

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

STEVEN WAYNE FISH, *et al.*, on behalf)
of themselves and all others similarly)
situated,)

Plaintiffs,)

v.)

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

Defendants.)

Case No. 16-2105-JAR-JPO

**PLAINTIFFS' MEMORANDUM OF LAW AND FACTS IN SUPPORT OF THEIR
MOTION TO ENFORCE PRELIMINARY INJUNCTION AND FOR ORDER TO SHOW
CAUSE WHY DEFENDANT KOBACH SHOULD NOT BE HELD IN CONTEMPT**

INTRODUCTION AND NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs seek relief to address Defendant Kobach's refusal to comply with the central directive of the Preliminary Injunction Order ("the Order") issued on May 17, 2016. Dkt. 129. Consistent with the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (the "NVRA") and governing precedent, the Court commanded Kobach "to register for federal elections all otherwise eligible motor voter registration applicants" regardless of whether they have submitted documentary proof of citizenship ("DPOC"). *Id.* at 67. Although Kobach's petition for an emergency stay has been denied by the Tenth Circuit, he refuses to comply and place DMV applicants covered by the Order ("covered voters") on the voter rolls. *See* Kan. Stat. Ann. § 25-2309(g) (providing that a person is "considered a registered voter" when her name has been added "to the county voter registration list"). Kobach has violated the Order by (i) failing to add covered voters to the official registration list and poll books; (ii) forcing covered voters to use provisional ballots; and (iii) issuing confusing and misleading notices to voters regarding their status. Indeed, Kobach has admitted in separate court proceedings that he has not registered these voters because he believes doing so would violate Kan. Stat. Ann. § 25-2309(l) ("DPOC law" or "DPOC requirement") and he wants to retain flexibility to delete thousands of Kansans from the voter rolls in the event a higher court rules in his favor. The Secretary has, in effect, granted himself permission to defer this Court's directive even though his petition for an emergency stay has already been denied.

These are not merely technical violations of the Order; they have real consequences for all affected Kansans. The refusal to register the Plaintiffs deprives them of the most basic protections afforded to registered voters. It means that Kansans covered by the Order are denied a traditional secret ballot and are relegated to casting votes on provisional ballots reserved for unregistered voters. It means that covered voters cannot find their names on the Secretary of

State's online voter lookup tool which lists all registered voters and their polling locations. It means that they receive misleading notices from the Secretary of State suggesting that they are not registered to vote at all. And when they call state election officials, they receive further inaccurate information indicating that they cannot participate in the general election. Kobach has claimed to Plaintiffs' counsel during meet-and-confer that he "regard[s] voters [covered by the Order] as registered for federal elections." But all the evidence demonstrates that this is simply not true. Because of the Secretary's defiance of the Order, covered voters have received no assurance that they may participate in the upcoming election or that their votes will be counted.

This state of affairs contributes to a chilling effect that will dissuade qualified Kansans from participating due to uncertainty over whether their votes will be counted. Such confusion is entirely unnecessary and can be easily remedied: Defendant Kobach can place the covered voters on the official registration list and issue a clear notice stating that they are registered to vote in federal elections. The fact that he has failed to take these most obvious and basic steps to comply with the Order despite this Court's June 14, 2016 deadline is deeply troubling. Plaintiffs recognize that Defendant Kobach has personal investment in the enforcement of the DPOC law—a statute he helped draft and enact. But the Secretary's obligations do not begin and end with the DPOC law. He is bound by the NVRA, the federal Constitution, and the directives of this Court. Kobach is obligated to take all steps necessary to comply with the Order. Here, he has failed to take the *initial* step of registering the Plaintiffs to vote in federal elections. Plaintiffs therefore seek appropriate relief from the Court.

STATEMENT OF FACTS

1. On May 17, 2016, the Court issued a detailed preliminary injunction order directing the Defendant to register covered voters for federal elections. Dkt. 129 at 67. On May 25, 2016, the

Court denied Kobach's requested stay pending appeal and set June 14, 2016 as the date by which the Secretary must comply. Dkt 145 at 15. On June 10, 2016, the Tenth Circuit subsequently denied Defendant's emergency petition for a stay pending appeal. Dkt. 168. Defendant has not appealed this denial to the Supreme Court.

