IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE, 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, KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION Defendant-Intervenors.	Case No. 16-cv-236 (RJL)

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a) and Local Rule 7(h), Plaintiffs in the above-captioned matter hereby move the Court for summary judgment on the ground that Defendants' actions were arbitrary and capricious and not in accordance with law. The Court should deny the Federal Defendants' motion for partial summary judgment.

In support of this motion and opposition, Plaintiffs rely upon the attached memorandum of points and authorities. A proposed order is also attached.

August 5, 2016

Respectfully submitted,

By: /s/ Linda Stein

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

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

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

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

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

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

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

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

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

John A. Freedman
D.C. Bar No. 453075
R. Stanton Jones
D.C. Bar No. 987088
Elisabeth S. Theodore
D.C. Bar No. 1021029
ARNOLD & PORTER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
John.Freedman@aporter.com

Wendy R. Weiser
Jonathan Brater
Tomas Lopez
Robert Ferguson
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(646) 292-8310
wendy.weiser@nyu.edu

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

Michelle Kanter Cohen
D.C. Bar No. 989164
PROJECT VOTE
1420 K Street, 7th Floor
Washington, DC 20005
(202) 546-4173
mkantercohen@projectvote.org

Attorneys for Plaintiff Project Vote

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE, Plaintiffs 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, KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION Defendant-Intervenors.	Case No. 16-cv-236 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Pursuant to Rule 56(a) FRCP and Local Rule 7(h), Plaintiffs hereby submit this memorandum in support of their motion for summary judgment. Plaintiffs seek a declaration from this Court that the decision of Defendant Brian Newby, Executive Director of the United States Election Assistance Commission ("Commission" or "EAC"), to unilaterally approve requests by Alabama, Georgia and Kansas to change the Federal Form so as to require documentary proof of citizenship was *ultra vires* action and otherwise violative of the Administrative Procedure Act ("APA") and the National Voter Registration Act ("NVRA"). Plaintiffs seek an order vacating that decision. Plaintiffs also submit this memorandum in support of their opposition to Federal Defendants' motion for partial summary judgment.

It is a bedrock principle of administrative law that an agency officer cannot exercise authority that he or she does not have. Defendant Newby violated that principle: his decision to grant the States' requests was a usurpation not only of authority he did not have, but, indeed, of authority that the Commission had specifically and expressly stated he did not have. He acted without the approval of three Commissioners as required by the Help America Vote Act ("HAVA"), and his action was inconsistent with prior EAC decisions, precedent, and policy. Congress built bipartisanship into the EAC under the Help America Vote Act ("HAVA"), and the Executive Director had no ability to act unilaterally when the Commission itself could not do so. Defendant Newby's actions must be vacated because he did not have the power to act.

Additionally, it is a fundamental precept of administrative law that agencies generally must comply with the notice-and-comment requirements of 5 U.S.C. § 553 when making a substantive regulatory change to the statutory or regulatory scheme. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011). It is eminently clear that

Defendant Newby's decision, which overturned twenty years of policy and precedent, effected a substantive change in the statutory and regulatory framework and thus could not be legally adopted without abiding by the APA's notice-and-comment requirement.

It is also a bedrock principle of administrative law that an agency must explain the reasons for its actions when it contradicts precedent or changes policy. The Defendants violated that principle. This issue has particular resonance in this case because the decision that Defendant Newby made was one governed by the NVRA, and the United States Supreme Court has ruled that there are particular findings that must be made to support that sort of decision, *i.e.*, that proof of citizenship is "necessary to enforce [the States'] voter qualifications." *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2259 (2013) ("*ITCA*"). Because Defendant Newby gave no reasons at the time he made the decision and subsequently expressly disclaimed that he considered the "necessity" requirement, and, more so, because the Commission itself gave no such reasons, the decision must be vacated. Indeed, Defendant Commission concedes this point.

Nevertheless, and while conceding that Defendant Newby's decision cannot stand on the ground on which it purportedly rests, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), Defendant EAC suggests that this Court address only that issue and not the *ultra vires* or notice-and-comment issues. That makes little sense. The over-arching legal error in this case is that Defendant Newby acted without authority. He compounded this error by failing to provide the requisite reasoning for his unlawful action. To vacate the decision without ruling on the threshold issue of *ultra vires* is contrary to settled principles of judicial economy and delays the inevitable. And further delay is particularly inappropriate where the unlawful conduct of

Defendant Newby has already caused unnecessary confusion as Alabamians, Georgians, and Kansans try to figure out how to register to vote for the upcoming election.

It is undisputed here that the Commissioners did not vote to take or otherwise approve the action that the Executive Director decided on January 29, 2016. It is also undisputed that the Commission had decided to reject such action on numerous occasions over a decade—a policy decision that the Executive Director reversed on January 29. It is also undisputed that Executive Director Newby made his decision—reversing decades of federal policy—without complying with the APA's notice-and-comment requirement, and without providing any explanation why the agency was reversing its policy. And, while the Commission had previously, in a written policy adopted by a formal vote, specifically delegated limited authority to its Executive Director to maintain the Federal Form *consistent* with agency policy and precedent, it is undisputed that the Commission had, in an express written policy adopted by a formal vote before Executive Director Newby was appointed, rescinded that limited delegation of authority. Finally, it is undisputed—and conceded by Federal Defendants—that, whatever authority the Executive Director had, he did not properly exercise it in accordance with the governing statutory standards. Nor did the Commission. Indeed, the administrative record is void of evidence that would have permitted Executive Director Newby or the Commission to meet the governing statutory standard, *i.e.*, that documentary proof of citizenship is *necessary* to enforce the States' voter qualifications. With a presidential election less than four months away, it is critically important that the Executive Director's unlawful action be stopped so that eligible voters will be able to register.

STATEMENT OF FACTS

A. Development of the Federal Mail Voter Registration Form

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

The NVRA directed the EAC to "develop" the Federal Form and "prescribe such regulations as are necessary to" do so. 52 U.S.C. § 20508(a)(1), (2). By Congress's delegation, the EAC is thus "invested with rulemaking authority to prescribe the contents of [the] Federal Form." *ITCA*, 133 S. Ct. at 2251. "The Federal Form . . . contains a number of state-specific instructions, which tell residents of each State what additional information they must provide and where they must submit the form," and Congress "explicitly instruct[s]" the EAC to "consult[]

with the chief election officers of the States" in developing the Federal Form. *Id.* at 2252 (citation omitted). "Each state-specific instruction must be approved by the EAC before it is included on the Federal Form." *Id.* The EAC's discretion in prescribing the contents of the Form is not unlimited, however. The NVRA specifically provides that the content of 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 . . ." 52 U.S.C. § 20508 (b)(1) (emphasis added).

The EAC's predecessor agency, the Federal Election Commission ("FEC"), developed the initial Federal Form through an extensive notice and comment rulemaking process. *See* 58 Fed. Reg. 51,132 (Sept. 30, 1993) (Advanced Notice of Proposed Rulemaking); 59 Fed. Reg. 11,211 (Mar. 10, 1994) (Notice of Proposed Rulemaking); 59 Fed. Reg. 32,311 (June 23, 1994) (Final Rules). In doing so, the FEC made clear at the outset that "decisions may have to be made that information considered necessary by certain states may not be included on the [Federal Form]." 58 Fed. Reg. 51,132. Specifically, the agency noted that some of the information required by states on their individual voter registration forms, "while undoubtedly helpful, might not be considered 'necessary' as the term is used in the NVRA." *Id.*

Though no state suggested during the FEC's initial notice-and-comment period that documentary proof of citizenship might be "necessary" under the NVRA, the FEC addressed a similar issue in considering whether to require information regarding naturalization in the Federal Form. In that context, the FEC concluded that information beyond that required by the NVRA was not "necessary," explaining that "[t]he issue of U.S. citizenship is addressed within the oath required by the [NVRA] and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will

appear in prominent type on the front cover of the national mail voter registration form." 59 Fed. Reg. 32,316 (June 23, 1994).

