

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 )  
situated, )

Plaintiffs, )

v. )

KRIS KOBACH, Kansas Secretary of State, in )  
his official capacity, )

Defendant. )

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Case No. 2016-CV-000550  
Division No. 6

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PERMANENT INJUNCTION**

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## 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, 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 system of registration and election administration in which thousands of voters who register to vote using the National Mail Registration Form (“Federal Form”) or at the Division of Vehicles (“DOV”) are only “half-registered” and prohibited from voting in state and local elections. To prevent the disenfranchisement and unequal treatment of these qualified Kansas voters in the November general election and in all future elections, Plaintiffs Marvin L. Brown, JoAnn Brown, and Charles William Stricker respectfully request, pursuant to Kan. Stat. Ann. (“K.S.A.”) § 60-901, that this Court permanently and fully enjoin this dual system

A permanent injunction barring enforcement of the Temporary Regulation and the dual registration system and ending the unequal treatment of affected qualified voters is clearly warranted. As this Court has already concluded, correctly, and consistent with Judge Theis’ unambiguous declaratory judgment in *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct.), Defendant’s dual registration system is unauthorized and prohibited. *See* Temp. Inj. Ruling Tr. (“TI Ruling Tr.”) at 7:10-8:1, 11:13-16, attached to Decl. of Attorney Sophia Lin Lakin as Ex. A. Defendant has created out of whole cloth a system of convoluted procedures specifically designed to circumvent existing state laws governing voter registration and voting procedures. Specifically, Defendant has invented a novel “Federal Election Only” registration status for



voters who register at the DOV or using the Federal Form. While these voters are permitted to vote for federal offices, they are not officially registered or placed in the poll book. Treated as suspect, these voters are given provisional rather than regular ballots, which are “seized” and later opened and effectively “edited,” in that any votes cast for state and local offices are disregarded. *See Belenky v. Kobach*, No. 2013CV1331, at 14, 27, 42 (Shawnee Cty. Dist. Ct. Aug. 21, 2015) (“*Belenky Aug. 21 Order*”). Defendant Kobach’s unequal treatment of these qualified electors exceeds his statutory authority and violates the Kansas Constitution. *See Ex. A, TI Ruling Tr.* at 7:10-8:4, 11:13-16; *Belenky Aug. 21 Order* at 44-47; *Belenky Jan. 15 Order* at 12-25.

Unless enjoined, Defendant’s actions and the dual registration system 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. Accordingly, Defendant Kobach should be enjoined from continuing to operate this dual registration system and from treating Plaintiffs and similarly situated voters differently from other qualified voters. Specifically, Plaintiffs respectfully request that the Court issue a permanent injunction that (1) enjoins enforcement of K.A.R. § 7-23-16 and Defendant’s dual system of registration and election administration; (2) orders Defendant to ensure that all “Federal Election Only” registrants are officially registered and given regular ballots on which all votes cast are counted in the November general election and future elections; (3) orders Defendant to ensure that all affected voters are provided notice that they are fully registered voters; and (4) directs Defendant to update all instructions to local elections officials in accordance with this injunction.

## STATEMENT OF UNCONTROVERTED FACTS

The following uncontroverted facts establish that Plaintiffs are entitled to a permanent injunction.

### I. DEFENDANT KOBACH'S DUAL REGISTRATION SYSTEM

1. On July 8, 2016, Defendant Kobach proposed and adopted temporary regulation K.A.R. § 7-23-16 (the “Temporary Regulation”). Ex. A, TI Ruling Tr. at 3:20-22; Kansas Secretary of State, Certificate of Adoption (July 8, 2016) (“Temp. Reg. Pkg.”), attached to Lakin Decl. as Ex. C.

2. Late on July 11, 2016, notice was given that the State Rules and Regulation Board (the “Board”) would meet at 8am on July 12, 2016 to consider the Temporary Regulation. Ex. A, TI Ruling Tr. at 3:22-24.

3. The Board is comprised of five members, one of whom is the Defendant or his designee. K.S.A. § 77-423.

4. During the meeting on July 12, 2016, the Board voted to approve the Temporary Regulation before providing an opportunity for public comment. Ex. A, TI Ruling Tr. at 3:23-25.

5. The Temporary Regulation took effect immediately. *See* K.S.A. § 77-422(c)(1).

6. Early voting for the August primary began on July 13, 2016. Ex. A, TI Ruling Tr. at 3:25-4:1.

7. 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.

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

9. Specifically, the Temporary Regulation purports to formalize a dual system of registration and election administration under which certain Kansas voters who have submitted complete voter registration applications but who do not provide documentary proof of citizenship (“DPOC”) pursuant to K.S.A. § 25-2309(l) are “permitted to vote in elections 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 to Lakin Decl. as Ex. D; Kansas Secretary of State, Instructions Concerning Division of Motor Vehicles Applicants (June 14, 2016) (“June 2016 Instructions”), attached to Lakin Decl. as Ex. E; Email from Director of Elections, Bryan A. Caskey, to Kansas County Election Officers (June 22, 2016, 10:31 AM) (“June 2016 Provisional Ballot Email”), attached to Lakin Decl. as Ex. F.

10. These individuals whom Defendant treats as “Federal Election Only” voters include at least two sets of voters. *See* Kansas Secretary of State, Update to Instructions Concerning Division of Motor Vehicles Applicants (July 29, 2016) (“July 2016 Instructions”), attached to Lakin Decl. as Ex. G.

