

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LEAGUE OF WOMEN VOTERS OF THE
UNITED STATES, *et al.*,

Plaintiffs,

v.

BRIAN NEWBY, *et al.*,

Defendants,

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

Defendant-Intervenors.

Civil Action No. 1:16-236 (RJL)

**FEDERAL DEFENDANTS' REPLY MEMORANDUM REGARDING THE
SIGNIFICANCE OF THE U.S. ELECTION ASSISTANCE COMMISSION'S
JUNE 1, 2017 SUBMISSION TO THE COURT**

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INTRODUCTION

As the Federal Defendants have explained, the Commission's lack of consensus regarding the scope and meaning of its 2015 delegation of authority to the Executive Director cautions against resolving this case on the basis of this disputed issue. The supplemental memoranda of the other parties do not provide a sound basis for concluding otherwise.

For the reasons discussed in Federal Defendants' supplemental brief, the Court need not reach Counts I and II of the Complaint because Counts IV and V provide a sufficient basis for disposition. If the Court reaches Count I, however, it should deny Plaintiffs' motion for summary judgment because the Help America Vote Act of 2002 ("HAVA") permits subdelegation and the Commission has unanimously agreed that it has statutory authority to delegate decisions regarding state-specific instructions on the Federal Form. If the Court reaches Count II, it should rule that, whatever the intended scope of the Executive Director's delegated authority, it cannot have included authority to violate the National Voter Registration Act of 1993 ("NVRA"). The Executive Director's failure to conduct the required statutory analysis provides an appropriately narrow basis for the Court to resolve this case under Counts IV and V. Accordingly, the Court should remand this matter to the Commission so it has an opportunity to decide the states' requests under the governing statutory standard.

ARGUMENT

I. THE COURT SHOULD DENY SUMMARY JUDGMENT TO PLAINTIFFS ON COUNT I.

As Federal Defendants have argued, although the Court need not resolve Count I, the Commission Tally Vote and Memorandum supports a denial of summary judgment to Plaintiffs on this claim. *See* Defs.' Supp'l Br., ECF No. 145 at 4 (citing ECF No. 141-1 at ECF numbered pages 6, 10-11). There is no reason to conclude that the statute prohibits delegation of the

relevant authority. *See id.*

Plaintiffs ask the Court to decide the case “without regard” to the Commission Tally Vote and Memorandum (June 1, 2017), ECF No. 141-1, and assert that the Commission’s action “should not be accorded any force.” *See* Pls.’ Supp’l Br., ECF No. 146 at 1, 4. But this contention is at odds with Plaintiffs’ repeated refrain that the Commission may act with the agreement of three Commissioners. *See, e.g., id.* at 3; Pls.’ Supp’l Mem. in Supp. of Pls.’ Mot. for Summ. J. & Opp’n to Def.-Intervenors’ Cross-Mot. for Summ. J., ECF No. 119 at 9-10. To the extent the Court reaches the issue, it is surely relevant that the Commissioners unanimously agree that the Commission has authority to delegate decisions regarding state-specific instructions. *See* Defs.’ Supp’l Br., ECF No. 145 at 4 (citing ECF No. 141-1 at 6, 10-11).

II. IF THE COURT REACHES COUNT II, IT SHOULD CONCLUDE THAT THE COMMISSION’S DELEGATION DID NOT INCLUDE AUTHORITY TO VIOLATE THE NVRA.

As Federal Defendants have stated, it would be most efficient for the Court to resolve this case on the basis of Counts IV and V. *See* Fed. Defs.’ Supp’l Br. at 5. And if the Court finds it necessary to address Count II, it should rule narrowly that the Executive Director’s actions were *ultra vires* because—whatever the scope of his delegated authority—it did not include the authority to violate the NVRA’s requirements. This approach is supported by the Court’s own conclusion that the Executive Director did not determine whether the states “needed documentary proof of citizenship to enforce their qualifications.” Mem. Op. at 4; *see also League of Women Voters v. Newby*, 838 F.3d 1, 9-10 (D.C. Cir. 2016). Without such a determination, the NVRA’s requirements cannot be satisfied. *See* 52 U.S.C. § 20508(b)(1); *Arizona v. Inter Tribal Council, Inc. (“ITCA”)*, 133 S. Ct. 2247, 2258-60 (2013); *League of Women Voters*, 838 F.3d at 10. Because the Commission cannot have delegated to its Executive Director the authority to strip the Commission of its responsibility to make the statutory

“necessity” determination, the Executive Director’s action was, in that limited but dispositive way, *ultra vires*.

The other parties’ arguments do not provide a viable path to resolving the case. Plaintiffs claim in Count II that under the Commission’s 2015 Policy Statement, the Executive Director lacks authority to decide any requests regarding the state-specific instructions on the Federal Form, Compl. ¶¶ 76-78. But as Federal Defendants have explained, on remand the Commissioners unanimously agreed that the Commission’s 2015 Policy Statement continued the Executive Director’s delegated authority to make decisions on certain requests to update state-specific instructions. ECF No. 145 at 4 (citing ECF 141-1 at ECF pages 6, 10-11). Plaintiffs’ latest brief does not coherently address the meaning of the Commission’s 2015 Policy Statement. *See* Pls.’ Supp’l Br. at 4, ECF No. 146. PILF incorrectly argues that the Commission’s action provides grounds for granting summary judgment for PILF on Count II, *see* PILF’s Supp’l Br., ECF No. 148 at 3, without explaining how the action disposes of Count II, let alone Counts III through V. Kansas asks the Court to focus not on “the issue of whether Newby acted within his authority” but on “the legality of the decision itself” and “reiterates” several arguments it has already made. *See* Kansas Supp’l Br., ECF No. 147 at 1, 3-4.¹

