

THIRD JUDICIAL DISTRICT  
SHAWNEE COUNTY DISTRICT COURT  
CIVIL DEPARTMENT

LOUD LIGHT & DAVIS HAMMET,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 20-cv-343
	)	Div. No. 3
SCOTT SCHWAB, Kansas Secretary	)	
of State, in his official capacity,	)	
	)	
Defendant.	)	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION AND MEMORANDUM FOR  
PRELIMINARY INJUNCTION**

COME NOW Defendant, by and through his undersigned counsel and respond to  
Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support thereof.

**STATEMENT OF FACTS**

1. On Wednesday, September 4, 2019, Mr. Davis Hammet made a Kansas Open Records Act (KORA) request for the "entire ELVIS Provisional Ballot Detail Report" for the 2018 general election. Mr. Hammet specified that he wanted the report to include the "Registration ID, Name, Address, and Status Reason such that it is clear which individuals' ballots were not counted and the reason their respective ballots were not counted." Defendant's Exhibit A ("Def. Ex. A").
2. Three business days later, on Monday, September 9, 2019, Defendant denied the request. Plaintiffs' Exhibit B.

3. On September 9, 2019, Mr. Hammet provided additional information claiming he was entitled to the documents. Plaintiffs' Exhibit C.

4. On September 24, 2019, Defendant, without revoking the initial denial, replied with an update to the request that an Attorney General's Opinion was requested and that Defendant would wait to review the Attorney General Opinion on the matter. Plaintiffs' Exhibit D.

5. Mr. Hammet did not respond to this email nor indicate that he had any problem awaiting an Attorney General's Opinion. Nor did Mr. Hammet claim Defendant was improperly denying him documents or a denial letter until June of this year.

6. After an exchange with Mr. Hammet in the days prior, on June 18, 2020, representatives of Mr. Hammet demanded the Secretary of State produce the records or deny production by Monday June 22, 2020.

7. On June 22, 2020, attorneys for the parties held a phone conference. Defendant explained that Defendant had discussed this KORA issue previously with Mr. Hammet and he never indicated that he did not want to await an opinion from the Attorney General.

8. Defendant explained he would have provided another denial letter at any time if Mr. Hammet indicated this was not the course of action he wanted to take.

9. It was Defendant's understanding that Mr. Hammet wanted to avoid needless litigation over this matter if the Attorney General's Office issued an opinion that the records should be disclosed.

10. On June 23, 2020, Defendant provided a new letter denying the KORA request and the reasons therefore. Plaintiffs' Exhibit E.

## **OVERVIEW OF CASTING PROVISIONAL BALLOTS IN KANSAS**

Prior to discussing the merits of Plaintiffs' motion, it may be helpful for the Court to understand the process in casting provisional ballots.

In any election, voters will cast regular and provisional ballots. A regular ballot is a ballot cast by an individual who is duly registered to vote and qualified to vote at the polling location where the ballot is being cast. A provisional ballot is a regular ballot cast by an individual that an election judge has "challenged" as not being eligible to cast a ballot at that polling location for one or more reasons, including failure to register, failure to present proper identification, etc. *See* 52 U.S.C. § 21082(a); K.S.A. §§ 25-409, 414. Provisional ballots, like regular ballots, can be cast in person or by mail.

The procedure for casting a provisional ballot is that the election judge instructs the individual to write his or her name on the poll book with an indication that it was cast provisionally. The individual is then provided a provisional ballot envelope, Kansas voter registration form, and a ballot to fill out in a designated space. K.S.A. § 25-409. The ballot is sealed in the envelope, the election judge writes on the envelope the reason for the ballot being cast provisionally, and two judges and the voter sign the envelope. *Id.* Depending upon the reason for casting a provisional ballot and the subsequent investigation by the relevant county election officer, provisional ballots are either counted, not counted, or partially counted. *See* K.S.A. §§ 25-3002, 3011; *see also* Exhibit 1 to Declaration of Bryan Caskey, attached to Def. Ex. B, Kansas Elections Standards, Ch. III, pp. III-9 - III-12, "Counting Provisional Ballots," ("Provisional Ballot Chart") *available at* <https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-III-Canvassing.pdf> (last visited July 7, 2020) (providing reasons ballots may be cast provisionally and guidance on counting provisional ballots).

## ARGUMENT

### **TO THE EXTENT PLAINTIFFS REQUEST SOME FORM OF RELIEF AVAILABLE UNDER K.S.A. 60-903 BEYOND A PRELIMINARY INJUNCTION, IT MUST BE DENIED**

Plaintiffs style their motion as a 60-903 motion, a temporary restraining order but limit their arguments to seeking a preliminary injunction. A temporary restraining order is to preserve the “status quo” and “can go no further than to preserve the status quo until hearing is held for temporary injunction.” *Unified School Dist. No. 503 v. McKinney*, 236 Kan. 224 (1984). Temporary restraining orders without notice should be “reluctantly granted.” *Unified School Dist. No. 503 v. McKinney*, 236 Kan. 224 (1984). Plaintiffs provide no rationale for seeking a temporary restraining order under Rule 60-903. Presumably any remedy outside of a preliminary injunction was denied during the status conference.

To the extent Plaintiffs request some form of immediate relief to preserve certain information currently in the ELVIS database, namely the “Provisional Ballot Detail Report” for the 2018 General Election containing certain data points Mr. Hammet seeks, it has been preserved. Defendant has a printed copy of the report if this court ultimately requires production.<sup>1</sup>

### **PLAINTIFFS CANNOT MEET THE STANDARDS FOR A PRELIMINARY INJUNCTION**

The purpose to a preliminary injunction is not to determine a controverted right, but to prevent injury to a claimed right pending final determination. *Idbeis v. Wichita Surgical*

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<sup>1</sup> As discussed on the June 29, 2020 conference call, Defendant can generate the report in the upcoming election, as well. However, it is unclear what date that report would be available and at least one of the requested data points, whether a provisional ballot was ultimately counted, will not be available until some time after the county canvass in each of the 105 counties.

*Specialists, P.A.*, 285 Kan. 485, 492, 173 P.3d 642, 648 (Kan. 2007). A temporary injunction preserves the status quo until a final determination can be made. *Id.* To obtain a temporary or preliminary injunction, Plaintiffs must establish (1) a reasonable probability of irreparable future injury, (2) an action at law will not provide an adequate remedy, (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) the injunction would not be adverse to the public interest. *Board of County Com'rs of Leavenworth County v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920, 925 (Kan. 2006). Plaintiffs must also “establish a substantial likelihood of success on the merits.” *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (Kan. 2007). Plaintiffs have not met the threshold for a preliminary injunction.

**I. PLAINTIFFS DO NOT HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS**

**A. While the Information Contained Within the ELVIS Database may be a Public Record under KORA, Defendant Does Not Maintain Most of the Records Plaintiffs Identify**

Prior to addressing the exemptions from disclosure, Defendant must address the “records” Plaintiffs identify in their motion because they are not the records Mr. Hammet sought. The Help America Vote Act of 2002 (“HAVA”) requires every state to implement a statewide computerized database for voter registration purposes. *See* HAVA, Pub. L. 107-252, Sec. 302(a)(1)(A) *codified at* 52 U.S.C. § 21083(a)(1)(A). Kansas complies with this requirement through the Electronic Voter Information System (ELVIS) database which includes records of voter registration information. Declaration of Bryan Caskey, Defendant’s Exhibit B (“Def. Ex. B”), ¶ 2. Defendant does not input or modify records in ELVIS; those functions are handled by county officials. *Id.* at ¶¶ 2-4; *see also* K.S.A. 25-2309(g) (a person is registered when a county

election officer adds the name to the county voter registration list). Defendant maintains the system and a minimal number of individuals in the office can access the database and generate reports. *Id.* at ¶ 4.

While Defendant does not dispute that some information within the ELVIS database is a public record, Defendant must clarify what records are at issue in this case. Mr. Hammet requested a specific Report along with specific data points as part of that Report. Def. Ex. A. While some of the information from the records Plaintiffs cite in their memo may ultimately be input into the ELVIS database, the records Plaintiffs cite in their motion are not ones received or maintained by Defendant. *See* Pls. Memo. at 7 (“Defendant Schwab is required . . . to maintain voter records” under state and federal law.). Plaintiffs cite state statutes that include information received and maintained by county election officers. *Id.* (citing K.S.A. §§ 25-2319, 2409(b)). The federal statute cited, 52 U.S.C. § 21082(a)(5)(B), simply requires a system for provisional ballot voters to verify information about their provisional ballot; that is not a record.<sup>2</sup>

Defendant does not dispute that the “Provisional Ballot Detail Report” that Mr. Hammet requested is a public record subject to disclosure by Defendant, absent an exemption prohibiting its release.

B. The Help America Vote Act Prohibits Disclosure of Whether Specific Provisional Ballots were Counted and Prohibits Disclosing the Reason that a Provisional Ballot was Cast

The KORA requires public records to be open to the public absent an exemption. *See* K.S.A. §§ 45-218, 221. One exemption is when federal law prohibits disclosure of the record.

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<sup>2</sup> Defendant also does not “clear” any data that would be relevant to the report Mr. Hammet seeks in ELVIS. Data clearing is dependent on actions taken by county election officials.