11. The first set of “Federal Election Only” voters are eligible Kansans who registered to vote while applying for a driver’s license or renewal at the DOV beginning on January 1, 2013. *See* Ex. C, Temp. Reg. Pkg.; Ex. D, June 16 Instructions. 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 pursuant to K.S.A. § 25-2309(l)<sup>1</sup> (“DOV registrants”) must be registered to vote

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

for federal elections. *See Fish v. Kobach*, --- F. Supp. 3d ----, No. 16-2105-JAR-JPO, 2016 WL 2866195, at \*32 (D. Kan. May 17, 2016).<sup>2</sup>

12. At the time of the August 2, 2016 primary, there were 17,468 DOV registrants. Ex. G, July 2016 Instructions. Defendant estimates that there will be “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), attached to Lakin Decl. as Ex. H.<sup>3</sup>

13. The second set of “Federal Election Only” voters are eligible Kansans who used the Federal Form to register to vote between January 1, 2013 and January 31, 2016. 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 to Lakin Decl. as Ex. I. During this time period, the Federal Form did not incorporate a DPOC requirement.<sup>4</sup> *Id.* ¶¶ 9, 11; *Belenky* Jan. 15 Order at 17-18. Pursuant to *Arizona v. Inter Tribal*

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<sup>2</sup> Plaintiffs 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), the decision in *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015), as well the orders in *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct.). *Jones v. Bordman*, 243 Kan. 444, 459, 759 P.2d 953 (1988) (under K.S.A. §§ 60-409 to 60-411, “a court may take judicial notice of the outcome of another proceeding”).

<sup>3</sup> Plaintiffs request that the Court take judicial notice of Defendant’s Tenth Circuit opening brief in *Fish* and his statements therein pursuant to K.S.A. § 60-409(b)(3), (4). Plaintiffs submit that statements made by the instant case’s Defendant as a defendant in *Fish* are party admissions. *See* K.S.A. § 60-460(h).

<sup>4</sup> States are precluded “from requiring a Federal Form applicant to submit information beyond that required by the form itself.” *Inter-Tribal Council*, 133 S. Ct. at 2260. Prior to February 1, 2016, the Federal Form did not include 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 Defendant), abruptly and unilaterally changed the Kansas state-specific instructions to the Federal Form to incorporate a DPOC requirement. A challenge to Mr. Newby’s 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).

*Council*, 133 S. Ct. 2247 (2013), and *Kobach v. U.S. Election Assistance Commission* (“EAC”), 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 Belenky* Aug. 21 Order at 18-21, 23.

14. At the time of the August 2, 2016 primary there were 192 Federal Form registrants. Ex. G, July 2016 Instructions.

15. Under the dual registration system, “Federal Election Only” voters are not actually placed on the voter rolls and are thus not officially registered to vote. Temp. Inj. Hr’g Tr. (“TI Hr’g Tr.”) at 37:6-12; 38:15-19; 50:22-51:14, attached to Lakin Decl. as Ex. B<sup>5</sup>; *see also* Ex. G, July 2016 Instructions; Ex. D, June 2014 Instructions at 2; Ex. E, June 2016 Instructions.

16. Instead, they are given a special “Federal Election Only” suspense status and placed on a separate list of “Federal Election Only” voters. *See* Ex. G, July 2016 Instructions; Ex. D, June 2014 Instructions at 2; Ex. E, June 2016 Instructions; Ex. B, TI. Hr’g Tr. at 37:6-12; 38:17-18; 38:23-24; 50:22-51:14.

17. These “Federal Election Only” voters are issued provisional, not regular, ballots that contain both federal and state offices. *See* K.A.R. § 7-23-16(b); Ex. G, July 2016 Instructions; Ex. D, June 2014 Instructions at 2; Ex. E, June 2016 Instructions; Ex. F, June 2016 Provisional Ballot Email; Ex. B, TI. Hr’g Tr. at 64:15-23.

18. These voters then mark the provisional ballot and enclose it in an envelope which he or she signs. Ex. B, TI Hr’g Tr. at 56:8-21.

19. These provisional ballots are separated into a separate stack and set aside until the

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<sup>5</sup> Statements made by Defendant and Defendant’s employee are party and/or vicarious admissions, admissible as evidence in this matter pursuant to K.S.A. § 60-460(h) and K.S.A. § 60-460(i).

county canvass. Ex. B, TI Hr’g Tr. at 56:25-57:25; 67:20-25; Ex. D, June 2014 Instruction at 3; Ex. G, July 2016 Instructions.

20. During the canvass, the county board of canvassers is directed to recommend that only the votes cast for federal offices be counted for provisional ballots identified as “Federal Election Only.” “Votes cast for other offices or on ballot questions shall not be counted.” K.A.R. § 7-23-16(b); Ex. D, June 2014 Instructions; Ex. E, June 2016 Instructions; Ex. F, June 2016 Provisional Ballot Email; Ex. I, Caskey Aff. at ¶¶ 9, 12.

21. To accomplish this partial counting, counting board members remove the provisional ballot from the signed envelope. Ex. B, TI Hr’g Tr. at 58:13-14, 19-21.

22. Counting board members then manually count only the votes cast for federal offices and disregard any votes cast for state and local offices or any ballot questions. Ex. B, TI Hr’g Tr. at 68:17-21; *see also* K.A.R. § 7-23-16(b); Ex. D, June 2014 Instructions; Ex. F, June 2016 Provisional Ballot Email.

## **II. PLAINTIFFS**

23. 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. Ex. A, TI Ruling Tr. at 5:3-8; 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 to Lakin Decl. as Ex. J.

24. Mr. Stricker did not submit and has not submitted documentary proof of citizenship. Ex. A, TI Ruling Tr. at 5:8; Letter from Sedgwick County Election Office to Charles Stricker (“Sticker Notice”), attached to Lakin Decl. as Ex. K-1.

25. 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 thus not

eligible to vote for state and local elections or any ballot questions. Ex. A, TI Ruling Tr. at 5:8-13; Ex. K-1, Stricker Notice.

26. The Sedgwick County notice also stated that he is “not considered a registered voter until [he] submit[s] an acceptable form of proof of citizenship.” Ex. K-1, Stricker Notice.

27. As of August 12, 2016, the “Registrant Search” on the website maintained by the Kansas Secretary of State did not list Mr. Stricker as a currently registered voter in the State of Kansas. *See* Screenshot of Registrant Search Result for Charles Stricker, attached to Lakin Decl. as Ex. N-1.<sup>6</sup>

28. 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. A, TI Ruling Tr. at 4:14-18; Ex. I, Caskey Aff., at ¶ 17.

29. Mr. Brown did not submit and has not submitted documentary proof of citizenship. Ex. A, TI Ruling Tr. at 4:18-19; Ex. I, Caskey Aff., at ¶ 17; Johnson County Election Office, Second Notice (“M. Brown Notice”), attached to Lakin Decl. as Ex. L-1.

