IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plantiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendants,

and

KRIS W. KOBACH, in his official capacity as the Kansas Secretary of State

Intervenor Defendant.

NO. 16-cv-236 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Introduction

Plaintiffs ask this Court for an extraordinary thing. They have denominated their motion as a request for a temporary restraining order (TRO) and preliminary injunction under Federal Rule of Civil Procedure 65. However, Plaintiffs' motion *does not seek to preserve the status quo* pending resolution of their claims. Rather, Plaintiffs seek an affirmative order of this Court to return to a prior set of circumstances, even though doing so would be exceedingly disruptive to the administration of elections in the State of Kansas, would impose substantial burdens upon the State of Kansas and its counties, and would be confusing to voters. Specifically, they seek to require the United States Election Assistance Commission ("EAC") to affirmatively withdraw its approval of changes to the state-specific instructions of the National Mail Voter Registration Form ("Federal Form") for the States of Kansas, Alabama, and Georgia. Doing so would force the three States to modify their registration procedures accordingly.

Plaintiffs have not only failed to show that they warrant such an extraordinary affirmative remedy at the outset of this litigation but also failed to show even that they meet the basic standard to maintain the *status quo ante* that is the normal function of a TRO or preliminary injunction. Their motion for a TRO and preliminary injunction should be denied.

I. Statement of Facts

For the convenience of the Court, the Kansas Secretary of State (the "Secretary") recounts below essentially the same statement of facts offered in the Secretary's Motion to Intervene and Memorandum in Support.

A. Kansas's Proof-of-Citizenship Law

In 2011, the Kansas Legislature passed and the Governor signed into law HB 2067, the "Secure and Fair Elections Act," which amended various Kansas statutes concerning elections. The law was enacted with large bipartisan majorities, passing by a vote of 111-11 in the House of Representatives and 32-8 in the Senate. In addition to requiring photographic identification from voters at the time of voting, the law required voters to provide evidence of United States citizenship at the time of registration. Section 8(l) of HB 2067, codified as Kan. Stat. Ann. ("K.S.A.") 25-2309(l), provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." The law enumerated thirteen different documents that constitute satisfactory evidence of citizenship, enabling Kansas election officials to assess the eligibility of voter registration applicants. *Id*. The proof of citizenship requirements took effect on January 1, 2013.

B. *Arizona v. Inter Tribal Council of Arizona* and Subsequent Litigation

In *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"), 133 S. Ct. 2247 (2013), Justice Scalia's majority opinion recognized that Article I, Section 2 of the United States Constitution reserves to the States the exclusive power to establish the qualifications of voters. The Court stated, "Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id*. at 2258–59. The Court further stated that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id*. at 2258. On the other hand, the Court recognized that the NVRA requires states to "accept and use" the Federal Form, *id*. at 2257, which at that time did not include state-specific instructions that

matched Arizona's state law requiring registrants to provide documentary proof of citizenship. Therefore, the Supreme Court specifically suggested that Arizona renew its request to the Election Assistance Commission's ("EAC") to modify the federal form to require proof of citizenship in the Arizona-specific instructions. If the EAC declined to honor that request, then the State should "seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed'" or "assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form." *Id*. at 2260 n.10 (*quoting* 5 U.S.C. §706(1)). Following the suggestion of the majority opinion in *ITCA*, the State of Kansas and the State of Arizona again requested in 2013 that the EAC modify the state-specific instructions of the Federal Form to reflect their respective proof-of-citizenship requirements. At that time, the EAC lacked any commissioners and lacked an executive director, and the Acting Executive Director Alice Miller said that she therefore could not act on the States' requests. The States sued in the United States District Court for District of Kansas. *Kobach v. Election Assistance Commission*, 6 F. Supp. 3d 1252 (D. Kan. 2014). After the district court ruled that the EAC must answer the States' requests, the EAC Acting Executive Director went beyond the district court's order and took the unprecedented step of first asking for public comments before answering the States' request. *Never before had the EAC asked for public comment on any state request for modification of the state-specific instructions of the Federal Form*. There had been dozens of requests by States across the country since the Federal Form was first created, and not once had such a request ever been subjected to public comment. Rather, the States simply asked; and the EAC responded.

After the refusal of the Acting Executive Director to grant the States' requests, the States renewed their demand for relief in the district court. The district court reversed the Acting

Executive Director's denial, holding as follows: "Consistent with *ITCA*, because the states have established that a mere oath will not suffice to effectuate their citizenship requirement, 'the EAC is therefore under a nondiscretionary duty' to include the states' concrete evidence requirement in the state-specific instructions on the federal form." *Id.* at 1271 (D.Kan. 2014) (*quoting ITCA*, 133 S. Ct. at 2260). The Tenth Circuit reversed. The panel held that the NVRA granted EAC broad discretion to determine what information is necessary for state officials to assess voter eligibility and therefore had the authority to deny the States' requests. *Kobach v. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), cert. denied 133 S. Ct. 2891 (2015).

