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THIRD JUDICIAL DIST.  
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THIRD JUDICIAL DISTRICT  
SHAWNEE COUNTY DISTRICT COURT  
CIVIL DEPARTMENT

Aaron Belenky, *et al.*,  
Petitioners, )  
)  
)  
v. ) Case No. 2013-CV-001331  
)  
)  
Kris Kobach, *et al.*,  
Respondents. ) Division No. 7  
)  
\_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF PETITIONERS'**  
**MOTION FOR PRELIMINARY INJUNCTION**

1. Petitioners Aaron Belenky, Scott Jones, and Equality Kansas submit this motion for a preliminary injunction in support of count three of their Petition, challenging Respondents' unlawful adoption and implementation of 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 – in contravention of the requirements of the Kansas Filing Act. Notwithstanding the unitary registration system contemplated by Kansas elections law, or the rulemaking process that all agencies must follow to promulgate administrative rules, the Respondents have simply bypassed all legal requirements and undertaken an informal, meandering, seemingly self-directed process for setting new voter registration rules. Instead of adhering to the requirements of state law, Respondents have constructed the dual registration system at whim – through un-publicized emails, statements to press, and submissions to federal courts – blatantly failing to promulgate the rules used to administer the system.

2. Respondents have created a dual registration system by which similarly situated registration applicants are divided into two categories and granted vastly different voting rights: Some voters, including those who were registered in Kansas on January 1, 2013, are granted full exercise of their voting rights. Voters who submit a complete registration application on the Federal Form after that date are denied some, but not all of their voting rights. They can vote in federal election, but they are unable to have their vote counted in state and local elections or to sign election related petitions.

3. Petitioners assert, *inter alia*, that Respondents have unlawfully implemented 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"). K.S.A. §§ 77-415 – 77-438. Moreover, if these rules are used to administer an election, Petitioner Belenky, Petitioner Jones, and other qualified voters in Kansas will be unlawfully deprived of their fundamental right to vote. Petitioners seek an order finding the dual registration system void, as is required when rules or regulations are administered without adherence to the Filing Act requirements.

#### **BACKGROUND**

4. Prior to 2013, voter registration in Kansas was straightforward. Qualified voters could apply for registration using (1) a state form approved by the Secretary of State, *see* K.S.A. § 25-2309(a); (2) the national mail voter registration form (the "Federal Form"), *see id.*; or (3) for persons in federal services, a Federal Services Post Card Application ("FSPCA"), *see* K.S.A. § 25-1215. All three applications contain an attestation to the applicant's age of majority and U.S. citizenship, and are signed by the applicant under penalty of perjury. *See* K.S.A. § 25-2309(b). The applicant could submit the application to the county election office in person, by mail,

through a voter registration agency, or by delivering the application personally. *See* K.S.A. § 25-2309(a). Upon receipt of the application, the county election official sent a notice of disposition by mail to the applicant. K.S.A. § 25-2309(e). 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. § 25-2309(g).

5. On April 1, 2011, the Kansas State Legislature passed an 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. SAFE was codified as K.S.A. §§ 25-2309(l)-(u), most of which became effective January 1, 2012. Pursuant to K.S.A. § 25-2309(s), the Secretary of State “may adopt rules and regulations . . . in order to implement the provisions of this section.”

6. K.S.A. § 25-2309(l), which became effective January 1, 2013, 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). To satisfy the “evidence of citizenship” requirement, an applicant must present one of thirteen documents listed in the statute before the registration deadline. *Id.*

7. In late 2011 and early 2012, as required by the Filing Act, the Secretary of State initiated the rulemaking process to promulgate rules and regulations related to SAFE: On November 24, 2011, the Secretary of State issued a notice of hearing on proposed administrative regulations.<sup>1</sup> On January 3, 2012, the Secretary of State presented the proposed rules and regulations noticed

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<sup>1</sup> Secretary of State, “Notice of Hearing on Proposed Administrative Regulations,” Nov. 18, 2011, <http://1.usa.gov/1nICSA4>.

for hearing to the Joint Committee on Administrative Rules and Regulations.<sup>2</sup> A hearing was held on January 24, 2012. The Secretary of State issued public hearing responses to concerns raised at that hearing.<sup>3</sup>

8. 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.<sup>4</sup> Of particular relevance, K.A.R. § 7-23-14(b)(3), implementing K.S.A. § 25-2309(l), requires 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.”

9. On January 1, 2013, the evidence of citizenship portion of SAFE became effective, requiring new registrants, in some instances, to provide evidence of U.S. citizenship before they would be registered to vote. K.S.A. § 25-2309(l). The relevant regulations, K.A.R. § 7-23-14, also became effective.

10. Since the evidence of citizenship requirement became effective, thousands of qualified voters who have attested to their eligibility to vote under penalty of perjury remain on a “suspense list” and are prohibited from exercising their fundamental right to vote.<sup>5</sup> Within the first year of K.S.A. § 25-2309(l)s application, 28% of new voter registration applications were put in suspense.<sup>6</sup> As of June 1, 2014, 18,071 registration applicants were on the suspense list,<sup>7</sup>

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<sup>2</sup> Joint Committee on Administrative Rules and Regulations, Minutes, Jan. 3, 2012, <http://bit.ly/1milsrs>.

<sup>3</sup> Kris Kobach, “Public Hearing Responses,” <http://bit.ly/UNhcug>.

<sup>4</sup> Available at <http://l.usa.gov/1wCeoxO>.

<sup>5</sup> See, e.g., Amanda J. Crawford, “Not All Voters Equal as States Move to Two-Tier Ballots,” Bloomberg, Oct. 10, 2013, available at <http://bloom.bg/1lsz5bZ>.

<sup>6</sup> Bryan Lowry, “Proof of citizenship law will be focus of secretary of state race,” Wichita Eagle, June 21, 2014, available at <http://bit.ly/1m1yeAi>. According to press reports, 28% of applications were put in suspense between January 1, 2013 and January 1, 2014. Some may

representing approximately 18.5% of all individuals who applied to register in Kansas since the “evidence of citizenship” provision went into effect in January 1, 2013.<sup>8</sup> The suspense list includes both applicants who used the Federal Form and those who used the state form. Secretary Kobach has dismissed concerns over this growing list of applicants who will be unable to vote, saying “People who are already registered don’t need to prove their citizenship under our law, so it really doesn’t distract from voting at all,”<sup>9</sup> and that people who register at driver’s license offices “are mostly casual registrants, many of whom do not intend to vote.”<sup>10</sup>

11. On June 17, 2013, the U.S. Supreme Court ruled in *Arizona v. Inter Tribal Council of Arizona* that Arizona could not impose its evidence-of-citizenship requirement with respect to individuals seeking to register to vote using the Federal Form. *See Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2257 (2013). As required by the National Voter Registration Act of 1993 (“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). The Court 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 §

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have since been removed from the suspense list. *See* Tim Carpenter, “Secretary of State Kris Kobach proud of 72 percent new voter registration compliance,” *Topeka Capital-Journal*, Jan. 29, 2014, *available at* <http://bit.ly/1jomYs1>.

