

THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
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. ____
)
)
_____)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

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 pursuant to Kan. Stat. Ann. ("K.S.A.") §§ 60-902, 60-903, and submit the following Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Temporary Injunction.

INTRODUCTION

"In 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 v. Kobach*, No. 2013CV1331, at 17 (Shawnee Cty. Dist. Ct. Jan. 15, 2016) ("*Belenky* Jan. 15 Order"). Despite this principle of Kansas law, on the eve of the August primaries, Defendant Secretary of State Kris Kobach adopted a temporary regulation, Kan. Admin. Regs. ("K.A.R.") § 7-23-16 (the "Temporary Regulation"), which formalizes a two-tiered voter registration system

in which voters who register using the National Mail Registration Form (“Federal Form”) or at the Division of Vehicles (“DOV”) are only half-registered, in that they will be permitted to vote for federal offices, but their ballots will be “edited,” such that any votes cast for state and local offices will be “excised.” Defendant’s adoption of the Temporary Regulation and operation of this dual registration system violates state law and the Kansas Constitution in direct contravention of this Court’s orders in *Belenky v. Kobach*. *Belenky v. Kobach*, No. 2013CV1331 at 17 (Shawnee Cty. Dist. Ct. Aug. 21, 2015) (“*Belenky* Aug. 21 Order”), attached hereto as Exhibit A; *Belenky* Jan. 15 Order, attached hereto as Exhibit B; *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. June 14, 2016) (“*Belenky* June 14 Order”), attached hereto as Exhibit C.

The Temporary Regulation was approved before an opportunity for public comment at a hastily called meeting¹ on July 12, 2016, one day before voting began for the August 2 primary. See Kansas Secretary of State, “Advance Voting: Important 2016 Election Advance Voting Dates,” https://www.kssos.org/elections/elections_registration_voting.html. In light of these actions, Plaintiffs respectfully request that this Court enter immediately a temporary restraining order and, after a hearing, a temporary injunction to prevent Defendant Kobach from depriving thousands of Kansans of their right to vote in state and local elections in the ongoing primary and the upcoming November general election.

Defendant’s Temporary Regulation is “wholly without a basis of legislative authority” and contrary to existing state law. See Ex. A, *Belenky* Aug. 21 Order at 27. By adopting this

¹ Notice of the meeting went out late on July 11, 2016. 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/>. The meeting took place at 8am the following morning. See Editorial, *Voting Volley*, Lawrence J.-World (July 17, 2016), <http://www2.ljworld.com/news/2016/jul/17/editorial-voting-volley/?opinion>.

regulation, Defendant Kobach attempts to give a veneer of legality to his *ultra vires* action—clinging, no matter the cost, to registration requirements that federal courts have barred for federal elections. On January 1, 2013, a provision of Kansas’s 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” (the “documentary proof of citizenship requirement”). K.S.A. §§ 25-2309(l), (u).² However, as mandated by the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511, Defendant must register for federal elections eligible Kansans who submit complete applications at the DOV or using the Federal Form,³ including an attestation under penalty of perjury to their U.S. citizenship, whether or not those voters submit documentary proof of citizenship (“DPOC”). *See Fish v. Kobach*, --- F. Supp. 3d ----, No. 16-2105-JAR-JPO, 2016 WL 2866195 (D. Kan. May 17, 2016); *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013); *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015). Although this requirement covers federal elections only, under existing Kansas law, these DOV and Federal Form registrants “are registered *and* qualified

² The documentary proof of citizenship requirement is satisfied by presenting one of thirteen documents listed in the statute. K.S.A. § 25-2309(l).

³ Pursuant to *Arizona v. Inter-Tribal Council of Arizona*, states are precluded “from requiring a Federal Form applicant to submit information beyond that required by the form itself.” 133 S. Ct. 2247, 2260 (2013). Prior to February 1, 2016, the Federal Form did not incorporate a documentary proof of citizenship (“DPOC”) requirement, and thus Defendant could not condition registration for Federal Form registrants on such a requirement. 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).

electors” for all elections since Kansas law does not contemplate partial registration. Ex. A, *Belenky* Aug. 21 Order at 30; *see also* Ex. B, *Belenky* Jan. 15 Order at 17. This Court made abundantly clear in *Belenky* that Defendant Kobach’s unequal treatment of these qualified electors violates state law and the Kansas Constitution.

