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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION SEVEN

Aaron Belenky, Scott Jones, )  
and Equality Kansas, )  
 )  
Plaintiffs, ) Case No. 2013CV1331  
 )  
vs. )  
 )  
Kris Kobach, Kansas )  
Secretary of State, and )  
Brad Bryant, Kansas )  
Elections Director, )  
In their Official )  
Capacities, )  
 )  
Defendants. )  
\_\_\_\_\_ )

**MEMORANDUM OPINION AND ORDER**

The matter was earlier before the Court on the Plaintiffs', Aaron Belensky, Scott Jones, and Equality Kansas's Motion for a Preliminary Injunction enjoining the Kansas Secretary of State and election officials under his supervision from certain acts deemed unlawful

in regard to the 2014 pending election cycle. At that time the Plaintiffs' asserted their standing as follows:

"1. Petitioner Aaron Belenky is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. On or about August 2, 2013, Mr. Belenky applied to register to vote in Kansas by filling out the National Mail Voter Registration Form (the "Federal Form") and attesting under penalty of perjury to his U.S. citizenship and eligibility to vote. As a Federal Form applicant, Mr. Belenky is subject to the dual registration system implemented by Respondents. As a result of Respondents' implementation of a dual voter registration system, on or about August 8, 2013, Mr. Belenky received notice that his voter registration was in 'suspense.' On or about September 27, 2013, Mr. Belenky called the Johnson County Elections Office to inquire about the status of his registration and an elections official informed him that he is not registered to vote in Kansas local or state elections. Mr. Belenky was unable to vote in the October 8, 2013, City of Overland Park election because he was deemed not registered despite his submission of the Federal Form, and he will be prohibited from voting in future elections.

2. Petitioner Scott Jones is a U.S. citizen, a Kansas resident, and a duly qualified elector for local, state, and federal elections in Kansas. In late July 2013, Mr. Jones applied to register to vote in Kansas by filling out the Federal Form and attesting under penalty of perjury to his U.S.

citizenship and eligibility to vote. Mr. Jones submitted the Federal Form in person at the Douglas County clerk's office. As a Federal Form applicant, Mr. Jones is subject to the dual registration system implemented by Respondents. As a result of Respondents' implementation of a dual registration system, in early August 2013, Mr. Jones received notice from a Douglas county clerk's office[r] that his registration was in 'suspense.' On or about September 26, 2013, Mr. Jones went to the Secretary of State's registrant search website to check his registration status. The Secretary of State's website listed him as registered to vote. On or about September 27, 2013, Mr. Jones called the Douglas County clerk's office and an elections official there informed him that he was registered to vote in federal elections and not registered to vote in state or local elections. Petitioner Jones will therefore be prohibited from voting in future state or local elections.

3. Plaintiff Equality Kansas is a statewide membership organization dedicated to ending discrimination based on sexual orientation and gender identity by lobbying state and local governments for equal rights. One of the organization's primary activities is assisting applicants with voter registration using the simple and accessible Federal Form. Central to Equality Kansas's advocacy strategy is to encourage voter registration and participation in state and local elections within communities that support equal rights for all Kansans. It is impracticable for Equality Kansas members and volunteers to carry photocopiers, or to retain copies of registrants' sensitive identity documents, when assisting applicants with their voter registration. The dual

registration system prevents Equality Kansas from effectively registering voters in state and local elections and creates confusion among Federal Form registrants who are later denied substantial portions of their voting rights."

*Petition, ¶s 1, 2, 3.*

They brought their action for relief at that time on the following allegations and request for relief:

"Petitioners Aaron Belenky, Scott Jones, and Equality Kansas, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction ordering Respondents to register Petitioner Belenky, Petitioner Jones, and similarly situated electors to vote in Kansas elections, and enjoining Respondents' unlawful implementation of a dual system of voter registration. In support thereof] Petitioners state and allege as follows:

1. Respondents have unlawfully implemented a dual system of voter registration, which permits some Kansas citizens to vote for federal offices such as U.S. Senator, but not for state offices such as Secretary of State.

2. Respondents have unlawfully adopted the rules and regulations governing the dual registration system without fulfilling the notice, opportunity for comment, publication and other processes required by the Rules and Regulations Filing Act (the 'Filing Act'). See K.S.A. § 77-421.

3. Where, as here, the requirements of the Filing Act are not followed to promulgate rules

or regulations, those rules and regulations are void.

4. Petitioner Belenky and Petitioner Jones have submitted complete and valid voter registration applications, but are prohibited from voting in state and local elections and from signing election-related petitions based on the unlawful rules and regulations of the dual system of registration.

5. Respondents' administration of a dual registration system therefore violates Petitioner Belenky's and Petitioner Jones's voting rights, causing irreparable harm absent an injunction.

6. The Petitioners respectfully request that this Court enjoin Respondents' unlawful dual system of registration to protect Petitioner Belenky's and Petitioner Jones's fundamental right to vote.

7. In light of the upcoming primary election on August 5, 2014, Petitioners request an expedited hearing on July 11, 2014 and an expedited briefing schedule."

Plaintiffs' Motion for a Preliminary Injunction and For an Expedited Hearing.

At the hearing held on July 11, 2014, the Court declined to grant injunctive relief, finding that, given the flux in the status of the law, principally, the decision in effect at that time emanating from

Judge Melgren of the United States District Court for the District of Kansas, 6 F.Supp.3d 1252 (3/19/14), finding that the U.S. Election Assistance Commission was obliged to incorporate Kansas's proof of citizenship requirements to its "Federal Form". Further, Judge Melgren had declined a stay (2014 WL1806703 (5/7/14)). An appeal to the U.S. Tenth Circuit Court of Appeals was then pending. At the hearing, this Court articulated that issuing a preliminary injunction, even if Plaintiffs were correct, would further discombobulate the election, that is, the cure could be worse than the disease, and declined the relief sought. By mutual agreement this case was then stayed. The Secretary had his motion for summary judgment on file at that time.

Now this matter is pending before the Court on the Defendant, Secretary of State's motion to deem his motion for summary judgment submitted and asks that his motion for summary judgment be sustained on his facts

advanced. The Secretary of State's motion for summary judgment advanced the following facts:

"1. On or about August 2, 2013, Plaintiff Aaron Belenky (hereinafter 'Belenky') applied to register to vote by submitting a National Mail Voter Registration Form to the Johnson County, Kansas, Elections Office. Petition ¶ 1.

2. Belenky chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 6b, Belenky Admission No. 8.

3. Belenky did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 1, above. Exhibit 6a, Belenky Interrog. V Resp. No. 6, 10.

4. On or about August 6, 2013, Belenky was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 1b.

5. Belenky is in possession of his birth certificate and United States Passport. Exhibit A 6a, Belenky Interrog. Resp. No. 7.

6. On or about November 25, 2013, Belenky applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3a; Exhibit 6a, Belenky Interrog. Resp. No. 13.

7. Belenky was offered the opportunity to apply to register to vote at the time he

applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 6a, Belenky Interrog. Resp. No. 14.

8. Belenky is not a member of Plaintiff Equality Kansas (hereinafter 'Equality Kansas'). Exhibit 6b, Belenky Admissions No. 10.

9. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Belenky, executed an affidavit with driver's license records for Belenky showing that Belenky provided a passport when he applied for a Kansas driver's license. Exhibit 3.

10. On July 7, 2014, Defendant Bard Bryant (hereinafter 'Bryant') sent the Earnest affidavit and accompanying documents to the Johnson County Elections Office to be evaluated as sufficient proof of citizenship for Belenky. Exhibit 1.