C. Kansas Makes a Different Request for Modification of the Kansas-Specific Instructions of the Federal Form

In the year that passed between the Tenth Circuit's decision on November 7, 2014, and the State of Kansas's November 17, 2015, request to the EAC to modify the Kansas-specific instructions of the Federal Form several significant developments occurred. First, the United States Senate confirmed a quorum of commissioners on the EAC. Second, those Commissioners acted official to appoint Brian Newby to the post of Executive Director of the EAC. Third, the State of Kansas promulgated regulations stipulating that applicants for voter registration would have 90 days to complete their applications by providing proof of citizenship to the relevant county election office. Failure to do so would result in the "cancellation" of the application record, but the applicant was free to fill out the five-line application once again as often as he wished and give himself another 90 days to provide proof of citizenship. *See* K.A.R. § 7-23-15. Against the backdrop of these new rules modifying registration procedures, and with a duly-appointed EAC Executive Director capable of approving state requests for modification of the state-specific instructions, on November 17, 2015, the State of Kansas requested instruction language significantly different from language requested in 2013. Specifically, (1) the new

language included the 90-day limit imposed by K.A.R. § 7-23-15, (2) the new language listed the thirteen acceptable documents under Kansas law that constitute sufficient evidence of citizenship, (3) and the new language notified applicants of their right under K.S.A. § 25-2309(m) to submit other evidence of citizenship.

In addition, the Secretary provided to the EAC a spreadsheet of eighteen cases of aliens who had either successfully registered to vote prior to Kansas's proof of citizenship requirement, or who had been successfully prevented from registering after the law went into effect. All but one of these cases were newly discovered and had not been presented to the district court in 2013 or the EAC's Acting Executive Director in 2014. Notably, the spreadsheet included a case of an alien who used the Federal Form to attempt to register. This case dispelled the nonsensical argument that somehow the affirmation of U.S. citizenship on the Federal Form was more powerful to prevent fraud than the affirmation of U.S. citizenship on the state forms.

On January 29, 2015, EAC Executive Director Brian Newby granted Kansas's requested modification of the state-specific instructions of the Federal Form, along with similar requests by the States of Georgia and Alabama. *See* Exhibit 3. Contrary to the false assertion of the Plaintiffs that "[t]he Executive Director provided no written explanations for these decisions," Pl. Mtn. for TRO 18, the Executive Director issued a written memorandum explaining in detail the basis for the decisions. That memorandum is in the possession of Defendants.

For the past three weeks, the State of Kansas has been operating under the revised instructions. The Secretary issued guidance to Kansas's 105 counties, and Kansas has accepted hundreds of applications to register to vote in that time span. Now that the instructions on the Federal Form conform to the instructions on the state form and conform to the requirements of State law, the administration of elections in the State of Kansas has become significantly less

burdensome. Because the Federal Form did not conform to state law during the federal election cycle of 2014, and because 383 Kansans had used the Federal Form and failed to provide proof of citizenship prior to the November 4, 2014, election, the Secretary had to administer a statewide election in which those 383 individuals would be qualified to vote for federal offices only, consistent with the terms of the NVRA and the *ITCA* decision. The State is now free to treat all registration forms in the same way and will not need to administer a separate process for Federal Form registrations who decline to provide proof of citizenship. If this Court were to grant Plaintiffs' requested relief, those administrative burdens would return, and Kansas elections would once again be vulnerable to voting by aliens.

II. Standard of Review

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Munaf v. Geren*, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (citations and internal quotation marks omitted). A court may only grant the "extraordinary remedy . . . upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (per curiam)); *see Cobell v. Norton*, 391 F.3d 251, 258, 364 U.S. App. D.C. 2 (D.C. Cir. 2004). Specifically, a plaintiff must show: (1) that it "is likely to succeed on the merits"; (2) that it "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "that the balance of equities tips in [its] favor"; (4) "that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citations omitted).

Courts apply the same factors in determining whether to grant a temporary restraining order. See *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208, 281 U.S. App. D.C. 400 (D.C. Cir. 1989); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001) ("The court considers the same factors in ruling on a motion for a temporary restraining order and a motion for a preliminary injunction."). Importantly, the purpose of a TRO is *to preserve the status quo*, not to restore some prior set of facts. "The purpose of a temporary restraining order is to preserve the *status quo* for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction." *Barrow v. Graham,* 124 F.Supp.2d 714, 715-16 (D.D.C.2000) (citations omitted).

