

THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY
CIVIL DEPARTMENT

MARVIN L. BROWN, JOANN BROWN, and)
CHARLES WILLIAM STRICKER III, on)
behalf of themselves and all others similarly) Case No. _____
situated,)
)
Plaintiffs,)
)
v.)
)
KRIS KOBACH, Kansas Secretary of State, in)
his official capacity,)
)
Defendant.) Division No. ____
_____)

**PETITION PURSUANT TO K.S.A. CHAPTER 60 FOR
DECLARATORY AND INJUNCTIVE RELIEF**

COME NOW Plaintiffs Marvin L. Brown, JoAnn Brown, and Charles William Stricker III, on behalf of themselves and all others similarly situated, by and through their undersigned Attorneys, and for their causes of action against the above-named defendant allege the following:

NATURE OF THE ACTION

1. On the eve of the August primaries, Kansas Secretary of State Kris Kobach (“Defendant”) enacted a temporary regulation, K.A.R. 7-23-16 (the “Temporary Regulation”) that denies thousands of Kansas residents their fundamental right to vote in state and local elections. The Temporary Regulation purports to formalize a system of dual registration and election administration that Defendant Kobach established and has operated, without any legal authority since 2013. The new Temporary Regulation operates in direct contravention of orders entered by this Court in *Belenky v. Kobach*. See *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Aug. 21, 2015) (“*Belenky Aug. 21 Order*”); *Belenky v. Kobach*, No. 2013CV1331

(Shawnee Cty. Dist. Ct. Jan. 15, 2016) (“*Belenky* Jan. 15 Order”); *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. June 14, 2016).

2. The dual registration system 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 applies to register. It permits some voters to vote for President and other federal offices, but prohibits them from voting for state and local offices, including all seats in the Kansas state House and Senate.

3. Specifically, the dual registration system unlawfully denies the right to vote in state and local elections to at least 17,000 qualified electors, including Plaintiffs, who registered by: (a) submitting a complete voter registration application, including an attestation under penalty of perjury to their U.S. Citizenship, at the same time they applied for a driver’s license or license renewal at the Division of Vehicles (“DOV”), or (b) submitting a complete voter registration, including an attestation under penalty of perjury to their U.S. Citizenship, on the National Mail Voter Registration Form (“Federal Form”).

4. Plaintiffs, on behalf of themselves and all others similarly situated, bring this lawsuit, seeking immediate declaratory and injunctive relief against Defendant Kobach to prevent him from enforcing the Temporary Regulation and dual registration system on the grounds that it: (1) exceeds 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 (2) violates the Kansas Constitution’s guarantee of equal protection, set forth in Sections 1 and 2 of the Kansas Bill of Rights.

5. Unless immediately enjoined by this Court, Defendant will continue to deny Plaintiffs and countless other duly qualified Kansas electors the right to vote in state and local elections, including in the ongoing August primary and the November 2016 general election.

PARTIES; JURISDICTION AND VENUE

6. Plaintiff Marvin Brown resides in Johnson County, Kansas, and is a U.S. citizen, and a duly qualified elector for local, state, and federal elections in Kansas.

7. Plaintiff JoAnn Brown resides in Johnson County, Kansas, and is a U.S. citizen and a duly qualified elector for local, state, and federal elections in Kansas.

8. Plaintiff Charles “Tad” Stricker resides in Sedgwick County, Kansas, and is a U.S. citizen and duly qualified elector for local, state, and federal elections in Kansas.

9. Defendant 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.

10. The Kansas Secretary of State’s primary office is in Topeka, Kansas.

11. Kansas Courts have personal jurisdiction over all parties in this matter.

12. Kansas Courts have subject matter jurisdiction over this matter. *See* K.S.A. § 60-1701 (declaratory relief); K.S.A. § 60-901 (injunctive relief).

13. Jurisdiction in the Shawnee County District Court is proper under K.S.A. § 60-1701.

14. Venue in the Third Judicial District of Kansas, Shawnee County District Court is proper under K.S.A. § 60-608.

CLASS ALLEGATIONS

15. Plaintiffs seek class certification under K.S.A. §§ 60-223(a), (b)(1), and (b)(2).

16. The class is defined as: all eligible Kansas residents who registered to vote at the DOV or using the Federal Form after January 1, 2013, whom Kansas will permit to vote in federal but not state and local elections due to purported failure to submit documentary proof of citizenship (“DPOC”) under K.S.A. § 25-2309(l). Members of the proposed class are Federal Form and DOV registrants who will be issued a provisional ballot in which only votes for federal offices will be counted because they have not provided DPOC in connection with their registration.

