

IN THE TENTH JUDICIAL DISTRICT OF KANSAS  
CIVIL COURT DEPARTMENT

DAVIS HAMMET, )  
)  
Plaintiff, )  
)  
v. )  
)  
RONNIE METSKER, )  
in his official capacity as Elections )  
Commissioner in Johnson County, Kansas, )  
)  
Defendant. )

Case No. 18CV05173  
Div. No. 7  
Chap. 60

**REPLY MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, by and through his undersigned counsel, and submits the following Reply Memorandum in Support of Plaintiff’s Motion for Summary Judgment.

**ARGUMENT**

**I. DEFENDANT HAS NOT ADVANCED A READING OF K.S.A. §25-2422 CONSISTENT WITH ENGLISH SYNTAX AND THE RULES OF STATUTORY CONSTRUCTION.**

Defendant Ronnie Metsker’s primary defense of his interpretation of K.S.A. §25-2422—that it closes the names of provisional ballot voters— consists of quoting the entirety of the statute without further explanation, apparently because “the statutory provisions are quite clear.” Mem. in Opp. at 5-6. But the county clerks in at least seven Kansas counties would appear to disagree with Defendant’s assessment. See Mem. in Supp. at 9. While Defendant urges the Court to ignore those county clerks who have released provisional voter lists, Mem. in Opp. at 10-11, their disclosures cast significant doubt on the supposed “clarity” of Defendant’s interpretation of K.S.A.

§25-2422.<sup>1</sup> See, e.g., *Miller v. Bd. of Cnty. Comm'rs*, 305 Kan. 1056, 1063 (Kan. 2017) (statutory provisions are not clear where they are susceptible to different meanings with different effects on statutory language); *In re Duel's Estate*, 171 P.2d 271, 273-74 (Kan. 1946).

Beyond recitation of the statutory text itself, the only actual basis Defendant asserts in support of his interpretation is that the phrase “name of any voter who cast *such ballot*” must refer to ballots cast provisionally as well as regularly. Mem. in Opp. at 7. Plaintiff does not disagree. But the question at issue is whether the *contents* of a voter’s provisional or regular ballot is confidential, or whether the fact of a ballot being provisional or regular is *itself* confidential information. Defendant suggests that the second reading must be correct, otherwise the preceding phrase “whether cast in a regular or provisional manner” would be meaningless. Mem. in Opp. at 7. That is simply incorrect. The phrase has a manifestly more coherent meaning under Plaintiff’s interpretation, where it modifies the preceding clause (“disclosing or exposing the contents of any ballot”) as is expected in the English language. Mem. in Supp. at 8-9; see *State v. Durham*, 38 Kan. App. 2d 791, 794 (Kan. App. 2007) (“In construing statutes, qualifying words, phrases and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding”).

Under Plaintiff’s reading, therefore, the phrase “whether cast in a regular or provisional manner” clarifies that the contents of a ballot is confidential not only for regular ballot voters, but also for provisional ballot voters. In this way, the statute affords provisional ballot voters the same confidentiality afforded to regular ballot voters— it prevents the government from revealing who a person voted for. Indeed, the phrase “such ballot” that Defendant relies on in his reply, Mem. in Opp. at 7, confirms this position. “Such ballot” refers back to the very first instance of the word

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<sup>1</sup> Indeed, if the statute clearly proscribed disclosure of provisional voter lists then each of these county clerks has committed a serious criminal offense. See Mem. in Supp. at 9. Defendant’s interpretation must contend with that reality.

“ballot” in the statute. *See* K.S.A. §25-2422(a)(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*”) (emphasis added). The statute therefore prevents disclosure of the name of any voter, but *only* in conjunction with the specific contents of their ballot. This is the statutory reading that Plaintiff has advanced and the only reading consistent with the basic principles of English syntax. *See* Mem. in Supp. at 9; *Durham*, 38 Kan. App. 2d at 794.<sup>2</sup> Defendant claims in reply that Plaintiff has somehow mischaracterized or ignored the express wording in the statute. Mem. in Opp. at 6. But it is Defendant who implies into the statutory language a provision that no longer exists by reading in a prohibition that the legislature removed six years ago. *See* Mem. in Supp. at 11 (noting that K.S.A. §25-2422 used to contain a prohibition on disclosure of “the manner in which the ballot has been voted” before 2013).<sup>3</sup>

Furthermore, Defendant’s reading of K.S.A. §25-2422 would necessarily close the list of regular ballot voters as well as provisional ballot voters. *See* Mem. in Opp. at 7 (asserting that the phrase “whether cast in a regular or provisional manner” must refer both to ballots cast regularly and provisionally). Defendant purports that K.S.A. §25-2320, which publicly opens “voter registration books, active voter lists, and other lists of voters required to be kept,” makes the lists of regular voters available to the public despite his interpretation of K.S.A. §25-2422. Mem. in Opp. at 7-8.<sup>4</sup> But if K.S.A. §25-2320 de-felonizes disclosure of the names of regular voters, it must do the same for provisional voters. As Plaintiff explained at length in his opening brief, lists of

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<sup>2</sup> This is also the reading that ranking minority member Representative John Carmichael advanced in discussing K.S.A. §25-2422 in 2018. *See* Mem. in Supp. at 15 (“it’s not a secret who votes in elections in America and it shouldn’t be a secret who votes, the secret is *how* did you vote?”). The names of voters should only be withheld from disclosure to the extent that sharing a voter’s name reveals whom they voted for in an election.

<sup>3</sup> We note, for example, that one of Defendant’s brief headings contains a misquotation of K.S.A. §25-2422, reporting that the law prevents disclosure of “the name of any voter who cast such vote.” Mem. in Opp. at 5. If the statute indeed had the word “vote” in it, Defendant’s position might be more defensible. However, it does not.

