1624317 at 6 n.1.) Of course, those "local leagues" are not parties to this case and such testimony appears to conflicts with statements made in briefing to this Court. (*See* App. Br. at 51 ("Appellants conduct voter registration drives as a key part of their mission of promoting voter participation and civic engagement.")).

The scope of the actual harm to the Kansas League—as opposed to its affiliates—is far from clear on the record before this Court and a preliminary injunction should therefore be withheld.

b. The Kansas League's Expenditures of Time, Resources, and Money do Not Constitute Irreparable Harm.

Appellants separately assert that as a result of the proof-of-citizenship requirement, they "have spent and will spend money, time, and other resources." (App. Br. at 54.) However, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough" to constitute irreparable harm. *Chaplaincy*, 454 F.3d at 297.

As a threshold matter, it is unclear from the record below that any significant portion of Kansas League's claimed injuries are "necessary" to respond to the proof-of-citizenship requirement. In Kansas, to register in state elections, a documentary proof-of-citizenship requirement has been in effect since 2013. As the district court rightly found, even if Appellants were successful, they would still be required to explain the requirements of providing proof-of-citizenship. (JA-1676; *see also* JA-1682-83 n. 20 and 21.) It is thus hard to imagine how registration materials printed before the 2016 Decision—which should have already informed citizens that Kansas' state elections require documentary proof of citizenship—are now "largely obsolete." (App. Br at 54.) The Kansas League merely speculates that it will be forced to spend a "significant amount" to merely inform registrants using the Federal Form that the same proof-of-citizenship requirement is now required. (*Id.*)

In this Circuit, to warrant emergency injunctive relief, the alleged injury must be certain, great, actual, and imminent. *See Wisc. Gas Co.*, 758 F.2d at 674. As the district court correctly found, Appellants' claim that the proof-of-citizenship requirement will cause them to spend resources to "educate potential voters about the proof of citizenship" (App. Br. at 54), "is nowhere close to the threshold of a 'great' injury required for the issuance of a preliminary injunction." (JA-1683 n.21 (citing *Chaplaincy*, 454 F.3d at 297).) At best, Appellants will simply have to

inform voters using the Federal Form that it, like the state registration form, also requires proof-of-citizenship.

Appellants attempt to circumvent their high burden by explaining that their alleged economic expenditures are nonetheless irreparable because the Administrative Procedure Act does not allow for recovery of money damages. (App Br. at 55-56.) Yet an inability to recover economic loss does not exempt Appellants from clearly demonstrating that their losses are certain, great, actual and imminent. "In this jurisdiction, harm that is 'merely economic' in character is not sufficiently grave under this standard." *Hi-Tech Pharmacal Co. v. United States FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (quoting *Wisconsin G*as, 758 F.2d at 674). "To demonstrate irreparable injury, a plaintiff must show that it will suffer harm that is 'more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff.'" *Gulf Oil Corp. v. Dept. of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981). "To shoehorn potential economic loss into a showing of irreparable harm, a plaintiff must establish that the economic harm is so severe as to cause extreme hardship to the business or threaten its very existence." *Hi-Tech Pharmacal Co.*, 587 F. Supp. 2d at 11 (quoting *Gulf Oil Corp.*, 514 F. Supp. at 1025.

As the district court noted, Appellants' "declarations are devoid of specifics necessary for the Court to evaluate whether such pecuniary losses constitute

irreparable harm under the law of this Circuit." (JA-1683 n.21.) "Without any specifics as to the costs plaintiffs will incur and their relation to the organizations' budgets as a whole, the Court cannot conclude plaintiffs are clearly entitled to injunctive relief." (*Id.*)

The law changes frequently. Any such change will necessarily require some expenditure of time and money by those who endeavor to explain the law to others. If any expenditure of money was sufficient to warrant injunctive relief, it would unnecessarily wreak havoc on the enforcement of countless duly enacted laws.[3]

3. Appellants Have Not Demonstrated That They Are Substantially Likely to Succeed on the Merits.

Should this Court believe it necessary to address the remaining preliminary injunction factors, it should find that they all weigh heavily against such extraordinary relief.

