

EXHIBIT A

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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

Aaron Belenky, Scott Jones,)
and Equality Kansas,)
)
Plaintiffs,) Case No. 2013CV1331
)
vs.)
)
Kris Kobach, Kansas)
Secretary of State, and)
Brad Bryant, Kansas)
Elections Director,)
In their Official)
Capacities,)
)
Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

The matter was earlier before the Court on the Plaintiffs', Aaron Belensky, Scott Jones, and Equality Kansas's Motion for a Preliminary Injunction enjoining the Kansas Secretary of State and election officials under his supervision from certain acts deemed unlawful

in regard to the 2014 pending election cycle. At that time the Plaintiffs' asserted their standing as follows:

"1. Petitioner Aaron Belenky is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. On or about August 2, 2013, Mr. Belenky applied to register to vote in Kansas by filling out the National Mail Voter Registration Form (the "Federal Form") and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote. As a Federal Form applicant, Mr. Belenky is subject to the dual registration system implemented by Respondents. As a result of Respondents' implementation of a dual voter registration system, on or about August 8, 2013, Mr. Belenky received notice that his voter registration was in 'suspense.' On or about September 27, 2013, Mr. Belenky called the Johnson County Elections Office to inquire about the status of his registration and an elections official informed him that he is not registered to vote in Kansas local or state elections. Mr. Belenky was unable to vote in the October 8, 2013, City of Overland Park election because he was deemed not registered despite his submission of the Federal Form, and he will be prohibited from voting in future elections.

2. Petitioner Scott Jones is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. In late July 2013, Mr. Jones applied to register to vote in Kansas by filling out the Federal Form and attesting under penalty of perjury to his U.S.

citizenship and eligibility to vote. Mr. Jones submitted the Federal Form in person at the Douglas County clerk's office. As a Federal Form applicant, Mr. Jones is subject to the dual registration system implemented by Respondents. As a result of Respondents' implementation of a dual registration system, in early August 2013, Mr. Jones received notice from a Douglas county clerk's office[r] that his registration was in 'suspense.' On or about September 26, 2013, Mr. Jones went to the Secretary of State's registrant search website to check his registration status. The Secretary of State's website listed him as registered to vote. On or about September 27, 2013, Mr. Jones called the Douglas County clerk's office and an elections official there informed him that he was registered to vote in federal elections and not registered to vote in state or local elections. Petitioner Jones will therefore be prohibited from voting in future state or local elections.

3. Plaintiff Equality Kansas is a statewide membership organization dedicated to ending discrimination based on sexual orientation and gender identity by lobbying state and local governments for equal rights. One of the organization's primary activities is assisting applicants with voter registration using the simple and accessible Federal Form. Central to Equality Kansas's advocacy strategy is to encourage voter registration and participation in state and local elections within communities that support equal rights for all Kansans. It is impracticable for Equality Kansas members and volunteers to carry photocopiers, or to retain copies of registrants' sensitive identity documents, when assisting applicants with their voter registration. The dual

registration system prevents Equality Kansas from effectively registering voters in state and local elections and creates confusion among Federal Form registrants who are later denied substantial portions of their voting rights."

Petition, ¶s 1, 2, 3.

They brought their action for relief at that time on the following allegations and request for relief:

"Petitioners Aaron Belenky, Scott Jones, and Equality Kansas, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction ordering Respondents to register Petitioner Belenky, Petitioner Jones, and similarly situated electors to vote in Kansas elections, and enjoining Respondents' unlawful implementation of a dual system of voter registration. In support thereof] Petitioners state and allege as follows:

1. Respondents have unlawfully implemented a dual system of voter registration, which permits some Kansas citizens to vote for federal offices such as U.S. Senator, but not for state offices such as Secretary of State.

2. Respondents have unlawfully adopted the rules and regulations governing the dual registration system without fulfilling the notice, opportunity for comment, publication and other processes required by the Rules and Regulations Filing Act (the 'Filing Act'). See K.S.A. § 77-421.

3. Where, as here, the requirements of the Filing Act are not followed to promulgate rules

or regulations, those rules and regulations are void.

4. Petitioner Belenky and Petitioner Jones have submitted complete and valid voter registration applications, but are prohibited from voting in state and local elections and from signing election-related petitions based on the unlawful rules and regulations of the dual system of registration.

5. Respondents' administration of a dual registration system therefore violates Petitioner Belenky's and Petitioner Jones's voting rights, causing irreparable harm absent an injunction.

6. The Petitioners respectfully request that this Court enjoin Respondents' unlawful dual system of registration to protect Petitioner Belenky's and Petitioner Jones's fundamental right to vote.

7. In light of the upcoming primary election on August 5, 2014, Petitioners request an expedited hearing on July 11, 2014 and an expedited briefing schedule."

Plaintiffs' Motion for a Preliminary Injunction and For an Expedited Hearing.

At the hearing held on July 11, 2014, the Court declined to grant injunctive relief, finding that, given the flux in the status of the law, principally, the decision in effect at that time emanating from

Judge Melgren of the United States District Court for the District of Kansas, 6 F.Supp.3d 1252 (3/19/14), finding that the U.S. Election Assistance Commission was obliged to incorporate Kansas's proof of citizenship requirements to its "Federal Form". Further, Judge Melgren had declined a stay (2014 WL1806703 (5/7/14)). An appeal to the U.S. Tenth Circuit Court of Appeals was then pending. At the hearing, this Court articulated that issuing a preliminary injunction, even if Plaintiffs were correct, would further discombobulate the election, that is, the cure could be worse than the disease, and declined the relief sought. By mutual agreement this case was then stayed. The Secretary had his motion for summary judgment on file at that time.

Now this matter is pending before the Court on the Defendant, Secretary of State's motion to deem his motion for summary judgment submitted and asks that his motion for summary judgment be sustained on his facts

advanced. The Secretary of State's motion for summary judgment advanced the following facts:

"1. On or about August 2, 2013, Plaintiff Aaron Belenky (hereinafter 'Belenky') applied to register to vote by submitting a National Mail Voter Registration Form to the Johnson County, Kansas, Elections Office. Petition ¶ 1.

2. Belenky chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 6b, Belenky Admission No. 8.

3. Belenky did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 1, above. Exhibit 6a, Belenky Interrog. V Resp. No. 6, 10.

4. On or about August 6, 2013, Belenky was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 1b.

5. Belenky is in possession of his birth certificate and United States Passport. Exhibit A 6a, Belenky Interrog. Resp. No. 7.

6. On or about November 25, 2013, Belenky applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3a; Exhibit 6a, Belenky Interrog. Resp. No. 13.

7. Belenky was offered the opportunity to apply to register to vote at the time he

applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 6a, Belenky Interrog. Resp. No. 14.

8. Belenky is not a member of Plaintiff Equality Kansas (hereinafter 'Equality Kansas'). Exhibit 6b, Belenky Admissions No. 10.

9. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Belenky, executed an affidavit with driver's license records for Belenky showing that Belenky provided a passport when he applied for a Kansas driver's license. Exhibit 3.

10. On July 7, 2014, Defendant Bard Bryant (hereinafter 'Bryant') sent the Earnest affidavit and accompanying documents to the Johnson County Elections Office to be evaluated as sufficient proof of citizenship for Belenky. Exhibit 1.

11. On July 7, 2014, the Johnson County Elections Office determined that Belenky had provided sufficient proof of citizenship and changed Belenky's registration status from incomplete to active. Exhibit 1.

12. Effective July 7, 2014, Belenky is registered to vote for all elections held in Kansas, including federal, state, and local elections. Exhibit 1.

13. On or about late July, 2013, Plaintiff Scott Jones hereinafter 'Jones') applied to

register to vote by submitting a National Mail Voter Registration Form to the Douglas County, Kansas Elections Office. Petition ¶2.

14. Jones chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 7b, Jones Admission No. 7.

15. Jones did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 13, above. Petition ¶2; Exhibit 7a, Jones Interrog. Resp. No. 10.

16. On or about July 23, 2013, Jones was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 2b.

17. Jones is in possession of his United States Passport. Exhibit 7a, Jones Interrog. Resp. No. 7.

18. On or about July 17, 2013, Jones applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3e; Exhibit 7a, Jones Interrog. Resp. No. 13.

19. Jones was offered the opportunity to apply to register to vote at the time he applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 7a, Jones Interrog. Resp. No. 14.

20. Jones is not a member of Equality Kansas. Exhibit 7b, Jones Admission No. 9.

21. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Jones, executed an affidavit with driver's license records for Jones showing that Jones provided a passport when he applied for a Kansas driver's license. Exhibit 3.

22. On July 7, 2014, Bryant sent the Earnest affidavit and accompanying documents to the Douglas County Clerk to be evaluated as sufficient proof of citizenship for Jones, Exhibit 1.

23. On July 8, 2014, the Douglas County Clerk determined that Jones had provided sufficient proof of citizenship and changed Jones's registration status from incomplete to active. Exhibit 1.

24. Effective July 8, 2014, Jones is registered to vote for all elections held in Kansas, including federal, state, and local elections, Exhibit 1.

25. Equality Kansas's mission is to end discrimination based on sexual orientation and gender identity or expression, and to ensure the dignity, safety, and legal equality of all Kansans."

THE DEFENDANT SECRETARY'S MOTION TO DEEM HIS MOTION FOR SUMMARY JUDGMENT SUBMITTED:

The Plaintiffs unquestionably did not respond to the Defendant's Motion for Summary Judgment in a manner that complied with Ks. S.Ct. Rule 141. Nevertheless,

the Plaintiffs' response to the Defendant's Motion for Summary Judgment clearly delineates what facts are contested. Fact #25 goes to the question of the standing of the named Plaintiff - Equality Kansas - to maintain suit. It is not disputed that the individually named Plaintiffs have each come into compliance with Kansas registration requirements, albeit indirectly (Defendant's Facts 6-24), which is clearly admitted and fundamentally makes Defendant's complaint about Plaintiff's Rule 141 non-compliance somewhat redundant. Further, the Plaintiffs' response does not contest that the individually named Plaintiffs are not members of the Equality Kansas organization.

Though not in a properly numbered format, Plaintiff Equality Kansas's responses to Defendant's Fact No. 25, the only noted contested fact, clearly is set forth in its Response to the Summary Judgment Motion both by stating the basis for contesting the fact and citation to the record supporting that contest. Accordingly, the Court finds that no reason exists why the

Secretary's motion for summary judgment, as far as it goes, should not be considered. The Court's duty is to identify what is at issue and what is not, regardless of the outcome of the motion. K.S.A. 60-256(d). The principal issue appears, at this juncture of the case, to be the standing of each of the Plaintiffs to bring or maintain this suit.

THE KANSAS SECRETARY OF STATE'S ACTIONS PROMPTING THIS SUIT:

The question of standing cannot really be considered without reference to Secretary Kobach's actions or inactions taken in regard to voting and voting registration procedures. Inquiry into the Secretary of State's registration practices is also necessary, notwithstanding what may seem to be the fact that the individually named Plaintiffs would facially lack standing because they are now fully eligibly registered in the eyes of the Secretary's view of the Kansas specific legal requirements. Nevertheless, it was the Secretary's initiatives which caused them to be acceptably registered by Kansas state standards and not

by their choice (See Defendant's Facts at 2 and 7, 14 and 19) but rather by the consequence of the requirements for obtaining a Kansas driver's license. Thus, Defendant asserts "Plaintiff's Belensky and Jones inflicted the purported harm upon themselves" (Defendant's Brief, pps. 6-9). If so, they did so only because they each chose one of two methods to register as provided by Kansas statute (K.S.A. 44-2309(a)), most likely not with the thought they would be "harming" themselves if they did so. It is the Secretary that perceived the "harm" and it was his unsolicited outreach that in his view "rescued" them. Whether he was acting as a "brother's keeper" or as "big brother" in doing so, he now claims their standing in this case has now been wholly undermined.

The Court finds that, had Belenky and Jones been registered in Kansas by their choice of doing so - the National Voter Registration procedure, *i.e.*, the "Federal Form", and not otherwise except by the assistance of the Kansas Secretary of State, Kris

Kobach - the two plaintiffs would have, by way of the impact of the directives from the Secretary to local election officials, been treated differently from other Kansas voter registrants that did not use the Federal Form.

By directive of the Secretary of State - had they not been "rescued" - their respective ballots, if cast, would have been automatically challenged (K.S.A. 25-409; K.S.A. 25-414) and thus characterized and marked as "provisional". Then, as a result of such declared provisional ballot status, and further per the Secretary's directives, their ballots were to have been edited by local election officials, which would have then recorded only their votes, if any, for Federal candidates, and would have disregarded their votes, if any, for state candidates or local candidates if present on such ballot. Alternatively, were such directives to have been disregarded by local election officials, then pursuant to an existing Kansas administrative regulation promulgated by the Secretary

of State in 2013, the Petitioners' ballots would have still been declared provisional, but no votes - federal, state, or local - would have been counted. See K.A.R. 7-23-14(b)(3). This latter regulation comports with Kansas statute. K.S.A. 25-414. Further, had a law now effective July 1, 2015, been then in force, and had either voted for a state or local office candidate, the Secretary of State would arguably be in the position to take such information and prosecute them. L. 2015, ch. 87, § 2. Further, certain election crimes were created (*Id.* § 1) or broadened, by example, the following:

"Sec. 5. K.S.A. 25-2416 is hereby amended to read as follows: 25-2416. (a) Voting without being qualified is knowingly ~~and willfully~~: ~~(a)~~ voting or attempting to vote ~~at~~ without being qualified:

(1) *In any election district when not a lawfully registered voter in such election district; or*

(2) *at any election by a person who is not a citizen of the United States or who does not otherwise meet the qualifications of an elector.*

~~(b) Voting or offering to vote more than once at the same election.~~

~~(c) Indueing or aiding any person to vote more than once at the same election.~~

(b) Voting without being qualified or attempting to vote without being qualified is a ~~class A misdemeanor~~ severity level 7, nonperson felony.

(c) *The provisions of K.S.A. 2014 Supp. 21-5301(c), and amendments thereto, shall not apply to a violation of attempting to vote without being qualified pursuant to this section.* (Emphasis added by underlining).

Id. § 5.

The situation, apparently to which the Secretary of State is attempting to respond, arises from two circumstances. First, in the Kansas legislative session of 2010, the Kansas legislature enacted what was denominated as the "Secure and Safe Elections Act" (L. 2010, ch. 56). It became effective January 1, 2012, except for a section that required proof of United States citizenship as a second step in the registration application process, which proof was required to be produced prior to being entered into the registration books as a duly registered Kansas voter

(*Id.*, § 5(b); K.S.A. Supp. 25-2309(1)). This law described the documentary proof necessary and the methods for any reconciliation. This latter section of the statute only applied to new registrants after January 1, 2013 (*Id.* § (u)). It excluded from its proof of citizenship requirement current registrants as of January 1, 2013 (*Id.* § (h)), including current registrants who merely moved within the State or had modified his or her registration for any other reason (*Id.*, § (p)), hence "grandfathering in" this character of registered voters.

This statute, as amended, however, did not change or alter the following pre-existing statutory text, which reads as follows:

"(a) Any person may apply in person, by mail, through a voter registration agency, or by other delivery to a county election officer to be registered. Such application shall be made on: (1) A form approved by the secretary of state, which shall be provided by a county election officer or chief state election official upon request in person, by telephone or in writing; or (2) the national mail voter registration form issued pursuant to federal law. Such application shall be signed by the applicant under penalty of perjury and shall

contain the original signature of the applicant or the computerized, electronic or digitized transmitted signature of the applicant. A signature may be made by mark, initials, typewriter, print, stamp, symbol or any other manner if by placing the signature on the document the person intends the signature to be binding. A signature may be made by another person at the voter's direction if the signature reflects such voter's intention."

K.S.A. 25-2309(a).

Also, certain Kansans in the military, merchant marine, or residing out of country and their family members, may register by another federal form.

("FPCA": 52 U.S.C. 20301 et seq.; K.S.A. 25-1214(b); K.S.A. 25-1215).

As noted earlier, the Plaintiffs Belenky and Jones registered by means of "(2)" above, the national mail voter registration form, aka the "Federal Form", which is governed, as was noted, by 42 U.S.C. 1973 gg-4, since transferred to 52 U.S.C.A. § 20505. On June 17, 2013, the United States Supreme Court decided the case of *Arizona v. Inter Tribal Council of Arizona, Inc.*, _____ U.S. _____, 186 L.Ed.2d 239, 133 S.Ct. 2247 (2013). Justice Scalia framed the case as follows:

"The National Voter Registration Act requires States to 'accept and use' a uniform federal form to register voters for federal elections. The contents of that form (colloquially known as the Federal Form) are prescribed by a federal agency, the Election Assistance Commission. The Federal Form developed by the EAC does not require documentary evidence of citizenship; rather, it requires only that an applicant aver, under penalty of perjury, that he is a citizen. Arizona law requires voter-registration officials to 'reject' any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship. The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States 'accept and use' the Federal Form."

133 S.Ct. at p. 2251.

That Court held that the Arizona statutory requirement *vis-à-vis* the "Federal Form" requiring additional physical documentation as proof of citizenship was "inconsistent with" that federal law, saying

"We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form. *Siebold, supra*, at 397. If this reading prevails, the Elections Clause requires that Arizona's rule give way.

We note, however, that while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, *it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'*" (Emphasis added)

133 S.Ct. at p. 2257.

The Court, though denying the current efficacy of Arizona's proof of citizenship requirement *vis-a-vis* the "Federal Form", did opine possible alternative legal routes for Arizona to obtain approval for its registration procedures either under the Federal Administrative Procedure Act by resubmission of its previously denied request to the Federal Election Assistance Commission or, perhaps, an independent suit.

133 S.Ct. at 2259-2260. The Court concluded its majority opinion by finding:

"We hold that 42 U.S.C. § 1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial

review of the EAC's decision under the Administrative Procedure Act."

133 S.Ct. at p. 2260.

As set forth earlier, the Kansas Secretary of State, and Arizona officials, pursued one of the opined alternative remedies noted. While sustained, as noted, in his point of view by the U.S. District Court for the District of Kansas, the Secretary's position was firmly rejected on his appeal to the Tenth Circuit Court of Appeals, 772 F.3d 1183 (November 2014). He appealed the latter decision to the United States Supreme Court, which on June 29, 2015 declined review. See 2015 WL1307634. As the Tenth Circuit Court of Appeals astutely noted, through its reference to the NVRA, Congress explicitly rejected any additional proof of U.S. citizenship beyond the oath or affirmation supporting the "Federal Form" registration. 772 F.3d p. 1195 and FN7.

The Kansas Constitution in Art. 5, § 1, sets the "Qualification of Electors" as U.S. citizenship, age 18, and resident of the voting area, with special

provisions for voting for presidential electors. Art. 5, § 2 establishes disqualifications, none of which include failure to provide proof of U.S. citizenship. However, Art. 5, § 4 directs the legislature to "provide by law for proper proofs of the right of suffrage".

This case, when filed in this Court on November 21, 2013, was first removed to federal court, which found no federal issue and returned it to state court (2014 WL1374048 April 8, 2014). As just previously discussed, even if the Secretary of State had been successful in his pursuit of changes to the EAC to have it put Kansas voting requirements on the NVRA "Federal Form", it would not change the congressional intent that a "Federal Form" registrant would be entitled to vote in elections in Kansas for federal offices only upon oath or affirmation of U.S. citizenship under "Federal Form" registration. The State requirements noted would not encumber the voting rights provided by the NVRA, but only, at best, advise that, for Kansas

state or local office elections, more may be required. Otherwise, the very reason the *Elections Clause* was placed in the U.S. Constitution would be jeopardized, that is, to prevent a State from refusing or, most likely equally so, encumbering or suppressing voting access for the selection of federal office holders such that federalism would be jeopardized and undermined.