A temporary injunction barring enforcement of the Temporary Regulation and the dual system—including the “post-vote editing” of affected voters’ ballots through the “excising” of their votes for state and local offices, *see* Ex. A, *Belenky* Aug. 21 Order at 27, and the continued dissemination of inaccurate information to voters about the two-tiered system—is clearly warranted. This Court’s unambiguous declaration judgment in *Belenky* resolves the merits of Plaintiffs’ claims in their favor. Unless enjoined, Defendant’s actions will irreparably harm Plaintiffs and thousands of other qualified Kansas voters by interfering with their fundamental right to vote at the purported “cost” of requiring Defendant to administer a far simpler registration and balloting system than he now inflicts. Defendant Kobach should be enjoined from continuing to operate this dual registration system, and prohibited from disseminating any information inconsistent with such an injunction.

In the interim, Plaintiffs seek a temporary restraining order barring enforcement of the Temporary Regulation and the dual system imposed by Defendant. Due to the fact that voting has begun in the August primary and closes in two weeks, a temporary restraining order against the dual registration system is necessary in order to prevent the disenfranchisement of thousands of voters while Plaintiffs’ request for a temporary injunction is adjudicated.

STATEMENT OF FACTS

I. Defendant Kobach’s dual registration system.

1. On July 8, 2016, Defendant Kobach proposed and adopted a temporary

regulation, K.A.R. § 7-23-16 (the “Temporary Regulation”). Kansas Secretary of State, Certificate of Adoption (July 8, 2016) (“Temp. Reg. Pkg.”), attached hereto as Exhibit D.

2. On July 12, 2016, before an opportunity for public comment, the State Rules and Regulation Board⁴ voted to approve the Temporary Regulation, which took effect immediately. *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>. Because a temporary regulation is effective for 120 days, *see* K.S.A. § 77-422(3), the Temporary Regulation will remain in effect through Election Day on November 8, 2016.

3. The Temporary Regulation sets forth registration procedures that segregate qualified Kansas electors into two separate and unequal tiers of voters—those who may vote for all elections and those precluded from voting in state and local elections. *See* Ex. D, Temp. Reg. Pkg.

4. Specifically, the Temporary Regulation purports to formalize a dual system of registration and election administration under which certain Kansas voters who have submitted completed voter registration applications but who do not provide 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* Kansas Secretary of State, Update and Instructions Regarding Federal-Form Voter Registration Applicants (June 4, 2014) (“June 2014 Instructions”), attached hereto as Exhibit E; Kansas Secretary of State, Instructions Concerning Division of Motor Vehicles Applicants (June 14, 2016) (“June 2016 Instructions”), attached hereto as Exhibit F; Email from Director of

⁴ The State Rules and Regulations Board is comprised of five members, one of whom is the Defendant or his designee. K.S.A. § 77-423.

Elections, Bryan A. Caskey, to Kansas County Election Officers (June 22, 2016, 10:31 AM) (“June 2016 Provisional Ballot Email”), attached hereto as Exhibit G.

5. Under this dual system of registration, 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.

6. This partial counting is “accomplished by post-vote editing by local election officials of [these voters’] executed and submitted ballot[s], by excising votes for state offices or local offices, if any, and counting those for federal office.” Ex. A, *Belenky* Aug. 21 Order at 27 (citing Ex. E, June 2014 Instructions); *see also* Ex. G, June 2016 Provisional Ballot Email (instructing county election officials to count federal votes only by using the “‘partial provisional’ ballot process, similar to the process that is used when a person votes at a polling place other than his own”).