2. On July 8, 2016, Defendant Kobach proposed and adopted Temporary Regulation, K.A.R. § 7-23-16, which became effective on July 12, 2016, attached to Danjuma Decl. as Ex. A. The temporary regulation endeavors to segregate and distinguish voters covered by this Court's preliminary injunction. K.A.R. § 7-23-16 provides, "If a court interpreting the [NVRA] issues an injunction requiring that any individual who submits a voter registration application at an office of the division of motor vehicles, and who has not had evidence of citizenship confirmed pursuant to [the DPOC law], be permitted to vote in elections for federal offices, that individual shall be permitted to vote for federal offices only." Ex. A, K.A.R. § 7-23-16(a). The temporary regulation further provides, "The individual shall not be deemed registered to vote for any state or local office or on any ballot question until the individual has provided sufficient evidence of citizenship . . ." *Id.*

3. Under current practice, motor voter applicants covered by the Court's Order are not actually placed on the voter rolls and thus are not registered to vote. They are instead given a special "Federal Elections Only" suspense status and are issued provisional, rather than regular ballots. Ex. A, K.A.R. § 7-23-16(b) (covered voters "shall cast . . . votes for federal offices using a provisional ballot . . ."). Secretary Kobach has instructed that these provisional ballots be separated from regular ballots during the county canvass. "DMV Voter Registration Implementation Guide Update," attached to Danjuma Decl. as Ex. C. Election officials have

been directed to manually count the votes identified for federal office while omitting any votes cast for state and local offices or any ballot questions. *See* K.A.R. § 7-23-16(b).

4. On July 19, 2016, a class action challenge to Secretary Kobach's dual registration system was brought in in the District Court of Shawnee County, Kansas: *Brown v. Kobach*, Case No. 2016CV550 (Shawnee Cty.. Dist. Ct. July 19, 2016). Tad Stricker is one of the three named plaintiffs in the lawsuit.

5. On July 29, 2016, Judge Hendricks held a hearing in the *Brown* case to consider whether to preliminarily enjoin Kobach's policy of barring individuals covered by the *Fish* Order from voting in state and local elections. At the conclusion of the hearing, the court issued an oral ruling from the bench granting the temporary injunction, holding that a "dual registration" system operated by the Secretary of State "is prohibited" by Kansas state law. *Brown* "Transcript of TI Hr'g Order" attached to Danjuma Dec. as Ex. D. As a result of the *Brown* injunction, motor voter applicants covered by the *Fish* Order had their ballots counted for local, state, and federal offices in the August 2, 2016 primary election in Kansas.

6. During the July 29, 2016 hearing, Kobach argued that Judge Hendricks should not require him to register the DMV applicants covered by the *Fish* Order and place them on the official registration list. *Brown* "TI Hr'g Transcript Excerpts", attached to Danjuma Decl. as Ex. E, at 37:15-23. Otherwise, Kobach maintained, it might be difficult to remove them from the voter rolls if the Tenth Circuit ultimately reversed the *Fish* preliminary injunction. *Id.* After the bench ruling, Secretary Kobach requested that Judge Hendricks clarify that he would not be required to actually register these voters as a result of the temporary injunction: "[C]ould your order specify that these individuals are not in time to be added to the principal voter roll of Kansas, but be kept separately so that way the 10th Circuit has the freedom to rule either way?"

Ex. D, at 12:23-13:2. Judge Hendricks agreed that the temporary injunction would not require that DMV applicants covered by the *Fish* Order “be placed on any registration, just that they be counted” for state and federal elections. *Id.*, at 13:5-6.

7. After the temporary injunction was issued in *Brown*, Secretary Kobach distributed updated instructions to state elections officers directing that individuals covered by the *Fish* Order should be counted for federal, state, and local offices during the August 2, 2016 primary. Ex. C. However, Kobach’s revised instructions reiterated that election officers should “not change the status of persons in these categories” and should “not print these applicants’ names on the poll book.” *Id.*, at 1. These individuals would continue to be required to vote using provisional ballots. *Id.* Therefore, the DMV applicants covered by the *Fish* Order remain unregistered although their votes were provisionally counted for all offices during the August 2, 2016 primary.

8. Since this Court’s preliminary injunction ruling, the *Fish* Plaintiffs have received misleading communications from state election officials regarding their registration status.