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[3] Appellants fault the district court for comparing their efforts to educate the public about the proof-of-citizenship requirement with the "ACA or the tax code." (App. Br. at 54.) Reference to those statutes is not "unrelated" as Appellants claim. (*Id.*) Rather, they underscore the Foundation's point. The ACA and the tax code are complex and far reaching, and changes can often cause confusion among the public. If any doctor or CPA could demonstrate irreparable harm merely by alleging that the change will cause an expenditure of resources related to client education, very few statutory changes could escape judicial review.

1. The Executive Director Approved the States' Request for Changes to the Federal Form under his Longstanding Delegated Authority to Informally Adjudicate Such Requests.

Appellants first contend that they are likely to succeed on the merits because Executive Director Newby acted contrary to law and EAC policy by approving the States' requested changes without the approval of three EAC commissioners. (App. Br. at 31.)

While the Help America Vote Act normally requires the "approval of at least three commissioners" to carry out the EAC's official duties, 52 U.S.C. § 20928, it does not preclude the EAC from delegating authority to the Executive Director or other officers and staff. As Appellants concede, in 2008, the EAC made such a delegation to the Executive Director, granting him the "authority to 'maintain[] the Federal Form.'" (App. Br. at 16 (quoting *Kobach*, 772 F.3d at 1193-94 (emphasis added).)

Appellants, however, contend that the Executive Director's authority to grant or deny State requests was superseded in 2015 by the "Election Assistance Commission Organizational Management Policy Statement," which became effective February 24, 2015 ("2015 Policy Statement"). The 2015 Policy Statement provides in relevant part,

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.

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.

(JA-1014.)

The 2015 Policy Statement requires "Policymaking" to be accomplished through the "formal voting process" of a quorum of commissioners. *Id*. Importantly, "Policymaking" is explicitly defined. It includes a "determination setting overall agency mission, goals, and objectives, or otherwise setting rules, guidance or guidelines." *Id*.

As the Tenth Circuit confirmed, the decision whether to grant or deny modification to state-specific requests is an "informal adjudication carried out pursuant to 5 U.S.C. § 555." *Kobach*, 772 F.3d at 1197. It is neither the setting of "overall policy" or "rules, guidance or guidelines," rendering it outside the scope

of the 2015 Policy Statement. *See* 5 U.S.C. § 551 (defining "rule" and "adjudication").[4]

Contrary to the Appellants' unsupported belief, the 2015 Policy Statement did not supersede the Executive Director's longstanding authority to informally adjudicate the States' request for modification to their state-specific instructions. In fact, what evidence exists on this matter, plainly contradicts the Appellants' interpretation of the 2015 Policy Statement.

When the 2015 Policy Statement was adopted, now-Chairman Hicks stated:

> I and my fellow Commissioners agree that [the 2015 Policy Statement] continues to instruct the Executive Director to **continue maintaining the federal form consistent with the Commissioners' past directives**, unless and until such directions were counter made should the agency find itself again without a quorum. The Executive Director will still be able to manage the daily functions of the agency consistent with federal statute, regulation and the EAC policies, answer questions from stakeholders regarding the application of [National Voter Registration Act] and [Help America Vote Act] consistent with EAC policies and guidelines and advisory and policies as set by the Commissioners.

Transcript, United States Election Assistance Commission Public Meeting at 74 (Feb. 24, 2015), available at http://www.eac.gov/public_meeting_2-24-15/ (emphasis added). Authority to "maintain the federal form" is precisely the

[4] Although the 2015 Policy Statement is not a statute, "the statutory construction principle, *expressio unius est exclusio alterius*, that is, the mention of one thing implies the exclusion of another thing" *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997), applies equally here.

authority Appellants concede gives the Executive Director the power to grant or deny proof of citizenship requirements. (App. Br. at 15 ("the Executive Director had authority to reject requests" under "delegation of authority").