<sup>7</sup> Editorial, “Voters still ‘in suspense,’” *Lawrence Journal-World*, June 15, 2014, *available at* <http://bit.ly/1pTiX1l>.

<sup>8</sup> According to press reports, 28% of applications were put in suspense between Jan. 1, 2013 and Jan. 1, 2014. Some may have since been removed from the suspense list. *See* Tim Carpenter, note 6 *supra*.

<sup>9</sup> Eric Armstrong, “Fight Over Kansas’ Voter ID Law Heating Up,” *kns.com*, May 12, 2014, *available at* <http://bit.ly/1wCfs4l>.

<sup>10</sup> *Lawrence Journal-World* Editorial, note 7 *supra*.

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 (internal quotation marks omitted). Instead, “every eligible voter can be assured that if he does what the Federal Form says, he will be registered.” *Id.* at 2255 n.4.

12. Soon thereafter, on July 12, 2013, the Secretary of State sought approval of an additional administrative rule. The proposed rule would permit electors on the “suspense list” to cast a provisional ballot and still have their ballot counted if they provide evidence of citizenship prior to ballot canvassing.<sup>11</sup> On July 16, 2013, the State Rules and Regulations Board *considered and rejected* that proposed regulation.<sup>12</sup>

13. Then, on July 30, 2013, through an informal, unpublicized directive, Respondents initiated a profound change to the way voter registration laws are administered in Kansas. In an email to all county election officials, *see Ex. A, Defs.’ Resps. to Pls.’ 1st Reqs. for Produc., Ex. 1.*, the Secretary of State, through the State Election Director, issued a policy directive (the “Dual Registration Directive”) providing binding “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 the case of *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.” Without authority and without abiding by the laws governing rulemaking, through this directive Respondents created a dual registration system.

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<sup>11</sup> *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://bit.ly/1jooOJC>.

<sup>12</sup> *See* John Milburn, “Board rejects voter registration fix despite computer glitch,” *Topeka Capital Journal*, July 16, 2013, *available at* <http://bit.ly/1sIFsNs>.

14. On many occasions thereafter, Respondents have described the different incarnations and changing rules of the unlawful dual registration system. On no occasion have Respondents publicized or promulgated these rules as required by the Filing Act.

15. On October 23, 2013, the Secretary of State, as a plaintiff in *Kobach v. U.S. Election Assistance Commission*, submitted a brief 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,” Br. in Supp. of Pls.’ Mot. for Prelim. Inj. Relief, *Kobach v. U.S. Election Assistance Comm’n*, No. 5:13-cv-04095 (D. Kan. Oct. 23, 2013), ECF No. 17 (“Pls.’ Prelim. Inj. Br.”), at 24. He later described the bifurcated system to the United States Court of Appeals for the Tenth Circuit. See Pls.-Appellees’ Combined Br. in Opp’n to Defs.-Appellants’ & Intervenors-Appellants’ Mots. for Stay Pending Appeal, *Kobach v. U.S. Election Assistance Comm’n*, No. 14-3062 (10th Cir. May 13, 2014) (“Pls.-Appellees’ Opp’n to Stay”), at 18 (“Some individuals will be registered to vote only in federal elections while others will be registered to vote in federal, state, and local elections. Many of those individuals will be confused as to why their ballot does not include state and local elections. It is likely that many voters will be confused as to which election they are registered to vote in.”)

16. In October 2013, the Secretary of State announced to the media that the Department of Revenue Services would begin transferring to the appropriate elections offices evidence of citizenship submitted by some Kansans applying for their driver’s license.<sup>13</sup> The process does not seem to apply to all applicants submitting proof of citizenship for the purpose of obtaining, changing or renewing their driver’s license.

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<sup>13</sup> See Andy Marso, “Kobach: 1/3 of suspended voters OK’d,” Topeka Capital-Journal, Jan. 22, 2014, available at <http://bit.ly/1qC0hpw>.



17. On January 7, 2014, the Secretary of State entered into an agreement with the Kansas Department of Health and Environment (“KDHE”) to cross-check information provided by voter registration applicants against the information maintained by KDHE. *See* Ex. B, Defs.’ Resps. to Pls.’ 1st Reqs. for Produc., Ex. 8. Eligible voters who were not born in Kansas, such as Petitioner Belenky and Petitioner Jones, cannot have their registration approved through this process. Similarly, Kansas-born applicants whose current name or gender marker is different from the one on their birth certificate cannot have their registration approved through this process.

18. On multiple occasions, Respondents have described the changing plans for administering upcoming elections. On no occasion have Respondents publicized or promulgated any of the election administration rules as required by the Filing Act.

19. Secretary Kobach has represented to federal courts that to administer the dual registration system he intended to use separate federal and state ballots in each county. *See* Pls.’ Prelim. Inj. Br. at 24, *Kobach* (D. Kan.); *see also* Pls.-Appellees’ Opp’n to Stay at 16, 18, *Kobach* (10th Cir.) (“Some individuals will be registered to vote only in federal elections while others will be registered to vote in federal, state, and local elections. . . . Furthermore polling places will be required to distribute a different ballot to each category of voter.”) On no occasion have Respondents publicized or promulgated these rules as required by the Filing Act.

20. On June 10, 2014, Secretary Kobach revealed through the Associated Press new plans for administering the dual registration system using provisional ballots.<sup>14</sup> Much like the rejected July 2013 rules, *see supra* ¶ 12, and in violation of K.A.R. § 7-23-14(b)(3), *see supra* ¶ 8, the

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<sup>14</sup> *See* Associated Press, “Kobach: Some Kansans will vote for federal candidates only,” *Topeka Capital-Journal*, June 10, 2014, *available at* <http://bit.ly/1nIFEVV>.



plans require Petitioners, and other Federal Form applicants, vote by provisional ballot, then local election officials are required to count their votes cast for federal contests only and disregard their votes cast for state contests. On no occasion have Respondents publicized or promulgated these rules as required by the Filing Act.

21. In response to discovery requests, Respondents have confirmed that they have instructed election officials to maintain a dual system of registration, which they will administer through the use of provisional ballots for Petitioner Belenky, Petitioner Jones, and other Federal Form registrants. This system requires that county election officials maintain a separate list of Federal Form applicants who are *not* considered registered and are not entered into the official voter registration list. These voters will be required to vote by provisional ballots. When the ballots are canvassed, only the votes for federal offices will be counted. *See Ex. C, Defs.' Resps. to Pls.' 1st Reqs. for Produc., Ex. 7.* There are no administrative rules for this method of canvassing Federal Form registrants.

22. As described above, Respondents have bypassed the Filing Act requirements and undertaken an informal, meandering, seemingly *ad hoc* process to create a dual registration system not contemplated by state law. Voters, candidates, and other members of the public affected by the dual registration system should not have the exercise of their fundamental right to vote governed by a registration system that changes at the whims of the Respondents, with no regard for the requirements of state law.

