UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and **PROJECT VOTE**, *Plaintiffs*, *v.* **BRIAN D. NEWBY**, in his capacity as the Executive Director of the United States Election Assistance Commission; and **THE UNITED STATES ELECTION ASSISTANCE COMMISSION**, *Defendants*, and **KRIS KOBACH,** in his official capacity as Kansas Secretary of State, and **PUBLIC INTEREST LEGAL FOUNDATION**, *Defendant-Intervenors.*	Civ. No. 1:16-cv-00236

INTERVENOR-DEFENDANT PUBLIC INTEREST LEGAL FOUNDATION'S REPLY TO FEDERAL DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS' AND DEFENDANT-INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Defendants' Combined Response to Plaintiffs' and Defendant-Intervenors' Cross-Motions for Summary Judgment and Reply Memorandum (Dkt. 113, "DOJ's Resp.") only address a few of the many points made in Defendant-Intervenor Public Interest Legal Foundation's Cross-Motion for Summary Judgment (Dkt. 105, "Foundation's Cross-Mot."). Indeed, the Foundation's Cross-Motion sets forth the relevant statutory background supporting its Motion (Foundation's Cross-Mot. 2-3), as well as an overview of the relevant policies of the Election Assistance Commission ("EAC") and its predecessor the Federal Election Commission (Foundation's Cross-Mot. 18-25), key arguments that the Department of Justice characterizes simply as "the lengthy and complicated history of the issue" (DOJ's Resp. 8).[1]

In general, the Department of Justice's Response, in so far as it relates to the Foundation's Cross-Motion, concerns the Foundation's analysis of *Arizona v. Inter-Tribal Council of Ariz., Inc*., 133 S. Ct. 2247 (2013) ("*ITCA*"), (DOJ's Resp. 5-6), as well as the Foundation's challenge to the Organizational Plaintiffs' standing, (DOJ's Resp. at 11-13). First, the Department of Justice's argument is premised on an incomplete view of the Supreme Court's decision in *ITCA*. Second, in addition to putting the Foundation in the unusual position of

[1] One thing the Department of Justice does address specifically is the Foundation's discussion of the EAC's 2014 Decision (Foundation's Cross-Mot. 6), which they describe as an "attempt to divert attention away from the challenged 2016 decision" (DOJ's Resp. 2 n.1). Yet, the Plaintiffs relied on the 2014 Decision throughout their Complaint. (*See, e.g*., Dkt. 1, Compl. ¶¶ 2-3, 31-34.) Plaintiffs even attached the entire decision to the Complaint. (Dkt. 1-7, Compl. Ex. 6.) Oddly, after questioning the Intervenors' discussion of the 2014 Decision, the Department of Justice then proceeds to rely on a declaration that *it* provided to this Court, for the assertion that Alice Miller, the then-Acting Executive Director of the EAC, "made the decision in 2014 to deny the states' requests." (DOJ's Resp. 2 n.1.) As the Foundation explained (Foundation's Cross-Mot. 6), the Department of Justice's own client, Executive Director Newby, provided testimony to this Court that Ms. Miller "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" (Dkt. 28-2, Newby Decl. ¶ 22).

arguing over Plaintiffs' standing with the supposed *defendants*, the Department of Justice's arguments supporting Plaintiffs' standing ring hallow.

ARGUMENT

I. The Executive Director's Decision Was Consistent with *ITCA*.

In its Motion, the Foundation explained how the Executive Director's decision is consistent and, indeed, follows the Supreme Court's decision in *ITCA*. (*See* Foundation's Cross-Mot. 32-33.) The Department of Justice claims that the Foundation's "argument is incompatible with the Supreme Court's suggestion in *ITCA*…which makes clear that the Supreme Court understands the EAC to have authority to reject a State's request." (DOJ's Resp. 6.) In so doing, the Department of Justice omits the beginning and end of a quote from *ITCA*, portions that are critical to an understanding of the Court's decision. In its entirety, the sentence reads as follows:

> Since, pursuant to the Government's concession, a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility, *see* § 1973gg-7(a)(2); Tr. of Oral Arg. 55 (United States), and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act, *see* 5 U.S C. § 701-706, no constitutional doubt is raised by giving the "accept and use" provision of the NVRA its fairest reading.