What is abundantly clear from the chain of cases emanating from Secretary Kobach's federal challenges is that, at least for federal offices, a proof of U.S. citizenship requirement falls within the *Elections Clause's* "Time, Place, and Manner" provision, hence, how the proof of qualification of U.S. citizenship for voting for federal offices is to be met is ultimately within the power of Congress and has been exercised, as noted, finding an oath or affirmation sufficient.

Given Kansas's second step of proof of citizenship for voter registration, which in fact, cannot be substantively distinguished from the statute of Arizona at issue in the *Inter Tribal Council* case, the question

is what effect can be given Kansas's proof of citizenship requirement given the right the Federal Form grants registrants to vote for federal offices. Under current Kansas law, the registration procedure established by the Secretary for registration only runs so far, like a road runs to where a bridge has washed out. Seemingly, nothing but the provision of separate ballots to vote for candidates for federal office would suffice if Federal Form registrants (K.S.A. 25-2309(a)(2)) are to be separately categorized from Kansas form registrants (K.S.A. 25-2309(a)(1)). In such case, persons registered by the "Federal Form" would be entitled to vote for federal offices, having affirmed the qualification to do so under penalty of perjury. Otherwise, if registered also, or separately - as Belenky and Jones were authenticated as eligible to do under the Kansas procedure - the voter could receive a combined ballot with both federal candidates and state and local offices, or, if relevant and as has long been authorized by the legislature, a separate

local offices ballot (K.S.A. 25-618). If a registrant chose not to, or was unable to, provide proof of U.S. citizenship under the separate Kansas registration procedure, then his Federal Form registration should, nevertheless, be available as a "backstop" in order to obtain access to a federal candidate ballot. *Inter Tribal*, 133 S.Ct. at p. 2255.

Here, in the Court's view, is where the registration system established by the Secretary meets a roadblock, as Kansas now maintains but a single combined ballot requirement for federal and state candidates for offices, *i.e.*, K.S.A. 25-610, K.S.A. 25-611, K.S.A. 25-616, and K.S.A. 25-617. The fact that a separate federal ballot is yet unavailable - the single, combined ballot requirement still prevailing - leads the Court to believe that what the Secretary of State has done - in maintaining registration lists - leads to no lawful end that the Secretary can be said to be administering. Further, and importantly, the Kansas Legislature was in session in 2014, and again in

2015, and now is gone until 2016, but for any special session. The 2014 and 2015 legislative cycles followed the *Inter Tribal Council* decision made in June, 2013. The 2015 session came after the 10th Circuit Opinion on the Secretary's suit against the EAC which culminated in November 2014. Neither session of the legislature took action, either to attempt to ratify the Secretary's action nor to provide a separate ballot for federal offices.

Even the Secretary has never moved beyond on his own *ad hoc* procedure for Federal Form registrants, except in the attempt to promulgate administrative regulations that require a suspense list for voters that have yet to provide proof of U.S. citizenship. See "Notice of Hearing on Proposed Administrative Regulations" at proposed "K.A.R. 7-23-15". As can be seen, the latter proposed regulation also adds a timeline on registration applicants for production of proof of U.S. citizenship and cancellation of the application on failure to meet the deadline. *This*

proposed regulation could have no independent relevance to Federal Form registrants based on the cases previously discussed. Notwithstanding, the inapplicability of this proposed regulation to, at least, Federal Form registrants, the Secretary's procedures to give limited ballot access to Federal Form registrants is still, per his instructions, to be accomplished by post-vote editing by local election officials of a Federal Form voter's executed and submitted ballot, by excising votes for state offices or local offices, if any, and counting those for federal office. See Plaintiffs' petition at Exhibit C. While this latter "fix" was done without voter notice, public notice, or comment under statutes requiring such for rules and regulations (K.S.A. 77-415 *et seq.*), and though the Secretary has been given the power to do so (K.S.A. 25-2309(s)), nevertheless, and most importantly in the Court's view, the Secretary's instructions - by reference to the resulting procedure instructed - are wholly without a basis of legislative authority and

further stand as contrary to existing state statute governing provisional ballots as well as the Secretary's own adopted regulations.

Without the availability of a separate ballot for federal offices, the only possible reason for maintaining a suspense list registration system now that includes Federal Form registrants is to enable election officers to identify "Federal Form" registrants for the purpose of a challenge to be made. However, viewing the statutes under which a challenge is made reveals no basis by statute for a challenge to be exercised against "Federal Form" registrants merely because they chose that method of the two registration methods provided by K.S.A. 25-2309(a). As the *Inter Tribal Opinion* noted, any impeachment of U.S. citizenship accepted by Congress based on registrant oath or affirmation would necessarily have to have been derived from sources extraneous to the registration application itself and cannot be compelled by State officials, 133 S.Ct. at p. 2257.

K.S.A. Supp. 25-414, which was last amended in 2004, which, of course, is before the advent of the K.S.A. Supp. 25-2309's amendment in 2010, provides:

"25-414. Duty of judge to challenge; provisional ballots, acceptance or rejection procedure. (a) It shall be the duty of each judge of election to challenge any person offering to vote, whom the judge shall know or suspect not to be qualified as an elector.

(b) A person who: (1) Has moved from an address in the registration book to another address in the same county; or (2) has not moved, but the registration list indicates otherwise, is a qualified elector, but shall be challenged by an election judge and entitled to cast only a provisional ballot pursuant to K.S.A. 25-409, and amendments thereto.

(c) Any person who votes after the polling place hours prescribed in K.S.A. 25-106, and amendments thereto, pursuant to a court or other order is entitled to cast only a provisional ballot pursuant to K.S.A. 25-409, and amendments thereto.

(d) The application shall be delivered to the election judges and attached to the provisional ballot envelope. Such application and ballot envelope containing the ballot shall be transmitted to the county election officer with election returns and supplies.

(e) Following the determination of acceptance or rejection of any provisional ballot by the county board of canvassers, the county election officer shall update the

registration record, if appropriate, for voting in future elections, and send, by nonforwardable first-class mail, to the address specified on the application, notice of disposition of the application. The registrant's name shall not be removed from the official list of eligible voters by reason of such a change of address except as provided in K.S.A. 25-2316c, and amendments thereto."

K.S.A. 25-414.

Section (a) permits a challenge to a voter whom the election official "shall know or suspect not to be qualified as an elector". Minimally, registrants who applied with the "Federal Form" application are registered *and* qualified electors at least for federal offices. However, the *statute* provides for *no partial or limited acceptance* of a voter's ballot, but rather section "(e)" specifies only either "acceptance or rejection" of the ballot that was marked "provisional" by the challenge. No other sections of K.S.A. 25-414 have relevance here.

K.S.A. Supp. 25-409, again last updated in 2004 - unlike K.S.A. Supp. 25-2309, which was updated in 2010 - provides as follows:

"25-409. Challenged voters; rejection or acceptance of vote; procedure. (a) If any person challenged pursuant to K.S.A. 25-414, and amendments thereto, shall refuse to subscribe the application for registration pursuant to K.S.A. 25-2309, and amendments thereto, the judges shall reject such person's vote.

(b) If a person is challenged pursuant to K.S.A. 25-414, and amendments thereto, such person shall be permitted to subscribe the application for registration and mark a ballot. The person shall then execute the affirmation prescribed in subsection (c) of this section before a member of the election board and the ballot shall thereupon be sealed in an envelope. The judges shall write on the envelope the word 'provisional' and a statement of the reason for the challenge, and that the ballot contained in the envelope is the same ballot which was challenged pursuant to K.S.A. 25-409 et seq., and amendments thereto. Such statement shall be attested by two of the judges. *The judges shall attach the application for registration to the envelope containing the provisional ballot. The envelope shall be numbered to correspond to the number of the provisional voter's name in the registration or poll book, and the word 'provisional' shall be written following the voter's name in the poll book.* The judges shall provide written information stating how the voter may ascertain whether the voter's provisional ballot was counted and, if such ballot was not counted, the reason therefor. Such provisional ballots, together with objected to and void ballots packaged in accordance with K.S.A. 25-3008, and amendments thereto, shall be reviewed by the county board of canvassers at the time

prescribed for canvassing votes, and such board shall determine the acceptance or rejection of the same. The county board of canvassers shall open all ballots deemed to be valid and include such ballots in the final canvass of election returns. (Emphasis added.)

(c) The voter's affirmation shall be sufficient if substantially in the following form, but the voter's affirmation shall not contain less than that prescribed in the form:

VOTER'S AFFIRMATION

STATE OF KANSAS, COUNTY OF _____, ss.

I am a registered voter in this jurisdiction and I am qualified to vote in this election. I declare under penalty of perjury that the foregoing is true and correct. This ____ day of _____ A.D. _____, Voter _____, Judge of Election"

K.S.A. Supp. 25-409.

Neither "(a)" nor "(b)" of K.S.A. 25-409 have relevance here since applications made on the "Federal Form" have already complied with the terms for its use, which Kansas is required to "accept and use". 133 S.Ct. at p. 2251. The Federal application form is specifically provided as one of two that can be used by K.S.A. 25-2309(a), as amended. There is no need for a second subscription under oath to an "application" or

otherwise. The same procedures are adopted for challenges in counties using voting machines. See K.S.A. 25-1337. The same applies to advance voting. K.S.A. 25-1136. Challenges at primary elections follow general election laws, except party affiliation may be challenged. K.S.A. 25-216.

While the *Inter Tribal Council* case completely nullified K.S.A. (2010 Supp.) 25-2309(1)'s second step additional proof of citizenship requirement for "Federal Form" registrants, and while K.S.A. 25-2309(a) provides and recognizes the "Federal Form" as an additional method of registration, the Secretary's instructions, nevertheless, decree Federal Form registrants' ballots to be provisional and conditions the counting of their ballots on his authorization to edit them. In the Court's view, the Secretary's currently existing instructions of record, as he applied here for the 2014 primary and general elections, stand as *ad hoc* and *ultra vires* (See Plaintiffs' Petition Exhibit A and Exhibit C). The

same would be true even were the substance of the instructions to be adopted as a regulation. This is particularly true in regard to Exhibit C which, because of its importance and relevance to the issue here, is reproduced in full:

**"Office of the Kansas Secretary of State
Update and Instructions Regarding
Federal-Form Voter Registration Applicants**

June 4, 2014

Previous instructions to county election officers dated and issued May 23, 2014 provided an update on *Kobach et al. vs. United States Election Assistance Commission*, which is the case filed jointly by Kansas and Arizona on August 21, 2013. As noted in the May 23 instructions, the district court decision in our favor was appealed. The Court of Appeals had indicated it would expedite its review of the case, and the Secretary of State's office hoped for a ruling before the August 5 primary. A favorable ruling issued by the Court of Appeals before August 5 would have meant there would have been no need for a bifurcated election system wherein voter registration applicants who submitted the federal form without documentary proof of U.S. citizenship would be permitted to vote in elections for Federal office only.

However, on June 3, 2014, our office received word that the Court of Appeals had scheduled

arguments for August 25, 2014, which is after the Kansas primary. We still hope for a final decision before the November general election. However, because there will be no decision before the primary, we have revised the procedure to be followed by county election officers. Please note the following instructions.

Actions by County Election Officer

1. Continue the practice of maintaining a list, outside of ELVIS, of voter registration applicants who submitted federal forms without proof of citizenship. The list should include all such applicants who submitted federal forms without proof of citizenship **between January 1, 2013 and July 15, 2014**, which is the voter registration deadline for the primary.

2. Continue to contact all incomplete-status applicants (those who used the Kansas form) at least twice to request citizenship documents. Also, if you have federal-form incomplete applicants, continue the expanded effort to contact federal-form applicants at least one additional time by phone or personal visit, if necessary, with a goal of reducing the list of federal-form applicants to zero. Note that these federal form applicants can provide proof of citizenship as late as August 4, 2014, and still complete their registration in time for the August 5, 2014, primary. At some point during the week before the primary provide your list of federal form incomplete applicants to the Secretary of State's Office.

3. Prepare to issue provisional ballots to federal-form incomplete applicants at the

primary election and count only the votes for federal offices (U.S. Senate and U.S. House of Representatives). The process will be similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. 25-002(b)(3). Use the following procedure for issuing provisional ballots to federal-form incomplete applicants:

a. Maintain a list of federal-form incomplete applicants in the county election office.

b. Do not print these applicants' names on the poll book. *They are not registered voters under Kansas law, even though they will be permitted to vote for federal offices during the August 5, 2014, primary.*

c. Poll workers will issue provisional ballots to these voters the same as any other voters whose names do not appear in the poll book.

d. When provisional ballots are returned to the election office after the close of polls on primary election day, use the list of federal-form incomplete applicants to separate their provisional ballots into a separate stack,

e. Unless these provisional ballots are determined to be invalid for another reason, make a recommendation to the county board of canvassers to count only the votes for federal offices.

f. Manually count the votes and add them to the other vote totals.

If you have any questions about this procedure, do not hesitate to contact Brad Bryant or Bryan Casey at the Secretary of State's Office."

Plaintiffs' *Petition*, Exhibit C. (Emphasis added).

The Kansas Constitution at Article 4, § 1 states as follows:

"§ 1: **Mode of voting.** All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide."

No question exists but that this provision provides for the secrecy of a voter's ballot, whether the vote is cast in person or by machine. *Sawyer v. Chapman*, 240 Kan. 409, 412-413 (1986). Further, the Kansas Supreme Court has held that any compromise of this right must be measured against "a compelling state interest". *Sawyer* at pps. 414-415. See also *State ex rel, v. Beggs*, 126 Kan. 811 (1928); *Taylor v. Bleakley*, 55 Kan. 1 (1895). It is only by proper law that ballot secrecy may, for compelling reasons, be conditioned, e.g., *Lambeth v. Levens*, 237 Kan. 614 (1985); *Hansen v. Lindley*, 152 Kan. 63 (1940); *Burke v. State Board of*

Canvassers, 152 Kan. 826 (1940); *Lemons v. Waller*, 144 Kan. 813 (1936); *Hooper v. McNaughton*, 113 Kan. 405 (1923).

Here the Secretary of State seeks to invade the secrecy of the balloting process for "Federal Form" registrants otherwise protected by the Kansas Constitution's Article 4 § 1. He has declared all such ballots to be "provisional", hence, effectively challenging such "Federal Form" registrants who present themselves to vote, but he does so on grounds neither *specified by statute* as a basis for challenge nor based on independent knowledge held by the Secretary or local election officials of such voters' non-qualification to vote for federal offices, but rather did so because these voters did not provide proof of U.S. citizenship that would qualify them, in his view, to then vote for state or local offices as well. Kansas election laws fundamentally rest challenges and the invasion of ballot secrecy on some voter qualification error affecting his or her eligibility to vote. Internal,

post-vote, voting errors reflected on a ballot are anonymous, unless illegal, and then challenged through proper proceedings. However, Federal Form registrants stand, by the noted ruling of the United States Supreme Court, as fully qualified to vote for federal offices.

As noted, Kansas does not provide for separate ballots for federal and state candidates, but rather maintains a unitary one. Thus, if any error exists, it is a post-vote error, not a registration error, and the error would rest with the State and its election officials, not the voter, *in failing to provide a suitable ballot* - one conforming to the Kansas Constitution, that is, a ballot that secures, except in the event of a voter error *that the legislature has accepted and authorized as grounds to invade the secrecy of the ballot itself*. That authorization is not present here and its absence, as measured both against the Kansas constitutional commitment to ballot secrecy and the failure to authorize a separate ballot for federal office candidates, reflects either a grand

error by the legislature, which would not be presumed, or really a judgment made by the legislature to fully "accept and use" the Federal Form premised as it is on oath or affirmation in *all* elections.

Both by Kansas law (K.S.A. 25-2309(a)) and by federal law, as construed by the *Inter Tribal Council* case, registration for federal voting purposes is complete when the "Federal Form" is submitted. Yet, here, the Secretary of State has directed such "Federal Form" registrants not be entered in the registration books, but, rather, placed on a suspense list, and, thereafter, if they cast a ballot, the Secretary of State claims the right to seize the voter's executed ballot, have it examined, and count the votes, if any, that may have been cast for federal offices and not counting the votes for state or local offices. Now, effective July 1, 2015, the Secretary may assume the authority to bring the force of prosecution if one such "Federal Form" voter subscribes to the oath required before voting such a combined "provisional" ballot

(K.S.A. 25-409) or, otherwise, strayed into the list of State or local candidates and voted purposely or in error or misunderstanding for one or more of them. He does this not because the voter has not sworn his eligibility to vote as a U.S. citizen and Kansan, but rather because the voter has not first proved U.S. citizenship by documents extrinsic to the accepted Federal Form, notwithstanding the fact that the "Federal Form" is a Kansas statutorily authorized, federally prescribed, method to register Kansas voters, which the State has agreed to "accept and use". Nevertheless, State election officials hand out a combined Federal, State, and local ballot instead of one constitutionally acceptable for its purpose and decrees for its invasion in violation of Art. 4, § 1 of the Kansas Constitution.

None of the *ad hoc* procedures employed by the Secretary of State authorize or justify such treatment of a Federal Form registrant. Nor, just because Kansas has declined to provide a separate ballot containing

federal office candidates only, should a voter registered by the "Federal Form" be subjected to the threat of prosecution based on a ballot procedure not authorized by the legislature in order to exercise his or her most fundamental franchise. The ballot itself is a document that he or she loses control of - and the ability to prevent third-party alteration of - the moment it is submitted. Without some clear legislative direction compatible with the Kansas Constitution such a voter should not have his or her ballot seized or be subjected to the loss of anonymity by his or her choice of an otherwise authorized method of registration and forced to waive ballot secrecy simply by virtue of the State's failure to provide a constitutionally conforming ballot. Neither should such Federal Form registrants, so long as they are entitled to register by that means, be given a "scarlet letter" and placed on a suspense list in lieu of being placed in the registration book based on some anticipation by the Secretary that the present law giving finality to that

voter's act of "Federal Form" registration may, in the future, be changed by the Kansas legislature or Congress. K.S.A. (2010 Supp.) 25-2309(a) explicitly accepts the Federal Form as a means of registering in Kansas. The *Inter Tribal* case made null and void Kansas's K.S.A. 25-2309(1)'s second step-proof of citizenship requirement requiring extrinsic documentation for Federal Form registrants. K.S.A. 25-2302 declares such act of registration as required by the act "shall entitle such voters to vote" and "shall prima facie evidence of the right of the voters to vote in any election held in the voting district where such voter resides". Thus, under Kansas law, Plaintiffs and the constituents of Equality of Kansas who have used, or will use, the Federal Form stand - and have stood since the Federal Form application was submitted - as fully registered to vote. In fact, the passing of two legislative sessions without alteration of existing law and the respective legislatures' omission to authorize

a separate ballot for federal offices can be seen to support that intent for Kansas's election laws.

Even the fact that a separate ballot for county and township officers (K.S.A. 25-618), certain ballot questions (K.S.A. 25-620; K.S.A. 25-621), and municipal elections (K.S.A. 25-2101 et seq.) can be, or may be, available for an election would not justify the dichotomy in registration practices. Absent some requirement to maintain separate registration books, which the law would require be promulgated first by rule or regulation, no basis for a distinction stands as authorized. See K.S.A. 25-2304; K.S.A. 25-2305. The Rules and Regulations Filing Act - K.S.A. 77-415 et seq. - procedures must be followed in order to do so, if it is to be done at all.

