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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, et al.,
Plaintiffs,

v.

Docket No. 16-2105-JAR

Kansas City, Kansas

KRIS W. KOBACH,

Date: 03/20/2018

Defendant.
.....

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Kimberly R. Greiner, CRR, RMR, RDR, CRC
 Official Court Reporter
 259 U.S. Courthouse, 500 State Avenue
 Kansas City, Kansas 66101

1 (9:19 a.m., proceedings commenced.)

2 THE COURT: All right. We are on the record
3 in *Fish, et al versus Kobach*, and this is the motion
4 filed by the plaintiff to enforce court orders and order
5 to show cause why Defendant Kobach should not be held in
6 contempt. It's Document 423. State your appearances,
7 please.

8 MR. HO: Dale Ho of the American Civil
9 Liberties Union for the plaintiffs, Your Honor.

10 MR. STEINER: Neal Steiner and Angela Liu
11 from Dechert for the plaintiffs.

12 MR. DANJUMA: Orion Danjuma of the ACLU on
13 of behalf of the plaintiffs.

14 MR. BONNEY: Doug Bonney on behalf of the
15 ACLU for plaintiffs.

16 MS. BECKER: Sue Becker on behalf of
17 Defendant Secretary Kobach.

18 MR. KOBACH: Kris Kobach.

19 MR. ROE: Garrett Roe on behalf of the
20 Secretary Kobach.

21 THE COURT: All right. Mr. Ho, Mr. Steiner,
22 whoever's taking the lead on this motion.

23 MR. HO: Thank you, Your Honor. Good
24 morning, Your Honor. It's with some regret that we
25 appear before you today. We apologize for having to

1 take the court's time for what really ought to be some
2 very simple issues that, in our view, the defendant
3 should have and could have addressed very simply to
4 ensure that all voters and local elections officials are
5 aware of the registration requirements of the State
6 under Your Honor's preliminary injunction ruling. And
7 in particular there are two issues that we're here to
8 address today.

9 The first is the defendant's failure to
10 update the on-line county elections manual to reflect
11 the fact that, under Your Honor's ruling, motor-voter
12 applicants who do not provide documentary proof of
13 citizenship are to be registered to vote.

14 The second issue has to do with certificates
15 of registration, what we've referred to often during the
16 trial as postcards, that get sent to registered voters
17 and provide them with a variety of information,
18 including their polling place.

19 To back up for a moment, Your Honor, your
20 preliminary injunction order directed defendant to
21 register all motor-voter applicants whose applications
22 are complete except for the documentary proof of
23 citizenship. That instruction is set out on page 1152
24 of the official reporter version of your order. The
25 order does not provide for any kind of second class

1 status for registrants who are covered by the
2 preliminary injunction ruling. Those voters under Your
3 Honor's ruling, our understanding is that they are to be
4 treated identically to all other registrants in the
5 state.

6 Subsequent to that ruling, Your Honor
7 entered an order, what we refer to sometimes as the
8 public notice order, Document 241 on ECF, which, among
9 other things, directed the defendant to correct
10 Secretary Kobach's website and to provide consistent
11 information to voters.

12 The record, Your Honor, demonstrates, as I
13 alluded to earlier, that Secretary Kobach is continuing
14 -- continues to be in violation of those directives in
15 two respects. The first, as I mentioned, is with
16 respect to the county elections manual. There's no
17 dispute between the parties that the county elections
18 manual is available on-line, that it's the definitive
19 resource guide for local elections workers. There's no
20 dispute that the manual erroneously instructs elections
21 workers that documentary proof of citizenship is
22 required for all voter registration applicants. It
23 mentions one exception for that and that is voters who
24 registered before 2013, which is what the statute
25 provides. So the simple fact that the manual identifies

1 an exception but then doesn't identify the exception
2 that Your Honor's injunction established, let alone the
3 one that the D.C. Circuit established in a separate
4 decision, the *Newby*, case. For the people who used the
5 federal voter registration form, we think that omission
6 is particularly striking.

7 The manual, although it is intended for
8 local election workers, it's available on-line to the
9 general public. And what that means is incorrect
10 information is continually distributed to the general
11 public on an ongoing basis in direct violation of the
12 public notice order.

13 The manual, according to the defendant, is
14 scheduled for revision later this year. But what we
15 learned, during correspondence with the defendant, is
16 even if Your Honor were to issue a final judgment at
17 trial, the defendant would not update the manual.
18 That's set forth in our briefing and in some of the
19 correspondence with defendant's counsel, Miss Becker.

20 Their view is that the manual will not be
21 updated unless and until the Supreme Court either
22 renders a decision on the merits or denies cert from a
23 ruling of the Tenth Circuit affirming a final judgment
24 from the court, which obviously could take years which
25 means years of misinformation being distributed to the

1 public.

2 The second issue is the certificates of
3 registration, or the postcards. And we introduced one
4 of these postcards as an exhibit during trial. It was
5 Plaintiffs' Exhibit 66. As Your Honor I think can see
6 here, that postcard contains a variety of information.
7 The voter's various districts that they vote for, their
8 precinct, and of course their polling location.

9 Now, during a telephonic status conference
10 in 2016, in October of 2016, the defendant promised that
11 voters who were covered by the preliminary injunction
12 would get the same notice that other voters get, the
13 notice that informs you of your polling place.

14 And as I'm sure Your Honor recalls, the
15 whole reason we had that telephonic conference in the
16 first place was we filed a motion about a year and a
17 half ago for contempt on a wide range of issues. After
18 Your Honor's preliminary injunction ruling, the
19 defendant was refusing to give any information
20 whatsoever to voters who were covered by the injunction
21 other than a piece of paper that told them that they
22 were not registered to vote, that they had to submit
23 documentary proof of citizenship in order to be
24 registered. He was refusing to correct any information
25 on the websites, and we had to file a motion for

1 contempt a year and a half ago just to get him to change
2 some of those practices. He did at the last minute
3 before the hearing and we withdrew the motion based on
4 -- in part on representations that the Secretary made,
5 and he made this representation during the hearing.

6 Now, we agreed to certain corrective notices
7 that would inform the voters who were covered by the
8 injunction that they were considered registered, that
9 they would not have to do anything else before the 2016
10 general election. And I believe Secretary Kobach's
11 position is that that is all that the court required.

12 But I think that's -- I don't think that
13 that's right, Your Honor. I think that that corrective
14 notice was necessary because of the misinformation that
15 Secretary Kobach was continuing to disseminate after the
16 preliminary injunction order. And correcting that
17 misinformation did not relieve him of the obligation to
18 send the same notices to voters covered by the
19 injunction to inform them of their polling locations and
20 that he -- that indeed he promised he would make -- that
21 he promised he would -- he would do during the
22 telephonic status conference.

23 Now, the next slide, Your Honor, is just
24 some of the testimony from trial. This is trial
25 transcript page 494, at line 7 to 15. The lead

1 plaintiff in this case, Mr. Fish, testified that he
2 never received one of these postcards.

3 There was also testimony, which I'm not
4 going to put up on the screen, from Marge Ahrens, the
5 president -- former president of the League of Women
6 Voters -- I believe it's at page 372 of the trial
7 transcript -- that not all voters covered by the
8 preliminary injunction, the league's knowledge is that
9 they're not all receiving postcards. That some voters
10 are. Some county election officials are sending them
11 out, which obviously is a good thing. But their
12 understanding is that those postcards are not being sent
13 to everyone.

14 And we sought to confirm that understanding
15 with the defendants in the fall of last year. In
16 November and December, there were a series of letters
17 exchanged between the parties where we asked for
18 information as to what directives have been sent to
19 county elections officials with respect to these
20 postcards and requested that the defendant inform county
21 elections officials that those postcards should be sent.

22 And -- I'm sorry, can we go to the next one
23 after this.

24 This is the first letter that we got from
25 the defendants. It's Exhibit H to our contempt motion.

1 When we raised these issues, Miss Becker responded by
2 saying that people who do not provide documentary proof
3 of citizenship, motor-voter applicants who do not do so,
4 they get the court-approved letters, the corrective
5 letters and that's -- that's it. She didn't respond to
6 our request for information about what directives have
7 been issued to the counties, just a simple
8 representation that they're getting the court-ordered
9 corrective notices.

10 I think the implication there is that
11 there's no obligation for them to get -- to make sure
12 that the postcards are being sent to everyone and that
13 they have not issued such an instruction.

14 We had a second letter from the defendants.
15 This was Exhibit J, a letter again from Miss Becker
16 dated December of 2011, which again stated that covered
17 registrants under the preliminary injunction get the DMV
18 receipt and the corrective notice that Your Honor
19 approved, but that certificates of registration are sent
20 to registrants who are not covered voters.

21 Now, what I believe, based on an e-mail
22 exchange with the defendants over the weekend, the
23 defendants may represent today for the first time, after
24 months of correspondence about this issue and after
25 simple requests for information, I believe the

1 defendants may stand up here today, Your Honor, and
2 represent that they, in fact, have given such an
3 instruction to county elections officials to send the
4 postcard.

5 I think the facts here today, Your Honor,
6 support a different inference. If that were, in fact,
7 true, then this issue could have been put to bed very
8 easily and very simply four months ago with a simple
9 representation to that fact and some documentation
10 behind it.

11 There's no mention of any such instruction
12 in Miss Becker's letters from November and December of
13 last year or in Mr. Caskey's testimony, as I'm sure Your
14 Honor recalls, when you sort of point blank asked him
15 are these postcards going to voters and Mr. Caskey could
16 not make a representation that those postcards were, in
17 fact, going to all registered voters.

18 Mr. Fish's testimony, I think, also clearly
19 demonstrates some voters are not getting them.

20 Your Honor, in conclusion, we do not take
21 this step lightly. We do not file a motion like this
22 without a strong belief that the facts support it. But
23 there is a record here not only with respect to these
24 two issues but dating back to 2016 and the failure to
25 fix the various notice issues that required our original

1 contempt motion. There are -- there's a record of the
2 many discovery disputes, including the sanctions that
3 were imposed by Magistrate Judge O'Hara finding that the
4 defendant had engaged in making patently misleading
5 representations to the court.

6 The only conclusion I think that can be
7 drawn from this pattern and from the failure to correct
8 these very, very simple issues is that the purpose of
9 the failure to address these problems, Your Honor, is to
10 undermine the effectiveness of the preliminary
11 injunction by not ensuring that all voters have accurate
12 information.

13 And based on that, we request that Your
14 Honor exercise the court's discretion to find not only
15 -- to not only order defendant to correct these things
16 but to find him in contempt for violating the
17 preliminary injunction order.

18 Thank you, Your Honor.

19 MS. BECKER: Your Honor, there are three
20 parts to this motion. First, there is the court's
21 written order of October 14th, 2016, concerning the
22 special notices that were to be sent to all suspense
23 voters covered by the court's preliminary injunction.
24 The defendant complied with the court's order in which
25 it laid out the language we were to post on our website

1 and the language that was to be sent in a notice to all
2 covered registrants.

3 Defendant complied with the order in the
4 weeks before the 2016 election. And when plaintiff
5 subsequently requested that the outdated language
6 referring to the November 2016 election be removed, I
7 personally worked with counsel and we came up with an
8 agreed to language modification that would not be in
9 violation of the court's order on the language and we
10 implemented them.

11 The second issue involves an issue first
12 raised in plaintiffs' reply to which they attached not
13 the court's written order but a transcript of the
14 telephonic hearing that was held before the court issued
15 its order. That telephonic hearing occurred on October
16 5th, 2016. Plaintiffs' reply dated January 28th was the
17 first time that plaintiffs stated that they were basing
18 their motion on something other than the court's written
19 order that we had been following.

20 When I read the transcript section cited by
21 the plaintiffs, I found the two conversations regarding
22 the standard postcards regarding the polling place. And
23 then I inquired of Bryan Caskey what the instructions
24 given to the counties were. Mr. Caskey confirmed that
25 the following -- that following the telephonic hearing

1 on October 5th, 2016, the counties received verbal
2 instruction in a statewide conference call later that
3 same day to send out the standard postcards with the
4 polling addresses on them to all voters affected by the
5 court's preliminary injunction.

6 After the court's order was filed on October
7 14th, 2016, Mr. Caskey then e-mailed all of the counties
8 the exact phrasing of the special notice that the court
9 had approved.

10 In light of the pending motion, I asked him
11 to follow up with some of the county clerks and see if
12 they had followed his verbal instructions regarding the
13 standard notices of polling places. He learned that at
14 least three counties just sent the special notice and
15 the court's written order which doesn't mention the
16 special polling address but does provide a toll-free
17 number to call and to find a specific polling place for
18 that person's address.

19 It appears that those counties interpreted
20 the written e-mail from Bryan as superseding any verbal
21 instruction given the previous week. I have since
22 learned he also typically ends his e-mails to the
23 counties with a notation that the present e-mail
24 supersedes all previous instructions from him on that
25 issue. So this, I believe, explains why at least three

1 counties interpreted the court's written order that was
2 forwarded to them as superseding the earlier instruction
3 on sending the standard postcards with the polling
4 locations to all covered registrants.

5 Clearly the Secretary of State's Office
6 complied with the court's statement that the standard
7 postcard should be sent. The office immediately
8 instructed the counties to do so in a weekly conference
9 call with the county clerks. The fact that some
10 counties did not comply with this instruction, perhaps
11 because they assumed that the special notice was a
12 substitute for the standard postcard, cannot be the
13 basis for the contempt of court. The Secretary of
14 State's Office conveyed the court's understanding to the
15 counties.

16 In addition, if the transcript of the
17 telephonic hearing is now going to be considered part of
18 the court's order, then it must be noted that the
19 transcript is not consistent. When the entire hearing
20 transcript is reviewed, it shows that there was some
21 ambiguity injected into the conversation near the end.
22 On page 21, which is after the court's discussion of the
23 issue with Secretary Kobach, Mr. Danjuma summed it up by
24 stating that either he wanted a representation that the
25 covered registrants would receive "the same notice that

1 every other registered voter receives, or that we'll see
2 a copy of that notice before its issued". The court
3 said, "Okay, I think that is fair." That's pages 21 and
4 22 of the transcript.

5 I checked into it further and saw that our
6 office sent the drafts of everything to the court and to
7 the plaintiffs' counsel on October 12th, 2016. This
8 appears to be consistent with the parties' understanding
9 that drafts of everything would be e-mailed to
10 plaintiffs' counsel and to the court for final approval.

11 But, regardless, the counties were still
12 verbally instructed to send the standard postcards.

13 THE COURT: And when did that happen?

14 MS. BECKER: That happened on October 12th,
15 2016.

16 THE COURT: And how were they instructed?

17 MR. KOBACH: Instructed on the 5th.

18 MS. BECKER: They were instructed on the 5th
19 in the -- in the --

20 THE COURT: Is that in evidence? You're
21 going to present evidence to that effect or am I just
22 supposed to accept your statement?

23 MS. BECKER: Well, we can -- we can bring in
24 someone who was on the telephonic conference if that's
25 what you would like? I wasn't there.

1 THE COURT: I want evidence. I'm not going
2 to accept anyone's statement about what happened here in
3 light of everything that's happened, in light of all of
4 the phone conferences and all of the communications and
5 all of the e-mails that I've been privy to that
6 repeatedly demonstrated that you all have engaged in
7 gamesmanship with this court about my questions, about
8 what you had done, your responses to those. We're here
9 for an evidentiary hearing. I'm not -- I'm just --
10 that's why I asked you yesterday how long is it going to
11 take.

12 Mr. Caskey sat on the stand when I asked him
13 directly. You didn't bother to ask him. When I asked
14 him directly during the trial had the postcards been
15 sent? "Well, I don't know. I don't know."

16 You all had no problem with giving very
17 clear direction to these people to not comply with my
18 preliminary injunction order because it wasn't a final
19 order. Apparently only the Supreme Court renders final
20 orders in your view. You had no problem with giving
21 that kind of clear direction.

22 But now for the first time today you're
23 going to stand here and tell me we gave direction to the
24 counties to send the postcards. Mr. Caskey didn't tell
25 me that and he was under oath.

1 MS. BECKER: Moving forward we are in a much
2 better position today --

3 THE COURT: No, no, don't move forward.
4 Answer the question I just posed to you. Are you going
5 to present evidence?

6 MS. BECKER: Yes.

7 THE COURT: All right. Fine.

8 MS. BECKER: Moving forward we are in a much
9 better position today to ensure that the counties
10 understand our instructions and comply with our
11 instructions. It is not three weeks to the next federal
12 election as it was in October 2016. It is five months
13 until the August primary.

14 Assuming that either there is no decision
15 from the court by the August primary or that the court
16 finds in plaintiffs' favor, we are in a position to
17 reiterate to the county clerks in a written directive
18 they should be sending both postcards with polling
19 addresses as well as court-ordered notices. We have an
20 annual training session coming up in May during which we
21 can make sure they're doing this. Obviously if the
22 court wants more directives to be given. We will do
23 that as well.