K.S.A. § 25-221(a)(1). HAVA Section 302(a) prohibits the disclosure of “information about an individual provisional ballot” to anyone except “to the individual who cast the ballot.” 52 U.S.C. § 20182(a). Ascertaining why a provisional ballot was cast and whether it was ultimately counted or not counted is necessarily “information about an individual provisional ballot.” *Id.* It is unclear what other information a county official could even provide regarding a provisional ballot besides this information. Thus, HAVA prevents Mr. Hammet from obtaining the reason a provisional ballot was cast or whether it was counted, except for a provisional ballot that he personally cast.

While Defendant is unaware of any court that has interpreted the meaning of the term “information about an individual provisional ballot,” the House Conference Committee Report is consistent with Defendant’s interpretation. It states that HAVA “[r]equires that . . . persons who claim to be registered to vote in a federal election in a jurisdiction but are not on the original list of registered voters . . . be offered and permitted to cast a provisional ballot . . . and the voter (*and no one else*) be able to ascertain whether the ballot was counted (*and if not, why not*) through a free-access system and be informed of that option when the ballot is cast.” H.R. Conf. Rep. 107-730 (emphasis added) *available at* 2002 U.S.C.C.A.N. 1086, 1094-95.

Although the HAVA language is unambiguous so the court need not address canons of statutory construction, statutory construction principles also support Defendant’s reading. A common canon is that when construing a statute, the court should interpret the statute as a whole. *Cochran v. State, Dept. of Agr., Div. of Water Resources*, 291 Kan. 898, 903, 249 P.3d 434 (Kan. 2011) (courts interpret a particular statutory provision in consideration of the entire act). 52 U.S.C. 21082(a)(5) requires an election official to provide an individual at the time a provisional ballot is cast “written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted,

and, if the vote was not counted, the reason the vote was not counted.” Subsection (B) requires the creation of a free access system so the provisional ballot voter can “discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.” The statute then requires that “[a]ccess to information about an individual provisional ballot . . . *be restricted to the individual who cast the ballot.*” (emphasis added) Read together, the term “information” in (a) must refer to the information provided to the person casting the provisional ballot in subsection (5)(A)—whether a ballot was counted and the reason it was not counted.

In Kansas, the reason a provisional ballot was cast ultimately will be the determinant of why it is or is not counted. The Kansas Election Standards provides guidance on whether a provisional ballot should or should not be counted based on the reason the ballot was cast. *See* Provisional Ballot Chart, pp. III-9 - III-12;; Def. Ex. B ¶¶ 8, 9; *see also* K.S.A. 25-409(b) (“The judges shall write on the envelope the word ‘provisional’ and a statement of the reason for the challenge.”). At the canvass, ballots are then counted or not counted based on those reasons. K.S.A. § 25-3107(a). If someone obtains a list of provisional ballot voters coupled with why each provisional ballot was cast, a person would know whether the ballot was ultimately counted and why it was not counted. In other words, Mr. Hammet is seeking information that HAVA restricts to only the person who casts a provisional ballot.

Nevertheless, Plaintiffs cite four authorities to support their HAVA argument, none of which are helpful in this matter. First, *Mah v. Shawnee County Comm’n*, No. 12-4148-JTM, 2012 WL 5584613 (D. Kan. Nov. 15, 2012), an unreported case from the District of Kansas, addressed whether HAVA precluded the disclosure of the names of provisional ballot voters. It did not hold that the reasons provisional ballots were cast could be disclosed. And Plaintiffs’ assertion that



*Mah* held that HAVA did not protect “the fact of whether their ballot was counted” is not accurate. Pls. Br. at 10. The brief discussion about counting ballots at canvass had to do with the secrecy of the ballots, not whether HAVA precluded disclosing which individual ballots were counted. Such a holding would be contrary to the plain language of HAVA.

In the Ohio district court decision, although the Court stated that HAVA did not prevent disclosure as to who cast a provisional ballot and whether it was counted, the court omitted the HAVA sentence that prohibited the disclosure of information about an individual ballot and never analyzed its meaning. *See Northeast Ohio Coalition for the Homeless v. Husted*, Case No. 2:06-cv-896 (S.D. Ohio Jan. 29, 2016) (failing to quote the relevant HAVA sentence in 52 U.S.C. 20182(a) and failing to analyze what “information about an individual provisional ballot” means). The Washington district court case contains a single conclusory sentence that opines that “[w]hen read in context and together with other [uncited] state and federal election statutes . . . that HAVA only precludes disclosure of for whom (or for what) the provisional voter voted, not whether that voter’s ballot had been counted or the identity of that provisional voter.” *See Washington State Republican Party v. Washington State Democratic Central Committee*, No. 04-2-36048-0 SEA (Wash. Sup. Ct. Nov. 16, 2004). The Opinion provides no explanation beyond this sentence and does not cite or analyze the relevant HAVA disclosure prohibition or the House Conference Report.

The only authority Plaintiffs cite which attempts to interpret what information is not disclosable is the Ohio Attorney General’s Opinion. It draws the odd conclusion, based on that office’s interpretation of Ohio open records laws and an Ohio statute, that information about provisional ballots are restricted to only the voter through the free access system, opines that the “validity and status of a voter’s provisional ballot arguably may be considered personal

information,” yet concludes that the provisional ballot envelopes themselves are nevertheless disclosable. Ohio Atty’ Gen. Op. No. 2011-012, , \*6-\*8 (June 2011). In other words, although the Opinion believes this information must be restricted to only the voter when obtained from an election office, the information is not protected when provided by reason of provisional ballot envelopes. That reading does not make sense and is not consistent with HAVA’s language. Furthermore, outside of potentially the Ohio Attorney General’s Opinion, these authorities do not hold that the *reason* a provisional ballot was cast or not counted is disclosable under HAVA.

Despite Plaintiffs’ claim that Defendant is “attempt[ing] to relitigate this issue in the face of unequivocal, binding precedent,” the reality is that Plaintiffs’ cited authority does not undermine Defendant’s decision to not disclose the reason a provisional ballot was cast or whether an individual ballot was counted. The plain language of HAVA and the House Conference Report require the closure of these pieces of information under K.S.A. § 45-221(A)(1).

C. K.S.A. 25-2422 Prohibits “disclosing or exposing . . . the name of any voter who cast such ballot”

Kansas law goes further than HAVA and prohibits the disclosure of the names of individuals casting provisional ballots:

(a) Unauthorized voting disclosure is, while being charged with any election duty, intentionally:

(1) Disclosing or exposing the contents of any ballot, whether cast in a regular or provisional manner, or the name of any voter who cast such ballot, except as ordered by a court of competent jurisdiction in an election contest pursuant to [K.S.A. 25-1434 et seq.](#), and amendments thereto[.]

K.S.A. § 25-2422(a).

“The fundamental rule of statutory interpretation is that legislative intent governs if it can be discerned.” *In Interest of T.S.*, 308 Kan. 306, 419 P.3d 1159, 1162 (Kan. 2018). “Statutory

interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well.” *Moser v. State Dept. of Revenue*, 289 Kan. 513, 516, 213 P.3d 1061, 1064 (Kan. 2009). ““When construing a statute, a court should give words in common usage their natural and ordinary meaning.” *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005).

Here, the statute in reasonably clear terms, provides that it is a nonperson felony for an individual charged with an election duty to disclose one of two things: (1) “Disclosing or exposing the contents of any ballot” and (2) “[Disclosing or exposing] the name of any voter who cast such ballot.” While Plaintiffs argue that the legislature may have meant to change the restrictions in the statute, this court cannot ignore or erase the express wording in the statute. Defendant is following the law in not disclosing the names of those who cast provisional ballots.

Although, the statute could be interpreted to prohibit the disclosure of names of voters casting regular ballots, the legislature has elsewhere provided means of access to that information. For example, K.S.A. 25-2319 requires the registration book to identify which individuals cast ballots in the election and 25-2320 requires that “voter registration books, active voter lists and other lists of voters required to be kept” are to be open for inspection. K.S.A. 25-2422(b) provides that the statute should not be read to prohibit the disclosure of individuals who voted advance ballots. And K.S.A. 25-2304(b) provides that active and inactive voter lists must be maintained, which necessarily requires disclosing who cast a ballot in an election. But, the statute does not require the disclosure of which type of ballot was cast, provisional or regular ballot and the ELVIS system reflects this distinction in a voter’s history. *See* Def. Ex. B ¶ 13 (the voter is given vote history credit regardless of which type of ballot is cast). Unlike these other provisions, the legislature has not created disclosure provision for the names of those

individuals casting provisional ballots. If the legislature intended K.S.A. 25-2422(a) to not restrict the names of those casting provisional ballots outside of election contests, it would have so stated.

1. Plaintiffs' Statutory Interpretation Arguments Do Not Support their Reading of K.S.A. 25-2422

Plaintiffs present three arguments to claim that K.S.A. 25-2422 does not prohibit the release of the names of individuals who cast provisional ballots. All three arguments require the Court to ignore the plain language of the statute and their statutory history arguments support Defendant's reading of K.S.A. 25-2422.