The bottom line is that in the absence of legislation providing a separate ballot for federal offices or the legislature's finding of a compelling State reason for not doing so, "Federal Form" registrants stand as fully qualified electors even when

only a combined ballot is provided to that voter. Even in the case where a separate local ballot is made available, "Federal Form" registrants stand as qualified electors until such time as a rule and regulation authorized by K.S.A. 25-2304 and K.S.A. 25-2305 has been adopted in accordance with the Rules and Regulations Filing Act that would permit that voter's registration to be entered into a separate registration book that would reflect limited voting rights only. The legal rule is that, if there be ambiguity in an election law, the law's construction should be in favor of the right of suffrage. *Burke v. State Board of Canvassers*, 152 Kan. 826, 836, (1940).

The Kansas guarantee of ballot secrecy requires both legal authority, specificity, and compelling state interest to avoid its tenets. It can hardly be said that *ad hoc* action taken by an executive branch officer - without authority but of his own creation - to invade the ballot secrecy of some voters on the surmise that they lied *under oath* about their qualifications to

register and vote provides a compelling basis to violate Art. 4, § 1 of the Kansas Constitution.

Except as noted, such voters registered by way of the "Federal Form" and authorized to do so by K.S.A. 25-2309(a)(2) have the equal right with other Kansas voter registrants to a secret ballot until the Kansas legislature - measuring a compelling state interest - decides otherwise or provides a separate federal ballot. This case, in part, attacked the Kansas Secretary of State's failure to implement regulations to cover matters that are clearly posited by the Secretary's directives as legal interpretations intended by him to be followed. *American Trust Administrators, Inc. v. Sebelius*, 273 Kan. 694 (2002). The Secretary does have authority to issue instructions to local election officials. (K.S.A. 25-124). The Secretary of State is the "chief state election official". K.S.A. 25-2504. However, particularly, in the area of voter registration, his authority is to be exercised by rules and regulations. See K.S.A. 25-

2304; K.S.A. 25-2305. However, in legal fact, the Secretary is not instructing on, nor even interpreting, any *applicable* Kansas statute, but rather he is proclaiming now as law that which does not exist and, in fact, is contrary to existing state law and federal law. As such, he has no authoritative basis upon which to instruct nor, with limited exception, too promulgate a rule or regulation. *Compare, State, ex rel. Stephan v. Finney*, 251 Kan. 559, 578, 583 (1992). That the Secretary may have harbored concerns over this may well explain his vigorous pursuit of federal litigation.

EQUALITY KANSAS' S STANDING:

Equality Kansas consists of adult Kansans with the ability to vote and with a mission to aid in voter registration through a federal and Kansas statutorily authorized method of registration using the United States mail system. This method best fits its capabilities, given its lack of ready access to potential voters' personal documents, but, otherwise, fulfills the purposes of its mission in securing voting

privileges for its members and like-minded fellow Kansans. It asserts standing at this point to raise issues that relate to determining for itself how best it may secure its organizational purposes.

It asserts its members' interests are not uniformly shared with all citizens and it wishes to advance the law in many areas where others may not share its view through the ballot box. This attribute of minority status or thinking gives Equality Kansas a narrow, but identifiable, focus, particularly, if the existing laws governing equality for which they seek alteration or the absence of such laws can be seen as representing the majority's view. Hence, the association urges that by the particular attributes of its membership it has an interest apart from other citizens and that Secretary Kobach's actions have affected, *i.e.*, injured, it and its members. Defendant's Exh. 20: Witt Affidavit, Exh. 9.

The prerequisites for a finding of associational standing have been consistently declared as follows:

“. . . when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted or the relief requested require participation of individual members”.

NEA-Coffeyville v. U.S.D. No. 445, 268 Kan. 384, 387 (2000). See also, *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

The Plaintiffs' Petition here carried three Plaintiffs: two individuals and Equality Kansas. Now, and admittedly at the time of the preliminary injunction hearing in July 2014, the individually named Plaintiffs had, and have, unquestionably been brought into what the Kansas Secretary of State believes is a voting safe harbor and each now possess the ability to vote in all Kansas elections. In this, the Court concurs. Further, these individuals had, and have, no membership in Equality Kansas.

These two individually named Plaintiffs at one time in the past bore a "scarlet letter" affixed by the Secretary and by his actions were ineligible for the municipal elections occurring in the spring of 2014.

They, at the filing of this case, clearly had standing. However, through the Secretary's act of overriding *their choice* of how, when, and upon what basis they wished to be registered to vote, he posits they now possess no basis for relief that be accorded to them as this action now stands. These individual Plaintiffs' standing will be discussed in a separate section subsequent.

Equality Kansas itself has never identified any of its members whose alleged voting rights have been impaired and no individuals, like Belenky and Jones, have subsequently sought intervention. Equality Kansas's claim now stands alone as purely associational and with no members identified as being personally impacted by the Secretary's actions other than through the impact claimed to accomplishing the association's purposes. Associational standing to sue is dependent on its members standing to sue. *Gannon v. State*, 298 Kan. 1107, 1127 (2014) *citing NEA-Coffeyville v. U.S.D. No. 445, supra*. The "cognizable injury" claims must

affect a member in a "personal and individual way".
Gannon at p. 1123. If not, though a legal dispute may exist, no actual litigable controversy exists. *Boeing Airplane Co. v. Board of County Com'rs of Sedgwick County, et al*, 164 Kan. 149 (1947); *Garden City News v. Hurst*, 129 Kan. 365 (1929); and *Williams v. Flood*, 124 Kan. 728 (1928).

Here, in reality, Plaintiff Equality Kansas can only satisfy one prong of the basis for standing, that is, that given the Kansas statutes and Secretary Kobach's action, its use of one of the national voter registration act methods - registration by mail based on oath of affirmation only - which though sanctioned as a method of registration in Kansas by K.S.A. 25-2309(a)(2), is now less efficacious than it was prior to January 1, 2013. Unquestionably, this lack of efficaciousness to the NVRA mail registration method is germane to its purposes and has impacted one road to their accomplishment. Nevertheless, the relief asked from this Court by Equality Kansas would principally

inure to others who are either registered now via the "Federal Form" or who might so register by that method in the future. These registrants, without Court enforcement of their rights and privileges, might otherwise be subjected to either a lack of ballot access to which they were otherwise entitled or to ballot privacy violations.

Here, however, there are no members of Equality Kansas who can identify as having such disabilities nor does such a disability adhere to a member merely from membership in Equality Kansas. Effectively then, Equality Kansas is fundamentally asserting the Kansas constitutional rights of third parties to register to vote, which rights are individual to those third parties. This it cannot do. *Warth v. Seldin*, 422 U.S. at 511. Hence, its standing is eroded from a lack of showing its members could sue and thus, accordingly, any relief, if given, would fall to others. Basically, as it stands, Equality Kansas can only show, as could only each of its members, that by virtue of the

Secretary's actions someone it aided to register, or someone that one of its members aided to register, may be treated wrongfully by the Secretary. This is not a "cognizable injury" to Equality Kansas, one that affects a member in "a personal or individual way", which would give either Equality Kansas or any of its members, merely by their membership, an independent standing to sue. While Equality Kansas may, perhaps, gain standing, given the Secretary's ongoing activities, by way of the Kansas Judicial Review Act (K.S.A. 77-611), it will be through another, not this, case.

THE STANDING OF PLAINTIFFS BELENKY AND JONES:

It is claimed Plaintiffs Belenky and Jones no longer have a stake in these proceedings and their claims are moot. This position of the Secretary is based on his "rescue" of them from what he claims was their error of choice of registration method, hence, he proclaims they have fully secured their right to vote in all elections and, hence, free, it would be argued,

from any those limitations or disabilities the Court has discussed previously. While it is true that the Secretary has accepted these two Plaintiffs as fully qualified Kansas residents and U.S. citizens and that they presently stand before the Court without any registration limitations to the exercise of their respective voting franchises, it is not quite true that they retain no legally meaningful stake in this case for the Court to adjudicate.

Clearly, Belenky and Jones were, and still are, presenting a test case to the Court dealing with the reach of their respective entitlements to vote by registering pursuant to K.S.A. 25-2309(a)(2), which authorizes their respective registrations by way of the "accept and use" mandate underlying the National Voters Registration Act, the so-called "Federal Form" means of registration. Test cases are neither forbidden nor frowned upon unless they tend to lack a true controversy, such that the case and the anticipated result is manipulated rather than truly adversely

presented for adjudication as a true case and controversy. *The State v. Dolley*, 82 Kan. 533, 536-537 (1910). Here, clearly, Kansas Equality was, and still is, sponsoring this test on these two Plaintiffs' behalf and unquestionably the issues in this case have been, and are, truly adversarial. Further, the legal fact, now determined, that Equality Kansas itself has no standing, or the fact Belenky and Jones are not members of Equality Kansas, seems of no consequence to the determination of their respective individual standings. The same vigorous counsel represented all three named plaintiffs and continues to do so. Neither Mr. Belenky nor Mr. Jones has indicated a desire to withdraw their dispute, notwithstanding their newly, yet involuntarily, acquired status as full and unencumbered voters in the eyes of the Secretary. However, to assert these two individual Plaintiffs now lack standing misses the premise of their suit and the right they claimed and wished to have adjudicated,

i.e., the reach of their voter entitlement in Kansas using Federal Form registration.

Defendants are solely looking at the equitable claim for relief articulated in their pleadings and overlooks the basis of their claim, which rests in a declaratory judgment. A declaratory judgment action can be maintained even if no relief is sought or to be accorded. K.S.A. 60-1701; K.S.A. 60-1702. The Defendants seem to have confused a remedy with a cause of action. The difference between the two is important.

"The phrase 'cause of action' has often been defined. It cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused. Bouvier defines it as a right to bring an action. . . . 'Cause of action is the right to prosecute an action with effect.' In . . . [it is] defined as follows:

'It may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action.'

Pomeroy in his Code Remedies, § 453, uses the following language:

'Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs.'"

Bruner v. Martin, 76 Kan. 862, 865-866 (1907).

As stated in *Foster v. Humburg*, 180 Kan. 64, 67-68 (1956):

"While allegations of damages are essential in a petition, they do not constitute the 'cause of action'. The 'cause of action' is the wrong done, not the measure of compensation for it, or the character of relief sought. A 'cause of action' arises from a manifestation of a right or violation of an obligation or duty. . . . Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach or wrong. The 'right of action' is merely the right to pursue a remedy, and the 'cause of

action' is the concurrence of the facts giving rise to an enforceable claim." (Citations omitted)

That Court went on to state:

"A mere failure of a petition to allege facts showing the correct measure of damages does not render the petition bad as against a demurrer. If the petition discloses a cause of action for recovery of damages, it does not fail to state a cause of action simply because the plaintiff attempted to apply an improper rule for the measure of damages sustained. It is the duty of the court on the trial of the action to apply the correct rule, whatever that rule may be under the evidence as disclosed in the case."

Id. at pps. 68-69.

Further it stated:

"It is a well-established rule in this state that where the original petition alleges a cause of action but does so imperfectly and with insufficient detail, and the additional allegations of an amended petition are only an enlargement and amplification of the averments of the original by setting out more definitely that which was previously imperfectly pleaded and do not set up a new cause of action, . . ."

Id. at p. 69.

The principal determinant to assess the propriety of proceeding upon a declaratory judgment is the existence of a genuine controversy, such that the

result, unlike a case where the controversy is feigned in an attempt to gain a desired result, is one truly adversarially arrived at and in which each party had, and has, a genuine stake in the outcome. An earlier Kansas case provides an extended discussion and exemplars for the use of this remedy. *The State, et al., v. Grove*, 109 Kan. 619 (1921). This latter case has also been one noted in a well written discussion on an issue involving the separation of powers. *State, ex rel., Morrison v. Sebelius*, 285 Kan. 875 (2008). The latter case's relevance here is that declaratory opinions issued without the benefit of a current controversy in matters of government intrude into the powers of other branches of government, which would then tend to pre-empt these other branches right of first input on the issues raised. *Id.* at p. 885, 899.

This latter concern does not attend this case because it involves the question whether an executive branch official has overrun or misinterpreted the authority given by the legislature. Both of the other

two branches of government have accordingly had their input. Further, the case is being defended ostensibly with the apparent sanction of the Kansas Attorney General. The case does not directly involve the public as whole, but only a class of citizens, of which Belenky and Jones are but two, who believed current Kansas law provided them with the right to secure full voting privileges by way of the National Voters Registration Act, but found the Kansas Secretary of State was treating them as he did other applicants not using the Federal Form and placing them on an off-the-books "suspense list" if no proof of citizenship had been provided. At the Secretary's direction these registrants were also sent letters making demands of them for proof of citizenship, notwithstanding registrants, by way of the Federal Form, had no such obligations, as declared in the *Inter Tribal Council* case, 133 S.Ct. 2247 decided in *June 2013*. Had their Federal Form registration status persisted into the present, but for their "rescue" by the Secretary after

this suit was filed, either their attestation as to their voting qualifications or a balloting error could arguably present potential opportunity for their prosecution by the Secretary. L. 2015, ch. 87.

Here, one Plaintiff, Mr. Belenky, applied for registration on August 2, 2013, by way of K.S.A. 25-2309(a)(2) but was told his registration was incomplete, ergo, not accepted without proof of citizenship (Plaintiffs' Exhibit 7: Belenky's Answers to Defendant's Interrogatories and Request for Admissions at Exhibits A and B; Defendants' Fact No. 4). Mr. Belenky claims his name should have been added on or about August 6, 2013 to the registration book as the Kansas statute requires. See K.S.A. 25-2302. Instead, he was placed on an out of channel, *ad hoc*, "suspense list" and his formal registration was detained on that list *until July 7, 2014*, when the Secretary of State contacted the Kansas Department of Revenue Motor Vehicle Division for Mr. Belenky's licensing information. That information indicated he

had provided proof of citizenship to obtain his driver's license on November 25, 2013, but had declined voter registration through the DMV. (The latter is also a method of registration under the NVRA. See, 52 U.S.C. 20504). The Secretary of State then secured local officials to add Mr. Belenky into the registration book, hence, relieving him from his detention on the "suspense list".

Similarly, Plaintiff Jones registered by way of the NVRA's Federal Form in July, 2013, and, likewise, was sent a letter on or about July 23, 2013 conditioning registration on his supplying proof of U.S. citizenship. (Plaintiff Jones Exhibit 8: answers to Defendant's interrogatories and requests for admissions at Exhibits A and B; Defendants' Fact No. 16). Similarly, his registration was also detained. On *July 2, 2014* the Secretary consulted the DMV and found Mr. Jones had provided proof of citizenship for his drivers license, which he had obtained back on *July 23, 2013*, and, also at the time, had declined the opportunity to

register to vote. Then on July 8, 2014, the Secretary, like he did for Mr. Belenky, secured local officials to release Jones from the confines of the "suspense list" and add him into the voter registration book. Although this case had been filed in this Court on November 21, 2013, then went through the Federal court system, and the Secretary of State has asserted his vigorous assistance to aid those yet to provide proof of U.S. citizenship, the Secretary did not act to discover the Plaintiffs' proof of citizenship through the DVM and act to secure Belenky's and Jones's placement in the registration book until July 2014. However, yet he now seeks to claim as his reward for his "rescue" of these two Plaintiffs from their presumed error of judgment the dismissal of this suit, which questions the detention of the Plaintiffs' registration on a "suspense list", their receipt of demands for proof of citizenship as a prerequisite to their Federal Form registration right to vote, and the consequent denial of their ability to vote in municipal and school board

elections in their respective local areas in 2014 because they had not been entered in the registration book as registered to vote.

The question is then, can this legal proceeding and its proper and intended result be denied when Plaintiffs Belenky and Jones were given unrequested assistance by their adversary - much like a competitive runner who has been involuntarily dragged across the finish line by his competitors' supporters and disqualified, hence, denied the victory he or she would have achieved if left alone? Is there no value to the loss of a right to vote in a local election when one was otherwise qualified to vote based on the fact no proper procedures to exclude them had been enacted to disqualify them from voting by the authorized registration method they had chosen? If Belenky or Jones choose to move their residence out of the State and later back again and no Kansas law or policy has changed, will they be required to run this gauntlet of registration again and/or be restricted or relegated in

their choice of how to re-register? Apparently, the answer to the latter is yes. See K.S.A. 25-2316c. Would then their ballots still be conditioned or restricted if given the right to vote and would the Kansas constitutional right to ballot secrecy be assured if they chose to re-register by way of the "Federal Form"? Certainly, if the freedom to move is a right of individual choice, the potential for repetition exists.

Further, the Defendant overlooks the fact that this case has not yet had a case management order; no deadline has been set to amend the pleadings; and no discovery deadlines have been established. See *Foster v. Humburg*, 180 Kan. at p. 69. This controversy has real facts and real issues. Plaintiffs, Belenky and Jones, clearly state a "cause of action", which equates to "an injury in fact" under the rules governing standing. The harm could be re-experienced. It is an issue of public importance that affected them and will affect others and could still, and did, cause real harm

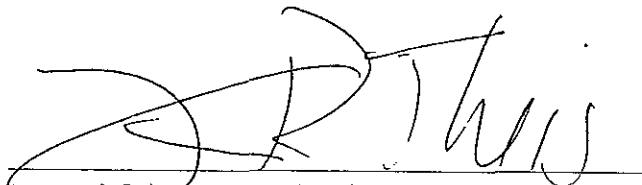
to these two Plaintiffs who, in order to test the extent of their rights to suffrage, decided to challenge the Secretary.

Surely a case should not be defeated merely by the unrequested assistance of their adversary in securing relief to the Plaintiffs through a standard or method chosen by the adversary, not them, the effect of which - they believe - secured no more than that which they were already entitled. While a case in federal court might sustain a different result, the U.S. Constitution does not have the Kansas Constitution's *Bill of Rights* § 18 - access to justice - guarantee. Further, see also *State v. Montgomery*, 295 Kan. 837, 840-841 (2012) (mootness doctrine is not a question of jurisdiction, but court policy); *Jenkins v. Schalansky*, 104 P.3d 1024, 2005WL217177, slip opinion at p. 4 (Kan. Ct. App. 2005). The Court is satisfied the case is not moot and that the individual Plaintiffs had standing, and maintain their standing, in this declaratory judgment action.

CONCLUSION

Accordingly, then, and for the reasons stated, the Court finds Defendants' Motion for Summary Judgment is submitted; that Plaintiffs' less technical compliance was adequate as a response; that Defendants' Motion for Summary Judgment in regard to the Plaintiff, Equality Kansas, should be sustained; and that the Defendants' Motion for Summary Judgment in reference to Plaintiffs Aaron Belenky and Scott Jones should be denied.

IT IS SO ORDERED this 21st day of August, 2015.



Franklin R. Theis
Judge of the District Court
Division Seven

- cc: Stephen D. Bonney
- Robert V. Eye
- Dale Ho
- Julie A. Ebenstein
- Bryan Brown
- Kris Kobach

EXHIBIT B

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

2016 JAN 15 A 11:20 *qm*

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

Aaron Belenky, Scott Jones,)
and Equality Kansas,)
)
Plaintiffs,) Case No. 2013CV1331
)
vs.)
)
Kris Kobach, Kansas)
Secretary of State, and)
Brad Bryant, Kansas)
Elections Director,)
(or his successor))
In their Official)
Capacities,)
)
Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

NATURE OF THE CASE/HISTORY:

This case is now back before the Court on a motion of the remaining Plaintiffs, Aaron Belenky and Scott Jones, for summary judgment. On August 21, 2015, the Court sustained, in part, and overruled, in part, a pending summary judgment motion filed by Kris Kobach as

Kansas Secretary of State and that office's then Election Director, Brad Bryant. The result was that the Court found that one Plaintiff, Equality Kansas, lacked standing to pursue its claims and ordered dismissal of that entity, but stayed formal entry of judgment, pending full completion of this case. On the other hand, the Court found that Defendants' challenge to the standing of the other two Plaintiffs, Aaron Belenky and Scott Jones, should be overruled. The Court found that the individual Plaintiffs had sustained actual injury by the actions of the Secretary of State in that he had denied their respective right to be registered to vote and to vote unencumbered for state and local candidates in elections forward in their respective jurisdictions, as derived solely from their National Voter Registration Form, aka "Federal Form", registration, which they completed, respectively, on August 2, 2013 for Aaron Belenky and in July 2013 for Scott Jones.