#### LEGAL STANDARD

23. The purpose of a temporary preliminary injunction is to prevent injury to a claimed right pending a final determination of the controversy on its merits. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 461, 726 P.2d 287, 289-90 (1986). A temporary injunction merely preserves

the status quo until there can be a full adjudication of a claim. *Id.* A movant is entitled to a preliminary injunction upon establishing the following:

[1] a substantial likelihood of prevailing on the merits; [2] a reasonable probability of irreparable future injury to the movant; [3] an action at law will not provide the adequate remedy;<sup>15</sup> [4] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and [5] the injunction, if issued, will not be adverse to the public interest.

*See Steffes v. City of Lawrence*, 284 Kan. 380, 395-96, 160 P.3d 843, 854 (2007) (citing *Wichita Wire*, 11 Kan. App. 2d at 462, 726 P.2d at 290; *Bd of Cnty. Comm'rs of Leavenworth Cnty. v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920, 925 (2006)).

24. In interpreting the first prong of the standard for a preliminary injunction, “[s]ubstantial likelihood of prevailing,” the Kansas Court of Appeals noted that “[i]t is only necessary that plaintiffs establish a reasonable probability of success, and not an ‘overwhelming’ likelihood of success, in order for a preliminary injunction to issue.” *Wichita Wire*, 11 Kan. App. 2d at 463-64, 726 P.2d at 290-91 (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981)).

25. As demonstrated below, all preliminary injunction factors are in Petitioners’ favor in this matter.

## ARGUMENTS AND AUTHORITIES

### **I. Petitioners Have a Substantial Likelihood of Prevailing on the Merits**

26. The dual election system haphazardly created by Respondents contravenes the requirements of the Filing Act. Where, as here, the requirements of the Filing Act are not followed to promulgate rules or regulations, a Court must declare the rules void. Petitioners are

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<sup>15</sup> An action for damages would be plainly inadequate to prevent the harm to Petitioners right to vote.

likely to succeed on the merits of this claim because Respondents blatantly failed to promulgate the rules that will be used for administering the dual election system.

*A. Any Agency Policy that (1) Does Not Permit Discretion; (2) Has General Application; and (3) Has the Effect of Law Constitutes a Rule and Regulation for the Purposes of the Filing Act*

27. K.S.A. § 77-415(c)(4) provides the definition of rules and regulations for the purposes of the Filing Act: “Rule and regulation, means 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.”

28. In *Bruns v. Kansas State Board of Technical Professions*, the Kansas Supreme Court set the parameters for defining what is a “rule” or “regulation.” 255 Kan. 728, 734, 877 P.2d 391, 396 (1994). The Court reviewed the Kansas Board of Technical Professionals’ (“BTP”) internal written policy which provided that the agency would not grant a professional engineering license through reciprocity if the applicant’s license in the state of original examination was no longer valid. 255 Kan. at 729, 877 P.2d at 392-93. The Court held that the BTP’s policy regarding licensure requirements for engineers was a “rule” or “regulation” as defined by Filing Act. 255 Kan. at 737, 877 P.2d at 397.

29. The Court relied on three factors in holding that the internal policy of the BTP was a “rule or regulation” within the definition of K.S.A. § 77-415: “(1) The agency did not exercise any discretion in applying the written policy; (2) the rule had general application to those having to do business with the agency; and (3) the agency treats as ‘having the effect of law.’” *Am. Trust Adm’rs, Inc. v. Sebelius*, 273 Kan. 694, 702, 44 P.3d 1253, 1259 (2002) (citing *Bruns*, 255 Kan. at 733-34, 877 P.2d at 395).

30. *Standard, requirement, or policy.* The Court in *Bruns* found that a primary attribute of a standard or policy is that it is applied by the agency without exercising any discretion or

engaging in any fact finding. *See Bruns*, 255 Kan. at 733, 877 P.2d at 394; *see also Am. Trust Adm'rs*, 273 Kan. at 703, 44 P.3d at 1259-60 (determining that a policy constitutes a “standard” for the purposes of K.S.A. § 77-415 in part because the policy alludes to a Commissioner’s discretion, but does not contain criteria with which the Commissioner could make exceptions to the policy.) The Court also found that the BTP’s internal policy was a policy requiring rulemaking because it implements a statute. *See Bruns*, 255 Kan. at 737, 877 P.2d at 397.

31. *General application.* A policy has “general application” when it applies to those having to do business with the agency. *Am. Trust Adm'rs*, 273 Kan. at 702, 44 P.3d at 1259, *citing Bruns*, 255 Kan. at 733-34, 877 P.2d at 395. The Supreme Court in *Bruns* agreed that application of the policy at issue to “all persons applying for a professional engineering license by reciprocity or comity” was “broad enough to satisfy the requirement of ‘general application.’” *See Bruns*, 255 Kan. at 734, 877 P.2d at 395 (quoting *Bruns v. State Bd. of Technical Professions*, 19 Kan. App. 2d 83, 87, 864 P.2d 1212, 1216 (1993)). In *American Trust Administrators*, the Court found that the Insurance Commissioner’s bulletin addressed to all insurance companies writing stop-loss insurance was broad enough for the Court to consider it a policy of general application for the purposes of the Filing Act. 273 Kan. at 703, 44 P.3d at 1260. An agency must always proceed by rulemaking if it seeks to establish rules of widespread application. *See Hallmark Cards, Inc. v. Kan. Dep't of Commerce and Hous.*, 32 Kan. App. 2d 715, 725, 88 P.3d 250, 257 (2004) (citing *Bruns*, 255 Kan. at 733-37, 877 P.2d at 394-97).

32. *The force and effect of law.* The content and effect of a policy are key to determining whether it is a rule or regulation. *See Am. Trust Adm'rs*, 273 Kan. at 703, 44 P.3d at 1260. In *Bruns*, the Court observed that under the BTP’s policy, it summarily denies licenses to any applicant who seeks comity for a lapsed out-of-state license, and therefore it treats its internal

policy as having the effect of law. 255 Kan. at 734, 877 P.2d at 395. In contrast, policies that do not have the effect of law include, for example, an operating manual “not intended to control the conduct of the public,” but rather, to function as an informational reference tool. *See Hemphill v. Kan. Dep’t of Revenue*, 270 Kan. 83, 88-89, 11 P.3d 1165, 1169-70 (2000) (finding that a breathalyzer manufacturer’s operating manual is merely informational in nature, not a rule or regulation requiring promulgation).