11. On July 7, 2014, the Johnson County Elections Office determined that Belenky had provided sufficient proof of citizenship and changed Belenky's registration status from incomplete to active. Exhibit 1.

12. Effective July 7, 2014, Belenky is registered to vote for all elections held in Kansas, including federal, state, and local elections. Exhibit 1.

13. On or about late July, 2013, Plaintiff Scott Jones hereinafter 'Jones') applied to



register to vote by submitting a National Mail Voter Registration Form to the Douglas County, Kansas Elections Office. Petition ¶2.

14. Jones chose to apply to register to vote using the National Mail Voter Registration Form of his own will and volition. Exhibit 7b, Jones Admission No. 7.

15. Jones did not include documentary evidence of United States citizenship with his voter registration application described in Paragraph 13, above. Petition ¶2; Exhibit 7a, Jones Interrog. Resp. No. 10.

16. On or about July 23, 2013, Jones was sent a letter informing him that his voter registration application was incomplete due to failure to provide proof of citizenship. Exhibit 2b.

17. Jones is in possession of his United States Passport. Exhibit 7a, Jones Interrog. Resp. No. 7.

18. On or about July 17, 2013, Jones applied for a Kansas driver's license and provided his passport to the driver's license examiner. Exhibit 3e; Exhibit 7a, Jones Interrog. Resp. No. 13.

19. Jones was offered the opportunity to apply to register to vote at the time he applied for a driver's license and he declined the offer to apply to register to vote at that time. Exhibit 7a, Jones Interrog. Resp. No. 14.

20. Jones is not a member of Equality Kansas. Exhibit 7b, Jones Admission No. 9.

21. On July 7, 2014, Julie Earnest, duly authorized custodian of the business records maintained at the Kansas Department of Revenue relating to Jones, executed an affidavit with driver's license records for Jones showing that Jones provided a passport when he applied for a Kansas driver's license. Exhibit 3.

22. On July 7, 2014, Bryant sent the Earnest affidavit and accompanying documents to the Douglas County Clerk to be evaluated as sufficient proof of citizenship for Jones, Exhibit 1.

23. On July 8, 2014, the Douglas County Clerk determined that Jones had provided sufficient proof of citizenship and changed Jones's registration status from incomplete to active. Exhibit 1.

24. Effective July 8, 2014, Jones is registered to vote for all elections held in Kansas, including federal, state, and local elections, Exhibit 1.

25. Equality Kansas's mission is to end discrimination based on sexual orientation and gender identity or expression, and to ensure the dignity, safety, and legal equality of all Kansans."

**THE DEFENDANT SECRETARY'S MOTION TO DEEM HIS MOTION FOR SUMMARY JUDGMENT SUBMITTED:**

The Plaintiffs unquestionably did not respond to the Defendant's Motion for Summary Judgment in a manner that complied with Ks. S.Ct. Rule 141. Nevertheless,

the Plaintiffs' response to the Defendant's Motion for Summary Judgment clearly delineates what facts are contested. Fact #25 goes to the question of the standing of the named Plaintiff - Equality Kansas - to maintain suit. It is not disputed that the individually named Plaintiffs have each come into compliance with Kansas registration requirements, albeit indirectly (Defendant's Facts 6-24), which is clearly admitted and fundamentally makes Defendant's complaint about Plaintiff's Rule 141 non-compliance somewhat redundant. Further, the Plaintiffs' response does not contest that the individually named Plaintiffs are not members of the Equality Kansas organization.

Though not in a properly numbered format, Plaintiff Equality Kansas's responses to Defendant's Fact No. 25, the only noted contested fact, clearly is set forth in its Response to the Summary Judgment Motion both by stating the basis for contesting the fact and citation to the record supporting that contest. Accordingly, the Court finds that no reason exists why the

Secretary's motion for summary judgment, as far as it goes, should not be considered. The Court's duty is to identify what is at issue and what is not, regardless of the outcome of the motion. K.S.A. 60-256(d). The principal issue appears, at this juncture of the case, to be the standing of each of the Plaintiffs to bring or maintain this suit.

**THE KANSAS SECRETARY OF STATE'S ACTIONS PROMPTING THIS SUIT:**

The question of standing cannot really be considered without reference to Secretary Kobach's actions or inactions taken in regard to voting and voting registration procedures. Inquiry into the Secretary of State's registration practices is also necessary, notwithstanding what may seem to be the fact that the individually named Plaintiffs would facially lack standing because they are now fully eligibly registered in the eyes of the Secretary's view of the Kansas specific legal requirements. Nevertheless, it was the Secretary's initiatives which caused them to be acceptably registered by Kansas state standards and not

by their choice (See Defendant's Facts at 2 and 7, 14 and 19) but rather by the consequence of the requirements for obtaining a Kansas driver's license. Thus, Defendant asserts "Plaintiff's Belensky and Jones inflicted the purported harm upon themselves" (Defendant's Brief, pps. 6-9). If so, they did so only because they each chose one of two methods to register as provided by Kansas statute (K.S.A. 44-2309(a)), most likely not with the thought they would be "harming" themselves if they did so. It is the Secretary that perceived the "harm" and it was his unsolicited outreach that in his view "rescued" them. Whether he was acting as a "brother's keeper" or as "big brother" in doing so, he now claims their standing in this case has now been wholly undermined.

The Court finds that, had Belenky and Jones been registered in Kansas by their choice of doing so - the National Voter Registration procedure, *i.e.*, the "Federal Form", and not otherwise except by the assistance of the Kansas Secretary of State, Kris

Kobach - the two plaintiffs would have, by way of the impact of the directives from the Secretary to local election officials, been treated differently from other Kansas voter registrants that did not use the Federal Form.

By directive of the Secretary of State - had they not been "rescued" - their respective ballots, if cast, would have been automatically challenged (K.S.A. 25-409; K.S.A. 25-414) and thus characterized and marked as "provisional". Then, as a result of such declared provisional ballot status, and further per the Secretary's directives, their ballots were to have been edited by local election officials, which would have then recorded only their votes, if any, for Federal candidates, and would have disregarded their votes, if any, for state candidates or local candidates if present on such ballot. Alternatively, were such directives to have been disregarded by local election officials, then pursuant to an existing Kansas administrative regulation promulgated by the Secretary

of State in 2013, the Petitioners' ballots would have still been declared provisional, but no votes - federal, state, or local - would have been counted. See K.A.R. 7-23-14(b) (3). This latter regulation comports with Kansas statute. K.S.A. 25-414. Further, had a law now effective July 1, 2015, been then in force, and had either voted for a state or local office candidate, the Secretary of State would arguably be in the position to take such information and prosecute them. L. 2015, ch. 87, § 2. Further, certain election crimes were created (*Id.* § 1) or broadened, by example, the following:

"Sec. 5. K.S.A. 25-2416 is hereby amended to read as follows: 25-2416. (a) Voting without being qualified is knowingly ~~and willfully: (a)~~ voting or attempting to vote ~~at~~ without being qualified:

(1) *In any election district when not a lawfully registered voter in such election district; or*

(2) *at any election by a person who is not a citizen of the United States or who does not otherwise meet the qualifications of an elector.*

~~(b) Voting or offering to vote more than once at the same election.~~

~~(c) Inducing or aiding any person to vote more than once at the same election.~~

(b) Voting without being qualified or attempting to vote without being qualified is a class A misdemeanor severity level 7, nonperson felony.