Thereafter, and after this suit was filed, and but for unsolicited steps taken by the Secretary of State in response to this suit that also secured these two Plaintiffs' registrations to vote in state and local elections in 2014 and thereafter under Kansas's Safe and Fair Elections Act (SAFE), K.S.A. 25-2309 *et seq.*, these two Plaintiffs would have been denied their respective rights to vote in those state and local elections, while simultaneously having their respective entitlements to a secret ballot in regard to any votes cast for federal offices in the 2014 elections and thereafter, as secured by Article 4, § 1 of the Kansas Constitution, encumbered. The Court found the named Defendants engineered such a result solely based on these two Plaintiffs' personal choice to register to vote by way of the National Mail Voter Registration Form, aka, the "Federal Form", which method for registration is recognized and specifically authorized and accepted in Kansas by K.S.A. 25-2309(a).

The Court found these actions taken by the Defendants to limit and compromise the voting rights of these two Plaintiffs because of their personal election to register by way of the "Federal Form" were wholly *ad hoc* and *ultra vires* and without the authority of any Kansas statute and were clearly beyond the scope of any existing regulatory authority, if any, that had been exercised to such end by the Secretary of State. The Court found that, without some authority granted to the Secretary of State by the Kansas legislature, the Secretary's action premised a recurrence of such discriminatory status to "Federal Form" registrants generally and that, as to Plaintiffs, had annulled their right to register as they had chosen and could mislead, intimidate, and have a chilling effect on the Plaintiffs' exercise of their right to vote under the authority of their registration method. Further, these uncalled for impediments to the exercise of these Plaintiffs' voting franchise continued until long after this suit was filed and, then, thereafter, and

nevertheless, would have remained to compromise their voting entitlements "but for" the gratuitous and unsolicited efforts of the Secretary of State to secure their present statuses as registered under the Kansas Safe and Secure Elections Act. Even with such undesired assistance, the Court found that the Secretary's assistance was effective only so long as these two Plaintiffs never had occasion or need to re-register because of the statutory tenets of K.S.A. 25-2316c. The Court found each of these two individual Plaintiffs had suffered an injury in fact by the failure of the Secretary to give full effect to their choice to be registered by way of the "Federal Form" and that the Secretary's actions to secure their respective registrations under the Kansas's *Safe and Secure Elections Act* added no rights to those not otherwise fully possessed by way of the "Federal Form" registrants *under existing Kansas statutes and regulatory authority.*

The premises for these prior rulings of the Court are fully set out in the Court's August 21, 2015 *Memorandum Opinion* which this Court will not repeat here, but rather will, and does here, incorporate that *Opinion* herein in full in support of, and in explanation of its ruling on the Plaintiffs' present motion for summary judgment, which the Court finds should be sustained. Thus, only to be discussed here are any new or restructured arguments raised by the Defendants which might affect the accuracy or efficacy of the opinions reached in the Court's earlier August 21st *Opinion*.

The Defendants first challenge Plaintiffs' *Motion* on the basis that there are facts that the Defendants claim are material to a final ruling which require further discovery and/or do not stand as undisputed. At a conference held on September 25, 2015, the Court directed that the Plaintiffs' summary judgment motion proceed with briefing such that if facts could not be agreed to, the motion itself would identify the

materiality or need for further discovery. Notwithstanding, the Defendants filed motions in disregard of the Court's directive seeking further discovery. The Court finds these motions without merit. While the legal conclusions derived from the facts of record stand as disputed, the material facts relating to Plaintiffs Belenky's and Jones's attempt to register by way of the "Federal Form" and the timing thereof, their eligibility to do so, and the consequences visited upon them, or threatened to be visited upon them, merely by their choice of their method of registration, are not in material dispute. Neither is it disputed that Plaintiffs' opportunity to vote, if available and desired, in their respective residence districts in 2013 and thereafter was conditioned by the communications from local election officials who were following the Secretary of State's instructions. These communications advised the Plaintiffs that their attempts at registration, respectively, were incomplete. The fact that the Secretary's subsequent

instructions evidenced the discrimination that would have been visited upon Plaintiffs had they attempted to vote, both in terms of the limitation of ballot choices and the invasion of the sanctity of their ballots otherwise assured by the Kansas Constitution's Art. 4, § 1 guarantee of anonymity to their ballots cast merely because of their choice of registration method, is clear. Further, it seems clear that Plaintiffs' access to a ballot required subscription to an oath that they were properly registered, a proposition which all communications to them by election officials disputed. Hence, a suit to test the reach of voting rights under their registration method was obviously the safest choice. But for the Secretary's belated and uninvited interventions coming long after the filing of this suit that negated their choice of method to be registered to vote, the consequences that otherwise would have occurred unquestionably stand as undisputed.

The only material fact that can be considered as new and now in existence arises from the Secretary of

State's promulgation and adoption of a new rule - K.A.R. 7-23-15 - that freed both Plaintiffs Belenky and Jones from the requirement to re-register and provide proof of citizenship should they have moved out of state and then back again and they had again elected the "Federal Form" method to be registered and again declined to provide proof of citizenship. See K.S.A. 25-2316c. The Secretary of State acted under the authority of K.S.A. 25-2309(s) and K.S.A. 25-2355 in promulgating that latter regulation, however, it is to be noted that K.S.A. 25-2309(p) speaks to a waiver of a re-presentation of citizenship documents on re-registration, but has limited the waiver only for such residential moves *within the State of Kansas*. Nevertheless, the fact that the Secretary's regulations now excuse the need for again providing proof on such a re-registration does nothing to impugn the fact that Plaintiffs' current registration status under the Kansas SAFE act was accomplished by the actions and choice of the Secretary, not at the choice of these two

Plaintiffs. Others registered by the way of the "Federal Form", but not so enthusiastically assisted by the Secretary, as were Plaintiffs, or otherwise fortunate enough to find legal assistance, would still, and regardless, remain compromised and discriminated against in their voting entitlements and the sanctity of their balloting choices would be threatened.

Accordingly, nothing advanced by the Defendants would reflect any compromise of Defendants' defenses nor is Plaintiffs' case bolstered by a lack of further discovery. As the Court noted in its August 21, 2015 *Opinion*, the disputed issue in regard to these two Plaintiffs was the reach and entitlement of their voting rights in Kansas when seeking to be registered by way of the "Federal Form". While true that the Defendants' unsolicited and gratuitous assistance to secure Plaintiffs' registration, also by way of the Kansas SAFE act requirements, has obviated a need for future equitable relief for these two remaining Plaintiffs, the Defendants cannot erase Plaintiffs'

past injury - the ignominy of having, and the now perpetual overruling of, their choice of how to lawfully be registered *under existing Kansas and federal law*. Nor can the Court ignore the inherent chilling effect of the communications from local election officials advising Plaintiffs that their registrations were incomplete, which would justify a resort to the courts for clarification, given the oath necessary to the exercise of their voting franchise due to the Secretary's categorization of their ballots as provisional. Only a maximum of 4.96% (less than 20 of 383) "Federal Form" registrants not providing proof of U.S. citizenship voted in the November 2014 general election. While the reasons for their non-voting is unknown, the very low percentage of those voting nevertheless stands out in comparison to the electorate as a whole which was 50.8% voting (887,023 of 1,744,866). See Defendants' Exhibit D: Affidavit of Bryan Caskey at ¶ 13.

Defendants next assert that the facts are insufficiently developed to sustain any claim of an overreach of existing state and federal law by the Secretary or to support any claim under the Court's analysis of Article 4, § 1 of the Kansas Constitution that resulted from the Secretary's actions in regard to "Federal Form" registrants not choosing to provide proof of United States citizenship. The difficulty with acceptance of Defendants' position here rests, in part, on the "should not", *i.e.*, admonitory, nature of the instructional prohibitions advanced by the Secretary as adequate to secure ballot secrecy to those required to vote by way of a "provisional" ballot. The Court has viewed the Secretary's exhibits that currently evidence the processes employed for provisional ballots. See Defendants' Exhibits D, E, E-1, E-2, E-3, F, F-1 and H. The Court notes that such voters are relegated to paper ballots. Oath or affirmation is necessary to obtain a ballot. See Exhibit E-3, pps. 95-112. None of these election

instructions instruct or require voter identification information to be removed prior to removing the ballot. While the Secretary has attached as an exhibit a draft regulation that imposes such a requirement, it is not now effective. See Defendants' Exhibit A at ¶ (2)(d). No provisions obviate the need for an oath or affirmation to obtain access to a ballot.

The Court has not overlooked the fact that the unauthorized disclosure of ballot information or voter identity can be a felony (K.S.A. 25-2422), but true anonymity only exists when no one knows how a vote was cast but the voter. Voting precinct personnel are often not indifferent strangers. The smaller the voting precinct, the more likely this is true. Merely having an on paper assurance that anyone having access to a voted ballot would not tell another of the vote may then represent only modest comfort. How apprehensive would Donald Trump be now if he had voted for Hillary Clinton for U.S. Senator in New York under

the same procedures that apply to provisional ballots in Kansas?

In the Court's view, such an invitation for intrusion on this protected seclusion, if it is to be had, can only be premised, if at all, on a legislative choice. The provisional ballot procedures do not reflect, therefore, true anonymity, but do reflect a *legislative choice* that some voter error or official error raise qualification questions that justify some intrusion. Here, as the Court has found, there has been no legislative choice that "Federal Form" registrants' ballots be so categorized, but, rather, it was the Secretary of State's sole initiative to so declare and invade the Kansas Constitution's Art 4, § 1 guarantee. Not material here, yet, ironically, where the legislature has so authorized, the legislature implicitly found the threat of felony prosecution for ballot disclosures to be a reasonable deterrent for the compromise of Art 4, § 1 ballot secrecy, but yet, in adding a documentary proof of citizenship requirement

to the registration process, necessarily found that the risk of a felony perjury conviction was insufficient to deter a fraudulent registration application.

Most importantly, the Defendants' position ignores the fact that *no Kansas law* sanctions a challenge to a ballot voted by a "Federal Form" registrant merely because they are a "Federal Form" registrant. "Federal Form" registration is adopted in Kansas as one method of registration (K.S.A. 25-2309(a)), a registration method for which the United State Supreme Court has held that any additional state requirements for proof of citizenship do not apply without advance approval and sanction by the Election Assistance Commission for federal elections (*Arizona v. Inter Tribal Council of Arizona, Inc.*, _____ U.S. _____, 186 L.Ed.2d 239, 133 S.Ct. 2247 (2013)).

But even beyond that, the Secretary has - by his failure to allow persons seeking to be registered by way of "Federal Form" registration to be placed in the registration books - created, *ad hoc*, an unsanctioned

method whereby those who have attempted to register by that method have not been entered in the registration books, yet, are, nevertheless, permitted a unitary ballot, but then are subjected to an immediate challenge to their vote pursuant to K.S.A. 25-409 and K.S.A. 25-414 as not qualified based on their non-registered status, the very status which the Secretary has withheld, and then, thereafter, their voted ballot is edited to count only votes for federal offices.

In Kansas, registration in one's area of residence is the foundational key to a voting entitlement for offices whose duties would affect that residence area. There is no such thing as "partial registration" to be found in the Kansas statute books. While the Secretary has authority over the maintenance and design of the registration books, including the power to issue rules and regulations in regard thereto (K.S.A. 25-2304) and, as well, to issue rules and regulations to comply with the National Voters Registration Act (K.S.A. 25-2355) and to implement the *SAFE* Act (K.S.A. 25-2309(s)), the

Secretary is not empowered to determine or declare the method of registration or create a method of "partial registration" only. In his Exhibit A, the Secretary, nevertheless, advances the draft of a regulation he has yet to adopt, which removes "Federal Form" registrants from his "suspense list" and declares them registered to vote for federal offices in federal election cycles, but still excludes the right to vote for all candidates or questions affecting those voters' respective residential areas - hence, a form of special registration, one not based only on voter residence.

In Kansas, a person is either registered to vote or he or she is not. By current Kansas Law, registration, hence, the right to vote, is not tied to the method of registration. The Secretary clings to K.S.A. 25-2309(1) as his authority which purports to require proof of citizenship as a precedent for *all* registrations to vote. However, as noted, by the *Inter Tribal* case, such state requirements are null and void for federal office elections until sanctioned by the

Election Assistance Commission, which has not been done and, in fact, has been specifically rejected. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014) *certiorari denied* (2015 WL1307634). Hence, K.S.A. 25-2309(a)'s authorization for the use and acceptance of the "Federal Form" as a valid, recognized means of registration should therefore stand as unfettered and uncompromised until the law is changed, hence, presently mandating such registrants to be entered into the registration books. The legislature has not yet changed the governing law. The Secretary of State is not a lawmaker, only an administrator of the law. As such, any challenge to a "Federal Form" registrant is *ipso facto* without legal foundation and merely a product of the Secretary's erroneous and *ultra vires* actions, whether issued through instructions or through rules and regulations.

Further complicating the Secretary's actions - beyond his flawed view of the purpose and entitlement granted by the chosen method of registration - is the

fact that the Kansas legislature has failed to authorize a separate federal office-only ballot (paper or electronic) for "Federal Form" registrants. Thus, even were, in fact, such character of separate or partial registration legislatively sanctioned, which it is not, such action - without authorizing a separate federal office-only ballot - would seemingly subject "Federal Form" registrant voters to discriminatory treatment in regard to their right to ballot secrecy secured by Article 4, § 1 of the Kansas Constitution and, hence, deny "Federal Form" voters the equal protection of Kansas law based merely on their choice of method of registration. Whether this latter could stand as a "compelling reason" need not be assessed, since no such choice has been made by the Kansas legislature. If the Secretary's flawed view of the propriety of permitting "Federal Form" registrants to vote a unitary ballot, yet then invade the ballot to edit the ballot cast, is allowed, a separate argument might be further raised that the separate treatment

ensuing defies the "accept and use" mandate to States underlying the federal law, the tenets of the *Inter Tribal* case, and the decision of the 10th Circuit in *Kobach v. U.S. Election Assistance Comm'n*.

The Secretary's directive to invade the ballots of "Federal Form" registrants is additionally flawed. To overcome this latter absence of authority - the lack of legislative authorization for a separate federal office - only ballot - the Secretary has sought the cloak of declaring these "Federal Form" voters' ballots as "provisional", notwithstanding his non-allowance of such registrants into the registration books, while yet allowing them to vote a federal office only portion of a unitary - all offices - ballot. As noted, his suggested draft regulation accepting "Federal Form" registrants as "registered" is one in name only since it still relegates their ballots to provisional status, notwithstanding.

This declaration of ballot status by the Secretary, like the premise on which it stands, lacks authority

and is flawed in its view of the legislative premise for a ballot to be authorized as "provisional".

Provisional ballots accommodate voter error or official error. To error means to make a *mistake*. Examples are voting, though properly registered, but in the wrong precinct; (K.S.A. 25-3302(a)(3)); voter error in failing to bring proper identification to the polling place (K.S.A. 25-2908(d)); or voter error based on such voter's mistaken belief that such voter was properly registered, but was actually not, or, otherwise, some *official error* in not placing such voter's name in the registration books. (K.S.A. 25-2908(e)). Here, the Secretary of State has, and is, by withholding the name and address of "Federal Form" registrants from entry into the local registration books, employed K.S.A. 25-2809(e) as the vehicle to declare "Federal Form" registrants' ballots as "provisional". However, since Plaintiffs and others using the "Federal Form" method of registration should have been entered as registered and accepted as registered, there was no error on the

part of the voter. Nor was the failure to place such voter in the registration books an official error as it was not based on a mistake, but, rather, such failure to enter such "Federal Form" registrants in the poll books was an intentional and manufactured one, hence, operating merely as a straw man as cover for the improper challenge that came next. The "suspense list", as substituted by the Secretary for proper entry into the registration books, facilitated a K.S.A. 25-2908(e) and K.S.A. 25-414(a) challenge and a resulting "provisional" ballot, hence, improperly creating a ballot that was subject to a loss of anonymity and treated differently from other registered voters, all to be accomplished through an intentional government design that was without proper legal premise. As noted, the Secretary's suggested regulation - Defendants' Exhibit A - would provide for registration, but registration in name only, not in substance. It would eliminate no existing discriminatory effect as

now occasioned by the Secretary's current and existing "instructions".

In the Court's August 21, 2015 *Opinion*, the Court noted that it had found no authority to partially count ballots for certain offices as the Secretary authorized and did for the 2014 elections by counting federal office only votes of "Federal Form" registrants. This was incorrect, as there is such authority in two instances, but both are based on voter error, not registration. K.S.A. 25-3002(b)(3) permits registered voters who vote in the wrong precinct to cast a provisional ballot and have their votes counted for all offices except those offices not otherwise within their proper voting precinct. K.S.A. 25-3002 otherwise prohibits internal ballot errors from invalidating the whole ballot, disqualifying only the vote for the office where the voter error appeared or where the voter's intention could not be determined. K.S.A. 25-3002 further identifies the rules governing the degree of acceptance or rejection of a ballot based on voter

error in voting or submitting his or her ballot. The statute applies to all ballots, not just provisional ballots, except, as noted, in K.S.A. 25-3002(b)(3). What the Secretary has done here can find no source in statute.

The heightened scrutiny given to rights under Art. 4 § 1 of the Kansas Constitution demands that laws or actions encumbering the privilege of voting be measured by a compelling reason, whether such actions are initiated by the legislative or executive branch of government. Clearly no such authority exists at all in the Kansas Secretary of State to encumber the voting process as he has done here. Simply, as the Court views it, the Defendant Secretary of State and his deputy, in their efforts to enforce their view of the law as they believe it should be, have advanced into the field of legislation because the Kansas legislature has yet to pave the way for implementation of the Secretary's views.

As all can agree, the issues raised by this case are highly important, even imperatively important. Their proper resolution affects the very democratic process of Kansas's elections. What this decision holds, and Plaintiffs clearly have standing to demand resolution, is that the Defendants simply had and have inadequate legal authority under either Kansas or Federal law to compromise or limit "Federal Form" registrants, such as the Plaintiffs, right to register and vote in Kansas elections, at least until the Kansas legislature acts, consistent with the Kansas Constitution and Federal law, to so permit. The Plaintiffs had and have standing to vindicate their choice of how to register to participate in our democracy. The Defendants' efforts to make the Plaintiffs' right of choice meaningless should be, and the Court has found is, unavailing to undermine their right to have that choice declared and vindicated. One's standing in court should not be hostage to the *ad hoc*, discretionary, transitory actions of an errant

government official, particularly in matters that touch upon the very essence of our democracy.

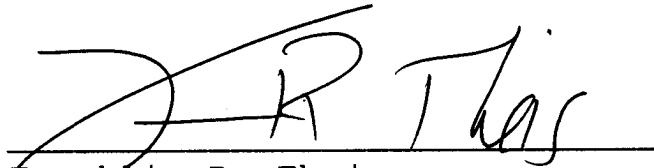
Accordingly, the Plaintiffs', Aaron Belenky's and Scott Jones's, Motion for Summary Judgment is sustained.