Courts in this Circuit traditionally have evaluated these four factors on a "sliding scale" – if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp*, 571 F.3d 1288, 1291-92, 387 U.S. App. D.C. 205 (D.C. Cir. 2009). The Supreme Court's decision in *Winter*, however, called that approach into doubt and sparked disagreement over whether the "sliding scale" framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established. *Compare Davis v. Billington*, 76 F. Supp. 3d 59, 63 n.5 (D.D.C. 2014) ("[B]ecause it remains the law of this Circuit, the Court must employ the sliding-scale analysis here."), *with ABA, Inc. v. District of Columbia*, 40 F. Supp. 3d 153, 165 (D.D.C. 2014) ("The D.C. Circuit has interpreted *Winter* to require a positive showing on all four preliminary injunction factors." (citing *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d at 1296 (Kavanaugh, J., concurring))).

Regardless of whether the sliding scale framework applies, plaintiffs must demonstrate irreparable harm, which has "always" been "[t]he basis of injunctive relief in the federal courts." *Sampson v. Murray*, 415 U.S. 61, 88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)). "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297, 372 U.S. App. D.C. 94 (D.C. Cir. 2006). If the Court concludes that Plaintiffs have not demonstrated irreparable harm, the Court need not even consider the remaining factors. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747, 313 U.S. App. D.C. 178 (D.C. Cir. 1995) ("Because [the plaintiff] has made no showing of irreparable injury here . . . [w]e . . . need not reach the district court's consideration of the remaining factors relevant to the issuance of a preliminary injunction."); see also *Econ. Research Servs., Inc. v. Resolution Econ., LLC*, No. 15-cv-1282, 2015 U.S. Dist. LEXIS 143274, 2015 WL 6406390, at *3 (D.D.C. Oct. 21, 2015) ("Given that [the plaintiff] has not demonstrated 'irreparable harm,' the Court's inquiry begins, and ends, with this factor alone.").

Moreover, if a movant satisfies the four criteria necessary for a TRO or preliminary injunction to issue, the movant does not normally gain the vacatur of the underlying law, rule, or policy. Rather, any TRO or preliminary injunction must be tailored narrowly, because the court has yet finally to resolve the merits of the dispute. "When a reviewing court" issues a final judgment holding "that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21, 278 U.S. App. D.C. 382 (D.C. Cir. 1989). In contrast,

when a court issues a preliminary injunction, it acts to preserve the parties' respective rights and interests while the case is pending, and it does not typically declare the challenged rule unlawful or vacate the rule. "A movant's failure to show any irreparable harm," moreover, "is . . . grounds for refusing to issue a preliminary injunction." *Chaplaincy*, 454 F.3d at 297.

Despite the flexibility in a sliding scale approach to the four factors, if the sliding scale continues to be viable, plaintiffs must still demonstrate irremediable injury. See *CityFed Fin. Corp.*, 58 F.3d at 747. Irreparable harm has "always" been the touchstone of injunctive relief, *Sampson*, 415 U.S. at 88, and, therefore, plaintiff's failure to demonstrate the required level of injury is grounds for denying a motion for a preliminary injunction, "even if the other three factors" merit relief. *Chaplaincy*, 454 F.3d at 297.

The D.C. Circuit "has set a high standard for irreparable injury" – it "'must be both certain and great; [and] it must be actual and not theoretical.'" *Id.* quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985) (*per curiam*). Any injury must be not only be certain and great; it must also be immediately imminent, and must occur before any decision on the merits could be rendered. *Wisc. Gas Co.* at 674 (holding that "the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm") (internal quotation marks and alterations omitted); see also 11A FED. PRAC. & PROC. § 2948.1 (stating that "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered[,]. . . . [for] if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief").

In the instant case, as explained below, Plaintiffs have not established any legally-cognizable injury at all. Moreover, any injury that might theoretically occur would be reparable by the State of Kansas. Plaintiffs' application for a TRO therefore fails at the outset, and this Court need not address the other factors.

III. Plaintiffs Have Failed to Show Irreparable Harm

Plaintiffs' allegation of imminent irreparable harm is baseless. There is no imminence, any "harms" suffered would be reparable by the State's voter registration system (albeit at considerable administrative cost to the State of Kansas), and there are no legally-cognizable injuries in this case. As explained below, Plaintiffs make several factual claims that are misleading or false, and they apparently misunderstand the voter registration systems of the three States.