Plaintiffs' argue that grammar principles would require the statute to be drafted differently to prohibit the names of individuals casting provisional ballots. *See* Pls. Memo. at 12-13. But Plaintiffs' argument ignores that the statute already plainly prohibits disclosure the "name of any voter who cast such ballot." K.S.A. 25-2422(a)(1). Plaintiffs ask the court to ignore the prohibition on name disclosure and instead focus on a lack of a third disclosure prohibition. *See* Pls. Memo. at 12. This court should decline Plaintiffs' attempt to rewrite the statute and instead follow the statute's plain language. The statute prohibits the disclosure of the voters' name and then other statutes, as discussed *infra*, clarify which names should nevertheless be disclosed. No statute permits disclosing the names of those casting provisional ballots. The fact some counties have released this information despite the statute's plain prohibition does not change the statute's language.<sup>3</sup>

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<sup>3</sup> While Plaintiffs are correct that *Hammet v. Metsker*, 18-cv-5173 (Jo. Co. Dist. Ct., Jan. 31, 2020), a Johnson County district court decision, held that K.S.A. 25-2422 did not prohibit the disclosure of provisional ballot names, that court's decision is not binding on this court. *Taco Bell v. City of Mission*, 234 Kan. 879, 892, 678 P.2d 133, 144 (Kan. 1984); *In re Sawyer*, 234

## 2. Plaintiffs Misunderstand or Omit the Relevant Legislative History

Next, Plaintiffs argue that legislative history supports their argument. Pls. Memo. at 14-21. Legislative history should only be reviewed when the statute is ambiguous. *Ambrosier v. Brownback*, 304 Kan. 907, 911, 375 P.3d 1007, 1010 (Kan. 2016). Again, while no ambiguity exists, the legislative history supports Defendants' reading of the statute.

Prior to the 2013 amendments, Plaintiffs acknowledge that K.S.A. § 25-2422 "prevented public disclosure as to whether a voter cast a provisional or regular ballot." Pls. Memo. at 16. The prior version of the statute prohibited election officials from disclosing "the manner in which the ballot" was voted. *Id.*; see 1993 Kansas Sess. Laws, Ch. 291, Sec. 208 (amending K.S.A. § 25-2422). In 2013, the statute underwent several amendments which, when read together, show an intent to prohibit the release of the names of voters casting provisional ballot. First, the legislature added the provision that the names of voters casting ballots should not be disclosed and added a provision clarifying that disclosures include both regular and provisional ballots. *Id.* at (a)(1). The legislature then added an amendment which restricted the time when any voters' names could be disclosed. See 2013 Kansas Sess. Laws Ch. 101, Sec. 1(b) (amending K.S.A. 25-2422). Rather than being superfluous as Plaintiffs claim, Pls. Memo. at 18, this provision clarifies that to the extent other statutes require name disclosures, those provisions may not be read as permitting the release of names prior to final canvass. Third, the legislature created an exception to these

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Kan. 436, 441-42, 672 P.2d 1093, 1097 (1983) ("*White* is a district court decision and as such is not precedent."). The decision misinterprets the statute. The court read the statute to only prohibit the disclosure of those casting ballots when combined with the exposure of the contents of the ballot. *Hammet*, 18-cv-5173 at 7. However, to read K.S.A. 25-2422 in that manner would require modifying the statute to add a phrase prohibiting disclosure of the voters names "when the contents of the ballot have been otherwise disclosed." The statute does not say that. It prohibits the disclosure of the names of those casting ballots, a separate action separated by the disjunctive "or" from the first clause of disclosing the contents of a ballot.

disclosure prohibitions involving the names of those casting advance ballots. *Id.* at (c). This advance ballot provision harmonizes another statute which makes the names of advance voters available on election day. K.S.A. § 25-1126 (providing that the lists of those who cast advanced ballots “shall be available at the voting place at all times on election day”). In other words, these amendments illustrate, as discussed *infra*, that the legislature knew it was prohibiting the disclosure of names generally, but simultaneously acknowledged that other provisions of Kansas law required some names to nevertheless be disclosed. One category of names, those of provisional ballot voters, is a category the legislature has not opened for disclosure.

A final important amendment in 2013 that Plaintiffs do not discuss confirms that the legislature was restricting access to provisional voter names, not expanding their availability. Prior to 2013, a “court of competent jurisdiction” could authorize election officials to disclose the contents of ballots and the manner in which those ballots were cast. *See* K.S.A. 25-2422 (2012). The *Mah* case in this district was such a case—it was a court of competent jurisdiction in a KORA action and authorized the disclosure of a limited number of provisional ballot voters’ names. Def. Ex. C (Order in *Mah v. Bd of County Comm’rs*, 12-cv-1214); Def. Ex. D (Petition filed in *Mah v. Bd of County Comm’rs*, 12-cv-1214). In 2013, the legislature amended the statute so that now only courts overseeing an “election contest,” as opposed to a KORA action, can authorize the release of these names. 2013 Kan. Sess. Laws 504, L. 2013, ch. 101, § 1. This change does not evidence an intent “to allow public access to the names of voters who cast a provisional ballot” as Plaintiffs claim. Pls. Memo. at 15. It closes the KORA avenue that was once available.

Incredibly, Plaintiffs claim a 2013 Kansas Legislative Research Department Summary (“2013 Summary”) confirms that these amendments eliminated the prohibition on disclosing the names of those who cast provisional ballots. *See* Pls. Memo. at 17. Yet, Plaintiffs omit the opening

paragraph of the summary they cite: “The *bill makes it illegal to intentionally disclose or expose the name of any voter who has cast a ballot, whether provisional or regular*, except as ordered by a court in an election contest.” 2013 Summary of Legislation at 34, Kan. Leg. Research Dep’t (2013), available at [http://www.kslegresearch.org/KLRD-web/Publications/SummaryofLegislation/2013\\_summary\\_of\\_legislation.pdf](http://www.kslegresearch.org/KLRD-web/Publications/SummaryofLegislation/2013_summary_of_legislation.pdf).<sup>4</sup> That is exactly the opposite of what Plaintiffs claim the 2013 Summary stated. *See* Pls. Memo. at 17 (arguing that the 2013 Summary interpreted the amendment as deleting “the specific prohibition on revealing the names of those who voted a provisional ballot as opposed to a regular ballot”).<sup>5</sup>

The 2018 Legislative Research Department Summary (“2018 Summary”) of the 2018 amendment is equally unhelpful to Plaintiffs’ position. *See* Pls. Memo. at 21. The single sentence in the 2018 Summary only reflects that the bill eliminated the delayed disclosure of names; the Summary does not state that the amendment changed what information could be disclosed. *See* 2018 Summary of Legislation at 147, Kan. Leg. Research Dep’t (2018) (cited by Pls. Memo. at 212). While the 2013 Summary stated that the bill made it illegal to disclose the names of those casting provisional ballots, the 2018 Summary does not state this disclosure prohibition was removed. Whatever information was prohibited from disclosure prior to the 2018 amendment is still prohibited from disclosure after the 2018 amendment, only the time restriction was eliminated.

Finally, Plaintiffs argue that three members of a committee discussing the 2018 amendment, two of which are minority members of the Legislature, somehow confirm Plaintiffs’ position. Pls. Memo. at 19-22. Notably, the words “provisional ballot” do not appear in any of

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<sup>4</sup> Plaintiffs claim courts “regularly examine[] bill summaries as legislative history[.]” Pls. Memo. at 17, n.29.

<sup>5</sup> Although Plaintiffs have correctly quoted the *Mah v. Bd of County Comm’rs*, No. 12-4148-JTM, 2013 WL 3967952 (Aug. 1, 2013), Defendant addresses that decision later. *See infra*. It is not as far-reaching as Plaintiffs imply.

the testimony Plaintiffs quote. *See generally id.* at 19-20. The quoted statements address knowing the names of those who cast ballots, such as convicted felons, prior to canvass for purposes of making election contests easier. *Id.* According to Representative Vic Miller, when you “have information that someone was a convicted felon and may have voted in that election, its kinda nice to know they voted. It’s kinda nice that when you know someone is improperly registered at a different address to know whether or not they actually voted and had an impact on the election and you have a very short timeframe to discover those things and prove them up and if you don’t even have access to the names of the people that voted, which are going to be public, that makes it very difficult to do an honest contest.”<sup>6</sup> But releasing the names of provisional ballot casters does not advance Representative Miller’s concerns. A provisional ballot is not counted until the canvass. If a person’s name is not on the registration list due to a felony conviction, that person would cast a provisional ballot and the vote would be rejected at canvass. *See* Provisional Ballot Chart, p. III-10, ¶ 6 (do not count the vote of a voter who is not registered). Stated another way, an uncounted provisional ballot would not be one of “the names of people who voted” for purposes of an election contest. *See* Pls. Memo at 20 (quoting Rep. Miller).<sup>7</sup> The language Plaintiffs quote does not support their position.

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<sup>6</sup> Hearing Before the H. Comm. on Judiciary, 87<sup>th</sup> Leg., 2018 Sess.at 5:26:02 5:26:37 PM (statement of Rep. Miller).

<sup>7</sup> The only reference to provisional ballots made during the cited hearing was by Representative Carmichael where he claimed prior to the 2013 amendment, someone could obtain the list of those who voted in the election, “usually by the next day,” so that if an “illegal alien person, a noncitizen, a felon, somebody who didn’t live there had voted in the election, you wanted to be able to bring it to the attention of the canvassers if they voted a provisional ballot so that they would have an opportunity to realize that this ballot should not be counted” and to prepare for an election challenge if the canvassers should error.” *Id.* at 5:26:48-5:27:35 (statement of Rep. Carmichael). It is unclear to what Representative Carmichael was referring to during this portion of the hearing because it is not an accurate statement of the law. Prior to the 2013 amendment, Plaintiffs even agree that the statute “prevented public disclosure as to whether a voter cast a provisional or regular ballot.” Pls. Memo. at 16.