24 Now, I turn to the third issue. With regard
25 to the county election manual, that is not a document

1 intended for voters. The manual was available on-line.
2 However, it was taken off the website in response to
3 plaintiffs' complaint it might confuse the voters.

4 The manual itself was last finalized in
5 2012. However, updates to the manual occur frequently
6 in the form of e-mail messages from Bryan Caskey to all
7 the county election officials so the county clerks have
8 instructions that bring their practices into full
9 compliance with all of the court's orders.

10 Finally, the finding of contempt is a very
11 serious thing and opposing counsel cannot point to any
12 specific part of your written order that was in any way
13 disregarded. The appropriate action at this point is a
14 modification of your written order from October 2016 if
15 the court chooses.

16 And, Your Honor, I understand that
17 Mr. Caskey may be available here shortly. I believe
18 there was some sort of a traffic accident on Highway 70.

19 THE COURT: All right.

20 MS. BECKER: I'll consult with counsel.

21 THE COURT: Do you have any other witnesses
22 other than him?

23 MS. BECKER: Just a moment, please. No,
24 Your Honor, it's just Mr. Caskey.

25 THE COURT: All right. When do you all

1 typically send postcards out ahead of the primary
2 election? We're approaching the primary August 5. So
3 when will the postcards go out? Because people move, of
4 course, they get new postcards; correct?

5 MS. BECKER: Correct.

6 THE COURT: I haven't got mine yet, that's
7 one reason I want to know. What's the typical cycle?
8 When do the postcards go out?

9 MS. BECKER: Your Honor, I'm going to defer
10 to Secretary Kobach who understands the cycle better
11 than I do.

12 THE COURT: All right.

13 MR. KOBACH: Your Honor, we can --
14 Mr. Caskey should be here momentarily.

15 My understanding is it varies county to
16 county. My understanding is some counties send a
17 postcard at the time of registration saying here's your
18 polling place, here's your confirmation of registration.
19 I understand some counties also send additional
20 postcards prior to the election too, so in the months
21 preceding the election. But Mr. Caskey can give
22 specifics on that.

23 THE COURT: And what prevented you from
24 sending the postcards out to these people on the
25 suspense and canceled list so they would know their

1 polling place and the other information that's on the
2 postcards and that they can show up and show the poll
3 workers that I'm at the right place, which is the way
4 most of us use these postcards? This is proof that
5 we're voter registrants, that we're registered to vote.

6 So what prevented you from putting that in
7 these people's hands so they would be treated like every
8 other registered voter in the state of Kansas?

9 MR. KOBACH: The Director of Elections,
10 Bryan Caskey, will testify as soon as he gets here.

11 THE COURT: All right.

12 MR. KOBACH: Just to be clear, the Secretary
13 of State's Office doesn't send any material to any of
14 the voters. The county sends them. We have to direct
15 the counties.

16 THE COURT: All right. You direct them what
17 to do. All right. You're the litigant in this case.
18 You're the one that brought this litigation. You're the
19 one that the -- that the order was directed to. The
20 county election officials weren't litigants in this
21 case. It's your duty to make sure they do what they're
22 supposed to do and abide by the law; right?

23 MR. KOBACH: That's a legal --

24 THE COURT: You're Secretary of State. It
25 is your duty to make sure that each county election

1 official abides by the law. You had no problem making
2 sure they abided by the DPOC requirement when it was
3 operative. But it's no longer operative because my
4 order -- my preliminary injunction order says it's not.
5 And, of course, that's subject to my order, you know, on
6 this trial, which you may prevail, you may not prevail.
7 But right now the preliminary injunction is operative
8 and that's why we have this contempt hearing.

9 I don't understand why you have taken the
10 position that, you know, you're in charge to make sure
11 they comply with one law but you're not in charge to
12 make sure they comply with my order, which is also the
13 law.

14 MR. KOBACH: One of the greatest surprises I
15 learned, upon becoming Secretary of State, is that they
16 have no legal duty to follow any direction I give them
17 unless it is a duty in the law. In other words, the law
18 says this --

19 THE COURT: This is the law. My preliminary
20 injunction is the law. They have a duty and you as
21 Secretary of State have a duty to tell them that and to
22 assure me that they complied.

23 MR. KOBACH: We did tell them that as we
24 will momentarily --

25 THE COURT: Let's get Mr. Caskey on the

1 stand.

2 MR. KOBACH: I want to make clear, Your
3 Honor, I don't have the authority to fire anyone. I
4 don't have the authority to tell county clerks their pay
5 will be docked. County clerks routinely get instruction
6 from us and then drag their feet.

7 So, for example, one of the things we
8 instructed, keep up voter maintenance so they don't have
9 more people on the voter rolls in their county than
10 alive. Several of our counties came under national
11 criticism they weren't keeping up their lists. We
12 specifically told these counties please do this now.
13 They -- I have no ability to say you're going to be
14 fired to an independently elected county clerk.

15 THE COURT: You have the duty to tell them
16 these people are registered.

17 MR. KOBACH: Which we did.

18 THE COURT: They are to be treated like
19 every other registrant.

20 MR. KOBACH: Which we did.

21 THE COURT: All right. Let's put Mr. Caskey
22 on the stand if he's your first and only witness.

23 BRYAN CASKEY,
24 called as a witness on behalf of the Defendant, having
25 first been duly sworn, testified as follows:

1 THE WITNESS: My apologies, Your Honor, for
2 my delay.

3 THE COURT: No, I understand there was an
4 accident on I- 70. No problem.

5 DIRECT EXAMINATION

6 BY MR. KOBACH:

7 Q. Mr. Caskey, I'm going to ask you a few questions
8 about the events of October 2016 and then more generally
9 about the practices of the Secretary of State's Office
10 and the counties.

11 Let's first talk about the county election
12 manual. When was the last time the manual was revised,
13 the manual itself?

14 A. The complete manual was last revised, I believe,
15 in 2013 and 2014.

16 Q. And do you update the manual by sending e-mails
17 or some other written communication?

18 A. I routinely send e-mail communication to the
19 counties almost weekly in election years, less often in
20 non-election years, by providing instruction and
21 guidance that supplements what's in the county election
22 officer manual.

23 Q. And how long have you been in the Elections
24 Division at the Secretary of State's Office?

25 A. Since early 1998.

1 Q. And when -- could you explain the relationship
2 between the Secretary of State's Office and both prior
3 to my becoming Secretary of State and during my tenure?
4 What is the -- what is your understanding of the
5 relationship, in terms of when you offer directions to
6 the counties?

7 A. Well, by both state and federal law, the
8 Secretary of State's Office is the chief election
9 official for the state. So we are responsible for
10 administering elections.

11 How that's done is each county has their own
12 county election officer. In 101 counties, it's an
13 elected county clerk. In the largest four counties,
14 it's an appointee of the Secretary of State. Although
15 it's funded by the county, it's an employee -- not an
16 employee. It's not an employee of the Secretary of
17 State. It's an appointee of the Secretary of State.

18 So we provide instruction and training and
19 directives and to each of the counties. I don't have
20 the ability to force them to do anything. We don't have
21 -- I'm not their boss. If they don't listen to what I
22 say, I can't make them do anything, but -- but we do
23 provide instruction and training. We have -- during my
24 entire tenure in the Secretary of State's Office, and by
25 and large most -- when I say something or when my

1 predecessor said something, they generally follow that
2 to the best of their ability.

3 Q. Do they sometimes delay in following whatever the
4 direction is?

5 A. Well, over the last 20 years, I can probably
6 recount several times where I've said things and haven't
7 been done as quickly or as expeditiously as I would have
8 liked. But, again, you know, I can't force them to do
9 anything. I just tell them what the law is and that
10 needs to be done.

11 Q. Were you present during the telephone conference
12 with the court and opposing counsel on October 5th,
13 2016, where this special notice was discussed?

14 A. I'll take your word for it that's the date. I
15 thought the date was the 6th.

16 Q. I think it was the 5th, but whichever anyway.

17 A. Was it Wednesday or Thursday?

18 Q. It was Wednesday -- I think it was Wednesday.

19 A. Then I probably was on it periodically because I
20 was doing several other things that day, including
21 having a conference call with the counties on that same
22 day I believe. This was 18 months ago. So I know I was
23 in the room some of the time. I can't swear that I was
24 in there start to finish.

25 Q. After the conference call, were the counties

1 directed -- after the telephone conference call with the
2 court, were the counties directed to send the standard
3 postcards, and by that I mean the certificate of
4 registration postcards, in your conference call with the
5 counties?

6 A. So the written instructions I sent to the
7 counties ordered the counties to comply with the written
8 notice issued by the court. And I provided written
9 instruction that spelled out exactly what the court
10 wanted in the notice and as well as everything that was
11 contained in the written notice that was sent to the
12 counties. It was provided to my legal counsel. It was
13 provided to opposing legal counsel. And to my knowledge
14 it was provided to both Judge O'Hara and Judge Robinson
15 prior to it being sent.

16 Q. Aside from the written notices, was verbal
17 instruction given to the counties regarding the standard
18 postcards?

19 A. There was a conference call. I believe it was
20 also on the same day I had a statewide conference call,
21 either the same day or the next day -- I don't have my
22 calendar in front of me -- with the counties where we
23 discussed sending out notices and what notices to send
24 out, and we discussed sending out the same notice that
25 we send to everyone else.

1 And there was a lot of discussion about how
2 to treat persons classified by the injunction. And we
3 made it crystal clear in the conversations and in
4 writing that persons who have applied at DMV and had not
5 provided proof of citizenship were treated just like
6 every other registered to voter. They were deemed by
7 the court as being fully registered to vote and they
8 should be treated as such.

9 Q. And you made that crystal clear to them in the
10 conference call?

11 A. And writing, both.

12 Q. And when did the subsequent written message to
13 the counties occur?

14 A. I believe it was sent out either October 12th or
15 shortly thereafter. I remember there was some back and
16 forth between attorneys on both sides of this case on
17 October 12th. I don't have my e-mail in front of me,
18 but it was either October 12th or very shortly
19 thereafter.

20 Q. And did you confer with Tabitha Lehman more
21 recently to refresh your recollection about what the
22 counties were directed to do?

23 A. I've talked to her once about --

24 MR. STEINER: Objection, Your Honor. If
25 he's now going to testify as to what --

1 MR. KOBACH: I'm not offering -- I haven't
2 said anything what Miss Lehman said.

3 THE COURT: All right. It's hearsay if he's
4 going -- if you're eliciting what Miss Lehman said. You
5 can elicit what he said to her but not what she said,
6 that would be hearsay.

7 BY MR. KOBACH:

8 Q. Did you have a conversation with Miss Lehman
9 recently about the events of the November 2016 election?

10 A. Yes, I have.

11 Q. And did -- after your conversation with
12 Miss Lehman, was -- was it confirmed in your mind that
13 instructions had been given to send out -- oral
14 instructions had been given on the conference call to
15 send out the standard postcards and that Sedgwick County
16 complied?

17 MR. STEINER: Objection, Your Honor. I
18 mean, this is -- he's now asking him as a result of
19 hearsay did that -- did that confirm.

20 THE COURT: Sustained.

21 MR. STEINER: He can't do that.

22 THE COURT: Sustained. Sustained. It's
23 hearsay.

24 BY MR. KOBACH:

25 Q. Is it your understanding that Sedgwick County

1 sent out the standard postcards?

2 A. Yes.

3 MR. STEINER: Objection, Your Honor.

4 THE COURT: All right. I'll disregard.
5 It's eliciting hearsay. I mean, there's a way -- I'm
6 not here to instruct anybody. But what you're asking
7 him to do is to essentially elicit hearsay in what was
8 your understanding based on your conversation with
9 Miss Lehman. That's -- that's asking him essentially to
10 relate what she said to him.

11 BY MR. KOBACH:

12 Q. Do you frequently determine what the counties are
13 doing after the fact? In other words, if you've given
14 an order, do you sometimes confirm, yes, afterward the
15 order was followed?

16 A. Yes, there are many, many times where myself or
17 members of my staff will follow up with counties. We
18 have the ability to track certain activities within the
19 ELVIS database on what they're doing and not doing. And
20 I consider that almost a routine part of my job is to
21 follow up with counties and gauge their compliance with
22 directives or e-mails or conversations.

23 Q. Did you confirm through your own investigation
24 that Sedgwick County did indeed send out the standard
25 postcard as you instructed them to?

1 A. Yes, I have done that.

2 Q. And when I say "send out the standard postcard,"
3 I mean, send it out to everyone, including the affected
4 voters at issue in this case?

5 A. Yes, I understand.

6 Q. Do all the counties send all the postcards at the
7 same time or do the practices of when they send that
8 postcard confirmation of here's where you vote, does
9 that vary from county to county?

10 A. The -- the procedure is the same. The time frame
11 is slightly different. So the way the sending that
12 postcard --

13 I want to make sure we're talking about what
14 we call the notice of disposition. I think there's some
15 confusion on what the word postcard means and I want to
16 make sure that we're all talking about the same mailing
17 that's going.

18 So assuming we're talking about the notice
19 of disposition that confirms someone has applied to
20 register to vote, usually comes in a postcard size
21 mailer, contains name, address, party affiliation, name
22 of the precinct, list of polling place and district
23 assignments. So if that's the notice that we're talking
24 about, then that generally is sent by each county
25 election officer once the voter registration application

1 in process is active.

2 That can take anywhere from, you know, two
3 to four weeks depending on county process and workflow.
4 It also depends on upcoming elections. If someone
5 applies to register to vote, you know, at the deadline
6 three weeks prior to an election, those notices go out
7 quicker so the notices are received prior to election
8 day. But that's generally the time frame.

9 Other than that, if you are currently
10 registered to vote, counties generally don't keep
11 sending those notices if nothing's changed. Although
12 that's county discretion. There's no law that requires
13 that. There is a law that requires those notices to go
14 out if a polling place has changed, you know, 30 days
15 prior to an election.

16 Some counties will send that out yearly to
17 help with some list maintenance activities. So once the
18 very initial notice goes, after that there's quite a bit
19 of discretion and leeway when that goes out to voters.

20 Q. Do the counties change -- do some of the counties
21 change the number of polling places that the counties
22 operate from election to election?

23 A. Yes, I would consider that routine election
24 administration.

25 Q. And when counties change the number and/or

1 location of polling places, do they typically send out
2 another set of these postcards that tell people where
3 their polling places are?

4 A. Any time a polling place is changed, our
5 directive to the counties is to send the voter a new
6 card notifying them of the change of polling place.

7 Q. You said a moment ago that the -- most counties
8 will send it after the status of the voter becomes
9 active in the ELVIS system; is that correct?

10 A. That is correct.

11 Q. The -- the voters covered by the court's
12 preliminary injunction, do they have a special category?
13 How are they designated in the ELVIS system?

14 A. So within the ELVIS system they are designated
15 separately so that we can maintain and identify who the
16 class of people that are affected by the injunction.
17 But all the procedures and orders to the counties have
18 been consistent since October 16. Our instructions are
19 you treat these -- this class of applicants the same as
20 a legally registered voter. They appear on poll books
21 just like a legally registered voter. They participate
22 on on-line voter look-up just like every other
23 registered voter. They appear on a ballot just like
24 every registered voter. In every sense they are treated
25 like a legally registered voter. That's been the

1 court's directive and that's been our instruction.

2 Within the background of the system, they
3 are listed differently so that we can identify who they
4 are pending the outcome of this trial. So within the
5 system they have a separate designation. The counties
6 are aware of that. They've been trained on that and it
7 exists within the system to identify them.

8 But from every interaction between the
9 election office and the public, they are treated
10 identically to every other registered voter not affected
11 by the injunction.

12 Q. Plaintiffs counsel -- I don't believe you were in
13 the courtroom, but plaintiffs counsel insinuated that
14 either the Secretary of State's Office or the counties
15 have been giving information to voters suggesting that
16 they are not registered or somehow undermining the
17 court's direction and information given to voters. Are
18 you aware of any message at all that suggests to the
19 voters that they may not vote like any other voter?

20 A. I am not aware and I spend a lot of time talking
21 to counties over -- over the course of this injunction.
22 And after the election in November of '16, in a couple
23 verbal statewide conference calls I asked if any person
24 had been denied their right to vote who was classified
25 -- who fell under the injunction and I have yet to find

1 anyone provide evidence to me that a person who was
2 affected by the injunction was treated differently than
3 anyone else.

4 Q. Are you aware of any communications that you have
5 had with the counties verbal or written that is in any
6 way contrary to any order of this court?

7 A. No. I've been extraordinarily cautious and
8 careful in making sure that I've complied with every
9 written order by the court. I've shared every
10 communication, both with not only own legal counsel and
11 opposing legal counsel, exactly what we're sending at
12 all times. I believe I've over-shared, extraordinarily
13 careful in what we tell the counties, especially with
14 regards to any ruling issued by the court.

15 Q. Are you the person who gives the orders to the
16 county election officers on behalf of the Secretary of
17 State's Office?