<sup>4</sup> Defendant cites to K.S.A. §25-2323, but the language actually quoted is from K.S.A. §25-2320.

provisional ballot voters are also “lists of voters required to be kept” under K.S.A. §25-2320 and are therefore likewise open to disclosure. Mem. in Supp. at 4-6. Plaintiff agrees that the Court must reconcile K.S.A. §25-2422 with the express requirement that voter lists be open to public inspection. *See State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 768 (Kan. 2003) (court must construe “provisions of an act or acts, *in pari materia*” and bring them into workable harmony if possible) (internal citation omitted). However, there is simply no principled way to treat regular ballot lists and provisional ballot lists differently if the phrase “whether cast in a regular or provisional manner” is the operative language that forecloses disclosure of the type of ballot a person casts. Defendant has attempted to force this reading of K.S.A. §25-2422 to bar disclosure of provisional voter names, Mem. in Opp. at 8, and yet would seem to have no similar concern about potential felony exposure when his office discloses regular ballot lists. That interpretation is absurd.

## **II. DEFENDANT HAS IGNORED RELEVANT PORTIONS OF THE LEGISLATIVE HISTORY THAT AMPLY SUPPORT PLAINTIFF’S INTERPRETATION OF K.S.A §25-2422.**

In his reponse brief, Defendant correctly identifies that Plaintiff must argue that one or both of the 2013 and 2018 amendments to K.S.A. §25-2422 changed the “clear and express provisions of the statute” to allow disclosure of provisional ballot voter lists. Mem. in Opp. at 8-9. This is precisely what Plaintiff argues. Specifically, that the 2013 amendment deleted the following phrase from K.S.A. §25-2422: “Disclosing or exposing the contents of any ballot *or the manner in which the ballot has been voted.*” Mem. in Supp. at 11. In doing so, the legislature changed this provision of the statute to remove the ban on disclosing the manner in which a voter cast their ballot. Defendant’s assertion that this deletion did not change the “express words of the statute” is flatly incorrect. Mem. in Opp. at 9. Indeed, in summarizing the 2013 amendment the Kansas Legislative Research Department stated that the amendment “eliminate[d] from the condition disclosure of the

manner in which the ballot has been voted.” 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); see Mem. in Supp. at 12-13. Defendant dismisses this legislative summary as likewise not containing any “express indication” that the manner in which a ballot is voted should now be disclosed after 2013. Mem. in Opp. at 9. It is unclear what indication from the legislature could be more clear than a deletion in the law and a corresponding summary noting that deletion.

Defendant is content to point out that the 2018 amendment to K.S.A. §25-2422 says nothing about whether provisional ballot voter lists should be disclosed or not. *Id.* But as Plaintiff noted at some length in his opening brief, the 2018 amendment expanded the *time period* during which the public can request lists of voter names, and did not impact the status of those voter lists. Mem. in Supp. at 13-14. The 2018 amendment therefore did nothing more to alter the fundamental changes made in the 2013 amendment, except to broaden the opportunity for the public to obtain the names of provisional voters at an earlier date. Still, Representative Carmichael’s remarks in support of the 2018 amendment clearly demonstrate his understanding that the names of provisional voters is indeed subject to disclosure under K.S.A. §25-2422. *See* Mem. in Supp. at 15 (“this reopens so that *all of us know* who participated in the election. That is what it’s about.”).

### **III. THE HELP AMERICA VOTE ACT DOES NOT BAR DISCLOSURE OF PROVISIONAL VOTER LISTS AND THE LEGISLATURE AMENDED K.S.A. §25-2422 TO INCREASE ACCESS TO PROVISIONAL VOTER LISTS AND IMPROVE INTEGRITY IN THE ELECTORAL PROCESS.**

Defendant asserts that the Help America Vote Act (HAVA) somehow operates to bar disclosure of provisional ballot voter lists. Mem. in Opp. at 11. This assertion is bold when, as Defendant himself notes, *id.* at 12 n.3, a federal district court in Kansas has already unequivocally determined that HAVA only protects the contents of a specific provisional ballot, and does not

protect the names of voters that cast those ballots. *Mah v. Shawnee County Comm'n*, Case No. 12-4148-JTM, 2012 U.S. Dist. LEXIS 163248, at \*8 (D. Kan. Nov. 15, 2012) (“§ 15482(a)(5)(B) does not protect the names of the voters who cast provisional ballots”). The plain language of K.S.A. 25-2422 demands the same result.

To the extent Defendant believes that K.S.A. §25-2422 prevents third party contact with provisional ballot voters in order to ensure election integrity, the opposite is true. By preventing the public from identifying the lists of regular and provisional voters before the election canvass, it was previously impossible to verify the accuracy of an election before the final results were calculated. In the 2018 amendment to K.S.A. §25-2422, the Legislature expressly removed the temporal barrier stopping the public from requesting provisional voter lists until after the election canvass, thereby allowing the public to access these voter lists with the precise and articulated purpose of being able to verify those votes and ensure greater election integrity. This goal is apparent both from the change in the statute in 2018 and the legislative history of the 2018 amendment before the House Judiciary Committee. *See Mem. in Supp.* at 13-15.

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to declare Defendant’s refusal to provide public access to voter lists violates the Kansas Open Records Act and order Defendant to provide Mr. Hammet with the public records he has requested.

Dated: January 4, 2019

Respectfully submitted,

/s/ Lauren Bonds

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on the 4th day of January, 2018, a copy of the above and foregoing document was mailed to the chambers of the Honorable David W. Hauber, and was served concurrently by electronic mail delivery on the following parties:

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Respectfully submitted,

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