(c) The provisions of K.S.A. 2014 Supp. 21-5301(c), and amendments thereto, shall not apply to a violation of attempting to vote without being qualified pursuant to this section. (Emphasis added by underlining).

*Id.* § 5.

The situation, apparently to which the Secretary of State is attempting to respond, arises from two circumstances. First, in the Kansas legislative session of 2010, the Kansas legislature enacted what was denominated as the "Secure and Safe Elections Act" (L. 2010, ch. 56). It became effective January 1, 2012, except for a section that required proof of United States citizenship as a second step in the registration application process, which proof was required to be produced prior to being entered into the registration books as a duly registered Kansas voter



(*Id.*, § 5(b); K.S.A. Supp. 25-2309(1)). This law described the documentary proof necessary and the methods for any reconciliation. This latter section of the statute only applied to new registrants after January 1, 2013 (*Id.* § (u)). It excluded from its proof of citizenship requirement current registrants as of January 1, 2013 (*Id.* § (h)), including current registrants who merely moved within the State or had modified his or her registration for any other reason (*Id.*, § (p)), hence "grandfathering in" this character of registered voters.

This statute, as amended, however, did not change or alter the following pre-existing statutory text, which reads as follows:

"(a) Any person may apply in person, by mail, through a voter registration agency, or by other delivery to a county election officer to be registered. Such application shall be made on: (1) A form approved by the secretary of state, which shall be provided by a county election officer or chief state election official upon request in person, by telephone or in writing; or (2) the national mail voter registration form issued pursuant to federal law. Such application shall be signed by the applicant under penalty of perjury and shall

contain the original signature of the applicant or the computerized, electronic or digitized transmitted signature of the applicant. A signature may be made by mark, initials, typewriter, print, stamp, symbol or any other manner if by placing the signature on the document the person intends the signature to be binding. A signature may be made by another person at the voter's direction if the signature reflects such voter's intention."

K.S.A. 25-2309(a).

Also, certain Kansans in the military, merchant marine, or residing out of country and their family members, may register by another federal form.

("FPCA": 52 U.S.C. 20301 et seq.; K.S.A. 25-1214(b); K.S.A. 25-1215).

As noted earlier, the Plaintiffs Belenky and Jones registered by means of "(2)" above, the national mail voter registration form, aka the "Federal Form", which is governed, as was noted, by 42 U.S.C. 1973 gg-4, since transferred to 52 U.S.C.A. § 20505. On June 17, 2013, the United States Supreme Court decided the case of *Arizona v. Inter Tribal Council of Arizona, Inc.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 186 L.Ed.2d 239, 133 S.Ct. 2247 (2013). Justice Scalia framed the case as follows:

"The National Voter Registration Act requires States to 'accept and use' a uniform federal form to register voters for federal elections. The contents of that form (colloquially known as the Federal Form) are prescribed by a federal agency, the Election Assistance Commission. The Federal Form developed by the EAC does not require documentary evidence of citizenship; rather, it requires only that an applicant aver, under penalty of perjury, that he is a citizen. Arizona law requires voter-registration officials to 'reject' any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship. The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States 'accept and use' the Federal Form."

133 S.Ct. at p. 2251.

That Court held that the Arizona statutory requirement *vis-à-vis* the "Federal Form" requiring additional physical documentation as proof of citizenship was "inconsistent with" that federal law, saying

"We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form. *Siebold, supra*, at 397. If this reading prevails, the Elections Clause requires that Arizona's rule give way.

We note, however, that while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, *it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'*" (Emphasis added)

133 S.Ct. at p. 2257.

The Court, though denying the current efficacy of Arizona's proof of citizenship requirement *vis-a-vis* the "Federal Form", did opine possible alternative legal routes for Arizona to obtain approval for its registration procedures either under the Federal Administrative Procedure Act by resubmission of its previously denied request to the Federal Election Assistance Commission or, perhaps, an independent suit. 133 S.Ct. at 2259-2260. The Court concluded its majority opinion by finding:

"We hold that 42 U.S.C. § 1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial

review of the EAC's decision under the Administrative Procedure Act."

133 S.Ct. at p. 2260.

As set forth earlier, the Kansas Secretary of State, and Arizona officials, pursued one of the opined alternative remedies noted. While sustained, as noted, in his point of view by the U.S. District Court for the District of Kansas, the Secretary's position was firmly rejected on his appeal to the Tenth Circuit Court of Appeals, 772 F.3d 1183 (November 2014). He appealed the latter decision to the United States Supreme Court, which on June 29, 2015 declined review. See 2015 WL1307634. As the Tenth Circuit Court of Appeals astutely noted, through its reference to the NVRA, Congress explicitly rejected any additional proof of U.S. citizenship beyond the oath or affirmation supporting the "Federal Form" registration. 772 F.3d p. 1195 and FN7.

The Kansas Constitution in Art. 5, § 1, sets the "Qualification of Electors" as U.S. citizenship, age 18, and resident of the voting area, with special

provisions for voting for presidential electors. Art. 5, § 2 establishes disqualifications, none of which include failure to provide proof of U.S. citizenship. However, Art. 5, § 4 directs the legislature to "provide by law for proper proofs of the right of suffrage".

This case, when filed in this Court on November 21, 2013, was first removed to federal court, which found no federal issue and returned it to state court (2014 WL1374048 April 8, 2014). As just previously discussed, even if the Secretary of State had been successful in his pursuit of changes to the EAC to have it put Kansas voting requirements on the NVRA "Federal Form", it would not change the congressional intent that a "Federal Form" registrant would be entitled to vote in elections in Kansas for federal offices only upon oath or affirmation of U.S. citizenship under "Federal Form" registration. The State requirements noted would not encumber the voting rights provided by the NVRA, but only, at best, advise that, for Kansas

state or local office elections, more may be required. Otherwise, the very reason the *Elections Clause* was placed in the U.S. Constitution would be jeopardized, that is, to prevent a State from refusing or, most likely equally so, encumbering or suppressing voting access for the selection of federal office holders such that federalism would be jeopardized and undermined.

What is abundantly clear from the chain of cases emanating from Secretary Kobach's federal challenges is that, at least for federal offices, a proof of U.S. citizenship requirement falls within the *Elections Clause's* "Time, Place, and Manner" provision, hence, how the proof of qualification of U.S. citizenship for voting for federal offices is to be met is ultimately within the power of Congress and has been exercised, as noted, finding an oath or affirmation sufficient.

Given Kansas's second step of proof of citizenship for voter registration, which in fact, cannot be substantively distinguished from the statute of Arizona at issue in the *Inter Tribal Council* case, the question

is what effect can be given Kansas's proof of citizenship requirement given the right the Federal Form grants registrants to vote for federal offices. Under current Kansas law, the registration procedure established by the Secretary for registration only runs so far, like a road runs to where a bridge has washed out. Seemingly, nothing but the provision of separate ballots to vote for candidates for federal office would suffice if Federal Form registrants (K.S.A. 25-2309(a)(2)) are to be separately categorized from Kansas form registrants (K.S.A. 25-2309(a)(1)). In such case, persons registered by the "Federal Form" would be entitled to vote for federal offices, having affirmed the qualification to do so under penalty of perjury. Otherwise, if registered also, or separately - as Belenky and Jones were authenticated as eligible to do under the Kansas procedure - the voter could receive a combined ballot with both federal candidates and state and local offices, or, if relevant and as has long been authorized by the legislature, a separate



local offices ballot (K.S.A. 25-618). If a registrant chose not to, or was unable to, provide proof of U.S. citizenship under the separate Kansas registration procedure, then his Federal Form registration should, nevertheless, be available as a "backstop" in order to obtain access to a federal candidate ballot. *Inter Tribal*, 133 S.Ct. at p. 2255.