As indicated, at this juncture of the case no equitable relief appears appropriate for Plaintiffs, Aaron Belenky and Scott Jones, to request. Accordingly, declaratory relief is all that is accorded here as expressed in the foregoing *Memorandum Opinion*, which incorporates the Court's *Memorandum Opinion and Order* of August 21, 2015 as corrected by an *Order Nunc Pro Tunc* of this date. Unless Plaintiffs, Aaron Belenky and Scott Jones, or one of them, anticipate pursuing some further relief by way of amendment to their pleadings here, this case should now be concluded. Counsel for Plaintiffs should indicate to the Court and opposing counsel by formal communication no later than January 29, 2016, whether or not any further relief is to be sought in this case. If the

response is no, then, the Court will by separate order enter final judgment for the Plaintiffs, Aaron Belenky and Scott Jones, and against the Defendants, Kris Kobach as Kansas Secretary of State and Brad Bryant's apparent successor under new title, Bryan Caskey, as Deputy Assistant Secretary of State, Elections and Legislative Matters, in accordance with the foregoing *Memorandum Opinion*, which incorporates by reference the Court's *Memorandum Opinion* of August 21, 2015.

Correspondingly, at such time, judgment for the Defendants, and against the Plaintiff, Equality Kansas, will be entered for the reasons expressed in the Court's August 21, 2015 *Memorandum Opinion*. The Court intends to assess the Court costs of filing this case to the Defendants given the improper status accorded Plaintiffs, Aaron Belenky and Scott Jones, by the Defendants at the time this suit was filed.

IT IS SO ORDERED this 15th day of January, 2016.


Franklin R. Theis
Judge of the District Court
Division Seven

Attachment: *Order Nunc Pro Tunc*

cc: Stephen D. Bonney
Robert V. Eye
Dale Ho
Julie A. Ebenstein
Kris Kobach
Bryan Brown
Garrett R. Roe

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

Aaron Belenky, Scott Jones,)
and Equality Kansas,)

Plaintiffs,)

vs.)

Kris Kobach, Kansas)
Secretary of State, and)
Brad Bryant, Kansas)
Elections Director,)
In their Official)
Capacities,)

Defendants.)

Case No. 2013CV1331

2016 JAN 15 A 11:01

FILED BY CLERK
K.S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

ORDER NUNC PRO TUNC

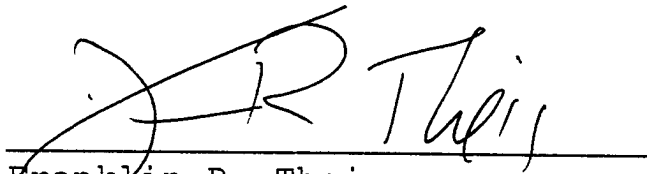
The Court's *Memorandum Opinion and Order* of August 21, 2015, is hereby corrected as follows:

On p. 1, l. 2, Belensky is corrected to Belenky.

On p. 13, l. 4, Belensky is corrected to Belenky.

On p. 18, l. 8, the reference K.S.A. 44-2309(a) is corrected to K.S.A. 25-2309(a).

IT IS SO ORDERED this 15th day of January, 2016.



Franklin R. Theis
Judge of the District Court
Division Seven

cc: Stephen D. Bonney
Robert V. Eye
Dale Ho
Julie A. Ebenstein
Kris Kobach
Bryan Brown
Garrett R. Roe

EXHIBIT C

FILED BY CLERK
KS DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

2016 JUN 14 A 10:57

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

Aaron Belenky, Scott Jones,)
and Equality Kansas,)
)
Plaintiffs,) Case No. 2013CV1331
)
vs.)
)
Kris Kobach, Kansas)
Secretary of State, and)
Bryan Caskey, Deputy)
Assistant Secretary of)
State, Elections and)
Legislative Matters,)
Kansas, In their)
Official Capacities,)
)
Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

NATURE OF THE ISSUE:

The Defendants have filed a motion pursuant to K.S.A. 60-260(b)(2) or K.S.A. 60-260(b)(6) asking the Court to vacate its prior judgment entered in this case

based on certain actions taken by the Executive Director of the federal Election Assistance Commission (EAC) as of February 1, 2016, which authorized Kansas proof of citizenship requirements to be added to the instructions for "Federal Form" registrants, which Defendants assert now moots the Court's prior judgment.

CONCLUSIONS OF LAW:

While if the action taken by the Executive Director of the EAC stands, the application of the Court's *Opinion* in regard to Federal Form registrants may have no present value. Of course, district court judgments have no binding reach beyond the case in which the particular judgment is issued. Further, determining the validity of that recent federal action is not within the jurisdictional ambit of this Court. Nevertheless, this Court's *Opinion* spoke to the facts and law pertaining to the issues as they stood at the filing of this case and to its conclusion, notwithstanding the Defendants' attempts, through their gratuitous actions, to undermine the standing of

Plaintiffs Messrs. Belenky and Jones to raise the issue of their voting entitlements as Kansas "Federal Form" registrants.

The Court notes the cited action taken by the EAC's executive director has been challenged in Court (*League of Women Voters of the United States v. Newby*, No. 16-236-RLJ, Doc. 1 (D.D.C. Feb. 12, 2016), but, notwithstanding the outcome, the fact exists that in challenging any specific governmental action change may come subsequent, or be attempted, through changes in the law under which the particular case at issue was litigated and determined, making only the principles announced, not the case's forward effect, its only useful residue. If confronting alleged present overreaching governmental conduct in Court was circumscribed because the law or regulation challenged may sometime later be changed, either temporarily or permanently, then there could never be any efficient or practical check or restraint on the abuse of power by a governmental official.

Here, the Plaintiffs pursuit of their cause prompted these Defendants to act differently than they apparently would have, but for Plaintiffs' suit, and, perhaps, spurred further action to be sought by the Defendants through the Election Assistance Commission. Plaintiffs themselves effectively concluded the case at hand when further legal relief was not sought by either of them by way of amendment to the pleadings. Nor was a motion made to expand the case by adding party plaintiffs. Simply, the fact this case presently, except, perhaps, by analogy (*See Fish v. Kris Kobach, in his official capacity as Secretary of State for the State of Kansas, et al, Memorandum Opinion and Order, No. 16-2015-JAR-JPO, May 17, 2016*), has lost, either temporarily or permanently, its legal efficacy does not affect, nor should it, the rights declared to Plaintiffs by the earlier rulings entered in the district court:

"Appellee's second contention, as to the change in the statute, requires no discussion. Without examining the provisions of the new amendment to section 19-804 it suffices to say

that whatever changes it makes they can, of course, have no effect on the present controversy. The rights of the parties were determined solely by the law governing the controversy when adjudicated."

Moore v. Smith, 160 Kan. 167, 170 (1945).

The Court finds no merit to Defendants K.S.A. 60-260 motion under any theory nor any reason, as Defendants suggest, to dismiss this case altogether simply because either the case has ended or subsequent governmental conduct has taken place and the propriety of such action is beyond the jurisdictional control of this Court. Whatever may transpire cannot cure the Defendants' errors of the past that first affected these Plaintiffs. Accordingly, Defendants' motion is denied.

IT IS SO ORDERED this 14th day of June, 2016.



Franklin R. Theis
Judge of the District Court
Division Seven

cc: Stephen D. Bonney
Robert V. Eye
Dale Ho

Julie A. Ebenstein
Kris Kobach
Bryan Brown
Garrett R. Roe

EXHIBIT D

KRIS W. KOBACH
Secretary of State

Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1594
(785) 296-4575
www.sos.ks.gov

STATE OF KANSAS

CERTIFICATE OF ADOPTION

K.A.R. 7-23-16. Processing voter registration applications and provisional ballots when an injunction is issued.

I, Kris W. Kobach, Secretary of State, hereby adopt temporary K.A.R. 7-23-16 pertaining to elections.

This temporary regulation has been approved by the Secretary of Administration as to organization, style, orthography and grammar, and by the Attorney General as to form and legality as being within the jurisdiction of the Secretary of State to adopt.

CERTIFICATION

I, Kris W. Kobach, Secretary of State, certify that I hereby adopt the above listed regulation.



In TESTIMONY WHEREOF, I
hereto set my hand and
caused to be affixed my
official seal.

Done at the City of Topeka,
this 8th day of July,
A.D. 2016.

A handwritten signature in black ink that reads "Kris W. Kobach".

KRIS W. KOBACH
Secretary of State

K.A.R. 7-23-16. Processing voter registration applications and provisional ballots when an injunction is issued. (a) If a court interpreting the national voter registration act issues an injunction requiring that any individual who submits a voter registration application at an office of the division of vehicles, and who has not had evidence of citizenship confirmed pursuant to K.S.A 25-2309(1) and amendments thereto, be permitted to vote in elections for federal offices, that individual shall be permitted to vote for federal offices only. The individual shall not be deemed registered to vote for any state or local office or on any ballot question until the individual has provided sufficient evidence of citizenship or evidence of citizenship has been obtained by the secretary of state or the relevant county election officer.

(b) Each individual specified in subsection (a) shall cast that individual's votes for federal offices using a provisional ballot that contains all of the offices applicable in the individual's voting district. The votes on the provisional ballot shall be counted for federal offices only by the relevant board of county canvassers. Votes cast for other offices or on ballot questions shall not be counted.

(c) This regulation shall be deemed null and void if a court subsequently rules that Kansas may require evidence of citizenship pursuant to K.S.A. 25-2309(1), and amendments thereto, from each voter registration applicant who applies at an office of the division of vehicles, in order for the applicant to be permitted to vote in elections for federal offices.

(Authorized by K.S.A. 2015 Supp. 25-2309, as amended by L. 2016, Ch. 82, Sec. 6, and 25-2352 and K.S.A. 25-2355; implementing K.S.A. 2015 Supp. 25-409, 25-414, 25-2309, as amended by L. 2016, Ch. 82, Sec. 6, and 25-2352; effective, T-_____, _____.)

ATTORNEY GENERAL

JUL 08 2016

APPROVED BY CP

APPROVED

JUL 08 2016

DEPT. OF ADMINISTRATION

KANSAS SECRETARY OF STATE
ECONOMIC IMPACT STATEMENT
K.A.R. 7-23-16

I. Summary of Proposed Regulations, Including purpose:

K.A.R. 7-23-16. This regulation details the procedure to follow when an individual who has applied to register to vote at a division of vehicles office, but has not yet provided proof of citizenship in accordance with K.S.A. 25-2309(l), seeks to vote. Pursuant to a recent preliminary injunction issued by the U.S. District Court for the District of Kansas, those individuals must be permitted to vote for federal offices only. This regulation serves to implement and comply with that preliminary injunction. That preliminary injunction is currently being appealed; consequently this temporary regulation becomes null and void in the event that the district court's decision is reversed. This regulation is promulgated pursuant to the authority of the secretary of state under K.S.A. 2015 Supp. 25-2352(g).

II. Federal law requirements:

The proposed regulation is required to comply with the national voter registration act, as recently interpreted by the U.S. District Court for the District of Kansas. That decision requires the State of Kansas to provide a mechanism for certain individuals, who have not yet provided proof of citizenship and who applied to register at a division of vehicles office, to vote for federal offices only. The proposed regulation does not exceed any requirements of federal law.

III. Economic Impact:

There are no significant economic impacts anticipated because of this regulation on any county election officer, state agency or the general public because the assessment of evidence of United States citizenship is required by statute, and the availability of provisional ballots at all polling places is required by statute. This regulation merely provides detail regarding the registration

of, and voting by, certain individuals who under a preliminary injunction issued by a court, have been granted the right to vote for federal offices only.

IV. Less Costly or Intrusive Methods:

The evaluation of other less costly or intrusive methods was unnecessary because it is anticipated that the regulation will have no significant economic impact while maintaining the present level of services.

EXHIBIT E

Office of the Kansas Secretary of State

**Update and Instructions Regarding
Federal-Form Voter Registration Applicants**

June 4, 2014

Previous instructions to county election officers dated and issued May 23, 2014 provided an update on *Kobach et al. vs. United States Election Assistance Commission*, which is the case filed jointly by Kansas and Arizona on August 21, 2013. As noted in the May 23 instructions, the district court decision in our favor was appealed. The Court of Appeals had indicated it would expedite its review of the case, and the Secretary of State's office hoped for a ruling before the August 5 primary. A favorable ruling issued by the Court of Appeals before August 5 would have meant there would have been no need for a bifurcated election system wherein voter registration applicants who submitted the federal form without documentary proof of U.S. citizenship would be permitted to vote in elections for Federal office only.

However, on June 3, 2014, our office received word that the Court of Appeals had scheduled arguments for August 25, 2014, which is after the Kansas primary. We still hope for a final decision before the November general election. However, because there will be no decision before the primary, we have revised the procedure to be followed by county election officers. Please note the following instructions.

Actions by County Election Officers

1. Continue the practice of maintaining a list, outside of ELVIS, of voter registration applicants who submitted federal forms without proof of citizenship. The list should include all such applicants who submitted federal forms without proof of citizenship **between January 1, 2013 and July 15, 2014**, which is the voter registration deadline for the primary.
2. Continue to contact all incomplete-status applicants (those who used the Kansas form) at least twice to request citizenship documents. Also, if you have federal-form incomplete applicants, continue the expanded effort to contact federal-form applicants at least one additional time by phone or personal visit, if necessary, with a goal of reducing the list of federal-form applicants to zero. Note that these federal form applicants can provide proof of citizenship as late as August 4, 2014, and still complete their registration in time for the August 5, 2014, primary. At some point during the week before the primary provide your list of federal form incomplete applicants to the Secretary of State's Office.



3. Prepare to issue provisional ballots to federal-form incomplete applicants at the primary election and count only the votes for federal offices (U.S. Senate and U.S. House of Representatives). The process will be similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. 25-3002(b)(3).

Use the following procedure for issuing provisional ballots to federal-form incomplete applicants:

- a. Maintain a list of federal-form incomplete applicants in the county election office.
- b. Do not print these applicants' names on the poll book. They are not registered voters under Kansas law, even though they will be permitted to vote for federal offices during the August 5, 2014, primary.
- c. Poll workers will issue provisional ballots to these voters the same as any other voters whose names do not appear in the poll book.
- d. When provisional ballots are returned to the election office after the close of polls on primary election day, use the list of federal-form incomplete applicants to separate their provisional ballots into a separate stack.
- e. Unless these provisional ballots are determined to be invalid for another reason, make a recommendation to the county board of canvassers to count only the votes for federal offices.
- f. Manually count the votes and add them to the other vote totals.

If you have any questions about this procedure, do not hesitate to contact Brad Bryant or Bryan Caskey at the Secretary of State's Office.

From: county-election-officials-bounces@list.ink.org [mailto:county-election-officials-bounces@list.ink.org] **On Behalf Of** Caskey, Bryan [KSOS]

Sent: Tuesday, June 03, 2014 4:39 PM

To: County Election Office List-Serve (county-election-officials@ink.org)

Subject: [County-election-officials] Federal Form Instructions

Dear County Election Officers:

Attached is a document containing an update and new instructions regarding federal-form voter registration applicants. Every county should review this update. Contact us if you have any questions.

Have a great afternoon.

BRYAN A. CASKEY | Assistant State Elections Director

Kansas Secretary of State | 785-296-3488 P | 785-291-3051 F | www.sos.ks.gov

Memorial Hall, 1st Floor | 120 S.W. 10th Avenue | Topeka, KS 66612-1594

EXHIBIT F

OFFICE OF THE KANSAS SECRETARY OF STATE

INSTRUCTIONS CONCERNING DIVISION OF MOTOR VEHICLES APPLICANTS

JUNE 14, 2016

BACKGROUND

A federal district court judge in Kansas has issued a temporary injunction concerning persons who register to vote at a division of motor vehicles office and do not provide proof of citizenship. Due to this injunction, a person who applies to register to vote at a motor vehicle office and did not provide proof of citizenship, is eligible to vote for federal office (President, United States Senate, United States House of Representatives), but is not eligible to vote for state, county, or local offices. In addition, any person who has registered to vote at a motor vehicle office from January 1, 2013 through the present, and has not provided proof of citizenship, is now eligible to vote for federal office without providing proof of citizenship. This case is currently under appeal by the Secretary of State's office. The instructions contained in this document are effective until modified by another judicial order.

POLICY

Effective immediately, when a county election office receives a voter registration application from a motor vehicle office and the applicant has not provided proof of citizenship, and the person has not been previously registered to vote, that applicant is now eligible to vote for federal office only. A new category of applicants has been entered into ELVIS under the category of 'suspense' – meaning the applicant has submitted an application that is incomplete; with a reason of DMV Office – Federal Election Only – No POC. This also applies to all applicants who have applied at a DMV office from January 1, 2013 through the present, and have not provided proof of citizenship.

ACTION ITEM(S)

Beginning immediately, review all new voter registration applications that are processed in ELVIS via Agency Central with a source of **motor vehicle office**. If the applicant did not provide proof of citizenship, and has not been previously registered, the record should be processed as 'suspense' with a reason of **'DMV Office – Federal Election Only – No POC'**. When an applicant provides an acceptable form of citizenship, the record should be changed to 'active' with a new status reason.

Beginning immediately, every county should review every record that is currently listed as 'suspense' with a reason of 'Proof of citizenship not submitted'. If the record has a source of registration listed as motor vehicle office, the reason should be changed to 'DMV Office – Federal Election Only – No POC'.

Beginning immediately, every county should review every record that is currently listed as 'cancelled' with a reason of 'Proof of citizenship not submitted'. If the record has a source of registration listed as motor vehicle office, the status should be changed to 'suspense' and the reason should be changed to 'DMV Office – Federal Election Only – No POC'.

The administrative regulation that requires proof of citizenship be provided within 90 days does not apply to persons who have applied to register to vote at a motor vehicle office. An applicant will be listed in the voter registration system as 'suspense with a reason of 'DMV Office – Federal Election Only – No POC' until an acceptable form of citizenship has been provided, or until the record is otherwise cancelled under Kansas law.

UPCOMING ACTION ITEMS

The Secretary of State's office is working with county election offices, voting equipment vendors, electronic poll book vendors, and printing companies to finalize policies on:

Poll book printing / programming

Ballot printing / programming

Voting machine programming

Provisional ballot printing / processing

Election poll worker training

County election office training

CONCLUSION

This document implements the temporary injunction issued by a federal district court judge in Kansas regarding persons who have applied to register to vote at a motor vehicle office and have not provided proof of citizenship. Under the injunction, if a person applied to register to vote at a motor vehicle office and did not provide proof of citizenship, that applicant is eligible to vote for federal office only (President, United States Senate, United States House of Representatives). The applicant is not eligible to vote for state, county, or local office until an acceptable form of citizenship has been provided. This case is currently under appeal. If a judicial order is issued that changes these instructions, additional communication will be provided.

Please contact Bryan Caskey, Director of Elections, concerning this policy.

EXHIBIT G

From: county-election-officials-bounces@list.ink.org [<mailto:county-election-officials-bounces@list.ink.org>] **On Behalf Of** Caskey, Bryan [KSOS]
Sent: Wednesday, June 22, 2016 10:31 AM
To: 'county-election-officials@list.ink.org'
Subject: [County-election-officials] DMV Implementation Update

Dear County Election Officers:

This email is supplemental to an email I sent on June 14th concerning the implementation of an injunction granting persons who register to vote at a Division of Motor Vehicles office and have not yet provided proof of citizenship the ability to vote for federal offices only. Please review those instructions and continue to process voter registration applications in accordance with those instructions.