ITCA, 133 S. Ct. at 2259. (*See also* Foundation's Cross-Mot. 4.)

The Department of Justice's reliance on the Court's acknowledgement that a State may challenge the EAC's rejection of a request as *supporting* the ability of the EAC to deny a properly-supported request from a State, like the requests at issue here, is misguided. *ITCA* did not concern an Administrative Procedures Act ("APA") challenge to a denial of requested changes to state-specific instructions. It concerned a state law requiring the rejection of Federal Forms not accompanied by documentary proof-of-citizenship. *ITCA*, 133 S. Ct. at 2251. As the quoted portion of the decision demonstrates, the Court's reference to the *availability* of an APA challenge was not intended to resolve the contours of such a challenge, but intended to alleviate

the obvious constitutional problems that would exist if such a challenge was not available. *ITCA*, 133 S. Ct. at 2259.

It is one thing that a challenge under the APA is available if the EAC refuses to implement state-specific instructions. It is another issue entirely whether the EAC actually has the authority to refuse to do so under the present circumstances. The Department of Justice reads *ITCA*'s reference to the *possibility* that the EAC might reject a state's request as meaning the EAC has the legal authority to do so. (DOJ Resp. 6.) *ITCA* held no such thing, nor could it have, because the question of EAC's authority was not before the Court. In fact, the Court agreed that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 133 S. Ct. at 2258-59.

Moreover, during oral argument for the *ITCA* case, Justice Scalia, the author of the language on which the Department of Justice relies, strongly suggested that the EAC may *not* have the authority to reject a properly supported request to alter the state-specific instructions to the Federal Form. As noted by the district court in *Kobach v. United States*,

> At oral argument, Justice Scalia, who authored the majority opinion in *ITCA*, expressed concern multiple times about Arizona's failure to challenge the EAC's 2-2 vote in 2005 that resulted in no action being taken on Arizona's initial request to add identical proof-of-citizenship language. Transcript of Oral Argument at 9, 11, 15-16, 18…. Justice Scalia expressed skepticism about how the EAC would fare in such a challenge under the APA. *Id*. at 56-57 ("So you're going to be—in bad shape—the government is going to be—the next time somebody does challenge the Commission determination in court under the Administrative Procedure Act.").

Kobach v. United States Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1261 n.39 (D. Kan. 2014). For these reasons, *ITCA* cannot be read to grant the EAC unfettered discretion to reject the States' requests to include their proof of citizenship requirements on the Federal Form. The

EAC's approval of the States' requests was consistent with *ITCA* and the NVRA, and should therefore be upheld.

II. Whether the Kansas League Has Standing Is a Disputed Issue of Fact.

As the Department of Justice acknowledges, (DOJ Resp. 12), the current president of the Kansas League has, since this Court ruled on the Kansas League's standing, testified in a different federal action that the Kansas League does not conduct voter registration drives. (*See* Foundation's Cross-Mot. 12.) The Department of Justice responds to this new development with nothing more than word games. It argues that this Court did not limit its finding on standing to the Kansas League's "voter registration drives," but extending that finding to "voter registration *endeavors*." (DOJ's Resp. 12 (emphasis added) (citing Mem. Op. at 17).)

The Department of Justice does not explain how "endeavors" is factually distinct from "drives." Nor does it point to anything in the actual Complaint or subsequently filed affidavits to show that such a distinction, should it exist, eliminates any material dispute over the Kansas League's standing, as it must to warrant summary judgment in the Plaintiffs' favor. *DOC v. United States House of Representatives*, 525 U.S. 316, 329 (1999) ("To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment . . . a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits.").