30. Kansas Election Director Bryan Caskey has stated that “Mr. Brown is not eligible to vote for state and local office.” Ex. I, Caskey Aff., at ¶ 17.

31. On or around June 21, 2016, Mr. Brown received a notice from the Johnson County Election Office informing him that his voter registration application is incomplete and that in order to complete his application he needed to submit DPOC. Ex. L-1, M. Brown Notice.

32. The Johnson County notice also informed him that his “citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the

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<sup>6</sup> Plaintiffs request that the Court take judicial notice of the Kansas government webpage “Kansas Secretary of State | Voter View – Registrant Search,” <https://myvoteinfo.voteks.org/VoterView/RegistrantSearch.do>, and the results returned for each of the Plaintiffs pursuant to K.S.A. § 60-409(b)(3), (4). *See* Declaration of Sophia Lin Lakin, dated Aug. 12, 2016, attached to Lakin Decl. as Ex. N.

application will be cancelled.” Ex. L-1, M. Brown Notice.

33. As of August 12, 2016, the “Registrant Search” on the website maintained by the Kansas Secretary of State did not list Mr. Brown as a currently registered voter in the State of Kansas. *See* Screenshot of Registrant Search Result for Marvin Brown, attached to Lakin Decl. as Ex. N-2.

34. 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. A, TI Ruling Tr. at 4:22-24; Ex. I, Caskey Aff. at ¶ 18.

35. Mrs. Brown did not submit and has not submitted documentary proof of citizenship. Ex. A, TI Ruling Tr. at 4:22-24; Ex. I, Caskey Aff. at ¶ 18; Johnson County Election Office, Second Notice (“J. Brown Notice”), attached to Lakin Decl. as Ex. M-1.

36. Kansas Election Director Bryan Caskey has stated that “Mrs. Brown is not eligible to vote for state and local office.” Ex. I, Caskey Aff., at ¶ 18.

37. On or around June 21, 2016, Mrs. Brown received a notice from the Johnson County Election Office informing her that her voter registration application is incomplete and that in order to complete her application she needed to submit DPOC. Ex. M-1, J. Brown Notice.

38. The Johnson County notice also informed her that her “citizenship documentation must arrive at the Election Office within 90 days of submitting your registration or the application will be cancelled.” *Id.*

39. As of August 12, 2016, the “Registrant Search” on the website maintained by the Kansas Secretary of State did not list Mrs. Brown as a currently registered voter in the State of Kansas. *See* Screenshot of Registrant Search Result for JoAnn Brown, attached to Lakin Decl. as Ex. N-3.



40. Under the Temporary Regulation and the system imposed by the Defendant, each of the Plaintiffs will, in the November general election and future elections, be offered a provisional, not regular, ballot on which only votes for federal offices will be counted and any votes cast for state and local offices will be disregarded. *See* K.A.R. § 7-23-16(b); Ex. I, Caskey Aff. at ¶¶ 17, 18; Ex. D, June 2014 Instructions.

### **BACKGROUND AND PROCEDURAL HISTORY**

As mandated by the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501–20511, Defendant must register for federal elections eligible Kansans who submit valid registration applications for which an attestation under penalty of perjury suffices as proof of their eligibility, including U.S. citizenship. This includes thousands of DOV and Federal Form registrants. Plaintiffs’ Statement of Facts (“Pls.’ SOF”) ¶¶ 11-12, 13-14. Instead of actually registering these voters, however, Defendant, citing Kansas’ DPOC requirement, K.S.A. § 25-2309(l),<sup>7</sup> invented a novel dual system of registration and election administration in which these thousands of Federal Form and DOV registrants are only “half-registered,” that is, they are given a new “Federal Election Only” registration status, not officially registered or placed in the poll book, and given provisional ballots for which only votes cast for federal elections are counted. Pls.’ SOF ¶¶ 9, 15-22.

On November 21, 2013, two Federal Form registrants challenged Defendant’s dual registration system as unlawful under the Kansas Constitution and state statutes in this Court. *See* Petition, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. Nov. 21, 2013). On January 15, 2016, Judge Theis issued a declaratory judgment concluding, among other things,

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<sup>7</sup> K.S.A. § 25-2309(l) provides that: “The county election officer or secretary of state’s office shall accept any completed application for registration, an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.”

that the 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.” *Belenky* Jan. 15 Order at 4.<sup>8</sup> He was not, however, able to order injunctive relief.<sup>9</sup>

On July 8, 2016, in the wake of the federal court injunction in *Fish* requiring Defendant Kobach to register DOV registrants for federal elections, Defendant adopted the Temporary Regulation. Pls.’ SOF ¶ 1. At a hastily called 8am meeting on July 12, 2016, the eve of the August primary, the State Rules and Regulation Board voted to approve the Temporary Regulation before providing an opportunity for public comment. *Id.* ¶¶ 2-4. The Temporary Regulation went into effect immediately and will be in place until just after the November general election. *Id.* ¶ 5.

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 the dual registration system, alleging substantially the same causes of action and equitable relief as in *Belenky* with the addition of similarly situated DOV plaintiffs.<sup>10</sup> That same day, Plaintiffs moved for a temporary restraining order and temporary injunction to block the Temporary Regulation and the disenfranchisement and unequal treatment of thousands of Federal Form and DOV registrants in the August 2, 2016 primary.

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<sup>8</sup> On July 8, 2016, the *Belenky* defendants filed a notice of appeal of all adverse rulings issued by this Judge Theis in that case. 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).

<sup>9</sup> While he could grant declaratory relief, Judge Theis concluded that he 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.

<sup>10</sup> 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 v. Kobach*, No. 2013CV1331, at 4 (Shawnee Cty. Dist. Ct. June 14, 2016) (“*Belenky* June 14 Order”).