In summary, Plaintiffs' reliance on legislative history and statutory construction principles do not overcome the plain language of the statute. In some instances, their citations support Defendant's reading.

3. Plaintiffs are Not Likely to Succeed on their Claim that the Constitutional Right to Privacy Does Not protect the Reasons a Provisional ballot was Cast or Whether it was Counted

Plaintiffs are not likely to succeed on their claim that the constitutional right to privacy does not prohibit disclosure of the Provisional Ballot Detail Report, which includes the reason a ballot was provisional and whether it was counted. This is a matter of first impression for the court.

In 2019, the United States District Court of Kansas held "that existing Tenth Circuit precedent recognizes a right to informational privacy." *Moore v Kobach*, 359 F. Supp 3d 1029 (D. Kan. 2019) (Ruling on a Motion to Dismiss). *Moore*, after a lengthy review of Supreme Court and 10<sup>th</sup> Circuit precedent, *id.* at 1042-1049, adopted a two-prong test for claims premised on a violation of the Constitutional Right to Informational Privacy. *Id.* at 1049-1050. The first prong is that the information must be entitled to a legitimate expectation of confidentiality, that is, an expectation that the information will remain confidential while in the government's possession. *Id.* at 1049-50. Whether the information is protected depends, "at least in part, upon the intimate or otherwise personal nature of the material which the state possess." *Id.* at 1050. The second prong is that, "[i]f an individual has a legitimate expectation of confidentiality, then '[d]isclosures of such information must advance a compelling state interest, which, in addition must be accomplished in the least intrusive manner.'" *Id.* at 1050. Only the first prong is at issue. Defendant is not justifying a public disclosure. Defendant is seeking to protect the legitimate

privacy interest of voters by not releasing their private information to the public. Kansas agencies must consider this opinion in responding to open records requests seeking individualized information, which sets a lower bar for violating that right -“*legitimate expectation of confidentiality*”- than other circuits.<sup>8</sup>

Prior to discussing the interest at issue in this case, it is instructive to consider what *Moore* held. *Moore* held that a government agency can violate a person’s informational right to privacy when state law otherwise does not restrict disclosure of the information, even when the agency’s release of the information is to government agency of another state, rather than directly in response to a KORA request. In 2013, the Secretary of State’s office sent an unencrypted spreadsheet to the Florida Department of Elections. *Moore*, 359 F. Supp 3d at 1037-38. Included within that spreadsheet was the names and the last four digits of individuals’ social security numbers. *Id.*<sup>9</sup> Four years later, the Florida Department of Elections released this information as part of a Florida public records request. *Id.* The *Moore* court acknowledged that both in 2013 and in 2017, Kansas law did not prohibit releasing the last four digits of an individual’s social security number, even if coupled with the person’s name. *Id.* at 1052, n.4. A prohibition on releasing the last four SSN to the public was not implemented until 2018, *id.*, and even today, the last four SSN linked to a name

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<sup>8</sup> *Cf. e.g. Powell v. Schriver*, 175 F.3d 107, 111 (2<sup>nd</sup> Cir 1999) (describing the “excruciatingly private and intimate [in] nature” of the information being released); *Matson v. Board of Educ. of City School Dist. of New York*, 631 F.3d 57, 67 (2<sup>nd</sup> Cir 2011) (exposes plaintiff to “societal discrimination and intolerance”).

<sup>9</sup> The unencrypted spreadsheet contained 945 entries with the following information: State, First Name, Middle, Last name, Suffix, Date of Birth, Voter Identification Number, Last Four Social Security Number (SSN), Full Registration Address, County, Date of Voter Registration. Except for the last four SSN, the other information is provided to numerous organizations and individuals every year.

is not considered personal information requiring special protective measures, KSA 75-7237(i)(1), although it cannot be released to the public. KSA 75-3520(a)(3).<sup>10</sup>

*Moore* also gave examples of information that would be subject to the informational right to privacy, such as embarrassing information, medical records, and financial records. *Id.* In the context of provisional ballots, personal information comes within the constitutional right to informational privacy when the person casting a provisional ballot has a legitimate expectation not to have their individual information publicly disclosed by the government. *Id.* at 1049.

*Mah vs Shawnee Cty Com'n.*, 2012 WL 5584613 (D. Kan 2012) is instructive on this matter. There the Court concluded that the names - and only the names - of those who cast provisional ballots could be released. In doing so, the *Mah* Court specifically noted that the issue before this court was not decided when it acknowledged the “hypothetical voter who might be embarrassed by having to vote provisionally because he forgot to change his address when he moved in with a girlfriend. Or that a person who forgot to register to vote might be embarrassed by having the oversight made public. These potential *embarrassments*[,]” however, were not at issue. *Id.* at \*2 (emphasis added). Moreover, the *Mah* Court also saw merit in implementing additional security measures to ensure only the provisional voter had access to the status of their provisional ballot. *Id.* at \*3.

Although the contours of the Right to Informational Privacy are somewhat uncertain, sharing a voter’s individual provisional ballot profile with the public would violate the provisional

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<sup>10</sup> *Moore* presents a problem for Kansas agencies releasing records. According to *Moore v Kobach*, an individual’s Constitutional Right to Informational Privacy may be violated, even when the disclosure of information is fully compliant with applicable statutes. State agencies now risk getting sued under Section 1983 for releasing information that state law does not explicitly protect or risk getting sued for a KORA violation for not releasing that information.

voter's Constitutional Right to Informational Privacy and subject the Secretary of State to a Section 1983 claim in federal court.

a. Disclosure of the Provisional Ballot Detail Report Would Violate a Voter's Right to Informational Privacy

The information requested by Mr. Hammet illustrates a higher need for protecting informational privacy than the facts in *Moore*. Plaintiff requested a specific report -- the "Provisional Ballot Detail Report" -- from ELVIS database, which provides 12 unique identifiers. Def. Ex. B ¶10. Three factors dictate this result- how the information was collected, the personal nature of the information, and the intrusive nature of the potential use of the personal information.

b. How the Information is Collected Creates an Expectation of Confidentiality

The circumstances under which the voter provided information for a provisional ballot creates an expectation of confidentiality. A person casts a provisional ballot when there is some issue with the normal voting process. *See* KSA 25-414. The provisional voter works one-on-one with polling place staff seeking to remedy their individualized problem, often providing personal information beyond the routine information needed to register or to vote. Def. Ex. B ¶11. This is a one-time personal encounter.

When a voter at a polling place is not listed on the polling place's poll book, the voter is provided a paper ballot, inserts the completed ballot in a provisional ballot envelope, and then completes a voter registration form printed on the outside of the provisional ballot envelope. Additionally, the provisional voter is often questioned by the polling staff about the provisional

voter's personal situation to determine what reason or personal circumstances might explain the voter not appearing on the poll book. *See* K.S.A. § 25-409.

Reasons the voter's name did not appear on the poll book can vary from mistakenly going to wrong the polling place, never having registered to vote, changing name due to divorce, changing residence, and the like. Def. Ex. B ¶12. Some issues can be promptly remedied by the voter such as failure to bring photo identification by simply providing the photo identification before the county canvass is held a week after the election. KAR 7-46-1.

Alternatively, when a voter casts a mail ballot and either forgets to sign the ballot envelope or the signature does not match the signatures on record, the county election officer will attempt to privately contact the voter to resolve the issue. KSA 25-1124(b). If the voter cannot be contacted or makes no effort to remedy the signature issue, the ballot is treated as a provisional ballot.

In contrast to provisional ballot information, voter registration information is provided by the voter to a county election officer on a voter registration form. KSA 25-2309. The form specifically states that declining to register to vote and the office where the voter applies to register to vote "will be kept confidential" – implying that the other information on the form would not be kept confidential. KSA 25-2309(b)(13),(14) and (c)(2),(3).

c. The Personal Nature of the Information Sought for Public Disclosure

Assuming Plaintiff will concede that each entry of the last 4 SSN on the Provisional Ballot Detail Report must be individually redacted from the report to comply with KSA 75-3520(a)(3), the problematic requested data are: reason for ballot being provisional and status of provisional ballot.

Two issues counsel against disclosure. First, is the HAVA prohibition on disclosure. Unlike in *Moore*, Defendant has identified a specific federal law that prohibits disclosure of this information. The second issue is the embarrassment an individual would feel if this information was released. Consider the public humiliation if it was revealed that a strong supporter of a losing candidate forgot to sign a mail ballot and then failed to remedy the missing signature or went to the wrong polling place and cast a partial provisional ballot but could not vote for the losing candidate. This individual could be subject to public embarrassment due to the disclosure of their private information. To prevent this scenario, when a voter attempts to vote, even if the provisional ballot is not counted, county election officials enter on the vote history section of the voter's individual ELVIS database record, it is indicated that the voter voted. Def. Ex. B ¶13.