18 A. Yes.

19 Q. Let's talk about the written notice that you sent
20 to the -- the written e-mail directions that you sent to
21 the counties after this court's order following the
22 telephonic conference. And I think the order was dated
23 October 14th -- 12th or 14th of 2016. Do you recall the
24 court's written order that came out after the opposing
25 side -- the opposing attorneys hashed out the language?

1 A. I know I've read it before, yes. I don't have it
2 committed to memory.

3 Q. Did you direct the counties to send out written
4 notices that were specifically the same wording that had
5 been approved by the attorneys and the court?

6 A. Yes. We were very careful with that notice.
7 There was some discussion between the court and opposing
8 counsel and own legal counsel on the exact wording. I
9 think there was several responses back and forth and I
10 think we even got into what should be highlighted and
11 put in bold and what shouldn't be highlighted and put
12 into bold. And it is my belief the notice reflects
13 exactly what the court ordered.

14 Q. I'll get a copy and put it up on the screen in a
15 moment. To your recollection, does the notice inform
16 voters that they can find out their polling place by
17 going to the Secretary of State's Office website?

18 A. Yes, it does.

19 Q. Does it also provide a toll-free number that
20 counties can call to find out their polling place --
21 sorry, that voters can call to find out their polling
22 place?

23 A. Yes, it does.

24 Q. And would that be in addition to a -- any
25 postcard they received from the county indicating their

1 polling place?

2 A. Yes.

3 Q. So would they have -- would that person have
4 three ways then to determine polling place; the
5 postcard, the toll-free number and the Internet website?

6 A. There actually would be more than that but
7 that's --

8 Q. What other ways would the person have?

9 A. There are lots of -- I won't say lots. That's
10 probably too strong a word. There are several
11 third-party groups that provide on-line tools for our
12 person to look up their address and find the location of
13 their polling place.

14 Specifically our office has worked with
15 Google with the Voter Information Project where we
16 provide information to Google and Google will publicize
17 a tool prior to the November 16 election where anyone
18 can type in their address and find the location of their
19 polling place. We've done that since 2008 I believe and
20 that was in effect in 2016. Google is just one group we
21 partnered with. There are other third-party groups that
22 do similar type activity that we worked with in the
23 past.

24 Q. When you send out e-mail updates of your
25 instructions to the counties, like the one you sent on

1 October 15, do your e-mails contain any notation saying
2 this instruction supersedes prior instructions on this
3 topic?

4 A. Yes, I will routinely say that to ensure that as
5 -- as directives change and letters and the language on
6 letters change, I always -- I say that when applicable
7 to ensure that previous drafts and previous language
8 contained in notes and training materials is discarded
9 to alleviate any potential discrepancy based on what
10 version and what point in time instructions were
11 released.

12 Instructions routinely change between -- for
13 example, in 2016 there were instructions issued prior to
14 the August election that were different by the time the
15 November election happened. And so I will say disregard
16 previous instructions because the rules are slightly
17 different between the August 16 election and the
18 November 16 election.

19 Q. Okay. You'll see on the screen --

20 MR. KOBACH: Your Honor, could we give this
21 an exhibit number or could we just --

22 THE COURT: If you want it part of the
23 record it needs to be.

24 MR. KOBACH: We'll call this Exhibit No. 1.

25 BY MR. KOBACH:

1 Q. What is this, Mr. Caskey?

2 A. It's an e-mail I sent to the counties on
3 Wednesday, October 12th at 12:11 p.m.

4 Q. And the language -- the final sentence of the
5 first paragraph, could you read that?

6 A. "This document replaces all documents previously
7 issued by this office concerning this topic."

8 MR. STEINER: Your Honor, I don't think
9 we've ever been provided with this e-mail out to the
10 counties. I could be mistaken about that. It may have
11 been given somewhere in discovery but I don't know
12 where.

13 MR. KOBACH: If I understand what my
14 co-counsel's saying, I think that we did provide a draft
15 before it was sent.

16 MR. STEINER: I'm talking about what was --
17 I'm talking about this e-mail, what was after he sent --

18 MR. ROE: Neal, you guys have -- do you guys
19 have October -- it was October 12th. I think -- I
20 thought it was this exact e-mail that was sent to the
21 court and to you guys again.

22 MR. STEINER: At a minimum, I would think if
23 they're introducing or using an exhibit --

24 THE COURT: All right. Do you have another
25 copy to provide to plaintiff? It's marked as Exhibit 1.

1 You're going to need to offer it into evidence.

2 MR. KOBACH: Your Honor, I will -- I offer
3 into evidence Exhibit 1, which is this e-mail. I'll
4 include the attachments to the e-mail and the exhibit
5 with permission of the court unless you want them
6 separate.

7 THE COURT: All right. And the attachments
8 are an Implementation Guide, which sounds like
9 plaintiffs did receive that. But you didn't receive
10 this cover e-mail to your recollection?

11 MR. DANJUMA: Implementation Guide?

12 THE COURT: It says, "Attached is an
13 Implementation Guide for processing persons who apply to
14 register to vote using federal form or DMV."

15 MR. DANJUMA: No, I don't believe.

16 MR. STEINER: We need to see the attachments
17 in order to -- yes, I think we do.

18 MR. KOBACH: Just to clarify, you did
19 receive the e-mail.

20 THE COURT: Two different things;
21 Implementation Guide, cover e-mail. You received the
22 Implementation Guide. Have you received this cover
23 e-mail? In any event, give them a copy of it now. It's
24 going to be an exhibit. I'm going to admit it but they
25 need to have a copy. That's the procedure for admitting

1 exhibits at any trial or evidentiary hearing.

2 MR. STEINER: Assuming that this is the same
3 -- I think what we were copied on was something that was
4 submitted to the court on October 13th of 2016. So
5 assuming these are the same documents -- it's not the
6 same cover e-mail, but assuming it's the same documents,
7 then we do have them.

8 THE COURT: All right. But you're wanting
9 to introduce the cover e-mail. It sounds like you
10 haven't seen this particular cover e-mail.

11 MR. STEINER: Correct.

12 THE COURT: Provide him with a copy and I
13 will admit Exhibit 1, which is the October 12, '16
14 e-mail from Mr. Caskey to election officials with
15 attachments.

16 MR. STEINER: Right. From what I saw on the
17 screen, I don't object to that, to the cover e-mail
18 itself.

19 THE COURT: All right. Exhibit 1 admitted.
20 Why don't you put it back up on the screen if you can.

21 MR. KOBACH: Your Honor, my staff just left,
22 I think to make copies for that. And as a result, I
23 would like to go back to the screen, but they're not
24 here. But we can -- we can continue on another line of
25 questions until they get back.

1 BY MR. KOBACH:

2 Q. Mr. Caskey, if the -- if, as a result of this
3 hearing today, the court issues another written order or
4 modifies any orders in this regard, what opportunities
5 exist between now and the August federal election in
6 Kansas to ensure that the counties to the -- to a "T"
7 confirm -- comply exactly with any instructions you give
8 them regarding what is to go to the affected voters at
9 issue in this case?

10 A. Well, first of all, whatever the court issues we
11 will follow immediately. I can -- I can rattle off a
12 list of potential solutions off the top of my head. If
13 the court so ordered, we would immediately, today even,
14 send a directive to the counties concerning any and all
15 notices and order them to comply immediately. And I
16 could even require counties to respond back
17 affirmatively that they have complied if that's what's
18 needed.

19 Counties have regional meetings in the
20 spring. The first one I went to last Thursday. I'm
21 about to attend the other regional meetings. We will
22 talk at length about several things, including the
23 orders issued by the court as relates to this case. So
24 I will talk about it there.

25 The counties have -- election officials have

1 a statewide conference. It's the first full week of May
2 I believe. Generally speaking, we have -- the Secretary
3 of State's Office has about a day of instruction
4 included in that conference. I will be discussing this
5 case at length and we will discuss any potential rulings
6 or directives from the court at that conference. And
7 that's just in the next few weeks.

8 We will send out continual reminders between
9 now and August. And two weeks ago I started our weekly
10 conference call series for 2018 and I will be in contact
11 with the counties on a weekly basis via phone from now
12 until virtually December. So there's several
13 opportunities I will have to talk with counties and
14 follow up.

15 Q. You described your weekly conference call series.
16 Was it during that weekly conference call series of 2016
17 that the verbal instruction was given to the counties to
18 send the standard postcard?

19 A. Yes.

20 Q. And I assume, by the way you describe it, it
21 is -- once a week a telephone conference call is had
22 with the counties to convey any additional instructions
23 to them?

24 A. Yes.

25 Q. Do you also answer questions from counties if

1 they aren't clear what their instructions are?

2 A. Yes, that's, quite frankly, the content of what
3 the conference call is. I will lead off and have
4 anywhere from two to ten items I need to address up
5 front. Then the remainder of the conference call spend
6 answering questions from counties to clarify directives
7 or questions about policy and procedure.

8 Q. Was October 2016 an exceptionally busy period for
9 the counties?

10 A. Yes, that's the month before presidential
11 election. I believe it was the second biggest turnout
12 in the history of our state. So October 16 was
13 extraordinarily busy for all county election offices.

14 Q. In contrast, if you sent out a written directive
15 to the counties today, are you more confident that you
16 could follow up and ensure that each and every one of
17 the 105 counties has complied with your directive?

18 A. Yes. I would include a notation in the directive
19 to mandate that all counties report back to me that they
20 have complied. And then I would get -- solicit
21 responses from all 105 until we received responses from
22 all 105.

23 Q. If the court so orders or if you are so directed,
24 could your written direction to the counties and the
25 follow-up specify that -- that the special notice for

1 the covered voters does not replace the normal postcard
2 but rather the voter is to receive both the special
3 notice and the normal postcard?

4 A. Yes, I would word it along the lines of that
5 everyone who is registered to vote receives the notice
6 of disposition. Covered voters -- voters covered by the
7 injunction would receive an additional notice at the
8 same time as notice of disposition. So, in fact,
9 covered voters would receive two pieces of paper in the
10 same mailing as opposed to one for non-covered voters.

11 Q. And could -- with this much lead time, could the
12 counties be -- are you confident that you could ensure
13 that each and every one of the 105 counties had complied
14 between now and the August primary?

15 A. I'm confident I could have it done within a
16 matter of a few weeks.

17 Q. And then you referred to the regional meetings.
18 What occurs at these regional meetings?

19 A. There's six regions among the county election
20 officials. We meet either once or twice a year and they
21 routinely invite me to come speak about relevant topics.
22 This court case and rulings issued by the court have
23 been a routine topic at those regional meetings and they
24 will be again this spring I'm sure.

25 Q. Do -- at each region -- do all of the counties in

1 the region normally attend or are there lots of
2 absences?

3 A. It depends on the timing of the meeting. There's
4 not 100 percent attendance. But the one I went to last
5 week in more central Kansas, there were approximately 15
6 to 17 persons in attendance. Most counties send one.
7 It's possible a couple counties may have had two
8 representatives at that meeting.

9 Q. And at the May meeting of the entire state of
10 county clerks and county election offices, is it normal
11 to have hundred percent attendance or close to hundred
12 percent attendance?

13 A. It's close. The Help America Vote Act passed in
14 2002 required states to provide instruction to counties
15 and Kansas adopted a law that mirrored that I think in
16 2004-2005. And so we basically mandated that counties
17 attend the May conference. And we've had, I would say,
18 over 90 percent attendance of at least one person from
19 every county at that May conference since probably the
20 middle 2000s to present.

21 In those instances where a county is not
22 present, we take -- take roll every day that we're
23 there. And for counties that are not there, we provide
24 them a copy of everything provided in writing to the
25 persons who were at the conference. So even those who

1 are not in attendance receive a complete set of
2 materials that were discussed at the conference. So
3 from my view all 105 get the same written documentation
4 every single May.

5 Q. So in addition to the written documentation that
6 happens at the time of the May conference and in
7 addition to the written documentation that you may issue
8 today or tomorrow or at any time clarifying or expanding
9 upon the court's orders, are you confident that you will
10 have the opportunity to have an in-person meeting with
11 any county between the regional meetings and the May
12 meeting to clarify any questions any counties may have?

13 A. I believe I will touch almost every single county
14 election office between now and May in person. And I'm
15 going to say "almost" because I can't guarantee won't be
16 a handful, but I'll come close to being in front of
17 physically every single county between now and May.

18 Q. And do you believe this ensures a much higher
19 rate of county compliance with your instructions than
20 giving direction only a few weeks before the election?

21 A. I'd like to believe that I can magically say
22 things and there's hundred percent compliance. I don't
23 think that's possible. But I always prefer an in-person
24 touch if I could. You can get your point across much
25 more effectively sometimes and you can get the reaction

1 for the person receiving it than by e-mail. But
2 e-mail's much more efficient.

3 Q. With regard to the -- I'm going to jump around
4 one more topic, then we'll go to this e-mail. With
5 regard to the election manual, has the manual been taken
6 off the Secretary of State's website?

7 A. Yes, it was weeks -- several weeks ago. I don't
8 remember the exact date. But, yes, it has been.

9 Q. Is it your understanding it was taken off because
10 of communications between opposing counsel and counsel
11 for the Secretary of State's Office?

12 A. I believe I've heard that, yes.

13 Q. Is the election manual intended to be
14 communication to voters?

15 A. I want to -- to -- the document called the County
16 Election Manual is not intended for the public
17 specifically, although we've always provided it to the
18 public so the public knows the type of instruction we
19 give to county election officers.

20 Q. So if a person asks for it, they can still come
21 in to the Secretary of State's Office and get a copy?

22 A. Oh, yes, absolutely.

23 Q. Let's look at these attachments now. I assume
24 the one that says Federal Form and DMV Implementation
25 Guide for November 8th, 2016 Election, is that the

1 implementation guide you're referring to in the text of
2 your e-mail?

3 A. Yes, that is correct.

4 Q. Can we open that, please.

5 Okay. Mr. Caskey, what is this document?

6 A. It was a set of updated instructions that I
7 issued to all of county election officials on October
8 12th, 2016, after the court issued its written ruling --
9 written instruction in October of '16.

10 Q. And is this your effort to translate the content
11 of the written order to the county clerks?

12 A. Yes, it is.

13 Q. And -- okay. Under Part 1 it talks about "a
14 notice must be provided to covered voters that
15 unequivocally advises covered voters they are deemed
16 registered and qualified for vote." Do you see that?

17 A. Yes, I do.

18 Q. And is this the notice that contains the language
19 discussed by the attorneys involved in this case and
20 approved by the court in this case?

21 A. Yes, it does.

22 Q. And can we go back to the principal e-mail. Is
23 the language on one of these attachments? I see old --
24 I see Voter Registration Applicant Notice Old Applicants
25 and I see Voter Registration Application Notice to New

1 Applicants?

2 A. They received a slightly differently worded
3 notice.

4 Q. Can you go ahead and open the old application as
5 well?

6 MR. ROE: Can I just say something? What
7 this e-mail is, Your Honor, is the e-mail that we sent
8 to the court. If you recall, back in October of 2016,
9 there was back and forth and there was a joint status
10 conference, joint status report and we sent varying
11 language back and -- you know, to the court and the
12 court issued a subsequent order. This is the e-mail
13 that has the various different language notice -- the
14 competing languages of the notice.

15 So this does not have the -- this e-mail
16 here does not have that final notice that you're talking
17 about, I don't think. This was the instructions that
18 were going out to the county. I have to go find that,
19 the actual final.

20 MR. KOBACH: Final one after this?

21 MR. ROE: Yes. I was just looking for the
22 one that went to the court and opposing counsel had this
23 specific e-mail.

24 THE COURT: All right. Is this Exhibit 1
25 we're talking about?

1 MR. ROE: Yes, well, this is -- this is the
2 e-mail that went to the court and to opposing counsel.
3 We were talking earlier they said they didn't get a copy
4 of that e-mail. This was part of that chain that went
5 to the court with opposing counsel is all I was bringing
6 that up for purposes this is what Exhibit 1 would be,
7 but Exhibit 1's the actual e-mail. This is the chain
8 that was provided to the court previously.

9 THE COURT: Okay. But then the -- what was
10 just up a minute ago? The Implementation Guide --

11 MR. ROE: Right.

12 THE COURT: -- is that the final?

13 MR. ROE: My understanding, that was the
14 final one that was sent to the court. So it's the other
15 notices in here that had some varying language. And the
16 court, if you recall, we had a separate conference, I
17 think a teleconference after that perhaps and the court
18 went through and -- went through the different notices
19 and issued a separate order that had the language that
20 the court wanted us to use for those notices.

21 THE COURT: So, in other words -- so the
22 attachments include the Implementation Guide, which is
23 the final of the Implementation Guide, but also include
24 Voter Registration Application Notice, actually notices
25 but those aren't the final?

1 MR. ROE: No, those would be in a separate
2 -- a separate e-mail which I think I'd have to find at
3 this point.

4 THE COURT: Does that mean that this
5 particular e-mail, which went out to county election
6 officials, included drafts that weren't final?