The decision by the Executive Director to grant the States' requests is a delegated authority that dates back to the Federal Election Commission. (JA-950, *see also* Fed. App. Br. at 7.) The Executive Director had full authority to make the 2016 Decision, and claims that decision superseded his delegated authority are just plain wrong.[5]

2. Informal Adjudications Are not Subject to the Administrative Procedure Act's Notice and Comment Requirement.

Appellants' argument that the 2016 Decision was subject to the Administrative Procedure Act's notice and comment requirement depends on its incorrect assertion that the Executive Director's actions were an act of "rulemaking" or a change in agency policy. (App. Br. 34.) As previously established, the Executive Director's decision to grant the States' requests was not

[5] Appellants maintain that the Executive Director's authority to "maintain the Federal Form" is conditioned on consistency with the "Commissioners' past directives." One of those "past directives," according to Appellants, is that requests proof-of-citizenship requirements are not necessary. (App. Br. at 16.) Appellants provide no citation for this contention, which contradicts the fact that granting or denying such requests is not policy or rulemaking, but mere fact-specific, "informal adjudication," *see Kobach*, 772 F.3d at 1197; *see also* Fed. App. Br. at 21-22 (alteration of state-specific instructions is not rulemaking, but informal adjudication), which does not establish any agency directive.

an act of rulemaking, but an informal adjudication that was based on the specific circumstances of the requests by the States. *See Kobach*, 772 F.3d at 1197. This crucial distinction renders Appellants' entire argument on this point fatally irrelevant.

"Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings. The Administrative Procedure Act fails to specify the procedures that must be followed for agency actions that fall within this category." *Izaak Walton League v. Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981).

It is the law of this Circuit, consistent with the Administrative Procedure Act, that when a decision is "not rules" under the Act, but "informal adjudications," the Act's notice-and-comment procedures are not "trigger[ed]." *Int'l Internship Program v. Napolitano*, 718 F.3d 986, 988 (D.C. Cir. 2013). The Department of Justice agrees. (Fed. App. Br. at 21-22 ("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.").)

3. The Executive Director's Decision to Grant the States' Request Can Be Reasonably Discerned from the Record and Must be Upheld as Necessary to Combat the Problem of Non-Citizen Voting.

a. The Reasoning for the Executive Director's Decision is Easily Discernible from the Record.

Appellants also argue that the Executive Director's decision must be set aside because he allegedly failed to provide reasons for his decision. (App. Br. at 36.) However, the record shows differently. The Executive Director issued a thorough and detailed memorandum on February 1, 2016, explaining his decision to grant the States' request to modify their state-specific instructions. (JA-788-94.) The Executive Director noted that the granting or denying of changes to state-specific instructions has, as a matter of precedent, been a "ministerial duty carried out by the Executive Director . . . without Commissioner involvement." (JA-791.) Importantly, the Executive Director recognized that the "federal form, itself, has state-by-state instructions. This implies the role and rights of the states to set the framework for acceptance and completion of the form." (JA-792.) His decision, the Executive Director concluded, was consistent with similar requests made by Louisiana and Nevada. (JA-791.) Accordingly, Executive Director Newby granted the States' requests.

Furthermore, in testimony before the district court, Executive Director Newby swore, "After determining that the changes to the state-specific instructions were necessary and proper," he accepted the state-specific change requests. (JA-

294.) Appellants' contention that such an explanation is insufficient again depends on its characterization that the Executive Director's actions were either a rescission of a formal rule or a change in policy. (App. Br. at 36.) Neither contention is true as the Executive Director's decision was simply an informal adjudication based on the facts before him, a routine matter that does not require Commissioner involvement.

Whether the agency provides what Appellants believe is an adequate justification for its adjudication is irrelevant. The Supreme Court has made clear that the determination of necessity does not reside with the EAC, but resides with the States: "a State may request that the EAC alter the Federal Form to include information that the *State deems necessary to determine eligibility*…." *ITCA*, 133 S. Ct. at 2259 (emphasis added). And even if other aspects of the Executive Director's reasoning are somehow viewed as unclear, it makes no difference: "[T]his Court "will . . . uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (citations and quotations omitted).

The EAC's decision to grant the States' request to require proof-of-citizenship can be easily discerned. Executive Director Newby testified that Kansas provided to him "new information that had not been provided to the EAC previously, consisting of a spreadsheet of non-citizens who recently registered to

vote in Sedgwick County, Kansas." (JA-292.) Appellants ask this Court to ignore this testimony solely on the grounds that it was submitted in a declaration to the district court and not in the EAC's initial response to the States. (App. Br. at 37.) But such a distinction is of no moment. Even assuming the Executive Director's explanation for his decision was, at the time it was made, deemed inadequate to permit review, the proper course of action is the submission of testimony to the court so as to permit review. As this Circuit explains,

> In *Camp v. Pitts*, 411 U.S. 138 (1973), the [Supreme] Court further elaborated on the function of a court reviewing an informal adjudication under § 706: 'If . . . there was such failure [by the agency] to explain administrative action as to frustrate effective judicial review,' the reviewing court should obtain from the agency 'such additional explanations of the reasons for the agency decision as may prove necessary.' *Id*. at 142-43.

Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 338 (D.C. Cir. 1989). In other words, the district court acted precisely in accordance with precedent.

Executive Director Newby rightly understood his duty to grant the States' request to be "routine" and "ministerial." (JA-791-792.) In the context of what is an "entirely informal" process, *ITCA*, 133 S. Ct. at 2260 n.10, the Executive Director's detailed explanation is plainly sufficient. Nonetheless, he has further testified that he considered evidence provided by Kansas showing that non-citizen registration is a problem in that state, and that such evidence demonstrates the necessity of the changes. The EAC's decision to grant the States' request was

plainly consistent with the evidence before it. Lastly, based on the abundance of evidence throughout the country of non-citizen registration *and* voting, *infra*, the EAC's decision cannot be characterized as arbitrary or capricious. In fact, refusing to grant the States' request could be considered arbitrary or capricious because, as the Supreme Court noted in *ITCA*, the EAC had previously "accepted a similar instruction requested by Louisiana." *ITCA*, 133 S. Ct. at 2260. Accordingly, Appellants have failed to show they are substantially likely to succeed on the merits of their claims and their objections should be overruled.

b. The Federal Form Has Failed to Prevent Noncitizens from Registering to Vote and Casting Ballots.

Together with the evidence submitted by Kansas, the States' requested modifications to the Federal Form may be conclusively considered *necessary* to combat the serious problem of noncitizen registration and voting. The citizenship "safeguards" of the Federal Form are nothing more than an honor system. They include a checkbox at the top of the form, the words "For U.S. Citizens" on the cover page, and an attestation of citizenship by the signature box. *See* National Mail Voter Registration Form – English, *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf. Despite Appellants' bald assertions, these measures have unequivocally failed to prevent noncitizens from registering to vote and from actually voting.

One ominous demonstration of the ineffectiveness of the citizenship checkbox at the top of the Federal Form comes from a small sample of materials collected from Harris County, Texas. (Dkt. 53-7.)[6] In this sample, four of the individuals actually checked "no" on the citizenship question,[7] six checked "no" and "yes,"[8] and the remaining three left the checkbox blank entirely.

Yet *each person was registered to vote* by the local state government officials, as evidenced by the resulting voter registration numbers (VUID) listed on the defective forms. In an unrelated matter, the former Voter Registrar for Harris County, Texas (the county in which Houston is situated) testified before the U.S. Committee on House Administration in 2006 and stated that while the extent of illegal voting by foreign citizens in the county was impossible to determine, "it has and will continue to occur." Noncitizen Voting and ID Requirements in U.S. Elections: Hearing Before the Committee on House Administration, 109th Cong.

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[6] The Foundation redacted all street addresses and birthdates on these faulty registration forms.

[7] Bayron Leo Castro (VUID #117187524), Giovanna Guzman (VUID #1171828471), Marta D. Morales (VUID #009429514), and Rodrigo Salazer (VUID #1171853313) all marked "NO" to the question, "Are you a United States Citizen?" (Dkt. 53-7 at 1-4.)

[8] Gregorio Matias (VUID #1171964586), Pedro Morin (VUID #1171874884), Chong Wang (VUID #1171938695), Sanchez R. Sanrbez (VUID # 1172025775), Suadoca Eliser (VUID #1171743204), and Oswald Hernandez (VUID #1171961390) marked "NO" (as well as "Yes") to the question, "Are you a United States Citizen?" (Dkt. 53-7 at 5-10.)