9. In mid-June, 2016, Plaintiffs Hutchinson and Stricker received notice from election officials stating that they must “submit an acceptable form of proof of citizenship” in order to “complete” their voter registration applications and that “under Kansas law, you are not considered a registered voter until you submit an acceptable form of proof of citizenship.” “Hutchinson Election Notice from Johnson County”, attached to Danjuma Decl. as Ex. F”; “Stricker Election Notice from Sedgwick County,” attached to Danjuma Decl. as Ex. B-1. The notices further stated that “[b]ecause of a recent injunction issued by a federal judge in Kansas, you are currently eligible to vote for federal offices only” and that a “case is pending before a federal appeals court” which “may affect your eligibility to vote in future elections.” *Id.*

10. On September 14, 2016, Plaintiff Stricker made a telephone call to the Sedgwick County Election Office to inquire about his registration status. “Stricker Declaration” attached to Danjuma Decl. as Ex. B, at ¶ 4. He was advised that he would not be registered to vote until he provided DPOC. *Id.*, at ¶ 6. The official also stated that although Mr. Stricker had been permitted to vote in the August 2, 2016 primary, the judge had not yet made any determination about whether he would be able to participate in the general election in November. *Id.*, at ¶ 7.

11. On September 2, 2016, Kobach filed a brief opposing summary judgment in the *Brown* case. *Brown* “Def. Opp’n to Perm. Inj.” attached to Danjuma Decl. as Ex. G. The brief made clear as a legal and factual matter that the Secretary does not consider motor voter applicants covered by the Fish Order as registered to vote. For instance, a central legal position advanced in the brief under a separate heading is that “Individuals who do not Provide Satisfactory Proof of Citizenship Are Not Registered to Vote.” *Id.*, at 43.

12. After reviewing Mr. Kobach’s brief, counsel for the *Fish* Plaintiffs sent a demand letter to the Secretary on September 7, 2016. “Plaintiffs’ Sept. 17, 2016 Demand Letter,” attached to Danjuma Decl. as Ex. H.. Plaintiffs advised Mr. Kobach that he must actually register covered voters and add them to the voter rolls in order to comply with the Order in *Fish*; he cannot simply count Plaintiffs’ votes for federal office. The letter set out steps for the Secretary to take, including (1) adding covered voters to the registration rolls and the poll book, (2) including DMV applicants on the State’s online web tool¹ where individuals can verify their registration status, (3) mailing a corrective notice to covered voters stating directly that they are “registered to vote in federal elections,” and (4) allowing covered voters to use regular ballots rather than provisional ones. *Id.* at 3-4.

¹ Registration Information, Kansas Secretary of State, Voter View, <https://myvoteinfo.voteks.org/VoterView/RegistrantSearch.do>.

13. On September 14, 2016, this Court held a telephonic status conference and directed the parties to meet and confer immediately regarding Plaintiffs' demand letter. Dkt. 216. During the parties' subsequent phone call, Secretary Kobach stated that he did not believe he was required to take any additional steps because he "regard[s] voters [covered by the Order] as registered for federal elections." Kobach indicated that he was willing to speak with his staff about adding DMV applicants to the online web tool used to check registration status.

14. On September 16, 2016, the Secretary's Office sent a responsive letter stating that, while the Office would explore updating the website, Kobach would not take any other steps Plaintiffs had requested and would not add covered voters to the registration rolls. "Defendants' Response Letter," attached to Danjuma Decl. as Ex. I.

ARGUMENT

I. LEGAL STANDARD

This Court "has broad discretion to use its contempt powers to ensure adherence to its orders." *Retiree, Inc. v. Anspach*, No. 12-2079-JAR, 2014 WL 2986654, at *11 (D. Kan. July 2, 2014) (Robinson, J.), *aff'd in part, rev'd in part on separate grounds*, No. 15-3101, 2016 WL 4401578 (10th Cir. Aug. 17, 2016). In a motion to enforce or for civil contempt, the movant bears the initial burden of establishing that the opposing party disobeyed the terms of an injunction. *Id.* Once the movant has "made [a] prima facie case," the burden shifts to the defendant who "must prove plainly and unmistakably his inability to comply with the order of the court." *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1486 (10th Cir. 1985) (internal quotation marks and alteration omitted). Although the Tenth Circuit has declined to formally alter this standard, some courts recognize an additional defense to contempt where "a defendant who has violated a court order may avoid liability for contempt by showing by clear