17. The requirements of K.S.A. §§ 60-223(a), (b)(1), and (b)(2) are satisfied here:

a. The class is sufficiently numerous such that joinder of all members is impractical.

Approximately 383 Kansas Federal Form registrants, *see* Aff. of Bryan Caskey, Assistant Kan. Sec’y of State, *League of Women Voters v. Newby*, No. 1:16-cv-00236-RJL (D.D.C. Feb. 21, 2016), ECF. No. 27-1 (“Caskey Aff.”) at ¶ 10, and at least 17,000 DOV registrants submitted complete voter registrations but are not allowed to vote for state and local offices because they did not submit DPOC.

b. Questions of law and fact are common to the class members. These include whether the dual registration system implemented by Defendant is permitted by Kansas law and the Kansas Constitution, and whether the Secretary of State possesses statutory authority to implement such a system.

c. The claims of the named Plaintiffs are typical of the class. Each Plaintiff is a duly qualified elector who submitted a complete voter registration application at the DOV or using the Federal Form but has not submitted DPOC. Each Plaintiff is permitted to vote in federal elections but denied the right to vote in state and local elections as a result of their choice of method of registration.

- d. The named Plaintiffs will fairly and adequately protect the interests of all members of the proposed class and seek relief on behalf of the class as a whole, and have no interests antagonistic to other members of the class. The individual Plaintiffs are all represented by *pro bono* counsel, including the American Civil Liberties Union (“ACLU”) Foundation’s Voting Rights Project and the ACLU Foundation of Kansas, who collectively have substantial experience in class action litigation generally, including litigation involving voting rights and constitutional law.
- e. Prosecuting separate actions by individual class members would create a risk of:
 - (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Defendant; or (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. Additionally, by denying the right to vote in state and local elections to these eligible Kansas registrants, Defendant has acted or refused to act on grounds that apply generally to the class so that final injunctive relief, or corresponding declaratory relief, is appropriate with respect to the class as a whole.

FACTS

18. Eligible Kansans can register to vote using a variety of methods: (a) a State form approved by the Secretary of State; (b) the Federal Form for mail-in registration; (c) an application made simultaneously with a driver’s license application or renewal; or (d) an in-person application at a State agency that provides public assistance or other benefits, *see* K.S.A. §§ 25-2309(a); 25-2352(a).

19. Prior to 2013, Kansas law required people registering to vote to prove their citizenship by attesting that they were U.S. citizens under penalty of perjury. K.S.A. 2010 Supp. § 25-2309(b). Kansas did not require any further proof of citizenship for eligible voters to register.

20. On January 1, 2013, a provision of the Secure and Fair Elections (“SAFE”) Act became effective that 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); K.S.A. § 25-2309(u).¹

The Secretary of State’s Adoption of an *Ad Hoc* System of Dual Registration

21. On June 17, 2013, the U.S. Supreme Court held in *Arizona v. Inter Tribal Council of Arizona* that any “state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form” and is preempted by it. 133 S. Ct. 2247, 2257 (2013) (citation omitted).

22. Until February 1, 2016, the Federal Form did not incorporate a DPOC requirement.² As a result, the *Inter Tribal Council* ruling required Defendant Kobach to register Federal Form registrants for federal elections even if, prior to February 1, 2016, they did not provide DPOC pursuant to K.S.A. § 25-2309(l).

¹ The DPOC requirement is satisfied by presenting one of thirteen documents listed in the statute. K.S.A. § 25-2309(l).

² On February 1, 2016, Brian Newby, the current Executive Director of the Election Assistance Commission and a former Elections Commissioner of Johnson County (who was reappointed to that role by Secretary Kobach), abruptly and unilaterally changed the Kansas state-specific instructions to the Federal Form to incorporate a DPOC requirement. A lawsuit challenging Mr. Newby’s unilateral actions as outside the scope of his authority and in violation of the Administrative Procedures Act is currently before the U.S. Court of Appeals for the District of Columbia, on appeal from the district court’s denial of plaintiffs’ motion for a preliminary injunction on the grounds that plaintiffs failed to demonstrate irreparable harm and seek relief that is inappropriate at the preliminary stage. *See League of Women Voters v. Newby*, No. 1:16-cv-00236 (D.D.C. June 29, 2016), Doc. No. 92, *appeal docketed*, No. 16-5196 (D.C. Cir. July 1, 2016).