In addition, all of you are facing deadlines in approving ballot proofs, ballot printing and programming for the 2016 Primary Election. The Secretary of State is requesting that all counties proceed with approving ballot proofs, ballot printing and programming consistent with previous years. The Secretary of State has not approved a shorter, 'federal only' ballot for use in the Primary Election.

Under a temporary injunction issued by Judge Julie Robinson, voters who registered to vote at a Division of Motor Vehicles office on or after January 1, 2013 and have not yet provided proof of citizenship are eligible to vote for federal office only (President, United States Senate, United States House). After reviewing applicable statutes it has been determined that such voters should vote using the "partial provisional" ballot process, similar to the process that is used when a person votes at a polling place other than his own. Votes for federal offices only will be counted. A temporary regulation is being promulgated to formalize this process in Kansas's code of regulations.

Judge Robinson's order is being appealed. However, that appeal will not affect the August 2 Primary Election. Oral arguments in the appeal will occur on August 23. It is unknown at this point whether the Court of Appeals will rule before the November 8 election and whether that ruling will result in different procedures being used in that election.

Additional details of this implementation will be forthcoming. Contact me if you have questions.

BRYAN A. CASKEY | Director of Elections
Kansas Secretary of State | 785-296-3488 P | 785-291-3051 F | www.sos.ks.gov
Memorial Hall, 1st Floor | 120 S.W. 10th Avenue | Topeka, KS 66612-1594

"Every election is determined by the people who show up."
— [Larry J. Sabato, *Pendulum Swing*](#)

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION
ASSISTANCE COMMISSION,

Defendants,

and

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

Intervenor Defendant.

NO. 16-cv-236 (RJL)

AFFIDAVIT OF BRYAN CASKEY

I, BRYAN CASKEY, am competent to testify to the matters stated herein, and having been duly sworn, do hereby declare, to the best of my knowledge and belief:

1. I am a U.S. citizen, a Kansas resident, and an eligible voter.
2. My title is Assistant Secretary of State, Elections and Legislative Matters for the State of Kansas. As such, I am the Elections Director for the State of Kansas. I have had that position since February 2015. I have worked in the Kansas elections office since March 1998.

3. My responsibility is to oversee the administration of elections in Kansas. Among my numerous duties in this regard is the fact that I administer the State's Election Voter Information System ("ELVIS") database and work directly with the counties in managing the registration of voters in the State of Kansas. As part of my responsibilities, I issue instructions to county election officers and county clerks on how elections should be conducted.
4. The Kansas Republican and Democratic presidential caucuses are private events conducted entirely by the Republican and Democratic Parties. The State of Kansas has no role in these private proceedings.
5. Neither Party's caucus is legally constrained by the State's voter rolls or the Kansas-specific instructions of the Federal Form. The Republican and Democratic Parties are free to allow or prevent participation by anyone they choose, without regard to whether such participants are qualified to vote under Kansas law.
6. The Kansas Republican Party required participants in its March 5, 2016, caucus to be registered by February 4, 2016, 29 days before the caucus, even though Kansas law allows residents to register as late as 21 days before a Kansas election.
7. The Kansas Democratic Party allows same-day registration of participants in its caucus, without contemporaneous proof of citizenship, even though same-day registration is not allowed under Kansas law for voting in Kansas elections and proof of citizenship is required before an individual's registration on the State's voter rolls is can be completed.
8. The next statewide election to which the Kansas voter registration system will apply is the primary election of August 2, 2016. The ballot in that election will contain the names of candidates for federal, state, county, township and precinct offices.

9. During the 2014 election cycle, voters who had registered with a the National Mail Voter Registration Form (“Federal Form”) on or after January 1, 2013, (the effective date of the State of Kansas’s proof-of-citizenship requirement) but did not provide proof of citizenship were permitted to vote in federal elections but not in state, county, or local elections.
10. I have general knowledge of the number of voters who registered with a Federal Form but did not provide proof of citizenship. It is my belief that in the November 4, 2014, general election there were approximately 383 such voters and only 3 actually cast a vote.
11. With the modification of the Kansas-specific instructions of the Federal Form that took effect on February 1, 2016, the requirements of the Federal Form now match the requirements of State voter registration forms. Both require proof of citizenship.
12. With respect to the individuals who registered with a Federal Form but did not provide proof of citizenship between January 1, 2013, and January 31, 2016, the State of Kansas treats those individuals as entitled to vote in federal elections but not in state, county, or local elections. However, Kansas law permits the State to obtain citizenship information on a voter’s behalf; and the State is taking special measures to ensure that the citizenship of all of the voters in that group is confirmed prior to the August 2, 2016, primary. Among those special measures are contacting other States to verify that a birth certificate exists confirming birth in the United States and contacting the voters themselves by telephone or in person.
13. More than 22,000 individuals submitted voter registration applications in the State of Kansas between February 1, 2016, and February 21, 2016, inclusive. A total of 7,444 individuals completed their voter registration applications (including providing proof of

citizenship) and were registered to vote in the State of Kansas between February 1, 2016, and February 21, 2016, inclusive.

14. If the State of Kansas were ordered by a court to retroactively treat the post-February 1, 2016, Kansas instructions of the Federal Form as if they did not require proof of citizenship, the Secretary of State's office would have to contact all 105 county clerks and election officers to identify Federal Form applicants in their respective counties. The Secretary of States' office would then instruct the counties to modify the records of such individuals to be treated the same as Federal Form applications received prior to February 1, 2016. The counties would then be instructed to contact each of the relevant applicants by mail to notify them of the change in their registration status. This process would be administratively burdensome and would involve hundreds of hours of work, collectively, by county and state officers. It would also involve substantial expense in the form of printing and mailing information the relevant applicants.
15. However, such a task could be accomplished at any time in the future if a court so ordered.
16. I have reviewed the registration records of Marvin Brown and Joann Brown, plaintiffs in the above-titled lawsuit.
17. Marvin Brown, date of birth [REDACTED] 1925, submitted a Kansas voter registration application on May 20, 2015. Mr. Brown did not simultaneously submit the required proof of citizenship with his application therefore making his application incomplete. On November 16, 2015, the Johnson County Election Office canceled his voter registration application. The application was cancelled to comply with Kansas's requirement that an incomplete registration application must be completed within 90 days of submission of

the application. On January 28, 2016, Mr. Brown submitted a Federal Form voter registration application without sufficient proof of citizenship. Mr. Brown's voter registration application was designated as incomplete. However, Mr. Brown is eligible to vote for federal office since his Federal Form voter registration application was submitted prior to the approval of the Kansas-specific instructions regarding proof of citizenship on the Federal Form. Mr. Brown is not eligible to vote for state or local office until sufficient proof of citizenship is provided.

- 18. Joann Brown, date of birth [redacted] 1929, submitted a Federal Form voter registration application without sufficient proof of citizenship on January 28, 2016. Ms. Brown's voter registration application was designated as incomplete. However, Ms. Brown is eligible to vote for federal office since her Federal Form voter registration application was submitted prior to the approval of the Kansas specific instructions regarding proof of citizenship on the Federal Form. Ms. Brown is not eligible to vote for state or local office until sufficient proof of citizenship is provided.

Bryan Caskey

Bryan Caskey
Assistant Secretary of State, Elections and Legislative
Matters for the State of Kansas

State of Kansas

ss:

County of Shawnee

Subscribed and sworn to before me, a Notary Public in and for the above county and state, this

21st day of February, 2016.

Heather Marie Evans

Notary Public

My commission expires 7/31/17

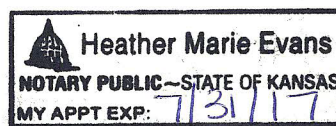


EXHIBIT I

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

STEVEN WAYNE FISH, RALPH ORTIZ,)
DONNA BUCCI, CHARLES STRICKER,)
THOMAS J. BOYNTON, AND DOUGLAS)
HUTCHINSON, on behalf of themselves and)
all others similarly situated,)

Plaintiffs,)

v.)

KRIS KOBACH, in his official capacity as)
Secretary of State for the State of Kansas, *et al.*,)

Defendants.

Case No. 2:16-cv-02105

DECLARATION OF CHARLES WILLIAM STRICKER III

1. I, Charles William Stricker III, have personal knowledge of the matters stated in this Declaration and could and would competently testify to these facts.

2. I was born on [REDACTED] 1978 in Missouri.

3. I am a United States citizen, and I currently reside in Wichita, Kansas.

4. I first lived in Kansas from 2006 to 2008. In 2008, I took a job in Chicago and lived there from 2008 to 2013. My wife’s family is from Kansas and we returned in 2013 to be closer to her family. My wife and I are currently expecting our first child.

5. As a citizen of the United States, I believe that voting is an important part of the democratic process and feel that it is important for my vote to be counted. I previously voted in both the 2012 Presidential Election and the 2010 mid-term elections.

6. Prompted by a desire to partake in the then-upcoming midterm election, I went to the Kansas Department of Motor Vehicles (“DMV”) in October of 2014 to obtain a Kansas driver’s license and register to vote.

7. I was told that I had insufficient documentation to obtain a Kansas driver's license and was sent home to obtain my Social Security Card. I then subsequently went home. I returned to the DMV with my out-of-state-driver's license, Social Security Card, and utilities bills that same day and was allowed to obtain a temporary driver's license.

8. At that time, I was asked by a clerk at the DMV if I would like to register to vote, and confirmed that I wished to register. The clerk at the DMV did not ask me to provide any additional documentation when I registered to vote, and contrary to my experience obtaining the driver's license that same day, did not tell me that I lacked any appropriate documentation.

9. I left the DMV that day fully believing that I had accomplished my goal of registering to vote for the then-upcoming midterm elections.

10. On Election Day, November 2014, I went to my polling place early in the morning to vote before going into work.

11. I provided my Kansas driver's license to the volunteer at the polling location. The volunteer could not locate my name on the list of registered voters and informed me that I was not registered to vote. I believed this to be an error and explained that I had recently registered to vote the previous month.

12. I was given a "provisional ballot" and instructed to fill it out at an open table inside of the polling location. I was the only person at the open table and felt on display while filling out my ballot. Other voters were given privacy to make their elections, but I was not. I was confused as to why I had to fill out a provisional ballot when I thought I was registered to vote.

13. I never received any notification as to whether my provisional ballot was counted or whether my provisional ballot was declined to be counted.

14. Several weeks after the above-mentioned election in which I cast a provisional ballot, I received a notice in the mail stating that I was not registered to vote and informing me for the first time that I had lacked sufficient proof of citizenship documentation to register.

15. Due to my work schedule and growing family I have been unable to return to the DMV to attempt registration for a second time.

16. I have been informed that, according to the Sedgwick County Election Office, my voter registration has been canceled pursuant to K.A.R. 7-23-15. I have been removed from the state's registration lists and am not registered.

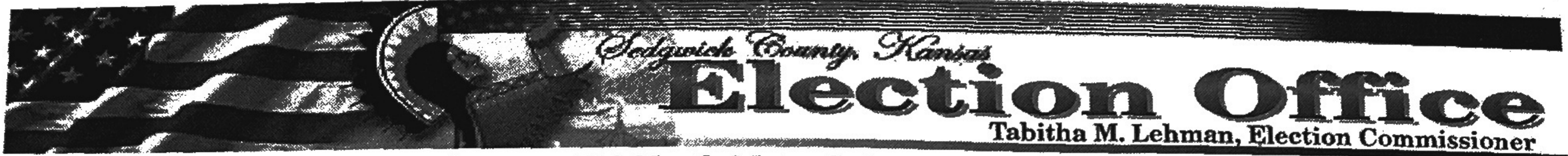
17. My experience being deprived of my right to vote has caused me to feel discriminated against and disenfranchised.

I declare under penalty of perjury that the foregoing statements, including all statements in this Declaration, are true and correct.

Executed on January 30, 2016.


Charles William Stricker III

EXHIBIT J



Historic Courthouse • 510 North Main, Suite 101 • Wichita, Kansas 67203
Telephone (316) 660-7100 • Fax (316) 660-7125 • www.sedgwickcounty.org/elections

Please return this portion with proof of citizenship.



5191689

Notice to DMV Applicant

Charles William Stricker III
4418 N Ironwood
Wichita, KS 67226

Clip Here

Dear Applicant,

This notice confirms receipt of your voter registration application submitted when you obtained or updated your Kansas driver's license.

To complete your application, please submit an acceptable form of proof of citizenship (see gotvoterid.com for a complete list) to this office by email to voterinformation@sedgwick.gov, by mail to 510 N Main, #101, Wichita, KS, or by fax to 316-660-7125.

Because of a recent injunction issued by a federal judge in Kansas, you are currently eligible to vote for federal offices only (President, United States Senate, United States House). However, under Kansas law, you are not considered a registered voter until you submit an acceptable form of proof of citizenship. This means that you are currently not eligible to vote in state or local elections. To become eligible to vote in all elections, please submit an acceptable form of proof of citizenship (see gotvoterid.com for a complete list) to this office.

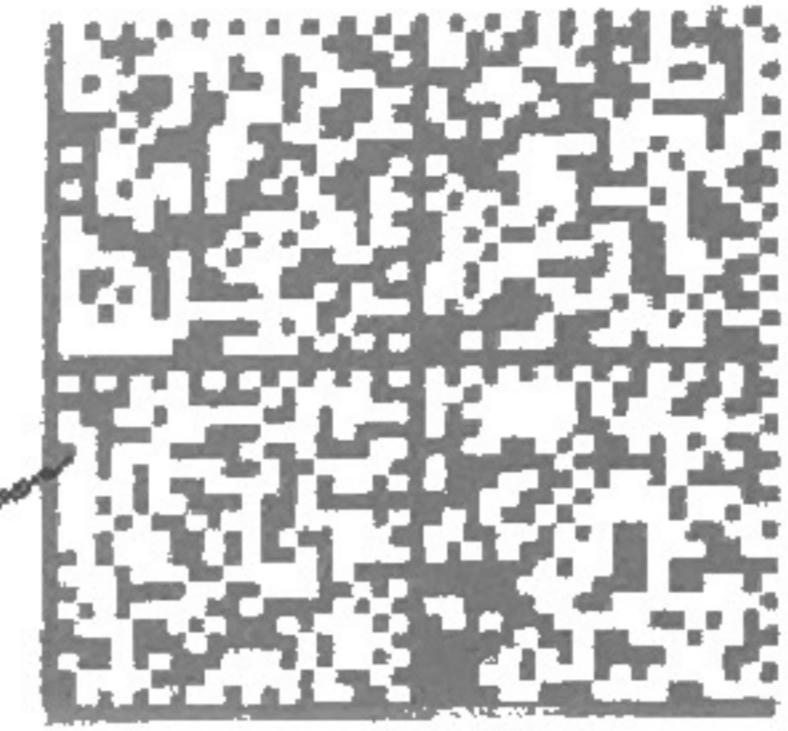
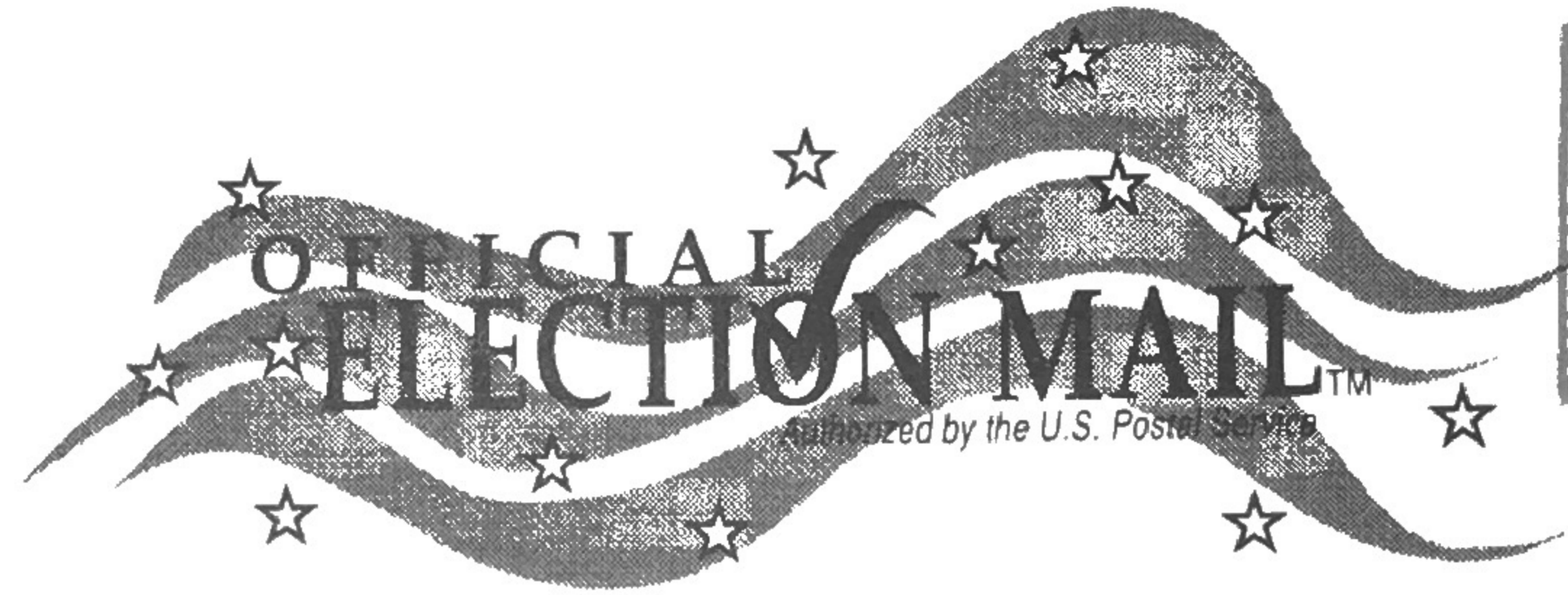
A case that is pending before a federal appeals court will determine the final status of persons who have not yet provided proof of citizenship. The outcome of that case may affect your eligibility to vote in future elections. To avoid confusion and to ensure that you are eligible to vote in all elections in the future, please submit an acceptable form of proof of citizenship. Questions? Contact the Sedgwick County Election Office at voterinformation@sedgwick.gov or 316-660-7100 or the Kansas Secretary of State at 1-800-262-8683.

Upcoming Elections: To be qualified to vote in:
August 2, 2016 Primary Election
November 8, 2016 General Election

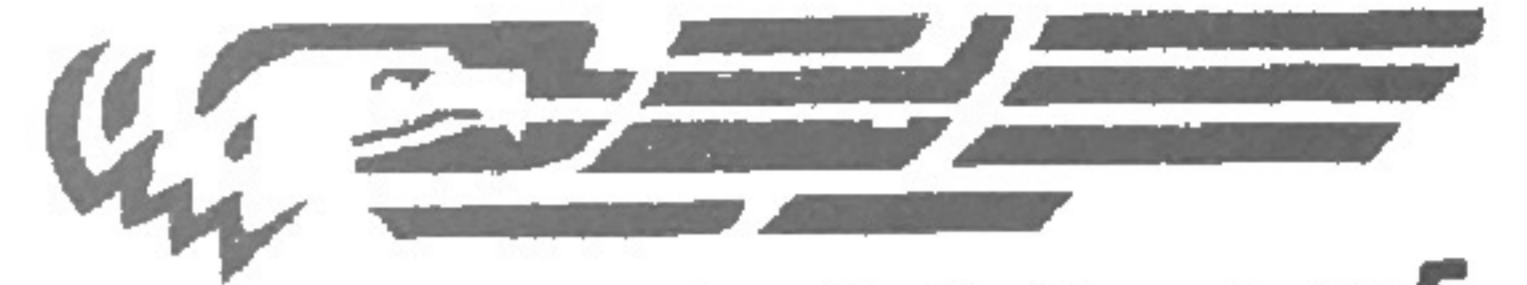
Your voter registration must be complete by:
August 1, 2016 at 11:59 PM
November 7, 2016 at 11:59 PM

SEDGWICK COUNTY ELECTION OFFICE
510 N MAIN ST STE 101
WICHITA KS 67203-3798

RETURN SERVICE REQUESTED



U.S. POSTAGE >> PITNEY BOWES



ZIP 67203 \$ 000.46⁵
02 1W
0001382778 JUL 08 2016

OFFICIAL ELECTION MATERIAL

6722643316 R014



EXHIBIT K

Johnson County Election Office



Ronnie Metsker
Election Commissioner

SECOND NOTICE

This is your second notice. Beginning January 1, 2013, any person registering to vote in Kansas for the first time is required to provide proof of U.S. citizenship. The law also requires persons to submit citizenship documentation if their registration had been cancelled and they are now re-registering in Kansas.