7 MR. ROE: No, not to my -- you have to ask
8 Bryan on that. My understanding no. This was an e-mail
9 that I was providing to the court per your instructions
10 during the conference -- I think after the conference
11 call or the conference call, whatever. You asked us to
12 submit what we were going to be sending to the counties.
13 So I submitted them to you, to the court, and to
14 opposing counsel. And you can see up here we could --
15 yeah, it should be in here. Might still be in here.
16 You can see here Your Honor's e-mail address in that
17 chain.

18 THE COURT: Okay. Then I'm going to need
19 some clarity. I appreciate that clarity from you,
20 Mr. Roe. I'm going to need clarity in this e-mail
21 chain. It looks like there were attachments going to
22 county election officials. I need clarity if what they
23 received in October 12 was a final or a draft?

24 MR. ROE: You can ask Bryan. My
25 understanding -- you can ask Bryan. Up to you, Your

1 Honor. My understanding was that we were sending this
2 so the court knew what the counties were going to be
3 getting. So it was only the ones that were not final,
4 the notices we went back and forth with opposing counsel
5 on were not final at that time. That's why Bryan would
6 be a better person to ask if he recalls.

7 THE COURT: Okay. Understood.

8 BY MR. KOBACH:

9 Q. Mr. Caskey, I'll ask you that question. So does
10 this appear to be the e-mail that was not sent to the
11 counties that had multiple versions we were still going
12 over, or is it your understanding that this -- that all
13 of the attachments and this e-mail that we were just
14 looking at was sent to the counties?

15 A. This exact e-mail was not sent to the counties
16 containing all of those attachments. This wording right
17 here was. But there are several drafts and revisions of
18 notices that -- on the attachments. I did not send
19 different drafts and revisions.

20 There was one final notice per type of
21 notice. And so there were fewer -- and I -- I've got
22 the e-mail and I've sent it to many people. The exact
23 e-mail with the exact attachments exists. But, no, we
24 did not send drafts. I believe that would have been too
25 confusing for the county election officers to decipher

1 what was a draft and what should have been used.

2 MR. KOBACH: Okay. I think we've located
3 that subsequent e-mail, which we will call as Exhibit
4 No. 2.

5 MR. ROE: Your Honor, if I could just make
6 one clarification on that. This is kind of starting to
7 refresh my memory what happened back then. As we were
8 trying to alert the court and opposing counsel what we
9 would be sending to the counties, so that was what was
10 sent to the counties, I think that e-mail. But then
11 subsequently we -- we sent, I think, the same e-mail
12 with the final notices.

13 THE COURT: Okay.

14 MR. ROE: I'm trying -- it was a year and a
15 half ago, Your Honor. I'm trying to piece that
16 together. Apologize.

17 THE COURT: I understand.

18 BY MR. KOBACH:

19 Q. Okay. So could we put that up. Mr. Caskey, you
20 will see this is a very similar e-mail, indeed virtually
21 identical in terms of your text to the county election
22 officers. Just take a look at it from "dear county
23 election officers" onward.

24 A. Yes, I'm familiar with this e-mail.

25 Q. Okay. Does this appear to be the one that was

1 finally sent to the counties notifying them of the
2 content of the court's written order?

3 A. Yes, I believe that to be true. I would probably
4 want to read the entire Implementation Guide because the
5 Implementation Guide references several attachments. I
6 believe there were just three attachments referenced in
7 the Implementation Guide which is consistent with this
8 e-mail. So I feel confident without having read every
9 word in the Implementation Guide recently.

10 Q. Okay. And can we scroll upward, please. And see
11 when -- do we have the exact date that this was sent?
12 October 12th?

13 A. This e-mail went to the counties on Wednesday,
14 October 12th, 2016 at 12:11 p.m.

15 Q. Okay. And let's go now into the --

16 MR. KOBACH: Your Honor, I offer into
17 evidence Exhibit 2, which is the e-mail that actually
18 went to the counties and the four attachments to it.

19 MR. STEINER: Your Honor, I believe that
20 that's already Exhibit 1. I think what Mr. Kobach wants
21 to do perhaps, or perhaps not, is introduce Exhibit 2,
22 which was the e-mail to the court that had -- I think
23 later that day that had additional drafts attached to
24 it. I think this already is Exhibit 1.

25 THE COURT: Is Exhibit 1 what actually went

1 to the county officials?

2 MR. KOBACH: Not Exhibit 1.

3 MS. TALIAFERRO: Yes.

4 MR. KOBACH: Exhibit 1 includes the seven
5 attachments.

6 MR. STEINER: No, this is Exhibit 1.

7 MR. KOBACH: Well, this is Exhibit 1 again.

8 MR. STEINER: Exhibit 2 is what subsequently
9 went to the court and includes additional drafts that
10 apparently does not go to the counties.

11 MR. KOBACH: Did we pull up the e-mail that
12 actually went to the counties?

13 MS. TALIAFERRO: You're looking at it.

14 MR. KOBACH: Your Honor, can we take a
15 five-minute recess so we can find all these different
16 e-mails?

17 THE COURT: That's fine. Let's be in recess
18 for 10 minutes.

19 (Recess.)

20 THE COURT: Let the record reflect we've
21 been on a 20-minute break, the defense counsel is not
22 here. Mr. Caskey is here. We'll wait. I got tired of
23 standing outside the courtroom and waiting. Where is
24 Mr. Kobach?

25 MS. BECKER: Your Honor, the Secretary and

1 his co-counsel are coming in. We were just making
2 copies. It will be one minute. Thank you.

3 THE COURT: All right.

4 MR. KOBACH: Apologize for the delay, Your
5 Honor. I think we've now got exactly the e-mail chain
6 in the order it went. So I'm going to use the Elmo
7 instead. I think it might be a little easier.

8 BY MR. KOBACH:

9 Q. So Exhibit 1 is the e-mail that went out on
10 October 12th, 2016. Let's see right there. And the
11 four attachments are noted. Okay. Mr. Caskey, do you
12 recognize this e-mail dated October 12th, 2016,
13 12:11 p.m.?

14 A. Yes, that is an e-mail that I transmitted to the
15 county election officers.

16 Q. So this one did go to the counties; is that
17 correct?

18 A. Yes, it is.

19 Q. Okay. And I've got -- can you take a look at the
20 four attachments that are listed above?

21 A. Yes, I see them.

22 Q. And I just want to make sure that we have exactly
23 what these attachments are. And we will provide copies
24 of all this to opposing counsel.

25 Okay. So I'm going to show you this one,

1 which has the title Rules Concerning Voter Registration
2 Application Submitted Without Proof of Citizenship. Is
3 this one of those attachments?

4 A. Could you let me see the top of it too? No.

5 Q. Top of this?

6 A. Yeah, that. Yes, this -- this notice is
7 reflected in the e-mail. If you could go back to the
8 e-mail now and I'll tell you which one it is.

9 Q. Okay.

10 A. It's the Voter Registration Application Notice
11 for New Applicants I believe.

12 THE COURT: Can you leave it up a minute so
13 I can read it.

14 THE WITNESS: Hang on just a second. I
15 believe this is the website notice.

16 BY MR. KOBACH:

17 Q. That's the website notice?

18 A. Yes.

19 Q. Okay.

20 A. So on the -- this e-mail, it's a document
21 entitled Website Notice.

22 Q. Okay. And let's now look at this document.
23 Maybe you can -- this is also -- I'm going to represent
24 to you I believe this is one of the attachments. Can
25 you tell us which attachment this is?

1 A. Yes. It is the voter registration application
2 that's sent to new applicants.

3 Q. Was this the notice that was sent -- the special
4 notice that was sent to covered voters in this
5 litigation?

6 A. Yes, that is correct, to some of the covered
7 voters. If you'll recall, the injunction covered both
8 -- so there's two notices, one that went to everyone who
9 applied moving forward and then there was a separate
10 notice which is also on here that applied to persons who
11 previously had been canceled, but due to the judicial
12 ruling were removed from canceled status and added to
13 the list and were eligible to vote. So they received
14 the other notice. And so there's two classifications of
15 people that got separate notices depending on how they
16 were covered by the injunction. So this one was sent to
17 persons moving forward who were new applicants.

18 Q. And were -- and was the boldface and all caps,
19 was that pursuant to direction from counsel and the
20 court?

21 A. This notice reflected exactly what the judge said
22 needed to be included in the notice including
23 punctuation, bold, capitalization. It was designed to
24 reflect exactly what the judge ordered.

25 Q. It's your understanding this is the notice that

1 the counties sent to the relevant voters?

2 A. Yes, that's correct.

3 Q. Now, I'm going to show you another one of the
4 attachments. Can you identify which one this is?

5 A. Yes. This notice was sent to the persons who
6 previously had applied to register to vote at DMV or
7 with the federal form and had not provided proof of
8 citizenship. Some of these persons may have been
9 canceled. This notice was sent to them to inform them
10 of their status due to the judicial ruling and to inform
11 them they were fully registered to vote and eligible to
12 participate in the November general election in 2016.

13 Q. And is it your understanding that the county --
14 that all the counties sent this notice to the relevant
15 voters?

16 A. Yes, that is my understanding.

17 Q. Have you heard from any county that said to you
18 subsequently we didn't get the notice out or indicated
19 subsequently we didn't get the notice out?

20 A. I have not heard from any county that either one
21 of these two notices have not been transmitted to the
22 applicable voters.

23 Q. And then show you the fourth attachment which I
24 believe we saw before the break. What is this?

25 A. Updated instructions I had transmitted to the

1 counties to comply with the court rulings in this case.

2 Q. Okay. Then I'm going to represent to you that,
3 as I'm sure you're aware, counsel and opposing counsel
4 had some conversations and there was some -- there were
5 some -- there was another e-mail. This one is
6 11:57 p.m. sent to the court and to the counsel in this
7 case. Are you familiar with this e-mail?

8 A. I don't believe I've seen this exact e-mail.

9 Q. Let's go back to the -- if you go down below, is
10 that your original?

11 A. So the text of this e-mail is what was included
12 in the text of the e-mail I sent to the counties on
13 October 12th at 12:11. So this body reflects what I
14 told the counties. The language above that in this
15 e-mail thread, I'm not -- I don't believe I've read all
16 of that e-mail thread.

17 MR. KOBACH: Okay. And we'll call this
18 Exhibit 2, Your Honor, just to make sure we're all on
19 the same page.

20 THE COURT: All right. And I've admitted
21 that. So this is -- it's the same e-mail but a later
22 string that went to the court and parties and included
23 different attachments or the same attachments?

24 MR. KOBACH: This is a different attachment
25 -- well, I can let -- I can have the witness identify

1 them, but this included the seven attachments that we
2 saw in the previous -- before the break.

3 MR. ROE: Your Honor, for the court's
4 clarification, again, I think you'll recall it has some
5 of those attachments. Then there was a competing
6 version of, I think, the website notice and the DMV
7 notice. If my memory serves correct, then Your Honor
8 submitted a separate order after that.

9 So the seven attachments you're going to
10 have the competing notices there, but then you've got
11 the other notices. The court already ruled on those
12 specific ones being the -- the letters that went out
13 from the counties. So that's what those attachments
14 reflect. Again, I think you should -- I don't know what
15 your e-mail practices are. You may still have this
16 e-mail in your.

17 THE COURT: I do. I do.

18 MR. ROE: Okay.

19 THE COURT: Okay. Thank you.

20 BY MR. KOBACH:

21 Q. Okay. And then, Mr. Caskey, finally, we have
22 this e-mail which we'll call Exhibit --

23 MR. KOBACH: Your Honor, I move, if we
24 haven't already, for the admission of Exhibit 2 and
25 attachments into evidence.

1 MR. STEINER: No objection, Your Honor.

2 THE COURT: Exhibit 2 admitted.

3 BY MR. KOBACH:

4 Q. Then, Mr. Caskey, I'm going to show you what
5 we're calling Exhibit 3. Can you take a look at that?

6 A. Yes. It's a e-mail I sent to all the counties on
7 Friday, October 14th at 5:30 p.m.

8 Q. Okay. And could you explain what the web notice
9 paragraph refers to?

10 A. Sure. After -- on Wednesday, October 12th, as
11 evidenced in Exhibit No. 2, there was e-mail traffic
12 between both opposing -- both plaintiffs' counsels and
13 defendant's counsels and the court over the wording of
14 the notices. I believe the judge updated -- issued a
15 ruling Friday at some point changing the language on the
16 web notice.

17 And so this e-mail was designed to inform
18 the counties of the updated language ordered by the
19 court on the web notice. And so this e-mail ordered the
20 counties to replace the version that I sent on Wednesday
21 with the updated version complying with the court's
22 orders on Friday afternoon.

23 And then there's another section that deals
24 with how to use electronic poll books in processing
25 persons covered by the injunctive order to ensure that

1 they were treated like everyone else.

2 THE COURT: And that -- the updated notice
3 removed the language that basically told them you may
4 not be registered after the November 16th election --
5 November 2016 election; right?

6 THE WITNESS: Yes, that is correct.

7 BY MR. KOBACH:

8 Q. And so is it your understanding that what was
9 modified after the interchange between counsel and the
10 court over specific language on the notices was the web
11 notice; correct?

12 A. Yes, that is correct.

13 Q. And so the -- is it your understanding that the
14 directive on Exhibit 1, the written notices we just went
15 to, those were not subsequently changed prior to the
16 election, were they?

17 A. That is correct.

18 Q. Okay. Now, let's look at the three attachments
19 to Exhibit 3. Which one of the attachments is this one?
20 Do you recognize this?

21 A. It deals with processing covered voters within
22 the electronic poll book system.

23 Q. Okay. So what are you explaining to counties in
24 this -- in this attachment?

25 A. Could you -- --

1 Q. Yeah.

2 A. -- flip through it a little bit more?

3 So basically the purpose of this document
4 was to again show counties how we're processing covered
5 voters within the system and then how to export the
6 covered voters into their electronic poll books to
7 ensure that, on the electronic poll books, the covered
8 voters would appear just like non-covered voters and
9 would be treated exactly the same, both covered and
10 non-covered voters. And so this document outlines those
11 procedures.

12 MR. STEINER: Mr. Kobach, is it possible to
13 get copies of the attachments?

14 MR. KOBACH: Yes, we're actually trying to
15 get the other versions, too.

16 BY MR. KOBACH:

17 Q. So it appears to me -- can you confirm, does this
18 go in step-by-step of how you open each screen and what
19 you do in each screen in the ELVIS database?

20 A. Yes, that is correct.

21 Q. I'm just going to flip through the --

22 A. Also provides procedures on how to print paper
23 poll books in the counties that provide paper poll books
24 in addition to electronic poll books. So it covers both
25 electronic poll books and paper poll books in the

1 procedure to ensure covered voters were treated
2 identically to non-covered voters.

3 Q. You testified before the break, but is it your
4 understanding the counties did, in fact, treat the
5 covered voters identically to other voters at the time
6 of election with respect to poll books?

7 A. Yes. Today I have not been informed of any
8 non-covered voter -- or any covered voter being treated
9 differently than non-covered voters.

10 MR. KOBACH: Okay. And I'm waiting on our
11 printout of the -- do we have the two other exhibits --
12 two other attachments to exhibits?

13 BY MR. KOBACH:

14 Q. Okay. And, Mr. Caskey, do you recognize this to
15 be one of the attachments to that e-mail?

16 A. Yes. This attachment again explains the
17 procedure for using electronic poll books and to ensure
18 that covered voters were treated identically to
19 non-covered voters. This procedure deals with counties
20 that have Knowink electronic poll books. The first one
21 was for customers that use ES&S as the vendor for their
22 electronic poll books. So the instructions have the
23 same goal. They're specific depending on the type of
24 vendor you had for electronic poll books.

25 Q. Can you give the court a rough estimate of how

1 many counties in the 2016 November election used
2 electronic poll books versus paper poll books?

3 A. Assuming -- I mean, acknowledging that this is a
4 guesstimate, I believe somewhere between 65 and 75
5 counties used electronic poll books. Most of those
6 counties also had paper poll books on the ready in
7 addition to electronic poll books.

8 Q. Okay. And then I'm going to show you what I may
9 look at here. Is this the third attachment to that
10 e-mail?

11 A. Yes. This is the revised notice ordered by the
12 judge on October 14th.

13 Q. And is this the one that went on the website?

14 A. Yes, that is correct.

15 Q. And can you explain what this notice conveys?

16 A. It covers persons who have applied to register to
17 vote and have not yet provided proof of citizenship. It
18 states that, "Due to recent court rulings, if you've
19 applied at a Department of Motor Vehicles office or have
20 applied using the federal form and have not yet provided
21 proof of citizenship, that you are registered to vote
22 for the November 8th, 2016 general election. Your name
23 will appear on the poll book. You will be given a
24 standard ballot. There is nothing further you need to
25 do subject only to further official notice."

1 Then it states that you can contact the
2 Secretary of State's Office on our toll-free line or
3 local county election office for additional information.

4 It is my belief this is exactly what Judge
5 Robinson ordered on October the 14th.

6 Q. So is this the -- the direction that you gave to
7 the counties pursuant to the court's written order on
8 that date?