***B. Agency Rules Must Be Formally Promulgated in Accordance with the Filing Act***

33. The Filing Act requires that agencies carry out 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.

34. Specifically, K.S.A. § 77-421 sets forth the requirements state agencies must comply with *prior to* the adoption of any rule and regulation. An agency must give *60 days’ notice* of intended rulemaking and publish such notice in the Kansas Register. K.S.A. § 77-421(a)(1). The *notice* must contain: a summary of the substance of the proposed rules; a summary of the economic impact on government, persons 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; 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)(1). All interested parties must have *reasonable opportunity* to present their views at the hearing, orally or in writing. The agency must 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. K.S.A. § 77-421(b)(1).

35. In addition, the Filing Act 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. See K.S.A. § 77-421(c).<sup>16</sup>

36. Adherence to the Filing Act is mandatory, not discretionary, for rulemaking. "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 rule is not properly promulgated, that rule is void. See *Am. Trust Adm'rs*, 273 Kan. at 703-04, 44 P.3d 1253, 1260; *Taylor v. Kan. Dep't of Health and Env't*, 49 Kan. App. 2d 233, 238, 305 P.3d 729, 734 (2013) ("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."); see also K.S.A. § 77-415(b)(1) ("Except as provided in this section, any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the rules and regulations filing act.").

37. There are a very narrow set of circumstances under which temporary rulemaking is allowed, specifically policies that pertain to public peace, health, safety or welfare, none of which apply here. See K.S.A. § 77-422(a) (limiting the use of temporary rules and regulations to circumstances in which "the preservation of the public peace, health, safety or welfare necessitates or makes desirable putting such rule and regulation into effect prior to the time it could be put into effect" if the agency complied with the K.S.A. § 77-421 requirements). None of those circumstances are present here.

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<sup>16</sup> See also Kansas Department of Administration, Policy and Procedure Manual for the Filing of Kansas Administrative Regulations, July 2012, <http://1.usa.gov/1iKNX6d>.

***C. The Dual Registration System is a Rule of Election Administration, and Thus Requires Formal Promulgation***

38. The dual registration system establishes standards, requirements, and policies of general application that have the force and effect of law for the purpose of implementing and interpreting K.S.A. § 25-2309. Those policies were established without notice, opportunity for public comment, publication, or any of the other requirement for promulgating rules and regulations. As a rule or regulation within the meaning of the Filing Act, state law does not permit implementation of the dual registration system without adherence to the appropriate administrative process. The dual registration system is therefore void.

39. *Standard, requirement, or policy.* The dual registration system is a profound and unprecedented restructuring of the way elections are administered in Kansas. The rules of the new system categorize eligible voters based on which registration method they use, and determine whether and how to allow them to exercise their voting rights.

40. The lack of discretion or factfinding in applying the rules of the system – segregating Federal Form applicants and automatically denying some of their voting rights – is one hallmark of a policy or standard. *See Bruns*, 255 Kan. at 733, 877 P.2d at 394; *see also Am. Trust Adm'rs*, 273 Kan. at 703, 44 P.3d at 1259-60. The dual registration system meets this criterion as a mandatory policy that is applied without election officials intervening discretion.

41. The requirements of the dual registration system are binding upon county election officials. Respondents' Dual Registration Directive, *supra* at ¶ 13, includes the mandatory requirement that local election officials track applicants who have applied using the Federal Form. A local elections official could not simply ignore the directive, use his or her discretion, and maintain a unitary system by properly registering Federal Form applicants in the Election Voter Information System (ELVIS) database and adding their name to the poll book. *See Ex. C*;



K.S.A. § 25-2304 (“The county election officer shall maintain registration books to register all citizens entitled to be registered by such county election officer under the provisions of this act. Such registration books may be in such form as may be authorized by the secretary of state.”) Local election officials are required to discard Federal Form registrants votes cast for state contests. *See Ex. C.*

42. Because the dual registration system requires that local officials maintain two separate voter registration lists, and permits them no discretion to decide independently whether to register Federal Form applicants or treat them differently from other voters, discretion is absent from the dual registration system. The dual registration system is comprised of mandatory, set policies and standards that are rules for purposes of the Filing Act.

43. Administering the system in the method ascribed by Respondents is, in turn, binding on voters. The Federal Form sets out the requirements, including the state-specific requirements, for voter registration. *See* 42 U.S.C.A. § 1973gg-4(a)(1). With the Respondents’ imposition of a dual registration system, Federal Form applicants, including Petitioner Belenky and Petitioner Jones, are disqualified from having their votes counted in state and local elections, despite their submission of a complete and valid voter registration.

44. *General application.* The dual registration system is a policy of general application that applies to all voter registration applicants. Any Kansan who applies to register to vote is now separated into one of two categories for the purposes of elections: those who will have all of their votes counted and those who will be denied many of their voting rights. The rule for sorting voters into these categories applies broadly to all Kansas registrants and prospective applicants.

45. Even viewing the policy at issue as applying only to applicants who have registered using the Federal Form or who intend to register using the Federal Form, the policy is still one of

general application. In this sense, it is entirely analogous to other administrative policies that the Kansas Supreme Court has held are rules of general applicability which must be formally promulgated in accordance with the Filing Act. *See Bruns*, 255 Kan. at 734, 877 P.2d at 395 (“The policy under consideration here has general application to all persons applying for a professional engineering license by reciprocity of comity.”); *see also Am. Trust Adm’rs*, 273 Kan. At 703, 44 P.3d at 1260 (The bulletin addressed to “all insurance companies writing stop-loss or excess loss insurance; registered third party administrators; and other addressees” has general application.)

46. Kansas Courts have found that regulations with far narrower reach satisfy the general application requirement. *See Bruns*, 255 Kan. at 734, 877 P.2d at 395 (holding that an agency licensure rule that applied to “all persons applying for a professional engineering license by reciprocity or comity” is broad enough to satisfy general application requirement); *Am. Trust Adm’rs*, 273 Kan. At 703, 44 P.3d at 1260 (finding that a bulletin addressed to “all insurance companies writing stop-loss or excess loss insurance; registered third party administrators; and other addressees” was a policy of general application for the purposes of the Filing Act.) A policy is sufficiently broad to qualify as a rule of “general application” if it applies to every person who must engage in Respondents’ dual registration system to exercise their right to vote, or to all applicants who seek to register using the Federal Form.

47. Furthermore, the Court in *Bruns* implied that both the reach and the importance of a policy may be relevant to determining whether it is one of general application. The Court noted that the BTP’s internal written policy should go through the rulemaking process in part because the rights affected were significant to applicants: “Professional licenses affect the ability to earn a living.” *Bruns*, 255 Kan. at 737, 877 P.3d at 397.

48. Here, the significance of the rights affected by the Secretary of State's policy cannot be overstated. *See McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440–41 (2014) (“There is no right more basic in our democracy than the right to participate in electing our political leaders.”); *see also infra* ¶ 56. The extraordinary importance of the fundamental right to vote weighs in favor of requiring appropriate publication, input from the public and final promulgation of the rules which affect that right.