Your application to register can be completed once this documentation is received. The citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the application will be cancelled.

Below is a list of valid citizenship documents. A copy of your documentation may be mailed, faxed, emailed to registration@jocoelection.org, or you may take a cell-phone photo of the document and text the photo to (913) 953-9539.

If the name or gender on the citizenship document is not consistent with the information provided on the voter registration application, it is necessary to either complete and sign the enclosed Form CDU and return to our office, or provide a copy of another government document confirming the name (such as a driver's license). This second document does not need to be one of the documents on the below list.

If you have questions, please contact the Election Office at (913) 782-3441.

Valid Citizenship Documents

Documents that are acceptable as evidence of United States citizenship for voter registration purposes:

- Birth certificate that verifies United States citizenship
- United States passport or pertinent pages of the applicant's valid or expired United States passport identifying the applicant and the applicant's passport number
- United States naturalization documents
- Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952
- Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number
- Consular report of birth abroad of a citizen of the United States
- Certificate of citizenship issued by the United States Bureau of Citizenship and Immigration Services
- Certification of report of birth issued by the United States Department of State
- American Indian card, with KIC classification, issued by the United States Department of Homeland Security (Note: This document applies only to a small Texas band of the Kickapoo tribe with slightly more than 50 members.)
- Final adoption decree showing the applicant's name and United States birthplace
- United States military record of service showing applicant's place of birth in the United States
- Extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States



1. Introduction

If an application for voter registration is denied due to an inconsistency in the name or sex indicated on the citizenship document provided, the applicant may sign the following affidavit and submit it to the county election officer or the Secretary of State. The election officer will assess the applicant's eligibility using this affidavit and the U.S. citizenship document submitted.

2. Statement

Describe the inconsistency in name or sex indicated on the citizenship document submitted, including the reason(s) for the inconsistency:

3. Address

Residential Address	City	State	Zip Code
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4. Voter Signature

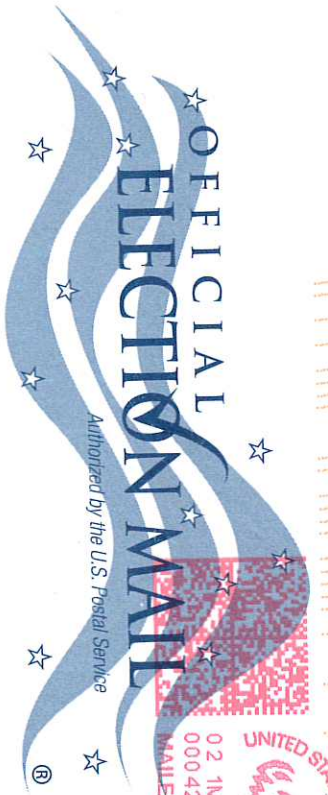
Note: False statement on this affirmation is a severity level 9, nonperson felony.

I do solemnly swear under penalty of perjury that, despite the inconsistency in name or sex indicated on the document I have submitted as proof of United States citizenship, I am the individual reflected in the document.

Required

Signature of Applicant	Name of Applicant (please print)
Date (MM/DD/YY)	Phone Number

JOHNSON COUNTY ELECTION OFFICE
2101 E. Kansas City Road
Olathe, Kansas 66061-3007
Return Service Requested



UNITED STATES POSTAGE
PRIMEY BOWES
\$ 00.465
02 1M JUN 17 2016
0004244624
MAILED FROM ZIP CODE 66061



5732866
MARVIN LUTHER BROWN
UNIT 347
9705 MONROVIA ST
LENEXA, KS 66215

6621581543 0076



EXHIBIT L

Johnson County Election Office



Ronnie Metsker
Election Commissioner

SECOND NOTICE

This is your second notice. Beginning January 1, 2013, any person registering to vote in Kansas for the first time is required to provide proof of U.S. citizenship. The law also requires persons to submit citizenship documentation if their registration had been cancelled and they are now re-registering in Kansas.

Your application to register can be completed once this documentation is received. The citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the application will be cancelled.

Below is a list of valid citizenship documents. A copy of your documentation may be mailed, faxed, emailed to registration@jocoelection.org, or you may take a cell-phone photo of the document and text the photo to (913) 953-9539.

If the name or gender on the citizenship document is not consistent with the information provided on the voter registration application, it is necessary to either complete and sign the enclosed Form CDU and return to our office, or provide a copy of another government document confirming the name (such as a driver's license). This second document does not need to be one of the documents on the below list.

If you have questions, please contact the Election Office at (913) 782-3441.

Valid Citizenship Documents

Documents that are acceptable as evidence of United States citizenship for voter registration purposes:

- Birth certificate that verifies United States citizenship
- United States passport or pertinent pages of the applicant's valid or expired United States passport identifying the applicant and the applicant's passport number
- United States naturalization documents
- Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952
- Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number
- Consular report of birth abroad of a citizen of the United States
- Certificate of citizenship issued by the United States Bureau of Citizenship and Immigration Services
- Certification of report of birth issued by the United States Department of State
- American Indian card, with KIC classification, issued by the United States Department of Homeland Security (Note: This document applies only to a small Texas band of the Kickapoo tribe with slightly more than 50 members.)
- Final adoption decree showing the applicant's name and United States birthplace
- United States military record of service showing applicant's place of birth in the United States
- Extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States

Office of the Kansas Secretary of State
Affidavit of Evidence of U.S. Citizenship

DOWNLOAD THIS FORM AT WWW.SOS.KS.GOV



1. Introduction

If an application for voter registration is denied due to an inconsistency in the name or sex indicated on the citizenship document provided, the applicant may sign the following affidavit and submit it to the county election officer or the Secretary of State. The election officer will assess the applicant's eligibility using this affidavit and the U.S. citizenship document submitted.

2. Statement

Describe the inconsistency in name or sex indicated on the citizenship document submitted, including the reason(s) for the inconsistency:

3. Address

Residential Address _____ City _____ State _____ Zip Code _____

4. Voter Signature **Note: False statement on this affirmation is a severity level 9, nonperson felony.**

I do solemnly swear under penalty of perjury that, despite the inconsistency in name or sex indicated on the document I have submitted as proof of United States citizenship, I am the individual reflected in the document.

Required Signature of Applicant _____ Name of Applicant (please print) _____
 Date (MM/DD/YY) _____ Phone Number _____

JOHNSON COUNTY ELECTION OFFICE
2101 E. Kansas City Road
Olathe, Kansas 66061-3007

Return Service Requested

KANSAS CITY 660

JUN 2016 5M 4E



UNITED STATES
\$00.465
02 1M JUN 17 2016
0004244624
MAILED FROM ZIP CODE 66061



5774832
JOANN BROWN
APT 347
9705 MONROVIA ST
LENEXA, KS 66215

66215-154397



EXHIBIT M

2013 NOV 21 A 10: 34

Stephen Douglas Bonney, #12322
ACLU Foundation of Kansas
3601 Main Street
Kansas City, MO 64111
Tel. (816) 994-3311
Fax: (816) 756-0136

THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY
CIVIL DEPARTMENT

Aaron Belenky, Scott Jones, and)
Equality Kansas,)
Plaintiffs,)
v.)
Kris Kobach, Kansas Secretary of State, and)
Brad Bryant, Kansas Elections Director, in)
their Official Capacities,)
Defendants.)

Case No. 13C1331

Division No. 7

Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief

COME NOW Petitioners, Aaron Belenky, Scott Jones, and Equality Kansas, by and through their undersigned Attorneys, state the following:

Nature of the Action

Petitioners seek declaratory and injunctive relief against Kansas Secretary of State Kris Kobach and Kansas Elections Director Brad Bryant (together, "Respondents"), to prevent them from violating Petitioners' right to equal protection under the Kansas Constitution by implementing a dual system of voter registration.

The Kansas Secretary of State has, without statutory authority and without engaging in the mandatory requirements for administrative rulemaking, unilaterally established an unprecedented and unlawful voter registration system that divides registered voters in Kansas into two separate and unequal classes, with vastly different rights and privileges (the "dual

registration system”), based on nothing more than the method of registration that a voter uses and the date on which the voter submits the form. In essence, the Secretary of State’s dual registration system permits some voters to cast ballots for President and other federal offices, but prohibits them from voting for Governor, State Legislator, Secretary of State, and other state and local offices. The adoption and enforcement of this dual registration system will, without a compelling or rational basis, arbitrarily deprive qualified electors, including Petitioners Belenky and Jones, of the right to vote in state and local elections, in violation of the Kansas Constitution’s guarantee of equal protection.

This lawsuit seeks to enjoin the enforcement of the dual system on the grounds that it is: (1) a violation of the Kansas Constitution’s guarantee of equal protection, set forth in Sections 1 and 2 of the Kansas Bill of Rights; (2) beyond the scope of the Secretary of State’s authority, in violation of the separation of powers set forth in the Kansas Constitution, and specifically, the delegation of lawmaking authority to the state legislature under Article II, Section 1 of the Kansas Constitution; and (3) a violation of the Kansas Rules and Regulations Filing Act, Kan. Stat. Ann. (“K.S.A.”) §§ 77-415 – 77-438 (hereinafter the “Filing Act”) to implement new administrative rules or regulations without fulfilling the notice, opportunity for comment, and publication requirements set forth in K.S.A. § 77-421.

Petitioners have no plain, speedy, or adequate remedy at law other than the relief requested in this petition. Unless enjoined by this Court, Respondents will continue to deny individual Petitioners and countless other duly qualified Kansas electors the ability to vote in state and local elections, thus violating their right to equal protection under the Kansas Constitution; and will continue to deny organizational Petitioner’s ability to conduct voter registration drives for state and local elections.

Parties; Jurisdiction and Venue

1. Petitioner Aaron Belenky is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. On or about August 2, 2013, Mr. Belenky applied to register to vote in Kansas by filling out the National Mail Voter Registration Form (the “Federal Form”) and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote. As a Federal Form applicant, Mr. Belenky is subject to the dual registration system implemented by Respondents. As a result of Respondents’ implementation of a dual voter registration system, on or about August 8, 2013, Mr. Belenky received notice that his voter registration was in “suspense.” On or about September 27, 2013, Mr. Belenky called the Johnson County Elections Office to inquire about the status of his registration and an elections official informed him that he is not registered to vote in Kansas local or state elections. Mr. Belenky was unable to vote in the October 8, 2013, City of Overland Park election because he was deemed not registered despite his submission of the Federal Form, and he will be prohibited from voting in future elections.

2. Petitioner Scott Jones is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. In late July 2013, Mr. Jones applied to register to vote in Kansas by filling out the Federal Form and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote. Mr. Jones submitted the Federal Form in person at the Douglas County clerk’s office. As a Federal Form applicant, Mr. Jones is subject to the dual registration system implemented by Respondents. As a result of Respondents’ implementation of a dual registration system, in early August 2013, Mr. Jones received notice from a Douglas county clerk’s officer that his registration was in “suspense.” On or about September 26, 2013, Mr. Jones went to the Secretary of State’s registrant search website to check his registration

status.¹ The Secretary of State's website listed him as registered to vote. On or about September 27, 2013, Mr. Jones called the Douglas County clerk's office and an elections official there informed him that he was registered to vote in federal elections and not registered to vote in state or local elections. Petitioner Jones will therefore be prohibited from voting in future state or local elections.

3. Plaintiff Equality Kansas is a statewide membership organization dedicated to ending discrimination based on sexual orientation and gender identity by lobbying state and local governments for equal rights. One of the organization's primary activities is assisting applicants with voter registration using the simple and accessible Federal Form. Central to Equality Kansas's advocacy strategy is to encourage voter registration and participation in state and local elections within communities that support equal rights for all Kansans. It is impracticable for Equality Kansas members and volunteers to carry photocopiers, or to retain copies of registrants' sensitive identity documents, when assisting applicants with their voter registration. The dual registration system prevents Equality Kansas from effectively registering voters in state and local elections and creates confusion among Federal Form registrants who are later denied substantial portions of their voting rights.

4. Respondent Kansas Secretary of State Kris Kobach is the chief state election officer in Kansas, responsible for administering elections and providing information regarding voter registration procedures.

5. The Kansas Secretary of State's primary office is in Topeka, Kansas.

6. Respondent Kansas Elections Director Brad Bryant is an official in the office of the Secretary of State responsible for election matters.

¹ Vote Kansas, Registrant Search, <https://myvoteinfo.voteks.org/VoterView/RegistrantSearch.do>

7. The Kansas Elections Director's office is in Topeka, Kansas.
8. Kansas Courts have personal jurisdiction over all parties in this matter.
9. Kansas Courts have subject matter jurisdiction over this matter. *See* K.S.A. § 60-1701 (declaratory relief); K.S.A. § 60-901 (injunctive relief).
10. Jurisdiction in the Shawnee County District Court is proper under K.S.A. § 60-1701.
11. Venue in the Third Judicial District of Kansas, Shawnee County District Court is proper under K.S.A. § 60-608.

Background Facts

12. On May 20, 1993, the U.S. Congress passed the National Voter Registration Act (“NVRA”), which requires that states adopt procedures to allow eligible persons to register to vote: (1) by application made simultaneously with a driver's license application or renewal; (2) by mail using mail-in forms developed by the Election Assistance Commission; and (3) by application at state offices that provide public assistance. *See* 42 U.S.C.A. §§ 1973gg – gg-10. The NVRA became effective on January 1, 1995.

13. Soon thereafter, the Kansas Legislature enacted legislation to implement NVRA mandates, including authorization of the secretary of state, as the chief state election official, to promulgate related rules and regulations. K.S.A. § 25-2355 (“The secretary of state may adopt rules and regulations to comply with the national voter registration act.”); *see* 1996 Kan. Sess. Laws Ch. 187 (H.B. 2079).

14. Under the 1996 Kansas state statutes which implemented the NVRA voter registration mandates, “[t]he secretary of state is hereby authorized to adopt such rules and regulations in the manner prescribed by law as may be necessary for the administration of the provisions of this section.” K.S.A. § 25-2352(g); 1996 Kan. Sess. Laws Ch. 187 (H.B. 2079), § 14. At the time,

the Filing Act defined “rule” and “regulation,” as “a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency.” 1996 Kan. Sess. Laws Ch. 43 (H.B. 2643), § 4; *see* K.S.A. § 77-415(c)(4).

15. The secretary of state promulgated rules and regulations authorized by the amended 1996 elections law, including Kansas Administrative Regulations (“K.A.R.”) § 7-37-1 (implementing voter registration procedures for driver’s license applications and renewals), K.A.R § 7-38-1 (implementing voter list maintenance procedures), and K.A.R. § 7-23-2 (regulating registration records).

16. Prior to 2012, voter registration in Kansas was straightforward. U.S. citizens could apply for registration in person, by mail, through a voter registration agency or by other delivery to a county election officer. K.S.A. 2010 Supp. § 25-2309(a). The application could be made on either a state form approved by the secretary of state or “the mail voter registration application prescribed by the federal election commission.” K.S.A. 2010 Supp. § 25-2309(a). Applications contained voter eligibility requirements and “such information as [wa]s necessary to identify the applicant and to determine the qualifications of the applicant as an elector and the facts authorizing such person to be registered,” K.S.A. 2010 Supp. § 25-2309(b), including an attestation to U.S. citizenship signed by the applicant under penalty of perjury. *Id.* A voter registration agency then transmitted the application to the county election office within five days of acceptance. K.S.A. 2010 Supp. § 25-2309(e). Upon receipt of the application, the county election official sent a notice of disposition to the applicant by mail. *Id.* A person was

considered a registered voter “when the county election officer add[ed] the applicant’s name to the county voter registration list.” K.S.A. 2010 Supp. § 25-2309(g).

SAFE and the Documentation of Citizenship Requirement

17. On April 1, 2011 the Kansas State Legislature passed omnibus elections reform bill H.B. 2067, the “Secure and Fair Elections Act” (“SAFE”). On April 18, 2011, the Kansas Governor signed the Act into law.

18. SAFE requires county election officers or the Secretary of State’s office to accept any completed application for registration, but specifies that “an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.” K.S.A. § 25-2309(l). The documentation of citizenship requirement is satisfied by presenting one of thirteen documents listed in the statute. *Id.*

19. The Secretary of State premised his support for requiring documentary proof of citizenship on protecting against fraudulent registration by non-citizens. Upon information and belief, from the advent of the Federal Form in 1996 until today, not a single non-citizen has used a Federal Form to unlawfully register to vote in Kansas.

20. SAFE requires some categories of electors to provide specific documentation of their U.S. citizenship in addition to their voter registration form in order to register for both state and federal elections. Other categories of electors, including persons who were already registered to vote in Kansas on the effective date of the amendment (January 1, 2013) and persons in federal service, are not required to provide documentation of their U.S. citizenship to register to vote.

21. SAFE does not affect electors who were registered as of January 1, 2013. Such electors may change their address or otherwise update their voter registration information without providing documentation of citizenship.

22. The documentation of citizenship requirement also does not apply to “persons in federal services,” K.S.A § 25-1214(b),² who may apply to vote in Kansas using the Federal Services Post Card Application (“FSPCA”). The FSPCA is an absentee ballot application prescribed by the federal government for state use, which may only be used for registration by eligible persons in federal service. *See* Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C.A. §§ 1973ff(b)(2), 1973ff-1(a)(4). Kansas residents in federal services may vote by federal services absentee ballot “notwithstanding any provision of law relating to the registration of qualified voters.” K.S.A. § 25-1215. Voters voting with the FSPCA are not subject to Kansas’s proof of citizenship registration requirements under the SAFE Act.³

23. Under K.S.A. § 25-2309(s), the Secretary of State “may adopt rules and regulations . . . in order to implement the provisions” of the state election laws. The Filing Act defines “rule” and “regulation,” as “a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation.” K.S.A. § 77-415(c)(4).

24. In late 2011 and early 2012, as required by the Filing Act, the Secretary of State implemented SAFE by promulgating rules and regulations based on a unitary system of voter registration, wherein registered voters could vote in federal, state, and local elections. On

² K.S.A § 25-1214(b) “Persons in federal services’ means: (1) Members of the armed forces of the United States, while in the active service, and their spouses and dependents; (2) members of the merchant marine of the United States and their spouses and dependents; and (3) citizens of the United States residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them.” *See* Military Selective Service Act, 50 App. U.S.C.A. § 453 (Non-citizen legal permanent residents must register for selective service and may enlist in the armed services).

³ Office of the Secretary of State, “Federal Services Voting,” http://www.kssos.org/elections/elections_registration_federal.html

November 24, 2011, the Secretary of State issued a notice of hearing on proposed administrative regulations.⁴

- a. On January 3, 2012, the Secretary of State presented the proposed rules and regulations noticed for hearing to the Joint Committee on Administrative Rules and Regulations.⁵
- b. A hearing was held on January 24, 2012. The Secretary of State issued public hearing responses to concerns raised at that hearing.⁶
- c. On February 24, 2012, the Secretary of State promulgated final regulations implementing SAFE. *See* K.A.R §§ 7-23-4, 7-23-14, 7-36-7, 7-36-8, 7-46-1, 7-46-2, 7-46-3.