7. The dual system adversely affects at least two groups of voters:

- a. First, the dual registration system adversely affects at least 17,000 eligible Kansans who registered to vote while applying for a driver’s license or renewal at the DOV beginning on January 1, 2013. Pursuant to a May 17, 2016 preliminary injunction issued by the U.S. District Court for the District of Kansas, any such registrants who attested to their citizenship under penalty of perjury but who did not provide DPOC (“DOV registrants”) must be registered to vote for federal elections. *See Fish*, 2016

WL 2866195, at *32.⁵ But under Defendant’s dual system, such voters are not actually placed on the voter rolls (and are thus not officially registered to vote) and are not permitted to vote in state and local elections. *See* Ex. D, Temp. Reg. Pkg.; Ex. F, June 2016 Instructions; Br. of Appellant Kan. Sec’y of State at 3, *Fish v. Kobach*, No. 16-3147 (10th Cir. July 1, 2016) (“[T]he [Secretary of State], and effectively all 105 Kansas county election officers, [must] register (for federal elections only) every individual who has applied to register to vote at a Kansas DMV office since January 1, 2013, and has not provided proof of citizenship. Pursuant to the district court’s preliminary injunction, those individuals will be permitted to cast votes only for federal offices in the August 2, 2016, primary election.” (footnote & citation omitted)).

- b. Second, the dual system adversely affects eligible Kansans who used the Federal Form to register to vote between January 1, 2013 and January 31, 2016. Pursuant to *Arizona v. Inter Tribal Council* and *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015), any such Federal Form registrants who attested to their citizenship status in accordance with the Federal Form’s then-existing requirements but did not submit DPOC (“Federal Form registrants”) must be registered to vote for federal elections. *See* Ex. A, *Belenky* Aug. 21 Order at 18-21, 23. But pursuant to Defendant’s dual system, such voters are not actually placed on the voter rolls (and are thus not officially registered

⁵Plaintiffs request that the Court take judicial notice of the preliminary injunction ruling in *Fish v. Kobach*, --- F. Supp. 3d ----, No. 16-2105-JAR-JPO, 2016 WL 2866195 (D. Kan. May 17, 2016), the decisions *Arizona v. Inter-Tribal Council*, 133 S. Ct. 2247 (2013), and *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015), as well as its earlier orders in *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. June 14, 2016). *Jones v. Bordman*, 243 Kan. 444, 459 (1988) (under Kansas judicial notice rules, K.S.A. §§ 66-409 to 60-411, “a court may take judicial notice of the outcome of another proceeding”).

to vote) and not permitted to vote in state and local elections. *See* Ex. E, June 2014 Instructions; 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 ¶¶ 9, 12, attached hereto as Exhibit H.

8. In *Belenky*, this Court declared that the dual registration system is “wholly without a basis of legislative authority” and contrary to existing state law. Ex. A, *Belenky* Aug. 21 Order at 27; Ex. B, *Belenky* Jan. 15 Order at 24.

II. Plaintiffs

9. In October 2014, while obtaining a driver’s license at the DOV, Plaintiff Charles “Tad” Stricker registered to vote in Kansas by attesting under penalty of perjury to his eligibility, including U.S. citizenship. Decl. of Charles William Stricker III, *Fish v. Kobach*, No. 2:16-cv-02105-JAR-JPO (D. Kan. Feb. 26, 2016), ECF. No. 20-5 (“Stricker Decl.”) at ¶¶ 6-8, attached hereto as Exhibit I. He did not submit and has not submitted documentary proof of citizenship. Letter from Sedgwick County Election Office to Charles Stricker, attached hereto as Exhibit J.

10. 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.” *Id.*

11. On January 28, 2016, Plaintiff Marvin Brown registered to vote in Kansas by using a Federal Form on which he attested under penalty of perjury to his eligibility, including U.S. citizenship. Ex. H, Caskey Aff., at ¶ 17. He did not submit and has not submitted documentary proof of citizenship. *Id.*; Johnson County Election Office, Second Notice (“M. Brown’s Notice”), attached hereto as Exhibit K.