Federal Defendants will not respond at length to Kansas’ repeated arguments but simply refer the Court to their prior briefing. First, Kansas’ claims that the Constitution and a regulation each independently “compel” the Executive Director to grant the State requests have already been rejected by the D.C. Circuit. *See* Fed. Defs.’ Supp’l Mem., ECF No. 121 at 4-5 (citing

¹ In doing so, Kansas mischaracterizes Commissioner Hicks’ position as “agree[ing] that Newby had the authority to make the decision.” ECF 147 at 1. The Position Statement of Commissioner Hicks speaks for itself, ECF No. 141-1 at ECF numbered pages 5-6, as does the entirety of the Commission’s submission, ECF No. 141-1.

League of Women Voters, 838 F.3d at 5, 10-11). Second, Kansas repeats its mistaken interpretation of *ITCA* as holding that “States . . . Control [the] Content of State Instructions,” Kansas Supp’l Br., ECF No. 147 at 9, which the D.C. Circuit also rejected. *See League of Women Voters*, 838 F.3d at 10-11 (“In *ITCA*, the Court made plain that the Commission, not the states, determines necessity. In the Court’s view, section 20508(b)(1) permitted states to ‘request that the Commission alter the Federal Form,’ which the Commission could ‘reject,’ subject to judicial review under the APA.”) (citing *ITCA*, 133 S. Ct. at 2258–60); Fed. Defs.’ Supp’l Mem., ECF No. 121 at 3. And third, Kansas’s argument that the Executive Director’s decisions “did not violate APA requirements,” ECF No. 147 at 5-9, is foreclosed by the D.C. Circuit’s analysis, which Kansas fails to address. *See League of Women Voters*, 838 F.3d at 10 (holding that because the Executive Director “expressly found that the criterion set by Congress—*i.e.*, whether the amendments were necessary to assess eligibility—was ‘irrelevant’ to his analysis, *id.* at 4, it is difficult to imagine a more clear violation of the APA’s requirement that an agency ‘must examine the relevant data and articulate a satisfactory explanation for its action’”); *see also* Mem. Op. at 4, ECF No. 133; Fed. Defs.’ Supp’l Br., ECF No. 121 at 2-3.

In addition to the foregoing, Kansas argues for the first time that two HAVA provisions—52 U.S.C. §§ 20922 and 20929—prohibit the Commission from “deciding whether to accept or reject a state law.” *See* Kansas Supp’l Br. at 9. However, Congress gave the Commission express authority to create the Federal Form and issue regulations concerning it. *See* 52 U.S.C. § 20508(a)(1), (2). Kansas cites a provision setting out additional responsibilities of the new Commission, *see* 52 U.S.C. § 20922, but this provision does not address or limit the Commission’s responsibilities under the NVRA that had been transferred from the Federal Election Commission and appear at § 20501, *et seq.* Nor is 52 U.S.C. § 20929 implicated

because that provision expressly permits regulations under 52 U.S.C. § 20508(a), which—as noted above—includes regulations regarding the Federal Form. *See* 52 U.S.C. § 20929 (limitation on rulemaking authority does not apply “to the extent permitted under section 20508(a) of this title”).

III. THE COURT SHOULD SET ASIDE THE CHALLENGED DECISIONS AND ALLOW THE AGENCY THE OPPORTUNITY TO TAKE FURTHER ACTION CONSISTENT WITH THE CORRECT STATUTORY STANDARD.

As Federal Defendants have explained, the only relief appropriate under these circumstances is to “remand[] to the agency for further action consistent with the corrected legal standards.” *Nebraska Dep’t of Health & Human Servs. v. Dep’t of Health & Human Servs.*, 435 F.3d 326, 331 (D.C. Cir. 2006) (citation omitted); *see also Cnty of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999); *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C. 2008) (collecting cases). While Kansas reiterates its suggestion that the Court seek a supplemental explanation from the Executive Director, *see* ECF No. 147 at 10, an additional declaration would serve little purpose. This Court has concluded based on the Executive Director’s contemporaneous memorandum that he unambiguously declined to perform any analysis of whether the instructions were “needed” to enforce state voter qualifications, Mem. Op. at 4, so a new decision—not merely clarification of the prior decision—is required. A supplemental declaration may not be considered insofar as it contradicts the agency’s contemporaneous decision. *See* ECF No. 121 at 7-8 (citing cases); *see also* Fed. Defs.’ Reply Mem. 10-11, ECF No. 112 (same).

CONCLUSION

For the reasons stated herein and in Federal Defendants’ prior memoranda, the Court should not reach Counts I and II of the complaint. If it does, the Court should find that the Commission had the authority to delegate the type of decision at issue here to the Executive

Director (Count I), but rule narrowly on Count II that, regardless of what the full scope of the Executive Director's delegated authority is, the Commission did not authorize, and could not have authorized, the Executive Director to disregard the requirements of the NVRA. Finally, for the reasons set forth in Federal Defendants' summary judgment briefs, *see* ECF Nos. 101, 112, and 121, the Court should rule that, because the Executive Director expressly found irrelevant whether the requested changes to the Federal Form were "necessary" for the states to determine voter eligibility, his decisions cannot be sustained. The proper remedy under the APA is to set aside the challenged decisions, giving the Commission the opportunity to consider the states' requests under the correct statutory standard.

Dated: August 28, 2017

Respectfully submitted,

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