(2006) (statement of Paul Bettencourt, Harris County Tax Assessor-Collector and Voter Registrar); (*see also* Dkt. 53-8 (hereinafter "Mr. von Spakovsky Testimony").)[9]

Nor does requiring individuals merely to check a box that they are citizens under penalty of perjury prevent noncitizens from registering and voting. In 2004 a citizen of Kenya voted in the 2004 federal election by checking the "yes" box on the Federal Form, "represent[ing] that he [was] a citizen of the United States." *Kimani v. Holder*, 695 F.3d 666, 668 (7th Cir. 2012). In 2006, a Philippine citizen was also able to vote simply by checking "yes" on the box asserting U.S. citizenship on the Federal Form. *Keathley v. Holder*, 696 F.3d 644, 645 (7th Cir. 2012). Just the same, a citizen of Peru was able to register and vote in 2006 by signing "a voter registration application in which she checked a box indicating that she was a United States citizen." *Matter of Margarita Del Pilar Fitzpatrick*, Board of Immigration Appeals (Decided May 7, 2015).

And there are plenty of other examples. Just a few years ago, a Bosnian citizen "readily admitted registering and voting" claiming that he did "not read the section of the voter registration form that includes the affirmations of citizenship."

[9] Mr. von Spakovsky, a member of the Foundation's Board of Directors, is also a former member of the Federal Election Commission. Prior to that, he served as counsel to the Assistant Attorney General for Civil Rights at the Justice Department.

Guilty Pleas Resolve All Five Voter Fraud Convictions in Iowa, DesMoines Register.com (Dec. 15, 2013), *available at* http://www.desmoinesregister.com/story/news/politics/2013/12/16/guilty-pleas-resolve-all-five-voter-fraud-convictions-in-iowa/4037125/. Last November, Idalia Lechuga-Tena was appointed to the New Mexico state legislature *and* admitted to voting prior to becoming a U.S. citizen. *DA reviews newly minted legislator's admission of voter fraud*, Santa Fe New Mexican (Nov. 12, 2015), *available at* http://www.santafenewmexican.com/news/local_news/da-reviews-newly-minted-legislator-s-admission-of-voter-fraud/article_220d67ab-60c9-5fb7-b14c-54c598ee0900.html. According to the report, Rep. Lechuga-Tena claimed that "she did not understand that she had to be a citizen to vote." *Id.*

And those are not isolated incidents. Again, just last November, Rosa Maria Ortega, a noncitizen in Tarrant County, Texas, was indicted for repeatedly voting illegally. *Non-U.S. Citizen Indicted For Voter Fraud In North Texas*, CBSDFW.com (Nov. 9, 2015), *available at* http://dfw.cbslocal.com/2015/11/09/voter-fraud-alleged-in-dallas-tarrant-counties/. According to reports, Ms. Ortega "fraudulently registered to vote in Dallas County by claiming to be a U.S. citizen." *Id.* It was that easy. The so-called citizenship "safeguards" of the Federal Form did nothing to deter Ms. Ortega from registering and voting. Neither Iowa, Texas, nor New Mexico has citizenship verification requirements on their version of the

federal voter registration form. These examples are not the only instances of demonstrable alien participation in American elections.

Other states are starting to take notice of the national problem of noncitizen voting. Michigan Secretary of State Ruth Johnson recently asked her attorney general to investigate "10 people who aren't U.S. citizens but have voted in past Michigan elections." *Michigan Investigation Sought of Non-Citizen Voting,* Associated Press (Dec. 6, 2013). And Ohio Secretary of State Jon Husted announced that he had found that seventeen noncitizens "illegally cast ballots in the 2012 presidential election." Eric Shawn, *Non-citizens Caught Voting in 2012 Presidential Election in Key Swing State*, Fox News (Dec. 18, 2013). There is evidence in big and small elections, from admitted noncitizen voting in the Compton, California mayoral race, Daren Briscoe, *Noncitizens Testify They Voted in Compton Elections*, L.A. Times (Jan. 23, 2002), at B5, to hundreds of votes by noncitizens in the 1996 congressional contest between Republican incumbent Bob Doman and Democratic challenger Loretta Sanchez, Mr. von Spakovsky Testimony at 5.