On July 29, 2016, after a hearing on the matter, this Court granted Plaintiffs’ motion for a temporary injunction. *See* Ex. A, TI Ruling Tr. at 11:10-12:1. In doing so, this Court correctly recognized that Defendant’s adoption of the Temporary Regulation and operation of this “dual registration” system violates state law and the Kansas Constitution, *id.* at 6:13-8:4, and “adopt[ed] Judge Theis’ legal findings [in *Belenky*] and those findings of the plaintiff in the[ir] memorandum that support [its] findings that the dual registration is prohibited,” *id.* at 11:13-16; *see also Belenky* Aug. 21 Order; *Belenky* Jan. 15 Order; *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct. June 14, 2016) (“*Belenky* June 14 Order”); Pls.’ Br. in Supp. Mot. TRO & Temp. Inj. Due to the proximity of the primary election day, the Court ordered relief limited to the primary and directed Defendant to instruct local election officials to count all votes cast—whether for federal, state, or local offices—by those voters tagged as “Federal Election Only.” *See* Ex. A, TI Ruling Tr. at 8:12-18; 11:21-12:1. The Court also ordered further briefing and set a hearing for a permanent injunction on September 21, 2016 in an effort to fully resolve this case before the November general election. *Id.* at 12:5-7, 15:15-16.

### **LEGAL STANDARD**

To obtain a permanent injunction, a movant must establish the following five requirements: (1) actual success on the merits, (2) a reasonable probability of suffering irreparable future injury; (3) the lack of an adequate remedy at law; (4) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (5) the impact of issuing the injunction will not be adverse to the public interest. *See Steffes v. City of Lawrence*, 284 Kan. 380, 394-95, 160 P.3d 843 (2007); *Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009); *see also State ex rel. Stephan v. Pepsi-Cola General Bottlers, Inc.*, 232 Kan. 843, 844-45, 659 P.2d 213 (1983).

## ARGUMENT

A permanent injunction enjoining the Temporary Regulation and Defendant's dual registration system is clearly warranted to prevent the disenfranchisement and unequal treatment of thousands of qualified Kansas voters. As this Court previously concluded, correctly and consistently with *Belenky*, Defendant's dual system is unauthorized and prohibited. 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. The purported "cost" of requiring Defendant to administer a single and far simpler registration and balloting system pales in comparison to this mass disenfranchisement. There is thus no question that the balance of equities and the public interest both call for this Court to issue a permanent injunction.

### **I. DEFENDANT'S DUAL REGISTRATION SYSTEM IS UNAUTHORIZED AND UNCONSTITUTIONAL.**

The Temporary Regulation and dual registration system are prohibited as a matter of law. There is no dispute that the dual registration system: (1) segregates Plaintiffs and similarly situated voters with a special "Federal Election Only" registration status; (2) fails to officially register them or place them in the poll book; (3) permits these voters to vote by provisional ballot only; and (4) subjects these ballots to the provisional ballot counting process, which requires counting board members to open these ballots in order to manually count only the votes cast for federal offices. *See* Pls.' SOF ¶¶ 9, 15-22. As discussed below, these procedures are both unauthorized and unconstitutional.

#### **A. Defendant Has Exceeded His Statutory Authority in Creating and Implementing His Dual Registration System.**

In enacting the Temporary Regulation and operating his dual system, Defendant has exceeded his administrative authority and written into Kansas law a new registration status and new bases for ballot challenges, partial counting, and ballot invasion. *See State ex rel. Stephan v.*

*Finney*, 251 Kan. 559, 578, 583, 836 P.2d 1169 (1992) (finding Governor, as member of executive branch, had no authority to bind State where “many of the provisions of the compact would operate as the enactment of new laws and the amendment of existing laws” because “[t]he Kansas Constitution grants such power exclusively to the legislative branch of government”). As this Court previously concluded, correctly, Defendant’s actions are “not backed by appropriate legislative authority” and are therefore “prohibited.” Ex. A, TI Ruling Tr. at 7:10-8:4, 11:13-16; *Belenky* Aug. 21 Order at 27 (concluding that dual system is “wholly without a basis of legislative authority”); *Belenky* Jan. 15 Order at 24 (“[N]o such authority exists at all in the Kansas Secretary of State to encumber the voting process as he has done here.”).

“[R]ules and regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency.” *Halford v. City of Topeka*, 234 Kan. 934, 939-40, 677 P.2d 975 (1984). Agency rules or directions “that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency” are void. *Id.* at 378-79; *see also Cline v. Meis*, 21 Kan. App. 2d 622, 905 P.2d 1072, 1075-77 (1995), *rev. denied* (Feb. 6, 1996) (“Any regulation or direction [of the Secretary of State] that provides more than is expressly provided by statute is invalid.”). In evaluating whether an agency has exceeded its authority, “an agency’s or board’s statutory interpretation is not afforded any significant deference.” *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 457, 228 P.3d 403 (2010); *see In re Tax Appeal of Lemons*, 289 Kan. 761, 762, 217 P.3d 41 (2009) (“No significant deference is due to an agency’s interpretation or construction of a statute.”).

Defendant Kobach has, as Kansas’s chief election officer, the statutory authority to issue training instructions in how to carry out election procedures, K.S.A. § 25-124, and to promulgate

regulations to implement the state registration system, K.S.A. § 25-2309(s), as well as to comply with the NVRA, K.S.A. § 25-2355, and to administer registration at the DOV, K.S.A. § 25-2352(g). But these specific authorizations are not unfettered license to hijack procedures for purposes for which they are not sanctioned or to elevate some statutory provisions by contradicting others in order to advance the Defendant's policy preferences. *Cf. State ex rel. Bradford v. Hamilton Cty. Comm'rs*, 35 Kan. 640, 904-05, 11 P. 902 (1886) (concluding that "it must be held that [a registration requirement] does not apply, and that the legislature did not intend that it should apply" where its application would necessitate "ignor[ing], and even [] violat[ing], some of the provisions of" the same or other acts). This is particularly true where, as here, agency choices result in the retraction of the franchise. *See Burke v. State Bd. of Canvassers*, 152 Kan. 826, 107 P.2d 773, 779 (1940) ("Election laws are liberally construed to permit exercise of the right of suffrage conferred by the Constitution and laws of the state."); *Cline*, 21 Kan. App. 2d at 1075-76; *see also Belenky* Aug. 21 Order at 45. In utilizing procedures for unauthorized purposes in a single-minded drive to cling to a registration requirement barred for federal elections, Defendant's Temporary Regulation and related instructions exceed his statutory authority in multiple ways.