9 A. Yes, we ordered the -- I ordered the counties in
10 the e-mail dated October 14th to replace the notice that
11 was issued on Wednesday, October 12th with the new
12 notice and required them to update the website notice on
13 their websites and also the Secretary of State's
14 websites.

15 Q. And just to clarify again, the October 12th
16 notice was updated by October 14th -- this October 14th
17 e-mail, is that correct, on the website?

18 A. Yes, that is correct.

19 Q. But the October 12th written notices that went
20 out were not changed on October 14th; is that correct?

21 A. Notices to voters were not affected by the
22 October 14th ruling.

23 Q. And, in conclusion, Mr. Caskey, are you aware of
24 any respect in which your communications with the
25 counties did not convey the intentions of this court?

1 A. I am not. It is my belief that I have attempted
2 to comply with every single order issued by the judge to
3 the best of my ability.

4 MR. KOBACH: No further questions, Your
5 Honor.

6 MR. STEINER: May I proceed, Your Honor?

7 THE COURT: Yes.

8 CROSS EXAMINATION

9 BY MR. STEINER:

10 Q. Good morning, Mr. Caskey. It's nice to see you
11 again.

12 A. Good morning, happy to be here.

13 Q. Now, just a couple of questions to make sure that
14 my understanding of things is correct. With respect to
15 the ELVIS system and the coding in the ELVIS system, the
16 data's input by the counties when someone registers or
17 attempts to register; right?

18 A. Yes, that is correct.

19 Q. And once it's input by the counties, control of
20 the data is by the Secretary or by your office?

21 A. The Secretary of State's Office does not modify
22 any data. The Secretary of State's Office purchased a
23 database. So I'm not sure how you want to explain it.
24 We own the database but the data itself is managed
25 exclusively by the counties. We don't touch a piece of

1 data. We don't manipulate data. I can view it. I can
2 query it. I can run reports. But as far as touching
3 it, the Secretary of State's Office doesn't touch it.
4 Just looks at it.

5 Q. And, for example, the postcards that are mailed
6 out by the counties are generated automatically from a
7 run of the ELVIS database; right?

8 A. Yes, that is correct.

9 Q. And that's because the Secretary's Office says
10 run all -- run postcards for all active voters; right?

11 A. That's a feature that is included in the system
12 across all states. So, yes, that's -- it comes with the
13 system, yes.

14 Q. Right. And while the counties do the mailing and
15 control the exact timing of the mailing, it's your
16 office that says print the postcards for the counties to
17 mail; right?

18 A. Actually, I think it's state and federal law that
19 requires that notice of disposition to be sent to all
20 registered voters.

21 Q. Postcards -- the formal name of the postcards is
22 formal notice of disposition?

23 A. Assuming we're talking about the same notice.
24 That gets confusing sometimes. That's correct.

25 Q. You've seen some of the postcards put up on the

1 screen shows the name and precinct, address, and things
2 like that?

3 A. Yes, that is correct.

4 Q. And the official name is a notice of disposition;
5 right?

6 A. Yes.

7 Q. Okay. Now, what I want to understand is from --
8 you were -- I think you testified that you were in and
9 out of the Secretary's Office during the telephonic
10 court conference on October 5th, 2016; is that right?

11 A. Yes, that is correct. I know that I was there
12 for part of it. I also do not believe I was there for
13 every word of the entire conversation.

14 Q. Well, were you there when Secretary Kobach
15 represented to the court that voters covered by the
16 preliminary injunction would receive the postcard or the
17 disposition notice?

18 A. I did not remember that conversation having taken
19 place.

20 Q. Now, and you understand that the court then
21 issued a written order; right?

22 A. Yes, I am familiar with that.

23 Q. In your view -- and I think you've testified that
24 following that court conference you now remember that
25 there was a telephone call you told the counties to send

1 out notices; is that right?

2 A. Yes. I went back and looked at my calendar. I
3 know I talked about notices repeatedly on several calls
4 with the counties. So I just needed to look at the
5 calendar to look at the last time I'd done that.

6 Q. So from the time of the telephonic court
7 conference on October 5th of 2016 until you testified in
8 this court about a week and a half ago, it was your
9 understanding that postcards were required to be sent;
10 right?

11 A. It is my understanding that in the written orders
12 there was a notice required to be sent to the counties,
13 yes. And so I've provided to everyone, including the
14 court, my understanding of what the notice looked like.

15 Q. I'd like an answer to my question, which is
16 following October 5th, 2016, telephonic conference, from
17 then until when you testified in this court on -- I
18 don't remember if it was March 8th or March 9th, but
19 thereabouts, maybe both days, it was your understanding
20 that what needed to be sent was also the disposition
21 notice or the postcard; right, sir?

22 A. I think I've been unsure of that from time to
23 time.

24 Q. Well --

25 A. I am positive that a notice was required to be

1 sent to the voters and that notice included the ability
2 to find where your polling place is and an ability to
3 know that you were considered registered to vote. And
4 the court drafted the notice and so I am positive that
5 that notice reflects the court's decision.

6 I personally have been unsure at times if
7 there was an additional notice required by the court
8 based on my review of written orders. For the time
9 period that you speak, during that entire time period, I
10 have not always been sure exactly what the court's
11 directive is as regarded two pieces of paper instead of
12 one.

13 Q. So from October -- so I want to make sure I
14 understand this. So from October 2016 up until a week
15 and a half ago, it's your testimony that you weren't
16 sure whether a postcard or disposition notice was
17 required; is that right?

18 A. I have not always been sure during that period of
19 time, that is correct.

20 Q. And you're the director of elections for the
21 state?

22 A. Yes, I am.

23 Q. And Secretary Kobach is the -- as the Secretary
24 of State, is the chief elections officer of the state;
25 right?

1 A. Yes, that is correct.

2 Q. And his duties -- and that involves duties under
3 federal law; right?

4 A. That is correct.

5 Q. And his duties under federal law under the
6 National Voter Registration Act is to ensure compliance
7 by all of the county election officers with the federal
8 law; correct?

9 A. Yes.

10 MR. KOBACH: Objection. Calls for a legal
11 conclusion.

12 THE COURT: Overruled.

13 BY MR. STEINER:

14 Q. And I think you testified, in response to
15 Secretary Kobach's questioning, that it also has
16 requirements under state law; right?

17 A. Yes, there are requirements under state law.

18 Q. And the Secretary's implementation of the law
19 runs through you; right?

20 A. You want to ask that differently?

21 Q. Sure. The Secretary, in discharging his duties
22 under federal law and state law, those fall, as respect
23 to elections, on you as director of elections; right,
24 sir?

25 A. Yes, that is correct.

1 Q. And you now testified that you weren't sure
2 whether this court's order required a disposition notice
3 to be sent or didn't require a disposition notice to be
4 sent; is that right?

5 A. It is my belief that I have complied with Judge
6 Robinson's written orders on this.

7 Q. Can you answer my question?

8 You don't -- your testimony today is you
9 don't know whether that required the disposition notice
10 to be sent; right, sir?

11 A. My answer is I believe that I've complied with
12 the court's order on this.

13 MR. STEINER: Your Honor, could you ask the
14 witness to respond to my question?

15 THE COURT: I would like a response. I
16 asked you about this very matter during your trial
17 testimony and what I heard was very different than what
18 you said on direct testimony. And now on cross
19 examination it seems to be even more different. So I
20 need some clarity here. Answer the question.

21 THE WITNESS: Would you repeat the question,
22 please?

23 BY MR. STEINER:

24 Q. Sure. You're not sure -- well, from October of
25 2016, when there was a telephone conference with the

1 court and representations by Secretary Kobach and the
2 subsequent orders up until your testimony a week and a
3 half ago, you weren't sure whether that required a
4 disposition notice to be sent or didn't; right, sir?

5 A. That is a correct statement, yes.

6 Q. And as the director of elections of the state,
7 you didn't bother to come back to the court or to get
8 clarity from the Secretary's Office as to whether
9 disposition notices were required to be sent; right?

10 A. That is not true. In October of 2016, I provided
11 communication to all legal counsels and the court on
12 exactly what our instructions were to the court
13 specifically as it pertained to the notices to the
14 voter. On October 12th, that information was provided
15 to my counsel, opposing counsel and the court and that
16 language clearly contained very specific instructions on
17 what I believe to follow the court.

18 In addition to answering your question, I
19 believe opposing counsel in 2017 asked our office the
20 same questions about this and again I provided exactly
21 what my understanding was of complying with the court.
22 So I do not think that the way you characterize my
23 information on that is accurate.

24 Q. So as of October 14th of 2016, which I think was
25 the last of the orders in the notices that you sent out,

1 is it your -- from October 14th of 2016 up until your
2 testimony on March 8th and 9th of 2016 (sic), were
3 disposition notices required to be sent to people who
4 were subject to the court's preliminary injunction
5 order?

6 A. Could you clarify the dates? I think you may
7 have --

8 Q. Yep.

9 From October 14th of 2016, which I think was
10 the last of the correction notices that you sent out to
11 the counties --

12 A. Yes.

13 Q. -- from that date until -- until November --
14 sorry, until March 8th or 9th of 2018, during that time
15 period were your instructions to the counties to send
16 disposition notices?

17 A. I have not changed my written instructions I had
18 sent since October 14th, 2016.

19 Q. So as of those written instructions, sir, were
20 the counties instructed to send disposition notices or
21 not to?

22 A. Not in writing.

23 Q. Could you answer my question? Were they -- were
24 they instructed to send them or were they not instructed
25 to send them?

1 A. From October 14th through March 8th, they were
2 not instructed to specifically. They were instructed to
3 send notices. Not that specific instruction, not that
4 specific notice, that is correct.

5 Q. They -- from October 14th, 2016 until today, the
6 instruction has been not to send postcards; right?

7 A. I have not said anything about the postcards in
8 my instructions. It was not do not send it, as what you
9 said. The -- my written instructions did not reference
10 that postcard in -- just did not.

11 Q. Your written instructions are the official
12 instructions out to county election officials; right?

13 A. Yes, that is correct.

14 Q. So your official instructions didn't instruct
15 people to send postcards; right?

16 A. They did not reference a separate postcard, that
17 is correct.

18 Q. And that's what you expected people to follow;
19 right?

20 A. I expect them to follow my written instruction,
21 yes, that is correct.

22 Q. And you expect them to follow your written
23 instruction and not what you may or may not have said on
24 a telephone call; right?

25 A. I expect them to follow all my instructions

1 written and verbal.

2 Q. Well, then I think you've now testified you gave
3 a verbal instruction to send and not a written
4 instruction to send. So could you tell the court,
5 during that time period, was the instruction to send
6 postcards, to not send postcards, or to do whatever you
7 want as the county official?

8 A. From the dates that you specified, from October
9 14th through today, the instructions on this have
10 strictly been written and the written instructions do
11 not separately reference a postcard, just the notice
12 approved by the court.

13 Q. And you didn't tell the court, contrary to what
14 Secretary Kobach represented to -- you were not
15 instructing people to send a postcard; right?

16 A. I believe I informed the court clearly and
17 exactly what I was instructing the counties. I did not
18 leave anything out. I was very clear in exactly what I
19 instructed the counties to send.

20 Q. So -- and the basis for that, I believe, is this
21 updated instructions concerning federal form applicants
22 and persons applying in person at DMV office, which was
23 the first attachment to Exhibit 1, is that what you're
24 talking about?

25 A. Yes, that is correct.

1 Q. And so your testimony is that because that form
2 doesn't mention postcards or disposition notices one way
3 or the other, you believe that that was telling the
4 court we're retracting Secretary Kobach's representation
5 made during the telephone conference and we're not
6 sending disposition notices or postcards; is that right?

7 A. All I can speak to is what I put on that piece of
8 paper. I can't speak to any other conversations that
9 didn't include me and I may have or may not have even
10 been in the room. I believe that I have been very clear
11 with the court exactly what instructions I have given to
12 the counties in writing.

13 Q. So you think that this notice told plaintiffs'
14 counsel and told the court who -- who Secretary Kobach
15 had made representations to that we're no longer
16 complying with the representations that we made a week
17 earlier, is that your testimony?

18 A. You're asking me what I was personally involved
19 in. And so, again, I'm going to repeat I was not privy
20 or in the room for exactly what was said.

21 I received the judge's written order and I
22 have been very clear this is what my belief on the
23 written order was and here's what the instructions say.
24 You have it. Our counsel has it. The chambers had it.
25 There have been multiple -- there's been no secret on

1 exactly what I've told the -- told the court, told the
2 counties -- on exactly what I'm telling the counties to
3 send. I'm not -- there's no hide the football here.
4 It's exactly what -- and --

5 Q. So I'd like to know from October 5th, when
6 Secretary Kobach made the representation to the court,
7 until March 8th of 2018, what conversations you've had
8 with him about the postcards?

9 A. In the last 18 months, quite frankly, I don't
10 know. I've had a million conversations in that time
11 period. Quite frankly, I can't think of any specific.

12 Q. You can't think of anything about the postcards;
13 right?

14 A. Since that period of time? I know that we've
15 talked about it. Because in the fall of 2017 there was
16 quite a bit of communication back and forth between
17 counsel on both sides and with Judge O'Hara I believe
18 and maybe even Judge Robinson. So there was quite a bit
19 of conversation about notices during the fall of 2017.
20 So I feel positive we talked about that.

21 Again, I provided information to both
22 counsels and the judge in 2017 reiterating exactly what
23 was being sent and my belief we were complying with the
24 judge's orders.

25 Q. So when you told Secretary Kobach in the fall of

1 2017, did you tell him that the instruction was that
2 counties should be sending postcards or should not be
3 sending postcards?

4 A. I reiterated the instructions I sent in October
5 2016. Those instructions do not reference a separate
6 postcard.

7 Q. And the written instructions are what county
8 officials are supposed to follow; right?

9 A. Yes.

10 Q. And so the written instructions don't say send
11 postcards?

12 A. The written instructions say nothing about the
13 postcards.

14 Q. And the written instructions -- let me go back to
15 a couple things.

16 The weekly calls, that's a regular part of
17 election cycles; right?

18 A. It's a -- something that I've done, yes. We
19 routinely have phone conversations with the counties
20 just so I can better do my job.

21 Q. Updates in the time period leading up to the
22 elections, the e-mail updates, you do that to ensure
23 that elections are run efficiently and in compliance
24 with the law; right?

25 A. Yes, that is my intent.

1 Q. And in 2016 there were no problems with counties
2 complying with the instructions that you sent; right?

3 A. When you say -- so let me make sure I understand
4 your question.

5 Q. I'll be more specific. With respect to the
6 October 12th and then supplemented by the October 14th
7 notices that you sent out, I think your testimony is,
8 even though it was in the three weeks or so before the
9 election, no problem, the counties got the instructions
10 and they complied with what I told them in writing;
11 right?

12 A. So I think my answer was as of today I'm not
13 aware of any person covered by the court's injunction
14 that was negatively impacted and not treated like a --
15 treated like a non-covered voter in this by the
16 injunction.

17 Q. And you have no reason to doubt that if you would
18 have told the counties send the postcards, that that
19 instruction also could have been complied with; right?

20 A. Would you say that again? I want to make sure.

21 Q. Sure. I think there's been a suggestion that,
22 well, back then it was three weeks and it was really
23 busy because this would be a presidential election. But
24 between now and August it's five months. And so it
25 would have been really hard to comply with sending the

1 postcards back then. But don't worry, Your Honor, we
2 can do it if you tell us to now. That's sort of been
3 the implication of your direct testimony?

4 A. No, I think that overstates what I said.

5 When a court issues an order, we will move
6 heaven and earth to comply with the order as we
7 understand it. And on October 12th, there was lots of
8 discussion between both legal counsels and the court on
9 the contents of her written order. And it is my
10 understanding that, to the best of my knowledge, we
11 complied fully with the court's order during that period
12 of time.

13 THE COURT: There was also -- there was also
14 an assurance during that phone conversation. I asked
15 Mr. Kobach a couple of times directly have the postcards
16 been sent out? Are the postcards being sent out? And I
17 got an assurance that the postcards would be sent out.

18 So that wasn't in the written order because
19 I already had an assurance on the record by an officer
20 of the court in lawyer Kobach that that had or would be
21 accomplished, a verbal order like you give the county
22 election officials.

23 And so I'm clear, did you or did you not
24 learn from Mr. Kobach that I had been assured by him,
25 meaning I didn't need to order it directly, he'd already

1 told me that it was going to be done, did you or did you
2 not learn that from Mr. Kobach that these registered
3 voters pursuant to the PI order were going to receive
4 postcards just like everybody else?

5 THE WITNESS: So my discussion with the
6 counties on the postcard --

7 THE COURT: That's a yes or no answer. Did
8 Mr. Kobach tell you that or not?

9 THE WITNESS: My belief is no because it's
10 not included in my written instructions on October 12th.

11 BY MR. STEINER:

12 Q. And between October 5th of 2016 and October 12th
13 of 2016, did you have any conversations with Secretary
14 Kobach about postcards?