A. No Relevant Election is Imminent

Plaintiffs complain that they are irreparably harmed by the EAC decision to alter the form because "Kansas's caucuses will be held on March 5, 2016, with registration available up to and including the day of the caucus for one of the two major political parties." Pl. Memo. in Supp. of TRO 23. Plaintiffs apparently misunderstand the nature of a party caucus and the State's lack of involvement therein. As explained by the attached Affidavit of Kansas Election Director Bryan Caskey, the Kansas Republican and Democratic presidential caucuses are private events conducted entirely by the Republican and Democratic Parties. Neither party's caucus is constrained by the State's voter rolls or the Kansas instructions of the Federal Form. The State of Kansas has no role in these private proceedings. Consequently, the Republican and Democratic Parties are free to allow or prevent participation by anyone they choose, without

regard to whether such participants are qualified to vote under Kansas law. Affidavit of Bryan Caskey, ¶¶ 4-8 (Exhibit A).

The next event to which the Kansas voter registration system would apply is the primary election for federal, state, and local offices held August 2, 2016. This will be an election in which Kansas provides the administrative mechanism and registration structure for the political parties to select candidates from among their members. Affidavit of Bryan Caskey, ¶ 9. Accordingly, no event is imminent that would cause Plaintiffs any "injury."

With respect to the States of Alabama and Georgia, Plaintiffs appear to be unaware of the fact that neither State is yet enforcing its proof-of-citizenship law. Plaintiffs state incorrectly that "Kansas and Alabama are already implementing the Executive Director's decision, directly impacting upcoming federal primary elections." Pl. Memo. in Supp. of TRO 23. However, Plaintiffs have not yet implemented their proof-of-citizenship law; due to the fact that the approval of election law changes under Section 5 of the Voting Rights Act delayed their implementation date for years. Moreover, Alabama's primary election will be held on March 1, 2016, but the deadline for registration passed on February 15, 2016, so any change in the Federal Form at this date would have no effect on the Alabama's primary election.

With respect to Georgia, Plaintiffs acknowledge that the voter registration deadline for Georgia's March 1, 2016, presidential primary election has already passed. Pl. Memo. in Supp. of TRO 23. But they claim urgency because the registration deadline for Georgia's May 24, 2016, general federal and state primary election is April 26, 2016. *Id*. However, Like Alabama, Georgia has yet to enforce its proof of citizenship requirement.

In summary, the only State in which the state-specific instruction regarding proof of citizenship on the Federal Form is having a meaningful impact is Kansas. And the soonest any

relevant election would occur is August 2, 2016. Consequently, there is no imminence to the "harm" asserted by the Plaintiffs.

B. Any Harm would be Reparable

All of Plaintiffs' asserted "harms" stem from the use of a Federal Form that includes a state-specific instruction that requires proof of citizenship. And the only State that is enforcing that requirement at present is Kansas. However, as is explained in the affidavit of Kansas Election Director Bryan Caskey, any "harm" that theoretically might arise if some unnamed person (who is not a party to this litigation) used the Federal Form in Kansas after February 21, 2016, could be easily repaired. If the State of Kansas were ordered by this Court to retroactively treat the post-February 1, 2016, Kansas instructions of the Federal Form as if they did not require proof of citizenship, the State could do so. The Secretary of State's office would contact all 105 county clerks and election officers to identify Federal Form applicants in their respective counties. The Secretary of State's office would then instruct the counties to modify the records of such individuals so as to treat them the same as Federal Form applications received prior to February 1, 2016. The counties would then be instructed to contact each of the relevant applicants by mail to notify them of the change in their registration status. Caskey Affidavit ¶ 14. And every such individual would be in the position that he or she would have been in if the Kansas-specific instructions on the Federal Form had never changed on February 1, 2016.

It should be noted, however, that while any such "harm" is reparable, it would be administratively burdensome and expensive for the State to undertake this task of restoring the *status quo ante*. In the three weeks that have passed since February 1, 2016, more than 22,000 individuals have submitted voter registration applications in the State of Kansas. Caskey Affidavit ¶ 13. Each of these records would have to be reviewed to determine if a Federal Form

were used, and if so, modified in the State's Election Voter Information System ("ELVIS") database accordingly. Therefore, the State should not be compelled to restore the *status quo ante* unless and until the Plaintiffs have demonstrated that they have standing and have proven their case on the merits, neither of which they can do, as explained below.