*First*, Defendant's dual system creates a "Federal Election Only" registration status that does not exist under Kansas law and that he is not empowered to create. *See Belenky* Jan. 15 Order at 16-17. Not only do Kansas state statutes make no mention of a "Federal Election Only" registration status, they envision to the contrary a unitary system of registration. For example, the statutory provision governing registration applications, K.S.A. § 25-2309, speaks simply of

“registration;” there is no partial, half, or “Federal Election Only” registration to be found.<sup>11</sup> That Kansas law does not contemplate a “Federal Election Only” registration status in particular is reflected in the creation of a unitary ballot for both state and federal elections. *See* K.S.A. §§ 25-610, 25-616, 25-617 (“The secretary of state shall prescribe *the* ballot format but the state offices part of *the* official general ballot for national and state offices shall follow the national offices part substantially as is shown in this section.” (emphasis added)); K.S.A. § 25-205(a) (“Except as otherwise provided in this section, the names of candidates for national, state, county and township offices shall be printed upon *the* official primary ballot (emphasis added)), § 25-210; *see also Belenky* Aug. 21 Order at 25-26. As Judge Theis confirmed in *Belenky*, “[t]here is no such thing as ‘partial registration’ to be found in the Kansas statute books.” *Belenky* Jan. 15 Order at 16. “In Kansas, a person is either registered to vote or he or she is not.” *Id.* at 17.

*Second*, Defendant’s dual registration procedures improperly treat DOV and Federal Form registrants as challenged voters by forcing them to vote provisional rather than regular ballots. *See Belenky* Aug. 21 Order at 38 (“[Defendant] has declared all . . . ballots [cast by these voters] to be ‘provisional’, hence, effectively challenging such ‘Federal Form’ [and DOV] registrants who present themselves to vote.”); Pls.’ SOF ¶ 17. As Judge Theis confirmed, eligible Kansas voters who register using the Federal Form or at the DOV “are registered *and* qualified electors” for not just federal but state and local elections as well. *Belenky* Aug. 21 Order at 30. As fully registered and qualified voters, DOV and Federal Form registrants cannot

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<sup>11</sup> *See also, e.g.*, K.S.A. § 25-2318 (providing for “a registration book for each polling place” containing “the registered voters authorized to vote at such voting place” (emphasis added)); K.S.A. § 25-2323 (“The secretary of state and deputy assistant secretaries of state may register voters on a statewide basis.”); K.S.A. § 25-2304(b) (establishing a “centralized voter registration database,” which “shall include all necessary voter registration information from every county within the state of Kansas”); K.S.A. § 25-2304(d) (providing that “[t]he secretary of state shall adopt rules and regulations . . . to prescribe the type of data, the frequency, and the manner in which it is transferred” to centralized voter registration database.).

be required to vote by provisional ballot, or forced to submit to challenges, in order to exercise their fundamental right to vote. *See Belenky* Jan. 15 Order at 17-18, 21-22; *Belenky* Aug. 21 Order at 38-39. State law, moreover, provides for the challenging of voters only in limited circumstances expressly set forth by statute, *see, e.g.*, K.S.A. §§ 25-414(a)-(c), 25-2908(d), (f), and 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. *Belenky* Aug. 21 Order at 28-29 (citing K.S.A. § 25-414); *see also Belenky* Jan. 15 Order at 15 (“Defendants’ position ignores the fact that *no Kansas law* sanctions a challenge to a ballot voted by a ‘Federal Form’ registrant.”).

*Third*, the dual procedures mandate partial counting of ballots that Kansas law does not authorize. *See* Pls.’ SOF ¶¶ 20-22. Kansas law expressly provides for a limited set of exceptions in which ballots, once accepted, may be only partially counted. Specifically, as Judge Theis observed, partial acceptance of a ballot is allowed only in two instances, both of which are “based on voter error, not registration.” *Belenky* Jan. 15 Order at 23 (citing K.S.A. § 25-3002). Nothing in Kansas law authorizes “partial or limited acceptance of a voter’s ballot,” *Belenky* Aug. 21 Order at 30 (emphasis removed), based on a qualified elector’s method of registration, *Belenky* Jan. 15 Order at 23.

*Fourth*, 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. *Belenky* Aug. 21 Order at 27, 37-39; *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.” *Belenky* Aug. 21



Order at 27; Pls.’ SOF ¶¶ 20-22. “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.” *Belenky* Aug. 21 Order at 42.

In operating these unauthorized procedures, Defendant Kobach has gone well beyond what Kansas statutes provide and thus has unlawfully “advanced into the field of legislation” in order to promote “[his] view of the law as [he] believe[s] it should be,” but not as it is. *Belenky* Jan. 15 Order at 24 (“[T]he Kansas legislature has yet to pave the way for implementation of the Secretary’s views.”); *see also Malone Oil Co. v. Dep’t of Health & Env’t*, 234 Kan. 1066, 1068, 677 P.2d 546, 548 (1984) (“The power of an administrative agency to adopt rules and regulations is administrative in nature, not legislative, and to be valid administrative regulations must be within the authority conferred.”). Under these circumstances, Defendant “must take [his] arguments to the legislature to change the statute”<sup>12</sup> in order to adopt the regulatory scheme he is imposing here. *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 470, 228 P.3d 403 (2010). Defendant has had ample opportunity to seek such legislative authorization but has not done so.<sup>13</sup> Ex. A, TI Ruling Tr. at 7:10-16. Defendant’s Temporary Regulation and the dual registration procedures are thus void.

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<sup>12</sup> That the legislature did not itself amend Kansas election laws in light of Judge Theis’ holding that this dual system is outside Defendant’s authority provides further confirmation that the scheme is *ultra vires*. *See Halsey v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 129, 136, 61 P.3d 691 (2003) (“When the legislature fails to modify a statute to avoid a standing judicial construction of that statute, the legislature is presumed to agree with the court’s interpretation.” (citation omitted)).