49. The dual registration system policies are *binding and have the effect of law*. First, the only authority delegated to the secretary of state for implementing the provisions of K.S.A. § 25-2309 is through rules and regulations. *See* K.S.A. § 25-2309(s) (“The secretary of state may adopt rules and regulations . . . in order to implement the provisions of this section.”). To the extent the secretary of state has authority to implement the provisions of K.S.A. § 25-2309, he must do so through the rulemaking process. *See Hallmark Cards*, 32 Kan. App. 2d at 726, 88 P.3d at 258 (“Here, the legislature has explicitly directed that the Department ‘shall publish’ rules and regulations to implement the statute. Given this clear legislative mandate, we must hold the Department to an even higher level of scrutiny in determining whether its internal and unwritten standards have been consistently and uniformly applied.”).

50. Second, in seeking to supplant the rules already promulgated in K.A.R. § 7-23-14, the dual registration system has the immediate force of law. Prior to the *Inter Tribal Council* decision, Secretary Kobach adhered to the rulemaking requirements and promulgated rules related to local election officials' treatment of “suspense list” voters in a unitary voter registration system. *See supra* ¶ 8 (K.A.R. § 7-23-14, promulgated to implement the requirements of K.S.A. § 25-2309). Immediately after the *Inter Tribal Council* decision, Secretary Kobach initiated the rulemaking process to amend the standards of K.A.R. § 7-23-14.

*See supra* ¶ 12 (On July 16, 2013, the State Rules and Regulations Board considered and *rejected* a proposal on a new treatment of provisional ballots within a unitary registration system.). Here, however, Respondents have bypassed their obligation to engage in rulemaking to create the dual registration system and have instead, through informal unpublicized instructions, issued a generally applicable directive that either amends or violates K.A.R. § 7-23-14. For that reason alone, it has the effect of law.

51. Third, the dual registration directive is binding on local election officials. Local election officials are not permitted to disregard the directive and unilaterally permit the Federal Form registrants to exercise their voting rights. Instead, the directive has a direct and binding impact on how those officials register voters and administer elections. *See supra* ¶ 41. The dual registration directive is therefore not informational in nature leaving independent, discretionary choices for election administration to local officials. *Cf. Hemphill*, 270 Kan. at 88-89, 11 P.3d at 1169-70 (finding that a breathalyzer manufacturer's operating manual is not a rule or regulation requiring promulgation).

52. Fourth, there is no intermediate step between the Respondents' directive and its binding effect on Petitioners. Petitioner Belenky and Petitioner Jones both applied to register to vote by completing and submitting the Federal Form. Petitioner Jones's and Petitioner Belenky's completion and return of the Federal Form is a sufficient and complete registration application. *See Inter Tribal Council*, 133 S. Ct. at 2257-60. The dual registration system enacted by Respondents singlehandedly eviscerated many of their fundamental rights. In light of their valid, complete registration, and the dual registration system's immediate effect of depriving Petitioner Belenky and Petitioner Jones of their voting rights, it has had the effect of law.

***D. Because Respondents Did Not Submit the Dual Registration System to the Rulemaking Process, the Dual Registration System is Void***

53. Respondents violated the Filing Act by failing or refusing to meet any of the requirements set forth in K.S.A. § 77-421. Although Petitioners also challenge the validity of the dual registration system itself on constitutional grounds, *see* Petition, at 18 – 19, irrespective of the unconstitutionality of the dual registration system, the dual registration system must be held void because Respondents have failed to promulgate its rules and regulations as required by state law. *See* K.S.A. §§ 77-621(c)(4) (court may grant relief if “the agency has erroneously interpreted or applied the law”); 77-621(c)(5) (court may grant relief if “the agency . . . has failed to follow prescribed procedure”); 77-622(b) (court may grant declaratory or injunctive relief); *see also* *Bruns*, 255 Kan. at 729, 877 P.2d at 392.

54. Secretary Kobach himself appears to recognize the need for formal rulemaking in this context, and has engaged in formal rulemaking to promulgate all of the other administrative rules intended to implement SAFE. *See* K.A.R §§ 7-23-4, 7-36-7, 7-36-8, 7-46-1, 7-46-2, 7-46-3; *supra* ¶ 8. Yet, as described above, the Secretary did not satisfy any of the Filing Act requirements for promulgating the dual registration directive or for administering the system through the use of half counted provisional ballots as described in Ex. C and ¶ 20.

55. Because the dual system was not promulgated through the rulemaking process, it violates Kansas law and must be held void. Because the dual registration system must be held void, Petitioners are likely to succeed on the merits of this claim.

## **II. Petitioners Have Established Irreparable Injury**

56. Irreparable injury, for the purposes of a preliminary injunction, requires a showing that a reasonable probability exists of prospective injury. *See Bd of Cnty. Comm'rs of Leavenworth Cnty.*, 281 Kan. 678, 683, 132 P.3d 920, 925 (2006). The Supreme Court has long recognized that the right to vote is one of the most fundamental rights that this country's citizens hold. *See*

*McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440–41 (2014) (“There is no right more basic in our democracy than the right to participate in electing our political leaders.”). Because voting is the fundamental building block of political power, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Restrictions on voting rights thus “strike at the heart of representative government” and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

57. The Kansas Supreme Court has also recognized the extraordinary importance of protecting the fundamental right to vote. See *State v. Beggs*, 271 P. 400, 402 (Kan. 1928) (striking down as unconstitutional a law that requires registered voters voting for the first time in a primary to declare their party affiliation, and finding that the “right to vote . . . is a constitutional right, which cannot be abridged by the Legislature, or by any other power except the entire people of the state by way of amendment to the Constitution.” (quoting *Wheeler v. Brady*, 15 Kan. 26, 32 (1875))); see also *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 779 (Kan. 1940) (upholding the right to ballot secrecy and noting, “[e]lection laws are liberally construed to permit exercise of the right of suffrage conferred by the Constitution and laws of the state.”).

58. If the dual registration system is used to administer the upcoming August 2014 election, Petitioner Belenky, Petitioner Jones, and countless other Kansas voters will be harmed irreparably by Respondents’ violation of their right to vote. Respondents’ violation of Petitioners’ voting rights and perpetuation of unlawful rules and regulations cannot be reversed if the election is administered according to an invalid system. In order to preserve the status quo

until these claims can be fully adjudicated, the Court must enjoin Respondents' dual system of elections.

59. Petitioner Belenky's and Petitioner Jones's submission of the completed Federal Form is sufficient to complete their voter registration. *See Inter Tribal Council*, 133 S. Ct. at 2255 n.4 ("every eligible voter can be assured that if he does what the Federal Form says, he will be registered."). As set forth in the Petition, regardless of the changes Kansas has sought to make to the Federal Form, in its current form, Petitioners have filled it out completely and meet the requirements for registration in Kansas, and therefore should be eligible to vote in all elections. *See* Petition, at 3. Instead, Petitioner Belenky, Petitioner Jones, and other Federal Form applicants will not have many of their votes counted in the upcoming election. The deprivation of Petitioners' fundamental voting rights, including the right to sign election related petitions, amounts to irreparable injury. *See generally Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Should the upcoming election go forward and Respondents deny Petitioners their right to vote in state and local contests, the harm would be irreparable.