C. Individual Plaintiffs Have Not Suffered Any Harm.

The Plaintiff group includes only two individuals – Marvin Brown and Joann Brown, both of whom reside in Kansas. However, the Browns have not suffered any "harm" due to the change in the wording of the Kansas-specific instructions of the Federal Form. That is because the Browns *both submitted their Federal Form registration applications before the change went into effect*. According to the State's ELVIS database, Plaintiff Marvin Brown submitted his Federal Form application on January 28, 2016. Caskey Affidavit ¶ 17. According to the State's ELVIS database, Plaintiff Joann Brown submitted her Federal Form application on January 28, 2016, as well. Caskey Affidavit ¶ 18. Both individual Plaintiffs' applications were accordingly treated under pre-February 1 language of the Kansas-specific instructions of the Federal Form. As a result, they are already fully registered to vote in federal elections in Kansas. *Id*. at ¶¶ 17-18. Therefore, the individual plaintiffs already have the relief that they seek. *The TRO that the Plaintiffs seek would not change their status in any way*. These individual Plaintiffs also lack standing to bring this lawsuit, because they have not presented any injury-in-fact, and this Court cannot provide any meaningful remedy for their non-injury.

D. Organizational Plaintiffs Have Not Suffered Any Harm.

The organizational Plaintiffs claim that the change in the state-specific instructions of the Federal Form "will make it difficult or impossible" for them "to conduct effective registration drives in those states." Pl. Memo. in Supp. of TRO 41. However, while organizational Plaintiffs

may have a legally-cognizable interest in speaking to potential registrants and handing out voter registration forms, Plaintiffs have no legally-cognizable interest in whether or not some unnamed, hypothetical individual chooses to register and whether or not that individual meets the State's qualifications for registering to vote. "The plaintiffs are organizations and cannot vote; instead they assert the right to vote of individuals not even presently identifiable. A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014) (quoting *Kowalski v. Tesmer*, 543 U.S. 125 (2004)). Therefore Plaintiffs have not demonstrated a "harm" sufficient to satisfy the exacting standards of a TRO. Any legally-cognizable interest in becoming a registered voter is not their own, and their asserted "harm" is entirely speculative.

IV. Plaintiffs Have Failed to Show a Likelihood of Success

A. Standing

As this Court has noted, an analysis of whether a plaintiff is likely to succeed on the merits begins with whether the plaintiff has established Article III standing. *Klayman v. Obama*, 2015 U.S. Dist. LEXIS 151826 at *23 (Nov. 9, 2015), citing *Jack's Canoes & Kayaks, LLC v. Nat'l ParkServ.*, 933 F. Supp. 2d 58, 76 (D.D.C. 2013) ("The first component of the likelihood of success on the merits prong usually examines whether the Plaintiffs have standing in a given case." (internal quotation marks omitted)).

Article III of the Constitution limits the authority of federal courts to the resolution of "Cases" and "Controversies." U.S. Const. art. III, § 2. "This limitation is no mere formality: it `defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.'" *Dominguez v. UAL Corp*., 666 F.3d 1359, 1361 (D.C.Cir. 2012) (quoting Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). "The Court begins with the presumption that it does not have subject matter jurisdiction over a case." *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

To establish the jurisdictional prerequisite of constitutional standing, Plaintiff must first show that it has suffered an "injury in fact," that is, the violation of a legally protected interest that is "(a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). Second, "there must be a causal connection between the injury and the conduct complained of." *Id*. Stated differently, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct." *Allen*, 468 U.S. at 751. Third, it must be "likely" that the injury would be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560, (*quoting Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 41-42 (1976)).

As explained above in Sections IV.C. and IV.D., neither the individual Plaintiffs nor the organizational Plaintiffs possess standing to sue, due to their lack of any judicially-cognizable injury in fact.

B. Plaintiffs Have Failed to Exhaust Their Administrative Remedies

As Plaintiffs themselves acknowledge, they brought this case shortly after the changes were made to the state-specific instructions of the Federal Form by the Executive Director of the

EAC. However, Plaintiffs have not even attempted to appeal the decision of the Executive Director to the Commission itself. Strangely, Plaintiffs go on at great length describing how the 2006 decisions of an EAC Executive Director to reject a request made by Arizona was appealed to the Commission. Pl. Memo. in Supp. of TRO 7-8. Plainly, Plaintiffs were aware of this administrative remedy. However, rather than attempt to appeal the decision of Executive Director Brian Newby to the Commission, Plaintiffs instead rushed to the courthouse door. This failure to exhaust administrative remedies is yet another reason that Plaintiffs cannot prevail.

C. Administrative Procedure Act Claims

Plaintiffs allege that the EAC Executive Director's actions violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596, 706, in at least *five* respects, any of which individually is grounds for vacating the Executive Director's actions. Plaintiffs have failed to establish a likelihood of success on any of these allegations.

1. Plaintiffs' Concerns for EAC Policy Cannot Raise Those Policies to the Level of Legally Enforceable Regulations

Plaintiffs allege that the Executive Director acted contrary to law when he unilaterally changed "longstanding" EAC policy without the approval of three Commissioners as required by the Help America Vote Act, 52 U.S.C. § 20928. Pl. Memo. in Supp. of TRO 31-32. Plaintiffs argue that the EAC's Executive Director violated the EAC's *Election Assistance Commission Organizational Management Policy Statement* (Feb. 24, 2015). *Id*.; Schmidt Dec. Ex. 6.