The content of the Federal Form is governed by duly enacted regulations specifying the precise information that can be requested from an applicant. *See* 11 C.F.R. § 9428.4(b)(l)-(3). It consists of three basic components: the application, general instructions, and state-specific instructions. *See* 11 C.F.R. § 9428.3(a); *see also* National Mail Voter Registration Form (updated Mar. 1, 2016), Administrative Record ("AR") (AR0008-32).[1] The application is formatted as a postcard that the applicant can simply fill out and mail in. With regard to citizenship, the Federal Form requires each applicant to check a box at the top of the application indicating U.S. citizenship, and clearly directs "do not complete [this] form" if any applicant checks "No" under citizenship. (AR0038). The Federal Form further requires the applicant to sign the bottom of the form and swear or affirm under penalty of perjury that he or she is a U.S. citizen and further that, "[i]f I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." (*Id.*) The cover of the Federal Form pamphlet states "For U.S. Citizens," and the General Instructions begin with the following: "If you are a U.S. citizen . . . ." (AR0033-34). The General Instructions further explain, "All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election." (AR0034). The Federal Form's Application Instructions open with the following instruction: "Before filling out the

[1] The administrative record was filed on March 17, 2016, and citations to the record use the pagination containing the prefix "AR." *See* Notice of Filing of Administrative Record, ECF Docket No. 69 (filed Mar. 17, 2016).

body of the form, please answer the questions on the top of the form as to whether you are a United States citizen [and age 18]. If you answer no to either of these questions, you may not use this form to register to vote." (AR0035).

Finally, and to ensure that applicants from each state "receiv[e] the information needed to correctly complete the [Federal Form] and attest their eligibility," 59 Fed. Reg. 32,317, the Federal Form contains state-specific instructions as to each state's voter eligibility requirements and instructions for filling out the fields on the form. *See* 11 C.F.R. § 9428.6. Examples include instructions on issues like the registration deadline, choice of party, and identification of race or ethnic group. (AR0015-32).

B. The Election Assistance Commission is Created

The HAVA created the EAC. 52 U.S.C. § 20921. Among the duties of the EAC was that it took over administration of the Federal Form from the FEC. The EAC was constructed so that actions could only be taken by a bipartisan contingent of Commissioners. The EAC consists of two Commissioners who are recommended by Democratic Congressional leadership and two who are recommended by Republican Congressional leadership. 52 U.S.C. § 20923.[2] HAVA requires that "[a]ny action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members." 52 U.S.C. § 20928. HAVA also provides that the Commission will appoint an Executive Director and General Counsel. 52 U.S.C. § 20924.

---

[2] *See* 52 U.S.C. § 20923(a)(2) ("[B]efore the appointment of any individual to fill a vacancy on the Commission, the Majority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, and the Minority Leader of the House of Representatives shall each submit to the President a candidate recommendation with respect to each vacancy on the Commission affiliated with the political party of the Member of Congress involved.").

C. Prior Requests to Change the Federal Form to Require Proof of Citizenship in 2005 Through 2013

In 2005, Arizona requested that the EAC modify Arizona's state-specific instructions to the Federal Form to reflect new state legislation that required documentary proof of citizenship for voter registration. (AR0233). On March 6, 2006, after consideration by a quorum of Commissioners, the EAC Executive Director sent a letter on behalf of the Commission denying Arizona's request, noting that the Commission had concluded that inclusion of a documentary proof requirement would violate the NVRA, and that Arizona must "accept and use" the Federal Form without imposing additional burdens. Specifically, the letter denying the request stated:

> The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a 'checkbox.' (42 U.S.C. § 1973gg-7(b)(2) and 42 U.S.C. § 15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as 'not necessary or consistent with the purpose of [the NVRA].'[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both 'accept' and 'use' the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. § 15483).

(AR0235).

Nonetheless, Arizona continued to reject Federal Form applicants who did not present proof of citizenship, and Arizona submitted a request for reconsideration. In July 2006, the EAC

---

[3] Joint Conference Committee Report on the National Voter Registration Act of 1993, H. Rep. 103-66 (April 28, 1993).

again considered the question and voted on whether to reverse course and modify the Federal Form pursuant to Arizona's request. The measure failed by a 2-2 vote, having not received approval of three members of the Commission as required by law for the EAC to take any action. *See* (AR0246-49); 52 U.S.C. § 20928. As Commissioner Ray Martinez III explained, the EAC had "established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from [the FEC]." (AR0257). Under this precedent, the "'language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls.'" (*Id.*) (citation omitted). Commissioner Martinez, in voting against Arizona's request, said that he stood by "the EAC's previously articulated legal rationale on the matter and that [he believed] no further EAC action is currently warranted." (AR0254). Commissioner Martinez also stated that changing course would be too significant to be taken without notice and a hearing: "In my view, this decision is too significant to be taken without the benefit of a properly noticed and convened public meeting or hearing. This is particularly true in light of the fact that if the EAC were to approve this [vote], we would be drastically altering our agency's interpretation of NVRA on a matter of fundamental importance to the American public." (*Id.*)

Rather than challenge the EAC's rejection of its request under the APA, Arizona continued to require proof of citizenship from Federal Form applicants, prompting the lawsuit that resulted in the Supreme Court's decision in *ITCA*. In *ITCA*, the Supreme Court held that Arizona's documentary proof of citizenship requirement was preempted by the NVRA with respect to applicants using the Federal Form. 133 S. Ct. at 2250. In the decision, the Supreme Court observed that 52 U.S.C. § 20508 (then codified at 42 U.S.C. § 1973gg-7)—the statute that vests in the EAC rulemaking authority over the contents of the Federal Form—requires that the

EAC include in the form "only such identifying information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant." *ITCA*, 133 S. Ct. at 2259 (emphasis added) (quoting 52 U.S.C. § 20508(b)(1)) (internal quotation marks omitted). Moreover, the Supreme Court agreed that the NVRA requires all states to "accept and use" the "Federal Form," which, as approved by the EAC, did not require documentary proof of citizenship. *Id.* at 2252-60. As Justice Scalia, writing for the Court, explained, "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *Id.* at 2255. The *ITCA* Court further found that the NVRA's "accept and use" requirement is a constitutional exercise of Congress's power under the Elections Clause, and preempts state regulations governing the "Times, Places and Manner" of holding federal elections. *Id.* at 2253. The NVRA thus "empowers the EAC to create the Federal Form, requires the EAC to prescribe its contents within specified limits, and requires States to 'accept and use it.'" *Id.* at 2255 (citations omitted). Accordingly, states may add a documentary proof of citizenship requirement to the Federal Form only by requesting that the EAC alter the Federal Form and, if necessary, "challeng[ing] the EAC's rejection of that request in a suit under the Administrative Procedure Act." *Id*. at 2259.

Just two days after the United States Supreme Court decision in *ITCA*, Arizona once again renewed its request that the EAC modify the Federal Form to require documentary proof of citizenship, and Kansas renewed a similar request it had first made in 2012. (AR0329). Georgia submitted a request of its own a month later. (AR0065). The Executive Director deferred all three requests because the EAC lacked a quorum of Commissioners to consider the matter. In an effort to compel EAC action, Arizona and Kansas brought suit against the EAC in the U.S.

District Court for the District of Kansas.[4] The League, Project Vote, Inc., and others intervened in the action. *See Kobach v. U.S. Election Assistance Comm'n*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *5 (D. Kan. Dec. 12, 2013). Although the EAC lacked the quorum required to change agency policy, the district court ordered the EAC to render a final agency action responding to the requests.