60. The dual registration system will also cause voter confusion and likely disenfranchise voters who did not use the Federal Form. Even though Petitioners' claims challenge Respondents' violation of the Filing Act, the impact of the dual registration system — increased voter confusion, depressed voter participation, and likely disenfranchisement—merits exacting scrutiny. Secretary Kobach himself acknowledged that the dual registration system will cause voter confusion. *See* Pls.-Appellees' Opp'n to Stay at 18, *Kobach* (10th Cir.) ("Some individuals will be registered to vote only in federal elections while others will be registered to vote in federal, state, and local elections. Many of those individuals will be confused as to why their ballot does not include state and local elections. It is likely that many voters will be confused as



to which election they are registered to vote in.”). Respondents’ failure to follow the law and publicize clear, consistent rules for implementing K.S.A. § 25-2309 has only exacerbated that confusion and will likely have collateral consequence of disfranchising more eligible voters. Enjoining the dual registration system to maintain the *status quo* will prevent widespread denial of fundamental rights until the dual registration system can be reviewed fully.

### **III. The Balance of Equities Strongly Favors Petitioners**

61. The balance of equities strongly favors a preliminary injunction. Respondents will not be injured by allowing citizens who have been deemed qualified to vote in the August 2014 primary for federal offices like U.S. Senator to also vote for state offices such as Secretary of State. Respondents will not be burdened by administering the upcoming elections according to a unitary system – using the same rules that Respondents used in all elections prior.

62. Even if there were a burden associated with administering a unitary system of registration, the injury that Petitioner Belenky, Petitioner Jones, and other Kansans will suffer absent an injunction—the violation of their right to vote and the protection included in the Filing Act—far outweighs that burden.

### **IV. An Injunction Will Serve the Public Interest.**

63. The Filing Act requirements serve multiple purposes. *First*, the rulemaking ensures proper delegation of legislative authority, as agencies rulemaking authority can only be exercised to “implement or interpret” a statute within the confines of that delegated statutory authority. *See Hallmark Cards, Inc. v. Kan. Dep’t of Commerce and Hous.*, 32 Kan. App. 2d 715, 726-28, 88 P.3d 250 (2004); *Bruns*, 255 Kan. at 735, 877 P.2d at 396 (“an administrative regulation may not contravene or nullify a controlling statutory enactment. . . . As is true of any law, the prime objective in construing laws creating and empowering administrative agencies is to ascertain and

give effect to legislative intent.” (quoting *Kan. Comm'n on Civil Rights v. City of Topeka St. Dep't*, 212 Kan. 398, 401-02, 511 P.2d 253, 256-57 (1973)).

64. *Second*, the Filing Act requirements guarantee that the public is notified about an agency's intent to promulgate a rule, has a right to comment on the rule, and receives an explanatory response to those comments. K.S.A. § 77-421. The Court in *Bruns* observed that a primary function of the requirements of filing and publishing rules and regulations is dissemination of information, and that “[m]embers of the public, and others affected thereby, should not be subjected to agency rules and regulations whose existence is known only by agency personnel.” *Bruns*, 255 Kan. at 737 (quotation omitted). Publication of the rules that will affect the public's most fundamental rights must be publicized and vetted thoroughly through the rulemaking process. A widely distributed policy is no substitute for a rule. *See Am. Trust Adm'rs*, 273 Kan. at 704, 44 P.3d at 1260 (“While we recognize the widely distributed nature of the bulletins here, we do not believe a widely distributed bulletin is a valid substitute for a properly promulgated rule or regulation under K.S.A. § 77-415.”)

65. Adhering to the requirements of state law and complying with the Filing Act serves the public's interest in transparency, consistency and due process. *See Bruns*, 255 Kan. at 737. Rulemaking guarantees an open, public, publicized process for promulgating the rules for administering elections. The public interest is served by Respondents' compliance with state law.

### CONCLUSION

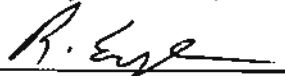
66. The dual registration system is a profound and unprecedented restructuring of the way elections are administered in Kansas. Respondents created rules for administering the system without adhering to *any* of the requirements of the Filing Act. Because those rules and

regulations violate Kansas law and will violate Petitioner Belenky's and Petitioner Jones's most fundamental right to vote, the dual registration system must be held void. Petitioners have demonstrated the substantial likelihood of prevailing on the merits of this claim, the reasonable probability of irreparable future injury, that Respondents will not be burdened or injured by administering a unitary registration system and registering Petitioners, and that the public interest is best served by an injunction.

67. For the foregoing reasons, Petitioners respectfully request that the Court find the dual registration system void and order Respondents to instruct all county election officials to cease compiling dual registration lists and to register all qualified electors, including Petitioner Belenky and Petitioner Jones, to vote in all Kansas elections.

Dated: June 27, 2014

Respectfully Submitted,



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*Attorneys for Petitioners*

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on the 27th day of June, 2014, a copy of the above and foregoing document was hand-delivered to the chambers of the Hon. Franklin. R. Theis, and was served on the following by electronic mail delivery and UPS:

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Caleb D. Crook  
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EXHIBIT A

From: [county-election-officials-bounces@list.ink.org](mailto:county-election-officials-bounces@list.ink.org) [mailto:[county-election-officials-bounces@list.ink.org](mailto:county-election-officials-bounces@list.ink.org)] On Behalf Of Bryant, Brad [KSOS]  
Sent: Tuesday, July 30, 2013 9:39 AM  
To: CEO list serve ([county-election-officials@ink.org](mailto:county-election-officials@ink.org))  
Subject: [County-election-officials] Supreme Court decision and Kansas voter registration

To all Kansas county election officers:

This message is intended to provide additional guidance regarding voter registration procedures and the CEO's responsibilities when implementing the dual registration system resulting from the recent U.S. Supreme Court decision in the case of *Arizona v. Inter Tribal Council*. As the Supreme Court made clear, its decision applies only to "federal registration forms" and covers *only federal elections*. States remain free to require proof of citizenship from voters who seek to also vote in state elections.

KSA 25-2309(a) allows any qualified elector to register to vote in Kansas using either the Kansas voter registration form or the national mail voter registration form, which is also referred to as the "federal form." The federal form may be viewed on the federal Election Assistance Commission's web site here: [http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration\\_1209\\_en9242012.pdf](http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf)  
Do not confuse the term "federal form" with the Federal Post Card Application (FPCA), which is used by military & overseas citizens to apply for ballots under the federal UOCAVA law.

State law allows applicants to use either the state form or the federal form for voter registration because states are required to "accept and use" the federal form. This is part of the National Voter Registration Act of 1993 (NVRA, or "motor voter") and was reaffirmed by the Supreme Court's decision. Whichever form a person uses, if an applicant does not submit a U.S. citizenship document, you must follow up and request one.