and convincing evidence that all reasonable steps were taken in good faith to ensure compliance with the court order and that there was substantial compliance.” *Phone Directories Co. v. Clark*, 209 F. App'x 808, 815 (10th Cir. 2006). Nevertheless, “[c]ivil contempt occurs when a party fails to comply with a court order,” regardless of intent. *Universal Motor Oils Co. v. Amoco Oil Co.*, 743 F. Supp. 1484, 1487 (D. Kan. 1990). Willfulness and bad faith are not required elements of civil contempt although they may bear on the severity of any penalty. *Id.*

II. THE NVRA REQUIRES DEFENDANT KOBACH TO REGISTER COVERED VOTERS BY PLACING THEM ON THE OFFICIAL REGISTRATION LIST, AND TO PROVIDE NOTICE TO THE VOTERS THAT THEY ARE REGISTERED.

Section 8 of the NVRA mandates that the Kansas Secretary of State must “ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is submitted” in a timely fashion. 52 U.S.C. § 20507(a)(1). The overarching purpose of the NVRA, as confirmed in the title of the Act itself, is to “increase the number of eligible citizens who *register* to vote in elections for Federal office.” 52 U.S.C. § 20501(b)(1) (emphasis added). The statute was based in part on congressional findings that “failure to become registered is the primary reason given by eligible citizens for not voting.” S. Rep. No. 103-9, at 2. The NVRA further “require[s] the appropriate State election official to send notice to each applicant of the disposition of the application.” 52 U.S.C. § 20507(a)(2).

Consistent with the NVRA’s statutory mandate and case precedent, this Court directed Defendant Kobach to register motor voter applicants for federal elections regardless of whether they have presented DPOC. The language of the Order is clear: “The Secretary of State is directed to register for federal elections all otherwise eligible motor voter registration applicants that have been cancelled or are in suspense due solely to their failure to provide DPOC.” Dkt. 129, at 67. The Order further provides that Defendant Kobach is “enjoined from enforcing

K.S.A. § 25-2309(1) as to individuals who apply to register to vote in federal elections at the same time they apply for or renew a driver's license." *Id.*

To register motor voter applicants pursuant to the NVRA, the Secretary of State must take corresponding action under Kansas law: the applicant must be added to Kansas's registration rolls. The state election code provides that "[a] person who completes an application for voter registration shall *be considered a registered voter* when the county election officer *adds the applicant's name to the county voter registration list.*" Kan. Stat. Ann. § 25-2309(g) (emphasis added). Kansas law further states that "[t]he county election officer shall prepare a registration book for each voting place . . . [that] shall have entered therein, in alphabetical order, the registered voters authorized to vote at such voting place if otherwise a qualified voter." Kan. Stat. Ann. § 25-2318(a). Although the state registration roll exists by virtue of Kansas law, Congress has authority under the Elections Clause to direct States to place DMV applicants onto their voter rolls. *See Gonzalez v. Arizona*, 677 F.3d 383, 393-4 (9th Cir. 2012), *aff'd*, *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013), 133 S. Ct. 2247 (Elections Clause gives Congress the power "not only to supplant state [election] rules but to conscript states to carry out federal enactments.").²

² In his response to Plaintiffs' demand letter, Kobach refuses to add covered voters to Kansas's poll books, asserting that "[t]he NVRA leaves it to *States* how to maintain lists of those registered to vote in federal elections." Ex. I, at 4. This position reflects an elementary misunderstanding of Kansas's obligations under the NVRA and the Elections Clause. Congress did *not* leave up to States how lists of registered voters would be maintained. The statute imposes numerous requirements including a mandate that each State must "ensure that any eligible applicant is registered to vote" within the State's voter registration system if a valid motor voter application has been submitted. 52 U.S.C. § 20507(a)(1). To comply with this statutory requirement, Kobach must place covered voters onto "the official list of eligible voters." § 20507(a)(3).

III. DEFENDANT KOBACH HAS VIOLATED THE ORDER BY FAILING TO ADD MOTOR VOTER APPLICANTS TO THE OFFICIAL LIST OF REGISTERED VOTERS.