On January 17, 2014, after a public notice and comment period, the Executive Director of the EAC, acting pursuant to a delegation of authority from the Commission discussed below, issued a thorough 46-page decision denying the pending requests of Arizona, Georgia, and Kansas. AR00283-328. Consistent with all previous determinations since the Federal Form was adopted, the EAC found that the States had failed to demonstrate that documentary proof of citizenship was "necessary" within the meaning of the NVRA. Considering the extensive record submitted in response to its request for public comment, the Executive Director found that Congress had rejected a similar requirement when deliberating over the NVRA; granting the States' requests would contravene other EAC rules; the States' requests were inconsistent with previous EAC determinations; and the requests would undermine the purposes of the NVRA by hindering voter registration and thwarting organized registration efforts. *Id.* The Executive Director found that even if the allegations submitted by Kansas and Arizona were true, at most 196 non-citizens had registered to vote in Arizona and 21 non-citizens had registered to vote in Kansas, which comprised less than one-hundredth of one percent of the registered voters in each state. (AR0316). The Executive Director went on to find that the "paucity of evidence provided

[4] This suit was brought by Kris Kobach and Ken Bennett, Secretaries of State of Kansas and Arizona, respectively. Kris Kobach is a Defendant-Intervenor here.

by the States regarding noncitizens registering to vote" was insufficient to establish necessity. (AR0317-18).

In rejecting requests from Arizona, Georgia, and Kansas to modify the Federal Form, then-EAC Executive Director Alice Miller was acting under two sources of authority: (1) prior EAC policy established through notice and comment rulemaking, and consistently maintained by votes of at least three Commissioners operating with a full quorum, and (2) an express delegation of authority from the Commissioners to apply agency policy and "maintain the [Federal Form]." (AR0283-328).

This latter delegation was made in the agency's "Roles and Responsibilities Statement," dated September 12, 2008, and adopted by a quorum of EAC Commissioners. (AR0209-16). The Statement delegated certain authority to the Executive Director, including the responsibility to "[i]mplement and interpret [policies, regulations, and guidance] issued by the commissioners," and to "[m]anage the daily operations of EAC consistent with Federal statutes, regulations and EAC policies." (AR0214-15). It also authorized the Executive Director to "[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies." (AR0215). However, as the Tenth Circuit noted in the challenge to the Executive Director's decision, "the 2008 subdelegation did not transfer the Commissioners' full power," but rather limited the Executive Director's authority to "maintaining the Federal Form *consistent with the Commissioners' past directives* unless and until those directions were countermanded." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1193-94 (10th Cir. 2014) (emphasis added). The EAC's previous decisions denying state requests to modify the Federal Form to require documentary proof of citizenship constituted such "past directives."

Kansas and Arizona challenged the rejection of their requests under the APA in the U.S. District Court for the District of Kansas; Georgia declined to do so. Ultimately the Tenth Circuit sustained the EAC's decision, ruling that the EAC was not obligated under either the NVRA or the Constitution to allow the requested modifications to the Federal Form. *See Kobach*, 772 F.3d at 1183. The Tenth Circuit held that "permitting such state alterations threaten[s] to eviscerate the [Federal] Form's purpose of 'increas[ing] the number of eligible citizens who register to vote.'" *Id.* at 1195 (quoting *ITCA*, 133 S. Ct. at 2256). Unless the information is "necessary to enforce [the States' voter] qualifications," the Federal Form must remain free of the State's procedural hurdles, as Congress intended. *Id.* (quoting *ITCA*, 133 S. Ct. at 2255). Noting that the EAC had previously rejected the States' request to include documentary proof of citizenship, the court determined that "had the EAC accepted the states' requests, it would have risked arbitrariness, because [Kansas] and [Arizona] offered little evidence that was not already offered in Arizona's 2005 request, which the EAC rejected. Changing course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision." *See id.* at 1198. Arizona and Kansas filed a petition for *certiorari*, which was denied. *See Kobach v. U.S. Election Assistance Comm'n*, 135 S. Ct. 2891 (2015).

D. State Requests to Add Proof of Citizenship Requirement Acted On By the EAC Executive Director in 2016

In January, 2015, three new Commissioners were sworn into the EAC and held their first public meeting on February 24, 2015, following their nomination by the President and unanimous confirmation by the U.S. Senate. The appointment of the Commissioners, including two Republicans and one Democrat, restored the EAC's quorum for the first time since 2010.

Among the new Commission's first official actions was to define the EAC's management policy with regard to "statutory duties, policy-making and day-to-day operations" by adoption of a new "Election Assistance Commission Organizational Management Policy Statement," which became effective February 24, 2015 ("2015 Policy Statement"). (*See* AR0226; AR0854).

Among other things, the 2015 Policy Statement confirmed the following:

> **I. The Election Assistance Commission**
>
> Any action of the Commission authorized by HAVA requires approval of at least three of its members. [52 U.S.C. § 20928]. (AR0226).
>
> **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*. (AR0227) (emphasis added).
>
> 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.

(AR0227) (emphasis added).

The 2015 Policy Statement expressly superseded the Commission's earlier delegations of authority to the Executive Director, including the 2008 "Roles and Responsibilities Statement." (AR0226) (providing that the 2015 Policy Statement supersedes 2008-2012 statements and "replaces any existing EAC policy or document that is inconsistent with its provisions").

On November 2, 2015, the Commission appointed Brian Newby to serve as Executive Director, and Mr. Newby started this job on November 16, 2015. (AR0001). On or about November 17, 2015, just one day after Mr. Newby assumed the position as Executive Director,

Kansas submitted yet another request to the EAC to add to the Kansas state instructions to the Federal Form a requirement that Kansas citizens provide documentary proof of citizenship to register to vote using the Federal Form. (*See* AR0072). In its request, Kansas referenced its statutory requirement of providing documentary proof of U.S. citizenship to register to vote, and Kansas purported to include new evidence showing noncitizens registering or voting. (AR0001). That new evidence consisted of allegations that in a thirteen year period in Sedgwick County (2003-15), seven non-citizens registered to vote (only one of whom voted) and eleven people attempted to register to vote. (AR0075-76). In its request, Kansas also cited its adoption of Kansas Administrative Regulation 7-23-15, which purported to interpret the state's new election code by adding a 90-day requirement to provide proof of citizenship after registering. (*Id.*)

On December 18, 2014, Alabama had submitted a request to the EAC to add to the Alabama state instructions to the Federal Form a requirement that Alabama citizens provide documentary proof of citizenship to register to vote using the Federal Form. (*See* AR0058). The Alabama request contained no information explaining why such an instruction was necessary to determine voter eligibility. (*Id.*) It was pending when Mr. Newby was appointed executive director of the EAC.

As explained above, on August 1, 2013, Georgia submitted a request to the EAC to add to the Georgia state instructions to the Federal Form a requirement that Georgia citizens provide documentary proof of citizenship to register to vote using the Federal Form. (*See* AR0069). The Georgia request was denied by the EAC on January 17, 2014 following a notice and comment period. (AR0067-68). Georgia did not appeal the 2014 EAC decision denying its request.

On January 29, 2016, Mr. Newby—in his capacity as the recently-appointed Executive Director of the EAC—took unilateral action in response to Kansas's request of November 17,

2015, Alabama's request of December 18, 2014, and Georgia's request of August 1, 2013 to approve alteration of the Federal Forms used in Alabama (AR0063-64), Georgia (AR0070-71), and Kansas (AR0109-10) to require documentary proof of citizenship.

All previous requests by various states to require that the citizens of the respective states provide documentary proof of U.S. citizenship to register to vote pursuant to the Federal Form had been denied either by the EAC or by its Executive Director pursuant to EAC precedent denying similar requests. (AR0233, AR0240, AR0245, AR0283, AR0332).

Prior to Executive Director Newby's January 29, 2016 letters approving the alteration of the state instructions for the Federal Forms in Alabama, Georgia and Kansas, the EAC did not issue any notice seeking public comment on Kansas's November 17, 2015 request, Alabama's December 18, 2014 request, or Georgia's previously denied request of August 1, 2013. (AR0001).

Prior to Executive Director Newby's January 29, 2016 letters approving the alteration of the state instructions for the Federal Forms in Alabama and Georgia, neither the Executive Director nor the EAC provided any public notice that either of those outdated requests were again under consideration, and the Executive Director did not offer any explanation for the sudden review and subsequent approval of those requested modifications to the Federal Form. (AR0001). Indeed, the Executive Director's written explanation for his decision, contained in an unpublished internal memorandum, did not issue until February 1, 2016, two days after issuing the letters approving the requests. (AR0001). This explanation makes clear that the Commission did not consider or vote on Kansas's November 17, 2015 request, Alabama's December 18, 2014 request, or Georgia's August 1, 2013 request. (AR0001). Nor did the Commission approve Kansas's November 17, 2015 request, Alabama's December 18, 2014 request, or Georgia's

August 1, 2013 request. *Id.* Moreover, Executive Director Newby has conceded that he did not rely on *any* of the evidence that Kansas submitted to demonstrate "necessity." (*See* AR0004) ("With respect to the Kansas State Election Director, his examples of the need for these changes are irrelevant to my analysis.").