15 A. I feel quite certain that we could have talked
16 about a lot of things during that period of time. Quite
17 honestly, I have no idea. That was in -- you know, four
18 weeks before a presidential election. This court case
19 was going on. There was a lot of communication. I
20 can't swear one way or the other.

21 Q. So you don't know whether you had a conversation
22 with Secretary Kobach about his representations to the
23 court about postcards; right?

24 A. I really do not remember.

25 Q. And you don't remember whether you were there

1 when he made the representations to the court; right?

2 A. I really don't. You're asking me to recount
3 several hour-long conference calls in the four weeks
4 prior to a presidential election. There was a lot going
5 on. I absolutely can't sit here and go, oh, yes, I have
6 a crystal clear memory of exactly what was said.

7 Q. And when Judge Robinson asked you a week and a
8 half ago whether postcards had been sent you said you
9 weren't really sure, you'd have to go back and check?

10 A. Right.

11 Q. And you didn't say at that point, "But I told the
12 county officials on a telephone call to send the
13 postcards, I'm just not sure that everyone, in fact,
14 did;" right? That wasn't your testimony a week and a
15 half ago to the judge; right?

16 A. No, because I honestly didn't remember. I
17 haven't thought about that in many, many months, so...

18 Q. Right. But you now suddenly remember, in
19 response to the Secretary's questioning, that you did
20 give such an instruction verbally in a call with no
21 notes, no agenda, just a calendar entry; right?

22 A. Well, I followed up because the judge asked me to
23 ascertain that. And so I went back and had
24 conversations with other people to try and recreate my
25 memory from that period of time; so, yes.

1 Q. And you found out at least three counties -- how
2 many people did you talk to?

3 A. Specifically about the notice, I've talked to
4 four.

5 Q. Okay. And three of the four didn't send them;
6 right?

7 A. Yes, that is correct.

8 Q. Okay. And which three are those?

9 A. Douglas, Shawnee and Riley.

10 Q. And Douglas is -- and you haven't talked to
11 Johnson one way or the other?

12 A. Not specifically about postcards, no.

13 Q. So you don't know whether Johnson County is
14 sending postcards?

15 A. I have not yet had a personal conversation with
16 Johnson County; correct.

17 Q. And Johnson County is the largest county in the
18 state?

19 A. Yes, it is.

20 Q. And would it surprise you if Johnson County was
21 not sending postcards?

22 A. Not -- on this, nothing would surprise me as far
23 as their answer goes.

24 Q. And you haven't bothered to ask, in the week
25 since you testified and told the judge you need to go

1 figure it out, you didn't bother to call the largest
2 county in the state to find out whether they were
3 complying with the representation by Secretary Kobach
4 that postcards would be sent; is that right?

5 A. I talked to the second, the third, the fourth and
6 the seventh biggest counties because I had the
7 opportunity to do so. I did not have the opportunity to
8 talk to the largest. I have been extraordinarily busy
9 with my job and so I did not have the opportunity. But
10 I talked to the second, fourth, fifth and seventh
11 biggest counties.

12 Q. And three of those weren't complying with the
13 supposed verbal instruction that there's no
14 documentation of; right?

15 A. Yes, that is correct.

16 Q. Sir, isn't it a fact that you were asked on one
17 of the calls whether to -- whether postcards were to be
18 sent -- or I think disposition notices were to be sent
19 and you responded no; isn't that right?

20 A. Quite frankly, you would have to give me a little
21 more context what period of time it was in. I've talked
22 about those notices in the last three years multiple
23 times. Yes, I believe I could have said that depending
24 on what point in time in the judicial proceeding, yes.

25 Q. And you acknowledge it's possible, "No, don't

1 send those disposition notices," at some point between
2 October 5th of 2016 and today; right?

3 A. I don't believe we've had much discussion on
4 sending out notices after my written instruction on
5 October 12th and October 14th.

6 Q. But it's certainly possible at some point between
7 October of 2016 and today you've said to counties, no,
8 don't send disposition notices; right?

9 A. No, I believe we would have said we stand by the
10 written instructions. I generally say follow the
11 written instruction.

12 Q. And -- and you were asked whether there would be
13 written instruction on whether or not to send
14 disposition notices and you said, no, I'm not putting
15 anything in writing; right?

16 A. I don't recall that but I've had lots of
17 conversations. I'd need more context what period of
18 time. This has been litigated for the last three years.
19 And so at some point in the last three years could I
20 have said that? Yes, that's possible.

21 Q. And it's certainly possible that from between
22 October of 2016 and today you were specifically asked by
23 county clerks whether you would be issuing written
24 instructions and you said, no, I'm not putting anything
25 in writing; right?

1 A. Because we have written instructions already in
2 existence.

3 Q. And you were asked for guidance -- during the
4 period of the preliminary injunction and Secretary
5 Kobach's representation about postcards, you were asked
6 for guidance about sending postcards and you told
7 counties I'm not putting anything in writing; right?

8 A. No. I said we've already issued something in
9 writing. I didn't say we weren't going to put something
10 else additional in writing. I said we already have
11 written instructions for you to comply with.

12 Q. When you put it in writing, it doesn't say one
13 way or the other about postcards; right?

14 A. The written instructions do not reference the
15 postcards either way, shape or form.

16 Q. And if we can talk for a minute about the
17 election manual, right. That's the on-line manual?

18 A. Are you talking about the election standards, the
19 manual specific to county election officers?

20 Q. The County Election Officer Manual; right?

21 A. Yes, we can talk about that.

22 Q. And that was last updated after the documentary
23 proof of citizenship law went into effect; right?

24 A. Yes, I believe that's true.

25 Q. Okay. And -- and it's next scheduled to be

1 updated in another year or two; is that right?

2 A. Yes, that is correct.

3 Q. Okay. But there's nothing in Kansas law that
4 stops you from updating that manual in advance of the
5 next scheduled update; right?

6 A. There's nothing in Kansas law that requires any
7 updates to the manual in any way, shape or form. It's
8 silent on that. So if you're asking me is there a legal
9 requirement to do so? No, there is not.

10 Q. I'm asking the opposite. There's no legal
11 prohibition on you updating the manual to comply with
12 Judge Robinson's orders and Secretary Kobach's
13 representations to the court; right?

14 A. I think it's -- in regards to the manual, the law
15 is silent in either direction.

16 Q. So you certainly could have done that if you
17 wanted to?

18 A. Hypothetically, yes.

19 Q. Practically, not just hypothetically. If you
20 said update the manual, as the director of elections, it
21 would have been updated; right?

22 A. If I wanted to do so, yes, that's true.

23 Q. You didn't want to do so; right?

24 A. I had other priorities that needed to be done
25 that I felt was a better use of my time.

1 Q. So what was a better use of your time and more
2 important priority than ensuring that Secretary Kobach's
3 representations to this court were complied with?

4 A. I believe I've been overly transparent with all
5 attorneys and the court on exactly what my instructions
6 are to the counties on complying with the written order.

7 Q. I'd like an answer to my question as to what it
8 was that was -- that had you too busy and was a higher
9 priority than complying with Secretary Kobach's
10 representations to this court on October 5th of 2016?

11 A. Nothing. I always attempt to comply with any
12 judicial order as I understand it.

13 Q. And you've testified that a regular part of your
14 job is communicating with counties to make sure that
15 they are complying with whatever laws and instructions
16 you send out; right?

17 A. Yes, that is correct.

18 Q. And, for example, you -- since last week's or the
19 testimony a week and a half ago, you went and asked four
20 of the counties whether they were or weren't sending
21 postcards; right?

22 A. Yes. I've had four discussions, yes.

23 Q. But in the 18 months from October 2016 up until
24 your testimony a week and a half ago, that wasn't part
25 -- you never asked that in your regular communications

1 to see if the law was being complied with; right?

2 A. Oh, I've had discussions about whether or not the
3 law's being complied with. I've had hundreds of
4 discussions about whether the law was being complied
5 with.

6 Q. Right. It's a part of your job; right?

7 A. Right.

8 Q. And it's part of what you do to talk to the
9 counties to see if they're complying with the law;
10 right?

11 A. Yes, I do that all the time.

12 Q. In those 18 months, you probably had a couple
13 hundred conversations with counties?

14 A. Couple thousand conversations with counties.

15 Q. I say a couple hundred. But I'll certainly take
16 a couple thousand; is that right?

17 A. Sure. In 18 months I've easily had a couple
18 thousand conversations with counties.

19 Q. In those few thousand conversations with counties
20 from October 16 -- from October of 2016 until your
21 testimony last week when you were asked about this by
22 Judge Robinson, you hadn't had a -- in not one of those
23 thousands of conversations with counties did you ask a
24 county whether they were sending postcards; right?

25 A. No, because there are thousands of laws that I

1 haven't asked any county, hey, are you complying with
2 that? It is impractical to believe that I have the
3 ability to answer -- ask all 105 counties, hey, are you
4 complying with every one of the thousand federal-state
5 laws, regulations. I think that's impracticably that I
6 would have the ability to do so.

7 Q. Right. Just so the record is clear, I think we
8 might have a double negative. The answer to my
9 question, that's correct you didn't ask any county in
10 any of those thousands of conversations about sending
11 postcards or not sending postcards; right?

12 A. I don't recall having a separate conversation
13 about postcards during that period of time. I don't
14 recall one. As I said, I've literally had thousands of
15 conversations. So I can't say it didn't exist but I
16 certainly don't recall one.

17 MR. STEINER: Stephen, can we put up
18 Exhibit H to the contempt motion. And do you have the
19 first page of that letter or you don't? Exhibit H.

20 THE COURT: Are you going to mark this as a
21 hearing exhibit?

22 MR. STEINER: I think it's attached. I'll
23 move it in. May I approach the witness?

24 THE COURT: Yes.

25 THE WITNESS: Thank you.

1 THE COURT: I will consider them if they're
2 attached to, but I think for the record it's cleaner to
3 include them as exhibits as well.

4 BY MR. STEINER:

5 Q. So, sir, you've been -- I've handed you what was
6 Exhibit H to our contempt motion which is -- -- which is
7 a letter dated November 21st of 2017 from Miss Becker to
8 Mr. Ho. Have you seen that letter before?

9 A. I have not seen this version of the letter.

10 Q. You saw a draft of the letter?

11 A. I've seen a draft of this letter but I have not
12 seen this.

13 Q. And you provided input on the draft of the
14 letter?

15 A. I provided input into the response. I do not
16 know what happened to that input.

17 Q. So if you go to the second page of it says page 3
18 of the document because the cover sheet is page 1, but
19 the second page of the letter, the top paragraph. Do
20 you see that?

21 A. The -- where it says "regarding issue No. 3"?

22 Q. Correct. "Those who register to vote using the
23 federal form or motor-voter form but do not provide DPOC
24 receive the court-ordered notices. The court's order
25 fully addressed what was to be sent to 'covered past

1 registrants' and 'covered new registrants' and ordered
2 that the agreed to notices be sent." Do you see that?

3 A. Yes, I do.

4 Q. Okay. And -- and that was saying -- that was in
5 response to the question of whether postcards were being
6 sent?

7 A. I don't know what the question was.

8 Q. So you don't know one way or the other whether
9 this was a response to the question of whether the
10 Secretary's Office was sending postcards?

11 A. I don't know what the question was. I just see a
12 reference to notices and I know there are multiple
13 notices that were -- that I've communicated to the
14 counties about depending on the status of the covered
15 voter.

16 Q. All right. Why don't I show you what was marked
17 as Exhibit J.

18 A. Thank you.

19 Q. This is a December 7th, 2017 letter.

20 A. Yes, I see that.

21 Q. Okay. And the paragraph 4 of that letter, if I
22 could direct your attention to that, have you seen this
23 letter before today?

24 A. I don't believe so.

25 Q. Did you provide input into a letter in December

1 of 2017?

2 A. I don't remember providing input. On this letter
3 I'm not -- I honestly don't remember providing input on
4 this. It's possible I did. It's just --

5 Q. Then if you look at paragraph 4, it's talking
6 about people covered by the order or not covered by the
7 order; is that right?

8 A. Yes, that is what it says.

9 Q. Okay. And that's saying people who are covered
10 by the order only get the ordered notice, they don't get
11 the postcards; right?

12 A. Well, I don't know what the question was, so I
13 see what is stated as the response on No. 4. But I
14 don't see what the question was to elicit that response.

15 Q. So you don't know one way or another from that
16 whether that was saying we're not sending postcards to
17 people who are covered by the preliminary injunction
18 order?

19 A. Well, I don't know what the question was on No. 4
20 because it's not contained here. So, no, I don't know
21 the answer.

22 Q. Did you have conversations with Secretary Kobach
23 or Mr. Roe or Miss Becker in November-December of 2017
24 as to whether or not postcards were being sent?

25 A. I had conversations in November concerning this

1 letter because there were discussions about covered
2 notices. So, yes, in November. I don't recall there
3 being any December. I just know I specifically remember
4 November.

5 Q. So in November of 2017, what did you say was the
6 status of postcards being sent or not being sent?

7 A. I don't know if that -- that specific word was
8 included in the conversations I had. I know they were
9 discussed but...

10 Q. All right. How about the official word,
11 "disposition notices," what did you say about
12 disposition notices?

13 A. We talked about them. I -- what question are you
14 asking me?

15 Q. Well, did you tell --

16 In response to the inquires from plaintiffs'
17 counsel whether Secretary Kobach's representations to
18 the court were being complied with, did you tell
19 Secretary Kobach or the people working with him in the
20 Secretary's Office that postcards were being sent by
21 counties or were not being sent by counties?

22 A. I don't think I was asked that question.

23 Q. Okay. Well, what were you asked?

24 A. I don't remember. You asked me if I remember
25 there being conversations. Yes. But did I commit them

1 to memory? No, I --

2 Q. And you didn't keep any records of it; right?

3 A. No, I did not.

4 Q. Okay. So you know you had a conversation before
5 these letters were sent back to -- to plaintiffs'
6 counsel?

7 A. On November 1 I feel confident that I was
8 involved in discussions on the entirety of the --
9 entirety of the letter and provided some input. I don't
10 remember being involved in the December letter.

11 Q. And you -- and so you know you had conversations
12 but you don't know whether you told Secretary Kobach and
13 the rest of the staff that notices were being sent or
14 were not being sent? As you sit here today, you're just
15 not sure?

16 A. Well, this is -- to be fair, this is a three-page
17 response. I haven't seen the letter that elicited this
18 three-page response, and so I'm going to assume that
19 there's a lot of information contained in this letter.
20 You're asking me was this specific question asked? I
21 don't believe that specific question was asked.

22 But being truthful in answering my question,
23 yes, I had discussions about some of the things in this
24 letter. But, no, I don't recall anyone point blank
25 asking me did you send a notice of disposition or

1 postcard related to those discussions.

2 So I want to be fair what you're asking me.

3 Q. Putting aside the letters in November and/or
4 December of 2017 or even in advance of that in October
5 of 2017, in that time period was there a discussion
6 about postcards or notices of disposition or was there
7 not?

8 A. I don't recall directly being asked are we
9 sending postcards during that period of time.

10 Q. Was there any discussion about postcards during
11 that period of time?

12 A. I don't remember there being -- we talked about
13 notices. I don't remember there being questions asked
14 specifically about postcards. Just don't remember.
15 That was also in the weeks leading up to our first
16 statewide municipal election in the fall, so I'm pretty
17 sure I was preoccupied with other things as well.

18 Q. And with respect to the ELVIS system, the ELVIS
19 system could be set so that people who are
20 coded that they're in suspense because of the proof of
21 citizenship could be coded that postcards would print;
22 right?

23 A. Could that be done? I want to say theoretically,
24 yes. Any kind of programming of the database that
25 excludes what I would consider a standard report,

1 generally there's a time and effort cost associated with
2 our vendor. So since this is a category of people who
3 are covered by injunction and need to be treated
4 differently for purposes of tracking, I don't know that
5 I could have just created a standard report at no cost
6 during that period of time.

7 Q. Putting aside -- I assume the cost is a few
8 thousand dollars? Maybe less?

9 A. I'm not sure. I would say less but we'll, for
10 argument sake, say a few thousand dollars.

11 Q. So for a few thousand dollars it could have been
12 coded so postcards would print for the people coded
13 covered by the court's injunction?

14 A. Is that technically feasible? I believe the
15 answer is yes.

16 Q. And feasible based on an instruction from your
17 office; right?

18 A. We would have to negotiate with our vendor to do
19 something like that. That would require a change order,
20 a process.

21 Q. But that would be done by your office; right,
22 sir?

23 A. Yes, that is correct.

24 Q. That wouldn't be left to the 105 counties to run
25 the report, print the cards. That would be done by your

1 office?

2 A. Yes, that would be correct.

3 Q. And we've talked about the upcoming May
4 conference. Was there also a conference in May of last
5 year or only even year conference?

6 A. It's every year.

7 Q. So you had the conference. You had -- one of the
8 things I think you said you could do if you were now
9 told to comply with Secretary Kobach's representations
10 from 18 months ago, is that you could talk about it in
11 May at the conference that 90 percent of the counties
12 attend; right?