It is undisputed that Secretary Kobach has refused to add the nearly 18,000 motor voter applicants covered by the Order to Kansas's voter registration list. Ex. I at 4. That refusal represents a fundamental breach of the Court's core directive that covered voters be registered to vote. The Plaintiffs and those similarly situated cannot be "considered . . . registered voter[s]" because Defendant Kobach has specifically instructed county election officials *not* to "add[] the applicant's name to the county voter registration list." Kan. Stat. Ann. § 25-2309(g); *see* Ex. C (directing county election officials: "do not change the status of persons [covered by the Order]"). Although Kobach has told Plaintiffs' counsel he "regard[s] voters [covered by the Order] as registered for federal elections," he has made contrary representations in parallel court proceedings that demonstrate he has never registered these voters at all.

First: Despite the denial of stay, Kobach has admitted that he is intentionally withholding registration status from covered voters so that if the Tenth Circuit reverses the preliminary injunction he will remain free to summarily remove them from the rolls without triggering NVRA purge protections for registered voters. *See* 52 U.S.C. § 20507(a)(3). During a July 29, 2016 hearing, Kobach told the presiding judge in the *Brown* case that the *Fish* "injunction was issued based on a reading of the NVR[A] that we regard as tenuous" and that he believed the "10th Circuit might very well, and we hope they do overrule Judge Robinson's preliminary injunction." Ex. E at 24:20-25. Because of the possibility of appellate reversal, Defendant Kobach insisted to the state court that covered voters must remain in limbo:

What if the 10th Circuit reverses Judge Robinson's preliminary injunction? At that point, it becomes very legally problematic for us to walk it back, because the NVRA, the national voter registration act, says once a person is fully registered, you can't take [them] off the books unless you have a request from them to take

me off, or they have failed to vote in two federal elections after putting them on an inactive list.
Ex. E at 37:15-23.

Thus, despite Mr. Kobach's contrary assertions to Plaintiffs' counsel, it is clear that he *does not* deem covered voters to be "registered to vote in an election," U.S.C. § 20507(a)(1).³ If they were already registered as this Court commanded, then Judge Hendrick's decision would not impact whether the NVRA's purge provisions were triggered. Instead, it is precisely because Kobach has *not* registered covered voters and added them to the official voter list that he does not want to risk them getting the very protections registered voters receive under the NVRA.⁴ This, in itself, is clear evidence that Kobach has not complied with the Order.

Kobach is entitled to disagree with this Court's preliminary injunction ruling. But he is not entitled to disobey the command that he register covered voters after his petition for emergency stay was denied by the Tenth Circuit. "Where no stay pending appeal has been granted the district court retains the power to enforce its judgment and to take steps in aid of execution. A primary means of enforcing its unstayed judgment is contempt." *S.E.C. v.*

Diversified Growth Corp., 595 F. Supp. 1159, 1170 (D.D.C. 1984) (citations omitted); *see also Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49, 58 (1st Cir. 2004) (holding that the fact "that

³ In addition, following the Tenth Circuit's oral argument on August 23, 2016, the Associated Press interviewed Kobach and quoted him as saying: "the state would be able to handle a ruling close to the election because *the voters subject to May's ruling will vote with provisional ballots and whether they're counted won't be decided until after Election Day.*" *See* "Court Considers Kansas Rule That Voters Prove Citizenship," *Associated Press*, Aug. 23, 2016 (emphasis added), <http://bigstory.ap.org/article/66f45dd060274cbd94b96ac57780e636/kansas-asks-court-exclude-voters-over-citizenship-proof>. Attached to Danjuma Decl. as Ex. J.

⁴ Defendant Kobach may well be wrong that placing covered voters on the registration rolls would be irreversible if this Court or a higher court subsequently concludes that they were not eligible to be registered under the preliminary injunction. But the relevant point at this stage is that Kobach's statements demonstrate his intent to maintain covered voters in an unregistered status to avoid the possibility of triggering the NVRA's purge protections. That decision clearly violates the Order.

appeal was still pending . . . has no bearing on a court’s power to hold a party in contempt for violating a court order related to execution on a judgment . . . [because] absent a stay, a victorious plaintiff may execute on the judgment even while an appeal of that judgment is pending.”).