23. Kansas election laws (K.S.A. ch. 25) establish a unitary system of voter registration and a unitary ballot listing all races—federal state, and local—on one ballot. *See, e.g.,* K.S.A. §§ 25-2323; 25-2304(b); 25-617.

24. Nevertheless, in the wake of *Inter Tribal Council*, Defendant Kobach created, by a unilateral policy directive issued in a July 30, 2013 email to all county election officials and informal statements to the press, an entirely new *dual* system of voter registration, classifying electors according to their method of registration, then assigning lesser voting rights to some electors who have registered using the Federal Form.

25. Under this dual system, new applicants who registered to vote using the Federal Form between January 1, 2013 and January 31, 2016 but who do not provide DPOC are registered for federal elections only and are denied the ability to vote in state elections. For these registrants, elections officials are instructed to employ a “process . . . similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. § 25-3002(b)(3).” Specifically, county officials are to “issue provisional ballots to these voters,” “separate their provisional ballots into a separate stack,” then “make a recommendation to the county board of canvassers to count only the votes for federal office.” Office of the Secretary of the Kansas Secretary of State, Update and Instructions Regarding Federal-Form Voter Registration Applicants (June 4, 2014).

26. By contrast, individuals who registered to vote prior to January 1, 2013 by any method are registered for and permitted to vote in both federal and state elections. *Belinky* Aug. 21 Order at 17; K.S.A. §§ 25-2309(n), (u). Individuals who register to vote using the State form and fulfill the form’s DPOC requirement are registered for both federal and state elections, and are granted the full range of election-related rights to which qualified electors in Kansas are entitled. New applicants who apply for a ballot using the Federal Services Post Card Application

(“FSPCA”) are also permitted to vote in both federal and state elections, *see* K.S.A. § 25-1215, even without providing DPOC.³

Belenky v. Kobach

27. On November 21, 2013, individual plaintiffs Aaron Belenky and Scott Jones (along with an organizational plaintiff not relevant here) filed suit in this Court against Defendant Kobach and then-Kansas Elections Director Brad Bryant, challenging the dual registration system and alleging substantially the same causes of action as in the instant petition.

28. On January 15, 2016, the Court granted summary judgment in favor of Plaintiffs Belenky and Jones, declaring that the Secretary of State’s dual registration system is “wholly . . . without the authority of any Kansas statute” and contrary to state law and the Kansas Constitution. *Belenky* Jan. 15 Order at 4; *see also id.* at 19, 24.⁴

29. The Court further declared that “[i]n Kansas, a person is either registered to vote or he or she is not. By current Kansas law, registration, hence the right to vote, is not tied to the method of registration.” *Belenky* Jan. 15 Order at 17.

30. Despite this ruling, Defendant Kobach has continued to operate his dual registration system.

The Fish v. Kobach May 17, 2016 Preliminary Injunction, Resulting in the Registration of at least 17,000 Kansas Voters for Federal Elections

31. On May 17, 2016, the U.S. District Court for the District of Kansas issued a preliminary injunction enjoining the Secretary of State from enforcing the DPOC law against DOV registrants. *Fish v. Kobach*, --- F. Supp. 3d ----, No. 16-2105-JAR-JPO, 2016 WL

³ 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, 52 U.S.C. §§ 20301(b)(2), 20302(a)(4).

⁴ This Court found that it could grant declaratory but not injunctive relief, because the Secretary of State, without consent, registered the individual plaintiffs to vote prior to the judgment, rendering “equitable relief . . . [in]appropriate.” *Belenky* Jan. 15 Order at 26.

2866195, at *31 (D. Kan. May 17, 2016). The injunction also ordered the Secretary to register Kansas DOV registrants whose applications were cancelled or in suspense, simply for failure to provide DPOC. *Id.* at *31-32. At least 17,000 Kansas DOV registrants are registered to vote pursuant to the injunction. *Id.*

32. On July 8, 2016, Defendant Kobach proposed and adopted a temporary regulation, K.A.R. § 7-23-16 (the “Temporary Regulation”), which sets forth the system of dual registration and election administration. Kansas Secretary of State, Certificate of Adoption (July 8, 2016).