Here, in the Court's view, is where the registration system established by the Secretary meets a roadblock, as Kansas now maintains but a single combined ballot requirement for federal and state candidates for offices, *i.e.*, K.S.A. 25-610, K.S.A. 25-611, K.S.A. 25-616, and K.S.A. 25-617. The fact that a separate federal ballot is yet unavailable - the single, combined ballot requirement still prevailing - leads the Court to believe that what the Secretary of State has done - in maintaining registration lists - leads to no lawful end that the Secretary can be said to be administering. Further, and importantly, the Kansas Legislature was in session in 2014, and again in

2015, and now is gone until 2016, but for any special session. The 2014 and 2015 legislative cycles followed the *Inter Tribal Council* decision made in June, 2013. The 2015 session came after the 10<sup>th</sup> Circuit Opinion on the Secretary's suit against the EAC which culminated in November 2014. Neither session of the legislature took action, either to attempt to ratify the Secretary's action nor to provide a separate ballot for federal offices.

Even the Secretary has never moved beyond on his own *ad hoc* procedure for Federal Form registrants, except in the attempt to promulgate administrative regulations that require a suspense list for voters that have yet to provide proof of U.S. citizenship. See "Notice of Hearing on Proposed Administrative Regulations" at proposed "K.A.R. 7-23-15". As can be seen, the latter proposed regulation also adds a timeline on registration applicants for production of proof of U.S. citizenship and cancellation of the application on failure to meet the deadline. *This*

proposed regulation could have no independent relevance to Federal Form registrants based on the cases previously discussed. Notwithstanding, the inapplicability of this proposed regulation to, at least, Federal Form registrants, the Secretary's procedures to give limited ballot access to Federal Form registrants is still, per his instructions, to be accomplished by post-vote editing by local election officials of a Federal Form voter's executed and submitted ballot, by excising votes for state offices or local offices, if any, and counting those for federal office. See Plaintiffs' petition at Exhibit C. While this latter "fix" was done without voter notice, public notice, or comment under statutes requiring such for rules and regulations (K.S.A. 77-415 *et seq.*), and though the Secretary has been given the power to do so (K.S.A. 25-2309(s)), nevertheless, and most importantly in the Court's view, the Secretary's instructions - by reference to the resulting procedure instructed - are wholly without a basis of legislative authority and

further stand as contrary to existing state statute governing provisional ballots as well as the Secretary's own adopted regulations.

Without the availability of a separate ballot for federal offices, the only possible reason for maintaining a suspense list registration system now that includes Federal Form registrants is to enable election officers to identify "Federal Form" registrants for the purpose of a challenge to be made. However, viewing the statutes under which a challenge is made reveals no basis by statute for a challenge to be exercised against "Federal Form" registrants merely because they chose that method of the two registration methods provided by K.S.A. 25-2309(a). As the *Inter Tribal Opinion* noted, any impeachment of U.S. citizenship accepted by Congress based on registrant oath or affirmation would necessarily have to have been derived from sources extraneous to the registration application itself and cannot be compelled by State officials, 133 S.Ct. at p. 2257.

K.S.A. Supp. 25-414, which was last amended in 2004, which, of course, is before the advent of the K.S.A. Supp. 25-2309's amendment in 2010, provides:

**"25-414. Duty of judge to challenge; provisional ballots, acceptance or rejection procedure.** (a) It shall be the duty of each judge of election to challenge any person offering to vote, whom the judge shall know or suspect not to be qualified as an elector.

(b) A person who: (1) Has moved from an address in the registration book to another address in the same county; or (2) has not moved, but the registration list indicates otherwise, is a qualified elector, but shall be challenged by an election judge and entitled to cast only a provisional ballot pursuant to K.S.A. 25-409, and amendments thereto.

(c) Any person who votes after the polling place hours prescribed in K.S.A. 25-106, and amendments thereto, pursuant to a court or other order is entitled to cast only a provisional ballot pursuant to K.S.A. 25-409, and amendments thereto.

(d) The application shall be delivered to the election judges and attached to the provisional ballot envelope. Such application and ballot envelope containing the ballot shall be transmitted to the county election officer with election returns and supplies.

(e) Following the determination of acceptance or rejection of any provisional ballot by the county board of canvassers, the county election officer shall update the

registration record, if appropriate, for voting in future elections, and send, by nonforwardable first-class mail, to the address specified on the application, notice of disposition of the application. The registrant's name shall not be removed from the official list of eligible voters by reason of such a change of address except as provided in K.S.A. 25-2316c, and amendments thereto."

K.S.A. 25-414.

Section (a) permits a challenge to a voter whom the election official "shall know or suspect not to be qualified as an elector". Minimally, registrants who applied with the "Federal Form" application are registered *and* qualified electors at least for federal offices. However, the *statute* provides for *no partial or limited acceptance* of a voter's ballot, but rather section "(e)" specifies only either "acceptance or rejection" of the ballot that was marked "provisional" by the challenge. No other sections of K.S.A. 25-414 have relevance here.

K.S.A. Supp. 25-409, again last updated in 2004 - unlike K.S.A. Supp. 25-2309, which was updated in 2010 - provides as follows:

**"25-409. Challenged voters; rejection or acceptance of vote; procedure.** (a) If any person challenged pursuant to K.S.A. 25-414, and amendments thereto, shall refuse to subscribe the application for registration pursuant to K.S.A. 25-2309, and amendments thereto, the judges shall reject such person's vote.

(b) If a person is challenged pursuant to K.S.A. 25-414, and amendments thereto, such person shall be permitted to subscribe the application for registration and mark a ballot. The person shall then execute the affirmation prescribed in subsection (c) of this section before a member of the election board and the ballot shall thereupon be sealed in an envelope. The judges shall write on the envelope the word 'provisional' and a statement of the reason for the challenge, and that the ballot contained in the envelope is the same ballot which was challenged pursuant to K.S.A. 25-409 et seq., and amendments thereto. Such statement shall be attested by two of the judges. *The judges shall attach the application for registration to the envelope containing the provisional ballot. The envelope shall be numbered to correspond to the number of the provisional voter's name in the registration or poll book, and the word 'provisional' shall be written following the voter's name in the poll book.* The judges shall provide written information stating how the voter may ascertain whether the voter's provisional ballot was counted and, if such ballot was not counted, the reason therefor. Such provisional ballots, together with objected to and void ballots packaged in accordance with K.S.A. 25-3008, and amendments thereto, shall be reviewed by the county board of canvassers at the time

prescribed for canvassing votes, and such board shall determine the acceptance or rejection of the same. The county board of canvassers shall open all ballots deemed to be valid and include such ballots in the final canvass of election returns. (Emphasis added.)

(c) The voter's affirmation shall be sufficient if substantially in the following form, but the voter's affirmation shall not contain less than that prescribed in the form:

VOTER'S AFFIRMATION

STATE OF KANSAS, COUNTY OF \_\_\_\_\_, ss.

I am a registered voter in this jurisdiction and I am qualified to vote in this election. I declare under penalty of perjury that the foregoing is true and correct. This \_\_\_\_ day of \_\_\_\_\_ A.D. \_\_\_\_\_, Voter \_\_\_\_\_, Judge of Election"

K.S.A. Supp. 25-409.