This dual registration system results in the following four scenarios:

Using the Kansas form

- (1) A person who applies for voter registration using the Kansas form and submits a citizenship document is eligible to vote in all Kansas elections—federal, state and local.
- (2) A person who applies using the Kansas form and does not submit a citizenship document is not eligible to vote in federal, state or local elections. This applicant should be issued a provisional ballot, but the ballot will not count. It would count only if an error was discovered after submission of the provisional ballot.

Using the federal form

- (3) A person who applies using the federal form and submits a citizenship document is eligible to vote in all Kansas elections—federal, state and local.
- (4) A person who applies using the federal form and does not submit a citizenship document is eligible to vote only in federal elections but is not eligible to vote in state or local elections. This federal-only registrant may have his/her votes counted only for the offices of President/Vice President, U.S. Senator, and U.S. Representative.

Many counties probably have had very few federal forms submitted over the years. Regardless of the number, beginning now you must track which voter registration applicants in your county have applied using the federal form since January 1, 2013. This means you should take note when a federal form comes to your office and keep a list of the names of individuals who submit them. One of the Statutes or Reasons in ELVIS will be changed to assist in tracking those who use the federal form. Also, you should



continue to request citizenship documents from those who fail to submit them with their applications, regardless of whether they used the Kansas or the federal form.

We will provide more detailed guidance regarding how this system will be administered when it is finalized.

**BRAD BRYANT** | State Election Director

Kansas Secretary of State | 785-296-4559 P | 785-291-3051 F | [www.sos.ks.gov](http://www.sos.ks.gov)  
Memorial Hall, 1st Floor | 120 S.W. 10th Avenue | Topeka, KS 66612-1594

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EXHIBIT B

**INTERAGENCY AGREEMENT**  
**Between the**  
**KANSAS SECRETARY OF STATE**  
**and the**  
**KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT**  
**Bureau of Epidemiology and Public Health Informatics**  
**Birth/Voter Registration Data Link**

The Secretary of State (hereinafter referred to as "KSOS") and the Kansas Department of Health and Environment (hereinafter referred to as "KDHE") enter into this Agreement.

**ARTICLE I. PURPOSE**

The KSOS is the single state agency in Kansas responsible for the administration of voter registration records in Kansas. KDHE is the single state agency responsible for registration and issuance of Kansas vital event records through its Bureau of Epidemiology and Public Health Informatics, Office of Vital Statistics. Subsequent to recent changes in Kansas voter registration requirements, there are voter registration applicants who have not provided citizenship documents as required by Kansas law. The KSOS and KDHE recognize a need for a Birth/Voter Registration data-matching process to facilitate documentation of citizenship for those who have submitted voter registration applications without the required citizenship documentation. This Agreement describes the authority and process to be utilized for this data linkage.

**ARTICLE II. GENERAL PROVISIONS**

**2.0 TERM OF THE AGREEMENT**

The terms of this Agreement shall apply to the period commencing with January 1, 2014, through December 31, 2014. This Agreement may be renewed on an annual basis upon the written agreement of the Parties.

**2.1 TERMINATION**

Either Party may terminate performance of work under this Agreement in whole or in part, whenever, for whatever reason, it shall determine that the termination is in the best interest of its agency and the State of Kansas. In the event that a Party elects to terminate this Agreement pursuant to this provision, it shall provide the other Party written notice at least thirty (30) days prior to such termination. The termination pursuant to this provision shall be effective as of the latter of (i) the date provided in the written notice of termination or (ii) thirty (30) days after written notice of termination is provided to the other party.



**2.2 AMENDMENTS / MODIFICATIONS**

Any amendments or modifications to this Agreement must be in writing and signed by both Parties.

**2.3 ASSIGNMENT:**

The Parties shall not assign, convey, encumber, or otherwise transfer its rights or duties under this Agreement without the prior written consent of the other Party hereto.

**2.4 CONFIDENTIALITY:**

Each Party hereto has access to private or confidential data (maintained by the State), necessary to carry out its responsibilities under this Agreement. The Parties agree that all information provided by KSOS to KDHE pursuant to this Agreement is and shall remain confidential. Pursuant to this Agreement, the Parties do not anticipate that KDHE will furnish information or data to KSOS other than the results of the data linkage to be furnished by KDHE to KSOS as provided in Article III below. The Parties agree that the results of the data linkage to be furnished by KDHE to KSOS, as provided in Article III below, may be disclosed by either party: (1) to county election officials for voter registration purposes and (2) to other persons if required by law or court order. In the event KDHE furnishes to KSOS information or data other than the results of the data linkage as provided in Article III below, the Parties agree that such additional information or data is and shall remain confidential. The Parties agree that they shall safeguard and maintain the confidentiality of all information received under this Agreement in accordance with federal and state law. The Parties agree that the use or disclosure of information or data for purposes other than as intended by this Agreement is prohibited. In the event either Party receives a request or otherwise intends to disclose any information received pursuant to this Agreement, other than the results of the data linkage, such Party shall give notice to the other Party within 24 hours. Disclosure of such information or data shall be made only upon the agreement of both Parties, unless required by order of a court of competent jurisdiction.

**ARTICLE III. DUTIES OF THE PARTIES HERETO**

**3.0 KSOS.**

KSOS will provide KDHE with the following information from voter registration applications which are incomplete due to the applicants' failure to provide citizenship documents as required by Kansas law:

- First name
- Middle name/initial
- Last name

Suffix name  
Date of birth (DOB)  
Gender  
Last four digits of the applicant's social security number (SSN4)  
County of Registration  
Voter Registrant ID #

### 3.1 KDHE. Comparison with Birth Certificate Records

KDHE will compare the KSOS information to its database of birth certificates and provide the results to the KSOS according to the following criteria:

#### FIRST COMPARISON

First name – exact match; cannot be null in either record  
Last name – exact match; cannot be null in either record  
Date of birth – exact match; cannot be null in either record  
Gender – exact match; cannot be null in either record  
SSN4 – exact match; cannot be null in either record  
Middle name – does not conflict. One or both sets of records (KDHE or KSOS) may contain no information (null).

If all of the above are true for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below.

#### SECOND COMPARISON

Every KSOS record that does not meet all of the search criteria for the FIRST COMPARISON will be compared to KDHE's database of birth certificates again according to following criteria:

First name – exact match; cannot be null in either record  
Last name – exact match; cannot be null in either record  
Date of birth – exact match; cannot be null in either record  
Gender – exact match; cannot be null in either record  
Middle name – If birth certificate has name, voter registration record must not conflict (match, first initial, null). If birth certificate has no name, voter registration record must also have no name.

If all of the above are true for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below.

### **THIRD COMPARISON**

Every KSOS record that does not meet all of the search criteria for the FIRST or SECOND COMPARISONS will be compared again with the following criteria:

KDHE will perform a comparison utilizing the same search criteria for the FIRST COMPARISON, except variants of first names will be used. If all of the above are true for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below. Documentation of specific variations of first names will be provided to the KSOS.