12. On or around June 21, 2016, Mr. Brown received a notice from the Johnson County Election Office informing him that in order to complete his application he needed to

submit DPOC and that the “citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the application will be cancelled.” Ex. K, M. Brown’s Notice.

13. On January 28, 2016, Plaintiff JoAnn Brown registered to vote in Kansas by using a Federal Form on which she attested under penalty of perjury to her eligibility, including U.S. citizenship. Ex. H, Caskey Aff. at ¶ 18. She did not submit and has not submitted documentary proof of citizenship. *Id.*; Johnson County Election Office, Second Notice (“J. Brown’s Notice”), attached hereto as Exhibit L.

14. On or around June 21, 2016, Mrs. Brown received a notice from the Johnson County Election Office informing her that in order to complete her application she needed to submit DPOC and that the “citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the application will be cancelled.” Ex. L, J. Brown’s Notice.

15. Under Federal law, each of the Plaintiffs must be registered to vote in federal elections. *See Fish*, 2016 WL 2866195, at *31-32; *Inter Tribal Council*, 133 S. Ct. at 2251, 2255 n.4, 2260; *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d at 1196, 1199.

16. This Court found in *Belenky* that, under existing Kansas, law a Kansas voter registered for federal elections is a “registered *and* qualified elector[.]” for all elections. Ex. A *Belenky* Aug. 21 Order at 30; Ex. B, *Belenky* Jan. 15 Order at 17.

17. Under the Temporary Regulation and the system imposed by the Defendant, each of the Plaintiffs will be offered a provisional ballot only and be prohibited from voting in elections for state and local offices in the ongoing August primary and November general election. *See* Ex. D, Temp. Reg. Pkg.; Ex. H, Caskey Aff. at ¶¶ 17, 18; Ex. E, June 14

Instructions.

PROCEDURAL HISTORY

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 (as well as then Deputy Assistant Secretary of State, Elections and Legislative Matters, Brad Bryant), challenging Defendant's dual registration system as unlawful under the Kansas Constitution and state statutes. *See* Petition, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Nov. 21, 2013), attached hereto as Exhibit M. On August 21, 2015, this Court denied Defendant's motion for summary judgment in a detailed order. Ex. A, *Belenky* Aug. 21 Order. On January 15, 2016, the Court granted summary judgment in favor of the individual plaintiffs, concluding, among other things, that the Secretary of State's dual registration system was implemented "wholly . . . without the authority of any Kansas statute and w[as] clearly beyond the scope of any existing regulatory authority" and therefore void. Ex. B, *Belenky* Jan. 15 Order at 4. While it could grant declaratory relief, the Court concluded that it could not order injunctive relief, because the Secretary of State had registered, without consent, the individual plaintiffs to vote prior to the judgment, rendering "equitable relief . . . [in]appropriate." *Id.* at 26.⁶

On July 8, 2016, in the wake of the federal court injunction in *Fish* requiring Defendant Kobach to allow DOV registrants to vote in federal elections, Defendant adopted the Temporary Regulation, which was approved on July 12, 2016, before an opportunity for public comment. Plaintiffs' Statement of Facts ("Pls.' SOF") ¶ 2. The Temporary Regulation went into effect

⁶ On July 8, 2016, the *Belenky* defendants filed a notice of appeal of all adverse rulings issued by this Court. Notice of Appeal, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. July 8, 2016). This notice was filed more than thirty days after the January 28, 2016 entry of judgment in *Belenky*. Entry of Judgment, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Jan. 28, 2016).

immediately. *Id.* On July 19, 2016, Plaintiffs, on behalf of themselves and all others similarly situated, filed the instant lawsuit to enjoin the Temporary Regulation and Defendant's continued implementation of their dual registration system. This case alleges substantially the same causes of action as in *Belenky* with the addition of similarly situated DOV plaintiffs, *see Ex. C, Belenky* June 14 Order at 4,⁷ and seeks not just declaratory but injunctive relief.