The two hypotheticals acknowledged in *Mah* are additional examples of the public “potential embarrassment” that a provisional voter may endure “by having to vote provisionally because he forgot to change his address when he moved in with a girlfriend. Or that a person who forgot to register to vote might be embarrassed by having the oversight made public.” *Mah*, at \*2.

d. The Intrusive Nature of the Intended Use of the Provisional Ballot Information

The Court should also consider the intended use of the provisional ballot profile. Plaintiff claims he wants to use the provisional ballot detail report to “assist voters in curing defects that led to their 2018 ballots being rejected before the August 2020 primary.” *Plt's Memo at 2*. The provisional ballot data at issue here will be used 18 months after the 2018 election, when a stranger, not working for the government, contacts voters to inform them that their ballot may not have been counted back in 2018, reminds the voter of the mistake they may have made in trying to vote, and then, apparently, will offer to help the voter not make the same mistake again.

This, despite the fact, that the issue preventing a provisional voter from successfully casting a ballot in 2018 - usually the person not being correctly registered - was remedied for the next election as part of the 2018 provisional ballot process. *See* K.S.A. § 25-409(b) (when completing a provisional ballot, a voter must complete a new voter registration application); Def. Ex. B ¶14. Only issues like failure to show photo identification or failure to sign a mail ballot envelope cannot, because of their inherent nature, be remedied for the next election. Not only would a person be potentially apprehensive of this kind of contact, it could deter someone from casting ballots in the future. The reason individuals cast provisional ballots is to ensure that if a mistake was made and the individual was in fact eligible to vote, the vote will count. *See* 52 U.S.C. § 21082(a)(4)

Additionally, every provisional voter is told how to determine if their provisional ballot was counted. KSA 25-409(b); 52 U.S.C. § 21082(a)(5); Def. Ex. B ¶15. If the provisional voter wanted to know if their ballot was counted, the provisional voter would have already, in private, found out. Indeed, given the private nature of this information, county election officers must adopt a procedure to ensure that only the person who cast the provisional ballot can learn if it was counted. 52 U.S.C. § 21082(a)(5); *Cf Mah*, 2012 WL 5584613 at \*3.

## **II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE INJURY IF THE PRELIMINARY INJUNCTION IS DENIED**

Plaintiffs have not shown they are likely to suffer irreparable injury absent a preliminary injunction. To satisfy this element, Plaintiffs must show a “reasonable probability of irreparable future injury to the movant.” *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843, 854 (2007).

Plaintiffs provide vague arguments that (1) they will be unable to help Kansas voters resolve the issues that led to their ballot being rejected before an important election and from

fulfilling their mission to protect Kansans' right to vote and (2) that data may be lost absent an injunction. Defendant addresses these claims in reverse order.

Defendant has a printed copy of the requested report in the office; the 2018 Report is retained. There is not a risk of loss of the 2018 Report absent a temporary injunction.

Regarding the first argument, Plaintiffs offer no explanation how obtaining a report from 2018 of names and private information will prevent their purported harms. The 2018 election was finalized nearly two years and the information was not requested until nearly a year after the election was final.

To the extent Plaintiffs' claim irreparable harm involving a potential denial of a future, hypothetical KORA request, this cannot sustain a preliminary injunction in this KORA action. First, KORA requests are for existing public records, not records that have not yet been created. *See* K.S.A. 45-218. A court does not have jurisdiction to enter an order until after a request is made and refused. *See id.* at 45-222(a). Second, the initial denial letter was sent to Mr. Hammet in September of last year. Mr. Hammet had ample time to challenge the initial denial. Plaintiffs cannot use that delay to claim that a temporary injunction is now needed to avoid irreparable harm. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) (delays in seeking a preliminary injunction can cut against a finding of irreparable harm). Third, some of the information Mr. Hammet seeks would not be available until after the county canvass. One data point Mr. Hammet seeks is whether a provisional ballot was counted, yet that determination is made at canvass. Obtaining that information is irrelevant to helping Kansans cure provisional ballot deficiencies. Pls. Memo. at 24. Additionally, it is unclear when another piece of information he seeks, the reason a provisional ballot was not counted, would be available. This information is obtained from information written on provisional ballot envelopes which the county election



officials utilize to prepare for the canvass. The Report Mr. Hammet requested is not one that counties are required to submit to the Secretary of State, but Defendant can generate it from ELVIS. *See* Def. Ex. B, ¶ 10. Defendant does not know what date the requested information would be input into the ELVIS. But, to ensure the Report is not lost, Defendant can generate whatever Report is available once the canvass is completed so that a copy of the Report will be retained prior to the information being cleared.

### **III. THE BALANCE OF THE EQUITIES FAVOR DEFENDANT**

While Plaintiffs are correct that the cost to generate the 2018 Report would be minimal, it has already been generated, Plaintiffs are wrong to the extent they claim the time in generating a 2020 Report would be minimal given their experience with certain counties. In the 2018 general election, over 29,000 individuals cast provisional ballots. Def. Ex. B, ¶ 5. It will be more time-consuming for one party, Defendant, to generate the report for the State of Kansas and manually redact the last four of each voter's SSN than for individual counties to produce county lists. *See id.* at ¶ 10.

Regardless, Plaintiffs' position is dependent upon this Court ultimately concluding the requested information is disclosable under KORA and the constitution. In other words, if Defendant's position is correct, information from the 2018 report will be improperly disclosed and an unknown number of 2020 provisional ballot voters' information will also be wrongfully disclosed. Once that disclosure occurs, it cannot be undone. Protecting the privacy information of past and future voters outweighs Plaintiffs' immediate need for this information. Furthermore, as noted above, when individuals learn that they will be contacted by non-government individuals regarding their ballots or that their provisional ballot information will be subject to open records,

it could deter individuals from casting provisional ballots in the upcoming election. That defeats the purpose in having provisional ballots.

#### **IV. PUBLIC INTEREST DOES NOT FAVOR A PRELIMINARY INJUNCTION**

Plaintiffs provide two conclusory statements to support their public interest arguments. Neither have merit.

First, Plaintiffs claim that “the requested data will help ensure properly registered voters who have been disenfranchised in the past will have their ballots counted in the future.” Pls. Memo. at 25. Plaintiffs provide no evidence to support this statement. At best, Plaintiffs suggest that they will either approach the homes of individuals who cast provisional ballots or attempt to locate the phone numbers of those individuals. As discussed previously, this could have a deterrent effect on voters casting provisional ballots, which would not be in the public interest. It is Plaintiffs’ burden to demonstrate a temporary injunction is in the public interest. They have not met that burden.

As to their second argument, Defendant is following federal and state law by refusing to disclose the requested information, and Plaintiffs are wrong that Defendant is violating any past precedent. Defendant has asserted three reasons for denial: (1) HAVA precludes providing “information” about a provisional ballot, meaning the reason a provisional ballot was cast and whether it was counted, (2) it is a nonperson felony under K.S.A. 25-2422 to disclose the names of those who cast provisional ballots, and (3) that provisional ballot casters have an informational right to privacy against the disclosure Plaintiffs seek.

A. HAVA

Defendant argues that HAVA prohibits disclosing the reasons provisional ballots were cast and whether the ballots were counted. The Kansas district court which Plaintiffs claim “summarily rejected the Secretary of State’s reading,” *see* Pls. Memo. at 10, did not address “the reasons why [voters] had to submit provisional ballots.” *Mah*, 2012 WL 5584613 at \*2. Nor did that court hold that HAVA required the disclosure of whether an individual provisional ballot was ultimately counted. The court only held that HAVA “does not protect the names of the voters who cast provisional ballots.” *Id.* at \*3. This is an issue of first impression in Kansas.

B. K.S.A. 25-2422

Defendant argues that K.S.A. § 25-2422 prohibits disclosing the names of individuals casting provisional ballots. Presumably, Plaintiffs are referring to one of three cases. Defendant addresses each.

The first possible case is the Shawnee County District Court KORA matter. *See* Def. Ex. C. That decision is not precedent because it was issued in 2012. K.S.A. 25-2422 has been amended twice since that decision. Plaintiffs even agree that in 2012, when that order was entered, K.S.A. § 25-2422 prohibited the disclosure of provisional ballot voters. Pls. Memo. at 16. As discussed *supra*, the list was disclosed pursuant to a KORA action. *See* Def. Ex. D. The statute now limits court ordered disclosures of the names of those casting provisional ballots to election contests.

To the extent Plaintiffs claim a 2013 federal district court decision, *Mah v. Bd of County Commn’rs*, 2013 WL 3967956 (Aug. 1, 2013), holds that K.S.A. 25-2422 does not prohibit the disclosure of names of provisional ballot voters, they are incorrect. *See* Pls. Memo. at 17-18. That

decision dismissed a case as moot after the legislature amended K.S.A. 25-2422 to prohibit disclosure of voters' names during the time between the election and the final canvass. The case involved the federal question of whether HAVA prevented the disclosure of names. It did not directly consider or rule upon the issue of whether provisional voter records are subject to disclosure outside of that time frame. But regardless, a federal court's decision on Kansas state law is persuasive authority, not binding. *Stormont-Vail Healthcare, Inc. v. Sievers*, 463 P.3d 431, 436 (Kan. App. 2020).

To the extent Plaintiffs claim the recent Johnson County decision is binding, *see* Pls. Memo. at 14, that is not correct. *Taco Bell v. City of Mission*, 234 Kan. 879, 892, 678 P.2d 133, 144 (Kan. 1984); *In re Sawyer*, 234 Kan. 436, 441-42, 672 P.2d 1093, 1097 (1983) ("*White* is a district court decision and as such is not precedent."). That decision ignores the plain language of the statute. *See supra* at p. 13, n.3.