Neither "(a)" nor "(b)" of K.S.A. 25-409 have relevance here since applications made on the "Federal Form" have already complied with the terms for its use, which Kansas is required to "accept and use". 133 S.Ct. at p. 2251. The Federal application form is specifically provided as one of two that can be used by K.S.A. 25-2309(a), as amended. There is no need for a second subscription under oath to an "application" or



otherwise. The same procedures are adopted for challenges in counties using voting machines. See K.S.A. 25-1337. The same applies to advance voting. K.S.A. 25-1136. Challenges at primary elections follow general election laws, except party affiliation may be challenged. K.S.A. 25-216.

While the *Inter Tribal Council* case completely nullified K.S.A. (2010 Supp.) 25-2309(1)'s second step additional proof of citizenship requirement for "Federal Form" registrants, and while K.S.A. 25-2309(a) provides and recognizes the "Federal Form" as an additional method of registration, the Secretary's instructions, nevertheless, decree Federal Form registrants' ballots to be provisional and conditions the counting of their ballots on his authorization to edit them. In the Court's view, the Secretary's currently existing instructions of record, as he applied here for the 2014 primary and general elections, stand as *ad hoc* and *ultra vires* (See Plaintiffs' Petition Exhibit A and Exhibit C). The

same would be true even were the substance of the instructions to be adopted as a regulation. This is particularly true in regard to Exhibit C which, because of its importance and relevance to the issue here, is reproduced in full:

**"Office of the Kansas Secretary of State  
Update and Instructions Regarding  
Federal-Form Voter Registration Applicants**

June 4, 2014

Previous instructions to county election officers dated and issued May 23, 2014 provided an update on *Kobach et al. vs. United States Election Assistance Commission*, which is the case filed jointly by Kansas and Arizona on August 21, 2013. As noted in the May 23 instructions, the district court decision in our favor was appealed. The Court of Appeals had indicated it would expedite its review of the case, and the Secretary of State's office hoped for a ruling before the August 5 primary. A favorable ruling issued by the Court of Appeals before August 5 would have meant there would have been no need for a bifurcated election system wherein voter registration applicants who submitted the federal form without documentary proof of U.S. citizenship would be permitted to vote in elections for Federal office only.

However, on June 3, 2014, our office received word that the Court of Appeals had scheduled

arguments for August 25, 2014, which is after the Kansas primary. We still hope for a final decision before the November general election. However, because there will be no decision before the primary, we have revised the procedure to be followed by county election officers. Please note the following instructions.

### Actions by County Election Officer

1. Continue the practice of maintaining a list, outside of ELVIS, of voter registration applicants who submitted federal forms without proof of citizenship. The list should include all such applicants who submitted federal forms without proof of citizenship **between January 1, 2013 and July 15, 2014**, which is the voter registration deadline for the primary.

2. Continue to contact all incomplete-status applicants (those who used the Kansas form) at least twice to request citizenship documents. Also, if you have federal-form incomplete applicants, continue the expanded effort to contact federal-form applicants at least one additional time by phone or personal visit, if necessary, with a goal of reducing the list of federal-form applicants to zero. Note that these federal form applicants can provide proof of citizenship as late as August 4, 2014, and still complete their registration in time for the August 5, 2014, primary. At some point during the week before the primary provide your list of federal form incomplete applicants to the Secretary of State's Office.

3. Prepare to issue provisional ballots to federal-form incomplete applicants at the

primary election and count only the votes for federal offices (U.S. Senate and U.S. House of Representatives). The process will be similar to the partial provisional ballot procedures specified in Kansas law at K.S.A. 25-002(b)(3). Use the following procedure for issuing provisional ballots to federal-form incomplete applicants:

a. Maintain a list of federal-form incomplete applicants in the county election office.

b. Do not print these applicants' names on the poll book. *They are not registered voters under Kansas law, even though they will be permitted to vote for federal offices during the August 5, 2014, primary.*

c. Poll workers will issue provisional ballots to these voters the same as any other voters whose names do not appear in the poll book.

d. When provisional ballots are returned to the election office after the close of polls on primary election day, use the list of federal-form incomplete applicants to separate their provisional ballots into a separate stack,

e. Unless these provisional ballots are determined to be invalid for another reason, make a recommendation to the county board of canvassers to count only the votes for federal offices.

f. Manually count the votes and add them to the other vote totals.

If you have any questions about this procedure, do not hesitate to contact Brad Bryant or Bryan Casey at the Secretary of State's Office."

Plaintiffs' *Petition*, Exhibit C. (Emphasis added).

The Kansas Constitution at Article 4, § 1 states as follows:

"§ 1: **Mode of voting.** All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide."

No question exists but that this provision provides *for the secrecy of a voter's ballot*, whether the vote is cast in person or by machine. *Sawyer v. Chapman*, 240 Kan. 409, 412-413 (1986). Further, the Kansas Supreme Court has held that any compromise of this right must be measured against "a compelling state interest". *Sawyer* at pps. 414-415. See also *State ex rel, v. Beggs*, 126 Kan. 811 (1928); *Taylor v. Bleakley*, 55 Kan. 1 (1895). It is only by proper law that ballot secrecy may, for compelling reasons, be conditioned, e.g., *Lambeth v. Levens*, 237 Kan. 614 (1985); *Hansen v. Lindley*, 152 Kan. 63 (1940); *Burke v. State Board of*

*Canvassers*, 152 Kan. 826 (1940); *Lemons v. Waller*, 144 Kan. 813 (1936); *Hooper v. McNaughton*, 113 Kan. 405 (1923).

Here the Secretary of State seeks to invade the secrecy of the balloting process for "Federal Form" registrants otherwise protected by the Kansas Constitution's Article 4 § 1. He has declared all such ballots to be "provisional", hence, effectively challenging such "Federal Form" registrants who present themselves to vote, but he does so on grounds neither *specified by statute* as a basis for challenge nor based on independent knowledge held by the Secretary or local election officials of such voters' non-qualification to vote for federal offices, but rather did so because these voters did not provide proof of U.S. citizenship that would qualify them, in his view, to then vote for state or local offices as well. Kansas election laws fundamentally rest challenges and the invasion of ballot secrecy on some voter qualification error affecting his or her eligibility to vote. Internal,

post-vote, voting errors reflected on a ballot are anonymous, unless illegal, and then challenged through proper proceedings. However, Federal Form registrants stand, by the noted ruling of the United States Supreme Court, as fully qualified to vote for federal offices.

As noted, Kansas does not provide for separate ballots for federal and state candidates, but rather maintains a unitary one. Thus, if any error exists, it is a post-vote error, not a registration error, and the error would rest with the State and its election officials, not the voter, *in failing to provide a suitable ballot* - one conforming to the Kansas Constitution, that is, a ballot that secures, except in the event of a voter error *that the legislature has accepted and authorized as grounds to invade the secrecy of the ballot itself*. That authorization is not present here and its absence, as measured both against the Kansas constitutional commitment to ballot secrecy and the failure to authorize a separate ballot for federal office candidates, reflects either a grand

error by the legislature, which would not be presumed, or really a judgment made by the legislature to fully "accept and use" the Federal Form premised as it is on oath or affirmation in *all* elections.