After the Executive Director granted Kansas's request, the Executive Director changed the Federal Form on the EAC website with Kansas state instructions informing Kansas voter registration applicants that they must submit a "document [specified therein] demonstrating United States citizenship within 90 days of filing the application." (AR0006). Similarly, after the Executive Director approved Alabama and Georgia's requests, the Executive Director changed the respective Alabama and Georgia state instructions for the Federal Form on the EAC website to require Alabama and Georgia voter registration applicants to submit documentary proof of citizenship with their voter registration applications on the Federal Form. (AR0005-6). The respective state-specific instructions were modified to require Georgia applicants to supply "satisfactory evidence of U.S. citizenship," and to inform Alabama applicants that they "shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." (AR0006).

STANDARD OF REVIEW

The general summary judgment standard does not apply to the Court's review of an administrative decision under the APA. "[I]n cases where review is based on an administrative record the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record." Comment to LCvR 7(h). This standard "requires courts to 'hold unlawful and set aside agency action, findings, and conclusions' that are 'in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right.'" *Ridgley v. Lew*, 55 F. Supp. 3d 89, 93 (D.D.C. 2014) (quoting 5 U.S.C. § 706(2)(C)). This Court must review the decision of an agency through an examination of the administrative record of the proceedings before the agency, rather than a *de novo* review of Plaintiffs' claims. *McDougall v. Widnall*, 20 F. Supp. 2d 78, 82 (D.D.C. 1998). It is also hornbook law that a reviewing court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g.*, *Coburn v. McHugh*, 77 F. Supp. 3d 24, 29 (D.D.C. 2014), *aff'd* No. 15-5009, 2016 WL 3648546 (D.C. Cir. July 8, 2016).

Additionally, the Supreme Court and the D.C. Circuit have set forth foundational principles relevant here that guide this Court's review of agency action. An "agency's unexplained departure from precedent *must be overturned* as arbitrary and capricious." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (emphasis added). If an agency fails to provide "a reasoned basis" for its departure from precedent, "the courts are not to supply one." *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If [the grounds invoked by the agency] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). An agency's action is also "arbitrary, capricious, or an abuse of discretion when it . . . frustrate[s] the policy that Congress sought to implement." *Beaty v. FDA*, 853 F. Supp. 2d 30, 41 (D.D.C. 2012), *aff'd in part, vacated in part sub nom., Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013) (internal citations and quotation marks omitted). Moreover, "[a]n agency is generally required by the APA to publish notice of proposed rulemaking in the Federal Register and to accept and consider public comments on its proposal," *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014), and "if an agency adopts 'a

new position *inconsistent with*' an existing regulation, or effects '*a substantive change in* the regulation,' notice and comment are required." *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d. 29, 35 (D.C. Cir. 2005) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).

ARGUMENT

Plaintiffs are entitled to summary judgment on Counts I and II of the Complaint, because Defendant Newby had no authority to approve the requests of Alabama, Georgia and Kansas to amend the instructions to the Federal Form to require documentary proof of citizenship, as the Federal Defendants partially concede. Specifically, the Commission's governing statute prohibited such action by Defendant Newby absent a vote of three Commissioners, which did not happen, and the Commission's internal guidelines prohibited Defendant Newby from making decisions inconsistent with Commission policy and precedent, such as those that occurred here.

Moreover, Plaintiffs are entitled to judgment as to Count III of the Complaint, because the Commission failed to give notice and seek comments before the issuance of Executive Director Newby's decisions.

Furthermore, as the Federal Defendants fully concede, Plaintiffs are entitled to summary judgment on Counts IV and V of the Complaint because Defendants failed to explain the decision to deviate from the settled precedent of not allowing states to require proof of citizenship in connection with the Federal Form, and, further, by failing to explain why approval of the States' request was "necessary" in accordance with the NVRA and the Supreme Court's decision in *ITCA*.

Finally, although the Defendants' arbitrary and capricious actions in respect to the conduct alleged in Counts IV and V are sufficient to support vacatur of Defendant Newby's decision, this Court should reject Defendants' suggestion that it not reach the issue of *ultra vires*

action raised in Counts I and II, because judicial economy demands it; the Commission requires guidance on how to evaluate this issue properly going forward so further confusion and litigation can be circumvented in the future.

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT I BECAUSE EXECUTIVE DIRECTOR NEWBY ACTED WITHOUT THE APPROVAL OF AT LEAST THREE COMMISSIONERS

Plaintiffs' first cause of action is that Executive Director Newby's action of approving the requests to incorporate the documentary proof of citizenship requirements of Kansas, Alabama, and Georgia violates the HAVA because the action did not have the approval of at least three Commissioners.

HAVA unambiguously states as follows: "Any action which the Commission is authorized to carry out under [HAVA] may be carried out only with the approval of at least three of its members." 52 U.S.C. § 20928; *see also* NVRA, 59 Fed. Reg. 11,211 (Mar. 10, 1994); NVRA, 58 Fed. Reg. 51,132 (Sept. 30, 1993). The reason for this is obvious—Congress wanted to make sure that the Commission would only act when there is bipartisan support amongst the Commissioners, two of whom are recommended by Democratic legislative leadership and two by Republican legislative leadership.

There was no such bipartisan support for Executive Director Newby's action. The administrative record demonstrates that the Commissioners did not vote to approve the States' requests or Executive Director Newby's actions related to those requests. This is a clear case of the Executive Director acting *ultra vires*, and this Court must set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

Plaintiffs do not dispute the Federal Defendants' statement, Federal Defs.' Mot. at 22 [Dkt. 101], that some subdelegation to the Executive Director or other staff is permissible. But that subdelegation cannot extend to setting new policy for the Commission, let alone reversing past precedent. Congress constructed the Commission such that policies could not be implemented without support from both Democrat-nominated and Republican-nominated commissioners, and so the Commission subdelegating its policy function would undermine Congressional intent. *See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1027 (D.C. Cir. 1978) ("Congress anticipated that the Commission's members would function more nearly at the level of policy determination, and might permissibly assign the planning and execution of particular projects to the staff."). The previous litigation in *Kobach* is instructive about the limits to subdelegation. In *Kobach*, when the Executive Director denied Kansas's previous request to have its proof of citizenship requirements incorporated in the Federal Form, the Executive Director did so under circumstances where there were no Commissioners, and the operative governance document gave the Executive Director broader subdelegation power. The Tenth Circuit found that it was permissible for the Executive Director to deny the request because the subdelegation was limited, and the decision was within that subdelegation in that the Executive Director's decision was consistent with the Commissioner's past directives. The court suggested that a more expansive subdelegation, such as one where staff were setting policy, would conflict with Congressional intent. 772 F.3d at 1090-91.

The Executive Director's decision here differs markedly from the Executive Director's decision at issue before the Tenth Circuit. To be sure, if there is any action that should require affirmative bipartisan approval from the Commissioners, it is a decision to approve documentary proof of citizenship requirements for the Federal Form. This issue has arguably been the most

important—and certainly the highest profile—issue before the Commission. The refusals of the Commission to grant the previous requests of Arizona and Kansas have been the subject of the Supreme Court decisions in *ITCA* and the Tenth Circuit in *Kobach*, both of which upheld the EAC actions rejecting state requests to require documentary proof of citizenship. Congress itself rejected such a requirement when it enacted the NVRA.