More broadly, a 2005 Report from the Government Accountability Office found that up to three percent of the 30,000 individuals chosen for jury duty from voter registration rolls in just one U.S. district court over a two-year period were not U.S. citizens. Government Accountability Office, *Elections: Additional Data*

Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists 42 (2005), *available at* www.gao.gov/assets/250/246628.pdf. According to a study released in 2014 by several professors at Old Dominion University and George Mason University, approximately 6.4% of noncitizens voted in 2008 and 2.2% of noncitizens voted in 2010. Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do noncitizens vote in U.S. elections?*, Electoral Studies 36 (2014) 149-157. Mr. von Spakovsky outlines more examples in Chapter Five of his book *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (Encounter Books, 2012).

Disturbingly, the extent of noncitizen registration and voting is not easily quantified. According to Mr. von Spakovsky,

> Obtaining an accurate assessment of the size of this problem is difficult. There is no systematic review of voter registration rolls by most states to find noncitizens, and the relevant federal agencies—in direct violation of federal law—have either refused to cooperate with those few state election officials who seek to verify the citizenship status of registered voters or put up burdensome red tape to make such verification difficult.

Mr. von Spakovsky Testimony at 6.[10] While how many noncitizens are registering and voting may not be readily ascertainable, one thing is sure—it is happening.

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[10] Appellee-Intervenor Kris W. Kobach testified before the same committee on the problem and reality of noncitizen registration and voting. Testimony of Kris W. Kobach, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and the Subcommittee on Health

And it is happening despite the Federal Form's "safeguards." Thus, there is a clear need for the States' proof of citizenship requirement.

4. The Executive Director's Decision Did Not Exceed His Authority Under the National Voter Registration Act.

Appellants lastly contend that the EAC's decision must be set aside because it exceeds the agency's authority under the National Voter Registration Act. Appellants' contention plainly conflicts with both the text of National Voter Registration Act and *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (*ITCA*).

The Federal 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). As interpreted by the Supreme Court in *ITCA*, this provision does not preclude proof-of-citizenship requirements as Appellants' contend. Rather, the Supreme Court was clear that if a State determines that "a mere oath will not suffice to effectuate [the state's] citizenship requirement," *ITCA*, 133 S. Ct. at 2260, it may provide evidence of noncitizen registration in their respective states. (JA-292 ¶ 21 (discussing evidence received by the EAC).)

Care, Benefits, and Administrative Rules at 1-3 (February 12, 2015), *available at* http://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

Upon presentation of such evidence, the EAC is "under a nondiscretionary duty" to provide state-specific instructions that will satisfy the state's proof-of-citizenship requirement. *ITCA*, 133 S. Ct. at 2260.

Appellants' citations showing that Congress considered such a requirement, but declined to require it for *all* states, says nothing about whether an individual state may, in accordance with the National Voter Registration Act, request that the EAC grant its request to implement such a safeguard in its specific state. The Supreme Court decision in *ITCA* expressly invites and authorizes such a request.

Appellants' argument amounts to nothing more than a disagreement with Executive Director Newby's determination that Kansas, Alabama and Georgia have demonstrated that a proof-of-citizenship requirement is necessary in those states.

In granting the States' request, the EAC acted consistently with its authority under the National Voter Registration Act and *ITCA*. Appellants' are not likely to succeed on the merits and injunctive relief should be accordingly denied.

4. The Foundation Will Suffer Injuries if an Injunction is Issued.

Appellant wholly ignores any harm that the Foundation may incur if an injunction is issued. The Foundation's mission is to ensure the integrity of elections nationwide. As is explained above, the States' measures are necessary to ensure that noncitizens do not register and do not vote in federal elections, thus

ensuring the integrity of the elections and avoiding the constitutional harm of voter dilution. Requiring the EAC to change the Federal Form is fundamentally at odds with the Foundation's mission.

5. An Injunction Would Not Further the Public Interest.

Similarly, enjoining the EAC and requiring the publication of a Federal Form that does not accurately reflect the state of the law in three states, with the high likelihood that it will need to be changed back to its current form once the district court addresses the merits of Appellants' claims next month, does not further the public interest. In fact, such an injunction would cause untold administrative burden and cost, as well as a high potential for public confusion during the end of an important election year.

Conclusion

For the forgoing reasons, the lower court's decision should be affirmed.

Dated: August 3, 2016

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 8,526 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellee-Intervenor's 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 on August 3, 2016. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on August 3, 2016, I caused eight (8) copies of the foregoing to be hand delivered to the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit.

Dated: August 3, 2016

/s/ Kaylan L. Phillips

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