Both by Kansas law (K.S.A. 25-2309(a)) and by federal law, as construed by the *Inter Tribal Council* case, registration for federal voting purposes is complete when the "Federal Form" is submitted. Yet, here, the Secretary of State has directed such "Federal Form" registrants not be entered in the registration books, but, rather, placed on a suspense list, and, thereafter, if they cast a ballot, the Secretary of State claims the right to seize the voter's executed ballot, have it examined, and count the votes, if any, that may have been cast for federal offices and not counting the votes for state or local offices. Now, effective July 1, 2015, the Secretary may assume the authority to bring the force of prosecution if one such "Federal Form" voter subscribes to the oath required before voting such a combined "provisional" ballot



(K.S.A. 25-409) or, otherwise, strayed into the list of State or local candidates and voted purposely or in error or misunderstanding for one or more of them. He does this not because the voter has not sworn his eligibility to vote as a U.S. citizen and Kansan, but rather because the voter has not first proved U.S. citizenship by documents extrinsic to the accepted Federal Form, notwithstanding the fact that the "Federal Form" is a Kansas statutorily authorized, federally prescribed, method to register Kansas voters, which the State has agreed to "accept and use". Nevertheless, State election officials hand out a combined Federal, State, and local ballot instead of one constitutionally acceptable for its purpose and decrees for its invasion in violation of Art. 4, § 1 of the Kansas Constitution.

None of the *ad hoc* procedures employed by the Secretary of State authorize or justify such treatment of a Federal Form registrant. Nor, just because Kansas has declined to provide a separate ballot containing

federal office candidates only, should a voter registered by the "Federal Form" be subjected to the threat of prosecution based on a ballot procedure not authorized by the legislature in order to exercise his or her most fundamental franchise. The ballot itself is a document that he or she loses control of - and the ability to prevent third-party alteration of - the moment it is submitted. Without some clear legislative direction compatible with the Kansas Constitution such a 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 and forced to waive ballot secrecy simply by virtue of the State's failure to provide a constitutionally conforming ballot. Neither should such Federal Form registrants, so long as they are entitled to register by that means, be given a "scarlet letter" and placed on a suspense list in lieu of being placed in the registration book based on some anticipation by the Secretary that the present law giving finality to that

voter's act of "Federal Form" registration may, in the future, be changed by the Kansas legislature or Congress. K.S.A. (2010 Supp.) 25-2309(a) explicitly accepts the Federal Form as a means of registering in Kansas. The *Inter Tribal* case made null and void Kansas's K.S.A. 25-2309(1)'s second step-proof of citizenship requirement requiring extrinsic documentation for Federal Form registrants. K.S.A. 25-2302 declares such act of registration as required by the act "shall entitle such voters to vote" and "shall prima facie evidence of the right of the voters to vote in any election held in the voting district where such voter resides". Thus, under Kansas law, Plaintiffs and the constituents of Equality of Kansas who have used, or will use, the Federal Form stand - and have stood since the Federal Form application was submitted - as fully registered to vote. In fact, the passing of two legislative sessions without alteration of existing law and the respective legislatures' omission to authorize

a separate ballot for federal offices can be seen to support that intent for Kansas's election laws.

Even the fact that a separate ballot for county and township officers (K.S.A. 25-618), certain ballot questions (K.S.A. 25-620; K.S.A. 25-621), and municipal elections (K.S.A. 25-2101 et seq.) can be, or may be, available for an election would not justify the dichotomy in registration practices. Absent some requirement to maintain separate registration books, which the law would require be promulgated first by rule or regulation, no basis for a distinction stands as authorized. See K.S.A. 25-2304; K.S.A. 25-2305. The Rules and Regulations Filing Act - K.S.A. 77-415 et seq. - procedures must be followed in order to do so, if it is to be done at all.

The bottom line is that in the absence of legislation providing a separate ballot for federal offices or the legislature's finding of a compelling State reason for not doing so, "Federal Form" registrants stand as fully qualified electors even when

only a combined ballot is provided to that voter. Even in the case where a separate local ballot is made available, "Federal Form" registrants stand as qualified electors until such time as a rule and regulation authorized by K.S.A. 25-2304 and K.S.A. 25-2305 has been adopted in accordance with the Rules and Regulations Filing Act that would permit that voter's registration to be entered into a separate registration book that would reflect limited voting rights only. The legal rule is that, if there be ambiguity in an election law, the law's construction should be in favor of the right of suffrage. *Burke v. State Board of Canvassers*, 152 Kan. 826, 836, (1940).

The Kansas guarantee of ballot secrecy requires both legal authority, specificity, and compelling state interest to avoid its tenets. It can hardly be said that *ad hoc* action taken by an executive branch officer - without authority but of his own creation - to invade the ballot secrecy of some voters on the surmise that they lied *under oath* about their qualifications to

register and vote provides a compelling basis to violate Art. 4, § 1 of the Kansas Constitution.

Except as noted, such voters registered by way of the "Federal Form" and authorized to do so by K.S.A. 25-2309(a)(2) have the equal right with other Kansas voter registrants to a secret ballot until the Kansas legislature - measuring a compelling state interest - decides otherwise or provides a separate federal ballot. This case, in part, attacked the Kansas Secretary of State's failure to implement regulations to cover matters that are clearly posited by the Secretary's directives as legal interpretations intended by him to be followed. *American Trust Administrators, Inc. v. Sebelius*, 273 Kan. 694 (2002). The Secretary does have authority to issue instructions to local election officials. (K.S.A. 25-124). The Secretary of State is the "chief state election official". K.S.A. 25-2504. However, particularly, in the area of voter registration, his authority is to be exercised by rules and regulations. See K.S.A. 25-

2304; K.S.A. 25-2305. However, in legal fact, the Secretary is not instructing on, nor even interpreting, any *applicable* Kansas statute, but rather he is proclaiming now as law that which does not exist and, in fact, is contrary to existing state law and federal law. As such, he has no authoritative basis upon which to instruct nor, with limited exception, too promulgate a rule or regulation. *Compare, State, ex rel. Stephan v. Finney*, 251 Kan. 559, 578, 583 (1992). That the Secretary may have harbored concerns over this may well explain his vigorous pursuit of federal litigation.

**EQUALITY KANSAS' S STANDING:**

Equality Kansas consists of adult Kansans with the ability to vote and with a mission to aid in voter registration through a federal and Kansas statutorily authorized method of registration using the United States mail system. This method best fits its capabilities, given its lack of ready access to potential voters' personal documents, but, otherwise, fulfills the purposes of its mission in securing voting

privileges for its members and like-minded fellow Kansans. It asserts standing at this point to raise issues that relate to determining for itself how best it may secure its organizational purposes.

It asserts its members' interests are not uniformly shared with all citizens and it wishes to advance the law in many areas where others may not share its view through the ballot box. This attribute of minority status or thinking gives Equality Kansas a narrow, but identifiable, focus, particularly, if the existing laws governing equality for which they seek alteration or the absence of such laws can be seen as representing the majority's view. Hence, the association urges that by the particular attributes of its membership it has an interest apart from other citizens and that Secretary Kobach's actions have affected, *i.e.*, injured, it and its members.

Defendant's Exh. 20: Witt Affidavit, Exh. 9.

The prerequisites for a finding of associational standing have been consistently declared as follows:



" . . . when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted or the relief requested require participation of individual members".

*NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 387 (2000). See also, *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

The Plaintiffs' Petition here carried three Plaintiffs: two individuals and Equality Kansas. Now, and admittedly at the time of the preliminary injunction hearing in July 2014, the individually named Plaintiffs had, and have, unquestionably been brought into what the Kansas Secretary of State believes is a voting safe harbor and each now possess the ability to vote in all Kansas elections. In this, the Court concurs. Further, these individuals had, and have, no membership in Equality Kansas.

These two individually named Plaintiffs at one time in the past bore a "scarlet letter" affixed by the Secretary and by his actions were ineligible for the municipal elections occurring in the spring of 2014.