33. The Temporary Regulation was approved before an opportunity for public comment at a July 12, 2016 meeting of the State Rules and Regulation Board. Notice of the meeting was given late on July 11, 2016.⁵ The meeting took place at 8am the following morning.⁶

34. The Temporary Regulation went into effect immediately, and, because a temporary regulation is effective for 120 days, *see* K.S.A. § 77-422(3), will remain in effect through Election Day on November 8, 2016.

35. The Temporary Regulation purports to formalize the dual registration system that Defendant Kobach has been operating pursuant to various “instruction” and emails sent to local county election officials since the *Inter Tribal Council* case. *See* Kansas Secretary of State, Update and Instructions Regarding Federal-Form Voter Registration Applicants (June 4, 2014) (“June 2014 Instructions”); Kansas Secretary of State, Instructions Concerning Division of

⁵ *See* Hunter Woodall, “Kansas rule change means some voters won’t be counted in August primary,” *Kansas City Star* (July 12, 2016), <http://www.kansascity.com/news/politics-government/article89057102.html>; Associated Press, “Little public notice given on rule throwing out Kansas votes,” *Wash. Times* (July 11, 2016), <http://www.washingtontimes.com/news/2016/jul/11/democrats-cry-foul-over-little-notice-on-voting-ru/>.

⁶ *See* Editorial, *Voting Volley*, Lawrence J.-World (July 17, 2016), <http://www2.ljworld.com/news/2016/jul/17/editorial-voting-volley/?opinion>.

Motor Vehicles Applicants (June 14, 2016) (“June 2016 Instructions”); Email from Director of Elections, Bryan A. Caskey, to Kansas County Election Officers (June 22, 2016, 10:31 AM) (“June 2016 Provisional Ballot Email”).

36. Specifically, under the dual system, DOV and Federal Form registrants who have submitted complete voter registration applications but who have not provided DPOC pursuant to K.S.A. § 25-2309(l) are “permitted to vote for federal offices only. The individual shall not be deemed registered to vote for any state or local office or on any ballot question[.]” K.A.R. § 7-23-16(a); *see also* June 2014 Instructions; June 2016 Instructions; June 2016 Provisional Ballot Email. These voters will be issued provisional ballots that contain both federal and state offices, but county canvassers are directed to count only the votes cast for federal offices. “Votes cast for other offices or on ballot questions shall not be counted.” K.A.R. § 7-23-16(b); Ex. E, June 2014 Instructions; Ex. F, June 2016 Instructions; Ex. G, June 2016 Provisional Ballot Email.

37. As a result of Defendant’s continued operation of the dual registration system, at least 17,000 Kansas DOV registrants and approximately 383 Federal Form registrants are registered to vote for federal elections but are precluded from voting in state and local elections.

Facts Relating to Class Representative Plaintiffs

38. Plaintiff Marvin Brown is a 90-year-old Army Air Corps veteran.

39. On or about January 28, 2016, Mr. Brown registered 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.

40. Mr. Brown did not submit and has not submitted DPOC. As of July 18, 2016, the website of the Kansas Secretary of State did not list Mr. Brown as a currently registered voter in the State of Kansas.

41. On or about January 28, 2016, Plaintiff JoAnn Brown registered to vote in Kansas by filling out the Federal Form and attesting under penalty of perjury to her U.S. citizenship and eligibility to vote.

42. Mrs. Brown did not submit and has not submitted DPOC. As of July 18, 2016, the website of the Kansas Secretary of State did not list Mrs. Brown as a currently registered voter in the State of Kansas.

43. On February 21, 2016, Kansas Director of Elections Bryan Caskey confirmed that Mr. and Mrs. Brown are eligible to vote for federal offices because they registered to vote using the Federal Form before January 31, 2016, but Director Caskey also stated that the Browns will be prohibited from voting in elections for state or local office. Caskey Aff. at ¶¶ 17, 18.

44. In October 2014, while applying for a driver's license at a Wichita office of the Kansas DOV, Plaintiff Tad Stricker applied to register to vote in Kansas, attesting under penalty of perjury to his U.S. citizenship and eligibility to vote.

45. Mr. Stricker did not submit and has not submitted DPOC. As of July 18, 2016, the website of the Kansas Secretary of State did not list Mr. Stricker as a currently registered voter in the State of Kansas.

46. On July 13, 2016, Mr. Stricker received a notice from the Sedgwick County Election Office informing him that he is "eligible to vote for federal offices only" and "not considered a registered voter until [he] submit[s] an acceptable form of proof of citizenship." Letter from Sedgwick County Election Office to Charles Stricker.