There is thus no doubt that Executive Director Newby's unilateral decision is contrary to the express language of HAVA and the underlying purpose of the three-vote requirement. Indeed, two days after Executive Director Newby informed Kansas, Georgia, and Alabama, Thomas Hicks, the sole Democratic commissioner, released a statement saying that this decision required the vote of the three Commissioners. *Statement by Vice-Chair Thomas Hicks*, Feb. 2. 2016, Dkt. 47-2. It could not be clearer that Executive Director Newby violated HAVA's three-vote requirement.

Crucially, the EAC does not counter any of these points in its brief. Instead, the Federal Defendants simply request that the Court not decide this cause of action or the Plaintiffs' second cause of action because it should grant summary judgment on narrower grounds set forth in Plaintiffs' fourth and fifth causes of action. But, as discussed in greater detail in Part III, it makes little sense for the Court to not reach all of the relevant issues for the sake of judicial economy, especially when the issues before the Court go to the Commissioners' and Executive Director's authority to act on the issue now under review.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION BECAUSE THE COMMISSIONERS DID NOT SUBDELEGATE THEIR AUTHORITY TO EXECUTIVE DIRECTOR NEWBY TO REVERSE LONGSTANDING EAC POLICY

Plaintiffs' second cause of action is that Executive Director Newby violated the APA by approving the requests of Kansas, Alabama, and Georgia, even though there was no subdelegation of authority to him by the Commission to do so. It is a long-settled principle that absent express and explicit delegation, a subdelegatee does not have authority to act. *Greene v. McElroy*, 360 U.S. 474, 506-07 (1959); *United States v. Tuohy*, 909 F.2d 759, 770 (3d Cir. 1990) *aff'd*, 500 U.S. 160 (1991). Far from explicitly granting Executive Director Newby authority to overrule longstanding agency policy and precedent denying state requests to add proof of citizenship requirements to the Federal Form, the Commissioners explicitly retained authority for setting policy. Though the Federal Defendants request that the Court not reach this claim, they acknowledge that Executive Director Newby exceeded his delegated authority by making new policy. Federal Defs.' Mot. at 21-24 [Dkt. 101]. For these reasons, Plaintiffs are entitled to summary judgment on their second cause of action.

The "Election Assistance Commission Organization Management Policy Statement" (the "2015 Policy Statement"), which the Commission states is its operative governance document on delegation, makes clear that the Commissioners set policies, and the Executive Director's authority is limited to recommending policies to the Commission and implementing policies that the Commission has approved:

> **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.

(AR0227) (emphasis added). Tellingly, while the Commission previously delegated specific authority to the Executive Director to "Maintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies" in 2008, (AR0215), the 2015 Policy Statement rescinded that specific subdelegation. In adopting the 2015 Policy Statement, Commissioners expressly recognized they were operating under a "changed situation and paradigm," where the Commission had a quorum of Commissioners. (AR0859). Indeed, the Commission and Executive Director Newby himself acknowledge that he had authority only to "carry out policies set by the Commissioners." Federal Defs.' Mot. at 22 [Dkt. 101]; (AR0004).

The Commission has previously acknowledged that there is longstanding policy and precedent establishing that the Commission would not approve state requests to include their proof of citizenship requirements on the Federal Form. In denying the requests of Kansas and Arizona in 2014, the Commission stated that this policy was adopted in 2006 when it denied Arizona's set of requests from that earlier time: "[T]he EAC established a governing policy for the agency, consistent with the NVRA, HAVA, and EAC regulations, that the EAC will not grant state requests to add proof of citizenship requirements to the Federal Form."[5] (AR0305).

---

[5] Although the Commission did not condition its statement, the Commission presumably would change the policy if a state made a compelling showing of necessity. As discussed below, the three states did not make such a showing here.

In the corresponding litigation in *Kobach*, the Commission reiterated that it was longstanding policy to reject citizenship documentation requirements. Reply Brief of the United States Election Assistance Commission, *Kobach v. U.S. Election Assistance Comm'n*, Nos. 14-3062, 14-3072, 2014 WL 3696897, at *25-26 (10th Cir. July 17, 2014) ("Even assuming that the Commission's authority to act on the States' requests is diminished by the lack of a quorum—a premise that, as we explain below, is incorrect—that would mean the Commission must leave in place, and not depart from, its longstanding policy of declining to require proof of citizenship on the Federal Form."). In its summary judgment brief, the Federal Defendants do not mention the Commission's longstanding policy of declining to require proof of citizenship on the Federal Form, but Federal Defendants concede that Executive Director Newby engaged in policymaking that went beyond his authority: "Whatever the scope of the Executive Director's delegated authority, it could not have included the policymaking in which he actually engaged." Federal Defs.' Mot. at 24-25 [Dkt. 101].

The EAC policy of rejecting state requests to incorporate proof of citizenship requirements developed from the statutory language and legislative history related to the Federal Form and the proof of the citizenship requirement, the subsequent rulemaking, and the failure of the states to persuade a bipartisan majority of Commissioners— as the Commission's enabling statute requires—that state proof of citizenship requirements were necessary. During Congress's deliberations on the NVRA, both Houses of Congress considered, voted, and rejected permitting states to require documentary proof of citizenship in connection with the Federal Form. *See* S. Rep. No. 103-6 (1993); 139 Cong. Rec. 5098 (1993); Conf. Rep."; 139 Cong. Rec. 9231-32 (1993). To that end, the final Conference Committee Report concluded that it was "not necessary or consistent with the purposes of this Act" and "could be interpreted by States to

permit registration requirements that could effectively eliminate, or seriously interfere with, the [Act's] mail registration program." Conf. Rep. at 23-24. Instead, Congress struck the balance of satisfying its first stated purpose to "increase the number of eligible citizens who register to vote in elections for Federal office," 52 U.S.C, § 20501(b)(1), and its purpose "to protect the integrity of the electoral process," 52 U.S.C. § 20501(b)(3), by requiring that Federal Form applicants attest, under penalty of perjury, that they are citizens. 52 U.S.C. § 20508(b)(2). Congress also directed the agency with responsibility for developing the Federal Form and regulations relating to the Form (originally the FEC, and then the EAC, upon its creation) that the content of 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 . . . ." 52 U.S.C. § 20508 (b)(1) (emphasis added).

When developing the Federal Form, the implementing agency has followed Congress's direction. An Applicant must sign the bottom of the form and swear or affirm under penalty of perjury that he or she is a U.S. citizen and further that, "[i]f I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." (AR0038). There are four other places where the Form or its instructions make clear that only United States citizens may complete the form. (AR0033-35, 38). In addition, the implementing regulations reference the attestation of citizenship requirement. 11 C.F.R. § 9428.4(b)(l)-(3) (regulations instruct that the Federal Form shall "list U.S. Citizenship as a universal eligibility requirement," "[c]ontain 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," and "[p]rovide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature."). During the extensive rulemaking

process related to the creation of the Federal Form and the associated regulations, the FEC never purported to permit documentary proof of citizenship requirements, and no state suggested during that process that documentary proof might be "necessary" under the NVRA.[6] Indeed, the FEC rejected proposals that would require additional information regarding naturalization, concluding that information beyond that required by the NVRA was not "necessary" and explaining that "[t]he issue of U.S. citizenship is addressed within the oath required by the [NVRA] and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form." 59 Fed. Reg. 32,316 (June 23, 1994).

More than a decade later, when Arizona became the first state to request that the EAC modify the Federal Form to account for its proof-of-citizenship requirement, the Executive Director of the Commission, on behalf of the Commissioners, took the position that the requirement was not "necessary or consistent with the purposes of the NVRA." (AR0235) (quoting Conf. Rep. at 23). When Arizona requested reconsideration, the Commissioners subsequently took a vote and deadlocked 2-2. (AR0236-39.) Without the requisite three votes for approval, the request was denied.