### **3.2 KDHE. Comparison with Marriage License and Birth Certificate Records**

KDHE will compare the KSOS information to its database of marriage licenses and birth certificates and provide the results to the KSOS according to the following criteria:

### **FOURTH COMPARISON**

Every KSOS record that does not meet all of the search criteria for the FIRST, SECOND, or THIRD COMPARISONS will be compared to KDHE's database of marriage licenses and birth certificates according to the following criteria:

- First name – exact match; cannot be null in either record
- Date of birth – exact match; cannot be null in either record
- Gender – exact match; cannot be null in either record
- SSN4 – exact match; cannot be null in either record
- Middle name – does not conflict. There may be one or both sets of records (KDHE or KSOS) that do not contain information (null).
- Last name – the last name from the voter registration record must exactly match the spouse's last name on the marriage license record.

If all of the above are true, then:

- Replace the last name from the voter registration information with the last name (maiden name or previous married name) found in the marriage license file for the corresponding voter registration record; and
- Compare the voter registration records, with the substituted last name (maiden or previous married) resulting from the comparison to the marriage license file, to the birth certificate file. If the first name, substituted last name, gender, DOB and SSN4 exactly match, and middle name does not conflict as described above for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below.

## FIFTH COMPARISON

Every KSOS record that does not meet all of the search criteria for the FIRST, SECOND, THIRD or FOURTH COMPARISONS will be compared to KDHE's database of marriage licenses and birth certificates again according to following criteria:

First name – exact match; cannot be null in either record

Date of birth – exact match; cannot be null in either record

Gender – exact match; cannot be null in either record

Middle name – If birth certificate has name, voter registration record must not conflict (match, first initial, null). If birth certificate has no name, voter registration record must also have no name.

Last name – the last name from the voter registration record must exactly match the spouse's last name on the marriage license record.

If all of the above are true, then:

– Replace the last name from the voter registration information with the last name (maiden name or previous married name) found in the marriage license file for the corresponding voter registration record; and

– Compare the voter registration records, with the substituted last name (maiden or previous married) resulting from the comparison to the marriage license file, to the birth certificate file. If the first name, substituted last name, gender, DOB exactly match, and the middle name does not conflict as provided above for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below.

## SIXTH COMPARISON

Every KSOS record that does not meet all of the search criteria for the FIRST, SECOND, THIRD, FOURTH, or FIFTH COMPARISONS will be compared again with the following criteria:

KDHE will perform a comparison utilizing the same search criteria for the FOURTH COMPARISON, except variants of first names will be used. If all of the above are true for information associated with any Voter Registrant ID #, KDHE will provide to KSOS a CERTIFICATION OF BIRTH/VOTER REGISTRATION DATA LINK MATCH form (Appendix 1) for such Voter Registrant ID # as provided in Paragraph 3.3 below, Documentation of specific variations of first names will be provided to the KSOS.

**3.3 Certification of Results.** For each KSOS record that meets all of the search criteria of the FIRST, SECOND, THIRD, FOURTH, FIFTH, or SIXTH COMPARISONS as described above, KDHE will provide to KSOS a certificate in substantially the same form as that provided in Appendix 1, affixed hereto. The certificate provided by KDHE pursuant to this provision may



be utilized by KSOS and county election officials in Kansas to determine whether there is satisfactory evidence of United States citizenship for the individual associated with the KSOS record provided to KDHE. The determination of whether such satisfactory evidence of citizenship is present for any such KSOS record will be made solely by KSOS and/or county election officials in Kansas. By providing the certificate described in this provision KDHE makes no representation regarding the citizenship status of any individual. KDHE will not return any vital event data to the KSOS.

#### **ARTICLE IV. LIMITATIONS AND CAVEATS**

There are several limitations that must be considered when using the results of the matching process described in 3.1 and 3.2. The parties acknowledge:

- The Kansas OVS maintains records only on Kansas vital events occurring in the State of Kansas. The voter registration form does not collect State of birth for the voter.
- SSNs for birth certificates were not collected in Kansas until 1988.
- SSNs for marriage records were not collected in Kansas until 2005.
- The voter registration form does not capture "maiden" names or names of individuals prior to marriage.

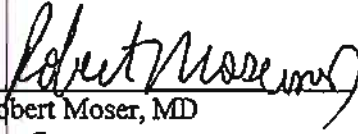
#### **ARTICLE V. FUNDING AND COMPENSATION**

5.0 KDHE assesses fees for special projects that consist of value-added data analysis activities. Work performed by KDHE staff on behalf of the KSOS will be assessed a fee of \$50 per hour for analyst time. Fees for data access will be waived. KDHE will provide KSOS an invoice for services at the time the analysis is completed.

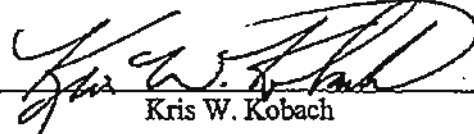
#### **ARTICLE V. LAWS APPLICABLE**

6.0 Authority to perform the work proposed in this Agreement is found in the Help America Vote Act of 2002, P.L. 107-252, (HAVA), the Uniform Vital Statistics Act [K.S.A. 65-2422], and the Secure and Fair Elections Act of 2011 [K.S.A. 25-2309].





Robert Moser, MD  
Secretary



Kris W. Kobach

KANSAS SECRETARY OF STATE

KANSAS DEPARTMENT OF  
HEALTH AND ENVIRONMENT

1/7/2014  
Date

Jan. 7, 2014  
Date

**CERTIFICATION OF BIRTH/VOTER REGISTRATION**  
**DATA LINK MATCH**

The undersigned declares and affirms that he/she is an employee of the Kansas Department of Health and Environment, Bureau of Epidemiology and Public Health Informatics, Office of Vital Statistics (hereinafter referred to as the "Office of Vital Statistics") and is duly authorized to make the certification contained herein on behalf of the Office of Vital Statistics.

Accordingly, the undersigned certifies as follows:

1. Pursuant to the Interagency Agreement entered into between the Kansas Secretary of State and the Office of Vital Statistics on January 7, 2014 (hereinafter referred to as the "Data Link Agreement"), the Office of Vital Statistics received the information set forth in Section 3.0 of the Data Link Agreement regarding an individual with the following Voter Registrant ID# on (INSERT DATE):

(INSERT REGISTRANT ID#)

2. On (INSERT DATE), the Office of Vital Statistics conducted the comparisons set forth in Sections 3.1 and 3.2 of the Data Link Agreement and determined that the above Voter Registrant ID# constitutes a match pursuant to the search criteria provided in:

(INSERT COMPARISON#)

\_\_\_\_\_  
INSERT NAME AND TITLE

\_\_\_\_\_  
Date

EXHIBIT C

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) [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](mailto: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](http://www.sos.ks.gov)

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