LEGAL STANDARDS

The purpose of a temporary injunction is to prevent injury to a claimed right pending a final determination of the controversy on its merits. *See Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491 (2007). A movant is entitled to a temporary injunction upon establishing the following: (1) a substantial likelihood that the movant will prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) a showing that an action at law will not provide the adequate remedy; (4) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (5) a showing that the injunction, if issued, would not be adverse to the public interest. *See id.*; *see also Steffes v. City of Lawrence*, 284 Kan. 380, 395-96 (2007); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Uarco Inc. v. Eastland*, 584 F. Supp. 1259, 1261 (D. Kan. 1984).

K.S.A. § 60-903 authorizes the issuance of a temporary restraining order “without notice or bond.” “The purpose of such order is to restrain a defendant for a very brief period, pending a hearing on the application for a temporary injunction.” *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 227 (1984).

⁷ Although the individual plaintiffs in *Belenky* were Federal Form registrants, on June 14, 2016, in an order denying defendants' motion to vacate its entry of judgment pursuant to K.S. A. § 60-260, this Court noted the potential “legal efficacy” of its summary judgment decision “by analogy” to DOV registrants in light of the May 17, 2016 preliminary injunction issued in *Fish. Belenky* June 14 Order at 4.

ARGUMENT

A temporary injunction enjoining the Temporary Regulation and the dual registration system imposed by Defendant Kobach in order to prevent the disenfranchisement of thousands of voters during the pendency of this action is clearly warranted. This Court's unambiguous declaratory judgment in *Belenky* resolves the merits of Plaintiffs' claims in their favor. In addition, unless enjoined, Defendant's actions will irreparably harm Plaintiffs and thousands of other qualified Kansas voters by depriving them of their fundamental right to vote. There is, moreover, no question that the balance of equities weighs in Plaintiffs' favor and that a temporary injunction would serve the public interest as the purported "cost" of requiring Defendant to administer a far simpler registration and balloting system than the Temporary Regulation and dual registration system now inflict pales in comparison to the disenfranchisement of thousands of qualified Kansas voters.

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

A. Defendant's Dual Registration System is Prohibited by State Law.

Defendant Kobach created and continues to administer a dual system of registration and election administration that is, as this Court has already concluded, "wholly without a basis of legislative authority" and contrary to existing state law. *Ex. A, Belenky* Aug. 21 Order at 27. There is no dispute that this dual system requires Plaintiffs and other DOV and Federal Form registrants to vote by provisional ballot, treats those ballots as challenged ballots, then requires local election officials to partially count the ballots so that their votes are only counted in federal elections and are discarded for state and local elections. *See* Pls.' SOF ¶¶ 4-7, 17. As this Court has aptly observed, "[c]learly no such authority exists at all in the Kansas Secretary of State to encumber the voting process as he has done here." *Ex. B, Belenky* Jan. 15 Order at 24.

Defendant Kobach has nevertheless brazenly usurped the role of the legislature and, clinging to “[his] view of the law as [he] believe[s] it should be,” has unlawfully “advanced into the field of legislation,” *id.* at 24, in multiple ways:

First, Defendant’s dual registration procedures mandate ballot challenges that are not sanctioned under Kansas law. Kansas state statutes envision a unitary ballot. Ex. A, *Belenky* Aug. 21 Order at 25; *see* K.S.A. §§ 25-610, 25-616, 25-617. The Kansas Legislature did not and has not authorized a separate ballot for federal office candidates, and thus intended that ballots cast by qualified electors for use in all elections would be accepted. *See* Ex. A, *Belenky* Aug. 21 Order at 25-26. Nevertheless, Defendant has “declared all . . . ballots [cast by DOV and Federal Form registrants] to be ‘provisional’, hence, effectively challenging such ‘Federal Form’ [and DOV] registrants who present themselves to vote.” Ex. A, *Belenky* Aug. 21 Order at 38; Pls.’ SOF ¶ 5. However, state law only provides for the challenging of voters in limited circumstances expressly set forth by statute, *see, e.g.*, K.S.A. § 25-414, and as this Court held, there is “no basis by statute for a challenge to be exercised against” these Federal Form and DOV registrants “merely because they chose that method” to register to vote. Ex. A, *Belenky* Aug. 21 Order at 28-29 (citing K.S.A. § 25-414); *see also* Ex. B *Belenky* Jan. 15 Order at 15 (“Most importantly, the Defendants’ position ignores the fact that *no Kansas law* sanctions a challenge to a ballot voted by a ‘Federal Form’ registrant.”). To be sure, Kansas law “permits a challenge to a voter whom the election official ‘shall know or suspect not to be qualified as an elector.’” Ex. A, *Belenky* Aug. 21 Order at 30 (quoting K.S.A. § 25-414). But eligible Kansas voters who registered to vote using the Federal Form or at the DOV “are registered *and* qualified electors” for not just federal but state and local elections as well, Ex. A *Belenky* Aug. 21 Order at 30, because “[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,” Ex. B, *Belenky* Jan. 15 Order at 17. As fully registered and qualified voters, DOV and Federal Form registrants cannot be required to vote by provisional ballot, or forced to submit to challenges, in order to exercise their fundamental right to vote.

Second, nothing in Kansas law authorizes “partial or limited acceptance of the voter’s ballot,” Ex. A, *Belenky* Aug. 21 Order at 30 (emphasis removed), based on a qualified elector’s method of registration, Ex. B, *Belenky* Jan. 15 Order at 23. Kansas law expressly provides for a limited set of exceptions in which ballots, once accepted, may be only partially counted. Specifically, as this Court found, partial acceptance of a ballot is allowed only in two instances, both of which are “based on voter error, not registration.” Ex. B, *Belenky* Jan. 15 Order at 23 (citing K.S.A. § 25-3002).

Third, as this Court concluded in *Belenky*, the “post-vote editing” of the ballots cast by DOV and Federal Form registrants compromises these voters’ right to ballot secrecy guaranteed by Article 4, Section 1 of the Kansas Constitution without statutory authority or compelling justification. Ex. A, *Belenky* Aug. 21 Order at 27, 37-39; Ex. B, *Belenky* Jan. 15 Order at 19-23. To ensure that only votes for federal offices are counted, Defendant’s dual system requires the ballots of DOV and Federal Form registrants to be set aside and edited by “excising votes for state offices or local offices.” Ex. A, *Belenky* Aug. 21 Order at 27; Pls.’ SOF ¶¶ 4-6. “Without some clear legislative direction compatible with the Kansas Constitution such a [qualified] voter should not have his or her ballot seized or be subjected to the loss of anonymity by his or her choice of an otherwise authorized method of registration.” Ex. A, *Belenky* Aug. 21 Order at 42.

Defendant’s adoption of the Temporary Regulation does not undermine this analysis. Defendant was aware of the possibility of a court-ordered injunction requiring him to register

DOV registrants to vote in federal elections at least as of February 26, 2016 when the plaintiffs in *Fish* moved for an injunction requiring exactly that, *see Fish*, 2016 WL 2866195, at *1, and certainly as of June 10, 2016 when the U.S. Court of Appeals for the Tenth Circuit denied his motion to stay the injunction, *see Fish v. Kobach*, No. 16-3147 (10th Cir. June 10, 2015) (order denying stay). Nevertheless, Defendant declined to show his Temporary Regulation to or otherwise raise this election issue with the Kansas legislature, despite the fact that the legislature did not adjourn *sine die* until June 1, 2016, and convened a special session on June 23-24, 2016.⁸ Instead, Defendant opted to use the temporary regulation process, which allowed him to bypass the 60-day period for notice and public comment that formal rulemaking mandates. *See* K.S.A. §§ 77-421; 77-422. Although Defendant Kobach may have authority to promulgate rules and regulations concerning voter registration to ensure compliance with federal and state statutes, this is not a license to trespass on the prerogatives of the legislature. The Temporary Regulation cannot serve as a stand-in here where “the Kansas legislature has yet to pave the way for implementation of the Secretary’s views.” Ex. B, *Belenky* Jan. 15 Order at 24.