Second: Kobach’s legal positions in *Brown* demonstrate that he is continuing to enforce the DPOC law in direct contravention of this Court’s Order. It is now abundantly clear that he is still using the DPOC law to block covered voters from being added to the registration lists. In briefing the *Brown* case, Kobach stated unambiguously that “Individuals who do not Provide Satisfactory Proof of Citizenship Are Not Registered to Vote.” Ex. G at 43. He contends that it is “a flawed belief that when a person fills out [a Federal Form or motor voter] application under K.S.A. §§ 25-2309(a)(2) or -2352, the person is registered to vote without providing satisfactory proof of citizenship.” *Id.* at 44. To the contrary, in the Secretary’s view, “[w]hen an individual has not complied with [the DPOC requirement], Kansas law *precludes registration*,” even if they are covered motor voter applicants. *Id.* (emphasis added); *see also id.* at 45 (arguing that covered voters cannot be placed in the official poll book because “[u]nder Kansas law, individuals who are not registered voters should not be included in the poll book.”). Because Kobach has taken the position that covered voters cannot be registered without DPOC, he refuses to place them on the list of registered voters. To Kobach, “[t]he only reason that [such] individuals are permitted to vote in *federal* elections without providing satisfactory proof of citizenship is due to intervening federal court decisions.” *Id.* at 25. The NVRA’s statutory mandate is irrelevant to him. Thus, in Kobach’s view: (1) federal court decisions compel him to *count the votes* of covered voters, but (2) these voters must nonetheless remain unregistered and

off the list of registered voters. This is not a valid or reasonable interpretation of the Order or Kansas' obligations under the NVRA.

IV. DEFENDANT KOBACH'S POLICY OF PROVISIONALLY COUNTING COVERED VOTERS' BALLOTS FOR FEDERAL OFFICE DOES NOT COMPLY WITH THE ORDER.

In refusing to put covered voters on the voter rolls, Kobach has fundamentally misinterpreted his obligations under the Order and under federal law. The right established by Congress in the NVRA is a right to be registered to vote—to know in advance that you are on the list of citizens who may participate on Election Day. Kobach's arrangement to count the votes of motor voter applicants on a provisional basis without actually registering them falls well short of compliance. The Order clearly directs the Secretary to “register for federal elections all otherwise eligible” motor voter applicants. Dkt. 129 at 67. The NVRA likewise requires Kobach to “ensure that” motor voter applicants are “registered to vote in an election.” 52 U.S.C. § 20507(a)(1). That means that the Plaintiffs must be added to the official list of registered voters. *See* 52 U.S.C. § 20507(a)(3); Kan. Stat. Ann. § 25-2309(g).

Kobach's decision to force covered voters to use provisional ballots further demonstrates that he has violated the Order. *See* Ex. A, K.A.R. § 7-23-16(b). Provisional ballot procedures are reserved for individuals who have not been added to the list of registered voters. *See* Help America Vote Act (HAVA), Pub. L. 107-252 (Oct. 29, 2002), 52 U.S.C. § 21082(a) (“[If an] individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot”).⁵ Provisional

⁵ Kansas law only provides for a handful of situations where voters may be required to cast provisional ballots, none of which apply here. *Cf.* Kan. Stat. Ann. § 25-414; Kan. Stat. Ann. § 25-2908(f); Kan. Stat. Ann. § 25-2908(d).

ballots also compromise voters' right to ballot secrecy because they are opened and examined by county election officials unlike a traditional secret ballot. *Cf.* Kan. Const. art. IV, § 1. A provisional ballot system is certain to generate chaos at the polls as thousands of covered voters are challenged by state election officials when their names do not appear in the poll books. This Court has already made factual findings regarding the confusion and embarrassment caused to Individual Plaintiffs when county election officials did not find their names in the poll books and required them to vote using provisional ballot during the 2014 election. Dkt. 5 at 16-19. Such confusion would be entirely avoidable if the Secretary simply complies with the Order and provides covered voters traditional ballots.

Kobach seems to believe that he may “regard [covered] voters as registered for federal elections” in some undefined, abstract sense while still blocking them from the voter rolls for failure to provide DPOC. *See* Ex. G at 44 (“When an individual [including a DMV applicant] has not complied with [the DPOC requirement], Kansas law precludes registration.”). The Secretary’s position entirely misconstrues federal preemption under the NVRA. When a covered voter submits a valid application, the applicant must be placed on Kansas’s official list of registered voters. The DPOC law ceases to have effect as a barrier because it conflicts with the NVRA. *Ex parte Siebold*, 100 U.S. 371, 397 (1879) (“[T]he laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.”). Kobach’s continued application of the DPOC law to prevent covered voters from registering directly violates the Court’s command not to enforce this requirement against motor voter applicants.