Similarly, Plaintiffs contend that the Executive Director acted contrary to the EAC's own internal policy by issuing final policy determinations that the Commission had expressly reserved to itself through formal Commission votes. Pl. Memo. in Supp. of TRO 32. Plaintiffs

similarly allege that the Executive Director violated EAC policy by engaging in *ex parte* communications with officials from the States. *Id*.

These arguments fail at fundamental levels. Plaintiffs attempt to arrogate EAC "policy" to substantially more than a policy and seek judicial enforcement of its content as regulations. Moreover, these policies are not "longstanding" and time does not ossify policy any more than desuetude may vitiate law.

Plaintiffs, at a fundamental level, misapprehend the nature of these "policy statements." While it is true that an agency must abide by its regulations unless and until it changes those regulations, *United States ex rel. Accardi v. Shaugnessy*, 347 US 260 (1954), these "policy statements" *are not substantive or even procedural regulations*. As stated by the District of Columbia Circuit:

> The distinction between legislative rules and interpretative rules or policy statements has been described at various times as "tenuous," *Chisholm v. FCC*, 538 F.2d 349, 393 (D.C. Cir.), cert. denied, 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976), "fuzzy," *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), "blurred," Saunders, *Interpretative Rules With Legislative Effect: An Analysis and a Proposal For Public Participation*, 1986 Duke L.J. 346, 352, and, perhaps most picturesquely, "enshrouded in considerable smog." *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975), quoted in *American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). As Professor Davis puts it, "the problem is baffling." 2 K. Davis, Administrative Law Treatise 32 (2d ed. 1979). By virtue of Congress' silence with respect to this matter, it has fallen to the courts to discern the line through the painstaking exercise of, hopefully, sound judgment. *Guardian Federal Savings & Loan Ass'n v. FSLIC*, 589 F.2d 658, 667 (D.C. Cir. 1978).

Community Nutrition Institute v. Young, 818 F. 2d 943, 946 (D.C. Cir. 1987). Twenty years later, the Circuit Court summarized the controlling tests in *Center for Auto Safety v. NHTSA*,

> "In determining whether an agency has issued a binding norm or merely" an unreviewable "statement of policy, we are guided by two lines of inquiry." See *Wilderness Soc'y v. Norton*, 369 U.S. App. D.C. 165, 434 F.3d 584, 595 (D.C. Cir. 2006). One line of analysis considers the effects of an agency's action, inquiring whether the agency has "(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." *Crop Life Am. v. EPA*,

> 356 U.S. App. D.C. 192, 329 F.3d 876, 883 (D.C. Cir. 2003) (citation and internal quotation marks omitted). The language used by an agency is an important consideration in such determinations. See *Cmty. Nutrition Inst.*, 818 F.2d at 946 (per curiam). The second line of analysis looks to the agency's expressed intentions. *Crop Life Am.*, 329 F.3d at 883. This entails a consideration of three factors: "(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Molycorp, Inc. v. EPA*, 339 U.S. App. D.C. 73, 197 F.3d 543, 545 (D.C. Cir. 1999).
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> As the case law reveals, it is not always easy to distinguish between those "general statements of policy" that are unreviewable and agency "rules" that establish binding norms or agency actions that occasion legal consequences that are subject to review. Compare *Nat'l Ass'n of Home Builders v. Norton*, 367 U.S. App. D.C. 240, 415 F.3d 8, 14, 16 (D.C. Cir. 2005) (holding that there was no final agency action where the language of the challenged Protocols was permissive and "the scope of a [regulated party's] liability under . . . [the statute] remains exactly as it was before the Protocols' publication"); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38, 48 (D.C. Cir. 1974) (noting that a policy statement that "does not establish a binding norm," and "is not finally determinative of the issues or rights to which it is addressed," is not subject to review) (citation and internal quotation marks omitted), with *Barrick Goldstrike Mines, Inc. v. Browner*, 342 U.S. App. D.C. 45, 215 F.3d 45, 47-49 (D.C. Cir. 2000) (holding, inter alia, that an EPA guidance, which created new reporting requirements for regulated entities, as a directive with legal consequences, amounted to final agency action).

452 F.3d 798, 806-7 (D.C. Cir. 2006). Plaintiffs have simply not met their burden of showing that the EAC's policies constitute any form of judicially enforceable "rule."