C. Plaintiffs cite no precedent regarding the informational right to privacy claim

Plaintiffs provide no citation claiming that Defendant is violating any prior precedent regarding informational right to privacy. Defendant believes this is an issue of first impression in Kansas.

## CONCLUSION

For the reasons stated above, Plaintiffs' motion for preliminary injunction should be DENIED.

/s/ GARRETT ROE

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Clay.barkder2@ks.gov

### **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on the 8<sup>th</sup> day of July, 2020, I caused a copy of the foregoing to be filed on the Court's electronic filing system and further that I caused a copy to be served on opposing counsel via e-mail.

/s/ Garrett Roe

Garrett Roe, Kansas No. 26867

*Attorney for Defendant*

## **EXHIBIT A**

**Barker, Clay [KSOS]**

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**From:** Davis Hammet [REDACTED]  
**Sent:** Wednesday, September 4, 2019 1:19 PM  
**To:** Kora [KSOS]; Caskey, Bryan [KSOS]; Beckner, Jameson [KSOS]  
**Subject:** KORA SoS Elections - 2018 General Provisional Ballot Detail Report  
**Attachments:** KORA-2018-General-NotCounted-Hammet.pdf

*EXTERNAL:* This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

To whom it may concern,

Pursuant to the Kansas Open Records Act K.S.A. §45-215, et seq.,  
I request the entire ELVIS Provisional Ballot Detail Report from the 2018 General Election including Registrant ID, Name, Address, and Status Reason such that it is clear which individuals' ballots were not counted and the reason their respective ballots were not counted. I request all communication in regards to this request be through email to [REDACTED]

I've attached a signed statement that I will follow use limitations within K.S.A. §45-220(c)(2) and a copy of my identification. No further documentation should be required to fulfill my open records request.

If you have concerns about fulfilling this provisional voter data request please review the court order in Hammet v. Metsker [Case No. 18CV5173].

Thank you,  
Davis Hammet  
[REDACTED]



# Kansas Open Records Request

## Person Requesting Records

Davis Hammet

Topeka, KS 66612

## Records Requested


I request the entire ELVIS Provisional Ballot Detail Report from the 2018 General Election including Registrant ID, Name, Address, and Status Reason such that it is clear which individuals' ballots were not counted and the reason their respective ballots were not counted. I request all communication in regards to this request be through email to [REDACTED]

## Understanding of Record Use Limitation

"Use of voter registration lists for commercial purposes is knowingly selling, giving or receiving the information on or derived from voter registration lists with the intent to use such list or information for any commercial purpose...." K.S.A. 25-2320a. Violation of this law is a class C misdemeanor.

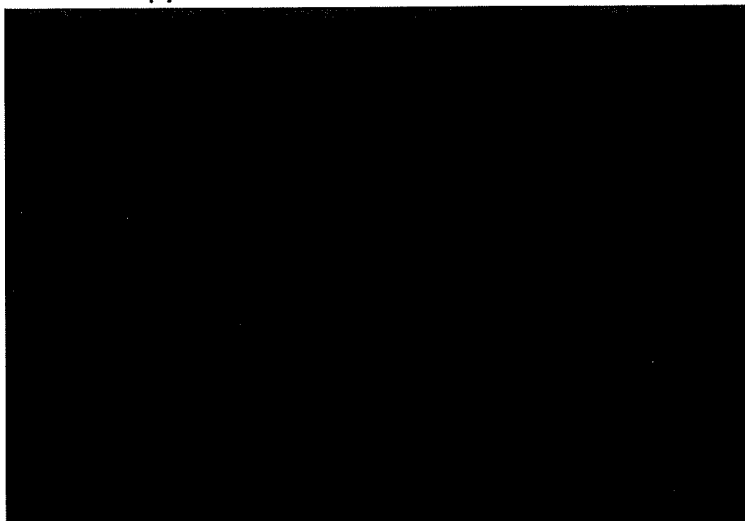
"No person shall knowingly sell, give or receive, for the purpose of selling or offering for sale any property or service to persons listed therein, any list of names and addresses contained in or derived from public records...." K.S.A. 45-230(a). Violation of this law may subject the violator to a civil penalty of \$500.00 for each violation.

By signing this request form, the requester states that he/she has read the above, that he/she is aware of K.S.A. 25-2320a and K.S.A. 45-220(c)(2), and that he/she makes the following certification pursuant to K.S.A. 45-220(c)(2): "The requester does not intend to, and will not: (A) Use any list of names or addresses contained in or derived from the records or information for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or, (B) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed."

  
\_\_\_\_\_  
Signature of Requester

09/04/2019  
Date Signed

## Copy of Photo Identification



## **EXHIBIT B**

THIRD JUDICIAL DISTRICT  
SHAWNEE COUNTY DISTRICT COURT  
CIVIL DEPARTMENT

LOUD LIGHT & DAVIS HAMMET,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 20-cv-343
	)	Div. No. 3
SCOTT SCHWAB, Kansas Secretary	)	
of State, in his official capacity,	)	
	)	
Defendant.	)	

**DECLARATION OF BRYAN CASKEY, DIRECTOR OF ELECTIONS FOR THE**  
**KANSAS SECRETARY OF STATE**

1. My name is Bryan Caskey. I am the Director of Elections for the State of Kansas. I have served in this capacity since February of 2015 and have served in the Elections Division of the Secretary of State's Office since 1998. I have personal knowledge of the information contained in this declaration.

2. The Election Voter Information System ("ELVIS") is the statewide voter registration database for the state of Kansas. ELVIS is managed and hosted through the Secretary of State's office. Each county is responsible for maintaining, adding, changing, and cancelling voter registration records within their respective county. ELVIS is the system of record for all voter registration records in the state of Kansas.

3. Each county election office is responsible for adding, cancelling or modifying voter registration data within the county. No other county and no state official has authority or responsibility for changes to voter registration records.

4. Fewer than ten people in the Kansas Secretary of State's Office have access to ELVIS. Each of these persons are responsible for maintenance or support activities, along with representatives of Election Systems & Software [ES&S] – the company contracted by the Secretary of State to provide the statewide voter registration database. Employees of the Secretary of State's office are able to generate reports and view data. No employee of the Secretary of State or ES&S may add or modify data.

5. A provisional ballot results when a registered voter changes his/her name, changes addresses within the county, changes from one political party to another, or fails to re-register before the election. A provisional ballot is also issued when there is a question about another qualification of the voter: U.S. citizenship, age, felony conviction, mental competence, residence in the county and precinct, registration, failure to provide photographic identification, or suspicion that the voter has already voted at that election. When there is any doubt about a voter's eligibility to vote at the precinct where the voter attempts to vote, a provisional ballot should be provided, even if the voter is apparently unqualified. The facts of the matter can be investigated between Election Day and the county canvass. In the 2018 general election, more than 29,000 provisional ballots were cast.

6. Before receiving a ballot, the voter completes a new voter registration application form, which is attached to a provisional ballot envelope. The reason for the provisional ballot is written on the envelope, along with the voter's number in the poll book. Two election board workers must sign the envelope. One of the board workers writes the word "provisional" next to the voter's name in the poll book. The voter marks a ballot. If electronic voting machines are normally used, the voter is given a paper advance voting ballot. The ballot is sealed in the provisional ballot envelope.

7. An election board worker gives the voter information about how to find out after the county canvass whether the provisional ballot counted. The envelope containing the ballot is grouped with other challenged/provisional ballots. These ballots are not counted on election day. They are set aside for consideration by the county canvassers. After Election Day and prior to the meeting of the county board of canvassers, each county election staff reviews the reason each ballot is provisional, categorizes each type of provisional, and reviews the provisional ballot chart provided to each county election office.

8. The county election officer presents the groups of challenged/provisional ballots to the county board of canvassers at the regular canvass meeting after the election. The canvassers review the reasons why the ballots are challenged/provisional and decide whether to count them. Care should be taken that voters' names and the manner in which they voted are not disclosed to the public or the canvassers. The canvassers make the final decision as to whether each challenged/provisional ballot is valid. Provisional ballots that are deemed valid by the canvassers are opened, counted and added to the official election results. Provisional ballots that are deemed invalid are not opened. They remain sealed and are stored with the other ballots after the canvass. The Secretary of State's office has provided a chart that explains various provisional ballot scenarios, along with the legal citation on making the determination to count or not count. A copy of that chart, which is available at <https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-III-Canvassing.pdf>, is attached to this Declaration as Exhibit 1.

9. Based on the provisional ballot chart, and various state laws, providing the reason a provisional ballot was cast will allow someone other than the voter to determine whether that voter's provisional ballot was counted.

10. The “Provisional Ballot Detail Report” is a pre-programmed report generated from information contained in the ELVIS database. When the report is generated, it contains the following information:

- Voter Registration Number
- Last 4 SSN
- County
- Full name
- Full resident address
- Type (Advance or Polling Place)
- Residence Precinct
- Precinct where voted
- Name of precinct where voted
- Status of Provisional Ballot
- Reason for Ballot being Provisional

Counties are not required to submit this report to the Secretary of State.