47. The Temporary Regulation bars Mr. Stricker from voting in elections for state and local office.

GROUNDS FOR RELIEF

Count I: Defendants' Adoption of a Dual System of Registration Violates the Separation of Powers Set Forth in the Kansas Constitution

48. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs in this petition as though fully set forth herein.

49. Article II, Section 1 of the Kansas Constitution provides that “[t]he legislative power of this state shall be vested in a house of representatives and senate.”

50. Kansas election law (K.S.A. ch. 25) establishes a unitary system of voter registration and a unitary ballot for federal, state, and local elections. *See, e.g.*, K.S.A. §§ 25-2323, 25-2304(b), 25-610-11, 25-616-17. It also controls when a provisional ballot should be issued and how provisional ballots should be handled and counted. *See, e.g.*, K.S.A. §§ 25-414, 25-3002(b)(1), (3); *Belenky* Jan. 15 Order at 23. In addition, Kansas election law sets forth when it is permissible to invade the Kansas Constitution’s guarantee of the secrecy of a voter’s ballot. *See Belenky* Jan. 15 Order at 14; Kan. Const. art. 4, § 1 (“All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.”); *see also, e.g.*, K.S.A. §§ 25-3002(b)(1), (3).

51. Because the rules and regulations implementing the Secretary of State’s dual registration system are inconsistent with Kansas’s unitary registration and balloting system, the rules governing provisional ballots and the partial counting of ballots, and the Kansas Constitution’s guarantee of the secrecy of a voter’s ballot, Defendant has exceeded his authority and improperly trespassed on the domain of the legislature in adopting and implementing the procedures to administer such a dual registration system.

Count II: The Dual Registration System Violates the
Equal Protection Guarantees of the Kansas Constitution

52. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs in this petition as though fully set forth herein.

53. Section 1 of the Kansas Bill of Rights provides: “Equal Rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

54. Section 2 of the Kansas Bill of Rights provides: “Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.”

55. The dual registration system classifies otherwise indistinguishable electors by their method or date of registration, then assigns lesser voting rights and protections to some qualified voters who submitted complete voter registration applications on or after January 1, 2013 at the DOV or using the Federal Form.

56. These qualified electors are registered to vote in federal elections alone and are arbitrarily denied the right to vote in state or local elections. These voters are, without rational justification, treated differently from all other qualified registrants—*i.e.*, persons who registered to vote before January 1, 2013, regardless of whether they have provided DPOC, FSPCA applicants, and State form registrants who submit DPOC—who are granted full voting rights. This irrational distinction violates the equal protection guarantees of the Kansas Constitution.

57. These qualified electors must also endure a “post-vote editing” invasion of their “executed and submitted ballot[s]” not imposed on the ballots of all other qualified registrants.

Belenky Aug. 21 Order at 27; *see Belenky* Jan. 15 Order at 19. Because they are subjected, without compelling reason or statutory authority, “to discriminatory treatment in regard to their right to ballot secrecy secured by Article 4, § 1 of the Kansas Constitution,” these voters are denied the equal protection of Kansas law. *Belenky* Jan. 15 Order at 19.

STATEMENT OF RELIEF SOUGHT

Plaintiffs respectfully request declaratory and injunctive relief as follows:

- a. Declare the Secretary of State’s Temporary Regulation and dual registration system invalid for the reasons set forth herein;
- b. Enjoin Defendant 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 Temporary Regulation and dual registration system or arbitrarily assigning different voting rights to Plaintiffs and other qualified electors who register to vote using the Federal Form or at the DOV;
- c. Order Defendant Kobach to employ his full authority to direct all county elections officers to cease compiling a dual registration system and register all registered voters as qualified electors for all elections;
- d. Order corrective measures to be taken by Defendant, including but not limited to registering Plaintiffs to vote in all Kansas elections and providing accurate information to registered voters on the suspense list;
- e. Retain jurisdiction over this matter until Defendant have complied with all the orders and mandates of the Court; and
- f. Award such other and further relief as this Court may deem just and proper.

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

Dated: July 19, 2016

Respectfully submitted,

/s/ Robert V. Eye

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**pro hac vice motions pending*

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 19th day of July, 2016, a copy of the above and foregoing document was electronically filed, and was served concurrently by electronic mail delivery and UPS on the following parties:

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