13 A. Absolutely.

14 Q. Okay. You could have done that last May;
15 right --

16 A. I could have last May --

17 Q. -- but you didn't?

18 A. No, because I talked about, for the first time in
19 150-plus years, of moving elections from the fall to
20 the -- spring to the fall in 2017. So the time spent in
21 the May conference of 2017 was moving municipal
22 elections to the fall.

23 Q. Right. So you had other things to talk about
24 last year so you didn't talk about it. But you could
25 talk about it this year if -- if you have to comply with

1 Secretary Kobach's representations; right?

2 A. Whatever the court decides, we will do.

3 MR. STEINER: No further questions, Your
4 Honor.

5 REDIRECT EXAMINATION

6 BY MR. KOBACH:

7 Q. Mr. Caskey, do you recall opposing counsel asking
8 you about instructions that you e-mailed to the counties
9 between October 14th and today?

10 A. Yes, I do.

11 Q. And do you recall that he repeatedly said between
12 October 14th and today, referring to several questions?

13 A. Yes, I do.

14 Q. But on October 5th -- on October 5th, the day of
15 the telephonic conference, you referred earlier to
16 verbal instructions that were given to the counties;
17 right?

18 A. I had a conference call where we discussed a
19 variety of things that day, yes.

20 Q. Including the standard postcard disposition;
21 right?

22 A. Yes, I believe we talked about that to some
23 extent.

24 Q. And your communications from October 14th onward,
25 were they about implementing the court's written order?

1 A. It was about complying with the judicial orders
2 in the case, and from my perspective that always means
3 written.

4 Q. I'm sorry, I didn't hear you.

5 A. From my perspective that means written.

6 Q. In your understanding, does the court's written
7 order make any mention of the standard postcards?

8 A. No, it does not. I relied heavily and
9 exclusively -- almost exclusively on -- on the written
10 order to make sure that I understood completely what was
11 said. There was a lot of confusion sometimes, and
12 acknowledging that I was not present for many parts of
13 the oral conversations, so I relied on the written
14 order.

15 Q. Is it fair to say that after October 14th, you
16 were focused on making sure that the written order was
17 complied with?

18 A. Yes, that is correct.

19 Q. We talked about Sedgwick County and the notice of
20 disposition postcards. Would Sedgwick County normally
21 have sent out notice of disposition postcards to the
22 affected voters without being directed to do so from
23 you?

24 A. I don't believe so.

25 Q. In the context of this case, do you always get

1 direction about what you should or shouldn't do from me
2 personally?

3 A. No, I do not.

4 Q. Do you sometimes get direction from other
5 attorneys in the office who have been involved in this
6 case?

7 A. Yes, I do.

8 Q. Would those other attorneys include Garrett Roe,
9 Bethany Lee, Jesse Burris, Sue Becker and Bryan Brown?

10 A. Yes, that is correct.

11 Q. Is it possible one of the other attorneys in the
12 Office of the Secretary of State, or possibly our
13 paralegal, Des Taliaferro, related to you what was said
14 on the conference call regarding the notice of
15 disposition postcards that should be sent out by the
16 counties?

17 A. It's possible.

18 Q. Were you present during the -- I'm going to show
19 you another part of the telephonic conference call by
20 the court and this is -- I'll represent to you it's
21 later than the earlier one talking about.

22 It's on page 21 and I'll just -- right where
23 the highlighting -- highlighted text is I'm going to
24 read this and ask you if you recall this. Mr. Danjuma
25 says, "Well, Your Honor, we just -- I'm sorry, this is

1 Orion Danjuma again. We just wanted to check the -- to
2 ensure that we were in agreement about what new voters
3 will -- new DMV registrants will receive, the notice
4 they'd receive. And I guess -- I guess the better way
5 to resolve that is either to have a representation from
6 Mr. Kobach that they'll receive the same notice that
7 every other registered voter receives or we'll see a
8 copy of that notice before it's issued."

9 And the court: "Okay. I think that's fair.
10 Mr. Kobach."

11 As you read that, does that suggest that
12 there is an alternative, the way Mr. Danjuma presents
13 it, the same notice, a notice of which the court could
14 be -- or the plaintiffs would receive -- or receive a
15 copy?

16 A. Me reading that I believe, yes, there would be
17 multiple answers to that.

18 Q. Were you present -- do you know -- if you don't
19 you can -- during -- do you recall this part of the
20 conversation?

21 A. I don't recall. Again, it's possible I was there
22 or not there. But, again, I was in and out on that --
23 that phone call. I just don't remember when I was there
24 and when I was --

25 THE COURT: So, in other words, you're

1 relying on Secretary Kobach who was there for the entire
2 conversation with me to relate to you what the -- what
3 my directives were based on the entire phone hearing,
4 not just perhaps on this one piece of the transcript
5 that he's directed you to; would that be fair to say?

6 THE WITNESS: I believe there were multiple
7 conversations with attorneys in our office, not just the
8 Secretary. But, yes, that is correct. I readily admit
9 that I was not physically present during the entire
10 conversation and could not speak to exactly what you
11 said and didn't say during that phone call.

12 THE COURT: Has anyone ever showed you those
13 parts of the transcript where Mr. Kobach and I discussed
14 the fact that -- or discussed the postcards and his
15 assurance that the postcards -- that these folks would
16 receive the postcards as well? Anyone showed you those
17 parts of the transcript?

18 THE WITNESS: I haven't seen this transcript
19 until the last two weeks.

20 THE COURT: Anyone showed you those parts of
21 the transcript?

22 THE WITNESS: In the last two weeks, yes,
23 both parts.

24 THE COURT: Only in the last two weeks?

25 THE WITNESS: I didn't know this transcript

1 existed until, I forget which day, within the last two
2 weeks.

3 THE COURT: All right. Thanks, Mr. Caskey.

4 BY MR. KOBACH:

5 Q. Mr. Caskey, do you recall being questioned about
6 this letter by Sue Becker of our office to Dale Ho
7 plaintiffs' counsel?

8 A. Yes, I do.

9 Q. And you were asked about the paragraph No. 4 that
10 Miss Becker drafted. Do you recall that?

11 A. I do recall being questioned about that, yes.

12 Q. And had you seen the letter to which this is
13 responding?

14 A. I don't believe so.

15 Q. Well, let me ask you if you've seen it.

16 MR. KOBACH: Your Honor, this is already --
17 it's Document 424, Exhibit I, I believe.

18 THE COURT: All right. I think for the
19 record these need to be admitted. H, J and now I, I'm
20 going to admit for the record. They were attached to
21 the briefs, so technically they don't have to be, but I
22 think it makes a cleaner record. So Exhibits H, J and I
23 are admitted.

24 BY MR. KOBACH:

25 Q. So do you have any understanding about whether --

1 let's go back to this. This is J I believe. This is
2 the one you were just looking at.

3 Do you have any understanding about whether
4 paragraph 4 here represents an exclusive statement of
5 all information that is given to different categories of
6 voters or whether just a statement something is given?

7 A. I don't. Quite frankly, I don't remember being
8 involved in discussing this letter with our counsel or
9 with anyone else. It's possible but I -- this letter
10 dated December 11th, I don't recall talking to anyone
11 about it. But so short answer is, no, I just don't
12 remember any interplay back and forth on -- during this
13 time period.

14 Q. And to conclude, are you aware of any
15 communication within the Secretary of State's Office
16 where you were present directing you not to comply with
17 any order of the court?

18 A. No, never. I've always tried to comply with
19 every -- every piece of the court order as I knew it and
20 understood it.

21 Q. And are you aware of any other activities in the
22 Secretary of State's Office by anyone else you may have
23 contact with that would suggest that the Secretary of
24 State's Office was not trying to comply to the absolute
25 dotting every "I" and crossing every "T" with the orders

1 of the court and the directions of the court verbal or
2 written or otherwise?

3 A. No, I am not.

4 MR. KOBACH: No further questions.

5 MR. STEINER: Nothing further, Your Honor.

6 THE COURT: All right. Mr. Caskey, can step
7 down.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Mr. Kobach, is there any more
10 testimony or any more exhibits you want made part of
11 this record before you rest your case?

12 MR. KOBACH: No further exhibits, Your
13 Honor. We would just add at the end though with respect
14 to what the court does with the pending motion, the --
15 in the briefing of the motion we didn't get the
16 transcript until the reply brief that opposing counsel
17 sent to us.

18 So the transcript wasn't in their original
19 -- wasn't attached to their original motion and so that
20 led to some confusion in our office as to what they were
21 talking about when they referred to -- our office was
22 focused on the written order. And the -- the briefing
23 didn't specifically mention the transcript until the
24 reply. So I want to be clear that that's why, although
25 I didn't do the briefing of this memo, my understanding

1 is that's why it was drafted focused on the written
2 order.

3 To the extent that this counsel -- that this
4 court is going to look at the transcript and the oral
5 representations during the -- during the oral hearing of
6 October 5th as somehow being part of the court's written
7 order or a basis for --

8 THE COURT: Why would I order something that
9 you'd already told me that you'd taken care of? Why
10 would I order that? As an officer of the court, as a
11 lawyer that's licensed in this state or in some other
12 state and has been allowed to practice in front of me
13 tells me, as an officer of the court, that they've done
14 something, I feel no reason to order it because you are
15 under an ethical obligation to tell me the truth. And
16 if you tell me you've done something, you're going to do
17 something, I trust that. That's the way -- that's why
18 lawyers are licensed. That's why judges honor and
19 accept what they say without them taking the stand when
20 we're talking about issues, you know, other than
21 evidence. So I would not have ordered that.

22 If -- if I had asked you if you had sent,
23 you know, voter ID cards to everyone and you told me,
24 yes, or you were going to -- not that that is an issue
25 in this case -- in other words, I honored and trusted

1 what you told me, Mr. Kobach.

2 MR. KOBACH: And you're --

3 THE COURT: Why would I then order it?

4 MR. KOBACH: I understand what you're
5 saying, Your Honor. I'm telling you now that I directed
6 the staff to make sure that that would happen. It
7 appears that I had a greater deal of confidence in what
8 the counties would do when instructed immediately over
9 the telephone than what they actually did.

10 As we began this morning, one of the great
11 surprises of this office --

12 THE COURT: This -- let's not have argument
13 -- let's not have argument. I haven't asked them if
14 they're putting evidence on. I'll come back around if
15 you want to make argument about what the evidence -- how
16 I should look at this evidence. Don't sit down because
17 maybe I won't be calling --

18 Do you have any evidence, Mr. Ho?

19 MR. HO: We just wanted to clarify the
20 record, Your Honor. The Exhibits A through J that were
21 attached to our opening brief were in the record for
22 your consideration for purposes of the motion.

23 THE COURT: All right. They're part of the
24 record. But for purposes of this evidentiary hearing, I
25 admit Exhibits A through J as well.

1 MR. HO: Thank you, Your Honor.

2 THE COURT: Nothing more for the plaintiff?

3 MR. HO: No further evidence, but we would
4 appreciate an opportunity to address the court with
5 argument.

6 THE COURT: Okay. All right. So actually
7 it's your motion, so I suppose the argument -- you
8 should have the first crack at the argument. And then,
9 Mr. Kobach, you can argue your position. Go ahead.

10 MR. HO: Very briefly, Your Honor. I think
11 the evidence today clearly supports a finding of
12 contempt.

13 With respect to the county elections manual,
14 there's no dispute that the information in the manual is
15 incorrect when it states that every voter registration
16 applicant must provide documentary proof of citizenship.
17 It lists one exception for that, people who registered
18 to vote before 2013.

19 It's the simplest thing in the world, Your
20 Honor, to add one more sentence to add an additional
21 exception to that people who register to vote at the DMV
22 consistent with Your Honor's preliminary injunction
23 ruling. Also simplest thing in the world to add a
24 phrase about the people who use the federal voter
25 registration form consistent with the D.C. Circuit's

1 ruling in the *Newby* case. Instead of making that
2 correction, Secretary Kobach simply took the manual
3 down. He took his ball and went home.

4 Now, even though that manual was no longer
5 on-line, and that's the first we heard about that fact
6 when that representation was made today, counties still
7 have hard copies of those manuals. They still use it as
8 their definitive resource guide. And I think it begs
9 the question why -- why would Secretary Kobach let
10 inconsistent information continue to exist out there
11 when the simplest thing in the world is to simply print
12 off a new version of this with a sentence or two and
13 disseminate it to the counties.

14 The second issue, Your Honor, the postcards.
15 Let's just -- there's been a lot of representations made
16 and I think it's just helpful to just identify what the
17 evidentiary record today actually shows. All right.

18 First is the timeline of when the first
19 written directive -- or when a written directive about
20 compliance with the preliminary injunction came out from
21 Mr. Caskey. Now, remember the preliminary injunction
22 was issued in May of 2016, so several months before the
23 November '16 election. There's no written directive
24 from Mr. Caskey about compliance with the injunction
25 until October 12th of 2016 and that only happened, I

1 remind the court, in response to our first motion for
2 contempt that we filed against Secretary Kobach.

3 There was a long period in which he was
4 refusing to disseminate any information about the
5 preliminary injunction order when people were going to
6 the motor -- to the DMV registering to vote in
7 compliance with the preliminary injunction and receiving
8 an incorrect notice telling them you are not registered
9 to vote, you will not be able to vote in November unless
10 you provide documentary proof of citizenship. So we're
11 not writing on a blank slate here.

12 Second point, what do those written
13 instructions actually show? Well, Secretary Kobach
14 entered them into the record and there's no reference
15 whatsoever to the notices of disposition or to the
16 postcards. There is a line that this supersedes any
17 previous instructions that they've -- that the county
18 elections officers have received. And Mr. Caskey
19 testified there have been no other instructions with
20 respect to the postcards or the notices of disposition
21 since then.

22 Now, he did make reference to some supposed
23 verbal instructions which went out before this October
24 12th e-mail. But remember, Your Honor, Mr. Caskey did
25 not remember those instructions previously. He had to

1 go away after he testified a week or so ago -- a week
2 and a half or so ago, jog his memory. And what he
3 learned was that three of the four counties that he
4 spoke to were not sending out the postcards. So that
5 hardly seems like strong evidence that an instruction
6 was given. And, in any event, any such instruction
7 would have been superseded by the written instructions,
8 the only thing that we have memorialized in any way.

9 Third thing, Your Honor, there is undisputed
10 evidence that at least some voters are not receiving the
11 postcards, Mr. Fish and also the evidence -- the
12 testimony of the League of Women Voters former president
13 Marge Ahrens. That's not disputed by the defendants.

14 The only thing that we have from them is the
15 verbal instructions that Mr. Caskey supposedly gave and
16 the representation that Mr. Kobach just made for the
17 first time that he directed that the postcards be sent.

18 And, Your Honor, I have to say, and I don't
19 say this lightly, this is a remarkable story. I mean, I
20 sent a letter to the defense on November 10th of last
21 year, that's Plaintiffs' Exhibit F, where we identified
22 this issue specifically. A response came from
23 Ms. Becker on November 21st. That's Exhibit J. That
24 letter makes no reference to any kind of instruction
25 being sent to the counties about the postcard.

1 I followed up with that on this issue on
2 November 30th with a second letter. That's Exhibit B.
3 We had a meet and confer on the 7th -- on December 7th.
4 Set forth in our opening brief, Miss Becker's position
5 was that -- and this was what was relayed to us during
6 the meet and confer -- that "the postcards were
7 "unnecessary" -- that's their word, not mine, Your Honor
8 -- because covered voters were already receiving the
9 court-approved corrective notices that, again, remember
10 only went out to correct the misinformation that
11 Secretary Kobach was continuing to disseminate after the
12 preliminary injunction ruling.

13 On December 11th we got a second response
14 from Miss Becker. That's Exhibit K. It makes no
15 mention of any instruction whatsoever about the
16 postcards to county elections officials. What it does
17 say about the postcards is that voters who are not
18 covered by the preliminary injunction are receiving the
19 postcards and that voters who are covered by the
20 injunction are receiving the court-approved corrective
21 notices.

22 And I just have to say, Your Honor, if it
23 were, in fact, the case that Secretary Kobach had given
24 this direction and that Mr. Caskey had given this verbal
25 instruction and that everyone in the Secretary of

1 State's Office believed that those instructions were
2 being followed, none of this back and forth would have
3 been necessary over the last few months. All it would
4 have taken was one sentence from Miss Becker in one of
5 her letters to me to say we gave that instruction, we'll
6 do it again, problem solved. But instead we fought
7 about this issue for months. And only after that did we
8 file this motion for a preliminary -- for sanctions,
9 Your Honor.

10 So I just have to say it really begs the
11 question what were the last few months for? What are we
12 even doing here today if these representations about
13 these instructions were actually correct?

14 One side note before I wrap up, Your Honor,
15 and it's that it seems like in large measure the problem
16 stems from how they're coding these voters in the ELVIS
17 system. If they simply coded these voters covered by
18 injunction as active voters, Mr. Caskey's testimony was
19 that a postcard would be generated and it would be sent
20 to them. They could also have reprogrammed the system
21 so that voters who were coded as being covered by the
22 preliminary injunction would similarly have postcards
23 automatically sent to them and they made no such efforts
24 to do those things.