11. When a person is required to cast a provisional ballot, the provisional voter is usually directed to a different table at the polling location to work individually with board workers seeking to remedy and document their individualized problem, often providing personal information beyond the routine information needed to register or to vote.

12. Common reasons for a ballot being provisional are: mistakenly going to wrong the polling place, never having registered to vote, changing name, and changing residence [See the provisional ballot chart]

13. When a voter attempts to vote, even if the provisional ballot is not counted, voting credit is issued to the voter indicating the voter cast a ballot.

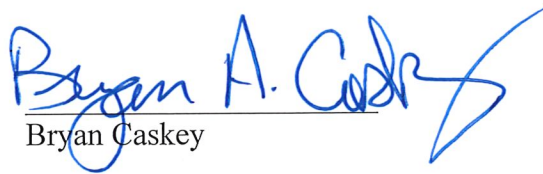
14. In many cases, when a provisional voter completes a voter registration card and updates the required information, the reasons for a ballot being provisional are remedied for future elections as part of the provisional ballot process.

15. Every provisional voter providing information to determine if their provisional ballot was counted.

16. County election officers enact procedures to ensure that only the person who cast the provisional ballot can learn if it was counted.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on July 8, 2020

  
Bryan Caskey

## **EXHIBIT 1**



## Chapter III. Canvassing

*Revised 7/17/19*

The canvassing process includes counting ballots, tabulating votes by election district and certifying the results of all official primary and general elections and question submitted elections held pursuant to federal or state law. It is the process which produces official election results, whether it is the official number of valid votes cast for each candidate for each elected office, or the official number of valid Yes and No votes cast on an issue in a question submitted election.

For local elections, there are always two canvasses: the original canvass and the final canvass. For national and state elections, there are always three canvasses: the original, intermediate and final canvass.

Canvassing begins with the counting of ballots on election night and culminates with the county canvass or the state canvass, depending on the election.

### **a. Election Night Tabulation**

Election night tabulation (ENT) refers to the unofficial counting of ballots and reporting of election results to the media and public on election night. This is done by county election officials (CEOs) and the Secretary of State's office as a public service. There is no statutory requirement for election night reporting; it is customarily done in response to the intense interest by the media, candidates and public in knowing the results of the election. It is important to note that results tabulated and reported on election night are unofficial.

Local elections are official after the county canvass. National and state elections are official after the state canvass.

For the national and state ENT, the media support the program by purchasing access to the Secretary of State's system. The Associated Press has traditionally made a separate donation to support the program. Part of the funds are used to pay for programming costs in the Secretary of State's office, and the remainder are donated to the Kansas County Clerks and Election Officials Association's scholarship fund for college students.

The law refers to the counting of ballots as the original canvass, whether it occurs in the precincts or centrally at the county election office. (See Original Canvass below.)

### **1. Local Elections**

Local elections include county, township, city, school board, all other jurisdictions with elected officers, and special question submitted elections. For all these elections, ENT is handled entirely by the CEO. If the county uses hand-counted paper ballots or a precinct-

**h. Partial Provisional Ballots**

Canvassers are required to count partial provisional ballots. If a voter cast a provisional ballot in a precinct other than the precinct in which the voter is registered but still within the same county, the canvassers should deem valid any votes for races or questions that are identical in both precincts. Any races or questions that do not appear on both precincts' ballots should not be counted.

For instance, votes for the offices of president, governor, other statewide races, constitutional amendment questions, countywide races and questions, and some state or county district offices will be valid because the races or questions were common to both ballots—the ballot the voter cast for the wrong precinct and the ballot intended for the precinct in which the voter was registered. [KSA 25-3002(b)(3)] This situation arises due to poll book error, election board worker error, voter error, or instances where the voter attempts to vote at a polling place closer to the voter's home than the polling place in the precinct where the voter is registered.

See the following chart for guidance on whether to count various types of challenged and provisional ballots.

**COUNTING PROVISIONAL BALLOTS**

#	SITUATION	SHOULD BALLOT COUNT?	LEGAL AUTHORITY	COMMENTS
<b>A</b>	<b>VOTER REGISTRATION</b>			
1	Voter registered in office before books closed and advance voted during the next few days before the CEO processed the registration application.	YES	25-1122 25-2311	If voter's notice of disposition was not returned by mail before canvass day.
2	Voter registered at CEO office after books closed or at the polling place on election day and voted at the same time.	NO	25-2311(a)(6) 25-2311(e)	Law requires that a voter must register by the 21st day before election.
3	Registered voter had different name than on poll book due to marriage, divorce or legal proceeding and completed a new voter registration application.	YES	25-409 25-2316c(a)	Name changes and address changes are the two major reasons for provisional ballots as outlined in federal law (NVRA). Such ballots count unless invalid for another reason.
4	Registered voter had different name than on poll book and did not complete a new voter registration application.	NO	25-409 25-2316c(a)	The law requires a provisional voter to complete a voter registration application in order to receive a provisional ballot. This process updates the voter's registration information and eliminates the need for provisional ballots in future elections.

Kansas Election Standards

5	Voter was registered but voted in wrong precinct, but within the county, due to CEO error, board worker error, voter error, or insistence by voter.	YES (partial ballot)	25-3002(b)(3)	Law requires counting of partial provisional ballots—count races and questions that are identical when comparing provisional ballot to correct ballot for voter's precinct.
6	Voter was not registered.	NO	25-215 25-2302	Kansas laws require registration before voting.
7	Voter claimed to have registered at DMV, post office, state fair or NVRA registration outpost and CEO had no registration.	NO	25-215 25-2302 25-2421a	Unless CEO verifies DMV or CEO error.
<b>B</b>	<b>VOTER MOVES</b>			
	<b>MOVES WITHIN COUNTY</b>			
1	Registered voter moved within county within 30 days of election. Voted at former precinct.	YES	KS Const. Art. 5 Sec. 1; 25-3702	KS Constitution allows this so ballot not required to be provisional. Voter must complete Form FP1 before voting.
2	Registered voter moved within county within 30 days of election. Voted at either new precinct or central location.	YES	25-2353, 25-409	Must complete new registration card before voting provisional ballot.
3	Registered voter moved anywhere in county and voted at new precinct.	YES	25-2316c(b)	Voter must complete a new voter registration application.
4	Registered voter moved within county at any time before election. Voted at either new precinct or central location.	YES	25-2353, 25-409	Must complete new registration card before voting provisional ballot. No time limit on date of move.
5	Registered voter moved within the county at any time and completed a new voter registration card.	YES	25-2353	If voted at new precinct or central location.
6	Registered voter moved within county within 30 days before election. Voted ballot at wrong precinct.	YES (partial ballot)	25-3702, 25-3002(b)(3)	Entire ballot valid if voted at former precinct. Partial ballot valid if voted ballot at precinct where not registered.
7	Registered voter moved within county more than 30 days before election. Voted at former precinct.	YES (partial ballot)	25-3702 25-3002(b)(3)	Partial ballot valid if voted ballot at precinct where not currently registered.
8	Registered voter moved within the county but refused to fill out a new voter registration card before voting.	YES (partial ballot)	25-409(a) 25-3002(b)(3)	Law requires counting of partial provisional ballots—count races and questions that are identical when comparing provisional ballot to correct ballot for voter's precinct.
	<b>MOVES OUT OF COUNTY, WITHIN STATE</b>			
9	Registered voter moved anywhere in state within 30 days of election. Voted at former precinct.	YES	Kan. Const. Art. 5 Sec. 1, 25-3702	KS Constitution allows this, so ballot not required to be provisional. Voter must complete Form FP1 before voting.
10	Registered voter moved out of county but within state within 30 days before election. Voted in new precinct without re-registering.	NO	Kan. Const. Art 5, 25-3702; 25-2316c(b)	Fail safe (provisional) voting only covers in-county moves. Former precinct voting only allows voting in precinct of former residence.

11	Registered voter moved out of county but within state more than 30 days before election.	NO	25-3702	Not protected by law. Needed to re-register at new address.
<b>C</b>	<b>ADVANCE VOTING</b>			
1	Registered voter requested advance ballot, did not receive ballot and voted at polls.	YES	25-2908c	If CEO verifies that voter did not cast multiple ballots.
2	Registered voter voted in advance, then voted at the polling place.	NO	25-2416(b)	Election crime.
3	Registered voter returned advance ballot in unsigned envelope.	–NO, UNLESS VOTER CURES	25-1124(b)	CEO must attempt to contact voter to sign envelope. If voter signs envelope, count ballot. If voter does not sign envelope, do not count ballot.
4	Voter signed another voter's envelope.	NO	25-1120, 25-1124	Law requires voter to sign statement on voter's own envelope unless another person signs for voter at voter's direction due to disability.
5	Two voters voted in advance. Ballot envelopes switched, signed by the wrong voter in same household. Both are eligible voters and signatures match.	NO	25-1120	Law requires voter to sign declaration on envelope containing the voter's own ballot..
6	Voter signed envelope but did not fill in address line.	YES	AG Op. 2012-26	Technical error that, by itself, does not invalidate ballot.
7	Voter submitted an advance voting ballot with ballot envelope not sealed.	YES		Technical irregularity unless CEO finds evidence of tampering.
8	Voter applied for an advance voting ballot after deadline for application.	NO	25-1122(f)	Kansas laws set application deadlines to allow time for transmission of ballots and conclusion of advance voting before election.
9	Voter used power of attorney to obtain advance voting ballot and used attorney to vote.	NO	AG letter to SOS, Sept. 16, 1997	Power of attorney has no effect in voting. Laws provide for assisted voting if affidavit of assistance is filed.
10	Voter casts advance ballot, then dies before election day. Election board makes ballot provisional pursuant to KSA 25-1136(c).	NO	25-1136(c) AG Opinion 2002-15	"Persons who are deceased on election day are not qualified electors and do not enjoy a constitutional right to vote."
<b>D</b>	<b>OTHER</b>			
1	Registered voter's name was found by CEO elsewhere in poll book.	YES	25-2908(e)	NVRA fail safe voting
2	Voter needed assistance – should not have been challenged.	YES	25-2909	No voter error
3	Voter voted provisional ballot, only one board worker signed envelope.	YES	25-3002(b)(1) 25-702(b), 25-716(a)	Technical irregularity. No voter error.
4	In primary election, registered voter requested and received a different party's ballot than the one registered for.	NO	25-3301(c) 25-3304(b)	If voter received ballot of party other than party of affiliation, ballot does not count. Unaffiliated voter may affiliate with a party and vote.