B. The Assignment of Vastly Different Rights to Similarly Situated Voters Violates the Kansas Constitution’s Guarantee of Equal Protection.

In classifying otherwise indistinguishable electors by their method of registration, then assigning lesser voting rights and protections to DOV and Federal Form registrants, the dual registration system violates the Kansas Constitution’s guarantee of equal protection in at least two ways. *See* Ex. B, *Belenky* Jan. 15 Order at 19; Kan. Const., Bill of Rights, § 1;⁹ Kan. Const.,

⁸ *See* Peter Hancock, *State board limits votes of 17,000 Kansans missing citizenship proof; Kobach-initiated process called ‘appalling*, Lawrence J.-World (July 12, 2016), <http://www2.ljworld.com/news/2016/jul/12/state-board-limits-votes-17000-people/>.

⁹ Section 1 of the Kansas Bill of Rights states: “Equal Rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

Bill of Rights, § 2.¹⁰

First, the dual registration system arbitrarily denies DOV and Federal Form registrants the right to vote in state and local elections. As discussed above, under Kansas law DOV and Federal Form registrants are “registered *and* qualified electors,” Ex. A, *Belenky* Aug. 21 Order at 30, and thus “fully registered to vote,” *id.* at 43. Under the Secretary’s dual registration system, however, these fully registered voters—who have submitted complete application under the DOV and Federal Form processes—are treated differently from other fully registered voters—*i.e.*, those who submitted complete applications prior to January 1, 2013 or who submitted complete applications using the State form¹¹—who are permitted to vote for all offices. *See In re Weisgerber*, 285 Kan. 98, 104 (2007) (“Guarantees of the Equal Protection Clause[] are implicated when a statute treats arguably indistinguishable classes of people differently.”). Because “[b]y current Kansas law, registration, hence, the right to vote, is not tied to the method of registration,” Ex. B, *Belenky* Jan. 15 Order at 17, DOV and Federal Form registrants are arbitrarily denied their right to vote in state and local elections.

Second, DOV and Federal Form registrants 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,” a right entitled to “heightened scrutiny.” Ex. B, *Belenky* Jan. 15 Order at 19, 24. Specifically, DOV and Federal Form registrants must suffer a “post-vote editing” invasion of their “executed and submitted ballot[s],” Ex. A, *Belenky* Aug. 21

¹⁰ Section 2 of the Kansas Bill of Rights states: “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.”

¹¹ Individuals who registered to vote prior to January 1, 2013 by any method are “grandfather[ed] in” to the registration rolls and thus their applications are deemed complete regardless of whether they satisfied the DPOC requirement. Ex. A, *Belenky* Aug. 21 Order at 17; K.S.A. §§ 25-2309(n), (u). Kansas’s State form meanwhile contains a DPOC requirement that must be met in order for that form to be complete. K.S.A. §§ 25-2309(a)(1), (l).

Order at 27, not endured by other qualified voters, “based merely on their choice of method of registration.” Ex. B, *Belenky* Jan. 15 Order at 19. Whether this can “stand as a ‘compelling reason’ need not be assessed, since no such choice has been made by the Kansas legislature.” *Id.*

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM AS A RESULT OF THE INTERFERENCE WITH THEIR RIGHT TO VOTE.

Plaintiffs, along with thousands of other registered Kansas voters, will be irreparably harmed if the Temporary Regulation and Defendant Kobach’s dual registration system are permitted to stand. Irreparable injury, for the purposes of a temporary injunction, requires a showing that a reasonable probability exists of prospective injury. *See Bd. of Cty. Comm’rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 683 (2006).

“There is no right more basic in our democracy than the right to participate in electing our political leaders.” *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1440-41 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964). 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). The Kansas Supreme Court has recognized the extraordinary importance of protecting the fundamental right to vote. *See State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (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*, 152 Kan. 826, 107 P.2d 773, 779 (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.”).