Plaintiffs recognize that Kobach wishes to continue enforcing the DPOC law for state and local elections.⁶ But that goal does not entitle him to disobey the Order or disregard the NVRA. Defendant Kobach is not entitled to prioritize his commitment to the DPOC law over this Court's Order. He may not keep covered voters in limbo simply to ensure that they do not participate in state and local elections. He must comply with the Court's directive and add motor voter applicants to the official registration list regardless of whether Kansas's current registration system permits them to participate in all elections.⁷ At an absolute minimum, to avoid being held in contempt, Kobach must clearly show that he has taken in good faith all reasonable steps to ensure compliance with the Order. *Phone Directories*, 209 F. App'x at 815 (10th Cir. 2006). Here, Kobach has failed to take the most simple and obvious step that any reasonable officer would do to comply; he has refused to add the affected voters to the State's registration list.

⁶ There is little practical rationale for Kobach's overriding fixation on blocking individuals covered by the Order from voting in state elections because they have not presented DPOC. Kansas has never had a system of pure DPOC compliance. The vast majority of Kansas' registered voters have never been required to present DPOC because they were grandfathered in under the statute. *See* Kan. Stat. Ann. § 25-2309(n) ("Any person who is registered in this state on the effective date of [the DPOC law] is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship."); *see also* Kan. Stat. Ann. § 25-2309(p) (same exemption for registered voters who move within Kansas).

⁷ Plaintiffs note that this motion is *not* the same challenge to "dual registration" which is at issue in the pending *Brown* case. The *Brown* lawsuit challenges Secretary Kobach's authority under state law to implement a segregated registration system where individuals submitting valid NVRA registration applications without producing DPOC are permitted to vote for federal office but barred from participating in state and local contests. Here, Plaintiffs do not seek an order from this Court permitting them to vote in state elections. Rather, this motion is directed at ensuring compliance with the Court's Order requiring Plaintiffs to be registered. In other words, *even if there were a basis under state law for a dual system* where covered voters could participate in federal but not state elections, Kobach has not actually registered Plaintiffs for federal elections. Defendant Kobach is instead operating a *non-registration and provisional balloting system* for covered voters. Regardless of the scope of Kobach's authority under Kansas law, the Court's order directs him to comply with the NVRA and "ensure that any eligible [motor-voter registrant] is registered to vote in an election." 52 U.S.C. § 20507.

Instead, the Secretary has attempted to evade the Order by reinterpreting it to achieve the objectives he desires. That is contempt of court.

V. DEFENDANT KOBACH HAS VIOLATED THE ORDER BY ISSUING CONFUSING AND MISLEADING NOTICE TO VOTERS.

When it denied Kobach's request for a stay pending appeal, the Court stated that "[w]hile the preliminary injunction will require another round of noticing that has the potential to confuse voters, the Court is confident that the Secretary will be able to fashion a conspicuous, easily understood notice that will apprise voters of the status of their registrations and their right to vote in federal elections in 2016." Dkt. 145 at 9. Unfortunately, the notice actually sent by the Secretary of State's Office to covered voters fails to do any of these things. Ex. B-1; Ex. F.. The Secretary's notice is confusing, ambiguous, and does not inform recipients at the most basic level that they are *registered* to vote at all or that they may cast votes for federal office that will be counted in upcoming elections. Section 8 of the NVRA "require[s] the appropriate State election official to send notice to each applicant of the disposition of the application." 52 U.S.C. § 20507(a)(2). The letter drafted by the Secretary and sent to covered voters fails to comply with the NVRA's notice requirements and violates the Order.

The notice seems calibrated to emphasize recipients' failure to comply with the DPOC law at the expense of accurately advising them of their right to vote. The notice addresses the recipient as an "Applicant" rather than as an individual who has successfully registered to vote.⁸ It instructs in emphasized text that the voter must "submit an acceptable form of proof of citizenship" in order "[t]o complete your application." Ex. B-1; Ex. F. The obvious effect is to

⁸ This may be because Defendant Kobach believes (contrary to his representations to Plaintiffs' counsel) that motor voter applicants cannot be deemed registered until they provide DPOC.

communicate from the outset that the recipient's registration remains incomplete and that something more must be done before the individual can vote.