After the Supreme Court held in *ITCA* that Arizona had to accept completed Federal Form applications that did not include state proof of citizenship requirements, Kansas and Arizona sought approval from the Commission to modify the Federal Form and brought the APA

---

[6] *See* 58 Fed. Reg. 51,132 (Sept. 30, 1993) (Advanced Notice of Proposed Rulemaking); 59 Fed. Reg. 11,211 (Mar. 10, 1994) (Notice of Proposed Rulemaking); 59 Fed. Reg. 32,311 (June 23, 1994) (Final Rules).

action in *Kobach* over the issue. The Commission examined the information provided by Arizona and Kansas in the litigation and in a notice-and-comment proceeding. The Commission found that even if the allegations submitted by Kansas and Arizona were true, at most 196 non-citizens had registered to vote in Arizona, and 21 non-citizens had registered to vote in Kansas, which comprised less than one-hundredth of one percent of the registered voters in each state. (AR0316). The Commission went on to find that the "paucity of evidence provided by the States regarding noncitizens registered to vote" was insufficient to establish necessity. (AR00317-18). The Tenth Circuit agreed that the evidence provided by the states was insufficient to establish necessity:

> The states have failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications because a substantial number of noncitizens have successfully registered using the Federal Form. Nor do they raise the argument that the Court suggested states might offer as part of an APA challenge: that the denial of their request was inconsistent with the EAC's granting other states' requests. Even if we credited all of Kobach's and Bennett's criticisms of the Executive Director's decision, the states simply did not provide the EAC enough factual evidence to support their preferred outcome.
>
> Moreover, had the EAC accepted the states' requests, it would have risked arbitrariness, because Kobach and Bennett offered little evidence that was not already offered in Arizona's 2005 request, which the EAC rejected. Changing course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision. *See In re FCC 11-161*, 753 F.3d at 1142 (noting that "[t]he arbitrary-and-capricious standard requires an agency to provide an adequate explanation to justify treating similarly situated parties differently" (quotation omitted)); *see also Eagle Broad Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (observing that "an agency may not treat like cases differently" and that "an agency's unexplained departure from precedent must be overturned as arbitrary and capricious").

Kobach, 772 F.3d at 1197-98 (internal citations omitted).

The allegations that Secretary Kobach submitted in connection with Kansas's 2015 request are weaker than what was before the Commission and the Tenth Circuit in *Kobach*. They consist of allegations that in a thirteen-year period in Sedgwick County (2003-15), seven non-citizens registered to vote (only one of whom voted) and eleven people attempted to register to vote when they were not citizens. (AR0075-76). Further, there is no basis whatsoever for the Executive Director to grant the requests by Georgia and Alabama to add a requirement for documentary proof of citizenship due to "necessity." Neither Georgia nor Alabama provided any facts or information to support a finding of "necessity," other than the bald assertion that the information is necessary. (*See* AR0058-59, AR0061-62, AR0065-66).

When Defendant Newby approved the requests by Alabama, Georgia, and Kansas to add a requirement of proof of citizenship documentation to the Federal Form instructions, he contravened this clear and long-standing policy. Compounding his error, he did so without evidence. As the Tenth Circuit previously found, accepting the States' position without new evidence would "risk[] arbitrariness, because . . . [c]hanging course and acceding to their requests absent relevant new facts would conflict with the EAC's earlier decision." *Kobach*, 772 F.3d at 1198 (citing *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 550 (D.C. Cir. 2009)). Nevertheless, the Executive Director "offered neither facts nor analysis to the effect," that new evidence warranted departure from consistent EAC precedent denying States' requests to require proof of citizenship. *See Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987). Under longstanding D.C. Circuit precedent, "an agency's unexplained departure from precedent *must be overturned* as arbitrary and capricious." *Comcast Corp v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (emphasis added); *Pontchartrain Broad. Co., Inc. v. FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994).

Under the agency's own guidelines, where there is a functioning Commission with a quorum, there is no valid procedure under any statute or other authority by which the Executive Director can unilaterally change agency policy. Accordingly, the Executive Director's decision was *ultra vires*, and must be vacated. *See, e.g., Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 645, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide" by its own governing rules and regulations); *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) ("It is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.") (quotation marks omitted); *VanderMolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) ("Actions by an agency of the executive branch in violation of its own regulations are illegal and void.") (internal citations omitted); *see New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010) (invalidating actions taken by two members of the National Labor Relations Board ("NLRB") when the statute required a quorum of at least three members to be present).

III. THE COURT SHOULD NOT DEFER SUMMARY JUDGMENT ON COUNTS I AND II OF THE COMPLAINT

The Court should decline the Federal Defendants' suggestion that the Court defer ruling on Counts I and II and "permit the Commission to decide the appropriate application of its delegation policy in the first instance." *See* Federal Defs.' Mot. at 24 [Dkt. 101]. Judicial economy and the specifics of the issues at bar dictate as much.

The decision of whether Executive Director Newby's actions were *ultra vires* is a threshold issue. To vacate his decisions on the basis that neither he nor the Commission issued the required statutory findings in support of that decision (*see* Part V, *infra*) is not enough. It is the question of who has the authority to render that decision in the first instance that must be

clarified. Vacating and remanding the Executive Director's decision without that direction is a recipe for further gamesmanship, litigation, and voter confusion. Moreover, the administrative record is clear that the evidence submitted to Newby by the States that precipitated his *ultra vires* decision was of the same type, and of much lesser degree, as what was already reviewed and considered by the EAC in its January 17, 2014 decision that had denied Kansas's previous request. A remand would be futile because, as discussed above, under D.C. Circuit precedent a decision to approve the requests must be overturned as arbitrary and capricious.

Indeed, *PDK Labs, Inc. v. DEA*, 362 F. 3d 786, 799, 809 (D.C. Cir. 2004), cited by Federal Defendants, strongly argues in favor of this Court's rejection of Federal Defendants' suggestion to defer. Similar to this case, the agency (there, the DEA) conceded its error and "all but conceded that this court should remand the decision on that basis." *Id.* at 799. However, the court decided to deal with all issues nonetheless:

> We do not understand the complaint in the concurring opinion that we should have disposed of this case solely on this basis, without saying anything about the Deputy Administrator's interpretation of § 971(c)(1). Giving several, separate reasons for reversing and remanding is a time-honored, prudent mode of appellate jurisprudence, *see e.g. Erie R.R. v. Tompkins*, 304 U.S. 64, 72-73, 77-79, 58 S. Ct. 814, 819-20, 833-23, 82 L. Ed. 1188 (1938); *Kleppe v. Sierra Club*, 427 U.S. 390, 403-06. 96 S. Ct. 2718, 2727-28, 49 L. Ed. 2d 576 (1976). So here, DEA should have our opinion on the statutory construction issue so that it may deal with that issue now, rather than later if PDK seeks judicial review of DEA's decision on remand.

Id. at 799 n.5.[7] Here, the "prudent mode" of jurisprudence mandates decisions on all issues, especially the threshold issue of who has the authority to make the decision in the first place.

[7] Other cases relied on by the Federal Defendants are inapposite. In *Whitehouse v. Illinois Central Railroad Court R.R. Co.*, 349 U.S. 366, 372-73 (1955), the Court declined to rule on an additional issue because of the complexity of a merits issue in the context of a temporary

IV. BECAUSE EXECUTIVE DIRECTOR NEWBY EFFECTED A SUBSTANTIVE CHANGE IN THE EAC'S REGULATORY FRAMEWORK WITHOUT NOTICE AND COMMENT AS REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT III

The Court should grant summary judgment to Plaintiffs on Count III and find that notice and comment rulemaking is required before the EAC can change long-standing policy and precedent to decide that documentary proof of citizenship is not "necessary" within the meaning of the NVRA. The Court should deny the Federal Defendants' motion for summary judgment on this issue.