Plaintiffs seek judicial enforcement of what they denominate as a policy, yet have attempted to show that the "policy" was ever been adopted by the EAC Commissioners as a regulation, or that the proffered document has ever been published in the *Federal Register* to give constructive notice of its content,[1] or that it was intended to be adopted as a substantive and judicially enforceable rule, or that it is a *de facto* rule because it is binding internally and externally, or the EAC has treated it as binding on it. In short, Plaintiffs have failed to provide

[1] Indeed, Plaintiffs have failed to establish the source of these "policy" documents outside their pleading – while they may appear somewhere in the EAC website, they have not been published in the *Federal Register* as rules, proposed rules, or notices.

even a scintilla of evidence that these "policies" are judicially enforceable rules under governing precedent, let alone that they are likely to prevail.

Plaintiffs claim that the EAC's policies are "longstanding" adds nothing to their argument and fails under the Supreme Court's decision in *Perez v. Mortgage Bankers Association*, 575 U.S. ___, 135 S. Ct. 1199, 191 L. Ed. 2d 186, 2015 U.S. LEXIS 1740, 83 U.S.L.W. 4160 (2015). Over the course of nearly twenty years, the D.C. Circuit had applied *Paralyzed Veterans of America v. DC ARENA LP*, 117 F. 3d 579 (D.C. Cir. 1997), and *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F. 3d 1030 (D.C. Cir. 1999), for the proposition that an agency cannot significantly alter its definitive interpretation of its regulations except by notice and comment rulemaking because the re-interpretation effectively revises that regulation. The Supreme Court rejected the doctrine that notice and comment rulemaking was required even for changes in longstanding interpretation (*i.e.*, interpretative rules or policy statements). The Supreme Court held that "The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U. S. 519, 524, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978)." *Mortgage Bankser Ass'n*, *supra*, 135 S. Ct. at 1206. Thus, agencies may alter their policy positions with substantial freedom. *Mortgage Bankers Association*, *supra*, undercuts the notion that Plaintiffs are likely to succeed on the merits because Plaintiffs never claim that the policies are more than policies, which the EAC may alter.

2. Notice and Comment on the States' Request

Plaintiffs appear also to allege that the EAC must alter the Federal Form only by notice and comment rulemaking – *i.e.* request public comments on the States' request for alterations to

the Federal Form – noting that the Federal Form was developed by the FEC through notice and comment rulemaking.[2] The underlying statute, now codified as 52 U.S.C. § 20508, provides that "The Election Assistance Commission – (1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3) [of this section]; (2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office; …." The statute does *not* require that the FEC or the EAC to develop the form through the formal rulemaking process. That the FEC once elected to do so does not require the EAC to do so in any change in the Federal Form. Moreover, agencies frequently propose rules when not required to do so as a matter of policy and such practices do not ossify agencies discretion to require proposed rules.

Plaintiffs accordingly have failed to show that they are likely to prevail on a core issue of their motion. As with other issues presented, Movant appears to confuse the details and make leaps of logic from some statutory language to a conclusion that is not supported by the law itself. At bottom, EAC responses to requests by the States to modify the state-specific instructions of the Federal Form are informal *adjudications*, not rulemakings.

[2] Oddly, Plaintiffs cite to the proposed rule and the advance notice of proposed rulemaking for the proposition that the FEC adopted a final rule but fail to cite the final rule. See Federal Election Commission, Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 11,211 (Mar. 10, 1994) (notice of proposed rulemaking); Federal Election Commission, Nat'l Voter Registration Act, 58 Fed. Reg. 51,132 (Sept. 30, 1993) (advance notice of proposed rulemaking). On September 30, 1993, the FEC published an Advance Notice of Proposed Rulemaking (ANPRM) to gain general guidance from the regulated community and other interested persons on how best to carry out these responsibilities. 58 Fed. Reg. 51,132. The FEC received 65 comments from 63 commenters in response to the ANPRM. In addition, the FEC National Clearinghouse on Election Administration conducted surveys of state election officials to obtain information on state laws and procedures that impact on FEC responsibilities under the NVRA. The FEC published a Notice of Proposed Rulemaking (NPRM) on March 10, 1994 to seek comments from the regulated community and other interested parties on the specific items of information that it proposed to include on the mail registration form, and on the specific items of information that it proposed be required from the states to carry out the Act's reporting requirements. 59 Fed. Reg. 11,211. The FEC received 108 comments in response to this notice. See Federal Election Commission, National Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994) (final rule). See also Federal Elections Commission and Election Assistance Commission, Reorganization of National Voter Registration Act Regulations, 74 Fed. Reg. 37519 (July 29, 2009) (transfer).