<sup>13</sup> Defendant was aware of the possibility of a court-ordered injunction requiring him to register DOV registrants to vote in federal elections as early as November 2015 when the plaintiffs in *Fish* sent him pre-suit notice that his failure to do so violated the NVRA, 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 raise this election issue with the Kansas legislature, even though the legislature did not adjourn *sine die* until June 1, 2016, and convened a special session on June 23-24, 2016. *See Peter Hancock, State board limits votes of 17,000 Kansans missing citizenship proof; Kobach-initiated process*

## **B. Defendant’s Discriminatory Treatment of DOV and Federal Form Registrants Violates the Kansas Constitution’s Guarantee of Equal Protection.**

The Temporary Regulation and dual registration system also violate the equal protection guarantees in the Kansas Constitution. Kan. Const., Bill of Rights, § 1<sup>14</sup>; Kan. Const., Bill of Rights, § 2.<sup>15</sup> Specifically, the dual system classifies otherwise indistinguishable electors by their method of registration, then assigns lesser voting rights and protections to DOV and Federal Form registrants without a compelling justification. *See Belenky* Jan. 15 Order at 19 (finding that dual system “subjects ‘Federal Form’ registrant voters to discriminatory treatment in regard to their right[s] . . . secured by Article 4, § 1 of the Kansas Constitution” and thus denies them “the equal protection of Kansas law based merely on their choice of method of registration”).

Equal protection guarantees are implicated where state action “treats arguably indistinguishable classes of people differently.” *In re Weisgerber*, 285 Kan. 98, 104, 169 P.3d 321 (2007). Here, DOV and Federal Form registrants are no different than any other qualified voter with respect to the relevant characteristics. The Kansas Constitution sets forth three simple qualifications to be a qualified elector: the voter must be 18, a U.S. citizen, and a resident of the relevant jurisdiction. Kan. Const. Art. 5, § 1. Eligible voters who submit complete registration applications using the Federal Form or the DOV process—both valid and accepted registration methods under state and federal law, *see* K.S.A. §§ 25-2309(a)(2), 25-2352(a)—have established

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*called ‘appalling’*, Lawrence J.-World (July 12, 2016), <http://www2.ljworld.com/news/2016/jul/12/state-board-limits-votes-17000-people/>. 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.

<sup>14</sup> 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.”

<sup>15</sup> 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.”

these qualifications and are thus no different than any other qualified elector. *See Belenky* Aug. 21 Order at 30; *see also* Ex. A, TI Ruling Tr. at 8:18-22 (finding that absent injunction “an overwhelming majority of” the 17,500 voters adversely impacted by the Temporary Regulation and dual registration system “are U.S. citizens [who] will lose their constitutionally-mandated right to vote”). Moreover, because fundamental rights—*i.e.*, the constitutionally guaranteed rights to vote and to ballot secrecy—are implicated, strict scrutiny applies to their differential treatment.<sup>16</sup> *See Provance v. Shawnee Mission Unified School Dist. No. 512*, 231 Kan. 636, 641-42 P.2d 710 (1982) (noting that “‘compelling state interest’” applies to classification that interferes with “the right to vote for elected representatives . . . ‘because statutes distributing the franchise constitute the foundation of our representative society’” (quoting *Kramer v. Union School District*, 395 U.S. 621 at 626 (1969)); *Sawyer v. Chapman*, 240 Kan. 409, 413, 415, 729 P.2d 1220 (1986) (applying compelling state interest standard where statute compromises constitutionally guaranteed right to a secret ballot); Ex. A, TI Ruling Tr. at 7:16-20; *Belenky* Aug. 21 Order at 45-46; *Belenky* Jan. 15 Order at 24. Defendant’s unequal treatment of DOV and Federal Form registrants fails that scrutiny in at least two ways.

*First*, the dual registration system denies eligible voters who register at the DOV and using the Federal Form equal treatment in the registration and voting process without a compelling justification. As discussed above, DOV and Federal Form registrants are under both state and federal law “registered *and* qualified electors,” *Belenky* Aug. 21 Order at 30, and thus “fully registered to vote,” *id.* at 43. Under Defendant’s dual registration system, however, these

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<sup>16</sup> Defendant claimed at the temporary injunction hearing and in his opposition brief that Plaintiffs conceded that rational basis review applies to the classifications at issue here. Plaintiffs have done no such thing. To the contrary, they noted, and continue to maintain, that voting classifications based on method of registration are arbitrary, and thus could not even survive rational basis. They further pointed out that whether a *compelling interest* justified the differential treatment between DOV and Federal Form registrants and other qualified voters could not be evaluated because the legislature had not made such a determination. *See* Pls.’ Br. in Supp. Mot. TRO & Temp. Inj. at 15-17.

qualified voters—who have submitted complete applications under the DOV and Federal Form processes—are treated differently from all other qualified voters—*e.g.*, those who submitted complete applications using the State form<sup>17</sup>—who are officially registered, placed in the poll book, and permitted to vote a regular ballot that is counted in full. The only basis for this discriminatory treatment is the voter’s method of registration. But the right to vote in Kansas is not tied to a voter’s choice between different valid and accepted methods of registration. *See Belenky* Jan. 15 Order at 17. DOV and Federal Form registrants are thus arbitrarily denied their right to vote in state and local elections and their right to vote is encumbered without compelling reason. *See id.* at 24; Ex. A, TI Ruling Tr. at 7:16-20; *see also Provance*, 231 Kan. at 641 (“[A]ny classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.” (*quoting Kramer*, 395 U.S. 621 at 626)).