They, at the filing of this case, clearly had standing. However, through the Secretary's act of overriding *their choice* of how, when, and upon what basis they wished to be registered to vote, he posits they now possess no basis for relief that be accorded to them as this action now stands. These individual Plaintiffs' standing will be discussed in a separate section subsequent.

Equality Kansas itself has never identified any of its members whose alleged voting rights have been impaired and no individuals, like Belenky and Jones, have subsequently sought intervention. Equality Kansas's claim now stands alone as purely associational and with no members identified as being personally impacted by the Secretary's actions other than through the impact claimed to accomplishing the association's purposes. Associational standing to sue is dependent on its members standing to sue. *Gannon v. State*, 298 Kan. 1107, 1127 (2014) *citing NEA-Coffeyville v. U.S.D. No. 445, supra*. The "cognizable injury" claims must

affect a member in a "personal and individual way".  
Gannon at p. 1123. If not, though a legal dispute may exist, no actual litigable controversy exists. *Boeing Airplane Co. v. Board of County Com'rs of Sedgwick County, et al*, 164 Kan. 149 (1947); *Garden City News v. Hurst*, 129 Kan. 365 (1929); and *Williams v. Flood*, 124 Kan. 728 (1928).

Here, in reality, Plaintiff Equality Kansas can only satisfy one prong of the basis for standing, that is, that given the Kansas statutes and Secretary Kobach's action, its use of one of the national voter registration act methods - registration by mail based on oath of affirmation only - which though sanctioned as a method of registration in Kansas by K.S.A. 25-2309(a)(2), is now less efficacious than it was prior to January 1, 2013. Unquestionably, this lack of efficaciousness to the NVRA mail registration method is germane to its purposes and has impacted one road to their accomplishment. Nevertheless, the relief asked from this Court by Equality Kansas would principally

inure to others who are either registered now via the "Federal Form" or who might so register by that method in the future. These registrants, without Court enforcement of their rights and privileges, might otherwise be subjected to either a lack of ballot access to which they were otherwise entitled or to ballot privacy violations.

Here, however, there are no members of Equality Kansas who can identify as having such disabilities nor does such a disability adhere to a member merely from membership in Equality Kansas. Effectively then, Equality Kansas is fundamentally asserting the Kansas constitutional rights of third parties to register to vote, which rights are individual to those third parties. This it cannot do. *Warth v. Seldin*, 422 U.S. at 511. Hence, its standing is eroded from a lack of showing its members could sue and thus, accordingly, any relief, if given, would fall to others. Basically, as it stands, Equality Kansas can only show, as could only each of its members, that by virtue of the

Secretary's actions someone it aided to register, or someone that one of its members aided to register, may be treated wrongfully by the Secretary. This is not a "cognizable injury" to Equality Kansas, one that affects a member in "a personal or individual way", which would give either Equality Kansas or any of its members, merely by their membership, an independent standing to sue. While Equality Kansas may, perhaps, gain standing, given the Secretary's ongoing activities, by way of the Kansas Judicial Review Act (K.S.A. 77-611), it will be through another, not this, case.

**THE STANDING OF PLAINTIFFS BELENKY AND JONES:**

It is claimed Plaintiffs Belenky and Jones no longer have a stake in these proceedings and their claims are moot. This position of the Secretary is based on his "rescue" of them from what he claims was their error of choice of registration method, hence, he proclaims they have fully secured their right to vote in all elections and, hence, free, it would be argued,

from any those limitations or disabilities the Court has discussed previously. While it is true that the Secretary has accepted these two Plaintiffs as fully qualified Kansas residents and U.S. citizens and that they presently stand before the Court without any registration limitations to the exercise of their respective voting franchises, it is not quite true that they retain no legally meaningful stake in this case for the Court to adjudicate.

Clearly, Belenky and Jones were, and still are, presenting a test case to the Court dealing with the reach of their respective entitlements to vote by registering pursuant to K.S.A. 25-2309(a)(2), which authorizes their respective registrations by way of the "accept and use" mandate underlying the National Voters Registration Act, the so-called "Federal Form" means of registration. Test cases are neither forbidden nor frowned upon unless they tend to lack a true controversy, such that the case and the anticipated result is manipulated rather than truly adversely

presented for adjudication as a true case and controversy. *The State v. Dolley*, 82 Kan. 533, 536-537 (1910). Here, clearly, Kansas Equality was, and still is, sponsoring this test on these two Plaintiffs' behalf and unquestionably the issues in this case have been, and are, truly adversarial. Further, the legal fact, now determined, that Equality Kansas itself has no standing, or the fact Belenky and Jones are not members of Equality Kansas, seems of no consequence to the determination of their respective individual standings. The same vigorous counsel represented all three named plaintiffs and continues to do so. Neither Mr. Belenky nor Mr. Jones has indicated a desire to withdraw their dispute, notwithstanding their newly, yet involuntarily, acquired status as full and unencumbered voters in the eyes of the Secretary. However, to assert these two individual Plaintiffs now lack standing misses the premise of their suit and the right they claimed and wished to have adjudicated,

i.e., the reach of their voter entitlement in Kansas using Federal Form registration.

Defendants are solely looking at the equitable claim for relief articulated in their pleadings and overlooks the basis of their claim, which rests in a declaratory judgment. A declaratory judgment action can be maintained even if no relief is sought or to be accorded. K.S.A. 60-1701; K.S.A. 60-1702. The Defendants seem to have confused a remedy with a cause of action. The difference between the two is important.

"The phrase 'cause of action' has often been defined. It cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused. Bouvier defines it as a right to bring an action. . . . 'Cause of action is the right to prosecute an action with effect.' In . . . [it is] defined as follows:

'It may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action.'



Pomeroy in his Code Remedies, § 453, uses the following language:

'Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs.'"

*Bruner v. Martin*, 76 Kan. 862, 865-866 (1907).

As stated in *Foster v. Humburg*, 180 Kan. 64, 67-68 (1956):

"While allegations of damages are essential in a petition, they do not constitute the 'cause of action'. The 'cause of action' is the wrong done, not the measure of compensation for it, or the character of relief sought. A 'cause of action' arises from a manifestation of a right or violation of an obligation or duty. . . . Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach or wrong. The 'right of action' is merely the right to pursue a remedy, and the 'cause of

action' is the concurrence of the facts giving rise to an enforceable claim." (Citations omitted)

That Court went on to state:

"A mere failure of a petition to allege facts showing the correct measure of damages does not render the petition bad as against a demurrer. If the petition discloses a cause of action for recovery of damages, it does not fail to state a cause of action simply because the plaintiff attempted to apply an improper rule for the measure of damages sustained. It is the duty of the court on the trial of the action to apply the correct rule, whatever that rule may be under the evidence as disclosed in the case."

*Id.* at pps. 68-69.

Further it stated:

"It is a well-established rule in this state that where the original petition alleges a cause of action but does so imperfectly and with insufficient detail, and the additional allegations of an amended petition are only an enlargement and amplification of the averments of the original by setting out more definitely that which was previously imperfectly pleaded and do not set up a new cause of action, . . ."

*Id.* at p. 69.

The principal determinant to assess the propriety of proceeding upon a declaratory judgment is the existence of a genuine controversy, such that the

result, unlike a case where the controversy is feigned in an attempt to gain a desired result, is one truly adversarially arrived at and in which each party had, and has, a genuine stake in the outcome. An earlier Kansas case provides an extended discussion and exemplars for the use of this remedy. *The State, et al., v. Grove*, 109 Kan. 619 (1921). This latter case has also been one noted in a well written discussion on an issue involving the separation of powers. *State, ex rel., Morrison v. Sebelius*, 285 Kan. 875 (2008). The latter case's relevance here is that declaratory opinions issued without the benefit of a current controversy in matters of government intrude into the powers of other branches of government, which would then tend to pre-empt these other branches right of first input on the issues raised. *Id.* at p. 885, 899.