Kansas Election Standards

5	Registered voter dies after casting ballot and ballot was not provisional.	YES	AG Opinion 2002-15	Non-provisional ballots are commingled with others are thus irretrievable and impossible to not count.
6	Registered voter returned a ballot after polls closed.	NO	25-106 25-1132 (advance)	Unless advance mail ballot returned postmarked on or before Election Day and received by the Friday after the election. Ballot then is eligible for counting.
7	Voter accidentally presses "Submit vote" on DRE before he/she is finished. Voter completes provisional ballot.	NO	25-2908(c)(5)	Voter cannot vote twice. If ballot cast on DRE cannot be retrieved, it has been cast and included with the other votes, regardless of how many races voter had completed.
<b>E</b>	<b>FEDERAL SERVICES VOTING</b>			
1	Federal services voter who was absent applied for ballot by noon the day before election day by completing a standard FPCA (Form 76).	YES	25-1215, 25-1216(b)	May vote by fax or email. Not required to be registered.
2	Registered voter (nonmilitary) moved out of state but in the U.S. at any time before election. (See Presidential Situations for exception.)	NO		Not protected by law. Voter should check with new state for laws.
3	U.S. citizen eligible to vote in the election district moved out of U.S. and applied by noon the day before election day by completing a standard FPCA (Form 76).	YES	25-2314, 25-1216(b)	May vote by fax or email. Not required to be registered.
<b>F</b>	<b>PRESIDENTIAL SITUATIONS</b>			
1	New voter moved to KS within 45 days before election. Filed form PN by noon the day before election.	YES	25-1801(b)(1), 25-1802(a)	New resident may vote only on U.S. president race.
2	Registered voter moved out of KS within 45 days before election. Filed form PF in county of former residence in KS by noon the day before election.	YES	25-1801(b)(2), 25-1802(b)	Former resident may vote only on U.S. president race.
3	Registered voter moved anywhere within KS not more than 20 days before election. Filed Form PR in county of new residence by noon the day before election.	YES	25-1801(b)(3), 25-1802(c)	Relocated resident may vote only on U.S. president race.
<b>G</b>	<b>VOTER IDENTIFICATION</b>			
1	Voter in the county fails to provide valid identification, votes provisional ballot.	NO	25-2908(e) 25-3002(b)(8)	The law requires voter to provide ID in order to have ballot counted. However, if voter provides valid identification to CEO after voting provisional ballot and before county canvass, ballot counts.

## **EXHIBIT C**

FILED BY CLERK  
KS. DISTRICT COURT  
THIRD JUDICIAL DIST.  
SHAWNEE, KS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION 1

2012 NOV -9 P 12:55

ANN MAH,

Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF SHAWNEE, KANSAS,

Defendant.

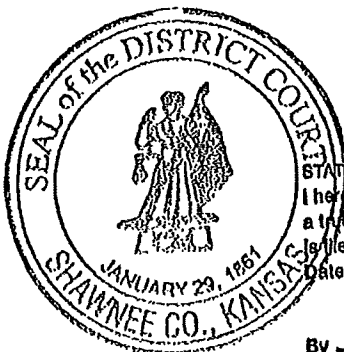
CASE NO. 12-C-1214

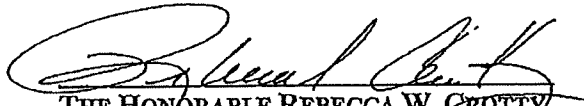
ORDER

This Court finds, based upon the Petition and evidence of the parties for good cause shown, that the Defendant is ordered to disclose to the Plaintiff and Ken Corbett (if he so requests) the names of all voters who cast provisional ballots for the 54<sup>th</sup> House District in Shawnee County by any method including but not limited to mail ballots and in-person ballots. The Shawnee County Election Office shall provide the records by 6:00 p.m. on Friday, November 9, 2012.

Petitioner is not requesting information regarding the content of any ballot or the reason voters cast a provisional ballot.

IT IS SO ORDERED.

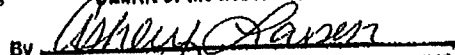


  
THE HONORABLE REBECCA W. CROTTY  
DISTRICT COURT JUDGE, DIVISION 1

STATE OF KANSAS, COUNTY OF SHAWNEE, S.S.  
I hereby certify the above and foregoing to be  
a true and correct copy, the original of which  
is filed and entered of record in the court

Dated November 9, 2012

CLERK of the DISTRICT COURT

By   
DEPUTY

PREPARED BY:

MARGIE WAKEFIELD, #12474

MARGIE WAKEFIELD-LAW OFFICES, P.A.

901 Kentucky, Suite 201

Lawrence, Kansas 66044

(785) 842-7900

(785) 841-296 (fax)

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OFFICE OF THE COUNTY COUNSELOR

SHAWNEE COUNTY, KANSAS

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Topeka, Kansas 66603-3932

Tele: (785) 233-8200 Ext. 4042

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Attorneys for Defendant,

The Board of County Commissioners

of the County of Shawnee, Kansas

RICHARD V. ECKERT - #16235



## **EXHIBIT D**

2

3

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION 1

FILED BY CLERK  
KS. DISTRICT COURT  
THIRD JUDICIAL DIST.  
TOPEKA, KS

2012 NOV -9 A 10:32

ANN MAH,

Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF SHAWNEE, KANSAS,

Defendant.

CASE NO. 12-C-1214

PETITION

Pursuant to K.S.A. Chapter 60

COMES NOW the Plaintiff, by and through her attorney, Margie Wakefield, for her cause of action against the Defendant, alleges and states as follows:

1. Petitioner is a resident of Shawnee County and the Democratic Nominee in the 54<sup>th</sup> Kansas House District. Petitioner resides at 3351 SE Meadowview Dr., Topeka, KS 66605.
2. Defendant is the governing body of Shawnee County, Kansas organized and existing pursuant to K.S.A. 19-101.
3. Plaintiff has requested the names and addresses of all persons who cast a provisional ballot for the November 6<sup>th</sup>, 2012 general election for the 54<sup>th</sup> Kansas House District in Shawnee County.
4. Shawnee County has denied such request based upon K.S.A. §25-2422. This statute prohibits 'Unauthorized voting disclosure' which the statute defines as "Disclosing or


exposing the contents of any ballot or the manner in which the ballot has been voted, *except as ordered by a court of competent jurisdiction.*" Shawnee County's denial was also based upon 42 U.S.C.A. § 15482(a)(5)(B) which provides, in relevant part, "Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot."

5. Shawnee County has alleged that only a court of competent jurisdiction can order the disclosure of the requested material. Petitioner alleges that the 3rd District Court of Kansas is a "court of competent jurisdiction" and therefore has the authority to order the disclosure of the manner in which certain ballots have been cast.

6. Such a disclosure would be in the public's right to an open and transparent electoral process.

**WHEREFORE**, Plaintiff requests that this court order the disclosure of the names of all voters who cast provisional ballots for the 54<sup>th</sup> House District in Shawnee County by any method including to but not limited to mail ballots and in-person ballots. Petitioner is not requesting information regarding the content of any ballot or the reason voters cast a provisional ballot.

Respectfully submitted,

  
MARGIE WAKEFIELD LAW OFFICES, P.A.  
901 Kentucky, Suite 201  
Lawrence, Kansas 66044  
(785) 842-7900  
(785) 841-2296 (fax)

#12474

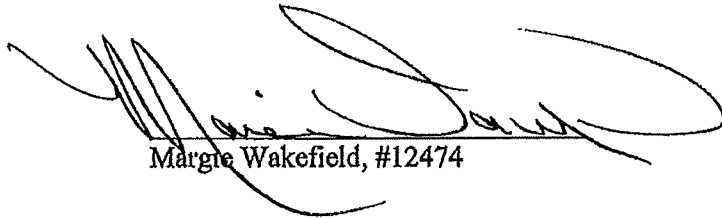
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the above and foregoing petition was served in person:

---

Cynthia "Cyndi" Beck  
200 SE 7<sup>th</sup> Street, Room 107  
Topeka, KS 66603

as attorney of record for Ann Mah, on the 9th day of November 2012.



Margie Wakefield, #12474