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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:

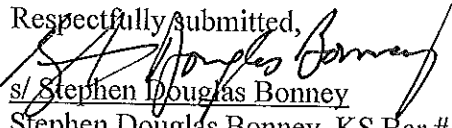
- a. An order declaring that the Dual Registration Directive is invalid for the reasons set forth herein;
- b. Injunctive relief enjoining Respondent Kobach, his successors in office, agents, employees, attorneys, and those persons acting in concert with him or at his direction from using and implementing 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
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