The Department of Justice ignores that the current president of the Kansas League further testified that the Kansas League merely "'gives guidance, education, and training to the local leagues'" affiliated with the state-level Kansas League to facilitate the voter registration drives of the local leagues. (*See* Foundation's Cross-Mot. 13.) Such attenuated interests do not demonstrate a "'concrete and demonstrable injury'" to the party before this Court. *Citizens for Responsibility & Ethics v. United States Dep't of the Treasury*, 21 F. Supp. 3d 25, 37 (D.D.C.

2014) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Only where a party establishes that its own "'discrete programmatic concerns are being *directly* and adversely affected' by the challenged action" does a plaintiff have standing. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (emphasis added) (quoting *American Legal Foundation v. FCC*, 808 F.2d 84, 91 (D.C. Cir. 1987). The Kansas League cannot allege a direct injury to its own interests and therefore lacks standing to challenge the EAC's actions.

At best, the Kansas League has made allegations that create a genuine dispute as to whether its own programmatic activities will be injured if relief is withheld. Such a dispute warrants denial of the Kansas League's motion for summary judgment.

III. The Alabama and Georgia Leagues Have Not Demonstrated a Credible Threat of Enforcement of the Proof of Citizenship Requirement.

This Court's finding that the Alabama and Georgia Leagues have standing warrants reconsideration. The Plaintiffs' challenge to the EAC's actions is a pre-enforcement challenge. (*See* Foundation's Cross-Mot. 14-15.) A plaintiff satisfies the injury-in-fact requirement for a pre-enforcement challenge only where he alleges "'credible threat'" that the law will be enforced. *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979).) The Alabama and Georgia Leagues have made no such demonstration.

Under the standard for a pre-enforcement challenge, the Alabama and Georgia Leagues' allegations fall short of demonstrating an injury that can support standing. As this Court found, those parties "will have to expend some resources to clarify the effects of the requirements to their members and volunteers and to potential voters they encounter in order to minimize confusion the instructions may cause." *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727, *29 (D.D.C. June 29, 2016).

The Foundation respectfully submits that the potential for "confusion" cannot alone support standing. Fundamentally, any confusion the Alabama and Georgia Leagues believe they will have to dispel is entirely speculative and is therefore not "'actual or imminent[.]'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, (1990).)[2] The Alabama and Georgia Leagues have made no allegations that they have encountered confused residents or that they have expended any resources to alleviate such confusion over the past seven months. Indeed, it is difficult to envision what additional resources the Leagues would need to expend to deal with the *non*-enforcement of the law beyond the resources they would normally expend to conduct their ordinary voter registration activities. As this Court previously found, the Alabama and Georgia Leagues need do nothing more than "simply inform the voter registration applicants they assist that the requirement is not being enforced." *League of Women Voters of the United States v. Newby*, 2016 U.S. Dist. LEXIS 84727, *28-29.

The insignificant nature of the Leagues' alleged injury is precisely the reason the Supreme Court requires a "credible threat" before a plaintiff may challenge a law prior to its enforcement. Without such a threat, the court risks issuing a decision where no case or controversy exists.

The Department of Justice does not address the pre-enforcement nature of the Leagues' challenge. Because the Alabama and Georgia Leagues have not satisfied the standard for such a

[2] *See also*, proposed Memorandum of Law in Support of Defendants-Intervenors by Amicus Curiae Eagle Forum Education & Legal Defense Fund, (Dkt. 110-3 at 10) ("Under standing's causation requirement, a 'self-inflicted injury' cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013).)

challenge, the Foundation respectfully requests that the Court reconsider its earlier holding that those plaintiffs have standing.

CONCLUSION

For these reasons and those stated in the Foundation's Cross-Motion for Summary Judgment, Defendant-Intervenor's Motion should be granted and both Department of Justice's Motion and the Leagues' Cross-Motion should be denied.

Dated: September 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I caused the foregoing to be filed with the United States District Court for the District of Columbia via the Court's CM/ECF system, which will serve all registered users.

Dated: September 2, 2016

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