The Supreme Court has observed, "[t]he Election Assistance Commission is invested with *rulemaking* authority to prescribe the contents of [the] Federal Form." *ITCA*, 133 S. Ct. at 2251 (emphasis added). "The Administrative Procedure Act's general rulemaking section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply in promulgating legislative rules." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 752 (D.C. Cir. 2001). Specifically, "there must be publication of a notice of proposed rulemaking; opportunity for public comment on the proposal; and publication of a final rule accompanied by a statement of the rule's basis and purpose." *Id.*; *see also Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

Of course, "[n]ot all 'rules' must be issued through the notice-and-comment process[.]" *Perez v. Mortg. Bankers Ass'n* ("*Perez*"), 135 S. Ct. 1199, 1203 (2015). But being excused from the notice-and-comment requirement under the APA is the exception, not the norm: "An agency

---

injunction proceeding. In *Cartier v. Secretary of State*, 506 F.2d 191, 198 (D.C. Cir. 1974), the court declined to rule on an issue that would have "a most significant impact on the administration of the immigration and nationality laws" and involved a conflict between the Department of State and INS.

is *generally required by the APA to publish notice of proposed rulemaking in the Federal Register and to accept and consider public comments on its proposal*." *Mendoza v. Perez* ("*Mendoza*"), 754 F.3d 1002, 1020 (D.C. Cir. 2014) (emphasis added). Only "(1) interpretative rules; (2) general statements of policy; and (3) rules of agency organization procedure, or practice" are exempt from 5 U.S.C. § 553's notice-and-comment requirement. *Id.* at 1020-21; *see also Perez*, 135 S. Ct. at 1203 (same).

Interpretative rules are "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)). Put another way, "[i]nterpretative rules are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track[] preexisting requirements and explain something the statute or regulation already required." *Mendoza*, 754 F.3d at 1021 (alteration in original) (quotation omitted).

By contrast, a "rule is legislative if it *supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy*." *Id.* (emphasis added). A legislative rule, thus, "'does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy.'" *Id.* (emphasis added) (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc.* 979 F.2d 227, 237 (D.C. Cir. 1992)). Put simply, legislative "rules have the force and effect of law." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Accordingly, although "[t]he absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules[,] . . . that convenience comes at a price: *Interpretive rules 'do not have the force and effect of law and*

are not accorded that weight in the adjudicatory process.'" *Perez*, 135 S. Ct. at 1204 (emphasis added) (quoting *Shalala*, 514 U.S. at 99).

Executive Director Newby's decision in this case is a legislative rule. Plainly, Executive Director Newby's decision at issue in this case does much more than "merely explain the statute, [which is] the effect of an interpretative rule." *Chamber of Commerce of the U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 469 (D.C. Cir. 1980). His decision "endeavors to implement the statute" and seeks to modify the policy decision that the FEC previously provided through notice-and-comment rulemaking—*i.e.*, what information is necessary to determine the eligibility of voters using the Federal Form to register. *See id.* "The [Executive Director] could not be explaining or clarifying the Act's language," *id.*, because the Supreme Court previously interpreted the NVRA as allowing the EAC and states to require "'only such identifying information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant," *ITCA*, 133 S. Ct. at 2259 (emphasis added) (quoting 52 U.S.C. § 20508(b)(1)), and Congress rejected the notion that documentary proof of citizenship was *necessary* within the meaning of the NVRA. Conf. Rep. at 23-24. As such, the Executive Director's decision at issue before this Court is one that "effectively amends a prior legislative rule"—*i.e.*, the FEC's initial determination of "necessary" under the NVRA reached after notice-and-comment rulemaking—and is therefore subject to Section 553's requirement for notice-and-comment rulemaking. *See Am. Mining Cong.*, 995 F.2d at 1112; *see also Perez*, 135 S. Ct. at 1206 ("[T]he APA . . . mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). Indeed, Executive Director Newby's interpretation of the NVRA conflicts directly with the unambiguous language of the statute as interpreted both by the FEC (and later the EAC) and the Supreme Court, and it

would "create *de facto* a new regulation" if permitted to stand. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

The Federal Defendants do not address whether Executive Director Newby's decision is a legislative rule or an interpretative rule. Instead, the Federal Defendants assert that notice and comment rulemaking is not required in this case after assuming that Executive Director Newby's action in this case must be an informal adjudication because the Tenth Circuit determined that the Executive Director's decision after voluntary notice and comment was an informal adjudication. *See* Federal Defs.' Mot. at 24-25 [Dkt. 101]. The Federal Defendants thus argue that "the APA standards for informal adjudications" should apply to Executive Director Newby's action at issue here and claim that "the Tenth Circuit previously found[] the Executive Director's decisions on states' requests are 'informal adjudication[s].'" *Id*. (citing *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d at 1197).[8] But the focus for determining what procedures apply to a given administrative action is not on prior actions, but rather "is on the nature of the administrative task at hand." *Nat'l Small Shipments Traffic Conference, Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1447 (D.C. Cir. 1984).

Executive Director Newby's decision at issue before this Court differs in one crucial respect from the decision that was at issue before the Tenth Circuit. The Executive Director's decision at issue before the Tenth Circuit in *Kobach* "merely tracked preexisting requirements

[8] Importantly, the Federal Defendants misread the Tenth Circuit's decision. The Court in *Kobach did not* hold broadly that every Executive Director decision on each State requests constitutes an informal adjudication, as the Federal Defendants claim. The Tenth Circuit found much more narrowly that "the Executive Director's decision to reject the states' request" —the agency action at issue before the court—"was an informal adjudication carried out pursuant to 5 U.S.C. § 555." *Kobach*, 772 F.3d at 1197.

and explain[ed] something that the statute or regulation already required," *see Mendoza*, 754 F.3d at 1021 (alteration omitted) (quotation omitted)—*i.e.*, that in order to require documentary proof of citizenship, states must demonstrate that such information is "necessary" within the meaning of the NVRA. *E.g.*, (AR301) (observing that EAC staff had authority "to 'implement and *interpret*' the agency's policies *consistent* with federal law and EAC regulations"); (AR0304) (observing that "granting the States' requests . . . would contravene the EAC's deliberate rulemaking decision that additional proof was not necessary to establish voter eligibility"); (AR0304-05) (reminding the requesting states that "the EAC, both by the staff and a duly-constituted quorum of commissioners, has already denied the very same substantive request that is at issue here"); (AR0308) (observing that the EAC's "discretionary authority . . . is limited by the terms of the statute, which provide, among other things, that the Federal Form may only require from applicants 'such information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant . . . .'"); (AR0324) (finding that "granting the States' requests would . . . undermin[e] a core purpose of the NVRA). In stark contrast, Executive Director Newby concluded that no showing of "necessity" was required to grant the States' requests to amend the instructions on the Federal Form to require documentary proof of citizenship: "[W]hile proof of citizenship will be the focal point many will place upon these requests, it's not the issue I am evaluating. With respect to the Kansas State Election Director, *his examples of need for these changes are irrelevant to my analysis*." (AR0004) (emphasis added). In doing so, Executive Director Newby "effect[ed] a substantive regulatory change to the statutory . . . regime." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011) (quotation marks omitted).

The very nature of Executive Director Newby's decision confirms that it *could not* have been rendered through informal adjudication. The decision at issue before this Court represents "an agency statement of general or particular applicability and *future effect designed to implement, interpret, or prescribe law or policy* . . . and includes the approval . . . for the future . . . practices bearing on any of the foregoing"—it is, by definition, a "rule" under the APA. 5 U.S.C. § 551(4) (emphasis added). And an agency may not issue rules through adjudication. *Id.* §§ 551(5)-(7) ("'[A]djudication' means agency process for the formulation of an order"; "'order' means the whole or a part of a final disposition . . . of an agency in a matter *other than rule making*"; "'rule making' means agency process for formulating, amending, or repealing a rule"). Nor can Mr. Newby's decision be construed simply as interpreting the meaning of "necessary" under the NVRA. "[T]he purpose of the APA would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret that statute and regulation" in subjecting voters to documentary proof of citizenship requirements previously deemed unduly burdensome and unnecessary. *See Elec. Privacy Info. Ctr.*, 636 F.2d at 7. The Federal Defendants violated the APA by failing to provide formal notice and comment before Executive Director Newby dispensed with the requirement to show necessity, and the Court should grant summary judgment to Plaintiffs on Count III.

V. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNTS IV AND V OF THE COMPLAINT

As the Federal Defendants concede, even if Defendant Newby had the authority to act—which he did not—the decision was still arbitrary and capricious because the decisions overruled agency precedent without explanation and without consideration of prescribed statutory

standards. An "agency's unexplained departure from precedent *must be overturned* as arbitrary and capricious." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (emphasis in original). Neither Defendant Newby, nor—more crucially—the Commission, explained why (1) they were departing from agency precedent (Count IV), or (2) why documentary proof of citizenship was "necessary," in accordance with the prescription in the NVRA (Count V). Accordingly, as conceded by the Federal Defendants, Plaintiffs are entitled to summary judgment on Counts IV and V of their Complaint.[9]

A. Federal Defendants Failed To Explain the Departure from Agency Precedent

An agency's decision to cast off its prior policies and legal decisions must be the product of reasoned decision-making; otherwise, the rule must be invalidated as arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). Indeed, "[i]t is axiomatic that an agency choosing to alter its regulatory course must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (internal quotation omitted); *see also FCC v. Fox Television Stations*, 556 U.S. 502, 535 (2009) (Kennedy, J., concurring in part and concurring in the

[9] In Count IV of the Complaint, Plaintiffs allege that Defendant Newby's actions were arbitrary and capricious, because he did not set forth the reasons for his decision at the time the decision was made, a critical lapse that was exacerbated by the fact that his decision was contrary to existing Commission policy and precedent. In Count V of the Complaint, Plaintiffs allege that Defendant Newby's decision violated the NVRA, because it was not based on the required finding that proof of citizenship was "necessary" to determine voter eligibility in Alabama, Georgia, and Kansas.

judgment) ("[A]n agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so."); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-91 (9th Cir. 2007) (without reasoned explanation, agency departure from a two-decade-old precedent is arbitrary and capricious); *see also INS v. Yang*, 519 U.S. 26, 32 (1996). When an agency fails to explain a change in course, this "unexplained departure from prior agency determinations is inherently arbitrary and capricious" and, therefore, must be overturned. *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457 (D.C. Cir. 2005) (internal quotation marks omitted).

As set forth in Part II *supra*, the policy not to allow states to amend the Federal Form so as to require proof of citizenship documentation had been settled by Commission precedent for years. Nevertheless, at the time of his decisions to contravene that long-standing precedent, the Executive Director did not disclose, much less provide, *any* explanation for his action approving the States' requests to require proof of citizenship that changed the EAC's policy, and failed to point to any changed circumstances or new evidence that would justify such a change. More important, neither did the Commission. To the contrary, they provided no contemporary explanation at all for the "*volte face*," making the abrupt departure from EAC precedent "intolerably mute." *Action for Children's Television*, 821 F.2d at 746. This "failure to follow [the EAC's] own well-established precedent without explanation is the very essence of

arbitrariness," and the decision therefore must be set aside. *Nat'l Treasury Emps. Union*, 404 F.3d at 457-58; *see also Comcast Corp.*, 526 F.3d at 769.[10]

B. Federal Defendants Failed to Determine Whether Documentary Proof of Citizenship Was Necessary in Violation of the NVRA

"An agency action is arbitrary, capricious, or an abuse of discretion when it . . . frustrate[s] the policy that Congress sought to implement." *Beaty v. FDA*, 853 F. Supp. 2d 30, 41 (D.D.C. 2012) [alteration in original], *aff'd in part, vacated in part sub nom. Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013) (internal citations and quotation marks omitted). As discussed above, the NVRA prescribes the Federal Form's specific content and requirements, and provides that the form "may require only such identifying information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1) (emphasis added). Federal Defendants failed to make any finding that documentary proof of citizenship is "necessary to enable the [States] to assess the eligibility of the applicant." *Id.*

Defendant Commission has conceded that point, (*see* Defendants' Response at 8-10; (AR0004), and Defendant Newby admitted as much two days after his decision—before this litigation commenced. Specifically, he conceded that he did not rely on any of the evidence that

---

[10] Only in the context of this litigation did the Executive Director release a private memorandum dated February 1, 2016, two days after the Executive Director's letters approving the States' requests purporting to explain his decision-making process concerning the States' requests. (*See* AR0001). However, this document does not satisfy the APA's reasoned decision requirement. "'[T]he focal point for judicial review' under the [APA] 'should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 945 (D.C. Cir. 2006) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). And it certainly does not constitute an explanation by the Commission itself.

the Kansas Secretary of State submitted to demonstrate "necessity." (*See* Newby Mem. at 4 (Dkt. #28-1) (AR0004)). Indeed, Executive Director Newby asserted that the purported evidence of necessity submitted by Kansas was "irrelevant to [his] analysis." *Id.*[11] The failure to make that finding violated the NVRA and the APA as a matter of law.

Further, when Congress passed the NVRA, it considered and rejected language allowing states to require "presentation of documentary evidence of the citizenship of an applicant for voter registration." *See* 139 Cong. Rec. 5098 (1993). In rejecting this provision, the Conference Committee determined that such a requirement was "not necessary or consistent with the purposes of this Act," could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and "could also adversely affect the administration of the other registration programs . . . ." *Id.*[12]

---

[11] After this litigation began, Defendant Newby submitted a declaration in this litigation purporting to explain further the rationale for his challenged decisions. Courts routinely reject this type of post hoc, litigation-triggered rationalization. *See Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Agency decisions must generally be affirmed on the grounds stated in them. [. . .] Post-hoc rationalizations, developed for litigation are insufficient."). This case demonstrates why. Federal Defendants argue that the Newby Declaration can be admitted as part of the administrative record or at least considered because portions of the declaration simply elaborate the Executive Director's reasoning without contradicting his February 1, 2016 memorandum or offering new rationalizations. Federal Defs.' Mot. at 16 n. 8 [Dkt. 101]. However, Federal Defendants devote nearly a page and half of their brief explaining why Executive Director Newby's assertion in his declaration that he "determined that the changes to the state specific instructions were necessary" does not mean what it says. *Id*. at 18-19. This Court should disregard Defendant Newby's post hoc declaration.

[12] Instead, Congress enacted specific provisions as to what the Federal Form may and may not contain. For example, the form "may not include any requirement for notarization or other formal authentication." 52 U.S.C. § 20508(b)(3). The Federal Form must, however, "include a statement that . . . specifies each eligibility requirement (including citizenship)"; "contain[ ] an attestation that the applicant meets each such requirement"; and "require[ ] the signature of the applicant, under penalty of perjury." 52 U.S.C. § 20508(b)(2). Additionally, pursuant to HAVA, the Federal Form must include two specific questions and check boxes for

As the EAC previously acknowledged, "Congress's rejection of the very requirement that . . . Georgia[ ] and Kansas seek here is a significant factor the EAC must take into account in deciding whether to grant the States' requests." (AR0302-03) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the [States] urge[ ] here weighs heavily against the [States'] interpretation.")). By adding requirements above and beyond those Congress deemed necessary in the Federal Form without making any determination of necessity, the Executive Director exceeded the EAC's statutory authority unambiguously set forth in the NVRA, and exercised his purported authority in a manner "the statute simply cannot bear." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1178 (D.C. Cir. 2003). Courts must set aside agency actions that are "in excess of statutory . . . authority . . . ." 5 U.S.C. § 706(2)(C).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their cross-motion for summary judgment, deny the Federal Defendants' motion for partial summary judgment, and vacate the challenged actions of the EAC's Executive Director dated January, 29, 2016.

---

the applicant to indicate whether he meets the U.S. citizenship and age requirements to vote. 52 U.S.C. § 21083(b)(4)(A).

Respectfully submitted this 5th day of August, 2016,

By: /s/ Linda Stein

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

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

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

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

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

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

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

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

Susan M. Davies
D.D.C. Bar No. 54867

John A. Freedman
D.C. Bar No. 453075

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

R. Stanton Jones
D.C. Bar No. 987088
Elisabeth S. Theodore
D.C. Bar No. 1021029
ARNOLD & PORTER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
John.Freedman@aporter.com

Wendy R. Weiser
Jonathan Brater
Tomas Lopez
Robert Ferguson
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(646) 292-8310
wendy.weiser@nyu.edu

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

Michelle Kanter Cohen
D.C. Bar No. 989164
PROJECT VOTE
1420 K Street, 7th Floor
Washington, DC 20005
(202) 546-4173
mkantercohen@projectvote.org

Attorneys for Plaintiff Project Vote