The letter then confusingly states that the recipient is "currently eligible to vote for federal offices only." *Id.* Such language is extremely ambiguous and difficult for any ordinary reader to parse. A recipient is "eligible" to vote because he meets the voting qualifications such as age, residence, and citizenship. But nothing in the letter suggests that the recipient has been *registered* and may cast a vote that will be counted. To most people, the ability to vote is directly tied to registration. Because the notice incorrectly states that one cannot be registered until he provides documentary proof of citizenship, an ordinary recipient of this notice would have no way of knowing that he will be permitted to cast a valid vote for federal office in upcoming elections.

Unfortunately the misinformation is not restricted to mailed notices. Plaintiff Stricker called the Sedgwick County Election Office on September 14, 2016, to verify his status only to be given incorrect information about his right to vote in upcoming elections. Ex. B. Mr. Stricker was advised that his registration application would not be complete until he provided DPOC. *Id.* Mr. Stricker was then told that while a judge had permitted him to vote in the August 2, 2016 primary, the judge had not yet made any determination about whether he could participate in the November general election.⁹

⁹ Furthermore, the names of covered voters have not been included on the Secretary of State's voter registration information website, which Kansans use to determine whether they are registered and to find their correct polling location. When Mr. Stricker attempted to use the database to check his registration status, he received the automated response, "no records were found with the criteria entered." Attached to Danjuma Decl. as Ex. B-2. Thus, a covered voter who wants to verify his registration would not know when examining the website that he may vote in elections for federal office. Indeed, if the voter takes the effort to look up his information, he would be left with the mistaken impression that he may not vote at all. In response to Plaintiffs' demand letter, Secretary Kobach has stated that his office is consulting

Ultimately, none of the information the Secretary of State's Office provides via mail, website, or telephone, currently tells covered voters directly that they are "registered for federal elections." Since that is what the Order clearly directs Kobach to do, this is an unacceptable omission that is sure to cause confusion. Individuals affected by the Order are unlikely to try to vote if every source of government information tells them they are not registered. The aggregate effect of the inaccurate information will be to dissuade covered voters from participating in the election due to confusion over whether they may cast a valid vote in the general election.

The simplest way to address the misunderstanding is for Kobach to issue a corrective notice stating plainly that the recipient is "registered to vote in federal elections" and may participate in the general election and vote for federal offices. A District Court in *Veasey v. Abbott* recently granted a motion to enforce which required Texas to issue corrective notices and voting information "to accurately reflect the language in the Court's Order." Case No. 2:13-cv-00193 (S.D. Tex Sept. 20, 2016) at 1, attached to Danjuma Decl. as Ex. K. The court also ordered Texas to provide Plaintiffs' counsel an advance copy of voter information prior to its publication. *Id.* at 2. Here Plaintiffs suggest that the parties seek the Court's approval before sending a revised notice to ensure compliance with the Order.

VI. EXPEDITED RELIEF IS NECESSARY TO PRESERVE THE ORDER.

The Court initially directed Defendant Kobach to comply with the Order and register covered voters by June 14, 2016. Since the Secretary filed his briefs in the *Brown* case on September 2, 2016, it has become apparent that he does not intend to register the Plaintiffs or add them to the State's voter registration lists. That refusal now necessitates a further order from the Court. But time is short with less than seven weeks before the general election. Covered voters

with the information technology department "to see what can be done." Ex. I at 3. Plaintiffs appreciate this effort and believe that this change could help in alleviating current confusion.

continue to receive inaccurate or misleading information from state election officials advising them that they are not registered to vote. Plaintiffs' overriding concern is to ensure that motor voter applicants are, in fact, registered, added to the voter rolls, and accurately notified of their registration status as swiftly as possible. Whether that might be resolved through a clarifying order from the Court after the parties have submitted briefing or through a contempt hearing makes little difference from Plaintiffs' perspective. But Plaintiffs respectfully request that the Court expedite responsive briefing and schedule any hearing deemed warranted at the Court's earliest convenience.

Dated this 23rd day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 23rd day of September, 2016, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Stephen Douglas Bonney
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