

**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

JOINT STATUS REPORT RE: PLAINTIFFS’ MOTION FOR CONTEMPT

The parties in the above-captioned matter submit this joint status report regarding Plaintiffs Steven Wayne Fish, Donna Bucci, Charles Stricker, Thomas J. Boynton, Douglas Hutchinson, and League of Women Voters’ motion for contempt.

On May 17, 2016, this Court issued a preliminary injunction (“the Order”) enjoining Defendant Kobach “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” and directing him “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 [documentary proof of citizenship].” Doc. No. 129 at 67. On September 23, 2016, Plaintiffs moved this Court for an Order to Show Cause Why Defendant Kobach Should Not Be Held in Contempt for failure to comply with the Order. Doc. No. 220. The Court granted the motion for

order to show cause and set a contempt hearing for this Friday, September 30, 2016.

Doc. No. 222.

The parties wish to advise the Court that they have continued to confer and have reached the following Interim Agreement regarding Plaintiffs' most serious concerns as they relate to the upcoming November 8, 2016 General Election. In providing this status report, Defendant does not waive his right to contend that the Order does not compel him to perform the actions described in the Interim Agreement. Similarly, Plaintiffs do not waive their right to contend that the actions Defendant has agreed to take in the Interim Agreement are insufficient to comply with this Court's Order.

Subject to those stipulations, Defendant states and Plaintiffs do not oppose the following regarding Defendant's treatment of otherwise eligible motor voter registration and Federal Form applicants that have been cancelled or are in suspense due solely to their failure to provide documentary proof of citizenship ("covered voters"):

1. Defendant will instruct the county election officials to send out a new notice that unequivocally advises covered voters that they "are deemed registered and qualified to vote for the appropriate local, state, and federal elections for purposes of the November 8, 2016 general election, subject only to further official notice." The parties will prepare a draft notice for this Court's review, revision, and approval. Upon approval by this Court, Defendant will direct county election officials to send the approved notice to covered voters on or before October 12, 2016.
2. Covered voters will be entitled to vote using standard ballots rather than provisional ballots at polling places on Election Day or when they request advance mail-in ballots.

3. Defendant will update the “Voter View” website so that covered voters are listed as registered to vote in the same way that other registered voters are displayed.
Defendant will implement these changes as soon as possible but in any event before October 12, 2016.
4. Plaintiffs agree for purposes of the November 8, 2016 General Election that Defendant may retain a separate coding system to identify covered voters within the Secretary of State’s internal database of registered voters (“ELVIS system”).
5. Plaintiffs agree that for purposes of the November 8, 2016 General Election that, in counties that use paper poll books, covered voters may appear on a separate official list of registered voters (the “secondary list”) and/or a supplemental poll book. In such counties, poll workers will be instructed that, in the case of any voter who appears at the polling place and whose name does not appear in the principal poll book, they must carefully check both the secondary list of registered voters and/or the supplemental poll book.

A. Plaintiffs’ Position

It is Plaintiffs’ position that Defendant Kobach must place covered voters on a single, unified list of registered voters—together in alphabetical order with all other voters—in order to comply with the Court’s Order that covered voters be registered to vote in federal elections, and that such relief is necessary as part of a final judgment. The Interim Agreement permits counties using paper poll books (approximately 30, including Sedgwick County), to continue using a separate, supplemental poll book for covered voters, which creates the possibility of voter and pollworker confusion. Defendant has represented to Plaintiffs’ counsel that he hesitates to place covered voters on the principal list of registered voters because he wishes to retain flexibility to

remove them should a higher court reverse the Order. Plaintiffs believe this is an improper attempt to circumvent full compliance with the injunction and achieve a de facto stay.

At this time, however, Plaintiffs believe that the Interim Agreement is sufficient for purposes of the November 8, 2016 General Election.

B. Defendant's Position

The list of registered voters in the ELVIS database has always had multiple subcategories for the purposes of election administration. There is no "single list" in the sense that Plaintiffs suggest. For example, there are "Active" and "Inactive" categories, both of which are individuals who are registered for both state and federal elections. Long before the enactment of Kansas's proof-of-citizenship requirement, there were multiple subcategories of voters in the "Suspense" category. Defendants note that the internal tagging of voters in the ELVIS database is not a subject covered by the NVRA and was not a subject covered by this Court's preliminary injunction. Instead, federal law leaves internal coding within ELVIS to the State. 52 U.S.C. § 21085. As long as the covered voters are included in the lists of voters that poll workers utilize on election day, it does not matter whether there is a unified list or there is a separate list of voters covered by this Court's preliminary injunction. Again, the preliminary injunction did not attempt to manage the details of how lists are kept at the polling places or within the ELVIS system; and the NVRA does not do so either. Defendant has been, and remains, in full compliance with this court's preliminary injunction regardless of how the database of registered voters is managed, and regardless of how the poll books are organized. Moreover the State and the County should be permitted to manage the State's voter registration database in a manner that ensures the efficient administration of elections. Finally, Defendant notes that with the concession of using regular ballots rather than provisional ballots for covered voters, from the

voter's perspective his or her experience at the polling place will be indistinguishable from the experience of any other voter.

Finally, Defendant respectfully suggests that a hearing on September 30, 2016, is no longer necessary, and that Defendant Kobach should not be held in contempt.

Respectfully Submitted,

/s/ Stephen Douglas Bonney

STEPHEN DOUGLAS BONNEY (#12322)
ACLU Foundation of Kansas
6701 W. 64th Street, Suite 210
Overland Park, Kansas 66202
(913) 490-4102
dbonney@aclukansas.org

DALE HO*
R. ORION DANJUMA*
SOPHIA LIN LAKIN*
American Civil Liberties Union Foundation,
Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
dale.ho@aclu.org
odanjuma@aclu.org
slakin@aclu.org

NEIL A. STEINER*
REBECCA KAHAN WALDMAN*
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
Phone: (212) 698-3500
Fax: (212) 698-3599
neil.steiner@dechert.com
rebecca.waldman@dechert.com

ANGELA M. LIU*
Dechert LLP
35 West Wacker Drive
Suite 3400
Chicago, IL 60601-1608
Phone: (312) 646-5800
Fax: (312) 646-5858
angela.liu@dechert.com

Attorneys for the Plaintiffs

/s/ Garrett Roe

GARRETT ROE, #26867

Kansas Secretary of State's Office

Memorial Hall, 1st Floor

120 S.W. 10th Avenue

Topeka, Kansas 66612

Phone: (785) 296-4575

Fax: (785) 368-8032

garrett.roe@sos.ks.gov

KRIS W. KOBACH, #17280

Kansas Secretary of State's Office

Memorial Hall, 1st Floor

120 S.W. 10th Avenue

Topeka, Kansas 66612

Phone: (785) 296-2034

Fax: (785) 368-8032

kris.kobach@sos.ks.gov

Attorneys for Defendant, Secretary of State

Kris Kobach

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2016, a copy of the above and foregoing was filed via the Court's electronic filing system, which serves notice on all counsel of record including the following:

/s/ Garrett Roe
Counsel for Defendant