V. The Merged Balancing of Interests and the Public Interest Favor Denial of Preliminary Relief Pending Disposition on the Merits

As explained at length above, the individual Plaintiffs have suffered no harm whatsoever, and they are already in the position that they would be in if a TRO were issued. The organizational Plaintiffs are asserting the interests of unnamed third parties in becoming registered to vote. Their own interest – in talking to potential voters and in providing materials to such individuals – is in no way harmed.

In contrast, the State has a numerous, significant interest in maintaining the status quo and in preserving the current wording of the Kansas-specific instructions of the Federal Form – wording that is consistent with Kansas law requiring proof of citizenship to register. The State asserts five specific interests.

First, the State would face severe administrative burdens if a TRO were to be issued. The State of Kansas has been operating under the revised instructions of the Federal Form since February 1, 2016. Kansas has accepted more than 22,000 applications to register to vote in the time span between that date and the present. Caskey Affidavit ¶ 13. Having the 105 counties of Kansas examine those 22,000 applications and contact those applicants who used the Federal Form would be exceedingly burdensome and expensive. *Id*. at 14.

Second, if a TRO were to remain in effect through the federal elections of August 2, 2016, and November 8, 2016, the State would face additional administrative burdens. The administration of elections in the State of Kansas has become significantly less burdensome with the instructions on the Federal Form conforming to the instructions on the State form and the requirements of State law. The impact of this change is not minimal. During the federal election cycle of 2014, because of the discrepancy between Federal and State Forms, the Secretary was required to administer a statewide election in which those 383 individuals would be qualified to

vote for federal offices only, consistent with the terms of the NVRA. Caskey Affidavit ¶ 10. With the conformity of the Federal Form, the State may now treat all registration forms in the same way and need not administer a separate election process for Federal Form registrations who decline to provide proof of citizenship in compliance with State law. These administrative burdens would be reimposed on Kansas, and likely increased, if this Court were to grant Plaintiffs' requested relief.

Third, as the State of Kansas demonstrated to the EAC in its request for modification of the state-specific instructions of the Federal Form, election fraud in the form of voting by non-citizens is a continuing concern. The State submitted a spreadsheet, in support of the November 17, 2015, request to the EAC to modify the Kansas-specific instructions of the Federal Form. Exhibit 2; Plaintiffs Motion, Exhibit 9. The spreadsheet illustrated eighteen instances of improper registration in a Sedgwick County alone, sixteen of which were discovered in the past two years. *See* Spreadsheet attached to Def. Mtn. to Intervene. Kansas has an overwhelming interest in ensuring the integrity of its electoral processes and deterring and preventing voting fraud – in this case, fraud in the form of non-citizens registering and/or voting. "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." *Rosario v. Rockefeller*, 410 U.S. 752, 759 (1973).

Fourth, as a sovereign State, Kansas has a significant interest in the preservation and enforcement of its laws. Kansas law requires county election officers and the Secretary of State's Office to "accept any completed application for registration, but [provides that] an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." K.S.A. § 25-2309(l). If a TRO were to be issued, Kansas law would be

defeated by the creation of a loophole for applicants who use the Federal Form and thereby evade the proof-of-citizenship requirement with respect to federal elections.

Fifth and finally, the State has an interest in ensuring Kansas voters are not confused. It would be extremely confusing to the citizens of Kansas if the Kansas-specific instructions on the Federal Form were to yo-yo back and forth in response to the demands of the interests groups who are Plaintiffs in this litigation. Modifications have been made to the state-specific instructions over the years, but never has a modification been changed reversed. This would be an unprecedented and confusing development. For all of these reasons, the interests of the Secretary outweigh any asserted interests by Plaintiffs, and the public interests reflected therein weigh against issuance of a TRO.

VI. CONCLUSION

For the reasons stated above, Plaintiffs Motion for a Temporary Restraining Order should be DENIED.

Dated: February 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did serve a copy of this Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order on all counsel who have made appearance in this case and consented to service by electronic means through the Electronic Case Filing system.

Dated: February 21, 2016

/s/ John M. Miano
John M. Miano

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, vs. BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and THE UNITED STATES ELECTION ASSISTANCE COMMISSION Defendants. and KRIS W. KOBACH, in his official capacity as the Kansas Secretary of State *Intervenor Defendant*.	Case No. 16-cv-236 (RJL)

[PROPOSED] ORDER DENYING TEMPORARY RESTRAINING ORDER

The Court has reviewed Plaintiffs' Motion for Temporary Injunction and Memorandum in Support thereof and Proposed-Intervenors' Response to Plaintiffs' Motion and Memorandum, Plaintiffs' Motion for a Temporary Restraining Order is DENIED.

IT IS SO ORDERED.

DATED: _____

_____

Honorable Richard J. Leon United States District Judge