*Second*, because they are forced to vote a partial provisional ballot, DOV and Federal Form registrants must suffer a “post-vote editing” invasion of their “executed and submitted ballot[s],” *Belenky* Aug. 21 Order at 27, not endured by other registrants who are given regular ballots. *See Belenky* Jan. 15 Order at 19. Article 4, § 1 of the Kansas Constitution guarantees a right to a secret ballot, a right whose invasion is subject “heightened scrutiny.” *Id.*; *see also Sawyer*, 240 Kan. at 413, 415. This provisional ballot procedure compromises ballot secrecy because it creates an opportunity for counting board members to look at the signature on the provisional ballot envelope and then compare it with the marked ballot upon its removal from the envelope. *See* Pls.’ SOF ¶¶ 18, 21; *see also Sawyer*, 240 Kan. at 413-14. That risk of disclosure exists notwithstanding procedures in place to minimize it, and exposing voters to this risk is

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<sup>17</sup> Kansas’s State form contains a DPOC requirement that must be met in order for that form to be complete. K.S.A. §§ 25-2309(a)(1), (l).

justified only by a compelling reason. *See Belenky* Jan. 15 Order at 13-14, 19; *see also Sawyer*, 240 Kan. at 413-14, 415 (concluding that, despite “safeguards to prevent such abuses from happening,” there is “potential for compromise of secrecy” that must be justified by a compelling reason where “a volunteer canvasser who is tabulating election votes” could “see[] how a voter’s ballot is marked”). Defendant’s sole proffered justification, again, is that Kansas statutes authorize him to discriminate in this way, but as discussed, *supra*, in Section I.A, the statutes provide no such authorization. And because Defendant is not authorized to discriminate in this manner, Defendant is not even in a position to *proffer* a “compelling reason” for this unauthorized discrimination. *See Belenky* Jan. 15 Order at 19 (observing that whether any justification here can “stand as a ‘compelling reason’ need not be assessed, since no such choice has been made by the Kansas legislature”). In any event, there is simply no justification for this discriminatory treatment because it is based arbitrarily on a voter’s choice between different valid and accepted methods of registration. *See Belenky* Jan. 15 Order at 17.

## **II. WITHOUT A PERMANENT INJUNCTION, PLAINTIFFS WILL BE IRREPARABLY HARMED.**

Plaintiffs, along with thousands of other registered Kansas voters, will be irreparably harmed if Defendant Kobach continues to enforce the Temporary Regulation and operate the dual registration system. For the purposes of an injunction, a movant must show only “a reasonable probability of irreparable future injury.” *See Bd. of Cty. Comm’rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920 (2006); *see also Steffes*, 284 Kan. at 395. Plaintiffs readily meet that standard here.

“It is beyond dispute that voting is of the most fundamental significance under our Constitution . . . . [T]here is no right that’s more precious to a free country than having a voice in the election of those who make the laws under which, as good citizens, we must all live.” Ex.

A, TI Ruling Tr. at 3:11-17; *see also Harris v. Anderson*, 194 Kan. 302, 303, 400 P.2d 25 (1964) (“[T]he right to vote for the candidate of one’s choice is of the essence of the representative form of government.” (citing *Reynolds v. Sims*, 377 U.S. 533, at 555)); *State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1440-41 (2014) (“There is no right more basic in our democracy than the right to participate in electing our political leaders.”). Because voting is the fundamental building block of political power, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The interference with this right 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”); *Fish*, 2016 WL 2866195, at \*26-\*27 (plaintiffs’ and other similarly situated voters’ inability to vote in the upcoming election constitutes irreparable harm because “[t]hose votes cannot be recast”).

If Defendant continues to enforce the Temporary Regulation and operate the dual registration system, Plaintiffs and at least 17,000 similarly situated Kansas voters will be denied their right to vote in state and local elections in the upcoming general election (in which all 165 seats in the Kansas legislature are on the ballot)<sup>18</sup> and all future elections. SOF ¶¶ 9-14, 20, 22, 25, 30, 36, 40; *cf.* Ex. A, TI Ruling Tr. at 8:12-22, 9:2-6 (finding that absent injunction approximately 17,500 Kansas voters would lose their votes “simply because of the DPOC requirement”); *Fish*, 2016 WL 2866195, at \*26-\*27 (finding plaintiffs would be denied right to vote in upcoming elections due to defendants’ refusal to register them solely due to failure to

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<sup>18</sup> *See* Hunter Woodall, *Kansas rule change means some voters won’t be counted in August primary*, Kansas City Star (July 12, 2016, 8:54 AM), <http://www.kansascity.com/news/politics-government/article89057102.html>.

submit DPOC). As this Court has already properly concluded, this interference with their right to vote and to have their votes counted constitutes irreparable harm because if Plaintiffs and other similarly situated voters “are not allowed to vote and cannot vote for local and state offices . . . they will never be able to re-cast their votes.” Ex. A, TI Ruling Tr. at 8:12-17.

In addition, Plaintiffs’ and all similarly-situated voters’ “right to vote, and to have their votes counted” is “constitutionally protected.” *Fish*, 2016 WL 2866195, at \*26 (quoting *Reynolds*, 377 U.S. at 554); Ex. A, TI Ruling Tr. at 3:11-13 (“[I]t’s beyond dispute that voting is of the most fundamental significance under our Constitution[.]”); *State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (“[The] right to vote . . . is a constitutional right[.]”). The loss of a constitutional right “for even minimal periods of time, unquestionably constitutes irreparable harm.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also, e.g., Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1118 (2004) (suggesting that violations of statutory and constitutional rights are a *per se* injury); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (finding irreparable harm where plaintiff alleged constitutional violations and observing that “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” (internal quotation marks and citation omitted)). Defendant’s deprivation of Plaintiffs’ fundamental right to vote thus undoubtedly establishes irreparable harm. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury.” (internal citations omitted)), *stay denied*, 133 S. Ct. 497 (2012).

### **III. AN ACTION AT LAW WILL NOT PROVIDE AN ADEQUATE REMEDY.**

As this Court has already correctly found, Plaintiffs do not have an adequate remedy at law. Ex. A, TI Ruling Tr. at 10:1-2. Thus, only an equitable remedy is adequate to address the

harm that will be caused by the enforcement of K.A.R. § 7-23-16 and operation of the dual system. *See id.* at 9:19-10:3. In addition, because the remedies under a declaratory judgment action are unavailing to Plaintiffs because they would not prohibit enforcement of K.A.R. § 7-23-16 or the dual system, only injunctive relief pursuant to K.S.A. § 60-901, *et seq.* provides an adequate remedy in this case.