This latter concern does not attend this case because it involves the question whether an executive branch official has overrun or misinterpreted the authority given by the legislature. Both of the other

two branches of government have accordingly had their input. Further, the case is being defended ostensibly with the apparent sanction of the Kansas Attorney General. The case does not directly involve the public as whole, but only a class of citizens, of which Belenky and Jones are but two, who believed current Kansas law provided them with the right to secure full voting privileges by way of the National Voters Registration Act, but found the Kansas Secretary of State was treating them as he did other applicants not using the Federal Form and placing them on an off-the-books "suspense list" if no proof of citizenship had been provided. At the Secretary's direction these registrants were also sent letters making demands of them for proof of citizenship, notwithstanding registrants, by way of the Federal Form, had no such obligations, as declared in the *Inter Tribal Council* case, 133 S.Ct. 2247 decided in *June 2013*. Had their Federal Form registration status persisted into the present, but for their "rescue" by the Secretary after

this suit was filed, either their attestation as to their voting qualifications or a balloting error could arguably present potential opportunity for their prosecution by the Secretary. L. 2015, ch. 87.

Here, one Plaintiff, Mr. Belenky, applied for registration on August 2, 2013, by way of K.S.A. 25-2309(a)(2) but was told his registration was incomplete, *ergo*, not accepted without proof of citizenship (Plaintiffs' Exhibit 7: Belenky's Answers to Defendant's Interrogatories and Request for Admissions at Exhibits A and B; Defendants' Fact No. 4). Mr. Belenky claims his name should have been added on or about August 6, 2013 to the registration book as the Kansas statute requires. See K.S.A. 25-2302. Instead, he was placed on an out of channel, *ad hoc*, "suspense list" and his formal registration was detained on that list *until July 7, 2014*, when the Secretary of State contacted the Kansas Department of Revenue Motor Vehicle Division for Mr. Belenky's licensing information. That information indicated he

had provided proof of citizenship to obtain his driver's license on November 25, 2013, but had declined voter registration through the DMV. (The latter is also a method of registration under the NVRA. See, 52 U.S.C. 20504). The Secretary of State then secured local officials to add Mr. Belenky into the registration book, hence, relieving him from his detention on the "suspense list".

Similarly, Plaintiff Jones registered by way of the NVRA's Federal Form in July, 2013, and, likewise, was sent a letter on or about July 23, 2013 conditioning registration on his supplying proof of U.S. citizenship. (Plaintiff Jones Exhibit 8: answers to Defendant's interrogatories and requests for admissions at Exhibits A and B; Defendants' Fact No. 16). Similarly, his registration was also detained. On *July 2, 2014* the Secretary consulted the DMV and found Mr. Jones had provided proof of citizenship for his drivers license, which he had obtained back on *July 23, 2013*, and, also at the time, had declined the opportunity to

register to vote. Then on July 8, 2014, the Secretary, like he did for Mr. Belenky, secured local officials to release Jones from the confines of the "suspense list" and add him into the voter registration book. Although this case had been filed in this Court on November 21, 2013, then went through the Federal court system, and the Secretary of State has asserted his vigorous assistance to aid those yet to provide proof of U.S. citizenship, the Secretary did not act to discover the Plaintiffs' proof of citizenship through the DVM and act to secure Belenky's and Jones's placement in the registration book until July 2014. However, yet he now seeks to claim as his reward for his "rescue" of these two Plaintiffs from their presumed error of judgment the dismissal of this suit, which questions the detention of the Plaintiffs' registration on a "suspense list", their receipt of demands for proof of citizenship as a prerequisite to their Federal Form registration right to vote, and the consequent denial of their ability to vote in municipal and school board

elections in their respective local areas in 2014 because they had not been entered in the registration book as registered to vote.

The question is then, can this legal proceeding and its proper and intended result be denied when Plaintiffs Belenky and Jones were given unrequested assistance by their adversary - much like a competitive runner who has been involuntarily dragged across the finish line by his competitors' supporters and disqualified, hence, denied the victory he or she would have achieved if left alone? Is there no value to the loss of a right to vote in a local election when one was otherwise qualified to vote based on the fact no proper procedures to exclude them had been enacted to disqualify them from voting by the authorized registration method they had chosen? If Belenky or Jones choose to move their residence out of the State and later back again and no Kansas law or policy has changed, will they be required to run this gauntlet of registration again and/or be restricted or relegated in



their choice of how to re-register? Apparently, the answer to the latter is yes. See K.S.A. 25-2316c. Would then their ballots still be conditioned or restricted if given the right to vote and would the Kansas constitutional right to ballot secrecy be assured if they chose to re-register by way of the "Federal Form"? Certainly, if the freedom to move is a right of individual choice, the potential for repetition exists.

Further, the Defendant overlooks the fact that this case has not yet had a case management order; no deadline has been set to amend the pleadings; and no discovery deadlines have been established. See *Foster v. Humburg*, 180 Kan. at p. 69. This controversy has real facts and real issues. Plaintiffs, Belenky and Jones, clearly state a "cause of action", which equates to "an injury in fact" under the rules governing standing. The harm could be re-experienced. It is an issue of public importance that affected them and will affect others and could still, and did, cause real harm

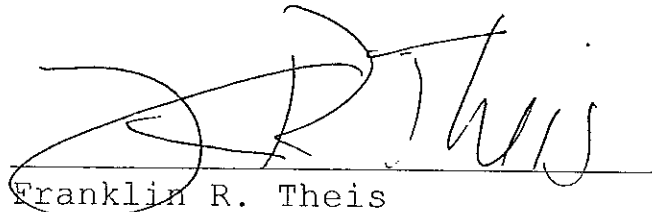
to these two Plaintiffs who, in order to test the extent of their rights to suffrage, decided to challenge the Secretary.

Surely a case should not be defeated merely by the unrequested assistance of their adversary in securing relief to the Plaintiffs through a standard or method chosen by the adversary, not them, the effect of which - they believe - *secured no more than that which they were already entitled.* While a case in federal court might sustain a different result, the U.S. Constitution does not have the Kansas Constitution's *Bill of Rights* § 18 - access to justice - guarantee. Further, see also *State v. Montgomery*, 295 Kan. 837, 840-841 (2012) (mootness doctrine is not a question of jurisdiction, but court policy); *Jenkins v. Schalansky*, 104 P.3d 1024, 2005WL217177, slip opinion at p. 4 (Kan. Ct. App. 2005). The Court is satisfied the case is not moot and that the individual Plaintiffs had standing, and maintain their standing, in this declaratory judgment action.

CONCLUSION

Accordingly, then, and for the reasons stated, the Court finds Defendants' Motion for Summary Judgment is submitted; that Plaintiffs' less technical compliance was adequate as a response; that Defendants' Motion for Summary Judgment in regard to the Plaintiff, Equality Kansas, should be sustained; and that the Defendants' Motion for Summary Judgment in reference to Plaintiffs Aaron Belenky and Scott Jones should be denied.

IT IS SO ORDERED this 21<sup>st</sup> day of August, 2015.



Franklin R. Theis  
Judge of the District Court  
Division Seven

cc: Stephen D. Bonney  
Robert V. Eye  
Dale Ho  
Julie A. Ebenstein  
Bryan Brown  
Kris Kobach