25 In conclusion, Your Honor, it's not our job

1 or the court's job to police every last detail of
2 Secretary Kobach's interactions with covered motor-voter
3 applicants. Under Your Honor's ruling, those
4 individuals are registered voters in Kansas. They
5 should be treated as registered voters in Kansas. It's
6 an election year this year, Your Honor, and there's no
7 more time -- there's no more time for games. This
8 court's orders and the voting rights of the citizens of
9 Kansas must be respected. Thank you.

10 THE COURT: Mr. Kobach, and you'd already
11 begun your argument and you can definitely reiterate
12 everything you said or however you want to proceed.

13 But I did note that you mentioned before
14 that until the plaintiffs' replied to this line of
15 motions back and forth about the contempt, plaintiffs'
16 contempt motion, you weren't aware of the transcript or
17 you didn't have the transcript of the phone hearing that
18 you all have with you. But that transcript was filed on
19 the docket in 2016. It was filed on the docket in this
20 case. You should have been on notice of it and it was
21 there free to the world, including to the parties at
22 that point. So, anyway, proceed.

23 MR. KOBACH: Your Honor, just a
24 clarification of what Mr. Ho represented. He --
25 Mr. Caskey did not testify that we never sent

1 instructions after the preliminary injunction. He did
2 send them and his testimony was about the --
3 specifically October. And so I think there was some --
4 the way Mr. Ho represented it, perhaps inadvertently,
5 was perhaps not exactly what Mr. Caskey said.

6 With respect to the standard postcards,
7 direction was given to staff to ensure that the
8 postcards to the in turn direct -- Mr. Caskey to in turn
9 direct the counties to send the postcards. It appears
10 that some counties fail to send the standard postcards
11 in that brief three-week period running up to the
12 federal election of November. They, of course, all did
13 send the special notice that gives the person -- gives
14 the person the option of going to the website or going
15 to the toll-free number to learn the specific polling
16 place.

17 So that then raises the question, well, if
18 the statements of the verbal conference are to be
19 incorporated into the written order, then that brings in
20 several legal -- first of all, we -- our office made a
21 good faith effort to comply with the court's verbal
22 statement during the order. And we absolutely did and
23 it appears some of the counties failed to carry out the
24 instructions on their end.

25 But in terms of the law of whether a

1 contempt is appropriate here, we would say it's not
2 because you have several doctrines at work here. One is
3 that any ambiguities in a written order must be
4 construed in favor of the target of the motion. And
5 that's from the Tenth Circuit and it's 8 F.3rd, 377. In
6 my haste to write it down, I forgot to write the case
7 name.

8 Secondly, the county officials are not my
9 agents and that's where we began here. We asked them to
10 do things. We plead with them to do things. But we are
11 often frustrated when they don't do them on time or they
12 do them incompletely or in some instances they don't do
13 them at all.

14 Thirdly, there is the doctrine of mistake
15 which comes into play in contempt motions where if the
16 counties did fail, it was their mistake in not following
17 the verbal instructions given to them on the conference
18 call of October 5th.

19 And then, fourth, there's the legal doctrine
20 of substantial compliance. And that is that certainly
21 the state was doing its best to substantially comply
22 with everything that was coming at us in terms of the
23 written orders, in terms of the directions, in terms of
24 suggestions from plaintiffs' counsel that orders should
25 be changed, modified, and the e-mail that went back and

1 forth about the varying definitions of what should be on
2 the website. So we have -- we have been substantially
3 in compliance with respect to the written orders.

4 There's no question it has been exactly in compliance.

5 So the -- the legal doctrines of ambiguity,
6 lack of clear agency, mistake on the part of the
7 counties in failing to comply within a timely manner and
8 then substantial compliance are four legal doctrines
9 that would weigh against a contempt, which, of course,
10 is a very heavy order in this instance. So legally we
11 don't think the contempt is warranted. We have shown an
12 absolute willingness to do whatever the court wants us
13 to do in terms of ensuring that the counties get
14 whatever message the court wants to give them out to the
15 voters.

16 We can ensure going forward that all of the
17 -- whatever this court wants to do, a very express
18 direction that every person receives the postcard, the
19 standard postcard at a specific time, perhaps closer to
20 the election or it can be right now, we're certainly
21 willing to do that. I think, frankly, people will pay
22 more attention to someone telling them where their
23 polling place is at the time the election approaches
24 than when the election is five months out. Whenever the
25 court wants, we can ensure all these covered people

1 receive the special notice and postcard.

2 We can also ensure at the training in May
3 and regional meetings in April there is face-to-face
4 insistence by our office, please, counties, we want you
5 to do this. This is very important to the court. So
6 there is ample time to ensure that going forward there
7 is no lack of clarity on the part of the counties.

8 We do concede that the notation that
9 Mr. Caskey habitually puts in his e-mails may have led
10 to their mistake. His notation "this supersedes all
11 prior orders" on this subject may have caused some
12 counties to make that mistake.

13 And, finally, with regard to the election
14 manual, the reason the election manual was taken down,
15 is that the election manual isn't updated every -- the
16 rules, especially in the context of this litigation do
17 change on a fairly frequent basis, because we've had
18 multiple -- we've had a preliminary injunction, then
19 we've had discussions about what notices should be sent.
20 And the manuals go into exacting detail what you send,
21 how you do it, how the election and the run up to the
22 elections is to be conducted. Mr. Caskey doesn't revise
23 the entire manual. Rather, he sends -- these e-mail
24 updates can be taken as revisions or supplements to the
25 manual.

1 And his plan, as he has told the rest of our
2 office, is to rewrite the whole manual again in the
3 coming year. Is he still here? My understanding some
4 time -- that that is in the near future.

5 THE COURT: Isn't one of the advantages of
6 having something like this on-line you can readily make
7 changes to it and the county officials can be directed
8 by Mr. Caskey that the on-line version is going to be
9 more current than the -- than the written manuals
10 obviously, and the fact that you have a preliminary
11 injunction that affects a lot of provisions? So I would
12 imagine the election manual, it would seem like you
13 would make it imperative to make modifications to the
14 on-line version and direct the counties to go to the
15 on-line version.

16 MR. KOBACH: Your Honor, that would make
17 sense to me too. Over the years I've been in the
18 office, I have deferred to Mr. Caskey on how he does
19 those directions and when he makes modifications to the
20 manual.

21 My guess -- he's not here. My guess is that
22 he would -- that our office would say or he would say
23 that it focuses the attention of the county on the
24 specific change that's being made. But certainly -- if
25 you send an e-mail about here's the change, here's the

1 new change in policy rather than just saying, okay,
2 here's version 25 of our manual, you know, please, see
3 page 13 for the -- for the revisions.

4 But if the court wishes us to more
5 frequently update the manuals, we can certainly pass
6 that direction -- the manual, singular, I should say not
7 manuals -- we can pass that direction on to Mr. Caskey
8 as well.

9 We are willing to do whatever the court
10 orders us to do in all these regards and we have the
11 luxury now of five months before the next federal
12 election to do that. So if you want the manuals put
13 back on the website -- the manual put back on the
14 website --

15 THE COURT: I certainly didn't order them to
16 come down. It's news to me they came down. Just
17 repeatedly it's been news to me things that you have
18 done and things that you haven't done.

19 I tell you that I want these special notices
20 to go out to tell people guess what, you are registered.
21 Because of the judge's preliminary injunction you are
22 registered. So what you do is you draft a notice that
23 says you are registered for 2016 but going forward not.
24 I never told you that.

25 So when you talk about, oh, you know, it's

1 been hard to keep up with all the different rules that
2 change, there have been no rules that have changed. My
3 preliminary injunction has not changed. The
4 interpretation of that preliminary injunction has not
5 changed.

6 In my view, you have chosen to interpret it
7 in a way to avoid, for whatever reason, being fully
8 compliant with the preliminary injunction order. You
9 never should have put that language in there. We
10 shouldn't have had to have a hearing where I told you
11 take it out, or I told you in e-mails to take it out
12 because it just introduced confusion.

13 Then we have a telephone conference. We had
14 others, but we had a phone conference. And I'm
15 concerned because I don't want these people to just get
16 the special notice. I want the people to get the same
17 thing everybody else does because they're fully
18 registered. And that's been another thing that
19 repeatedly you all have pushed back against the concept
20 that because of my preliminary injunction these folks
21 are not second class registered voters. They are fully
22 registered voters to be treated the same as everyone
23 else. That means they get the same postcards.

24 So I asked you that and you said -- you
25 assured me that they had or they would get the

1 postcards. So it didn't find its way into the order
2 correcting the language that should be going out to them
3 as a special notice because these are a class of people
4 that have showed up at the polling place or they've been
5 given some sort of notice saying you're not registered.
6 We know you might have -- you know, maybe they thought,
7 when they left DMV, they were but now they get something
8 in the mail goes you're not registered. So they're
9 confused. They don't understand what happens.

10 So I had directed a special notice to cure
11 that problem but also I'd made it clear they're fully
12 registered voters. And so when you start talking about,
13 oh, the rules have changed, we can't keep up with the
14 rules that come out of this court because they're just
15 dynamic and they are fluid, that is not true.

16 Every action that I've taken since the
17 preliminary injunction has been in response to
18 plaintiffs filing a motion with me to say the
19 Secretary's not fully compliant with your preliminary
20 injunction, now we found something else on the website,
21 now we found a different notice.

22 As Mr. Ho said, it's not plaintiffs' job to
23 figure out every one of your communications and every
24 one of your websites and every one of your notices.
25 It's your job to be fully compliant with the court's

1 order. It's not my job to go rooting around trying to
2 figure out have you fully complied, changed the language
3 of something everyone might see out in the voting
4 public.

5 But we've had to police this. I've had to
6 police this over and over again. As things come to
7 plaintiffs' attention, they bring it to my attention.
8 And the pattern has been, oh, we'll fix it, we'll fix
9 it. But we don't know what we don't know, Mr. Kobach.

10 So I just want the record to be clear this
11 isn't a situation where the Secretary of State has been
12 at a disadvantage because you're not clear on what the
13 rules are, I keep changing the rules. I haven't changed
14 any rules. The preliminary injunction says the same
15 thing today as it said back then. It's still operative.

16 The real question here is why the Secretary
17 of State repeatedly has not complied with it until he's
18 called on it and then he fixes it and then finally we're
19 here today for a hearing about two other -- two more
20 components of something that seems like it hasn't been
21 fixed. So I just want that to be clear. There has been
22 no change of rules. There's been no confusion and
23 there's been no ambiguity.

24 MR. KOBACH: Your Honor, I do want to
25 clarify something. I did not say that our office cannot

1 keep up with the changes in the court's orders. I said
2 that Mr. Caskey does not change the manual every time
3 there is an applicable change in the rules or regs
4 governing elections because there are legal changes,
5 regulatory changes, changes from this court, changes
6 from other courts.

7 THE COURT: Well, you should have changed
8 the manual about this because it affected initially over
9 35,000 people that wanted to register to vote. Pretty
10 important that they've been told you're suspended or
11 canceled and now the court is telling them, no, you're
12 not, you're registered to vote. That is a change that
13 should have found its way into every mailing, every
14 notice, every publication, every on-site informational
15 site that you put out there to supposedly educate the
16 voting public and supposedly to educate the people that
17 administer the election system at the county level.

18 MR. KOBACH: And that, Your Honor, is why
19 the manual was taken down because it has not been
20 revised, the manual itself hasn't been revised since
21 2012. So my guess is it will probably take Mr. Caskey
22 multiple months to bring the manual up to date.

23 THE COURT: So as we sit here now the county
24 election officials -- Mr. Caskey, did an investigation.
25 The county election officials he talked to, three of

1 them in the, what did he say, second and fourth or
2 second, fourth and seventh largest counties, Sedgwick,
3 Shawnee, Riley, he talked to them; they didn't send out
4 the postcards.

5 MR. KOBACH: Sedgwick did, Your Honor.

6 THE COURT: Election manual, everybody is
7 operating with the election manual. The on-line has
8 disappeared. There's no dispute the election manual is
9 not up to date and not in compliance with the PI order.

10 MR. KOBACH: What Mr. Caskey tells every
11 election officer, when they take office, here is a
12 written manual but there is a long chain of
13 supplementary e-mails you need to treat as amendments to
14 the manual. So he would have to incorporate -- when he
15 does update the manual, he's going to have to
16 incorporate seven years of e-mail updates reflecting
17 changes in statute, changes in law and preliminary
18 injunctions and things like that.

19 I was not attempting to say at all the State
20 isn't able to keep up with the preliminary injunction,
21 just that that was why it was taken down. Making it
22 accurate and up to date is going to be a many months
23 project by Mr. Caskey and his staff.

24 THE COURT: Well, that's ridiculous. It's a
25 ridiculous process an on-line publication can't be

1 updated except every seven years. Anyway, so be it.

2 MR. KOBACH: Your Honor, the State has
3 endeavored to treat these individuals as fully
4 registered from the perception of everywhere except in
5 the ELVIS system, from the perspective they are on the
6 poll book, from the perspective of the voter, from the
7 perspective of the notices they receive that they are
8 fully registered to vote. And indeed court's -- the one
9 the court ordered that we went painstakingly through
10 with opposing counsel and the court makes it very clear
11 that they are fully registered to vote.

12 The voters and public see they are
13 registered. The only distinction is inside -- the ELVIS
14 notations inside the database. We explained this during
15 one of the teleconference hearings. The classification
16 given to these affected voters is a separate
17 classification.

18 Whatever happens to this case on appeal, we
19 can say these are the individual voters, okay. Now,
20 because of the Tenth Circuit confirming whatever
21 decision, they are now to be treated as -- you know,
22 there no longer is proof of citizenship at the DMV, so
23 therefore they should just go to standard active. That
24 -- it's just an administrative thing on the inside of
25 the system so that -- so that we are able in the future

1 to comply with whatever court orders come down.

2 Otherwise, it would be nearly impossible to find these.

3 From the voters' perspective, they are fully
4 registered. We have told them they are fully
5 registered. We have repeatedly told them they are fully
6 registered. Again, they are given multiple
7 opportunities to find their polling place in addition to
8 the postcard.

9 I just want to correct one statement. While
10 Your Honor was rattling off counties, Sedgwick County
11 did send postcards in compliance with the verbal order
12 of Mr. Caskey. They are, of course, the second largest
13 county in the state.

14 And so we will endeavor absolutely to
15 expressly do whatever this court tells us to do. If you
16 want us to update the manual and put it back on the
17 website, I will direct Mr. Caskey to do it as quickly as
18 possible. If you want us to direct every county in
19 writing to send both the postcard and the special notice
20 for affected voters, we will do that as well. If you
21 want to direct us to do anything else sending to the
22 voters, we can do that as well.

23 And because we have the luxury of five
24 months of time until the next federal election, we can
25 absolutely follow up with each of the 105 counties and

1 confirm with them that they have done what we've
2 instructed them to do.

3 Again, because they -- they drag their feet,
4 because I can't fire them, because I can't technically
5 order them, I can only tell them what we believe the law
6 requires them to do, we don't always get -- if it's on a
7 short time frame, we don't always get complete
8 compliance. But on a longer time frame like this, we
9 will have ample time to follow up, to harasses and
10 harangue any county that's dragging its feet and ensure
11 every single piece of information this court wants to
12 give is given to the counties.

13 And I want to represent my office has been
14 absolutely 100 percent complying with this court's
15 orders doing everything we can think of to do. So I
16 acknowledge some of them didn't follow the verbal
17 instructions given by Mr. Caskey regarding the
18 postcards. But I certainly would have no interest in
19 failure to comply with any court's order.

20 And our only issue that we have ever raised,
21 in terms of all the orders, is just that we want to have
22 these voters separately designated inside the system,
23 not -- just on the inside, on the back end, not where
24 people can see, but inside the system so that whenever
25 this case goes on appeal the future Secretary of State

1 will have the ability to do whatever the courts rule --
2 go whichever way the courts rule.

3 So we have these voters separately tracked
4 so that there is an ability to respond to the court's
5 order. That's ultimately why we even insist on that.
6 It's just all about being able to comply with the
7 court's orders and do whatever the court wishes that we
8 do here. So thank you. We now rest.

9 THE COURT: Plaintiff can have the last word
10 if he so choose.

11 MR. HO: Nothing further from us, Your
12 Honor.

13 THE COURT: All right. I'll consider this
14 under submission, issue a written decision. All right.
15 We'll be in recess until 1:30.

16 (Proceedings adjourned.)

17

18 CERTIFICATE

19 I certify that the foregoing is a correct
20 transcript from the record of proceedings in the
21 above-entitled matter.

22 DATE: March 26, 2018

23

24 /s/Kimberly R. Greiner
25 KIMBERLY R. GREINER, RMR, CRR, CRC, RDR
United States Court Reporter