25. On January 1, 2013, the documentary evidence of citizenship portion of K.S.A. § 25-2309 became effective, requiring new registrants to provide documentary proof of U.S. citizenship before they would be registered to vote. The implementing regulations also became effective, requiring that “[i]f any applicant to whom this subsection applies fails to submit satisfactory evidence of United States citizenship in accordance with this subsection and the applicant casts a provisional ballot, the ballot shall not be counted.” K.A.R. § 7-23-14(b)(3).

26. Soon thereafter, Respondents created a procedure by which voter registration applicants who did not submit proof of U.S. citizenship documents with their registration application were placed on a “suspense list” and were thus prohibited from voting in local, state, and federal

⁴ Secretary of State, “Notice of Hearing on Proposed Administrative Regulations,” http://crrb.ks.gov/docs/07---kansas-secretary-of-state/sos_kar_7-23-4_14_7-36-7_8_7-46-1_4.pdf?sfvrsn=4

⁵ Joint Committee on Administrative Rules and Regulations, Minutes, Jan. 3, 2012, http://www.kslegislature.org/li_2012/b2011_12/committees/resources/ctte_jt_rules_regs_1_2012_0103_min.pdf

⁶ Kris Kobach, “Public Hearing Responses,” Jan. 24, 2012, <http://www.gotvoterid.com/pdf/safe-responses.pdf>

elections unless or until they provided documentation of citizenship.⁷ There are currently nearly 18,000 voters on the suspense list, representing approximately one-third of all individuals who have applied to register to vote in Kansas since January 1, 2013.

27. On July 12, 2013, the Secretary of State sought approval of an administrative rule permitting electors on the “suspense list” to cast a provisional ballot and then provide proof of citizenship prior to the canvassing of votes.⁸ The State Rules and Regulations Board considered and rejected the proposal on July 16, 2013.⁹

Supreme Court Decision in *Arizona v. Inter-Tribal Council of Arizona*

28. On June 17, 2013, the U.S. Supreme Court ruled in *Arizona v. Inter-Tribal Council of Arizona* that states may not impose a documentary proof of citizenship requirement with respect to individuals seeking to register to vote using the “Federal Form,” a simple, uniform one-page voter registration application prescribed by the National Voter Registration Act. *See Arizona v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2257 (2013).

29. As required by the NVRA, the citizenship status of voter registration applicants who register using the Federal Form is verified by requiring that applicants attest to their U.S. citizenship under penalty of perjury. *See* 42 U.S.C.A. § 1973gg-7(b)(2). That system was upheld by the Supreme Court in *Inter-Tribal Council* as sufficient for voter registration applicants for federal elections.

⁷ *See, e.g.*, Amanda J. Crawford, “Not All Voters Equal as States Move to Two-Tier Ballots,” Bloomberg, Oct. 10, 2013, *available at* <http://www.bloomberg.com/news/2013-10-10/not-all-voters-equal-as-states-move-to-two-tier-ballots.html>.

⁸ *See* Scott Rothschild, “Kobach proposes rule change on proof-of-citizenship requirement to register to vote,” Lawrence Journal-World, July 12, 2013, *available at* <http://www2.ljworld.com/news/2013/jul/12/kobach-proposes-rule-change-proof-citizenship-requ/>.

⁹ *See* John Milburn, “Board rejects voter registration fix despite computer glitch,” Topeka Capital Journal, July 16, 2013, *available at* <http://cjonline.com/news/2013-07-16/board-rejects-voter-registration-fix-despite-computer-glitch>

30. The U.S. Supreme Court in *Inter-Tribal Council* held that the NVRA requires states to register all Federal Form applicants who are eligible to vote and comply with the Form’s requirements and that the statute “precludes [a state] from requiring a Federal Form applicant to submit information beyond that required by the form itself.” 133 S. Ct. at 2260; 42 U.S.C.A § 1973gg-4(a)(1). Thus, any “state-imposed requirement of evidence of citizenship beyond the attestation is inconsistent with the NVRA[.]” and is preempted by it. 133 S.Ct. at 2257 (citation omitted) (internal quotation marks omitted). The Court rejected – at some length – the notion that it was sufficient that a state “merely . . . receive the [federal] form willingly and use it *somehow* in its voter registration process.” *Id.* at 2254. Rather, “every eligible voter can be assured that if he does what the Federal Form says, he will be registered.” *Id.* at 2255 n.4.

The Dual Registration System

31. The Kansas Election Law (K.S.A. § 25, *et seq.*) establishes a unitary system of registration. The Secretary of State’s dual registration system is not envisioned or authorized by the state elections code.

- a. K.S.A. § 25-2323 establishes a unitary statewide system of registration, with the Secretary of State as the lead elections official. (“The secretary of state and deputy assistant secretaries of state may register voters on a statewide basis.”)
- b. The Secretary of State must establish a centralized voter registration database which “shall include all necessary voter registration information from every county within the state of Kansas.” K.S.A. § 25-2304(b).
- c. The county election officials maintain voter registration records, K.S.A. § 25-2304(c), but the Secretary of State adopts rules “to prescribe the type of data, the

frequency and the manner in which [the voter list] is transferred to such central location,” K.S.A. § 25-2304(d).

- d. A single ballot is used for state and federal offices. *See* K.S.A. § 25-617 (“The secretary of state shall prescribe *the* ballot format but the state offices part of the official general ballot for national and state offices shall follow the national offices part substantially as is shown in this section.”) (emphasis added).

32. Notwithstanding the unitary registration system contemplated by the Election Law, on July 30, 2013, in an email to all county election officials (attached hereto as Ex. A), the Secretary of State, through the State Election Director, issued a policy directive (the “Dual Registration Directive”) purporting to provide “guidance” regarding voter registration procedures and the “[County Election Officer]’s responsibilities when implementing the dual registration system resulting from the recent U.S. Supreme Court decision in *Arizona v Inter-Tribal Council*.” The directive requires that “beginning now” county elections officials “must track which voter registration applicants in [their] count[ies] have applied using the federal form since January 1, 2013.” The “guidance” in the Dual Registration Directive is binding on county election officials.

33. The dual registration system creates, by a unilateral policy directive and informal statements to the press, an entirely new system of voter registration. The dual system classifies electors according to their method of registration, then assigns lesser voting rights to some electors who register using the Federal Form.

34. New applicants who register to vote using the Federal Form are placed on the “suspense list” and registered for federal elections only and are denied the ability to vote in state elections, along with a host of other voting-related rights enjoyed by duly registered electors in Kansas,

notwithstanding the fact that they have fulfilled the Federal Form's requirement of proving citizenship through a sworn attestation. *See infra*, ¶ 38.

35. Voters who register through other channels are arbitrarily treated differently. New applicants who register to vote using the state form and fulfill the form's requirement of proving citizenship through documentary evidence are registered for both federal and state elections, and are granted the full range of election-related rights enjoyed by duly registered electors in Kansas.

36. New applicants who apply for a ballot using the FSPCA are registered for both federal and state elections. Despite the fact that one need not be a U.S. citizen in order to serve in the U.S. Armed Forces, or in order to become a spouse of an Armed Forces member, persons in federal services are not required to provide documentary evidence of citizenship.

37. Individuals who registered to vote through any channel prior to January 1, 2013, are registered for both federal and state elections. They are granted the full range of election-related rights enjoyed by duly registered electors in Kansas, and are not required to provide documentary evidence of citizenship.

38. Upon information and belief, individuals who are permitted to vote in federal elections alone are not treated as duly registered electors in Kansas, and therefore will also be denied a host of other election-related rights that are enjoyed by duly registered electors in Kansas, including the right to sign candidate nomination petitions for national, state, county and township offices (*see* K.S.A. § 25-205(b) requiring that nomination petition signatories must be an elector and duly registered voter in the state of Kansas); the right to vote in primary elections (K.S.A. § 25-215); the right to contest state or local elections (K.S.A. § 25-1435); the right to participate in the recall of state and local elected officials (K.S.A. §§ 25-4306 and 25-4324); the right to sign petitions (K.S.A. 25-3604); the right to run as a candidate in a local school board election

(K.S.A. § 25-2020); and the right to sign a nomination petition for a candidate for city office (K.S.A. § 25-2110).

39. Upon information and belief, the Secretary of State intends to use separate federal and state ballots in each county, at considerable expense to the state and the counties. *See* Br. in Supp. of Pls.’ Mot. for Prelim. Inj. Relief, *Kobach v. U.S. Election Assistance Commission*, 5:13-cv-04095 (D. Kan.), ECF No. 17, at 21. If Kansas uses such separate ballots, the ballot will contravene K.S.A. § 25-617, which envisions a single unitary ballot.

40. Upon information and belief, if Kansas implements the dual registration system while maintaining a single ballot and Federal Form registrants are required to vote by provisional ballot as the Secretary of State has suggested, *see supra* ¶ 27, the fundamental right to ballot secrecy will be compromised. *See* K.S.A. Const. Art. 4, § 1; *Sawyer v Chapman*, 240 Kan. 409, 413, 729 P.2d 1220, 1223 (1986). The procedure for counting provisional ballots requires a judge to “attach the application for registration to the envelope containing the provisional ballot” and the county board of canvassers to “open all ballots deemed to be valid.” K.S.A. § 25-409. As compared to voting by regular ballot, which an elector would be entitled to do if he or she were not placed on the “federal only” list, the procedure increases the potential for compromising ballot secrecy.

41. Neither the NVRA nor *Inter-Tribal Council* mentions, much less mandates, a dual registration system of dividing electors between those qualified to vote in state elections and those qualified to vote only in federal elections. Indeed, the U.S. Supreme Court has made clear that NVRA does not mandate a dual registration system. *Young v. Fordice*, 520 U.S. 273, 290 (1997).

42. Dual registration systems for voting erect unnecessary bureaucratic hurdles to full participation, and have a long and ignominious history in the United States. Mississippi implemented the “original dual registration requirement,” which “was enacted as part of the ‘Mississippi plan’ to deny blacks the right to vote following the Constitutional Convention of 1890.” *Miss. State Chapter, Operation Push v. Allain*, 674 F.Supp. 1245, 1251 (N.D. Miss. 1987). In *Young, supra*, the Supreme Court blocked Mississippi from re-implementing a dual registration requirement that would have deprived approximately 10,000 individuals of the right to vote in state and local elections by dividing electors—like the dual system at issue here—between those qualified to vote in state elections, and those qualified for federal elections. Mississippi’s failed attempt during the 1990s to reenact a dual registration system marked the last time—until now—that a state has tried to implement such a system.

Failure to Engage in Agency Rulemaking

43. The Secretary of State has described the “bifurcated” election system to the media,¹⁰ and to other state officials, but has neither satisfied the requirements of the Filing Act (K.S.A. § 77-421), nor provided adequate information to electors regarding the dual system. The dual registration system establishes standards, requirements, and policies of general application that have the force and effect of law, purportedly for the purpose of implementing and interpreting statutes. It does so without notice, opportunity for public comment, publication, or any of the other hallmarks of the formal promulgation of rules and regulations.

¹⁰ Dion Lefler, “Kris Kobach laying groundwork for two-tier voting system in Kansas,” Wichita Eagle, Oct. 4, 2013, *available at* <http://www.kansas.com/2013/10/04/3038825/kobach-laying-groundwork-for-two.html>

44. Upon information and belief, on October 4, 2013, the Secretary of State confirmed the establishment of a dual registration system to the Kansas Legislative Research Department,¹¹ describing “three classifications of potential voters at present: a potential voter who has submitted a voter registration application plus proof of citizenship as outlined in Kansas law, who will be allowed to vote in all elections; a potential voter who has submitted the Kansas Voter Registration Application but has not submitted proof of citizenship, who will not be allowed to vote in any election; and a potential voter who has submitted a National Voter Registration Application . . . but no proof of citizenship to Kansas officials, who will be allowed to vote only in federal elections.”

45. On October 23, 2013, the Secretary of State, as a plaintiff in *Kobach v. U.S. Election Assistance Commission*, submitted a brief acknowledging that he has “implement[ed] a bifurcated voter registration system that is unduly burdensome,” Br. in Supp. of Pls.’ Mot. for Prelim. Inj. Relief, 5:13-cv-04095 (D. Kan.), ECF No. 17, at 21, and confirming that he is now “administer[ing] one system for voter registration only for federal elections and one system for voters registered for both state and federal elections,” *id.* at 24.

46. The Filing Act, K.S.A. § 77-421, establishes a specific process for rulemaking that guarantees that the public is informed of an agency’s intent to promulgate a rule, has an opportunity to comment on the rule, and receives a response to its comments and an explanation of why a particular rule was chosen. The Filing Act sets forth specific procedures for the promulgation of rules and regulations, including that an agency must give 60 days of notice of intended rulemaking and publish notice in the Kansas Register, which contains: a summary of the substance of the proposed rules; a summary of the economic impact on government, persons

¹¹ Email from Jill Shelley to legislators, Oct. 4, 2013, attached hereto as Ex. B.

subject to the proposed rules, and the general public; the address where a complete copy of the proposed rules may be obtained; the time and place of the public hearing; the manner in which interested parties may present their views; and a specific statement that the 60 days' notice constitutes a public comment period; and the address where such comments may be submitted. K.S.A. § 77-421(a).

47. The agency must also give all interested parties a reasonable opportunity to present their views at the hearing, orally or in writing. K.S.A. § 77-421(b).

48. Upon adoption of a rule, the agency must also prepare a statement of the principal reasons for adopting the rule, including the reasons for not accepting arguments made in testimony and comments and the reasons for any substantial change between the text in the published notice and the text adopted. The Filing Act also requires new rulemaking proceedings if a state agency proposes to adopt a final rule that differs in subject matter or effect in any material respect from the rule and regulation as originally proposed and is not a logical outgrowth of the rule and regulation as originally proposed, *i.e.*, a person affected by the final rule was not put on notice that such person's interests were affected in the rule making. K.S.A. § 77-421(c).

49. These requirements are mandatory. "Any rule or regulation not filed and published as required by this act shall be of no force or effect." K.S.A § 77-425. "If a state agency fails to submit a policy that by content and effect is a regulation to the notice and publication requirements of the Act, the policy is void." *Taylor v. Kan. Dep't of Health & Env't*, 305 P.2d 729, 734 (Kan. Ct. App. 2013) (citing *Bruns v. Kan. State Bd. of Technical Professions*, 255 Kan. 728, 734, 877 P.2d 391 (1994)).

50. Although the adoption of the NVRA and SAFE were each accompanied by formal administrative rulemaking, the dual registration system has been implemented without the required formal rulemaking procedures. Electors, such as Petitioner Belenky, have been arbitrarily denied the right to vote in municipal elections, and the ability to exercise other voting related rights because of the implementation of the dual registration system.

Grounds Upon Which Relief is Sought

51. Petitioners seek redress of the agency policy for three primary reasons:

52. First, the dual system violates the equal protection guarantees of § 1 of the Kansas Bill of Rights, which provides “Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” The dual registration system classifies otherwise indistinguishable electors by their method or date of registration, then assigns lesser voting rights to those not registered on January 1, 2013, who use the Federal Form for registration. Qualified applicants who use the Federal Form after January 1, 2013, and fully comply with the Federal Form’s requirements are registered to vote in federal elections alone, and are arbitrarily denied the right to vote in state or local elections, as well as the full range of other election-related rights enjoyed by duly registered electors in Kansas.

53. There is no compelling or rational basis for permitting qualified voter registration applicants who use the Federal Form on or after January 1, 2013, to vote in elections for federal office, such as U.S. President, but denying them the ability to vote in elections for state and local office, such as Governor or Secretary of State, particularly while all other qualified applicants are granted full voting rights. That is, anyone in the following three sub-categories will be permitted to vote in federal, state, and local elections: (1) persons who were registered to vote on January 1, 2013, regardless of whether they have provided documentary proof of citizenship; (2) persons

who apply to vote using the Federal Services Post Card Application (as opposed to the NVRA Federal Form), regardless of whether they have provided documentary proof of citizenship; and (3) persons who register to vote using the state form and provide documentary proof of citizenship.

54. Second, Respondents Kobach and Bryant exceeded their authority in adopting the Dual Registration Directive. Article II, Section 1 of the Kansas Constitution provides that “the legislative power of this state shall be vested in a house of representatives and senate.” The legislature neither envisioned nor authorized a dual registration system in passing SAFE, and the Secretary of State lacks statutory authority to establish such a system. Furthermore, the Supreme Court’s decision in *Inter-Tribal Council* does not require a dual registration system. To the degree the legislature decides to change current policy, it is the legislature – not the executive branch – that must do so. The rules and regulations implementing a dual system are inconsistent with the authorizing legislation (K.S.A. § 25-2309) and the promulgated regulations (K.A.R. § 7-23-14).

55. Third, the Dual Registration Directive was not properly promulgated as a rule or regulation according to the requirements of the Filing Act K.S.A. § 77-421, and is therefore void. *See* K.S.A. § 77-425. The Filing Act sets forth a specific process for rulemaking, which guarantees that the public is informed of an agency’s intent to promulgate a rule, has an opportunity to comment on the rule, and receives a response to its comments and an explanation of why a particular rule was chosen. Respondents Kobach and Bryant established the dual registration system unilaterally through informal directive, without complying with the processes required to promulgate a rule and/or regulation.

Statement of Relief Sought

56. Petitioners respectfully request declaratory and injunctive relief as follows:

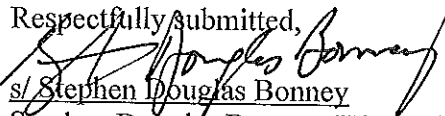
- a. An order declaring that the Dual Registration Directive is invalid for the reasons set forth herein;
- b. Injunctive relief enjoining Respondent Kobach, his successors in office, agents, employees, attorneys, and those persons acting in concert with him or at his direction from using and implementing the dual registration system or arbitrarily assigning different voting rights to petitioners and other qualified electors who register the vote using the Federal Form their right to vote in all Kansas elections;
- c. Injunctive relief ordering Respondents Kobach and Bryant to employ their full authority to direct all county elections officers to cease compiling a dual registration system and register all qualified electors as registered electors;
- d. Injunctive relief ordering corrective measures to be taken by Respondents, including but not limited to registering Petitioners to vote in all Kansas elections, and providing accurate information to registration applicants on the suspense list;
- e. An order of this Court retaining jurisdiction over this matter until Respondents have complied with all the orders and mandates of the court; and
- f. Such other and further relief as this Court may deem just and proper.

Request for Hearing and Scheduling Conference

57. Petitioners request a scheduling conference to set dates to govern discovery as well as a final disposition hearing and briefs related thereto.

WHEREFORE, Petitioners respectfully request this Honorable Court grant the relief requested herein and grant any other relief in the interest of justice.

Dated: November 21, 2013

Respectfully submitted,

s/ Stephen Douglas Bonney
Stephen Douglas Bonney, KS Bar #12322
ACLU Foundation of Kansas
3601 Main Street
Kansas City, MO 64111
Tel.: (816) 994-3311
Fax: (816) 756-0136
dbonney@aclukswmo.org

s/ Julie A. Ebenstein
Dale Ho*
Julie A. Ebenstein*
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
Tel.: (212) 549-2693
Fax: (212) 549-2651
dale.ho@aclu.org
jebenstein@aclu.org
**pro hac vice motions pending*

Attorneys for Plaintiffs