If Defendant continues to enforce the Temporary Regulation and dual registration system during the ongoing August primary and upcoming November election, Plaintiffs and thousands of other Kansas voters will be denied their right to vote in state and local elections in a year when all 165 seats in the Kansas legislature are up for election.¹² The deprivation of Plaintiffs’ fundamental voting rights is the epitome of irreparable harm because “once [an] election occurs, there can be no do-over and no redress.” *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015); *see also Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of right to vote is unquestionably “irreparable harm”); *see generally Reynolds*, 377 U.S. at 562.

III. THE BALANCE OF EQUITIES WEIGHS STRONGLY IN FAVOR OF PLAINTIFFS.

The balance of equities strongly favors the grant of a temporary injunction. Defendant Kobach will not be injured by allowing citizens who are qualified to vote in the August primary and November election for federal offices to also vote for state and local offices. Indeed, Defendant can claim no harm because the requested injunction merely requires Defendant to comply with existing Kansas statutes and constitutional provisions by refraining from “editing” the ballots of affected voters to excise votes for state and local offices, and by refraining from disseminating any information inconsistent with this Court’s order. It is difficult, moreover, to see how Defendant will be burdened by administering the same registration and ballot procedures for all registered and qualified voters—the unitary system Kansas operated prior to adopting a dual registration system. If anything, the temporary injunction will *reduce* administrative burdens by eliminating the processes of maintaining a special suspense category

¹² *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>.

for DOV and Federal Form registrants, of cross-referencing a voter's eligibility at the polling station, and of canvassing the thousands of ballots for those whose votes are counted for federal elections only.

Even if there were a burden associated with administering a unitary system of registration and voting, the injury that Plaintiffs, and the thousands of affected Kansas voters will suffer absent an injunction—the violation of their right to vote—far outweighs that burden.

IV. A TEMPORARY INJUNCTION WILL SERVE THE PUBLIC INTEREST.

The grant of the temporary injunction in this case would not be adverse to the public interest.¹³ To the contrary, there is an extraordinary public interest in protecting the right to vote. *See, e.g., Wesberry*, 376 U.S. at 17.

A temporary injunction would further the public interest of preventing voter disenfranchisement and permitting full participation by thousands of registered voters in the ongoing primary and the November election. In fact, Defendant Kobach estimates that the May 17, 2016 preliminary injunction in *Fish* will result in “between 17,000 and 50,000” DOV registrants “by the time of the November 8, 2016 presidential election.” Br. of Appellant Kan. Sec’y of State at 56, *Fish v. Kobach*, No. 16-3147 (10th Cir. July 1, 2016).¹⁴ These thousands of voters, along with Federal Form registrants, will be deprived of their right to vote in state and

¹³ Insofar as Defendant claims that an injunction would be adverse to the public interest because it would be contrary to a purported public interest in enforcing the State's citizenship requirement, that interest is far outweighed by the risk of disenfranchisement of thousands of Kansas voters. *See, e.g., Fish v. Kobach*, --- F. Supp. 3d ---, No. 16-2105-JAR-JPO, 2016 WL 3000356 (D. Kan. May 25, 2016) (in denying Defendant Kobach's request for a stay, concluding, among other things, that “the Court cannot find that the public interest in enforcing the State's citizenship requirement is strong enough to counterbalance the public's strong interest in ensuring that thousands of qualified voters can successfully exercise their right to register to vote and cast a ballot in federal elections”); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388 (6th Cir. 2008) (“Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the Defendant's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].”).

¹⁴ Plaintiffs submit that statements made by the instant case's Defendant as a defendant in *Fish v. Kobach* are party admissions. *See* K.S.A. § 60-460(h).

local elections in the August primary and November general election if the Temporary Regulation and dual registration system imposed by Defendant Kobach are not enjoined.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests the Court to issue a temporary restraining order and, after a hearing, a temporary injunction enjoining K.A.R. § 7-23-16 and the dual system of registration and election administration imposed by Defendant. Plaintiffs further request that the Court prohibit Defendant from disseminating any information inconsistent with the injunction order.

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Respectfully submitted,

/s/ Robert V. Eye

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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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