#### **IV. THE BALANCE OF EQUITIES WEIGHS STRONGLY IN FAVOR OF PLAINTIFFS.**

The balance of equities clearly favors the grant of a permanent injunction. Plaintiffs and other similarly situated voters will be disenfranchised absent a permanent injunction, while an injunction will impose at most minimal burdens on Defendant and may even *reduce* costs.

As an initial matter, Defendant can claim no harm because, as outlined, *supra*, in Section I, the requested injunction merely requires Defendant to comply with existing Kansas statutes and constitutional provisions by treating all qualified Kansas voters equally. In any event, it is difficult to see how Defendant would 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.<sup>19</sup> *See* Ex. A, TI Ruling Tr. at 9:12-18 (finding that “it shouldn’t be difficult” to inform election officials to “do it how you normally do it”). In fact, the permanent injunction will likely *reduce* administrative burdens by eliminating the need to maintain a special “Federal Election Only” registration status for DOV and Federal Form registrants, to cross-reference these voters’ eligibility at the polls, and to separate out, canvass,

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<sup>19</sup> To be sure, Defendant may incur one-time costs in correcting registration records and providing updated notice to affected voters. But, as Judge Robinson found in *Fish*, “the Court cannot find that the State’s time spent changing applicants statuses back to active is unduly burdensome. . . . Further, the Court cannot find that the cost to the State to notify voters of their completed registrations is unduly burdensome. As compared to the many notices the State would otherwise send to voters who lack DPOC, the burden is substantially less.” 2016 WL 2866195, at \*30.



and manually count the federal-only votes of potentially tens of thousands of ballots cast by these voters.

#### **V. A PERMANENT INJUNCTION WILL SERVE THE PUBLIC INTEREST.**

The grant of a permanent injunction in this case would not be adverse to the public interest. To the contrary, there is an extraordinary public interest in protecting the right to vote. *See, e.g., Wesberry*, 376 U.S. at 17. That interest far outweighs the state interests that Defendant claims will be harmed if an injunction is imposed. *See Ex. A, TI Ruling Tr. at 10:24-11:9.*

A permanent injunction would further the public interest of preventing voter disenfranchisement and permitting full participation by thousands—and potentially tens of thousands—of registered voters in the November election and all future elections. *See Ex. A, TI Ruling Tr. at 11:5-7.* In fact, Defendant estimates that the 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.” Pls.’ SOF ¶ 12. Without an injunction, these thousands of voters, along with Federal Form registrants, will be deprived of their right to vote in state and local elections in the November general election and beyond. Not only will their votes for state and local elections be tossed out, but they may not even make it to the polls in the first instance given the confusing and inaccurate information they are receiving about their registration status and ability to vote. *See, e.g., Pls.’ SOF ¶¶ 26-27, 31-33, 37-39.*

The public interest in averting such disenfranchisement clearly surpasses any harm to state interests resulting from an injunction. *See Obama for Am.*, 697 F.3d at 436-37 (“While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote,” which “is best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.” (internal quotation marks and citations omitted)). Defendant claims that an

injunction would be adverse to the public interest because it would be contrary to a state interest in preventing non-citizens from registering to vote. In doing so, he points to evidence compiled by Sedgwick County Election Commissioner Tabitha Lehman, who is appointed and supervised by Defendant, indicating that a grand total of 25 non-citizens either got registered prior to the effective date of the DPOC or were prevented from registering after the DPOC requirement was implemented. *See* Ex. B, TI Hr’g Tr. at 20:11-14. But this nominal evidence of alleged non-citizen registration pales in comparison to the risk of disenfranchising tens of thousands of qualified Kansas voters.

As an initial matter, Defendant obscures the fact that these 25 purported instances of a noncitizen getting registered or applying to register span over a decade, going back to 2003, and that only three cast votes. *See* Def’s Temp. Inj. Hr’g Ex. 1-B, Ex. B, TI Hr’g Tr. at 77:19; *see also* *Fish*, 2016 WL 2866195, at \*21. By comparison, between January 1, 2006 and March 28, 2016, 860,604 people registered to vote in Kansas. *Fish*, 2016 WL 2866195, at \*21. When Defendant trotted out substantially the same evidence of non-citizen registration and voting in *Fish*, Judge Robinson characterized it as “at best nominal.” *Id.*; *see also* *EAC*, 772 F.3d at 1197-98 (finding, based on similar evidence, that Defendant had failed to produce evidence that a “substantial number of noncitizens have successfully registered” to vote in Kansas).<sup>20</sup> Consistent with other courts’ conclusions that such paltry evidence of purported non-citizen registration does not justify the disenfranchisement of thousands—and potentially tens of thousands—of

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<sup>20</sup> *See also* U.S. Election Assistance Comm’n, Mem. of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form, Dkt. No. EAC-2013-0004, 33-34 (Jan. 17, 2014), <http://www.eac.gov/assets/1/Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf> (finding that evidence of 20 or 21 non-citizen registrations or attempted registrations in Kansas, approximately 0.001 percent of registered voters in the state, “fails to establish that the registration of non-citizens is a significant problem in [Kansas]” and does not necessitate a DPOC requirement).

voters, this Court already appropriately concluded that “the State’s interest in counting votes of eligible voters only . . . do[es] not outweigh the risk that the public will suffer by losing those 17,500 votes of qualified voters as opposed to” a possible “25 or 100 individuals that are not qualified” to vote. Ex. A, TI Ruling Tr. at 11:4-8; *see also Fish v. Kobach*, --- F. Supp. 3d ---, No. 16-2105-JAR-JPO, 2016 WL 3000356 at \*7 (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].”).

## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully requests the Court to issue a permanent injunction that: (1) enjoins enforcement of K.A.R. § 7-23-16 and operation of Defendant’s dual system of registration and election administration; (2) orders Defendant to ensure that all “Federal Election Only” registrants are officially registered and given regular ballots on which all votes cast are counted in the November general election and future elections; (3) orders Defendant to ensure that all affected voters are provided notice that they are fully registered voters; and (4) directs Defendant to update all instructions to local elections officials in accordance with this injunction.

Dated: August 15, 2016

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 15th day of August, 2016, a copy of the above and foregoing document was electronically filed and was served concurrently by electronic mail delivery on the following parties:

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